

A COMPARISON OF THE REGULATION OF THE CRIME OF KILLING A NEWBORN  
IN THE OLD AND NEW TURKISH PENAL CODES AND THE ITALIAN PENAL  
CODE\*

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SUMMARY: 1.- The Crime of Killing a Newborn Baby in the 1889 Italian Penal Code (m.369); 2.- Amendments to the Crime of Infanticide in the 1930 Italian Penal Code; 3.- Türkiye. Old Penal Code 1926; 4.- New Penal Code 2005; 5.- Comparative evaluation and conclusion.

**1.- The Crime of Killing a Newborn Baby in the 1889 Italian Penal Code (m.369).**

Italy's Zanardelli Criminal Code of 1889 regulates the murder of a newborn baby as a separate situation. Article 369 of the law considers the crime of committing intentional slaughter under certain conditions as a special reason for criminal reduction (*circostanza attenuante*).

According to the article: "If the crime of intentional homicide has been committed on a baby that has not yet been registered and within the first five days of his birth, with the purpose of saving the perpetrator's own dignity or the honor of his wife, sister, sister, or adopted daughter, the penalty will be imprisonment from three to ten years".

As seen, the Zanardelli Law treats the crime of infanticide not under a separate heading, but as a special form of intentional killing. The perpetrator is usually the mother of the baby, but in the text of the article, it is emphasized to protect the honor of the family by mentioning the "honor of the spouse, sister, subscendate or adopted daughter" in addition to the "own honor" of the perpetrator. These statements indicate that not only the mother, but also the baby's grandmother/grandfather or father kills a newborn baby in order to save family honor, can theoretically be evaluated in this context. As a matter of fact, the social values of the period saw extramarital births and having "illegitimate" children as a heavy shame. The legislator thought that the murder committed under these circumstances could be considered "less harmful" and provided for lower criminal penalties compared to a normal act of murder. Although there is no death penalty in the Law of 1889 and life imprisonment is the most severe punishment, the fact

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that only 3–10 years in prison is provided for the mother who killed her newborn baby with the basis of honor shows that this crime is considered a kind of excused murder (*omicidio scusato*). To understand the mentality behind this regulation, it is necessary to look at the terms of the period. In Italian society at the end of the 19th century, women having children out of wedlock was a great cause of social exclusion and shame. In the justifications of the law, it was emphasized that the "sad state of the morally corrupt honest woman" in such a situation created an "extraordinary excitement" in the mother, and it was emphasized that the crime of the infanticide was not committed with a monstrous feeling or a planned reason. From this point of view, it was accepted that the act of killing a newborn baby committed by the mother trying to save her honor contained less moral damage than a normal murder, and the penalty was deemed appropriate.

## **2.- Amendments to the Crime of Infanticide in the 1930 Italian Penal Code.**

The Rocco Law of 1930 (the criminal code still valid in Italy) also regulated the act of infanticide as a crime. In the new law, this crime was included under Article 578 under the title "Killing of Children Due to Honor (Infanticidio per causa d'onore)". Although the 1930 Act largely continued the regulation in 1889, it made some important changes to the text.

First of all, the scope of the time of the crime is narrowed. While the article in the 1889 Law can be applied to the baby "within the first five days after birth", the 1930 Law concretely shortened this period by using the expression "immediately after birth (immediatamente dopo il parto)". The new text seeks a mandatory time affinity between labor and the act of murder, requiring the infanticide to actually occur at the time of sudden physiological and psychological shock created by labor. The purpose of this change is to exclude the possibility of designing or planning that the mother can realize with cooler thought days after birth.

