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## *Criminal Liability of People With Mental Disorders: Selected Issues*

### ABSTRACT

The issue of criminal liability in different legal systems and of the perpetrator's sanity and mental disorders, has received much attention of researchers from different scientific disciplines. Of many important aspects relevant to this topic, the paper addresses only some related to two legal orders. The first part of the article focuses on the circumstances that exclude and mitigate culpability under Polish criminal law. The author examines the problem of insanity referring to the ways in which insanity is determined and enumerating sources of insanity. Then, the legal consequences of insanity are identified. Finally, the issue of diminished mental capacity in the doctrine of Polish criminal law is analysed. The second part of the article deals with the concept of imputability in the Code of Canon Law of 1983. Quoting the provisions of canon law, the author considers the issue of natural inability to commit a crime by persons who are habitually deprived of the use of reason, and then indicates the circumstances excluding, mitigating and aggravating the perpetrator's culpability.

*KEYWORDS: criminal liability; sanity/imputability; insanity; Polish criminal law; canon criminal law*

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## INTRODUCTION

The issue of criminal liability in relation to the perpetrator's sanity has been widely considered not only in the doctrine of Polish criminal law, but also in other disciplines, including psychology, psychiatry, and canon law. Sanity or imputability as a key concept of both secular and canon substantive criminal law is one of the basic conditions that determines criminal liability. Both secular penal law and canon law contain systematic provisions on this issue, some of which are identical, while others different. The key issue in this respect is the "presumption of imputability" in canon law and the "presumption of innocence" in secular law. It should also be noted that the terms "sanity" or "insanity" have not been defined in either secular or canon law system. The article provides an analysis of the circumstances that exclude or mitigate the offender's culpability in Polish criminal law, as well as the circumstances that exclude, mitigate, and aggravate legal responsibility under canon law. This analysis is an important and noteworthy contribution to the discussion on the issue.

CIRCUMSTANCES EXCLUDING AND MITIGATING CULPABILITY  
IN POLISH CRIMINAL LAW

Article 31(1) of the Polish Penal Code provides: "No offence is committed by anyone who performs a prohibited act while incapable of recognising its significance or of controlling his or her actions due to a mental illness, mental retardation or other disorder of mental functions." In legal terms, the state of a perpetrator defined in the article is referred to as insanity (Marek, 2011). It is assumed that a mature person, as a rule, is capable of following a legal norm, and thus can be held liable for their actions. Accordingly, the Penal Code does not define the conditions for sanity/soundness of mind; instead, it sets the premises for an

exception to the rule, that is, insanity – when a perpetrator cannot be attributed with culpability (Zoll, 2012). This means that it is not necessary to establish the sanity of a perpetrator each time when proving his or her criminal liability. What has to be proved, however, is the insanity or significantly diminished mental capacity of a perpetrator (Królikowski, 2011).

Deviation from the norm or insanity is construed as the mental state of a perpetrator who suffers from a mental illness, mental retardation or other disorders of mental functions, which result in the inability to recognise the nature of his or her actions or to control his or her conduct (Grzeškowiak & Wiak, 2021). It should be noted, however, that this is not a legal definition of insanity, but the one derived *a contrario* from the interpretation of Article 31 of the Polish Penal Code. Still, it is considered sufficient both from a legal point of view and from the point of view of psychiatry and psychology.

Article 31 of the Penal Code now in force is essentially identical to Article 25 of the 1969 Code. It seems appropriate, however, to point out two significant differences. The first of them concerns one of the psychiatric premises, which is formulated differently. Namely, the term “mental deficiency” has been replaced with a more comprehensive term “mental retardation” (Królikowski, 2011). Secondly, the expressions “the moment of an act” (§1) and “the moment of committing a prohibited act” (§2) used in Article 25 of the 1969 Code have been replaced with “at the time of an act” and “at the time of the commission of a prohibited act”, respectively. Zoll (2012) believes that this is not merely a linguistic change, as the expression “time of committing an act” is broader and more suitable, encompassing prohibited acts that take longer than a moment to commit.

