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Alcohol-related crime or no crime because of the perpetrator's (factual) insanity?

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Abstract

The criminal liability of the perpetrator of a criminal act is not only conditioned on the objective features of the criminal act but also on the subjective ones (intentional or unintentional behavior). Apart from the subjective features of the act, guilt is also necessary in order to be able to attribute the crime. However, both theory and practice face with one exception to the principle of *nullum crimen sine culpa* (no crime without guilt). This applies to a state of disturbances of mental functions caused by the perpetrator of a criminal act. There are numerous problems arising from the collision of the need to punish the perpetrator (dictated by criminal policy), and the real state of his/her psyche, which can sometimes speak even for no fault (and thus no crime). It has a significant meaning for the subjective aspects of the crime. The aim of this study is to present these problems based on a dogmatic and legal analysis of regulations and a review of the literature in the field of medicine. The final conclusions lead to a *de lege ferenda* postulate concerning the legal solution of the above-mentioned dilemmas.

Key words

Crime; insanity; diminished sanity; state of intoxication; guilt

Resumen

La responsabilidad penal de quien comete un acto delictivo no se supedita solo a las características objetivas del acto delictivo, sino también en las subjetivas (conducta intencionada o no intencionada). Además de los rasgos subjetivos del acto, la culpa no es necesaria para poder imputar el delito. Sin embargo, tanto la teoría como la práctica se encuentran con una sola excepción al principio de *nullum crimen sine culpa* (no hay delito sin culpa). Esto se aplica a un estado de alteraciones de las funciones mentales

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causadas por el autor o autora de un hecho delictivo. Surgen numerosos problemas de la colisión de la necesidad de castigar al perpetrador (dictada por la política penal) y el estado real de su psique, que a veces puede hablar incluso sin culpa (y por lo tanto, sin delito). Ello tiene un significado relevante para los aspectos subjetivos del delito. El objetivo de este estudio es presentar estos problemas basándonos en un análisis dogmático y jurídico de la normativa y en una revisión de la literatura médica. Las conclusiones llevan a un postulado *de lege ferenda* relativo a la solución jurídica de los mencionados dilemas.

Palabras clave

Delito; demencia; cordura disminuida; intoxicación; culpa

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1. Introduction

This paper calls into question the issue connected with criminal liability of a perpetrator who commits a crime acting in a state of so-called "factual insanity". It lets us take a new look at the problem not only because of the structure of the offense, but most of all, because of some interdisciplinary aspects that will arise in this paper. They remain in a background of the question of the aspects of a crime as to the doer, known also as the subjective aspects of the offense. What are they? Do they have something in common with the mental state of the perpetrator? If so, was the perpetrator who commits the crime in a state of factual insanity, in fact, sane or insane? What kind of state covers the concept of "factual insanity"? Ergo, will he or she bear the criminal responsibility for his/her prohibited act in such cases or not?

There are a lot of doubts and questions regarding the issue mentioned in the title of this paper. Some of them stem from the fact that the basic ideas of the offense, a way it can be shown, understood or explained are different in two cardinal systems of law – i.e. in a continental system of law and a system of common law. Taking into account that most of the European systems of criminal law have their roots in the first one, in this paper the continental system of law will be a ground for carrying further arguments. It is justified to take a closer look at one or several criminal codes in this respect.

A real challenging area in this field seems to be, however, a matter of mental aspects of a crime, presented both from the point of view of a prohibited act (where they could be defined from a conjectural aspect), and, on the other hand, shown in the perspective of the crime (i.e. in the perspective of a prohibited act committed by the perpetrator in a state of factual insanity, that is presented in a concrete aspect). That is the reason why this paper will try to re-examine some statements regarding the responsibility of the perpetrator who acts in a state of factual insanity. This could not be done without a reference to a psycho-pathological, as well as psychological point of view. This is necessary not only because of the shape of some provisions being in force in contemporary systems of law, but mostly because it would enable to present a real problem of imputation of the crime committed by the perpetrator in a state of factual insanity. Moreover, it is worthy to add that the described matter is of extremely major importance not only from a theoretical point of view, but mainly because of difficulties that it can cause in the practice of applying criminal provisions.

Already at the outset, it seems to be worth noting that the subject is relevant in the continental system of the law, although for every European country based – as for their legislation – on this system, it may look quite different.

The starting point for the further discussion on this issue should be, however, a structure of an offense. It will enable to differentiate the subjective aspects of the offense from those that regard the deed (objective side of a crime). Moreover, taking into account the structure of the offense from a point of view of the continental system of criminal law, it allows to clarify the problem of guilt (which cannot be underestimated in the context of insanity), as well as, consequently, to separate the last one from the subjective side of the offense.