As a matter of fact, in the Italian Criminal Law literature, this amendment in 1930 was evaluated as "an important revision compared to Article 369 in 1889, which required the act of infanticide to take place successively with birth". The second important change is the emphasis on the issue of perpetrator and motive. In the 1930 Law, the motivation to be sought while committing the crime was "protecting the dignity". Article 578 made the reason for honor a descriptive element of the crime with the statement "in order to save one's own honor or the honor of a close relative". However, a more limited approach to who could be the perpetrator was adopted in the 1930 Law. With the amendments made, the crime of infanticide has acquired the quality of a "specific crime" that can only be committed by certain relatives (mother or close family

members). Thus, for example, in the concept of "close relative" in addition to the mother, the fact that the grandmother, father or sibling kills the baby just for the purpose of helping the mother can be evaluated within the scope of this article, when these people are perpetrators, they are required to act only with the intention of protecting the mother's honor. Other cases – non-motivated acts of honor, such as killing the baby for inheritance – will no longer be accepted under the infanticide and will be punished as a normal crime of intentional killing.

In terms of the amount of fine, the Rocco Act also provided for a much lighter prison sentence for infanticide than for normal manslaughter. The penalty range prescribed in the text in 1930 was 6 months to 7 years in prison, if the law remained in force until 1981 (note: provisions for pre-1981 honor killings in Italy also applied to this crime). However, with the law reform made in Italy in 1981, Article 578 was changed and the expression "out of honor" was removed from the text, while the sentence interval was changed from 4 to 12 years. Until this change, the crime of infanticide was punished with a much lower sentence (up to 7 years in prison or up to 12 years after the reform) instead of a casual murder (murder) in Italy. In comparison, the sentence for the ordinary crime of intentional homicide in the Italian Penal Code was at least 21 years in prison. Therefore, faithful to the basic approach of 1889, the 1930 arrangement treated the infanticide in the form of a family drama that could be excused under special circumstances, rather than a serious crime. In addition, the 1930 Law introduced a concept to the literature that was not clearly regulated in 1889: "feticidio" (killing the fetus at birth). Article 578 includes not only the killing of a baby immediately after birth, but also the deliberate killing of the fetus during labor. This is important in terms of evaluating the immediate before and after stages of the birth process of the law together and taking into account whether the baby is born alive or not. This detail in the text of the law has also brought with it that medical evidence (e.g. respiratory test, docimasia) may be needed to "determine whether the baby is alive". However, since the baby must have been born alive and killed immediately after in order for the crime of infanticide to occur, a distinction has been made between this crime and miscarriage or fetal murder.

To summarize, the 1930 Italian Criminal Code preserved and improved the regulation of infanticide in 1889. Honor motive is still kept in the center, but the application conditions have been narrowed (by reducing it to "immediately" for 5 days) and the abused parts have been reduced. Infanticide has still been accepted as a special state of manslaughter whose sentence was alleviated; the acts committed by the mother in her spiritual-physical depression during or immediately after childbirth continued to be excused from a criminal point of view.

When evaluating the differences between the 1889 and 1930 regulations, it is necessary to consider the legal and social dynamics in the background. The Zanardelli Law (1889) is known as one of the progressive laws of its period; It abolished the death penalty and drew attention with its humanitarian approaches according to the situation of individuals in criminal justice. The fact that infanticide is a special reason for discount in that law is also a reflection of the liberal perspective on the social values of the period and criminal justice. The exclusion of women who became pregnant out of wedlock made the figure of "mother who killed her child to cleanse her honor" almost a tragic victim. Criminal laws could not ignore this fact, as cases of young and unmarried women secretly giving birth and killing their babies are common in many European countries, especially in rural areas. For this reason, the Zanardelli Law, on the one hand, took into account the pressure of social ethics and the motive of "saving the honor" of the mother, on the other hand, it left this act completely unpunished and covered it with a reasonable prison sentence. This approach can be considered as a reflection of the importance attributed to women's sexual honor and discriminatory gender roles on criminal law. As a matter of fact, in the late 19th century, honor was considered a reason for reduction not only for infanticide but also for some other crimes (for example, a slight punishment for the husband who killed his wife "for honor"). Even in canonical law, the murder of an illegitimate child was punished more severely when it was done "for the purpose of destroying evidence", which points to the radical historical dimension of the justification of honor.

