

Re KABASINGA

[Rwanda SUPREME COURT – RS/INCONST/SPEC 00003/2020/SC– (Ntezilyayo, P.J., Cyanzayire, Muhumuza, Rukundakuvuga and Hitiyaremye, J.) November 27, 2020]

Constitution – The principle of equality before the law – Distinction of individuals – All persons are equal before the law without any distinction or discrimination and the enacted law should treat people equally – This principle may be subject to exception if there are reasonable grounds based on legitimate purpose of distinction of people but which, with consideration of their physiology, does not constitute a discrimination.

Law determining offences and penalties – Infanticide – It is a particular offense which cannot be committed by a male due to his physiology as a person unable to conceive and deliver, and therefore unlikely to undergo postnatal effects and lactation problems as it happens to female – It is committed by a female as a result of postnatal effect.

Constitution – Due process of law – Guarantees of due process of law – It consists with a course of legal proceedings based on the principles of law and fair justice preventing the adoption of unreasonable legislation or other measures violating the substantive due process of law for the people.

Law determining offences and penalties – Constitutive acts of infanticide – They are wilful acts or omission committed by a woman with intention to kill her biological child occasioned by postpartum depression or lactation problems – This depression is different from mental disturbance likely to result into incapacity of the person to perceive his/her acts.

Facts: Kabasinga initiated a petition to the Supreme Court praying the court to declare article 108 of the Law N°68/2018 of 30/08/2018 determining offenses and penalties in general inconsistent with the Constitution of the Republic of Rwanda of 2003 revised in 2015, articles 15 and 16, on ground that it manifests gender-based discrimination since it only penalises a female. She also contends that this provision is an obstruction to fair justice provided for under article 29 of the Constitution because it provides for punishment against a woman who committed an offence being mentally incapacitated, accordingly, she prays the court to repeal it in accordance with the provision of article 3 of the Constitution.

The Government of Rwanda argues that such provision does not manifest gender-based discrimination and that such does not obstruct the right to fair justice; accordingly, it is in their stance that it should not be repealed because it does not contradict the Constitution.

In the hearing in public, the petitioner alleges that article 108 of the above-stated law is inconsistent with articles 15 and 16 of the Constitution because it manifests gender-based discrimination whereby it is only a woman who is likely to be prosecuted for this offense given that in no way a man can be found guilty of the offense provided for by this provision since he can neither conceive nor breastfeed. Another thing is that the postpartum effects that may lead to involuntary infanticide do not only concern the woman, rather both parents including the man, for instance in the event of the postpartum death of the delivering mother, the parental duties also lie with a man who, at such time may kill the child unwillfully occasioned by intense care demand for the child to wit long sleepless nights which may impact his mind negatively. In such a case, a man would be prosecuted

based on article 111 of the stated law determining offenses providing for manslaughter, which is different from the fact that a special penalty is provided for a woman who would kill her child unwillfully.

The Government of Rwanda states that women and men who commit infanticide are prosecuted for manslaughter in the same way but the particularity of a woman's physiology of makes her susceptible to the postpartum depression or lactation effects. In case infanticide was occasioned by such effects, she is not punished for the manslaughter, she is rather punished for infanticide as a result of such effects. This entails that she is given a lesser penalty comparing to women or men who committed infanticide for reasons other than these.

The Government of Rwanda elucidates that the purpose of the foregoing provision was established in the to protect the right of the child, whereby in the past, a new born used to be killed on ground that the parents were not happy with it. This indicates that this provision does not contain discrimination since a man who commits infanticide is also punished the same way as a woman who would commit voluntary infanticide. Therefore, even though this provision seems to be discriminatory against women, it would be a positive discrimination permitted by the law.

Health Development Initiative (HDI) organisation as the amicus curiae states that the punishment of the offense of infanticide has not occurred for the first time in Rwandan legislation because the successive legislations have had the provision criminalising this offense where the man and woman were subject to the same penalties for infanticide. The particularity of article 108 of the Law n° 68/2018 of 30/08/2018 consists of the fact that it punishes a woman only and stresses that she is punished in the event she commits infanticide while she is in the state of mental disturbance as a result of the effects stated above, it thus finds this provision discriminatory.

The organisation "Women's Link Worldwide" also finds that article 108 of the foregoing law manifests gender-based discrimination because it provides for the infanticide which can be committed by women only.

Regarding another issue relating to the fact that article 108 of the Law n° 68/2018 of 30/08/2018 determining offenses and penalties in general is an obstruct to the right to fair justice, thus inconsistent with article 29 of the Constitution, the petitioner submits that this provision punishes the person who committed an act that does not fulfil all constitutive elements of an offense as there is no intention to commit such offence while in usual circumstances, an offense is considered as such if all its constitutive elements are manifested. Accordingly, aside from the fact that such article does not guarantee fair justice, it does not even abide by the general principles of criminal law.

She further elucidates that from the comparison of the criminalisation of this offense in Rwanda and that of other countries from where our instrument seems to have originated from, it is evident that the legislator shallowly explicated some notions and this is likely to subject women to aa continuous injustice towards women who may undergo postpartum depression, and instead of justice being served to them, their traumatism is worsened. In view of the principles of criminal laws, no person should be punished for an act committed unwillfully, even in the event where such an act occasioned of death given that in the absence of intent, there is no offense and thus, no punishment. She is of the stance that article 108 needs to be amended for the purpose of legal certainty in order to differentiate the instance of willful commission of an offence that is subject to punishment and an unwillful one that is punishable. Hence, this would help courts to administer fair justice.

The Government of Rwanda contends that the statements that article 108 of the law punishes a wrong person are unfounded. It explains that the Kinyarwanda version of this provision introducing in the text “ubwenge bwe budakora neza” (disturbed mind), consists of the formulation issue only as this text should not be part of the provision, rather, it should be perceived as in the English and French versions where it is understood as any woman, who intentionally or by omission kills her biological child whose age is not above twelve (12) months but during the commission of the offense she was in postpartum depression or by the effect of lactation commits an offense. It relies on the fact that usually, the medical experts indicate that the postpartum or lactation effects are not likely to result in mental incapacity like in the case of mental disorder patients. This entails that even if she has such conditions, she remains with the faculties to know the good and wrong, and even the consequence of the acts he/she may commit, which is different in case of the person with a mental disorder who lacks such faculties. For this reason, she should be held liable for the act willfully committed with full knowledge, but with a reduced penalty because she commits the offense of infanticide unwillfully as a result of those effects, the reason why not every woman who delivers or with postpartum depression does not kill her own child, therefore, the woman who does it should be punished.

In its analysis of article 108 of the foregoing law, the organisation Health Development Initiative (HDI) as the amicus curiae analyses alleges that this provision violates with the rights of the woman to reproduction health as provided in the international conventions and other domestic legal instruments as well as the principle of criminal liability. In addition, it deems that this article 108 contradicts article 95 of the Constitution providing that international conventions duly ratified prevail over ordinary laws. For this reason, the Law n° 68/2018 of 30/08/2018 is an ordinary law which is inferior to the international convention ratified by Rwanda in relation to the right of the woman health in general and to reproductive health in particular. It is again inconsistent with articles 3, 12, and 16 of the Law n° 21/05/2016 of 20/05/2016 relating to human reproductive health because if these provisions were respected, the woman would not commit infanticide unless she has mental depression. This provision is as well inconsistent with Article 85(2) of the Law n° 68/2018 of 30/08/2018 stated above, providing that there is no liability if the accused had a mental disorder at the time of the commission of the offense.