2. Crime and its complex structure according to the continental system of law

The system of criminal law, originated from the continental law system, provides that an action (or omitting the action), before it becomes an offense, needs to fulfil some requirements. They result both from a principle of specificity (Latin: *nullum crimen sine lege*) and some elements that, as it is usually assumed, make up what we call a crime. It is worth adding that the above mentioned Latin paroemia hides the legal maxim that: "Only a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible".

This principle shall not prevent punishment of any act which, at the moment of its commission, constituted an offense within the meaning of international law.[1] In fact, most of the European countries have based their regulation on a system of positive law. Because of that they also tend to express the mentioned principle in their domestic criminal law regulations.[2] Even if there are some differences in the description of the elements creating the offense structure (in its substantial meaning), they all strive to perceive the element of guilt as a necessary prerequisite which at the same time determines a crime.

To approximate the essence of the issue, it is worth using the example of the Criminal Code of the Republic of Poland (hereinafter: P.C.C.), which in Article 1 states that only one who commits a criminal offense by a statute in force at the time of its commission shall be subject to criminal liability. What is more, there is no offense (in its substantial meaning) if the social harm of a prohibited act is negligible, as well as if there is no *culpa* that can be attributed to the offender at that time of committing this prohibited act (a *culpa* principle). This includes clarifying the principle of *nullum crimen*, indicating that this crime (Latin: *crimen*) arises only when there is guilt. In reverse, the negative aspect means – there is no crime without guilt in the thought of *nullum crimen sine culpa*.

On the basis of the above-cited rule, it is possible to reconstruct a substantial definition of offense, which allows also to explain the complex structure of the offense.[3] It should be added that only if the preceding element of the structure has been fulfilled can the next one be proved. In other words, each subsequent element constituting the structure of the offense must be a logical consequence of the previous one. Taking into account the description of an offense, e.g., under Polish criminal law, it is necessary to distinguish

[1] Statement according to Article 42 Sec. 1 of the Constitution of the Republic of Poland, 1997.

[2] See e.g.: § 1 of the Criminal Code of the Republic of Austria (1974, amended 2015); § 1 of the Criminal Code of Denmark (as of 2005); § 2 of the Criminal Code of the Republic of Estonia (2001, amended 2017); Section 1 and 2 of the Criminal Code of the Republic of Germany (1971, amended 2013); Section 1.1 of the Criminal Code of the Kingdom of Netherlands (1881, amended 2012); Section 2 of the Criminal Code of the Slovak Republic (2005); esp. Article 2 and 4 of the Criminal Code of the Kingdom of Spain (1995, as of 2013). The codes are available on this website: https://www.legislationline.org/documents/section/criminal-codes [Access 22 September 2020].

[3] The structure of the crime is a moot point in criminal law. There are three, four and five-pronged concepts. According to the most extensive (five-pronged) concept, the crime consists of (successively): act (it encompasses both action and omission), prohibited act (in meaning of an illegal act), punishable act (intentional or unintentional is considered at this stage of the structure), reprehensible/shameful act (only if its social harm is higher than negligible) and culpable act.

its two aspects: the subjective aspect (associated sometimes with the *mens rea*) and the objective aspect.

Within the framework of the structure of an offense, the most important are these stages at which there is to consider the perpetrator's mental attitude to his/her acts. At the stage of the punishment of the act (as elements of description of each type of the forbidden act), we are to consider the intentional behavior or the unintentional action/omission. At the stage of reprehensibility, some of these aspects are taken into account when assessing the degree of the social harm. For example, Article 115 § 1 P.C.C. provides that the prohibited act is any behavior displaying the characteristics specified under criminal law as unlawful. Most problematic seems to be in this matter the last element of the offense structure, namely guilt. It depends, in a large measure, on the theoretical understanding of this element, which is also decisive about the subjective aspects by assessment of the guilt or – on the contrary – about perceiving this element in complete isolation from the subjective element of the act. It certainly does not facilitate the task in those cases where some doubts arise as to the possibility of assignment because of the subjective aspects of the offense (mostly if the act was culpable). It seems necessary to clarify how the concept of "subjective aspects of the offence" can be understood in the Polish criminal law – or even in the continental system of criminal law –, and some ways of understanding "guilt" (taking into account the variety of definitions resulting from the ambiguous way of its understanding).

3. Subjective aspects of the offense as the crux of the problem

Subjective aspects of the offense – sometimes called, not correctly, aspects of the offense as to the doer –, generally speaking, refer to the psychic attitude of the perpetrator to the act committed by himself or herself. Their meaning lies in determining whether the perpetrator who committed a forbidden act (including activity or omission), acted intentionally or unintentionally.

