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The Provocation to an Unpremeditated or Affective Intention

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Abstract: Within the article, the author examines the crime committed in a state of provocation, and concludes that it represents a conscious and deliberate response to the provocative act, committed against the perpetrator or another person. In this context, the author underlines the fact that the perpetrator, although it was in a strong state of agitation or emotion which diminishes his inhibitory power, he represents the natural consequences of his action, which he seeks or accepts and wishes to accomplish, but, among others, also the fact that the commitment of a crime in a state of provocation excludes the unintentional form of that crime.

Keywords: provocation; intention; crime; motive; mitigating circumstance; perpetrator; violence

In the current vocabulary of the 12th century, *provocation* comes from the Latin word *provocatio* and will be defined as "*action of provoking*, meaning a personified process through the provocative behavior of the victim, thus, that victim is the one who composes a fact or an assembly of raw facts about which we can say they are forming and instituting themselves". (Grand, 1992, p. 864)

From the point of view of the legislative technique adopted through the respective law, it can be observed that the provocation is considered both as accomplishment procedure and as produced psychical result. (Defferrard, 2002, p. 233)

Thus, the legislator sometimes envisages a procedure simply called "the act of provoking". For the repression to be risked, it is necessary that the plot of the provoker, not taking into consideration the intention and the motive had by the carrier in order to provoke such an outcome or state of mind, to be of a provoking nature, after which to undertake and to commit an action opposite to a protected interest[1]…

Thus the provocation is *a plot* which the criminal law incriminates as an *autonomous crime*[2] (Carbonier, 1952) be it as a *material* or *formal*[1] crime, which involves a generating fact stated by the law and by which it is sustained to be *instituted* necessarily *a causal and injurious report.*

[1] Civ. 2e, 8 mars 2001, D. 2001, IR 1077. Dans le meme sens, Crim., 29 oct. 1936, Bull. Crim., nr. 104.

[2] About this matter it is noted the fact that sometimes the provocation is elevated to the rank of „*autonomous crime*", especially when it is in itself a crime, but, in some cases, the legislator, in particular, can *not punish some provocations which are not followed by execution.* The action of committing suicide, for example, cannot be punishable, if it was not followed *by at most one attempt at such a crime*

Regarding the notion of *autonomous crime,* we note that in accordance with art. 431-6 of the French criminal code, it is thought to be "A generating fact of the provocation and which accordingly may constitute, certain public speeches or outcries, letters displayed or broadcasted by any means of transmission: in writing, picture or verbal…", oriented through a behavior directed with the intention of provoking regardless of the public it is aimed to or by the type of support it is made available (poster, journal, etc.). In the law of July 29th 1881 on art. 23 and 24 it is incriminated the behavior of consummation or of the attempt of committing the crime, meaning that it is a provocation which is taken into consideration as an autonomous factor of a social disorder.

Also, *the generating fact* of the provocation can take place as well by a material behavior or an imaginable one, thus even regardless of the usable means (show, sports game, etc.)[2].

A classical method of peremptory exercise consists, at the moment of studying a concept, of a certain situation or behavior aimed at making heard various acceptations which the ordinary language assigns before examining, and to what extent the law captures, absorbs and shapes them according to its interest with the perspective of offering its own legal direction and utility.

The provocation is thus a simple mechanism consisting of *two main components.* It can be defined as the intentional action by which a person, through any legally admitted means, intents to *influence another motive in order to establish the most favorable conditions to committing a crime* (Defferrard, 2002, p. 235).