In Article 31(1) of the Penal Code, the Polish legislator defines insanity by means of a mixed method (psychiatric and psychological), just as it was in the 1969 Code. This method consists in enumerating both sources and consequences of insanity (Zoll,

2012). The psychiatric method indicates causes of disorders in the perpetrator's consciousness and will, disregarding the results of these disorders. If the disorders are identified by expert psychiatrists, the court is obliged to adjudge insanity. However, considering the fact that mental illnesses may vary in their intensity in different stages, and that mental disorders may remit, a significant drawback of the psychiatric method is that it does not take into account the effects of mental diseases *in concreto* (Grześkowiak, 2007). On the other hand, the psychological method, which is limited only to the material element, treats insanity as any disorder of mental functions which makes a person unable to recognise the nature of their actions or to control his or her conduct, regardless of the sources of this inability (Wróbel & Zoll, 2013). It seems that this method allows for the excessive arbitrariness in determining insanity (Zoll, 2012).

In Article 31(1) the legislator adopts a mixed model, which means that in order to adjudge insanity, it is necessary to determine both the inability to understand the nature of one's actions or the inability to control them, and to determine sources of this inability (Grześkowiak, 2007). Therefore, pursuant to Article 31, the defence of insanity does not occur if the perpetrator suffers from a mental illness, mental retardation or other disorder of mental functions but these do not make him or her unable to recognise the nature of his or her actions or to control them (Daniluk, 2011). Consequently, the inability to recognise the significance of one's actions or to control one's conduct that does not result from a mental illness, mental retardation or other disorder of mental functions, will not be classified as insanity (Daniluk, 2011). As Zoll rightly points out (2012), when interpreting Article 31(1–3) of the Penal Code, it should be borne in mind that neither psychiatry nor psychology has developed rigorous criteria that would allow to make a clear distinction between sanity and insanity.

The use of expression "due to" in Article 31(1) of the Penal Code indicates that a relationship between the causes of insanity

and their consequences must be established each time (Wąsek, 2005). Both the causes and consequences of insanity have been enumerated in an alternative way. This means that it is sufficient for adjudging insanity if one of the causes (mental illness, mental retardation, other disorder of mental functions) and at least one of the consequences stated in Article 31 (inability to recognise the significance of one's actions or inability to control one's actions) occurs (Daniluk, 2011).

Crucially here, the sources of insanity must be determined. Article 31(1) of the Polish Penal Code provides for three such causes: mental illness, mental retardation, and other disorder of mental functions (Giezek, 2021). It should be emphasised that the definition and classification of mental illnesses generates much controversy among psychiatrists. Also, the Mental Health Protection Act of 19 August 1994 fails to provide a clear-cut definition of mental illness.

Undoubtedly, mental illness can be considered in a broader or narrower sense. Broadly speaking, this term refers collectively to all psychotic disorders (e.g., hallucinations, delusions, severe mood and emotion disorders). On a narrower view, mental illness is synonymous with psychosis, i.e., it covers only those mental aberrations that are characterised by a serious disintegration of specific mental processes, for example, cognitive processes (e.g., distracted thinking), emotional and motivational processes (e.g., depression or mania), or superior regulatory processes (e.g., disturbances of consciousness) (Daniluk, 2011).

Hence, the term "mental illness" refers not only to organic psychoses, but also to functional ones. In view of that, it is necessary to provide a proper definition of mental illness and to determine whether it is possible to establish legal insanity pursuant to Article 31 of the Penal Code. Thus, the term "mental illness" refers to "a mental disorder of various origins which results in losing the ability to assess the reality rationally. It also encompasses states in which a person experiences delusions, disturbances of

consciousness, strong emotion and mood disturbances, which are also accompanied with disturbances in thinking and complex activity. Additionally, mental illness is characterised by a distorted perception of reality and the inability to critically evaluate oneself, the environment, other people, their intentions and relationships between them” (Gierowski & Paprzycki, 2013). However, it should be remembered that the term “mental illness” is very general and no complete catalogue of mental illnesses has been compiled yet. It may happen that some illness symptoms, or even sets of symptoms, are present in other mental disorders not classified as a mental illness. For criminal liability to be exempted, it is necessary to examine a mental illness properly and this should be based on the opinions of at least two expert psychiatrists (Resolution of the Supreme Court of 10 June 1977).

