

# Basis for the judgment of criminal responsibility exemption in cases of insanity



Received: 04/05/2024; Accepted: 09/10/2024

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## Abstract

In spite of the fact that the majority of criminal legislation agrees that insanity is a negation of criminal responsibility, there is disagreement regarding the objective and procedural basis for this exoneration due to insanity.

This research paper will elucidate the points of divergence, highlighting the position of Algerian legislators on this matter

## Keywords

Insanity;  
legal incapacity ;  
exoneration ;  
acquittal ;  
Condemnation.

## الكلمات المفتاحية

الجنون ؛  
موانع المسؤولية ؛  
موانع العقاب ؛  
البراءة ؛  
الإدانة.

## أساس الحكم بامتناع المسؤولية الجزائية في حالة الجنون

### ملخص

وإن اتفقت غالبية التشريعات الجنائية على كون الجنون سبب نافي للمسؤولية الجنائية، إلا أنها اختلفت حول الأساس الموضوعي والإجرائي لانقضاء هذه المسؤولية بسبب الجنون، ومن خلال هذه الورقة البحثية سنبين مواطن هذا الاختلاف مبرزين موقف المشرع الجزائري من هذه المسألة.

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Doi: <https://doi.org/10.34174/0079-035-004-003>

## Introduction

Most criminal legislations have taken insanity as a reason for exemption from responsibility, yet they have differed on the basis for the exemption of criminal responsibility due to insanity. While the majority of jurisprudence holds that the basis lies in the absence of the mental element of the crime, some argue that it is due to the futility of punishing the insane, while others believe it stems from the inability of the insane offender to defend themselves.

On the other hand, criminal legislative systems differ in the basis of the judgment issued regarding the exemption of criminal responsibility for insanity, ranging from conviction of the accused with a mental disorder followed by exemption from punishment, to a judgment of criminal irresponsibility (acquittal). Although the outcome is the same in both cases, different effects ensue, whether regarding the nature of the mental disorder preventing criminal responsibility (is it a bar to punishment or to criminal responsibility?), or the authority of the prosecuting authority (the public prosecutor) or the investigating judiciary in deciding to dismiss the case or issue an order of non-prosecution for the insane criminal. Therefore, the research problem lies in the following question: What is the basis for the judgment of exemption from criminal responsibility in cases of insanity?

To answer this problem, we adopted a descriptive-analytical approach to analyze the various positions of criminal legislations regarding this issue. Based on this approach, we divided our study into two main sections. In the first section, we addressed the objective basis for the judgment of exemption from criminal responsibility in cases of insanity, while in the second section, we delved into the procedural basis for such a judgment.

### **Section One: The Objective Basis for the Judgment of Exemption from Criminal Responsibility in Cases of Insanity**

The objective basis varies between the absence of the mental element of the crime, the futility of punishment, and the inability of the insane to defend themselves. We will clarify this through these statements, elucidating the position of Algerian legislators on the matter.

#### **First: Absence of the moral element of the crime.**

A crime consists of three elements: the legal element, the material element, and the moral element. Regarding the legal element, it refers to the criminal legal text that criminalizes a category of harmful or dangerous actions to the safety of individuals and society, and specifies punishment for those who commit them.<sup>1</sup>

The material element of the crime pertains to its material aspects, encompassing all aspects related to the crime and having a tangible nature perceivable by one of the senses.<sup>2</sup>

Therefore, it is said that criminal law is a law of actions, and if the description of the act is lacking, the justification for the intervention of this law is also lacking.<sup>3</sup>

As for the mental element, it represents the psychological relationship between the behavior and its perpetrator - i.e., the offender. Based on the presence of this element, the concept of moral attribution of the crime is established, meaning attributing it to the perpetrator because it reflects a human will from which the criminal behavior emanated. This will must be valid to express the criminal capacity of its owner, thus being questioned criminally. Here lies the idea of criminal responsibility. The mental element takes two forms: deliberate intent and penal error. Knowledge and intent are two elements of deliberate intent.<sup>4</sup>

We have reviewed the elements of the crime to demonstrate which of them is affected by mental disorder and therefore negated.