Women’s Link Worldwide (WLW) as another amicus curiae states that the Supreme Court should address issues relating to the punishment of infanticide including the abuse of the laws punishing such crime where women are punished on ground that they are unable to access sufficient health reproduction services and violation of the women’s right to life, health and privacy and abuse of the offense of infanticide towards women and girls who aborted or underwent postpartum effects which constitutes a cruel and unusual penalty. The organisation explains that in several countries, this offense is considered a petty offense comparing to other kinds of homicide, on ground that that the intention for the commission of such crime is considered.

It concludes by stating that indicting women and girls facing serious postpartum effects or unsafe abortion, constitutes serious violation of women’s right to life and health protected by the law and international conventions as a human right. The right solution to this issue should be striving for the better security of women by giving them access to reproduction health services including abortion and post abortion care, sexual health education and pregnancy prevention.

Held: 1. All persons are equal before the law. They are entitled to equal protection of the law without any distinction or discrimination and the enacted law should treat people equally. This

principle may be subject to exception if there are reasonable grounds based on legitimate purpose of distinction of people but which, with consideration of their physiology, does not constitute a discrimination. For these reasons, article 108 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general does not manifest inequality before the law or gender – based discrimination on ground that infanticide cannot be committed by a man due to the fact that his physiology is different from that of a woman, accordingly, it is not inconsistent with articles 15 and 16 of the Constitution of the Republic of Rwanda.

2. Infanticide is a special offense that cannot be committed by a man due to the nature of his physiology as an individual unable to conceive, deliver and undergo postpartum and lactation effects as it is to a woman. Thus, it is committed by a woman as a result of postpartum effects.

3. Due process of law consists of a course of legal proceedings based on the principles of law and fair justice preventing the adoption of unreasonable legislation or other measures violating the substantive due process of law for the people.

4. They are wilful acts or omission committed by a woman with intention to kill her biological child occasioned postpartum depression or by effect of lactation. This depression is different from mental disturbance likely to result into incapacity of the person to perceive his/her acts. Therefore, article 108 does not obstruct fair justice provided for under article 29 of the Constitution.

Petition without merit.

Statutes and statutory instruments referred to:

Constitution of the Republic of Rwanda of 2003 revised in 2015, articles 3, 15, 16, 21, 29 and 95.

Organic Law n° 01/2012/OL of 02/05/2012 instituting the penal code, article 143.

Decree law n° 21/77 of 18 August 1977 instituting the penal code, article 314.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted in Maputo on 11 July 2003, ratified by the Presidential Order N° 11/01 of 24/06/2004, article 8.

African Charter on Human and Peoples Rights, ratified by the Presidential order n° 10/1983 of 17/05/1985, article 16.

Convention on the Elimination of All Forms of Discrimination Against Women, adopted by Rwanda through the Presidential order n°431/16 of 10 November 1980 and ratified on 02/03/1981, articles 1 and 12.

International Covenant on Economic, social and Cultural Rights, ratified by the decree law n° 8/75 of 12/02/1975, article 12.

International Covenant on Civil and Political Rights), 1966, article 26.

Universal Declaration of Human Rights of 1948, article 7.

Law n° 68/2018 of 30/08/2018 determining offences and penalties in general, articles 85, 107, 108 and 111.

Law n° 21/05/2016 of 20/05/2016 relating to human reproductive health, articles 3, 12 and 16.

Foreign legislations referred to:

Criminal code of Canada, article 233

UK penal code, article 16.

The Law relating to infanticide in Canada, article 262.

Cases referred to:

RS/INCONST/SPEC00003/2019/SC, rendered by the Supreme Court on 04/12/2019, para. 13.

RS/INCONST/SPEC00001/2019/SC, rendered by the Supreme Court on 29/11/2019.

RS/SPEC/0001/16/CS, rendered by the Supreme Court on 23/09/2016, Law Report V. 2, 2017,
p.1.

S.C.C. No.: 36585, Her Majesty the Queen and Meredith Katharine Borowiec, para. 2.

R. v. Parks, [1992] 2 S.C.R. 871, at p. 896.

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Erwin Chemerinsky, In Defense of Equality: A Reply to Professor Westin, 81 MICH. L. REV.
575, 578 n.17 (1983).

Eric Vallillee, Western Journal of Legal Studies, Vol 5, Issue 4, article 1. I. Elements of the
offence (Infanticide).

R v. Smith (1976) 32 C.C.C.(2d)224(Nfdl Dist Ct), cited by Winifred H. Holland.

Winifred H. Holland, Murder and related Issues: An Analysis of the law in Canada, Report for
the Law Commission, July 27th, 2005, p. 26.

Michele Connell, The Postpartum Psychosis Defense and Feminism: More or Less Justice for
Women.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] Kabasinga initiated a petition to the Supreme Court praying the court to declare article 108 of the Law N°68/2018 of 30/08/2018 determining offenses and penalties in general inconsistent with the Constitution of the Republic of Rwanda of 2003 revised in 2015, articles 15 and 16, on ground that it manifests gender-based discrimination since it only penalizes a female. She also contends that this provision is an obstruction to fair justice provided for under article 29 of the Constitution because it provides for punishment against a woman who committed an offence being mentally incapacitated, accordingly, she prays the court to repeal it in accordance with the provision of article 3 of the Constitution.

[2] Article 108 of the Law n° 68/2018 stated above reads that any woman, who intentionally or by omission kills her biological child whose age is not above twelve (12) months but during the commission of the offense she was in postpartum depression or by effect of lactation commits an offense. Upon conviction, she is liable to imprisonment for a term of not less than five (5) years but not exceeding seven (7) years.

[3] The Government of Rwanda states that this provision does not manifest gender-based discrimination and that it does not obstruct the right to fair justice; therefore, it is in its stance that it should not be repealed on ground that it is not inconsistent with the constitution.

[4] The case was heard in public on 03/11/2020, Kabasinga Florida - the petitioner - was assisted by Counsel Rwagitare Fred Fiston and Counsel Mugababandi Jean Maurice, and present was also the Government of Rwanda represented by Counsel Umwari M. Claire together with Counsel Kabibi Spécioza. There were also Amicus curiae: *Health Development Initiative*, (HDI) represented by Counsel Garura Christian and “Women’s Link Worldwide” represented by its representative in Rwanda and assisted by Counsel Cyiza Consolée.

[5] In the instant case, the following issues were examined:

- Whether article 108 of the Law n° 68/2018 of 30/08/2018 determining offenses and penalties in general manifests gender-based discrimination in so much that is inconsistent with the Constitution of the Republic of Rwanda of 2003 revised in 2015, articles 15 and 16;
- Whether this provision is an obstruct to the right to due process of law provided for under article 29 of the Constitution.