Just like any other disease, mental illness is a dynamic phenomenon and its intensity may change depending on the therapy or medications taken. Moreover, there may be some periods when a mental illness does not interfere significantly with either intellectual or voluntary functions. What follows is that it is not possible to determine *in abstracto* whether a particular mental illness leads to insanity or diminishes sanity in a significant or minimal degree. As Zoll (2012) rightly notes, it should be established *in concreto* what was the impact of the perpetrator’s mental illness on the ability to recognise the nature of their act or to control their conduct at the time when a criminal offence was committed.

Mental illnesses do not include personality disorders formerly referred to as psychopathy. So far, psychiatrists have not developed a definition of psychopathy that would be widely accepted, or the criteria for distinguishing it from other abnormalities relating to the human psyche (Daniluk, 2011). It is only generally stated that psychopathy refers to affective, volitional and emotional disorders (Grześkowiak, 2007). In principle, psychopathy does not constitute grounds for the insanity defence because in

most cases it does not exclude the ability to recognise the nature of one's actions or to control one's conduct (Cieslak et al., 1991).

The second source of insanity listed in Article 31(1) is mental retardation. Strictly speaking, the term "mental retardation" does not refer to an illness, but it covers a range of disorders of various etiologies, the main symptom of which is low intelligence (Daniluk, 2011). It is worth noting that the 1969 Penal Code used the term "mental deficiency" Article 25(1). However, in line with the recommendations of physicians, it has been replaced with the term "mental retardation". Mental retardation includes both mental deficiency as a congenital condition and other disorders acquired later in life as a result of severe brain diseases or blood vessel diseases (senile dementia) (Giezek, 2021).

Mental retardation usually results from a combination of genetic conditions, factors affecting the fetus during pregnancy, and perinatal and socio-economic factors (Gierowski & Paprzycki, 2013). What distinguishes it from other intellectual deficits is the time when it occurs. Mental retardation arises in childhood. It should also be mentioned that nowadays this term is increasingly being replaced with the term "intellectual disability" (Budyn-Kulik, 2018).

Traditionally, oligophrenia was divided into three types according to the degree of disability: idiocy (*idiot*), imbecility (*imbecillitas*), and moronity (*debilitas mentalis*) (Tarnawski, 1976). Nowadays, however, a different classification is used. It is based on the scale adopted by the General Assembly of the World Health Organization (WHO) on January 1, 1968. Following this classification, mental retardation is categorized into: profound (IQ score below 20 or 25 points), severe (IQ range of 25–39), moderate (IQ range of 40–54), and mild (IQ range of 55–69) (Grześkowiak, 2007). According to Marek (2011), there is no doubt that profound mental retardation constitutes the grounds for insanity, while the remaining types are generally not sufficient to declare a person insane. A different approach is taken by Grześkowiak, who be-

believes that both profound retardation and severe retardation can constitute the grounds for insanity defence provided that they are accompanied by the consequences stipulated in Article 31; that is, the inability to recognise the nature of one's act or to control one's conduct. Mild and moderate retardation may only constitute the grounds for diminished responsibility provided that it results in the inability to recognise the nature of one's act or to control one's conduct (Grzeškowiak & Wiak, 2021)

The third and the last cause of insanity provided for by the Polish legislator in Article 31(1) of the Penal Code is "other disorder of mental functions". This expression should be understood as referring to all types of disorders in the functioning of mental processes, other than mental illness and mental retardation (Daniluk, 2011). Following Wolter (1973), it is assumed that those other disorders of mental functions can be both pathological (e.g., pathological intoxication) and non-pathological (e.g., extreme exhaustion or sleep intoxication). In the doctrine and jurisprudence, some postulate that physiologically conditioned emotional disturbance (strong agitation) should also be included in the category of disorders in the functioning of mental processes, as it significantly reduces the ability to think logically (Daniluk, 2011).