In the Polish Criminal Code the definition of the intentional and the unintentional act is contained in Article 9 P.C.C. According to Article 9 § 1 P.C.C.: "A prohibited act is committed with intent when the offender wants to commit it, namely where there is a desire to commit it or an acceptance and the foreseen possibility of committing the act".

Next paragraph of Article 9 states that: "A prohibited act is committed without intent where the offender does not intend to commit it, but does so out of a failure to exercise due care under the circumstances, even though the possibility of committing the prohibited act was foreseen, or could have been foreseen".

Taking into account the above, the willfulness is equivalent to intent. The intent, in Polish Criminal Law, has its own structure (its two sides, i.e., the "intellectual side" and the "voluntative side").

The first one is tied with an awareness of the undertaken behavior, the second one with the decision, or more precisely, with the willingness or the lack of desire with preserved consent to undertake criminal behavior. It allows us to differentiate more than one intention. We distinguish, therefore:

- direct intent – when the offender is willing to commit a crime and is fully aware of what he/she is doing,

- conceivable intent – when the offender is not willing to commit a crime, however he/she accepts such possibility, and does not have a full awareness of the act (it means he/she cannot be sure of every feature of the type of the prohibited act – e.g. he/she knows that he/she kills but is not sure that he/she undertakes his/her acting with a specific brutality).

On the other hand, we assume that the perpetrator acts unintentionally if he/she, without having an intent, commits, however, a forbidden act due to non-compliance with the carefulness required in the given circumstances. An additional requirement, along with such an objectified condition of determining inadvertence, is that the perpetrator has foreseen or, at least, might have foreseen the possibility of commission of the forbidden act.

Obvious questions arise at this point about the evaluation criteria of what is foreseeable by the perpetrator or the criteria to predict the possibility that he/she will violate some rules of prudence required in given circumstances (in terms of some certain worked-out rules of conduct in social life, business etc.). Such evaluation criteria, considered at the level of the description of the type of prohibited act, must have a general dimension. To achieve this, the best solution appears to be a reference to the standard of a model citizen. The pattern of such a citizen is nothing like a typical, average person in terms of intellectual capacity. Is this a correct pattern?

The answer to this question must be negative. It is enough to give an example of a doctor who inadvertently kills the patient or causes heavy damage to the patient's health. In this case, the assessment of whether the doctor violated the medical art rules requires referring to the rules that are binding for professionals and should not be referred to the standard citizen. Thus, such an "average" pattern in a specific situation may require its modification and putting higher expectations on a given person.

Once again, subjective aspects of the offense encompass a mental attitude of the perpetrator to his/her offense. Its importance lies in determining whether the perpetrator of an offense undertook a certain behavior (act or omission) intentionally or unintentionally.

Both intent and the lack thereof constitute a description of the type of a criminal act, therefore they are considered at an abstract level, in the sense that they have to occur, and they are characterized by external behavior. In practice, it means that they need to be proven to the perpetrator. There should not be any doubts that proving the aspects of the offense as to the doer is possible only on the basis of external circumstances accompanying a deed, e.g., whether he/she planned the event or foresaw its course. This is possible when a person is of a sound mind.

On the other hand, apart from these aspects, when characterizing imputation of responsibility, guilt must also be considered (it is not the same as a statement that a person is declared to be blamed for his/her act because the last one is kind of the statement while proceeding).

Contrary to the subjective aspects of the offense – which are part of the description of the forbidden act and are covert by every provision constituting a type of offense, like killing, robbery etc. (e.g., Article 148 and 280 P.C.C. – types of the mentioned forbidden acts.) – guilt does not describe the type of offense. It is also worth adding that most

typified prohibited acts are intentional. It is not often that there are also the types that have been created as if they were their "mirror reflection" because they describe the same, however, unintentionally undertaken act (e.g. Article 155 P.C.C.: involuntary manslaughter).

Culpa is a personalized subjective element of the crime's structure. What is guilt (Latin: *culpa*) exactly in our system of criminal law? How to understand this term? It would be difficult to give one correct answer to this question because there is no special provision where it would be explained. Moreover, e.g., some theories on the matter exist in the Polish doctrine of criminal law: psychological theory, pure-normative theory, complex-normative theory and relative theory of guilt.

The first one – the psychological theory of guilt – describes it as a will of the perpetrator (the pursuit of the offender) directed at the forbidden act while preserving awareness (discernment) of the undertaken action, and it manifests itself in the realization of this prohibited act by a particular person. It means that guilt is a psychological process of a person who has committed a crime. Consequently, in a situation where the offender shows a "pathological disturbance in the sphere of consciousness or will (which indicate insanity)", there is no possible culpability (Brzezinska 2007).