II. LEGAL ISSUES AND THEIR ANALYSIS

1. **Whether article 108 of the Law N° 68/2018 of 30/08/2018 determining offenses and penalties in general manifests gender-based discrimination in so much that it is inconsistent with the Constitution of the Republic of Rwanda of 2003 revised in 2015, articles 15 and 16;**

[6] Kabasinga Florida and her Counsels state that article 108 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general manifests gender-based discrimination, therefore, it is inconsistent with the Constitution of the Republic of Rwanda of 2003 revised in 2015, articles 15 and 16. This provision provides that any woman, who intentionally or by omission kills her biological child whose age is not above twelve (12) months but during the commission of the offense she was in postpartum depression or by effect of lactation commits an offense. Upon conviction, she is liable to imprisonment for a term of not less than five (5) years but not exceeding seven (7) years. They state that it is evident that this provision discriminates against women for the following reasons:

a. The woman is the sole person who susceptible to prosecution for this offense, and in no way a man can be convicted of this offense because does he neither conceive nor breastfeed. They construe the fact that a woman is the sole person concerned by this provision in light with the constitutive special elements of the offense, meaning the fact for the mother to kill her child as a result of postpartum or lactation effects.

b. The postpartum effects that may lead to involuntary infanticide do not only concern the woman, rather both parents including the man, for instance in the event of the postpartum death of the delivering mother, the parental duties also lie with a man who, at such time may kill the child unwillfully occasioned by intense care demand for the child to wit long sleepless nights which can lead to mental disturbance.

c. In the event a man happens to commit infanticide, he would be prosecuted in accordance to article 111 providing for manslaughter and be liable to an imprisonment for a term of not less than six (6) months but not more than two (2) years and a fine of not less than five hundred thousand Rwandan francs (Frw 500,000) and not more than two million Rwandan francs (Frw

2,000,000) or only one of these penalties, and such is a minor penalty comparing to that provided for a woman who commits the same crime.

d. If the legislator intended to establish the penalty based on the offense committed, he/she would not have segregated the woman by fixing a special penalty against her. A woman who commits involuntarily kills her child would be punished like any other person who commits manslaughter provided for by article 111 of the above stated law, and if there is intent, she should be liable to the same penalty as that for persons who committed murder provided for by article 107 of the same law without being necessarily differentiating between man and woman.

[7] They conclude by alleging that this provision is inconsistent with the Constitution of the Republic of Rwanda of 2003 revised in 2015, articles 15 and 16 prohibiting any kind of discrimination, and it is as well in contradiction with international conventions on the elimination of all forms of discrimination ratified by Rwanda. They cite the Protocol adopted in Maputo in 2003, ratified by the Presidential Order n° 11/01 of 24/06/2004, and for these reasons, they accordingly pray the Supreme Court to rely on article 3 of the Constitution of the Republic of Rwanda and repeal it.

[8] With regard to this reason, the State Attorneys disagree with the petitioner to the effect that article 108 of the Law n° 68/2018 of 30/08/2018 previously mentioned manifests discrimination, and they rely their arguments on the following grounds:

Men like women who all commit infanticide are prosecuted in the same way for voluntary homicide because killing their own child consists of murder;

The particular physiology of a woman leads to the fact that she is the only person who is likely to suffer from postpartum depression or lactation effects. However, if she commits infanticide as a result of those effects, she is not punished for voluntary murder, rather, she is punished for infanticide due to postpartum depression and lactation effects. This implies that they are punished with a reduced penalty comparing to those imposed on men and women who killed his/her newborn for different reasons.

[9] The State Attorneys further explain that natural physiology of a woman who delivered is different from that of a man, and that it is this physiology which was taken into account for punishing the acts constituting a crime under article 108 of the Law n° 68/2018. They state that those acts stated in this article consist of killing a child shortly after delivery and that such postpartum effects could not affect a man. They argue therefore that such effects were considered in this law, a situation different from the ancient instruments where a man and a woman were subjected to same punishment in the event of the commission of the crime of infanticide. The particularity of this provision lies in the fact that a woman who commits an infanticide as a result of the postpartum depression is punished but with a mitigated penalty.

[10] They argue that the reason for enactment intended to protect the right of the child, where in the past infanticide used to be committed against an undesired newborn by the parents. They gave an example of a situation where a parent could kill his/her own child for disability reasons or for being a girl while they desired a boy.

[11] They conclude their briefs by declaring that they don't deem this article discriminatory due to the fact that a man who kills willfully his own child also punished as a woman who would kill

her child wilfully; that even though this provision may appear discriminatory against women. As was held by Rwandan courts in the event where the distinction pursues legitimate purpose and based on particular criterion, it would be considered as positive discrimination permitted by the law. They give the instance of the law establishing the general statute for civil servants where it provides a long maternity leave for a woman than that given to a man without considering this as discrimination.

[12] With regard to this issue, the representative of Health Development Initiative (HDI) as a friend of the Court, states that the punishment of the offense of infanticide is not new in Rwandan legislation because the successive amendments have had a provision criminalising this offense. She cites article 143 of the Organic Law n° 01/2012/OL of 02/05/2012 instituting the penal code as well as article 314 of the Decree Law n° 21/77 of 18 August 1977 instituting the penal code.

[13] She declares that those above-stated instruments provided for the same punishment for men and women in the event they commit infanticide. The particularity of this article 108 of the Law n° 68/2018 of 30/08/2018 is that it punishes the woman only and stresses that she is punished in case she commits infanticide while in a state of mental disturbance as a result of postpartum depression or lactation effects; therefore, they find this provision discriminatory.

[14] The representative of “Women’s Link Worldwide” states that article 108 of the Law mentioned above manifests gender-based discrimination because it provides for the offense of infanticide which can only be committed by women.

DETERMINATION OF THE COURT

[15] Article 15 of the Constitution of the Republic of Rwanda of 2003 revised in 2015 provides that all persons are equal before the law. They are entitled to equal protection of the law. In addition, article 16 of the Constitution states also that discrimination of any kind or its propaganda based on, inter alia, ethnic origin, family or ancestry, clan, skin colour or race, sex, region, economic categories, religion or faith, opinion, fortune, cultural differences, language, economic status, physical or mental disability or any other form of discrimination are prohibited and punishable by law.

[16] The article for which the abrogation is sought against which the petitioner alleges to be inconsistent with the provisions of the Constitution of the Republic of Rwanda as stated above consists of article 108 of the Law n° 68/2018 of 30/08/2018 determining offenses and penalties in general providing that any woman, who intentionally or by omission kills his or her biological child whose age is not above twelve (12) months but during the commission of the offense she was in postpartum depression or by effect of lactation commits an offense. Upon conviction, he / she is liable to imprisonment for a term of not less than five (5) years but not exceeding seven (7) years.

[17] In order to determine whether this provision manifests inequality before the law and gender-based discrimination, therefore inconsistent with article 15 as well as 16 of the Constitution of the Republic of Rwanda as declared by the petitioner, it is necessary to explain how these

provisions are construed. As explained in the judgment RS/SPEC/0001/16/CS¹ rendered by this Court on 23/09/2016, articles 15 and 16 of the Constitution are linked to the extent that it is difficult to interpret them separately. Indeed, article 15 provides that all persons are equal before the law and are entitled to equal protection of the law. This implies that there should not be discrimination likely to prevent people from enjoying equal protection or being deprived of their entitled rights. On the other hand, article 16 provides that the distinction between individuals is considered as discrimination and that, it is prohibited by the Constitution. Both provisions are to be considered as encompassing a single principle of prohibition of distinction in their rights or prohibitions with the purpose of excluding some people from enjoying their entitled rights.

[18] The principle of equality and prohibition of discrimination is not only found in the Constitution of the Republic of Rwanda, but also present in International Conventions ratified by Rwanda to wit article 7 of the Universal Declaration of Human Rights, 1948 which states that “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against discrimination in violation of this Declaration and against any incitement to such discrimination”.

[19] There is also article 26 of the International Covenant on Civil and Political Rights, 1966 stating that “All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status”. In particular, concerning the equality between women and men, article 8(f) of Maputo Protocol, provides that “Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure (f): reform of existing discriminatory laws and practices in order to promote and protect the rights of women”.²

[20] As indicated in the foregoing provisions of the law and international conventions, the principle of equality before the law denotes that people are entitled to equal protection of the law without distinction or discrimination and the adopted instrument should treat people equally. However, this principle may be subject to exception in case there exists a legitimate reason based on rational purpose. This has been held by the instant Court in judgment RS/INCONST/SPEC 00001/ 2019/SC rendered on 29/11/2019³. In that judgment, the Court explained also that “Things that are alike should be treated alike, and things that are unlike should be treated unlike in proportion to their unlikeness”⁴. In other words, people should be treated equally but with consideration of their physiologies.