It should be remembered, however, that the category of "other disorders of mental functions" is an open category that encompasses all mental disturbances that do not result from a mental illness, but may be caused, for example, by puberty, sthenic and asthenic emotions, anger, terror, etc. Nevertheless, the cause must be so strong that it results in exclusion or significant limitation of the activity of the intellect or will; i.e., in the inability to recognise the nature of one's actions or to control one's conduct. Only then do they fulfil the condition necessary to establish insanity (Grzeškowiak & Wiak, 2021).

At this point, it seems reasonable to examine the results of the sources of insanity. Article 31(1) of the Penal Code defines the effect of insanity as the inability to recognise the significance of



one's actions or inability to control one's conduct. These results are expressed in the form of an ordinary disjunction, which means that only one of them is sufficient for the exemption of criminal liability on the grounds of insanity (Zoll, 2012). This is quite unusual as a perpetrator who is unable to recognise the nature of their act at the time of commission is also unable to control their conduct. On the other hand, a person who is able to recognise the significance of their actions may not be able to control their conduct. An example of this is addiction to alcohol or other intoxicants (Wąsek, 2005).

The inability to recognise the nature of one's action may refer to both ontological and axiological level (Daniluk, 2011). In the former case, perpetrators are unaware of what they are doing. For example, a mentally ill person does not recognise that their actions cause the death of another person because they cannot see a cause and effect relationship between these two (Giezek, 2021). On the other hand, the inability to recognise the nature of an act refers to the axiological level, when the perpetrator is unable to assess rightly what he or she is doing. For example, a profoundly retarded person who kills someone, may be convinced that in this way they save their life, which is threatened by the victim (Giezek, 2021).

When examining the perpetrator's awareness of the nature of an act, we should refer to a specific prohibited act. The significance of that act should be considered on two different levels, namely, the factual recognition of the nature of that act and the evaluation of that act, or in other words, moral and social assessment of it, which is also connected with the legal assessment (Grześkowiak & Wiak, 2021). It may reasonably be asked whether the inability to recognise the nature of one's act should concern one of these levels, or perhaps both of them simultaneously. Wąsek claims that it refers not only to a factual aspect, but also to a social and moral aspect. This view is shared by Zoll (2007). On the other hand, the Court of Appeal in Cracow ruled: "establishing ... the limitation

of the ability to recognise the significance of one's actions means that, as a result of one of the conditions limiting sanity, perpetrators do not understand sufficiently the significance of their acts, but only in an axiological sense; that is, the act constitutes a violation of ethical and legal order. This inability concerns mental processes, but it need not mean that the perpetrator is not aware of the causal relationships that occur" (Judgment of the Court of Appeal in Cracow of 31 March 2005).

The second consequence of insanity provided for in Article 31(1) of the Penal Code is the inability to control one's actions. This means that the perpetrator recognises the ontological and axiological significance of a prohibited act that they commit, but is not able to control their behaviour. For example, a drug addict can be aware of committing a theft and of the legal consequences of theft, but still cannot refrain from stealing due to the drug craving (Daniluk, 2011). Here, the inability concerns the will/volition, which may be disturbed by disorders in mental functions. Consequently, the perpetrator's choice to commit some act is not free or the choice they make is based on the pathological perception of reality. Controlling one's conduct refers to taking action which is based on the perpetrator's perception (Grześkowiak & Wiak, 2021).

An important aspect of the issue examined here concerns legal consequences of insanity. Article 31(1) of the Polish Penal Code provides: "No offence is committed by anyone who performs a prohibited act while incapable of recognising its significance or of controlling their actions due to a mental illness, mental retardation or other disorder of mental functions." This clearly suggests that insanity excludes criminal liability, but only in a situation when it occurs at the "time of committing a prohibited act". Therefore, the state of insanity has to be related to a specific situation and a precisely defined time of the act. It may happen that the perpetrator was insane or had a diminished capacity to recognise the nature of his or her act or control his or her conduct in relation

to one act but is criminally liable for another act (Królikowski, 2011).