The prevailing opinion in France tends to view the basis for exemption from criminal responsibility due to insanity (in the old penal code)\*. Or due to mental and nervous disorder (in the new penal code) as the absence of the mental element of the crime because the actor is not aware of what they are doing and cannot comprehend or intend to commit the crime.

So, the mental element of the crime does not depend on mere will, but rather this will must be characterized by criminality, meaning it must be blameworthy<sup>5</sup>. This will is only present if it fulfills two conditions: perception or discernment, and intention or choice. These two conditions simultaneously represent the elements of criminal capacity. If one or both of them are absent, the mental element of the crime is negated due to the lack of a suitable will for its commission.<sup>6</sup>

The scholar Garo states that a mentally disturbed person cannot be considered a criminal due to the lack of one of these two capacities: awareness and freedom of choice. Insanity negates responsibility because it makes us strangers to our society and ourselves.<sup>7</sup>

As for the jurists of Arab criminal law, they are divided into two trends: one considers insanity as negating the mental element of the crime, while the other asserts that insanity does not negate the mental element of the crime.

The first approach argues that insanity nullifies the mental element in crimes that are based solely on criminal intent. Their argument is that criminal capacity, represented by the ownership of perception and choice, is an essential prerequisite for the existence of the mental element in the crime. This capacity must be present to attribute the crime to the psyche of its actor, indicating their will and intention.<sup>8</sup>

On the other hand, there is another opinion stating that the absence of criminal capacity does not affect criminal intent. According to this view, the mental element is distinct from criminal capacity, and thus criminal intent (the mental element) exists in both the insane and undiscerning children. Supporters of this perspective argue that there should not be confusion between intent, which is the essence of the mental element, and freedom of choice, which determines criminal responsibility.<sup>9</sup>

According to them, the impediments to responsibility are personal and are related to the actor, not the crime. They remain essentially actors, whether acting alone or as accomplices. Impediments to responsibility are related to discernment and freedom of choice and are not related to the crime, whether in its material or mental element. Thus, they belong in the theory of responsibility rather than the theory of crime.<sup>10</sup>

From our perspective, criminal responsibility arises as a result of the commission of a crime with its three elements; there is no responsibility where there is no crime. As for the impediments to criminal responsibility, such as mental disorder, minority, and coercion, they presuppose the absence of the mental element of the crime (lack of consciousness or intent).

## **Second: Futility of Punishment**

It has been said in the past that there is no point in punishing the insane because insanity is punishment in itself. Therefore, there is no benefit in punishing a criminal who is unable to comprehend that what they are committing constitutes a crime punishable by law. Punishment fails to achieve its purpose of deterring the insane criminal and seeking retribution from them.

Islamic jurists believe that the purpose of punishment (ta'zeer) is discipline, correction, and general deterrence, which cannot be achieved by the insane. Thus, punishing them would be harmful and futile, not in line with humanity, as they are patients who should be treated with compassion, not violence.<sup>11</sup>

On the contrary, the stance of psychiatry differs from both legal and religious perspectives, considering that mentally ill patients have a sense of responsibility and are capable of bearing punishment. A field study conducted in a psychiatric hospital in France revealed that mentally ill patients are subject to internal hospital regulations and behave as individuals with a sense of responsibility, justice, and acceptance of punishment.

## **Third: Incapacity of the Insane Criminal to Defend Themselves**

Some argue that a criminal is unable to defend themselves when suffering from a mental disorder. Therefore, it is advisable to prosecute them when they regain their mental faculties.