The human action, if it is accomplished, it is likely to incite significantly *the instincts* and *the reason* of the persons, which can become determinant for them and which can be provoked by a single act or *a sum of acts* (Defferrard, 2002, p. 233) which, in turn, can be of a *material nature*[3] (physical) or *psychical* (moral). (Boulan, 1989, p. 7; De Lamy, 2000; Dupuy, 1978). Regarding the contents of the *psychological means* of the provocation, they *compel a greater complexity.*

The unilateral dependency relationship it is assessed by *the nature* and *intensity of the provoking act* which in turn can be variable, and thus this contradicted relationship confers signification only to the recipient of the provoking act which in a certain way *lacks the will to act* (Memmi, 1979, p. 32). The provocation does not "intimidates", it *stimulates.* If the provoked individual's motivations would not exist it would not mean anything else than an "*overimpression"*, and even if the action of the provoker has been intentional it only represents a *"corrupt intention" pressed by another person's efforts.* From a *legal* and *semantic* it can also be considered as a "*plot"*[4] (Salavage, 1981, p. 29).

Thus, *the state of provocation generates a strong disturbance* or *emotion* of the perpetrator determined by a provocation from the injured person or due to the disturbance caused by the process of birth. It is stated *in the general section* of the Criminal code as a *statutory mitigating circumstance* in art. 73, letter b (provocation), as well as in the *special section* in art. 177 Criminal code (infanticide) or in art. 322, paragraph 2, Criminal code (scrimmage) (Mitrache, 1997, p. 92-93).

For example, about *infanticide*, some authors (Tadevosean, 1940, p. 157-158; Borodin, 1966, p. 114) believe that the assessment of this crime as being one of the *less serious crimes, it would not exactly be a reasonable solution.* Others (Şargorodschii, 1948, p. 88; Sluţchii, 1947, p. 11) on the contrary,

[1] This is the case, for example, for the provocation of the abandonment of a born child or of a child about to be born (art.227-12 paragr.1 Criminal code) or to commit safe crimes or crimes through mass media (art.24, law of July 29th 1881).
[2] TGI Nevers, 21 avril 1988, cite *in* J. Boricand, *La répression de la provocation au suicide: de la jurisprudence a la loi*, JCP, 1988. I. 3359, n. 19.
[3] The material means contained by the provocation can be diverse, namely of a human, natural nature, etc.
[4] *Regalement Provocation* (2) *in* G. Cornu, *Vocabulaire juridique Capitant, Quadrige IPUF*, 2 2. ed., 2001, p. 691.

regard the act as a crime *separated by homicide with mitigating circumstances.* To give a proper solution to the problem, it is essentially required to study all the aspects in order to assess correctly the problem of the *motive* for that crime according to the state of *psychological disturbance* caused by the result of the birth. As a *determinant* factor of the state of provocation, may be also some states of a physiological nature. *There is also a differentiation* between *the determination*[1] of the state of *disturbance caused by the birth* and the first degree murder, even when the newborn child murder takes place shortly after birth. For this act to be classified as article 177 Criminal code - infanticide, it must be established both from the *previous behavior,* as well as *the subsequent behavior of the perpetrating mother,* if she *effectively was or was not in a state of disturbance provoked by the birth.* Thus, it is correctly assessed if on the crime of *infanticide* it is proven that the mother, who murdered her newborn child shortly after birth, did not act with a *spontaneous intention determined by the state of disturbance caused by the birth,* or if she put into effect the decision *made before this moment,* the committed crime will be classified as first degree murder according to art. 174, 175 lett. a. and d. of the Criminal code and not the crime of infanticide provided by art. 177 Criminal code[2].

In this case, the evidence adduced in the case, revealed that the defendant sought to *deliberately* murder the newborn child, and for that she has hidden the pregnancy and did not inform the medical specialists, gave birth alone with no assistance from anyone, then she has abandoned the child in a less circulated area, only after the act has been committed. Thus, the correct legal classification of the act is provided by art. 174, 175 lett. a. and d. of the Criminal code - first degree murder.