The principle from Article 1(3) of the Penal Code, which states that the offender of a prohibited act does not commit an offence if no guilt can be attributed to them at that time, requires that premises of guilt must be fulfilled in relation to all the circumstances that constitute the basis for a negative assessment of an act. Therefore, if an act was committed when the perpetrator was insane, it cannot constitute the ground for culpability (Wróbel & Zoll, 2013). Consequently, if culpability cannot be attributed to an insane perpetrator, they cannot be held liable for that act. In such a situation, the court may only apply protective measures (Marek, 2011). However, the premise for imposing preventive measures is not the perpetrator's culpability, but a danger they may pose to the legal order. These measures are used to prevent another attack on some good protected by law. Pursuant to Article 94 of the Penal Code, if the offender commits a prohibited act involving significant harm to the community while in the state of incapacity and it is highly likely that they will commit such an act again, the court may place them in a suitable mental facility (Zoll, 2012).

With regard to the provision on insanity (Article 31(1) of the Penal Code) and diminished capacity (Article 31(2) of the Penal Code), the judicial body has to determine whether the perpetrator acted: with intent (Article 9(1) of the Penal Code), without intent (Article 9(2) of the Penal Code), or could have foreseen the consequences of a prohibited act (Article 9(3) of the Penal Code). According to Wąska (2005), this is extremely difficult, especially in the case of an offence which has been committed by an insane perpetrator.

In the doctrine of Polish criminal law, some authors, referring to Andrejew's view (1973), claim that it is impossible to determine whether an insane perpetrator committed a criminal act with or without intent because the difference between these two lies in psychological phenomena (Cieślak, 1995). A different view is

expressed by Zoll (2010), who concludes that it is not right to identify the inability to recognise the significance of one's act with being unaware of committing a prohibited act. It is particularly important to distinguish between these two on the grounds of the Penal Code, which draws a line between a mistake as to the circumstances constituting a feature of a prohibited act (Article 28(§1) of the Penal Code) and ignorance of unlawfulness of an act (Article 30 of the Penal Code). An insane person may be aware that a specific act is prohibited by law, but still be unable to recognise its significance at the time of committing that act. Law enforcement authorities are obliged and often have the possibility to determine whether the perpetrator has committed a criminal offence with an intent, and only at the next stage, proceed to examine the perpetrator's sanity.

Zoll's view seems to be in line with the opinion expressed by the Supreme Court in its decision of December 22, 2006: "the intent, though it exists only in the perpetrator's mind, is a psychological fact, therefore it can be proved with appropriate inference rules and in the same way as objective circumstances. If the perpetrator did not express his intent verbally, it is inferred from the circumstances of an act" (Decision of the Supreme Court of 22 December 2006).

Another issue that is of key importance in this context is that of diminished capacity. In the doctrine of Polish criminal law, insanity and sanity are treated as two opposite poles when assessing the mental state of a perpetrator. In between there are intermediate states with deviations from the norm being of various intensity and ranging from slight disorders to significant limitations in the ability to recognise the nature of one's actions and control one's conduct (Giezek, 2021).

These states are referred to in Article 31(2) of the Penal Code, which provides: "If an offence was committed while the offender's ability to recognise the significance of the act or to control his or her actions was significantly diminished, the court may

apply an extraordinary mitigation of the penalty.” It should be clearly stated that, in accordance with Article 31(2), the state of diminished mental capacity does not exclude culpability, but only mitigates it. Consequently, a perpetrator with diminished mental capacity who performs a prohibited act, commits a crime and bears criminal liability for that crime; however, extraordinary mitigation of the penalty may be applied (Marek, 2011).

If there are some reasons for suspecting mental disorders, the court is obliged to instruct expert psychiatrists to carry out appropriate tests (Giezek, 2021). It is highly problematic to determine when diminished capacity can be regarded as “significant”. Neither the doctrine of criminal law nor psychiatry has developed strict criteria for determining what exactly the term significantly diminished capacity refers to (Wąsek, 2005).

