

MENTALLY INCOMPETENCE AS A CIRCUMSTANCE THAT EXCLUDES CRIMINAL RESPONSIBILITY

Rina ALIMI¹

*Faculty of Law, University of Tetova, RNM
Corresponding author e-mail: rina.alimi@unite.edu.mk*

Abstract

Modern Criminal Law starts from the assumption that every adult, normal, psychologically healthy person is capable to value the importance of his actions. This assumption is indisputable. Mentally incompetence the time of the perpetration of the criminal offense, excludes criminal responsibility, respectively guilt. Mentally Incompetence as a circumstance that excludes criminal responsibility is provided in Article 12, paragraph 1 in the Criminal Code of RNM and comes in use in the cases of the perpetrators with mental disorders who at the time of the perpetration of the criminal offense are considered incapable of understanding the importance of the offense and of guiding its own actions. Mentally incompetence is a legal concept, not medical one and always refers to the moment of the perpetration of the criminal offense. Just suffering from a mental disorder is not sufficient to prove mentally incompetence. Mentally Incompetence must be proven and declared in court, respectively during criminal proceedings. Therefore, psychiatric examination has an important place.

Keywords: criminal responsibility, mentally incompetence, psychiatric examination, Article 12, paragraph 1 of the Criminal Code of RNM, security measures

1. Introduction

Perpetration of a criminal offense means the enforcement of punishment or other measures against its perpetrator as a necessary reaction of the society and the state for damage caused or threatening the protected values, as a result of violation of the norms of legal order. In order, to enforce the punishment it is necessary that the perpetrator be responsible for the offense committed, that means, to have a certain psychological relationship with the offense committed as its perpetrator.¹ Therefore, to apply the punishment it is necessary to have the existence of the criminal offense, including the criminal responsibility of the perpetrator. Criminal responsibility is a set of subjective conditions that determines the mental state of the perpetrator and his relationship to the criminal offense. These subjective conditions are the ones that portray the perpetrator of the criminal offense, as mentally capable and guilty, implying at the same times his mental ability and guilt.² Otherwise, mental capacity determines the existence of mental abilities of the perpetrator of criminal offenses, which enable him to understand the importance of his offenses and to guide his own actions, while guilt determines the existence of a certain relationship of the perpetrator to his offense.³ From this it can be concluded that criminal responsibility is a psychological type and has a subjective character.⁴

¹Shefqet Muçi "E drejta penale, pjesa e përgjithshme", 2007, fq. 93.

² Ligj nr.7895, datë 27.01.1995 "Kodi Penal i Republikës së Shqipërisë", i ndryshuar, neni 11.

³ Borislav Petroviq, *E drejta penale*, Prishtinë, Universiteti AAB, 2006, fq. 65.

⁴ Kreshnik Myftari, "Papërgjegjshmëria për shkak të gjendjes mendore. Kriteri juridik në të drejtën penale". (tezë e pabotuar e doktoraturës, e mbrojtur në Fakultetin e Drejtësisë të Universitetit të Tiranës, në vitin 2014) fq. 22.

The law first of all link criminal responsibility with the age of the perpetrator at the time of the perpetration of the criminal offense. The juveniles, who at the time of the perpetration of the criminal offense have not reached the age of 14 years old, cannot be applied criminal punishment. According to this, the children are outside the criminal law and for them the assumption that they cannot be criminally responsible is valid. To senior perpetrators, the law starts from the assumption that every adult, normal, psychologically healthy person is capable to value the importance of his actions. This assumption is refutable: mentally incompetence at the time of the commission of the criminal offense excludes responsibility, respectively guilt. Lack of accountability and consequently the ability to understand actions and to desire the consequences of exclusion, excludes criminal responsibility, respectively guilt.

In most criminal justice systems of democratic states is recognized the opinion that persons who suffer from a mental disorder cannot be held responsible for their actions, in which case no criminal sanction can be imposed on them, since the person affected by a mental disorder at the time of the perpetration of the criminal offense did not have that what is legally known as the ability to understand actions and omissions and to desire the coming of consequence and in this case cannot perceive the reality of illegal action.