In terms of *affective* or *emotive aspects,* regarding the crime of *scrimmage* governed by art. 322 Criminal code, they can be governed, in fact, as the most common cases and by some physical states or activities. Thus, the distinction and individualization of the activity of each participant, namely of the *individual acts of violence which are intertwined in such situations, it is determined by the common action of the two sides* through which it is materialized the subjective side of the crime. Thus, the subjective position of each participant must be reported to *the concrete conditions,* circumstances which affect and influence *the quality* and *the intensity of the intention* through the *disturbance* and *excitement* which accompany the conflict (Clocotici, 1979, p.20).

More than that, the common will and action of each participant cannot be detached from the particularities regarding the *psychical position* and the concrete action of each participant. In this case, the will of each participant, represents *the common will* of this type of crime, *but which, in fact, maintains its individual features.* The disturbance, determined by a provocation, can overlap to the *subsequent state of excitement* specific only to those clenched in the scrimmage, thus resulting an *unique disturbance* which influences *the subjective position* of the provoked participants. The fact that the scrimmage, as any other conflict arising in people's life, determines a *psychical disturbance* cannot be challenged. The problem is that, in the case of the *scrimmage,* only this disturbance or other grounds have determined the legislator to diminish the criminal responsibility.

In the legal literature, it has been forwarded the opinion that *the scrimmage* can be assimilated to a *mutual provocation between the participants* (Pop, 1932, p.863). It was considered, in this respect, that the legislator has regulated the scrimmage starting both from the existence o a *certain* disturbance, as well as of a *common guilt* (Clocotici, 1979, p. 20) of all the participants.

Otherwise it has been mentioned that the existence of the provocation will not be presumed, but, in these situations, it has to be proved and it cannot be considered as existing in the mental state of each

[1] Supreme Court, criminal department., dec. no. 867 of April 13th 1983 in *R. R.D.* no. 7 of 1984, p. 68.
[2] Supreme Court, criminal dep., dec. no. 2067 of November 1977, in *R.R.D* of. 1978, no. 4, p. 67.

participant to the crime. In this respect in the specialty literature it has been shown that "On any risk, we can find a type of provocation in the strict sense of the pretence of the provocation in the Criminal code, but more broadly, or it is hard to establish, in this exchange of words, which have been entitled" (Dongoroz, 1939, p. 557; Tanoviceanu, 1925, p. 723).

More recently, the inherent disturbance of the scrimmage has been characterized "by the manifestations of violence involved, by the screams and alarm which accompany it, the scrimmage creating a state of agitation or anxiety…" (Bulai, 1970, p. 676; Tanoviceanu, 1925, p. 723). Thus, in the case of scrimmage, the psychical disturbance differs both *qualitative* and in *intensity* by the state of *disturbance specific to the provocation* (Clocotici 1979, p. 21). Between the mitigation of the provocation and the one on the art. 322 Criminal code *there is no identity*, being *causes differed by the reduction of the sentence.* Thus, the legislator understood to give a unique punishment regardless of the number of victims. In general, the number of the victims of the crimes against a person it is equal to the number of crimes in progress[1] (Antoniu, 1972, p.124).

We believe that, in fact, in these circumstances would be about a *disturbance similar to the provocation* which, being regulated as *distinct mitigating circumstance with general application*, in the case of the crime of scrimmage it can find its legislative appreciation in a special manner.

To be more explicit in explaining the notion of provocation we will bring some examples. Thus, the fact of the defendant, a guard at a gas station, during a conflict with some clients, of taking the hunting rifle, he shouted *"Down"* and fired a shot which injured the victim, constitutes attempted murder. The fact that the victim had an *irreverent attitude* cannot be considered a provocation, according to art. 73 lett. b. of the Criminal code. The fact that the defendant has been awakened from his sleep and notified of the behavior of the victim, that he initially turned towards the unarmed group, but, noticing the athletic stature of the victim, considered that he is facing an attack and took the rifle with the intention of intimidating, that the defendant requested the group to leave the gas station, but the members of the injured party laughed at him and told him that they will beat him up with his own weapon until it breaks, it is a legal mitigating circumstance of the state of provocation[2].

