

# Reduced Punishment for Murder in Israel: What Constitutes a Severe Mental Disorder?

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Section 300/A/A of the Israel Penal Law, amended in 1995,<sup>1</sup> deals with reduction of punishment for severe mental and/or intellectual disturbances insufficient to warrant a plea of not guilty by reason of insanity. The present version of the amendment allows the court total freedom in determining punishment, thereby creating a plethora of court decisions. In this article, we have attempted to provide an understanding of the mutual responsibility of the psychiatrists and the court, through presentation and discussion of several cases in Israel in which punishment was or was not reduced for psychiatric reasons. In addition, suggestions are proposed to enhance the clarity and pertinence of the amendment to specific clinical conditions.

Article 19 of the Israel Penal Law follows English tradition, defining legal responsibility according to the *McNaughton* cognitive tests, and states that:

No person will be considered responsible for a criminal act if he was incompetent at the time of its execution due to a disease which affected his sanity or a defect in his mental capacity to understand what he did or to know that it was forbidden to behave as he did.<sup>2</sup>

In 1994, the Penal Law was modified, and clause 34 § 8 was added, which states that:

No person will be held responsible for his act if, at the moment of execution, due to a disease which affected his mind or due to

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a defect in his intelligence, he lacked the necessary capacity to understand what he was doing or what is forbidden in his act and restrain himself from committing the act.<sup>3</sup>

Combining both the psychiatric and legal worlds, the law grants full acquittal from criminal responsibility to a mentally ill person if: “the defendant had been ill at the moment of committing the act. He is thus not punishable.”<sup>4</sup> Clause 34 § 8 of the Israel Penal Law, 1994,<sup>3</sup> includes the *M’Naughten* concepts and also the defense of “irresistible impulse,”<sup>5–7</sup> expressing the predominant opinion of the professionals<sup>8</sup> and the courts.<sup>9</sup>

Psychiatric experts continue to assist decision makers when necessary, taking into consideration that not all diagnoses classified by the medical community as mental disorders are conceptualized as exculpating diseases by the Israeli Supreme Court.<sup>10</sup>

## Diminished Criminal Responsibility

The conflict of treating versus punishing mentally ill offenders has been ongoing for many years.<sup>11–14</sup> In many countries, the concept of partial responsibility or diminished capacity is currently used as a defense. To date, Israel’s legal system does not contain a legally sanctioned concept of diminished criminal responsibility.

In the past, the courts have expressed the opinion that there is a need to change the law to include the concept of diminished criminal responsibility in murder cases.<sup>15,16</sup> This approach, although supported by part of the medical community,<sup>17–19</sup> has never been accepted by most medical professionals in Israel.

In the United States, Congress abolished the diminished responsibility defense in the federal courts in 1984, after the attempted murder of President Ronald Reagan. The defense still exists in many states; however, its legal characteristics vary from state to state.<sup>20</sup> The subject is controversial and is still awaiting a fully satisfactory solution.<sup>21–23</sup>

U.S. federal law establishes a scale of punishment that the court must use in determining punishment for each crime. Mitigating circumstances, such as presence or absence of previous crimes, the gain accrued from the crime, and cooperation with the authorities can be taken into account in determining a sentence. Among such circumstances, mental disturbance is included in the U.S. Sentencing Guidelines as mitigation for reduced punishment in crimes that do not involve violence.<sup>24</sup> Accordingly, provisions for reduced punishment are not applicable in the crime of murder.

However, the sentencing guidelines allow mitigation of punishment if the court finds, in an unusual case, that the guilty person behaved in a manner significantly different than defendants in most cases of the same type to which the scale refers.<sup>25</sup> Because the U.S. Sentencing Commission apparently did not take into account mitigating or aggravating circumstances when determining the federal scale of punishments, implementation of this guideline requires definition of these circumstances to enable sentencing different from that delineated on the scale. Although the guideline does not explicitly refer to mental disturbances, these are recognized and used in cases of “unusual” behavior. The case of *U.S. v. Working*,<sup>26</sup> in which the defendant was found guilty of murder, demonstrates this point. Among the considerations taken into account by the court was an opinion that the guilty party suffered from significant depression, emotional stress, and major depressive disorder.

### Reduced Punishment in Murder Cases in Israel

The 1995 amendment of the Israeli Penal Law<sup>1</sup> deals with cases in which murderers may be sentenced to lesser punishment. According to clause 300/A/A, it is possible to impose a lesser degree of punishment than the one fixed by law if the offense was committed when the defendant had a severe mental disorder or intellectual defect, causing substantially diminished capacity (but not to the extent

of total lack of capacity, as described in clause 34 § 8<sup>3</sup>).