Punishing a person who is not responsible for the crime is a violation of the basic human rights and fundamental rights under the Constitution. As the criminal punishment in itself causes suffering, it would be unfair to impose it on a person who is already suffering from a mental disorder. This would not only be unfair, but also ineffective. Hence, in this case, security measures must be applied to protect the person and society at the same time.

2. Mentally incompetence according Criminal Code of RNM

Mentally incompetence as a circumstance that excludes criminal responsibility is provided in all criminal systems in Europe and beyond. The Criminal Code of RNM in Article 12, paragraph 1 provides the Mentally incompetence where it highlights this:

"The perpetrator, who during the commission of the criminal offense could not understand the importance of his offense or could not control his action due to permanent or temporary mental illness, temporary mental disorder or mental irresponsibility, or for other serious mental complications, is not responsible".⁵

To determine, mentally incompetence by the court, the following features must exist:

- (1) that the person had a mental disorder or defect and
- (2) this defect destroyed his or her capacity to value the unlawfulness of his or her conduct, or value the nature of his or her conduct (i.e. not understand the physical nature and quality of his or her act or control his or her conduct to conform with the law).⁶

From this it can be concluded that, only by mutual application of psychological and biological methods we can come to the conclusion of Mentally incompetence. Abnormal biological state in itself can not determine if there is Mentally incompetence or reduced mental capacity, until it is not concluded that the level of influence in certain mental functions, from which the mental capacity is dependent. Also, the determination of psychological obstacles are not enough to

⁵ Kodi Penal i RMV-së "Gazeta zyrtare e Republikës së Maqedonisë së Veriut" nr.80/99, 4/2002 43/2003, 19/2004, 81/2005, 60/06, 73/06, 7/08, 139/08, 114/09, 51/11, 135/11, 185/11, 142/12, 166/12, 55/13, 82/13, 14/14, 27/14, 28/14, 115/14 dhe 132/14 neni 12, paragrafi 1.

⁶<https://www.usip.org/sites/default/files/MCI/MCI-Part1Section9.pdf> (12.05.2020)

conclude the Mentally incompetence until the biological state that created these obstacles is not determined.⁷

According to these two elements, there is a cause-and-effect relationship that leads to two-phase findings of Mentally incompetence: it is examined whether the mentioned biological circumstances exist and then their action against the intellectual or volitional abilities of the perpetrator. Responsibility will not be excluded when one of them is found.⁸

3. The role and impact of forensic-psychiatric expertise in evaluation of the Mentally incompetence of the perpetrator at the time of the commission of the criminal offense

Psychiatric examination is a specific action which is integrated into the criminal process. The psychiatric examination is executed only with the request of the investigating authority and the court and is expressed only in those cases when there is a suspicion that the defendant's responsibility has been excluded or reduced due to permanent or temporary mental illness, due to the temporary mental disorder or mental impedance.⁹ In other words, psychiatric expertise comes in use every time where there is a reasonable suspicion about the perpetrator's Mentally incompetence duo to the biological basis of Mentally incompetence.

This type of expertise can be assigned at any time during the procedure, including time during the main trial. The court may *ex officio*, or with the proposal of the public prosecutor or defense counsel appoint an expert to conduct a psychiatric examination of the defendant to determine whether at the time of the commission of the criminal offense the defendant was in a state of mental incapacity or reduced mental capacity and aims to determine whether the perpetrator's mental state can be seen as a basis for excluding his responsibility or reducing the sentence.

Procedural authority by order can assign the psychiatric examination and from the disposal list can choose the expert who will execute it. The order for the appointment of the psychiatric examination also indicates the reasons for the examination, the assignments that have to be solved and the deadline for submitting the conclusions.¹⁰

The psychiatric examination is executed by a psychiatrist - forensic expert, who has specialized knowledge, skills, experience and education in the field of psychiatry and is regularly engaged in the practice of psychiatry - forensics. However, it can happen that in the absence of a psychiatrist - forensics, the expertise is executed by a psychiatrist, neuropsychiatric, doctors of other experts of the field and general medical practitioners.¹¹