[21] After explaining the meaning of equality before the law, in order to address the issue in the instant case relating to whether article 108 of the Law n° 68/2018 of 30/08/2018 determining offences and penalties in general manifests discrimination, it is necessary to define discrimination. In the judgment RS/SPEC/0001/16/CS⁵ delivered on 23/09/2016, the instant Court defined

¹ Rwanda Law Reports, V. 2, 2017, P.1.

² Rwanda ratified this protocol on 25/06/2004.

³ RS/INCONST/SPEC00001/ 2019/SC rendered on 29/11/2019, p.12, para. 35

⁴ RS/INCONST/SPEC 00001/ 2019/SC rendered on 29/11/2019, p.12, para. 35

⁵ Law report, V. 2, 2017, P.16, Para. 22.

discrimination in general, as the distinction of people with the purpose of depriving some of them of opportunities and practice nepotism in favor of others based on irrational grounds. Concerning gender-based discrimination, article one of international conventions on the elimination of all forms of discrimination against women, states that it is any distinction, exclusion or restriction made on the basis of sex which has the effect of nullifying the recognition, enjoyment of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field (*For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field*)⁶.

[22] Following the foregoing general explanations, the next course of action is to determine whether the fact that article 108 of the aforementioned Law n° 68/2018 which states that any woman, who intentionally or by omission kills his or her biological child whose age is not above twelve (12) months but during the commission of the offense she was in postpartum depression or by effect of lactation commits an offense, manifests discrimination for omitting a man. For this matter to be addressed, it is important to analyse the constitutive elements of the offence of infanticide.

[23] It is the finding of this court that the text of article 108 is not Rwandan particularity only, and it is not the first time debates about its content have arisen across the world but in order to settle them, the legal instruments, court decisions as well as legal scholars always corroborate to consider the particularity of the woman due to her natural physiology. In Canada for instance, article 233 of the criminal code provides that “*A female person commits infanticide when by a wilful act or omission she causes the death of her newly born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed*”. In the criminal code of UK, article 160 providing for infanticide reads that *Where a woman by any wilful act or omission causes the death of her child, being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child [...]*.

[24] The provisions of these articles were later interpreted in various judgments. In his article on infanticide, Julio Arboleda-Florez indicated that according to the analysis of Lord justice McRuer⁷ on article 262(2) of the Law of Canada of the year 1948 on the offense of infanticide, he indicated that it is constituted by the following elements:

- a) The accused should be a woman,
- b) She should have killed a child,
- c) The child should be a newborn,
- d) The child should belong to the accused,

⁶ This Convention was ratified by Rwanda on 02/03/1981.

⁷ James Chalmers McRuer, OC (August 23, 1890 – October 6, 1985) was a Canadian lawyer, judge, commissioner and author in Ontario.

- e) The death should be the result of the intent to commit the offense or the omission to do what ought to be done,
- f) During this time, the accused should be in the state of postpartum lactation effects,
- g) The accused should be in a state of postpartum depression.

He expressed it in the following English terms: “In his analysis of the then Section 262, 2, Judge McRuer considered the elements of the offence of infanticide as: the accused must be a woman; she must have caused the death of a child; the child must have been newly born; the child must have been a child of the accused; the death must have been caused by a wilful act or omission of the accused; at the time of the wilful act or omission the accused must not have fully recovered from the effect of giving birth to the child; and by reason of giving birth to the child the balance of her mind must then have been disturbed (19)”⁸

[25] In his article published in *Western Journal of Legal Studies*, titled *Deconstructing Infanticide*, Eric Vallillee clarified the constitutive elements of the offense provided by article 233 of the criminal law in Canada (*Infanticide*). The case law *R v Smith* that he referred to in his article indicated that the infanticide is constituted by the following elements: The accused is female; (b) The deceased was born alive; (c) The accused caused the death of her child; (d) The death of the child was caused by a wilful act or omission of the accused; (e) The child was newly-born (under 12 months of age); (f) The accused was not fully recovered from the effects of giving birth to the child; (g) By reason of childbirth or the consequent effects of lactation the accused’s mind was disturbed.⁹

[26] In the judgment opposing Her Majesty the Queen (Appellant) against Meredith Katharine Borowiec (Respondent), the Supreme Court of Canada held that infanticide consists of the offense which is committed in a particular manner. Firstly, this offense is committed by a mother, willfully kills her newborn child under twelve months of age. Secondly, at this time, he is still in a state of depression due to delivery or lactation effects. It stated this in the following English terms: “*Infanticide, which is defined in s. 233 of the Criminal Code, is a form of culpable homicide and applies in the narrow set of circumstances where (1) a mother, by a wilful act or omission, kills her newborn child (under one year of age, as defined by the Criminal Code, s. 2) and, (2) at the time of the act or omission, the mother’s mind is “disturbed” either because she is not fully recovered from the effects of giving birth or by reason of the effect of lactation: L.B., at para. 58*”¹⁰

[27] Based on the explanations provided in relation to the commission of infanticide, it is the finding of the Court that it is a special offense that cannot be committed by man due to his physiology and inability to conceive and deliver, and thereby suffers the effects of delivery and lactation as it happens to female. In addition, for the commission of infanticide to be possible,

⁸ Available at https://docksci.com/infanticide-some-medicolegal-considerations_5e58e908097c47f42d8b4578.html. Consulté le 26/11/2020.

⁹ *Western Journal of Legal Studies*, Vol 5, Issue 4, article 1. I. Elements of the offence (Infanticide) *R v Smith*⁵ clarified the seven elements of section 233: The accused is female; (b) The deceased was born alive; (c) The accused caused the death of her child; (d) The death of the child was caused by a wilful act or omission of the accused; (e) The child was newly-born (under 12 months of age); (f) The accused was not fully recovered from the effects of giving birth to the child; (g) By reason of childbirth or the consequent effects of lactation the accused’s mind was disturbed. This article is available in *Western Journal of Legal Studies*: <http://ir.lib.uwo.ca/uwojls/vol5/iss4/1>.

¹⁰ File No.: 36585. 2016: January 20; 2016: March 24.

those circumstances are necessary as indicated above. The court finds in contrast that the offense of infanticide is committed by a female as a result of postpartum effects, and the purpose of the law is not to favour some people or depriving them of opportunities based on irrational grounds.

[28] Accordingly, the fact that article 108 of the Law n° 68/2018 of 30/08/2018 determining offenses and penalties in general provides that infanticide cannot be committed by a man due to his physiology which is different from that of a woman, the court finds that no inequality before the law or discrimination is manifest in this provision; therefore, it is not inconsistent with article 15 and 16 of the Constitution of the Republic of Rwanda.

2. Whether article 108 of the Law n° 68/2018 of 30/08/2018 determining offenses and penalties in general is inconsistent with article 29 of the Constitution of the Republic of Rwanda of 2003 revised in 2015

[29] Kabasinga Florida declares that article 108 of the Law n° 68/2018 of 30/08/2018 determining offenses and penalties in general is an obstruction to the right to fair justice, therefore, inconsistent with article 29 of the Constitution of the Republic of Rwanda of 2003 revised in 2015. She explains this in the following way:

a. This provision punishes a person who committed an act that does not fulfill the required constitutive elements of an offense in order to be considered as such because it provides that he/she could be punished for an act committed without intent while normally, in order to establish that the offense happened as declared by Robert Kint, it should be examined if the constitutive elements are present: to wit material, legal, and moral elements. Accordingly, aside from the fact that it does not guarantee fair justice, this provision does not even abide by the general principles of criminal law.

b. Though the content of this article is found in other countries like the United Kingdom of Great Britain, Ireland, or Canada where, it is found that if a person committed infanticide unwillfully, due for instance to mental disorders is not punished, rather, she follows medical treatment of her doctor while according to article 108 of the stated Law, instead of assisting her to access medical treatment, it subjects her to severe sanctions.

c. This provision does not distinguish between a person that committed infanticide willfully and the one who committed it without intent.