If the committed act occurred *after the termination of the attack*, it is situated outside the self defense. But in such a situation, if from the circumstances of the cause it results that the requirements provided in art. 73 lett. b of the Criminal code are fulfilled, the court is to determine the existence of the mitigating circumstance of the provocation, with the corresponding consequences upon the punishment and the responsibility for the damages caused to the victim[3].

There is a *mitigating circumstance* of the provocation provided by art. 73 lett. b, Criminal code and in the case in which the defendant, being hit by a person and being in a state of strong disturbance caused by the violence exercised upon him, has turned against the author of the aggression with the intention of hitting, but has hit another person by mistake, a person who was together with the one who committed the provocation act.

Also, in fact, it was noted as well that in the day of June 19th 1977, the victim M.I. accompanied by I.N., both drunk and armed, the first one with a club and the second with a fork, were walking together through the village of Bărbuleşti. Arriving at the courtyard where the defendant M.A. was, I.N. begun an argument with him. The defendant was armed himself with a spear made of an iron pipe 2.07 m

[1] The Regional Court Iaşi, criminal dec. no. 1826 of 1963, in *J.N.* no. 5/1964, p. 171; Regional Court Crişana, criminal dec. no. 449 of 1965, in *J.N.*, no. 10/1965, p. 165.
[2] Pandectele Române/*Romanian Pandicts* no. 4/2001, 156, p. 69; criminal decision no. 2266 of May 23rd 2000.
[3] Court house of Hunedoara County, criminal decision no. 620 of September 5th 1977, in *R.R.D.*, no. 5 of 1978, p. 62.

long at the end of which there was welded a military bayonet of 23 cm in length. After a short while, I.N. hit the defendant with a fork over the hand, and he, with the intention of hitting him with the spear, has thrown it at him, but instead he has hit M.I., who was close by, in the chest.

As a result of the injury, the victim suffered a right hemithorax pasternal penetrated wound, sectioning the lower right pulmonary lobe, open pneumothorax, severe hemorrhagic shock, which required approximately 100 days of medical care, his life being saved after the emergency medical interventions.

The defendant M.A. appealed against the sentence. The defendant pleaded a single reason for cassation, consisting of the fact that it was wrongfully discarded the application of the legal mitigating circumstance provided by art. 73 lett. b. Criminal code, the crime being committed in a psychical disturbance state provoked by the hit from I. N. and taking this into consideration, he considers that it is irrelevant the fact that he accidentally hit another person than the one who provoked him.

Regarding the criticism which has been formulated it is found unequivocally that the defendant has thrown the spear towards I.N. only after he has been hit by him, a situation which has been correctly established.

That being the case, the serious violence exerted on the defendant, who required several days of medical care, was capable of producing that psychical disturbance under whose influence he acted, as provided in art. 73 lett. b. of the Criminal code. The point of view expressed in the indictment as well as in the decision, meaning that in the given situation it cannot put in practice the provocation, due to the fact that the provocative act does not come from the victim, is invalid, given that the mental disorder which caused the actions of the defendant, and which is in an effective state has the nature of being provoked[1].

In the legal practice it has been decided that the case when a murder victim has been caught in *flagrante delicto* of adultery does not constitute a provocative act as provided by article 73 letter b. This text refers exclusively to the situation in which the murder has been committed by the husband exactly in the moment of catching the victim in the act of adultery[2].

As we can see, some of the courts confer the value of mitigating circumstance to the provocation provided by art. 73 lett. b, Criminal code, and other courts do not attach such significance, as in other cases, although it concerns *situations and occurrences with different intensities* with respect to their influence upon the psychical state of the perpetrator, however they were given the same juridical efficiency in establishing the degree of guilt of the victim in determining the commission of the crime (Daneş, 1984,p. 20).

Thus, regarding the situation of the provocation, it justifies the mitigation of the legal responsibility, it also constitutes, as it has been mentioned regarding the essence of the institution, *the state of strong disturbance*, namely of *excitement* or *nervous tension*, *anger* or *indignation* (Bulai, 1982, p. 213-214).