In turn, representatives of the so-called the pure normative approach describe guilt as an unjustified impairment of a decision-making process, as evaluated from the socio-ethical point of view (for more about concepts in the Polish legal order see: Glaser 1934, Wolter 1954). Thus, guilt means the allegation of a lack of obeying a sanctioned norm by the perpetrator when such a subordination to the norm can be demanded of him/her. According to this concept, culpability is subjected to certain conditions, which are – apart from being able to recognize the unlawfulness of the act and recognize that there is no circumstance excluding illegality or guilt – also the suitability to be culpable, which is determined by maturity, within the meaning of the Criminal Code, and sanity (Zoll 2016).

There are also proponents leaving the psychological elements in the content of the *culpa* concept. In this approach, subjective elements fulfill a double role. Apart from the features of the description of the type of a prohibited act, they constitute an element of guilt, where they complement the defectiveness of the decision-making process (the allegation of a lack of obeying a sanctioned norm). In this way, guilt draws its meaning not only from the psychic experience of the perpetrator but also from the negative evaluation of his/her will.

The literature has also entertained a need to treat guilt as something of an ontological being, proposing to give it the character of the relation where its *definiens* consists of interdependencies between the defining elements, the basis of which – in a simplified perspective – creates a relationship of the subject with the commission of his/her act at a given time (time of an undertaken behavior).

At this point, however, the most important matter is that an intent, as well as unintentional behavior (as elements of the subjective aspects of the offense) is a completely different stage of the offense from guilt. That ought to be emphasized, especially taking into account the main subject of this paper.

4. "Factual insanity" – why does it rely on insanity and diminished sanity?

At the beginning of further reflections on the issue of the subjective aspects of a crime, it seems advisable to explain the understanding of insanity and diminished sanity as legal states. The reason why this seems to be justified is, first, a reference to what has been mentioned above, in particular to the problem of guilt; and, second, the reason is obvious since "factual insanity" refers to the notion of insanity by definition. This is also the right place to point out that, in principle, all the contemporary criminal justice systems consider insanity to be a precondition of exclusion. Such a principle is also accepted by the Polish criminal legislator.

Accordingly, Article 31 § 1 P.C.C.: "Whoever, at the time of the commission of a prohibited act, was incapable of recognizing its significance or controlling his or her conduct because of a mental disease, mental deficiency or other mental disturbance, shall not commit an offense". This regulation provides an exception to the rule of sanity and defines the essence of this state in the criminal law sense. In accordance with Article 31 § 2 P.C.C.: "If at the time of the commission of an offense the ability to recognize the significance of the act or to control one's conduct was diminished to a significant extent, the court may apply an extraordinary mitigation of the penalty". The second provision refers to diminished sanity, which essentially covers the intermediate cases, including neither insanity nor full sanity.

According to Article 31 § 3 of the Polish Criminal Code: "The provisions of § 1 and 2 shall not apply if the offender put himself into a state of inebriation or a state of intoxication resulting in exclusion or limitation of his sanity if he had anticipated or could had foreseen it".

This provision gives rise to the conclusion that the perpetrator who was drunk at the time of the act is not treated as insane or with reduced sanity, therefore he/she carries responsibility for the offense (i.e., he/she is responsible under the normal rules of criminal liability).This means that he or she is responsible in the same way that anyone who was free from mental disturbances at the time of committing a crime, although from the point of view of his/her actual mental state, in fact, he/she had a mental disturbance at the time of the act. The requirement of the foreseen refers to the possibility of the offender to foreseen results of the state of intoxication, not to the prediction of committing a crime. To mention is that a "state of inebriation" has been defined for the purposes of this Code in Article 115 § 16 P.C.C.[4]

The system laid down in Article 31 § 3 P.C.C. is also an exception to the rule that the perpetrator, who at the time of the commission of a prohibited act, due to mental disease, mental deficiency or any other mental disturbance was incapable of recognizing its significance or controlling his/her conduct shall not bear criminal responsibility. In terms of a real mental state, however, we can sometimes compare such an offender to the insane perpetrator or to the one who was *tempore criminis* in a state of diminished sanity (factual insanity and factual diminished sanity). It means that Polish legislator creates something like "a fiction" on the responsibility of the offender in a state of inebriation.

[4] According to Article 115 § 16 P.C.C., inebriation is a state when: 1) the alcohol content in the blood exceeds 0.5 per mille or effecting in concentration exceeding such level, or 2) the alcohol content in 1 dm^3 of the exhaled air exceeds 0.25 mg or results in concentration exceeding this level.