[30] She submits that the research carried out on cases in relation to this offense in the United Kingdom and Wales [Pays des Galles in French] in the year 2005, established that among 49 women convicted of infanticide between the year 1989 and 2000 based on the provision which is similar to the impugned one, only two (2) were sentenced to imprisonment and the rest were placed in treatment facilities where they were to follow medical counselling, a situation totally different from that in Rwanda where the big number is incarcerated. She avers that as indicated by this research, those who are punished in accordance to the provision similar to article 108 of the Law in Rwanda are very few who ostensibly manifested the intention to kill their children, which is different from the content of article 108 of the Law in Rwanda where it punishes a woman who unintentionally killed a child due to mental incapacity occasioned by postpartum depression or lactation effects. It is in her stance that instead of being punished, she should be subject to medical treatment and follow-up in order to help her recover.

[31] She goes on to state that in Canada as one of the developed countries in human rights in general, the provision of article 233 of the law criminalising the offense of infanticide providing that a female person commits infanticide when by a wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed.

[32] She alleges that the fact that this law has no elaborate explanations, it inspired debates which were settled by court decisions in cases of Veit J held in R v Effert and R v LB. She states that these judgments settled these debates and served to explain this provision in this country, where courts had first to determine whether the accused committed it with or without intent or if it was a result of unforeseeable circumstances that drove her to do so.

[33] She further elucidates that from the comparison of the criminalisation of this offense in Rwanda and that of other countries from where our instrument seems to have originated, it is evident that the legislator shallowly explicated some notions and this is likely to subject women to a continuous injustice who may undergo postpartum depression, and instead of justice being served for them, their trauma is worsened.

[34] She states that the consideration of article 108 of the Rwandan Law determining offences and penalties in general, reveals that it contradicts itself and the law. She alleges that there exists no issue for this provision to read that "in the event a woman kills her infant with intent" because in this case, the offense is complete since there is an intention. However, the issue resides in the fact that this provision pursues that "during the commission of the offense she was in postpartum depression". Thus, she argues that the intent to commit an offense could not exist while the state of mind is disturbed, therefore, providing it as such suggests that the legislator relieved the prosecutor of the duty to prove the constitutive elements of the offence including the intent given that the latter is only required to prove that a woman killed her infant.

[35] She further explains that according to aforementioned general principles of the Law, no person would be punished for an act committed without intent, even when it resulted into death. She emphasizes that whenever there is no intention, there is no offence and for this reason, no punishment should be imposed. She states therefore that this provision should be amended in order to clearly explain it and make a distinction between the situation where the accused would be considered as if she committed it willfully and be punished and the event when she committed it without intention and be disculpated. This position would help Courts to dispense fair justice as supported and indicated by the results of aforementioned researches carried out in foreign countries.

[36] She concludes her briefs by requesting the Court to consider article 108 of the Law determining offenses and penalties in general inconsistent with all stated provisions notably articles 15, 16 as well as 29 of the Constitution of the Republic of Rwanda of 2003 revised in 2015; and therefore that it should be repealed in compliance with article 3 of the same Constitution.

[37] Counsel Rwagitare Fred Fiston and Counsel Mugabonabandi Jean Maurice for Kabasinga Florida state that the text of article 108 of the Law determining offenses and penalties in general contradicts itself if confronted with the provisions of the law. They allege that the fact for this

provision to state that “any woman, who intentionally or by omission [...]”, and ends by stating that “but during the commission of the offense she was in postpartum depression or by effect of lactation [...]; they deem that the manifestation of intent is impossible as long as she is in a state of mind disturbance. They declare that this provision contradicts article 85 of the same law providing that the person who commits an offense without intent is not prosecuted.

[38] Counsel Umwari M. Claire and Counsel Kabibi Specioza, the State Attorneys reply that the statements according to which this provision inculcates the person who should not be prosecuted are not correct. Firstly, though the Kinyarwanda version of this provision introduced the text “ubwenge bwe budakora neza” (disturbed mind), they consider it as the formulation issue only as this text should not be part of the provision, rather, it should be perceived as in the English and French versions where it is understood as being any woman, who intentionally or by omission kills her biological child whose age is not above twelve (12) months but during the commission of the offense she was in postpartum depression or by the effect of lactation commits an offense.

[39] They base such assertions on the fact that medical experts establish that postpartum depression or lactation effects are not likely to result in mental incapacity like in the case of mental disorder patients. This denotes that even if she has undergone those effects, she has the mental capacity to discern the right from the wrong, and even the consequence thereof, a different situation with a person with mental disorder who is unable to discern the right from the wrong and the effects thereof. They argue that since the mind of that woman remains in a normal state, she should be held liable for the act willfully committed, but with a mitigated penalty because she commits infanticide unwillfully as a result of such effects beyond her control.

[40] They further submit that the fact for this provision provides for severe penalties than for manslaughter, is justified on ground that, even though a woman who kills her child as a result of postpartum depression and lactation effects do it without intention, she should not be punished as an author of manslaughter due to inherent duty of protection she has with regard to her child. They elaborate on that as follows:

- She remains with a sound mind, with full knowledge of acts she can commit which are likely to kill the baby, therefore she has the obligation to refrain from doing them;
- She has the duty of care in order to protect the life of the baby as the person who ensures it entirely and as her primary caregiver;
- Since every woman who delivers undergoes changes in her body including those affecting her mind, she should get ready beforehand, control herself, and assumes those effects at the time of delivery in order to preserve the life of the child.

[41] The State Attorneys conclude their briefs by declaring that not every woman who delivers or who is depressed commits infanticide, the reason why a woman who kills her baby should be punished. They pray that if the court finds it necessary, it would summon a postpartum psychologist to furnish the court with explanations.

[42] Concerning this issue, the representative of Health Development Initiative, (HDI) as an amicus curia, states that their opinions shall stress the explanations of medical experts in relation to reproductive health as provided for by the Constitution of the Republic of Rwanda, other domestic instruments and international agreements relating to human rights.

[43] Concerning the correlation between pregnant women, women that recently delivered, and mental health, she states that as the World Health Organization indicated through statistics at the world level, around 13% of pregnant women are usually affected by the mental disorder, especially, depression and in developing countries, where Rwanda belongs, the number raises to 19.8%.

[44] She further aversthat the research carried out in Manchester City in England, revealed that the number of mothers admitted in psychiatric hospitals for postpartum depression is 8 times higher than that of other women who underwent other conditions that resulted into depression.

[45] She goes on to submit that the Ministry of Health concedes that a woman who underwent postpartum depression could commit suicide or infanticide. The ministry declares that such a woman should get psychotherapy and medication. Another conclusion that was reachedat was that postpartum depression affects women only.

[46] She states that concerning the right to health in general, article 21 of the Constitution of the Republic of Rwanda provides that all Rwandans have the right to good health and that they enjoy that right especially that article 16 (1) reads that all Rwandans are born and remain equal in rights and freedoms.