The literal interpretation of Article 31(2) of the Penal Code might suggest that the legislator did not use the mixed method to determine what it refers to; instead it relied solely on a psychological method, pointing out to the consequences of mental disorders. However, this conclusion is unjustified, as in this case one should rely on the systemic interpretation. Following this interpretation, §2 is organically related to §1 and thus, the sources of mental disturbance as stated in Article 31(1) refer to diminished mental capacity as well (Daniluk, 2011).

The court may apply an extraordinary mitigation of a penalty if it is established that a prohibited act was committed in a state of diminished capacity. Zoll (2012) believes that this is a clear signal that in such cases even the least severe penalty out of the ones prescribed in the Penal Code may still be disproportionately severe – taking into account the level of culpability. In this vein, one should read the judgment of the Court of Appeal in Lublin which states: “It would be an obvious violation of the principle of fair and just penalty if the severity of a penalty imposed on those who suffer from diminished mental capacity resulting from organic disorders exceeded their culpability, in order to possibly

deter others – completely sane and fully responsible for their actions – and to develop legal awareness in this way” (Judgment of the Administrative Court in Lublin of 19 December 2000).

Regardless of different court decisions, it must be remembered that any limitation of sanity is a circumstance that mitigates culpability and as such, must be taken into account when passing a sentence, which is clearly stated in Article 53(1) of the Penal Code. Obviously, this also refers to a significant limitation of sanity also in the situation when the court does not apply extraordinary mitigation of the penalty (Daniluk, 2011).

#### THE CONCEPT OF IMPUTABILITY IN THE CODE OF CANON LAW

The concept of imputability in the Code of Canon Law is connected with the concept of an offence, which is defined as an external violation of a law or precept which entails punishment and for which someone is morally responsible (imputable) (Cenalmor & Miras, 2022).

Can. 1321 §2 of the 1983 Code of Canon Law points out two sources of imputability. These are: *dolus* and *culpa*, that is, evil intent (deliberate guilt), and unwilful negligence or fault. It should be emphasised, however, that the ecclesiastical legislator refrains from punishing those who have violated a law or precept due to unwilful fault. In such situations, punishment is limited only to those cases that are specified in the Code. This means that the issue of punishing the perpetrator focuses on a wilful/intentional misconduct. To be classified as grave, a wilful misconduct must contain two essential elements: a person must be fully aware of violating the penal norm, and their intent to act as well as an act itself must be completely free. It is worth noting, however, that pursuant to can. 1321 §4, where there has been an external violation, imputability is presumed, unless it appears otherwise (Leszczyński, 2004).

Imputability means that an act can be imputed to the free and conscious will of a person. Thus, a person's behaviour must be classified as *actus vere humanus*; in other words, it must result from the proper operation of cognitive and volitional powers (Leszczyński, 2004). Of crucial importance here is can. 1322: "Those who habitually lack the use of reason, even though they appeared sane when they violated a law or precept, are deemed incapable of committing an offence." This provision includes people who are permanently and completely deprived of the use of reason due to mental retardation or mental illness. Habitual lack of the use of reason may affect all mental spheres or only some of them. It may be either congenital as a result of mental retardation, or it may develop later in life when certain functions of the brain disappear, or it may result from certain mental disorders (Syryjczyk, 2008).

In can. 1322, the ecclesiastical legislator concludes that persons who habitually lack the use of reason are deemed incapable of committing an offence. According to V. De Paolis (1993), the expression used in the Code, *delicti incapaces habentur*, is not accidental and cannot be replaced with the expression "are incapable", as the fact whether someone is capable or incapable of committing an offence can be determined only by expert psychiatrists. Those who lack the use of reason are deemed to be incapable of committing a crime, because their criminal actions cannot be imputed to them as those actions do not fulfil the attributes of a human act, which must be conscious and voluntary (Syryjczyk, 2008).