During the examination of the mental state of the defendant, the psychiatric expert does not intend to delve into the disease and its treatment with the aim of cure, but on the impact that the latter has had on the ability to understand his actions. His assignment is to verify whether at the time of the commission of the criminal offense there were such circumstances which affected his ability to judge and guide his actions. He must give an opinion on the action of these circumstances on his mental state and on the cause-and-effect relationship between Mentally incompetence and the act committed.¹²

If from the executed examination the expert confirms that the mental state of the defendant is disordered, it will determine the nature, type, extent and timing of the disorder and give his

⁷Vllado Kambovski, *E drejta penale – pjesa e përgjithshme* (Përkthyer nga Afrim Osmani, Ismail Zejneli), Shkup, Furkan ISM, 2010, fq. 257. vep. cit., fq. 257.

⁸Ibid

⁹Ejup Sahiti, Ismail Zendeli, *E drejta e procedurës penale të Republikës së Maqedonisë*, Tetovë, Universiteti i Evropës Juglindore, 2007, fq. 210.

¹⁰Vesel Latifi, *Kriminalistika*, Prishtinë, Universiteti i Prishtinës, 1999, fq. 162.

¹¹Sllobodan Lloga, *Psikopatologjia Gjyqësore*, Prishtinë, Fakulteti i shkencave kriminalistike, 2007, fq.8

¹² Vllado Kambovski, vep. cit., fq. 260.

opinion for the impact that the condition has had, as well as the extent to which the mental state disorder occurred during the commission of the criminal offense.¹³

In the case of evaluation, the defendant's Mentally incompetence, the expert tries to determine his ability and motives through the reconstruction of events and through other less visible aspects of the offense, however taking his offense as a basis for assessing his psychopathological condition.¹⁴

In clinical psychiatry, have been developed methods that help psychiatry experts in cases of evaluation the Mentally incompetence of the perpetrator at the time of the commission of the criminal offense. It is important to mention the importance of two specialized questionnaires: *The Mental State at the Time of the Offense Screening Evaluation (MSE)* and *Rogers Criminal Responsibility Assessment Scales (R-C RAS)* which were developed in 1980 to standardize and facilitate the assessment of defendant's Mental incompetence.¹⁵

In our country, the evaluation of the Mentally incompetence of the perpetrator is realized out through six stages.

- Evaluation of the current mental state of the defendant
- Evaluation of the mental state of the perpetrator at the time of the commission of the criminal offense
- Evaluation of the motives that prompted the perpetrator to commit a criminal offense. It is important to distinguish whether the motive for the commission of the offense was of a psychopathological nature.
- Evaluation of the perpetrator's personality - is done through psychological research and analysis of the perpetrator's personal data. Based on the data on the personality of the perpetrator, we can decide whether it is a matter of a personality disorder of the defendant.
- Analysis of the action from the psychological-psychopathological point of view. For the assessment of Mentally incompetence it is very important to analyze whether the criminal offense was committed under the influence of emotional or mental disorders.
- Analysis of the criminal offense committed - the cause-and-effect relationship should be clarified, the relationship of the defendant with the injured party, whether the offense was committed intentionally or what was the reason that pushed the perpetrator to commit a criminal offense.¹⁶

4. Criminal-legal action of Mentally incompetence

Mentally incompetence excludes guilt. A perpetrator, who has not been able to understand the importance of his conduct or be guided by his actions, cannot be punished for the offense committed.¹⁷

Some criminal legislation strictly adheres to the principle of "nullum crimen, sine culpa" and the definition that - criminal law should be dealt only with responsible and guilty perpetrators. A person, who in an irresponsible state commits an act that is provided by law as a criminal offense, is not treated as a "*perpetrator of a criminal offense*", but with him as well as with mentally ill persons, acts according to the principles of medical law.

¹³ Ligji për procedurë penale, "Gazetazyrtare e Republikës së Maqedonisë", nr.150/2010, 100/2012, neni 248.

¹⁴ Mujo Hasković, *Psikologjia gjyqësore*, (Përkthyer nga Mustafë Reçica), Prishtinë, Universiteti AAB, 2008, fq. 100.