According to statistics from the United States, the number of individuals acquitted by reason of insanity is much lower than the number of inmates declared incompetent to stand trial or mentally unfit for trial due to their mental condition. The accused must be able to understand the nature of the legal proceedings or trial proceedings taken against them and be capable of assisting in their defense. When the accused is found incapable of this understanding, the legal proceedings are adjourned, and the accused is sent to a mental health institution to help them regain their competence or ability to stand trial. This is done to protect the accused and maintain the court's reputation for dispensing justice.<sup>12</sup>

It is known that criminal investigation procedures require the interrogator to confront the accused with the charges against them for acknowledgment or denial. The courts would lose public confidence if they were to try individuals who are unaware of reality or have lost touch with it, living in their own worlds filled with delusions, fantasies, hallucinations, and scattered thoughts.

English legislation has adopted this approach in the Criminal Procedure Act of 1964 concerning procedures applied to the mentally impaired.

When the accused is unable to comprehend trial procedures, a specialized psychiatric medical panel can, based on their expertise, determine their eligibility through a medical report. If proven, the trial refrains from proceeding because the accused is incapable of defending themselves (incapable de plaider).<sup>13</sup>

If it is proven that the defendant is unable to defend himself due to a mental impairment that occurred after the commission of the crime, the lawsuit against him is suspended, or his trial is postponed until he regains his faculties.

### **As for the position of Algerian legislator,**

The Algerian legislator considers the impediments to responsibility as personal circumstances of the perpetrator that intervene in the moral element of the crime, thus negating it. The moral element consists of three components: capacity, criminal intent or culpable mistake, and freedom of choice, which are elements related to willpower. The legislator relies on willpower if it is supported by two elements:

- 1.If discernment is lacking, as in the case of minority.<sup>14</sup>
- 2.If awareness is lacking, as in the case of insanity.<sup>15</sup>
- 3.If choice is lacking, as in the case of coercion.<sup>16</sup>

Therefore, criminal liability is linked to capacity. However, the Algerian legislator has limited the definition of insanity that absolves liability to the condition of the defendant being insane at the time of the act, without adding conditions related to the impact of insanity on the characteristics of will and its legal value. The legislator could have stated that if one of the capacity elements is lacking, liability is absolved, but they chose to enumerate impediments to liability exhaustively, thus closing the door without broadening the scope of the text to include other cases where one of the capacity elements is lacking.

## **The second section: Procedural Basis for Acquittal Due to Insanity**

In this section, we will explore the positions of both the French and Algerian legislators on the matter, followed by an overview of comparative legislation.

### **First: The French Legislative Position**

The French legislator considers mental, psychological, or nervous disorders as grounds for acquittal, as Article 122, paragraph 1 of the French Penal Code stipulates that a person who, at the time of committing an act, suffers from a mental or psychological disorder that deprives them of discernment or control over their actions, cannot be held criminally liable.

If presented before an investigating judge with a claim of exemption from criminal responsibility, and if it is established that the offender suffers from a mental or psychological disorder, the investigating judge shall issue a decision to dismiss the case ("ruling of dismissal" or "decision of non-prosecution".) against the offender.<sup>17</sup> If the case is brought before the court, and if it is a misdemeanor case, the judge issues a decision to release (Relaxe) the suspect, and if it is a felony case, the court issues a decision to acquit the accused.

The Public Prosecution is also entitled to issue a decision to close the file and prevent prosecution against the accused if it is proven that they suffer from a mental disorder.

### **Second: Position of the Algerian Legislator**

The conditions stipulated in Article 47 of the Algerian Penal Code, which relate to the acquittal of criminal responsibility in cases of total mental impairment, entail the non-attribution of the crime to the will of the individual who performed the actions constituting its elements. Consequently, the perpetrator is absolved of responsibility for these actions, whether they constitute felonies, misdemeanors, or violations, and whether they are intentional or unintentional.

The reasons for the exemption from responsibility are personal, so the scope of these reasons is determined by the individual who meets the conditions for their application, excluding others who may have participated with them in the crime as actors or accomplices. Therefore, someone who lacked consciousness or will at the time of committing the act constituting the crime due to a mental disorder is not held accountable for this crime. However, their exemption from

responsibility in this case does not prevent the prosecution of the perpetrator or the accomplice who participated in committing the crime.