In order to determine exactly who is meant by "those who habitually lack the use of reason," it seems appropriate to quote two more provisions from Book 1 of the Code. Can. 97 §2 reads: "A minor before the completion of the seventh year is called an infant and is considered not responsible for oneself. With the completion of the seventh year, however, a minor is presumed to have the use of reason." On the other hand, can. 99 states: "Whoever

habitually lacks the use of reason is considered not responsible for oneself (*non sui compos*) and is equated with infants.”

Since minors who have reached the age of seven are presumed to have the use of reason, the opposite state – the lack of reason – must be proved, either directly or indirectly. When a defect in the intellect as referred to in can. 99 and 1322 is proved, an adult person is treated as a child and considered to be not responsible for themselves (Sobański, 2003). Consequently, both a child and a person who habitually lacks the use of reason are deemed to be incapable of committing a crime, as in both cases the constitutive element of a crime (i.e., imputability) is missing (Calabrese, 1996). As criminal law falls within the scope of ecclesiastical legislation, the legislator could introduce such a regulation without violating the natural law or the positive law of God, especially as this regulation is more favourable for a person who violates a law (Arias, 2011a).

It should be mentioned that there are some people who habitually lack the use of reason, but sometimes experience the so-called flashes of consciousness (*lucida intervalla*). Researchers attempt to establish whether they may be aware of their acts during remission (De Paolis, 1992). According to Syryjczyk (2008), *lucida intervalla* are merely a symptom of a temporary and transitory alleviation of the disease, but the pathological state of a mentally ill person does not change. That is why, under canon law, such persons are deemed to be completely insane and as such incapable of committing a crime.

A similar legal regulation was formulated in the previous Code of 1917 in can. 2201 §2. It provided that those who habitually lack the use of reason should be considered incapable of committing a crime – also at the time when they experience the so-called flashes of consciousness. Still, this legal presumption in can. 2201 §2 has provoked much controversy as to whether it was a rebuttable (*iuris tantum*) or irrebuttable presumption (*iuris et de iure*) (Syryjczyk, 2008). The current wording of can. 1322 of the 1983



Code, which states that those who habitually lack the use of reason are considered to be incapable of committing a crime even if they violated a law while seemingly sane during remission, is an irrebuttable (conclusive) presumption. Being in line with the principle of Christian serenity, it confirms the natural incapacity and defines the legal incapacity to commit a crime (De Paolis, 1992).

Can. 1323 of the 1983 Code provides:

No one is liable to a penalty who, when violating a law or precept:

1° has not completed the sixteenth year of age;

2° was, without fault, ignorant of violating the law or precept; inadvertence and error are equivalent to ignorance;

3° acted under physical force, or under the impetus of a chance occurrence which the person could not foresee or if foreseen could not avoid;

4° acted under the compulsion of grave fear, even if only relative, or by reason of necessity or grave inconvenience, unless, however, the act is intrinsically evil or tends to be harmful to souls;

5° acted, within the limits of due moderation, in lawful self-defence or defence of another against an unjust aggressor;

6° lacked the use of reason, without prejudice to the provisions of cann. 1324 §1 n. 2 and 1326 §1 n. 4;

7° thought, through no personal fault, that some one of the circumstances existed which are mentioned in nn. 4 or 5.

The circumstances specified by the legislator in can. 1323 are not of the same significance. Some of them (nos. 2, 3, 5, 6, 7) exclude imputability and thus rule out a crime as such (De Paolis, 1992). In fact, these are not circumstances *sensu stricto*, because only when an offence has been committed, can we talk about circumstances. On the other hand, if these do not violate the con-

stitutive structure of a crime, but only exclude criminal liability, they are circumstances *sensu stricto* (nos. 1 and 4) (De Paolis, 1992).