It follows from the fact that the perpetrator, who knows the effects of alcohol consumption and still does not resign from its use, causes voluntarily and consciously his or her diminished sanity or insanity (because of that it is also called "culpable insanity or diminished sanity").

Such a regulation may arouse a lot of questions, especially when it comes to assessing whether basic elements of the offense structure there have been fulfilled.

5. The subjective aspects of the offense – questions concerning factual insanity and diminished sanity

In all modern criminal systems of justice, the insanity of the perpetrator is recognized as a precondition of exclusion. As a consequence, the person who commits a crime while being in a state that will be evaluated by forensic psychiatrists as a state of mind which prevents normal perception, behavior, or social interaction cannot bear criminal responsibility. Further, relying on the opinion given by experts in psychiatry, the independent court usually rules on insanity.[5]

Nonetheless, a question of the subjective aspects as well as their influence on liability in a case of insanity is still open, and subjective aspects are in fact a part of the description of the type of prohibited act. As a consequence, they need to "occur" in every case, and it does not matter if it is an insane or sane perpetrator. The matter is most complicated in the case of the assessment of the subjective aspects of a prohibited act if the perpetrator's sanity is doubtful, because in these situations the court cannot resign from punishing the perpetrator on the grounds of lack of the elements of the offense (he/she commits a crime in the sense that it is assumed guilt of the perpetrator, at leastas long as he/she will not be considered insane).

We all are aware that sometimes it is difficult to determine these aspects even in relation to the perpetrator who, *tempore criminis*, was sane (and was not intoxicated). Normally, the aspects of the offense as to the doer (subjective aspects) are based on the characteristics of the behavior itself. In the case of insanity of the perpetrator, this issue is even more difficult to determine, because the psyche of a person with mental disorders cannot be compared with requirements we used to set to the sane perpetrator. The issue of assessing the subjective aspects of the assignment becomes even more valid in those criminal law systems that provide for reduced penalties. In this case, the fault of the perpetrator is not excluded. Thus, it is justifiable and necessary to determine whether the perpetrator, in a state of diminished sanity, committed a crime with or without intent, and it is also necessary to determine the degree of guilt.

[5] It orders sometimes to apply a precautionary measure in the form of psychiatric treatment. The rules and procedure for placement in such a facility are regulated by the laws in force in the given country. For example, the Polish Criminal Code, in Article 93g section 1 and 2, provides that the court orders placement of the insane perpetrator in an appropriate psychiatric facility if there is high probability that he/she will commit another prohibited act of substantial social harmfulness in relation to his/her mental illness or mental impairment. However, while sentencing the perpetrator with diminished sanity to the penalty of deprivation of liberty without the conditional suspension of its enforcement, the penalty of deprivation of liberty for 25 years or the penalty of deprivation of liberty for life, the court orders placement of the perpetrator in an appropriate psychiatric facility if there is high probability that he will commit a prohibited act of substantial social harmfulness in relation to his mental illness or mental impairment.

These problems become even more apparent in the case of the perpetrator who *tempore criminis* was in a state of inebriation or intoxication. His or her forbidden act doubtlessly becomes a crime (the perpetrator not always and not necessarily acts, however, intentionally). In every case he or she is also guilty of the committed crime. On the other hand, taking into account the state of health and mind of such a perpetrator, we could conclude that quite often his/her current state, from the psychopathological point of view, should justify treating him/her, according to criminal law, as an insane offender or someone who had diminished sanity at the time of committing the crime. Such a method of deduction results from the action of alcohol and other intoxicating substances. It would be impossible to argue that consumption of ethyl alcohol causes reactions that, if only based on the psychological criterion of insanity, i.e., the ability to recognize the meaning of an act or to control one's behavior, would undoubtedly justify insanity or at least diminished sanity. From a medical point of view, every intoxication includes distortions both in the intellectual sphere, referring to the possibility of recognizing the meaning of an act, as well as in the volitional sphere, related to the ability to direct one's behavior in a manner adequate to this diagnosis (Kopera *et al.* 2010). Such a reaction to the use of a narcotic substance results from its inhibitory action, causing impairment, slowdown and disorganization of the central nervous system. Research into the structure and functioning of the brain under the influence of alcohol provides solid evidence that this substance is responsible for changes in the functioning of synaptic connections in some areas of the brain – mainly the cortex of the frontal and temporal lobes (Mechtcheriakov *et al.* 2007, Zahr and Pfefferbaum 2017).