By 1930 Rocco's Law, political and ideological conditions in Italy had changed. This law, prepared under the fascist administration, aimed to strengthen the patriarchal family structure and the population policy of the state in general. Paradoxically, the fascist ideology, on the one hand, showed an understanding of the crimes committed with honor because it glorified family honor, on the other hand, it foresaw very harsh sanctions against the prevention of births or termination of pregnancy because it encouraged population growth. This conflicting situation has also been influential in the regulation of the crime of infanticide: the law has continued to approach the mother's (or family's) killing of the newborn baby with some tolerance in order to protect her honor, but narrowed the legal framework to ensure that this would actually be limited to "an inevitable moment of honor defense."

The condition of "immediately after birth" is related to the fact that fascist criminal lawyers see this crime as an overflow that can only be committed with a sudden shock of honor. Thus, if the mother killed her child at that moment in the physical and mental weakness caused by the moment of birth, she should be excused a little, but if she killed in a more planned way hours

or days after the birth, this excuse should no longer be seen. Behind this thought, there is also the influence of criminology and forensic medicine findings that developed in the 1920s. In the literature of the period, concepts such as "puerperal fever" and "puerperal mania" discuss the mother's temporary mental imbalance after childbirth; in some cases, it was suggested that women accused of infanticide could be considered semi-mentally ill ("semi-infermità mentale") due to childbirth. In fact, if possible, judges could rule that the mother's penal capacity was at fault and apply a further penalty reduction based on such medical opinions. On the other hand, the infanticide article of the 1930 Law was also part of the fascist regime's understanding of controlling female sexuality and considering family honor as the basis of the state. The same law included article 587, which brought a similar "honor deduction" to the perpetrators who learned about the extramarital relationship and killed their spouse or daughter. These articles were the legal basis of the institution called "delitto d'onore" (honor killing) in Italy. As a result, when the changes in 1930 are examined, it can be said that the text differences in the crime of infanticide were both aimed at preventing abuse (narrowing the time limit) and reflecting the ideological emphasis of the period (preserving the concept of honor).

As social values changed after the World War, the view of this type of crime also changed. In the 1970s, the inclusion of the "justification for honor" in the criminal law in the public, especially feminist movements, began to receive intense criticism. Honor discounts, which were also mocked by famous films and literary works, were finally completely removed from the penalty law with a reform in 1981. With the Italian law dated August 5, 1981 and numbered 442, Article 587, which provided for a discount on the husband who killed his wife, was completely abolished, and the phrase "honor" was removed from the article of the infanticide. The new form of Article 578 emphasized the "material and moral abandonment conditions associated with birth", based the psychological-social desperation of the mother and limited the perpetrator of the crime only to the mother. Thus, Italy has transitioned from honor-oriented understanding to a maternal and psychological state-oriented understanding in the historical development of the crime of infanticide.

### **3.- The Crime of Killing a Newborn Child in the 1926 Turkish Penal Code (m.453).**

Turkish Penal Code 1926 (law numbered 765) was largely prepared by the translation and adaptation of the Italian Zanardelli Law. Therefore, a similar regulation has been provided for the crime of infanticide. Article 453 of the TPC No. 765 deals with the act of a mother's murder of her newborn child as a special case.

The first version of m.453 adopted in 1926 is as follows: *"If the act of murder is committed by the mother against the newborn child in order to save her honor, the perpetrator is sentenced to four to eight years in prison."* As can be seen, this provision is an almost one-to-one translation of Article 369 in the Italian Law into Turkish. The perpetrator of the crime is stated only as "mother" (although other people in the family are also implied in the Italian text, just mother is emphasized in Turkish law). The victim of the crime is *"a newborn child"*. The law sought the purpose of "saving her honor (honor)" as a reason underlying this actual work of the mother. The penalty, on the other hand, is provided for only between 4 and 8 years in prison, which is an extremely light sanction considering that the normal penalty for intentional manslaughter in the 1926 Law is death or life imprisonment.