The strong state of emotion generated within the mental state of the perpetrator and which, by weakening the power of his inhibition, explains the criminal decision and its accomplishment[3], not because he has been hit, but because that hit has produced within his mental state a disturbance which made him partially loose control upon his actions, to reduce his power of self control, and in this state to commit a crime in the prejudice of the aggressor (Pavel, 1965, p.55). In these circumstances, the

[1] Supreme Court, criminal depart. dec. no. 522 of March 24th 1978 in *R.R.D.*, no. 4 of 1978, p. 67.
[2] Supreme Court of R.P.R., col. pen., dec. no. 693 May 23rd 1962, in *J.N.*, no. 5 1963, p. 170.
[3] Plen. Of the Supreme Court, dec. no. 3/1959, in *L.P.*, no. 5/1959, p. 83.

committed crime is, to an extent, the consequence of the unjust behavior of the victim, as the perpetrator, although *guilty, he would have not committed the crime, if he would not have been in a state of strong emotional disturbance or emotion determined by the provocative act.*

On the other hand, however, it is the *consequence of the psychical attitude, education, mentality of the provoked person,* who was unable to control himself and responded, committing the crime. The fact that the perpetrator, even though he was disturbed, acted in guilt anticipating and, at the same time, accepting the consequences of his response, maintains the criminal act within the criminal boundaries regardless of the severity of the provocative act. However, the fact that, in the absence of the aggression which brought him into a state of deep disturbance or emotion, he would have not infringed the criminal law, displays a lower risk to his person, which justifies, in all cases, the mitigation of the criminal liability (Daneş, 1984, p. 21).

Thus *the provocation* involves a criminal act *in which the subjective side is completely achieved,* existing also the anticipation of the result as well as the desire to produce it, all these taking place within a *free, but disturbed consciousness. The emotion, disturbance* produced by the aggression explain the violent mode of reaction and that is why attract a mitigation of the penalty, but *does not remove the contents of the subjective side of the crime which has been completed in full* (Pavel, 1965, p. 55). The essence of the provocation stems from the fact that it is a *psychical state from which the criminal decision and the will to achieve it start,* being *personal,* with all the consequences arising from this characterization for the punishment of the participants (Daneş, 1984, p. 21).

The legal literature has shown that on provocation, establishing *the degree of severity of the facts* which affect the dignity of a person, it is important to take into consideration the explicit or implicit character, the allusive or direct character of the statements from the person to whom he has responded, to a group, the relationships between the persons, if the statement or imputation have been made as jokes or in order to reprehend its recipient, the pejorative meaning of the words or of the behavior or a pejorative significance (Grigoraş, 1967, p.147-149). Specifically, it has been claimed that it cannot be considered to have been produced a serious interference with the dignity of the person liable to cause a strong disturbance or emotion when, immediately after insulting the defendant, the victim apologized[1]; neither in the case when the insult comes from an irresponsible[2] person or from a person in an obvious state of intoxication[3].

It is noted the fact that by *other unlawful action* it is understood any act, action or inaction contrary to the law and presenting, both objectively and *subjectively* in relation to the author of the provoked crime, a particular sense of severity under the provisions or art. 73 lett. b. of the Criminal code. By this it is meant not only an act which would fall under the criminal law, but also an action illegal and outside the criminal law, for example an administrative violation, a civil injurious act, severe of course, *susceptible of producing a strong state of disturbance, of nervous excitement* (Bulai, 1997, p.150). Thus, it has been rightfully considered, as an act of provocation, not only an attempt of the victim of being provoked, but it has to take place as well the provocation itself[4].