Scientific research clearly confirms the changes in the bioelectric activity of the brain, and the EEG record after the consumption of alcohol shows the release of the alpha frequency, increasing its amplitude; single waves appear in it. These findings seem to confirm numerous clinical studies. One of them shows, for example, that even the harmful use of alcohol comes to atrophy changes in the cerebral structures (cerebellar atrophy, cerebral cortex, mainly around the frontal and temporal lobes) (Pollock *et al.*1983, Kocur1991). As a consequence of the above, there is a specific compensatory reaction counteracting the inhibitory effects, which in turn is the reason for disturbances in the area of proper response to stimuli by a person subjected to alcohol. The course of typical drunkenness is characterized by psychosomatic reactions, which in the "model" approach led to distinguishing certain stages of such drunkenness.[6]

It might be worth noting that the described model scheme of the course of drunkenness concerns only this form of intoxication which (from the psychopathological point of view) does not show any deviations (known as simple, ordinary or uncomplicated intoxication).

In this context, it should not be surprising why regulations concerning the perpetrator in a state of intoxication have been embraced by the same provision as insanity and diminished sanity (Article 31 P.C.C.).

However, assuming the optics suggested above, it seems natural to ask already a question about the criteria of assessment of the subjective aspects of an offense by the

[6] One of the first criminologists that classified drunkenness was Elvine Morton Jelinek, who presented the four stages of alcoholism development (Jelinek 1946).

offender being in a state of intoxication. In other words, it is necessary to take into account that he or she, while committing the crime, had been, in fact, in a state that could be compared to that of the perpetrator who was insane (or can be observed if the perpetrator had diminished sanity) *tempore criminis*. As a result comes the question: how to assess the psyche of such a person for the purpose of attributing a crime to him/her?

The use of any even generally abstracted standard "pattern of a citizen", or – even more – the definition of intention in the case of an insane person or of diminished sanity is impossible. It is impossible to compare the state of the psyche of a healthy person with that of a person suffering from any mental disorder.

The assessment of the subjective aspects in relation to the perpetrator in a state of inebriation or intoxication needs to include in addition the evaluation of his or her guilt according to provisions regarding the culpa principle. In the latter, the perpetrator's guilt is something like a *quasi*-culpa, meaning that the legal criteria of the assignment of subjective aspects have not been fulfilled. Neither a psychological nor a normative theory of the guilt would allow to attribute a crime to a person in a state of inebriation or intoxication. In this case, therefore, "moral culpa" or "social culpa" are often mentioned in order to stress the harmfulness of the perpetrator's behavior (Buchala 1998, Kaczmarek 2005). The fundamental problem remains unresolved. It is the fact that the perpetrator, by his own action, has caused himself/herself to be in a state which would, in fact, not allow him/her to be considered fully imputable. This problem can be seen in a similar way with regard to those criminal law systems where the perpetrator is responsible for the separate offense of getting into a state of intoxication and committing another crime (e.g. Section 323a of the German Criminal Code).

However, it should be clearly stated that there is no solution to the problem of assigning the subjective aspects of a crime when it is committed by the perpetrator while intoxicated. We assign subjective features of a criminal offense theoretically regardless of the actual mental state of the perpetrator. This is a logical consequence of the strict separation of the subjective side of a criminal act from guilt. Meanwhile, in this case, the mental state of the perpetrator is not the same as that of the perpetrator with undisturbed mental activities. In this regard, the proposal was made to assume in advance that the perpetrator committed the prohibited act inadvertently (Lachowski 2006). The justification for this is the adjudication in favor of the perpetrator. In my opinion, it is, however, incorrect, because it would lead very often to release the perpetrator from liability, e.g., when there is no unintentional type of offense in the criminal code – like in the case of fight and beating in the Polish Criminal Code.

Another way to solve the above-mentioned doubts is to resign from determining the subjective aspects of the prohibited act. This would completely redefine the principles of criminal liability in continental criminal law and it is impossible in the light of the current regulations of the Code, as well as accordingly *nullum crimen* principle.

Finally, the third, most commonly accepted legal solution to the dilemma associated with the attribution of subjective aspects is the assumption (hypothetical, based on a certain fiction) that the evaluation of these elements is possible on the basis of the characteristics of past events in an outside world, that is, only on the basis of events occurring in the objective reality is it possible to define if the offender shall be responsible

for intentional or unintentional act, and further clarification, for what kind of intentional or unintentional behavior he or she should be sentenced (Golonka 2013).