This article has also been called "puerperal murder"; It is generally accepted that it regulates the crime of young mothers who give birth out of wedlock and are under social pressure. As a matter of fact, in the old case jurisprudence of the Court of Cassation, in order to apply this type of crime, it is not necessary to kill the child as soon as he is born; Even if the mother causes the death of the baby by not giving milk within a day after birth, the conditions of Article 453 are met and the mother's constant depression after birth has been observed. This approach also shows that infanticide in Turkish law is considered an act that should be excused a little in connection with the traumatic psychological condition of the mother.

In the general systematics of Law No. 765, Article 448 regulates the main crime of "intentional homicide", while Articles 449 and 450 listed the aggravating causes (qualified cases). Article 451 included the penalty to be applied if no death occurred during the attempt phase, and it covered aggravated cases due to the result of Article 452. Article 453, on the other hand, completed this systematics by regulating a mitigating special form of intentional killing. Therefore, 453 is accepted in the doctrine as a "qualified state that reduces punishment". The elements of the crime are listed as the mother having an illegitimate birth, the action taking place on the newborn baby and the mother's acting in order to save her honor. When these elements were not available, even if the mother killed her own child, normal murder provisions were in place, not 453. For example, if the mother is married and killed her married child for another reason, 453 is not applied; Again, the mother's killing of her new nature for economic reasons, for example, without the justification of honor, would not be considered in this context. In terms of the social context, this article reflects the value judgments that prevailed in Türkiye in the early years of the Republic. Since it is considered a great shame for a single woman to give birth to a child in Turkish society, the legislator has adopted a criminal policy that is

tolerant of this crime committed in order to protect the honor of the family. With the pressure of religious and customary values, it was stated by the jurists of the period that some mothers killed their newborn babies "forced by the pressure of society" even though they did not want to. For this reason, Article 453 aims to punish the "desperate mother" in a way, which is not too heavy, with a measured punishment. It has already been accepted that the verb is usually processed without preconceived, at the moment of panic and despair. In this respect, Article 453 is a good example of both the influence of moral norms on criminal law and the direct transmission of the Italian model inspired by the 1926 Law. This provision in the Turkish Penal Code remained almost unchanged for many years.

However, as we approach the 2000s, within the framework of international conventions to which Türkiye is a party and the EU harmony process, the "honor"-oriented provisions in the criminal code became the subject of discussion. It was criticized that these provisions are misunderstanding and can lead to impunity, especially in the segments of society where ritual and honor killings are still seen.

In the shadow of these criticisms, the first concrete amendment to Article 453 was made in 2003 with Law No. 4928. Law No. 4928 increased the amount of punishment in the text of Article 453: The prison sentence of 4–8 years was increased to the range of 8–12 years. Apart from this, no change was made in the application conditions or elements of the article. With the 2003 amendment, the provision was brought to a heavier sanction, and it can be said that a message was given that the state no longer looks as tolerant of killing babies as before, albeit with honor.

#### **4.- New Penal Code 2005.**

The main radical change in Turkish penal legislation was made with the Turkish Penal Code No. 5237, which was adopted in 2004 (The Law entered into force on June 1, 2005). The new TPC, largely abandoning the language and approach of the old law, adopted a philosophy based on libertarian and individual rights. In this context, all provisions that excuse the commission of the crime on the grounds of "honor" or "ritual" have either been abolished or, on the contrary, aggravating reason against the perpetrator have been accepted. The crime of infanticide has also undergone a significant change in this context: The new law does not include any provision corresponding to the old article 453. In other words, the mother's killing of her newborn child with honor is no more regulated as an independent reason for discount; on the contrary, it is subject to general provisions.