Thus, *the act of provocation* must have produced in the mental state of the perpetrator a *strong*

[1] Court house of the county of Timiş, crim. sentence no. 155/1970, in *R.R.D.* no. 1/1971, p. 157.
[2] Supreme Court, col. pen., dec. no. 1483/1963, in *J.N.*, no. 3/1964, p. 169.
[3] Supreme Court, in the composition provided in art. 39 paragr. 2 and 3 of the Law on Judicial Organization for the Judicial Organization, dec. no. 25/1980, in *Culegere de decizii 1980 / Collection of decisions 1980,* p. 249 and the following and in *R.R.D.* no. 1/1081, p. 70 ; Supreme Court, criminal depart.., dec. no. 2552/1982, in *C.D.* of 1982, p. 225 and the following
[4] Supreme Court, Crim. Depart. , dec. no. 2249/1971, in *R.R.D.* no. 6/1972, p. 169; Supreme Court, crim. depart., dec. no. 64/1975, in *C.D.* of 1975, p. 303 and the following

disturbance or emotion. If it has not generated to the perpetrator such an emotional state of great nervous excitement, of revolt, indignation, anger, namely of emotion, the action of the victim cannot be recognized as having the characteristics of a provocative act as stated in art. 73 lett. b. of the Criminal code, being just a simple circumstance of committing the crime, for which the judges will recognize or not the character of *legal mitigating circumstance.*

Thus, in the legal practice[1] it has been decided that the one who murdered the man who was having intimate relations with his wife cannot benefit of the mitigating circumstance of provocation. And this is true as long as being separated in fact for a long time with no perspective of resumption of the cohabitation, he cannot consider himself offended in his dignity as a husband. Also, the existence of the *disorder or of the emotion* and *its intensity are not presented, based on a legal assumption*[2] in case of committing one of the actions listed in art. 73 lett. b. of the Criminal code, but they must be established, based on evidences, in each case. In order to review the state of disorder, the judicial body cannot report to the type of the average person as a psychical balance, but to the real person, of the perpetrator of the type that he is investigating. In this regard it has been decided, for example, that if the defendant is suffering from organic disorders which increase his impulsiveness, in order to apply the mitigating circumstance of provocation, the court must verify if the activity of the victim, *reported to the background of the defendant's disorder,* could or could not have provoked him a strong disturbance or emotion for him to subsequently react (Manoliu,1959, p. 9). In order to establish the disorder or the emotion, its intensity and duration, the court has to take into consideration *the psychical particularities of the perpetrator, the relationship between the parties,* to perform a *concrete analysis of the mental state in which the perpetrator was* after the victim has committed the provocative act until the moment of committing the crime, aspects which could exclude the possibility of the single use *of several objective criteria* based on which to be decided, in an apriori manner, if the action of the victim produced or not, into the mental state of the defendant, a strong disorder or emotion. Each time, the existence, intensity and duration of such an emotional state must be verified specifically in relation to all the data of the cause[3]. Thus, the absence of the perpetrator from the place of committing the provocative act upon another person does not exclude the possibility of him being strongly disturbed of its discovery[4] (Manoliu, 1959, p.8-9).

The provocative act committed by the victim must have not been preceded by an aggression or a provocation from the perpetrator. The provoked crime must have been committed upon the person who committed the provocation[5]. The rule according to which the provoked crime has to target the author of the act of provocation knows an *exception*, namely when the victim has responded *by mistake* upon another person than the aggressor, confusing that person with him. In such a case, the mitigating circumstance of provocation operates as if the crime would have been committed upon the

[1] Supreme Court, crim. depart., decided, (dec. No.1195/1972 in *C.D.* of 1972, p. 309 and the following., as well as in *R.R.D.* no. 8/1972, p. 165.

[2] Regarding some issues appeared in the practice of the Supreme Court with respect to the mitigating circumstances of the provocation, in *L.P.* no. 5/1958, p. 9; Supreme Court, col. pen. dec. no. 1501/1962, in „Justiţia nouă" no. 2/1963, p. 155 ; Supreme Court, crim. depart., dec. no. 271/1977, in *Repertoriu*... 1976—1980, p. 328.