In this matter, assigning guilt to the perpetrator being in a state of intoxication would only be possible by the assumption that, before launching himself or herself into this state, he/she foresaw or could have foreseen that he/she would have the ability of perception disrupted. Thus, he/she should have foreseen that the ability to properly recognize the importance of the act and to direct his/her conduct would be reduced. It is a kind of fault on the foreground of an offense justifying criminal liability. Therefore, the subjective elements of a crime should be evaluated from the point of view of the objectively observable behavior traits. Based on this, the hypothetical "will" of the perpetrator and his or her awareness of the particular offense must be reproduced. This point of view is reasonable; however, it still appeals to fiction.

Before the summary, it would be worth pointing out that an interesting construction leading to the justification of criminal liability of the perpetrator for a crime involving getting into a state of intoxication is foreseen by some European criminal codes, e.g., German, Austrian and Swiss Criminal Codes. For example Paragraph 323a of the German Criminal Code (*das deutsche Strafgesetzbuch* – StGB) provides that whoever intentionally or negligently get intoxicated with alcoholic beverages or other intoxicants, shall be punished with imprisonment for not more than five years or a fine, if he/she commits an unlawful act while in this condition and may not be punished because of it because he/she lacked the capacity to be adjudged guilty due to the intoxication, or this cannot be excluded. Section 2 additionally provides that the punishment may not be more severe than the punishment provided for the act which was committed while intoxicated (Section 323a, German Criminal Code, 1998). This is a good regulation; however, it may also arouse a doubt, in particular, if we pay attention to the necessity of justifying the subjective side of the offense.

It would be worth putting forward a proposal for a regulation concerning a provision that would regulate the above-mentioned problems, and at the same time it seems that it could be applied in the penal codes of many countries of the continental legal system.

6. Summary and *de lege ferenda* postulates

Summing up, in light of the above-mentioned issues, there is no doubt that the subjective assignment of an offense to such a perpetrator of a prohibited act, in which *tempore criminis* had disruptions of mental functions, is a highly problematic issue. If one looks at this issue from a psychiatric or psychological point of view, one can come to the conclusion that it is even not possible to have criminal liability in such a case. In relation to the insane perpetrator of a prohibited act, it is obvious that this person cannot hold responsibility under the rules provided for the perpetrator who did not show any mental disorders during the act. Therefore, in contemporary criminal law systems, it is assumed that such a person is not punished because he or she cannot be attributed blame.

The criminal law assessment of the perpetrator's behavior in attempting to assess whether he/she committed this act deliberately or unintentionally may be slightly more difficult. It seems not possible to carry out such an assessment, at least not from the perspective of the requirements set by criminal law. In this case, what seems most appropriate is to abandon the attribution of subjective characteristics and make instead

a purely objective assessment of the behavior (i.e., its assessment from the perspective of the objective characteristics of the prohibited act described in the criminal law prescription). Such a "reduction" of the legal assessment may find its justification in the fact that the perpetrator is ultimately not charged with committing a crime as well as in the fact that he or she may not be sentenced to the crime. The proceedings against him or her are discontinued and sometimes a protective measure is given in the form of placement in a psychiatric institution.

These issues look completely different in relation to the perpetrator in a state of factual insanity or diminished sanity, i.e. the state that – from the point of view of the psychological criterion – could correspond to the characteristics of insanity or diminished sanity; however, because this has been caused by the perpetrator, it enforces treating his/her act as a crime with all its consequences in the sphere of punishment. Such a person, if putting himself/herself into a state of inebriation or intoxication, causes the consequences in reality by himself/herself, in the form of reduction – even to a large extent – of the ability to recognize the meaning of an act or to direct his/her behavior or, sometimes, in the form of complete abolition of these abilities. Moreover, it is not uncommon for the court to take into account the state of intoxication as an aggravating circumstance, which is justified by the considerations of the criminal policy, as well as the social and moral reprimand of committing a crime in a state of intoxication. What is more, as indicated above, the effects of alcohol and other intoxicants are often the main factor that leads to acts of violence. This is confirmed by statistics. Using the national data of the Polish police, it is clearly visible that almost half of the murders were committed by a perpetrator that had been in a state of intoxication during these acts (Polska Policja 2020a); almost 55% of all acts of domestic violence had their origin in problems with alcohol of their perpetrators (Polska Policja 2020b). The problem of road accidents committed by drunken perpetrators is still valid.[7]

In this state of affairs, punishment is unobjectionable.

Therefore, a lack of regulation that would justify the basis of criminal liability of such a person and only endorse the punishment (for example, that he would incur more severe criminal liability) is certainly not sufficient.

First of all, it is necessary to postulate the introduction of appropriate regulations in those criminal law systems in which there are no appropriate regulations in this regard (especially those based on the continental legal system).