However, Article 47 of the Algerian Penal Code indicates that insanity is a ground for exemption from punishment, not a ground for exemption from responsibility, as it begins with the phrase "no punishment for those who were insane."

This raises the question: when insanity is proven at the time of committing the crime, is the judgment pronounced as exemption from punishment or as acquittal?

It is supposed that the judgment should be one of acquittal rather than exemption from punishment, as insanity is not a legally exempting excuse but rather a reason for non-accountability. The Algerian legislator has followed the same approach through Article 368 of the Code of Criminal Procedure, which states: "If the accused is acquitted due to a state of insanity at the time of the incident, the court may impose all or part of the expenses on him." Therefore, the wording of Article 47 of the Algerian Penal Code is flawed in this regard, as the loss of consciousness or choice is a factor that affects the will, either nullifying it or diminishing it to an extent not recognized by the law, thus negating the moral aspect of the crime. Hence, there is no legal basis for it, and consequently, there is no place for punishment. Rather, this factor becomes a reason for exemption from responsibility, not a reason for exemption from punishment. To argue for exemption from punishment, we must be dealing with a complete crime in all its elements. Therefore, the text does not distinguish between grounds for exemption from responsibility and grounds for exemption from punishment.

This is the approach we support based on the understanding that insanity, as a reason for non-imputability, is a barrier to responsibility. Therefore, the Algerian legislator should have corrected the first phrase of Article 47 of the Penal Code as follows: "No one shall be held criminally liable if they were insane at the time of committing the crime."

### **Third: Comparative legislative stance.**

The stance of comparative criminal legislation regarding the criminal responsibility of the "insane" has varied between considering them exempt from punishment and as a reason for non-accountability.

Some laws state "exempted from punishment" (Articles: 230 of the Syrian Penal Code, 92 of the Jordanian Penal Code) or "no punishment" (Articles: 62 of the Egyptian Penal Code, 101 of the Omani Penal Code, 38 of the Tunisian Penal Code) as a consequence of insanity, which renders the criminal unconscious and unaware.

Others have used the phrase "not held criminally responsible" for the insane criminal (Articles: 22 of the Kuwaiti Penal Code, 60 of the Iraqi Penal Code, 60 of the Emirati Penal Code, 83 of the Libyan Penal Code). If the case is before an investigating judge and the criminal's insanity is proven, a decision to dismiss the case can be issued, and the public prosecution may choose not to refer the case to court, opting to keep the records for lack of benefit from a trial.

If the criminal's insanity is presented in court, it must decide on his non-responsibility and declare his innocence (Articles: 231 of the Syrian Penal Code, 342 of the Egyptian Code of Criminal Procedure, 22 of the Kuwaiti Penal Code, 315 of the Libyan Code of Criminal Procedure). Anglo-Saxon legislations adopt a system of convicting the mentally disturbed criminal but exempting them from punishment through a decision issued by a jury, as in English legislation (the 1883 law concerning the trial of the insane). In contrast, European criminal legislations adopt a system of acquitting the mentally disturbed criminal, declaring their non-responsibility for the crime.

Thus, we have shown that the consequence of losing sensation and will due to mental defect is the criminal's exemption from the crime committed. However, this rule is not absolute. Not everyone who loses sensation or will at the time of committing a crime due to their mental illness is exempt from criminal responsibility, nor should it be accepted from them. It is a prerequisite for exempting them from criminal responsibility that they did not contribute to the loss of their sensation or will, meaning they were not the cause of depriving themselves of their mental faculties. If the criminal himself caused this, then his criminal responsibility is not waived, even if he was devoid of sensation and will at the time of committing the crime.