According to the TPC No. 5237, the intentional killing of a mother (or any person's) newborn child is considered as a qualified form of the crime of intentional murder. Paragraph 1 (d) of Article 82 of the Law counted "killing an upper lineage or a descendant (e.g. child)" among the qualified cases punishable with aggravated life imprisonment. Therefore, when the mother deliberately kills her own baby – regardless of the means – she is sentenced to aggravated life imprisonment by applying Article 82/1-d of the TPC. As a matter of fact, it is emphasized in the doctrine that the provision of Article 453 in Law No. 765 is "not included in the new law due to the developments". The practical consequence of this change is that an act that was formerly tried for 4–8 (later 8–12) years in prison is punished with life imprisonment in the new law. As can be seen, within a few years, the legal perspective in Türkiye has been completely reversed. While the 1926 Law was written with an understanding that protected the mother and family honor to some extent, the 2005 Law switched to an approach that prioritized the baby's right to life and the prevention of violence against women. The new law considered the killing of an innocent baby as one of the most serious crimes, instead of easing the honor pressure of the mother in punishment.

When the social and legal reasons behind this reform are examined, the effect of a paradigm developing on the axis of women's rights and the right to life is seen. In the 2000s, ritual and honor killings were highly debated issues in the Turkish public opinion, and provisions such as the former TPC m.453 was the target of criticism. While the new TPC was being prepared, women's organizations and human rights defenders made great efforts to clear up sexist and discriminatory provisions in the criminal code. As a result of these studies, the crime of infanticide was also examined. In the final analysis, the legislator came to the conclusion that excusing an act such as "child murder due to honor" is incompatible with the principles of the modern rule of law. Because the child's right to life should have been considered superior to the concern for the social reputation of the mother or family; In addition, even the existence of such a provision legalized the concept of a kind of "illegitimate child shame". As a matter of fact, in the justification of the new regulation, it was said that "Law No. 5237 is based on the legal values of the individual; It has been removed from being a reason for compliance with a law based on customs or honor or a reason for penalty reduction" (From the justification text). From a legal point of view, this amendment of TPC numbered 5237 has brought some discussions. Especially in the doctrine of criminal law, with the abolition of Article 453 in the old law, the situation of mothers whose mental health deteriorated in the postpartum period came to the fore. Because in the previous system, even if the puerperal mother did not act with the guise of



"saving her honor", she was evaluated at least within the scope of a special sentence and could receive a penalty reduction. There is no such privilege in the new system. Instead, if a psychiatric disorder due to the mother's childbirth (for example, postpartum depression or psychosis) is detected in the case, but then there may be a reduction in criminal licens according to the general provisions or a reduction in unfair incitement reduction. Otherwise, the mother who killed her newborn baby, like all other murderers, is held responsible for full punishment. Some experts have argued that a psychological state-oriented infanticide arrangement can be considered in Türkiye, referring to the example of the "Infanticide Act" in English law or the special provisions that protect the postpartum mother in some European countries. For example, Article 116 of the Swiss Penal Code and Article 136 of the Portuguese Penal Code continue to consider killing her newborn child as a separate type of crime that mitigates the punishment, taking into account the special postpartum situation of the mother. However, TPC numbered 5237 did not prefer this way; Türkiye has joined the countries that remove infanticide from being a separate crime and dissolve it within the general provisions. Although this attitude was positive from the perspective of gender equality and the right to life, it left the obligation to evaluate each case in terms of the principle of personification of punishment to the judiciary.

### **5.- Comparative evaluation and conclusion.**

This examination, which was carried out on the axis of 1889 Zanardelli Law - 1930 Rocco Law - 1926 TPC – 2005 TPC, shows that great transformations have occurred over time in the definition and punishment of the crime of infanticide (killing a newborn baby). The 1889 Italian Penal Code and the 1926 Turkish Penal Code, which were in force at the end of the 19th century and the beginning of the 20th century, showed an extremely similar approach to the act of infanticide. In both laws, the mother was portrayed as a desperate perpetrator who acted with the motive of "saving her honor"; the victim who was killed was seen as an innocent baby who "had not yet gained a social existence". In this context, although the laws did not fully approve of the mother's action, he found it unfair to punish her for life like an ordle murderer. Instead, much lighter prison sentences were provided for compared to common murder, such as 3–10 years (Italy) and 4–8 years (Türkiye).