However, it raises the question of the wording of such a provision. In other words, how to solve a kind of "collision" of law with psychopathology in such a situation? What would be the best way to precise a prescription that may be given to the court, which is obliged to assign the subjective elements of a crime if the perpetrator was intoxicated *tempore criminis*?

[7] Vissers *et al*. 2017, pp. 26–27. Police in Poland, according to official statistics in 2018, stopped 104,664 people on "double gas" at the wheel – that is 4,654 fewer than in 2017. Drunks caused 1,550 accidents (82 fewer than in 2017), which killed 169 people (37 fewer than in the previous year), and 1,904 people were injured (64 fewer than in 2017). The drivers who were drunk caused 7,915 collisions last year, which is 15 more than it was, for example, two years earlier. See Polska Policja 2018.

The analysis of the title problem leads to the conclusion that guilt (i.e., a culpa) of such a perpetrator will remain only pure fiction as long as we demand the coincidence of deed and guilt. Guilt, recognized as an element determining the structure of crime – whether from the perspective of psychological theory of guilt or its normative theory –, will not occur during the act in this case.

The reprehensibility of the undertaken behavior results from the disrupted ability to recognize the essence of the act and to have an adequate behavior as a consequence of previously using the intoxicating substance, which somehow displaces these abilities (according to its properties – especially the type of substance, its dose, the method of application, individual characteristics of the person etc.). This reprehensibility transferred to the criminal law field is expressed in the culpable offense because of voluntary and non-pathological assault in such a state (it is clear that cases of atypical intoxication should be assessed in the context of legal insanity or diminished sanity). Therefore, the guilt precedes the act, and the coincidence of the offense and guilt is replaced in this case by the reproach of getting intoxicated. Such *quasi*-guilt, as if it were somewhat on "the foreground" of a prohibited act, seems to be legally justified. This, however, requires a relevant provision that would penalize it as a separate offense.

Its essence is committing a different type of a prohibited act (which means realization of the objective features of this type), from which it derives the statutory threat of the penalty but committed by a perpetrator who was intoxicated (which is the basis for legitimization and justification of guilt and punishment). This provision could take the following wording (based on the well-known systematic of the Criminal Code covering articles and paragraphs):

> Article (...) Paragraph 1: Under the rules provided for in this Code, shall be responsible for a criminal act committed in a state of intoxication, whoever put himself in this state and wanted, or at least consented to it, being aware of the intoxicating action of the substance used that in this state he will commit a prohibited act.
>
> Paragraph 2: The court sentences on the basis of a provision providing for a punishment for a criminal act committed in a state of intoxication.

Such a provision allows the conclusion that the guilt for a specific act is in some way replaced by the guilt for causing psychological distortions in circumstances of full awareness of the impact on the CNS of the substance, and thus the person is aware of the possibility of undertaking action being in such a state that remains to be seen as a punishable act. It is worth noting that the postulated solution departs from the use of the nomenclature proper to insanity or diminished sanity, i.e., it does not refer to the term: the ability to recognize the meaning of an act or direct one's conduct. The purpose of this is to clearly separate these states from the state of intoxication (thus not making it the state of factual insanity or diminished sanity).

Left to verify is whether the action that has been undertaken by the perpetrator who was in a state of intoxication was intentional or unintentional. My proposal meets this expectation. It allows us to assume the intentional action while committing the prohibited act by the offender in a state of intoxication. This was expressed in the proposal of the provision that constitutes the ground for justifying bringing the perpetrator to criminal liability. Thus, the perpetrator, knowing the narcotic effect of the substance used and, despite it, voluntarily using this substance, needs to foresee that in

such a state he/she may undertake an action or omission for which he/she will not have the awareness (i.e., a full recognizing of the meaning of an act), as he/she would have if he/she had remained sober. Therefore, the perpetrator agrees at least that he/she can commit an act in such a state that will even be a crime.

The above-made proposal enables justification of the responsibility of the perpetrator for an offense committed in the state of intoxication without the need, on the one hand, to refer to the criteria of sanity assessment. They, as it has already been said, cannot be created in general. All the more, they cannot be based on those that are taken into account in the case of "non-culpable" insanity or diminished sanity. On the other hand, it prevents the omission of such a provision in penal codification. The lack of it is not right. Does it lead to the consolidation of a legal aspect (related to criminal responsibility) and psychopathology in one point? The answer to this question must remain open, and thus there may be a way to take it on the international forum. It seems, however, that looking for this "common point" could be possible only if it were a state of intoxication as such, with all its consequences in the form of disruption of mental functions. However, if this "point" ought to be confronted as a disturbed psyche due to the use of a substance of intoxication with demand on the criminal-law assessment that someone is capable of bearing responsibility, such a convergence will always be lacking.

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