[3] See Supreme Court, in the composition provided in art. 39 paragr. 2 and 3 of the Law for Judicial Organization, decision no. 25/1980, in *Culegeri de decizii* 1980 / *Collection of decisions 1980*, p. 249 and the following, and in *R.R.D.* no. 1/1981, p. 70 and no. 475)1979, in Culegeri de decizii 1979, p. 346 and the following, and in *R.R.D.* no. 10/1979, p. 67; decision no. 277/1977, in Repertoriu de practică alfabetică of 1976-1980 by V. Papadopol, M. Popovici, p. 328; Supreme Court, col. pen., dec. no. 2025/1968, in *R.R.D.* no. 6/1969, p. 170.

[4] Supreme Court, criminal college, decision no. 371/1964, in *J.N.*, no. 12/1964, p. 160; Supreme Court in the composition provided in art. 39 paragr. 2 and 3 of the Law for Judicial Organization, dec. no. 50/19776, in *Culegeri de decizii*1976, p. 284 and Supreme Court, criminal department, decision no. 589/1981, in *R.R.D.*, no. 12/1981, p. 109.

[5] See Plen Supreme Court, guidance decision no. 12/1966 in *R.R.D.*, no. 2/1979, p. 55.

person who committed the act of provocation[1].

Regarding the *spontaneous intention,* this form of intention is characterized by two main elements: *the decision is made in a state of disorder or emotion,* respectively, *it is immediately executed* (Mitrache, 1994., p. 92-93). *For example, the perpetrator is punched by the victim,* thus causing him a state of disorder, and he responds by stabbing the aggressor with a knife. The murder committed under these circumstances *will be characterized by a spontaneous intention.* As we have already sown, the same intention exists as well in the case of the mother who, in the state of disturbance caused by the birth, takes the life of the newborn, immediately after birth (art. 177 of the Criminal code). *The unpremeditated or spontaneous intention (also called provoked) arises from a strong state of disturbance or emotion* of the perpetrator determined by a provocation from the injured person or due to the disturbance caused by the process of birth. It is stated *in the general section* of the Criminal code as *a legal mitigating circumstance* in art. 73 lett. b. (provocation), as well as in the *special section* in art. 177 Criminal code (infanticide); art. 322, paragraph 2 Criminal code (scrimmage)[2].

Thus, *the spontaneous intention* constitutes *a legal mitigating circumstance* because the decision has been made by the perpetrator in special circumstances, in a *strong state of disorder or emotion,* which *has an influence upon the degree of anticipation and will (self control) of that person, which it diminishes, but without excluding them.* Also, the decision making has been determined by causes provided by the law (provocation, birth, etc.). For these reasons, we do not share the opinion that the acts committed in a moment of anger (*impeto animo),* from a momentary impulse, "*do not leave room for a prior deliberation in taking the criminal decision"* (Dongoroz, 1969 p. 143; Brenciu, Panţurescu, 1984, p. 53).

Thus, we support the opinion that, *any mode or degree of intention* means both *the appearance of the criminal idea* as well as *the deliberation in making the decision* even though the deliberation is sometimes *longer,* while sometimes is very short (Basarab,1997, p. 181).

Also, in this context, we would mention as well the fact that the crime committed in a state of provocation, is *a conscious and deliberate response* to the provocative act, committed against the perpetrator or another person. *The perpetrator,* although in a strong state of disorder or emotion which diminishes his power of self control, *represents the natural consequences of his action, which he follows or accepts and whishes to accomplish.*

Having mentioned these facts, it would follow that the crime committed in a state of provocation excludes the *unintentional* form of that crime.