This situation shows how influential the concept of family honor was in the social values of the period. Protecting family honor has become a determining factor for punishment even in criminal law. In contrast, between the last quarter of the 20th century and the beginning of the 21st century, the priorities of law changed. Although the initial version of the Italian Penal Code

of 1930 continues the old approach, Italy has revised its view of this crime since the 1980s; It has turned to a model based on the psychological state of the mother, removing the phenomenon of "honor" from being a reason for criminal reduction. Similarly, with the reform it made in 2004, Türkiye completely repealed the crime of infanticide and subjected it to a general intentional homicide crime regime. Moreover, in Turkish law, this verb is considered an aggravating reason even if the perpetrator is a mother.

The differences in legal approach can be summarized as follows: While the old laws are in a moral reaction (showing understanding of the mother's action in a situation that the society is ashamed), the new laws have legal objectivity and victim orientation (if there is a dead person, his rights are priority, the perpetrator's motivation to "cover up the defect" cannot be excused). The differences in criminal sanctions are at the level of abyss: The sentence for 4-8 years in prison in the 1926 TPC was sentenced to life imprisonment after 2005. Although the sentence, which was 3-10 years in the period 1889-1930 in Italy, is between 4-12 years today, it is now limited only to the special psychology of the mother during childbirth (even the word "honor" has been completely removed by law).

The impact of the legal reforms behind these transformations is great. Türkiye's 2004 reform in particular was a broad revision aimed at ending violence against women and discrimination in the field of criminal law. This reform was part of the effort to adapt to international human rights norms, and as a result, the Turkish penal code was modernized, both in terminology and philosophy. Crimes committed for the sake of "honor" have become an aggravating element, let alone alleviating the punishment. As a matter of fact, in paragraph of Article 82/1-i of the Law No. 5237, homicide by or honor is regulated as a separate form and it is stipulated that it should be punished with the heaviest punishment (although this article specifically targets ritual murders, the general message is the same: The excuse of honor is not valid in crimes).

From a social point of view, the difference between old and new regulations is related to the change in the position of women in society and the strengthening of children's rights. While the existence of an illegitimate child used to be considered a "disgrace" for the family, today even the concept of a child born out of wedlock has been removed from the language of law. As a matter of fact, with the reform of the Turkish Civil Code in 2001, the distinction between "legal child" and "illegal child" was abolished, and all children gained equal status, whether their parents were married or not. On such a social level, it has become unacceptable to understand that the mother kills her baby just because she is single. Instead, the state should focus on reducing the pressures that women may face during out-of-wedlock pregnancy, preventing such

tragedies with support such as shelters and adoption mechanisms. At the level of the criminal code, deterrence has come to the fore: The act of killing a newborn baby is given the message that it will be punished with heavy sanctions.

On the other hand, it is also a fact that legal reforms cannot completely solve every problem. The abolition of the infanticide provision in the new TPC may bring some difficulties in practice. The evaluation of the criminal responsibility of mothers who experience disorders such as depression or psychosis, especially after childbirth, is entirely at the discretion of the judicial authorities. In such cases, the courts may reduce the penalty by applying the provisions of the Turkish Penal Code of mental illness (Article 32) or unfair incitement (Article 29). However, this is not as pronounced and automatic discount mechanism as in the old law. In this context, some lawyers have stated that the transition to a completely punishment-free system regarding infanticide may be debatable, perhaps a limited reduction provision based on the mother's psychological state can be considered (for example, a regulation such as "child murder in case of postpartum mental disorder").

In the current situation, in Türkiye, judicial authorities usually either give full punishment in such cases or can evaluate the incident under different legal qualifications such as "killing by negligent behavior". This can create some uncertainty in practice. As a result, in the case of both Italy and Türkiye, it is seen that the place of the crime of killing a newborn baby in criminal law has evolved in parallel with the social value system and legal policy of that country. From the 19th century to the 21st century, the perception of the concept of "honor" in law has changed radically. In the past, the tolerance given to the mother who wanted to protect her honor has given way to the protection of the baby's right to life and gender equality. This evolution is a small but striking example of the broad transformation in the history of criminal law from moral values to universal human rights.