[47] She further states that at international level, article 12 (1) of the International Covenant on Economic, social and Cultural Rights¹¹ and article 16 (1) of African Charter on Human and Peoples Rights¹² provide that every individual has the right to health. They read as follow: “Every individual shall have the right to enjoy the best attainable state of physical and mental health”.

[48] She further submits that concerning health, the World Health Organisation clarified that health does not imply the lack of ailments but it extends to well-being: “Health is a state on complete physical, mental and social well-being and not merely the absence of disease or infirmity”. This implies that health encompasses also the mental aspect. The right to health does not imply the absence of disease, it rather involves the right to be protected from disease and to treatment in the event a person falls ill.

[49] She declares that concerning the right of the woman on health in particular, article 14(2)(b) of the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa¹³ stipulates that States parties shall establish and strengthen pre-natal, delivery and post-natal health for women during pregnancy and while they are breast-feeding.

[50] She further states that article 12(2) of the Convention on the Elimination of All Forms of Discrimination Against Women also provides for the same thing that “Notwithstanding the provisions of paragraph 1 of this article, states parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation”.

¹¹ Rwanda ratified this Covenant by the Presidential order n° 8/75 of 12/02/1975.

¹² Rwanda ratified this Covenant by the Presidential Order n° 10/1983 of 17/05/1985.

¹³ Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, adopted in Maputo on July 11, 2003, ratified by the presidential order N° 11/01 on 24/06/2004.

[51] She goes on to submit that the Committee on the Elimination of Discrimination against Women (CEDAW Committee) analysed article 12 of this Convention in the following terms: “States parties should include in their reports how they supply free services where necessary to ensure safe pregnancies, childbirth and post-partum periods for women. Many women are at risk of death or disability from pregnancy-related causes because they lack the funds to obtain or access the necessary services, which include antenatal, maternity and post-natal services¹⁴. In other words, the above stated Committee requests state parties including Rwanda to indicate in the report they submit to this Committee, information with respect to free services in relation to safe pregnancies, childbirth and post-partum periods for women.

[52] From the analysis of article 108 of the aforementioned Law n° 68/2018 of 30/08/2018, she states that as pointed out above, they find that this provision is inconsistent with the following:

- The right of woman to reproductive health as stipulated by international conventions and domestic instruments.
- The principle of criminal liability.

[53] With regards to the right of woman to reproduction health, she states that they are of the view that holding that infanticide resulted from postpartum depression and lactation effects consists of a sufficient reason to indicate that there has been violation of her right to good health because it is clear that her life was in dismay at the time of the commission of the offense.

[54] She further states that they find article 108 of the aforementioned Law inconsistent with article 95 of the Constitution which provides that international treaties and agreements ratified by Rwanda prevail over ordinary laws. Therefore, the fact that the Law n° 68/2018 of 30/08/2018 is an ordinary law, it ranks below the international treaties and agreements ratified by Rwanda that were cited above, where they indicated what they provide about woman’s right to health in general and reproduction health in particular.

[55] She declares that following their analysis of article 108 of the n° 68/2018 of 30/08/2018 determining offenses and penalties in general, it is their findings that it also contradicts articles 12 and 16 of the Law n° 21/05/2016 of 20/05/2016 relating to human reproductive health, because were these provisions respected, a woman would not commit infanticide unless she was in a state of depression.

[56] She intimates that concerning the prosecution of a woman who committed infanticide as a result of postpartum depression, in the case *State v. White*, the Supreme Court of Idaho State in the United States of America acquitted Jane White on the count of infanticide due to postpartum depression she also suffered.

[57] She goes on to argue that one may wonder if there exist reasons for the punishment of woman while they indicated that according to the directives of the ministry of health, a woman who faced a postpartum psychosis deserves to be given medical treatment, especially that article 85(2) of the Law n° 68/2018 of 30/08/2018 provides that “there is no criminal liability if the accused was insane during the commission of the offence”.

¹⁴Office of the United Nations High Commission for Human Rights Committee on the Elimination of Discrimination against Women General recommendation N° 24: Article 12 of the Convention (women and health).

[58] She goes on to state that the Supreme Court of Idaho in the United States of America held that “the conviction of mentally ill persons does not serve the purpose of punishment in the criminal law, and it certainly does not serve the end of rehabilitation but rather may serve to release a mentally ill person to society after futile confinement.”

[59] She rests her case by stating that “postpartum non-psychotic depression” is one of the problems that women usually face, stressing that it is a serious public health concern that affects women and their families. A woman affected by postpartum non-psychotic depression deserves to be assisted rather than being punished for infanticide.

[60] The representative of Women’s Link Worldwide (WLW) as another amicus curiae, states that after a brief analysis of the situation of the offence of infanticide in Rwanda, and concerns stated about the abortion services abuse by ladies applying for abortion services or affected by severe postpartum effects, they wish the Supreme Court to consider the following four issues with respect to the punishment of infanticide:

The misapplication of law criminalising infanticide where women are punished as a consequence of inaccessibility to sufficient reproduction health services, consists of the violation to the right of woman to good well-being, health, and personal life and this affects women who already bear stigma, especially poor and rural women;

The misapplication of infanticide against women and girls who aborted or affected by severe postpartum effects, consists of the violation to the right of woman to fair trial;

The misapplication of infanticide against women and girls who aborted or affected by severe postpartum effects, consists of an unhuman and weird penalty.

[61] They explain that in many countries, the offense of infanticide is considered as a petty offense compared to other kinds of homicides since taken into account are the reasons of the commission of the offense, to wit the standards of living of the accused, mistreatment during pregnancy, the reverential fear of parents, mental depression due to pregnancy, and the lack of irrefutable evidence of her intent to commit the crime.

[62] In conclusion, Women’s Link Worldwide (WLW) alleges that the prosecution of women and girls facing serious problems of unsafe delivery and abortion constitutes serious violation of the right of women to their lives and health protected by international instruments as human right. They explain that the inaccessibility by needy and rural women to adequate family planning and reproduction health services, exposes them to delivery complications or to forced abortions in secret, can lead them to prosecution for infanticide.

[63] They rest their case by wondering whether at the time of including infanticide into the penal code, the purpose was to reduce the number of offenders, and if this is the case, a better remedy to this issue would be striving for the better security of women and have access to reproduction health services including abortion and post abortion care, sexual health education and pregnancy prevention.

DETERMINATION OF THE COURT

[64] Article 29 of the Constitution of the Republic of Rwanda of 2003 revised in 2015 provides for some of the elements of the right to due process of law. As indicated by the wording of this provision, not all elements of the right to fair justice were listed. The word “burimo” or “includes” in English was used. This implies that there are other unstated elements of the right to due process of law in addition to those listed by article 29.

[65] As held by the instant Court in the judgment RS/INCONST/SPEC 00003/2019/SC rendered on 04/12/2019, fair justice is explained in different ways whereby there is fair justice based on the procedural due process¹⁵ meaning a course of formal proceedings carried out regularly and in accordance with established rules and principles; and fair justice based on substantive due process¹⁶ which prohibits the adoption of irrational legal instruments and other measures affecting the peoples’ rights. This is what is in line with the petition submitted to this Court in the instant case.

[66] Pursuant to these explanations, it is to be determined if the provisions of article 108 of the Law n° 68/2018 of 30/08/2018 determining offenses and penalties in general, would be considered as depriving a woman of the right to fair justice since according to the petitioner, the text of this article violates the principles of fair justice by punishing a woman who committed infanticide without intent.

[67] The Court concurs with the petitioner that in order for the offense of infanticide to occur, like other offenses, it should fulfill three constitutive elements to wit material legal and moral elements.