This means that the exemption from criminal responsibility as a result of the presence of a mental defect is not achieved if the loss of sensation or choice is attributable to the criminal's will. If the criminal's criminal acts, committed when he lost sensation or choice, were intentional, then he is responsible for them intentionally. If he could foresee these criminal acts and prevent them, then he is responsible for them unintentionally. Whoever willingly hypnotizes someone, anticipating that during their hypnosis they will commit a certain act and intending that act and its consequences, is held accountable for it intentionally. However, if he could foresee it and its criminal consequences and prevent it, he is responsible for it unintentionally.

In all cases, the person who caused the criminal to lose their sensation or will is responsible for the crime they committed whenever they had criminal intent.<sup>18</sup>

## Conclusion

Thus, we have elucidated both the objective and procedural basis for ruling on the insanity defense, and we have reached the following conclusions:

1. The legal approach in Anglo-American law differs from the French legal approach regarding insanity or mental disorder. The former not only requires the accused to be affected by insanity or disorder but also adds conditions and characteristics related to its impact on their knowledge of the nature of their actions or their error, as well as their inability to defend themselves. In contrast, the French approach merely requires the accused to be affected by insanity or disorder without considering such effects. Jordanian criminal law has aligned with the former approach, while most other Arab laws, including Algerian penal law, have aligned with the latter approach.

2. Arab criminal legislations vary in their treatment of the criminal responsibility of the insane, ranging from considering insanity as exempting from punishment to being a reason for the lack of criminal responsibility. The Algerian legislator considered insanity as a preventive factor from the reasons of responsibility. This is because the loss of consciousness or choice is an obstacle that affects the will, either by negating it or diminishing it to a degree that the law does not recognize. Consequently, the moral aspect of the crime disappears, and it lacks a legal entity. Therefore, there is no place to discuss punishment. Rather, this obstacle becomes a reason for the lack of responsibility rather than a reason for the lack of punishment. To establish the exemption from punishment, it is assumed that we are dealing with a complete crime. Therefore, Article 47 of the Algerian Penal Code did not distinguish between impediments to responsibility and impediments to punishment. It is supposed that the ruling should be acquittal and not exemption from punishment, as insanity is not a legal excuse but rather a reason for non-imputability. This was the conclusion reached by the Supreme Court in Algeria in its decision issued by the Criminal Chamber on 03/21/2013 (File No. 0857215). In the recent decision, it was stated: "The Criminal Court, when it becomes clear from the deliberation that the accused was insane at the time of the commission of the acts, should respond negatively to the question 'Is the accused... guilty of committing...' and rule for acquittal, not conviction with exemption from punishment."

## Finally, we propose the following recommendations:

1. Amend Article 47 of the Algerian Penal Code and replace the defective phrase "No punishment for those who were insane..." with the correct phrase "Not to be held criminally responsible for those who were insane at the time of committing the crime..." as insanity is an impediment to responsibility, not to punishment.

2. We also suggest using the phrase "mental disorder" instead of "insanity" to bring legal language closer to psychiatric terminology. There is no medical diagnosis in psychiatry called insanity. However, it is a term used by criminal legislators and is the basis for judgments. This makes psychiatric physicians dealing with legal issues regarding the eligibility of mental patients, whether civil or criminal, face difficulty in reconciling legal language with psychiatric terminology. Furthermore, the gap between the two languages leads to misinterpretation, which in turn disrupts the balance of justice. It would be preferable if the legislator adopted a division of criminal responsibility, in line with the development in most legislations in this regard. This would establish the principles of justice and precision in assessing punishment and holding the accused accountable to the extent of their will - whether complete or impaired - and constitute a development that aligns Algerian criminal legislation with foreign legislation that preceded it in adopting the principle of partial criminal responsibility.

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#### **Footnotes:**

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<sup>1</sup> Ahsan Bouskia,(2012-2013), "Al-Wajiz Fi Al-Qanun Al-Jazai Al-Aam", 12th edition, Dar Houma, Algeria, p. 64.