¹⁵ V. Vijaynath, M. R. Anitha, & G. M. Raju, "Specialized scales for criminal responsibility assessments", J Indian Acad Forensic Med, Vol.31, No. 4, fq. 409.

¹⁶ Dušan Petrović, *Priručnik za sudsku psihijatriju*, Kragujevac, Biblioteka "Dr Vićentije Rakić", 2014, fq. 18-19.

¹⁷ Vllado Kambovski, vep. cit., fq. 242.

In the vast majority of criminal legislations, irresponsible perpetrators remain within the scope of criminal law and are treated as perpetrators of criminal offenses. Such is the definition of our legislator (n.12 p.1: the perpetrator is not responsible who at the time of the commission of the criminal offense...).¹⁸

It is important to note that when talking about a criminal offense committed by an irresponsible person criminal responsibility, guilt is excluded but criminal-legal responsibility is not excluded as a basis for the implementation of security measures. Even the irresponsible person "responds" (before the court), or in other words any sanction is provided for his actions, only that his responsibility is based on other subjective elements (danger of the irresponsible person).¹⁹

Maintaining this category mainly in criminal law, is imposed by the need to provide criminal-legal guarantees for their freedoms and rights, but also by the implementation of criminal-legal measures to respond to the dangerous situation of the person caused by biological circumstances of irresponsibility. Therefore, the Criminal Code provides for the imposition of security measures: *compulsory psychiatric treatment and care in a health institution* and *compulsory psychiatric treatment in freedom*, as the only sanction against the irresponsible perpetrator.

The court may impose such a measure when it finds that due to irresponsibility, the perpetrator may again commit a criminal offense, while in order to avoid such a risk, his treatment and storage in a health institution or treatment in freedom is required. Irresponsible perpetrators of criminal offenses are placed in specialized health institutions on the basis of a court decision for the execution of the imposed security measure, compulsory treatment and care in the institution and are placed in the judicial department. RNM currently has three such institutions: The Psychiatric Hospital - Skopje, Negorci Psychiatric Hospital and Demir Hisar.

The analysis of the data shows that a total of 37 people was retained in the Psychiatric Hospital - Skopje based on the court decision. From these, 36 were serving security measures for compulsory psychiatric treatment and care in a health institution, while only one person was convicted of compulsory treatment of alcoholics and drug addicts.²⁰

In the judicial department of the Psychiatric Hospital in Negorci within 2018/2019, a total of 36 people were retained, while in the judicial department of DemirHisar also 36 people.

5. Conclusions

In conclusion, we can say that criminal offenses perpetrated by persons with mental disorders, occupie a modest place in the range of general crime, so implementationof the institute of Mentall Incompetence occur rarely in practice.

One of the most disputable issues in determining Mentally incompetence is related to the assessment of the mental state of the perpetrator at the time of the commission of the criminal offense.The assessment of the Mentally incompetence of the perpetrator at the time of the commission of the criminal offense is a very delicate and problematic moment, because it is related to a fact committed in the past, that requires a judgment on the social danger that refers to the present and the future. Reconstructing the mental state of the subject at a different historical moment duo to discrepancy in time presents a problematic situation, because it can often turn out to be wrong.

Another problem which is evident in practice is that there are often cases when experts are influenced by the defendant and decide in his favor, so it happens that the defendant is declared

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Department for treatment of convicted persons with mental disorders - PHI Psychiatric Hospital "Skopje".

mentally incompetent by the expert, in order to avoid criminal responsibility. Reasons can be subjective or material.

What is observed in practice is that, despite the fact that the final decision is made by the court, it always adheres to the *a priori* act of expertise, putting the expert in the role of the court, is the one who decides on the responsibility or irresponsibility of the subject. In these cases, the court takes for granted only the act of expertise and derive the entire decision on this act, giving the latter a predetermined value.

I consider that the imposition of a punishment on perpetrators which ones at the time of the perpetration of the criminal offences are completely irresponsible due to mental disorders is unfair and ineffective. These people need to be treated and not punished, because otherwise we are punishing the disease and not the person.

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