Can. 1324 provides a catalogue of circumstances that do not eliminate any of the constitutive elements of a crime:

§1. The perpetrator of a violation is not exempted from penalty, but the penalty prescribed in the law or precept must be diminished, or a penance substituted in its place, if the offence was committed by:

1° one who had only an imperfect use of reason;

2° one who was lacking the use of reason because of culpable drunkenness or other mental disturbance of a similar kind, without prejudice to the provision of can. 1326 §1 n. 4;

3° one who acted in the heat of passion which, while serious, nevertheless did not precede or hinder all mental deliberation and consent of the will, provided that the passion itself had not been deliberately stimulated or nourished;

4° a minor who has completed the sixteenth year of age;

5° one who was compelled by grave fear, even if only relative, or who acted by reason of necessity or grave inconvenience, if the offence is intrinsically evil or tends to be harmful to souls;

6° one who acted in lawful self-defence or defence of another against an unjust aggressor, but did not observe due moderation;

7° one who acted against another person who was gravely and unjustly provocative;

8° one who erroneously, but culpably, thought that some one of the circumstances existed which are mentioned in can. 1323 nn. 4 or 5;

9° one who through no personal fault was unaware that a penalty was attached to the law or precept;

10° one who acted without full imputability, provided it remained grave.

§2. A judge can do the same if there is any other circumstance present which would reduce the gravity of the offence.

§3. In the circumstances mentioned in §1, the offender is not bound by a *latae sententiae* penalty, but may have lesser penalties or penances imposed for the purposes of repentance or repair of scandal.

Although the circumstances mentioned above diminish the perpetrator's imputability, it is still grave; or in other words, it is a kind of imputability that is necessary for the commission of a crime under canon law (De Paolis, 1992). Therefore, if any of these circumstances occurs, a penalty must be reduced or replaced with a penance (Szyjczyk, 2008). The catalogue provided in can 1324 is not an exhaustive *numerus clausus* catalogue, which means that certain issues are left to the discretion of a particular legislator (Pighin, 2021).

As regards aggravating circumstances, the 1983 Code provides in can. 1326:

§1. A judge may inflict a more serious punishment than that prescribed in the law or precept when:

1° a person, after being condemned, or after the penalty has been declared, continues so to offend that obstinate ill will may prudently be concluded from the circumstances;

2° a person who is established in some position of dignity, or who, in order to commit a crime, has abused a position of authority or an office;

3° a person who, after a penalty for a culpable offence was constituted, foresaw the event but nevertheless omitted to take the precautions to avoid it which any careful person would have taken;

4° a person who committed an offence in a state of drunkenness or other mental disturbance, if these were deliberately

sought so as to commit the offence or to excuse it, or through passion which was deliberately stimulated or nourished.

§2. In the cases mentioned in §1, if the penalty constituted is *latae sententiae*, another penalty or a penance may be added.

§3. In the same cases, if the penalty constituted is discretionary, it becomes obligatory.

Aggravating the penalty stated in the precept consists primarily in increasing the reprehensibility attributed to the perpetrator who violated the law in certain circumstances provided for by law. In other words, the perpetrator's awareness of and will to commit a crime may be the same, but his/her motives of various nature aggravate culpability and make it more reprehensible (D'Auria, 1997).

The aggravating circumstances enumerated in can. 1326 give the ecclesiastical judge the possibility to impose a more severe sentence (*ferendae sententiae*) or a penalty or penance in addition to *latae sententiae* (Arias, 2011b; Renken, 2015). Two issues need to be clarified here. Firstly, according to can. 1326, a judge may inflict a more severe penalty (*iudex gravior punire potest*), which means that this is the right of a judge, but not the obligation. Secondly, because the catalogue in can. 1326 is a closed *numerus clausus* catalogue, the judge will not be able to foresee other aggravating circumstances at his discretion, unlike it is the case in relation to can. 1324 §2 (Calabrese, 1996).

#### 4. CONCLUDING REMARKS

Let us conclude these theoretical considerations with a practical postulate. With the growing number and variety of mental disorders and mental health problems, clinical psychology, as well as modern psychiatry are of great help when making diagnoses.

Thus, the role of court experts who provide competent expert opinions on the mental health of a perpetrator, cannot be overestimated. This seems to be the *condicio sine qua non* to avoid mistaken court decisions.

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