<sup>2</sup> Mahmoud Najib Hassani. (1986), "Sharh Qanoon Al-Uqubat," General Section, 5th ed., Dar Al-Nahda Al-Arabiya, p. 371

<sup>3</sup> Ashraf Tawfiq Shams al-Din. (2010), "Sharh Qanoon Al-Uqubat (Al-Qism Al-Aam) - Al-Nazariyya Al-Aamah lil-Jareemah wa al-Uqubah," Dar Al-Nahda Al-Arabiya, Egypt, 2009, p. 128.

<sup>4</sup> Huda Hamed Qashqoush, "Sharh Qanoon Al-Uqubat," General Section, Dar Al-Nahda Al-Arabiya, Cairo, p. 189.

\*the formulation of Article 64 of the old French penal code "" There is neither crime nor offense. " suggests that insanity is a reason for justification rather than a bar to criminal responsibility, which has been criticized by French jurisprudence, which also criticized the restriction of the text to crimes and misdemeanors without including contraventions.

<sup>5</sup> Mahmoud Najib Hassani, cited above, p. 501.

<sup>6</sup> Adel Yahya Qarni Ali.( 2000), "Al-Nazariyya Al-Aamah lil-Ahliya Al-Jaza'iya - Dirasah Muqarana -," Dar Al-Nahda Al-Arabiya, Cairo, p198. As cited In: Sherif Sayed Kamel. (1992), "Al-Nazariyya Al-Aamah lil-Khata' fi Al-Qanoon Al-Jaza'i," Doctoral Thesis, Cairo, p. 730.

<sup>7</sup> Khaled Suleiman. (2007), "Al-Mas'ooliyya Al-Jaza'iya lil-Mujrim Al-Mudtarab Nafsian - Dirasah Muqarana -," 1st ed., Dar Zeinoun Al-Huqiqi, Beirut, p. 223.

<sup>8</sup> Supporters of this view include Mahmoud Najib Hassani and Ahmed Fathi Sorour.

<sup>9</sup> Advocates of this view include Mahmoud Mahmoud Mustafa, Ramses Bahnem, and Al-Saeed Mustafa Al-Saeed (see: Kamel Al-Saeed. (1986), "Al-Janun wa al-Idtirab al-Aqli wa Atharu fi al-Mas'ooliyya al-Jaza'iya," 1st ed., University of Jordan, Jordan, p. 16.

<sup>10</sup> Mohammed Imam. (1991), "Al-Mas'ooliyya al-Jaza'iya," 2nd ed., Majd University Press, Beirut, p. 213.

<sup>11</sup> Mohammed Abu Zahra. (1963), "Crime and Punishment in Islamic Jurisprudence," General Section, Anglo-Egyptian Library, Cairo, p. 459.

<sup>12</sup> Abdelrahman Mohammed Al-Eissawi. (2011), "The Psychological Content of Drug Law," 1st edition, Halabi Legal Publications, Beirut, Lebanon, p.77 .

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<sup>13</sup> Abdul Rahman Mohammed Al-Issawi, the aforementioned reference, page 79.

<sup>14</sup> see Article 49 of the Penal Code.

<sup>15</sup> see Article 47 of the Penal Code.

<sup>16</sup> see Article 48 of the Penal Code.

<sup>17</sup> The investigating judge is not authorized to issue a decision to dismiss the case based on Article 122, paragraph 1, as demanded by psychiatrists if the French legislator used the phrase "n'est pas punissable" instead of the current phrase "n'est pas pénalement responsable." This brings relief to the victims' families who prefer a judgment from the court, even if it is an acquittal, rather than a decision to dismiss the case by the investigating judge. However, French criminal law did not adopt this approach. See: Khaled Slimane, reference above, p. 249.

<sup>18</sup> Mahmoud Sulaiman Musa. (2010), *Criminal Responsibility in Arab Legislations and French and Italian Laws: A Comparative Study in Light of Contemporary Trends in Criminal Policy*, Manshurat Al-Ma'arif, Alexandria, p. 476.