However, in the Russian (Tcacenco, 1964, p. 49; Ragor, 1996, p. 30; Scuragor, Lebedev, 1996, p. 213; Borodin, 1994, p.19) doctrine, regarding the *provoked crime,* it has been discussed if it an be done either in the *form of director indirect intention,* or with *praeterintention.*

Regarding only the discussions *upon* the form of the *provoked, unpremeditated or affective* (Tcacenco, 1996, p. 49; Ragor, 1996, p. 30; Scuratov, Lebedev, 1996, p. 213, Borodin, 1994, p. 16; Tcacenco, 1996, p. 31) intention, in general, it has been mentioned that the supporters of *the first point of view* claimed that the issue deserves to be solved only as a form of a *direct intention,* namely only in such a form it can be *affective,* where it is mentioned that "The person guilty of committing the crime, even if that person was in an affective state, that person still can be aware of the social danger, *with an*

[1] See Plen Court House of Suceava county, dec. no. 624/1978 in *R.R.D.,* no. 2/1979, p. 55.
[2] See decision no. 1035/1968of the Crim. C. of the Supreme Court., in *C.D.*, 1968, p. 238-240.

amount of volitional efforts in order to accomplish certain criminal activities (Sidorov, 1978, p. 78-79).

The authors of *a second opinion,* in the analysis of the *affective aspects* of the intention, noted about these crimes that in fact they could have been committed as well in the form of *indirect intention* (Tcacenco, 1996, p. 31). Thus it is mentioned that "*The imagination regarding the purpose* appears, as it is known, *as a part of the volitional process as well as the desire* in fact, and if the crime is committed without a qualified purpose, then no crime with affective intention cannot be committed with the form of *the direct intention, but with the form of indirect intention"* (Tcacenco, 1996, p. 49; Rarog, 1996, p. 30; Scuratov, Lebedev, 1996, p. 213, Borodin, 1994, p. 16).

Finally, *the last doctrinal position,* shared by most of the authors, regarding the form of the intentional *affective* crimes, it is presented as being possible only in a form of *the indirect intention,* and this because the psychical attitude of the person towards his actions, can be accomplished only with *the purpose* of causing certain criminal results, injuries which are explained by the fact that the perpetrator, being in an affective state of disturbance or emotion, aims at *committing the crime represented as such,* and thus, *it can overcome any obstacle in order to reach his goal of revenging his own offense.*

In these situations, the perpetrator *does not think concretely* what a dangerous social result will be created, *that person acknowledges what he desires to cause to the victim,* namely *that person is following the purpose of getting satisfaction from revenge.* Thus in these *affective states,* to the perpetrator it is *irrelevant what will follow after,* thus the *intention* being an *indirect one. The nearest goal in these situations is only to commit the crime,* not to attain any results. Usually, in these situations, subsequent to the commitment of a crime, most of the perpetrators have an attitude of *repentance, willingness to help, calling the police* or even one which is inadequate to those previously mentioned, such as the one of leaving the crime scene (Sidorov, 1978, p.88).

As far as we are concerned, we support the advocates of the second opinion, mentioning the fact that for the crime, as a *volitional element,* will be present because it exists on any conscious activity, or at least will be a less than usual one. We must also mention that the *state of provocation* cannot change the *contents of the intention* and, consequently, *neither the legal classification of the act,* only in certain cases which we have previously mentioned, namely art. 177 of the Criminal code (infanticide) or art. 322, paragraph 2, Criminal code (scrimmage). Thus, if the *provocation* cannot change the contents of the intention, neither the legal classification of the act, except for certain cases, where it could not be claimed that, even though he has struck the victim with a knife in the chest area, *the perpetrator,* who was *governed by a strong emotion* produced by the provocative act, *did not realize,* because of that, *that his action could have as result the death of the victim* and thus the committed crime would not become the crime of death blows[1], as we could wrongfully believe that it was claimed, but the crime of murder with direct intention. In our view, we see no impediment for the crime committed in such states to be unlikely of being committed also in the form of the praeterintentional guilt.

[1] See Supreme Court, crim. depart. dec. no. 2092/1980 in *R.R.D.* no. 8/1981, p. 66-67.

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