[68] Some of the elements provided by article 108 of the Law n° 68/2018 of 30/08/2018 determining offenses and penalties in general are that, any woman who intentionally or by omission kills his or her biological child whose age is not above twelve (12) months but during the commission of the offense she was in postpartum depression or by effect of lactation commits an offense.

[69] In addressing the petition submitted to the instant Court relating to determining whether this article holds responsible a woman who killed her baby without intention to commit the offense, it is necessary to know the elements of infanticide and its difference with murder provided for by the article 107 and manslaughter provided by article 111, both of the aforementioned Law n° 68/2018.

[70] The offense of murder may be committed by any person including a woman and against any person including one’s own child. It is the same case with manslaughter occasioned by carelessness and failure to observe rules but without intent to kill him/her. The constitutive elements of murder consist of the person who kills another person (*actus reus*), with the intention to do so (*mens rea*). Among the constitutive elements of manslaughter include also the killing of a person but as a result of carelessness (*actus reus*) resulting from the attitude which would have been avoided and prevent the commission of the offense (*mens rea*).

¹⁵ Procedural due process: a course of formal proceedings (such as legal proceedings) carried out regularly and in accordance with established rules and principles. RS/INCONST/SPEC 00003/2019/SC rendered on 04/12/2019, Para. 13.

¹⁶ Substantive due process: protection against enactment of arbitrary and unreasonable legislation or other measures that would violate peoples’ rights. *Idem*.

[71] Concerning the offense of infanticide, the analysis made by law scholars on its constitutive elements from the legislation in their countries, demonstrates that in order for this offense to occur, there should be a will to kill or the intent to refrain from doing what ought to be done which resulted into death. In an article titled *Deconstructing infanticide*, Eric Vallillee explained the constitutive elements of infanticide provided in article 233 of the criminal law of Canada, where he indicated in the following words that the *actus reus* (material element) of the offense requires that an act or omission causes death of an infant, while the *mens rea* (moral element) requires that this act or omission be intentional.¹⁷

[72] Winifred H. Holland¹⁸ clarified the constitutive elements of infanticide basing on the analysis carried out by Courts where she indicated that there should be a will to commit an act or an intent of omission with a bad purpose or motive. Shee states it in the following words: *What is the mens rea of the the offence? While it is clear that the act or omission must be “willful”, it is not clear whether the death must be caused willfully....According to Smith¹⁹ the act must be done with a bad motive or purpose, or with intent.*²⁰

[73] Article 108 of the aforementioned Law n° 68/2018 of 30/08/2018 is composed of the first part reading that “any woman, who intentionally or by omission kills his or her biological child whose age is not above twelve (12) months...”. In the Canadian law, it is stated that “A female person commits infanticide when by a wilful act or omission she causes the death of her newborn child...”, while the Uk law, it is stated that “*Where a woman by any wilful act or omission causes the death of her child, being a child under the age of twelve months...*”.

[74] Consideration made of the above explanations, it is understood that in order for the offense of infanticide to be committed, there should have been the intent, implying the will to commit an act that causes death of an infant or an omission that resulted in the death of a child. The problem that arises from article 108 of the Law n° 68/2018 of 30/08/2018 determining offenses and penalties in general, consists of formulation which does not indicate clearly the intent to refrain from doing what ought to be done and ambiguous explanation of what is termed in English and French as postpartum depression/état de dépression postpartum.

[75] Courts explained that one of the elements of *actus reus* (material element) of infanticide and which differentiates it from that of murder, is that it should be committed by a female parent who kills her new born due to depression resulting from immediate effects of delivery. In the judgment of Her Majesty the Queen v. Meredith Katharine Borowiec, the Supreme Court of Canada elaborated it in the following words: “Infanticide convictions are rare, distinguishable from murder and manslaughter by their unique *actus reus*: causing the death of her newly-born child while the mother is not fully recovered from the effects of giving birth or lactation and by reason, thereof her mind is then disturbed.”²¹ This depression caused by delivery is the one termed postpartum depression/état de dépression postpartum stated in the above-stated article 108 in English and French versions, which is different from the mental disturbance (Ubwenge budakora

¹⁷ Eric Vallillee, “Disconstructing infanticide”, (2015)5:4 online: Uwojleg Stud/ <https://ir.lib.uwo.ca/uwojls/vol5/iss4/1>

¹⁸ Professor, faculty of law, University of Western Ontario, London, Ontario, Canada

¹⁹ R v. Smith (1976) 32 C.C.C.(2d)224(Nfdl Dist Ct), cited by Winifred H. Holland

²⁰ Winifred H. Holland, Murder and related Issues: An Analysis of the law in Canada, Report for the Law Commission, July 27th, 2005, p. 26.

²¹ S.C.C. No.: 36585, Her Majesty the Queen and Meredith Katharine Borowiec, para. 2.

neza) stated in Kinyarwanda version because this should rather be considered as “postpartum psychosis”.

[76] As explained by experts, the delivering and breastfeeding mother may undergo two different conditions:

- a) She may suffer postpartum psychosis, therefore unable to discern the good and wrong. In this situation, she could not be held liable for all acts she may commit including the killing of her own child since her mind is in a state of disorder.
- b) She may have postpartum depression but not necessarily losing her sound mind. She is able to discern the good and wrong; therefore, she could be held liable for an act infringing the law she would commit, but due to this situation she undergoes, it is taken into account for her punishment.

[77] In her article titled “The Postpartum Psychosis Defense and Feminism: More or Less Justice for Women”, Michele Connell explains that the difference between postpartum psychosis and postpartum depression is that a woman who delivers and develops postpartum psychosis loses her mind and becomes insane to the extent of being singled out for different legal treatment while the one who develops postpartum depression does not lose her mind and does not fail to discern the right from wrong, therefore, does not need special legal treatment. She stated this in the following terms: *“This distinction is crucial to understanding why postpartum psychosis can be singled out for different legal treatment while the other two illnesses cannot. Based on current medical research, postpartum psychosis is the only condition that should qualify for special legal treatment. “Baby blues” and postpartum depression, while medically recognized, would not meet the threshold of legal insanity in the majority of cases because they typically do not impair a mother’s ability to tell right from wrong. It is also important to emphasize, as a rebuttal to those concerned with an overly broad insanity standard, that postpartum psychosis is a narrowly defined medical category that includes relatively few women”*²²

[78] The foregoing arguments were reiterated in the judgment of Her Majesty the Queen v L.B whereby the Court of Appeal of Ontario provided the definition of infanticide. It held that infanticide is constituted by two elements to wit the first being the relationship between the accused and the infant killed, and the second being that the mind of the accused who should be the mother of the deceased should be in a state of disturbance as a result of delivery and lactation. This is unlike other mental states that may mitigate criminal liability. With regards to infanticide, it does not require the connection of any causal connection between the disturbance of the mind and the decision to commit an act that caused the child's death, because that state is not connected to the decision to kill. That disturbance is rather considered as part of the actus reus and not a mens rea component of infanticide.²³

²² Michele Connell, The Postpartum Psychosis Defense and Feminism: More or Less Justice for Women. Case Western Reserve Law Review. Available at: <https://scholarlycommons.law.case.edu/caselrev/vol53/iss1/5>

²³ The definition of Infanticide focuses on two things. First, it requires a mother-child relationship between the perpetrator and the victim. Second, the mental state of the perpetrator/mother must be disturbed and that disturbance must be connected to the effects of giving birth or lactation. Unlike other mental states that may mitigate criminal responsibility, infanticide does not require any causal connection between the disturbance of the mother's mind and the decision to do the thing that caused her child's death: R. v. Guimont (1999), 141 C.C.C (3d) 314 (Q.C.A), at p. 317, E. Cunliffe, “infanticide: Legislative History and Current Questions” (2009) 55 Crim. L.Q. 94, at pp. 112-113; I;

[79] Back on the instant case, the petitioner states that article 108 of the Law n° 68/2018 of 30/08/2018 determining offenses and penalties in general does not ensure fair justice thereby purporting that it punishes even the person without a sound mind, incapable of discerning right and wrong. Based on the foregoing elucidations, a woman alluded in this provision is not that person with postpartum psychosis, who, as seen above is unable to discern the right and wrong; accordingly, she should not be held liable for punishable acts she commits. On the contrary, it is the one affected by postpartum depression, who, given that she is able to discern right and wrong; she is held liable in the event she commits unlawful acts including infanticide.

[80] The petitioner alleges that the part of this provision that does not ensure fair justice is the one reading that "...but during the commission of the offense she was in a state of mental disturbance caused by postpartum depression or by the effect of lactation ...". It reads in the English version as follows "...but during the commission of the offense she was in postpartum depression or by effect of lactation commits an offense". She thus argues that if a person is in a state of mind disturbance, she would not express the intent to commit a crime. As recalled above, this provision exists even in other countries like England and Canada. Article 233 of the criminal code of Canada states, regarding the state in which a woman should be at the time of the commission of infanticide, that "... if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed".

[81] In article 160(1) of the criminal code of England (UK), it is stated that "...but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child." Despite that different wording were applied in these three legislations, the idea is the same that at the time a woman kills her infant, she is in a state of depression caused by postpartum or lactation effects. It is this indicated part of the provision the petitioner faults for not meeting the constitutive elements of the offense, because the state of mind disturbance implies the absence of intent (*mens rea*); therefore, the punishment should not be imposed.

[82] In analysing the constitutive elements of infanticide with the purpose of establishing its constitutive elements, especially with the purpose of knowing the meaning of the statement "her mind is then disturbed", in the judgment *Her Majesty the Queen (Appellant) v. Meredith Katharine Borowiec (Respondent)*, the Supreme Court of Canada explained that the legislator, by using this statement, he/she did not intend to mean the person who lost his/her mind unable to discern the right from wrong as provided for by article 16²⁴, he/she rather intended to mean that a woman should be depressed by effects of delivery and lactation; the depression which constitutes the act of killing her own child (*actus reus*), instead of being the intent to kill (*mens rea*). The court stated this in the following English words: "*The question of the meaning of the phrase "her mind is then disturbed" is one of statutory interpretation. The grammatical and ordinary sense of the words,*

Grant, D. Chunn & C. Boyle, *The Law of Homicide*, loose-leaf (Scarborough: Carswell, 1995), at p. 4-91. Because the mother's "mental disturbance" is not connected to the decision to kill, that "disturbance" is better considered as part of the *actus reus* and not a *mens rea* component of the crime of infanticide. Docket: C49467-C49468, Date: 20110302, Court of Appeal for Ontario, Doharty, Moldaver and Cronk JJ.A. Between Her Majesty and L.B., Para. 59.

²⁴ Article 16 (1) of Criminal code states: No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

*their place within the Criminal Code, the provision's legislative history and evolution, and the jurisprudence interpreting the phrase "her mind is then disturbed" do not support the conclusion that Parliament intended to restrict the concept of a disturbed mind to those who have "a substantial psychological problem". Rather, the phrase "mind is then disturbed" should be applied as follows: (a) the word "disturbed" is not a legal or medical term of art, but should be applied in its grammatical and ordinary sense; (b) in the context of whether a mind is disturbed, the term can mean "mentally agitated", "mentally unstable" or "mental discomposure"; (c) the disturbance need not constitute a defined mental or psychological condition or a mental illness. It need not constitute a mental disorder under s. 16 of the Criminal Code or amount to a significant impairment of the accused's reasoning faculties; (d) the disturbance must be present at the time of the act or omission causing the "newly-born" child's death and the act or omission must occur at a time when the accused is not fully recovered from the effects of giving birth or of lactation; (e) there is no requirement to prove that the act or omission was caused by the disturbance. The disturbance is part of the actus reus of infanticide, not the mens rea; (f) the disturbance must be "by reason of" the fact that the accused was not fully recovered from the effects of giving birth or from the effect of lactation consequent on the birth of the child"*²⁵.

[83] The instant Court further motivates that the accused of infanticide should not raise the mental disturbance as a defense since she does not lose the mind to the extent of ignoring that his/her acts are wrong. It stated this in the following words: *The concept of a "disturbed" mind is unique to infanticide and does not appear elsewhere in the Criminal Code. Conceptually, a "disturbed" mind must be different from a "mental disorder", a term used in s. 16 of the Criminal Code, and, when proved on a balance of probabilities, can lead to a verdict of not criminally responsible. It must also be different from non-insane automatism, which makes the act committed by the accused involuntary: R. v. Parks, [1992] 2 S.C.R. 871, at p. 896.*

[84] In addition, in order to determine whether the fact that at the time of the commission of infanticide the accused's mind was disturbed exempts her from liability, the Supreme Court of Canada in the judgment Her Majesty The Queen v. Meredith Katharine Borowiec, stated that when a similar matter was resolved in 1976, the judge held that the intention to commit infanticide is manifested through the commission of an intentional unlawful act, and established by the intent to harm; therefore, the fact that the accused's mind was disturbed when she caused the death of her newborn baby does not alter her intention. This court expressed it in the following terms: *"An early case relative to this issue is the 1976 trial decision of R v Smith. The judge determined that the mens rea of infanticide is a willful unlawful act consisting of intentional wrongdoing. The finding that the accused's mind was disturbed when she caused the death of her newborn baby in that case did not alter the mens rea"*.

[85] In the premises, the court is of the view that the punishable acts committed by a woman provided under article 108 of the Law n° 68/2018 of 30/08/2018 determining offenses and penalties in general, are willful acts or omission with the intent to kill her own child but as a result of postpartum depression or lactation effects. As explained, such depression is different from loss of mind likely to result into incapacity to perceive her acts. For this reason, this provision is not in any case an obstruction to fair justice provided for under article 29 of the Constitution of the Republic of Rwanda of 2003 revised in 2015.

²⁵ 2016 SCC 11, File No 36585, 2016: January 20; 2016: March 24.

[86] The Court finds however that, as explained above, the way the above-stated article 108 is formulated is likely to cause confusion to the extent of being understood that a woman mentioned in it loses her mind to the point of becoming unable to make a difference between good and wrong while it should not be perceived as such; therefore, this Court advises relevant organs to reformulate it that it may clearly provide a woman stated therein is the one having been affected by postpartum depression or lactation effects, but has not lost her mind to the extent of being exempted from criminal prosecution for her unlawful acts.

[87] With regards to the intention expressed in this provision, The Court finds also that it ought to be well-formulated to the point of being singled out from an act of killing of one's own child (a willful act), and from an omission of doing something with the intent to kill own child (a wilful omission) by a woman. According to the way it is formulated, this intention occurs with respect to the person who commits an act of killing of an infant, while for the omission to take a necessary action would be perceived as not revealing the wicked intention to the extent of being punished for manslaughter while it is not the case.

III. DECISION OF THE COURT

[88] Declares the petition initiated by Kabasinga Florida without merit.

[89] Declares that article 108 of the n° 68/2018 of 30/08/2018 determining offenses and penalties in general does not in any way contradict articles 15 and 16 of the Constitution of the Republic of Rwanda of 2003 revised in 2015.

[90] Declares also that this article is not inconsistent with article 29 of the Constitution of the Republic of Rwanda of 2003 revised in 2015; rather, its formulation needs to be rectified.