In Israel, trials are held before professional judges rather than a jury. The judges hear and examine the evidence, adjudge innocence or guilt, and determine the appropriate punishment, according to the law and the circumstances. As a rule, severe crimes for which the punishment is more than seven years' imprisonment are adjudged in the district courts, and in specific cases, including and especially cases of murder, they are heard by a panel of three judges. District court appeals are heard by the Supreme Court, which hands down decisions that prescribe the law for the lower courts.<sup>27</sup>

Since the implementation of the 1995 amendment,<sup>1</sup> reduction of punishment has been requested in several cases, even when the offense was committed before the introduction of the amendment, but the sentence had not yet been handed down.

### Case Descriptions

Following are some Israeli Supreme Court decisions in response to appeals of sentences for severe offenses.

#### Case 1

N.A.<sup>28</sup> was found guilty of stabbing his wife to death in the course of a quarrel during which she had attacked him. After the murder, N.A. stabbed himself and tried to jump from a second-floor window.

The Israeli Supreme Court did not accept the defense plea of not guilty by reason of insanity or the contention that he deserved a reduced punishment due to reduced capacity, as described in Section 300/A/A of the Penal Law.<sup>1</sup> Moreover, the prosecution presented a medical report regarding N.A. that stated that the defendant did not have a mental disorder that diminished his capacity to restrain himself. The appeal of the defense was rejected.

#### Case 2

I.S.<sup>29</sup> was convicted of a murder committed for nationalistic motives. He was diagnosed as having a personality disorder with immature, obsessive, paranoid, and grandiose traits. The district court ruled that the personality disorder of the defendant had not interfered with his capacity to decide to kill and had not affected his capacity to understand his acts or to forecast their possible tragic results. The Israeli Supreme Court decided that the defendant did not

have a severe mental disorder that could justify reduced punishment.

### Case 3

T.D.<sup>30</sup> was a 40-year-old married man and father. When a 22-year-old woman with whom he had had an extramarital relationship decided to leave him, he burned her to death. In his youth, T.D. had been in a road accident while serving as an army conscript and was subsequently discharged. Since 1976, he had undergone psychiatric treatment for chronic depression, had tried to commit suicide on several occasions, and had become a drug addict.

The Israeli Supreme Court did not accept the request for reduced punishment, and the appeal was rejected.

### What Is a Severe Mental Disorder?

“Severe” is a flexible and relative term.<sup>31</sup> The law does not state that a severe mental disorder is a mental disease. The subject may be analyzed from different perspectives:

1. The intensity of the disorder: Section 300/A/A<sup>1</sup> refers to a mental condition which, although severe, does not reach the level of full insanity. It is possible to infer that clause 300/A/A is intended to include a defendant whose mental disease was in an inactive phase at the moment of committing the crime—for example, a person with chronic schizophrenia with negative symptoms. This category also might include other psychotic conditions that are not always recognized by the courts as mental diseases, such as delusional disorders or borderline personality disorders with brief psychotic episodes.

2. The type of disorder: Early psychiatric classifications listed psychosis, neurosis, emotional disorders, and personality disorders. Psychosis was frequently cited as a useful defense, neurosis almost never, and personality disorders occasionally.

3. Personality disorders: Personality disorder is not recognized as a mental disease by the law,<sup>32,33</sup> but persons with severe personality disorders may suffer profound disturbances in most aspects of life. It is our contention that determining the type of personality disorder is not enough to establish the degree of severity of disturbance, except perhaps in those types that have the potential for developing short psychotic episodes. One useful approach is the three categories of organizational level (high, medium, and low) described by Kernberg.<sup>34</sup> The lowest

level is characterized by a very low threshold of tolerance for frustration and anxiety, poor sublimation capacity, and marked difficulty in impulse control. It also includes severe disturbances of interpersonal relations and instability in self-esteem and regard for others. These individuals find it extremely hard to cope with any separation process and often show inappropriate sexual or aggressive behavior. The Supreme Court has stated: “a personality disorder by itself does not answer the requirements of Clause 300/A/A of the Penal Law.”<sup>35</sup>

4. Organicity: Reduced punishment was meted out for murder to a man who had severe brain damage as a result of a cerebrovascular accident.<sup>36</sup> The expert’s medical report clearly confirmed the presence of marked cognitive deficits without any signs of mental disease.

5. Capacities and skills: Functional capacities, such as the capacity to work and execute familial and social tasks demanded by society, could be useful in determining severity of mental disorder. This could be measured by the Global Assessment of Functioning (GAF) Scale<sup>37</sup> by which the physician may obtain a quantitative evaluation of the general functioning of the patient.

6. Medical history: Information from other sources (workplace, military, family members, medical files) helps weigh the validity of the collected information. When no records are available of previous psychiatric disorders, it is usually harder to convince the court that the defendant has a severe mental disorder.<sup>38</sup>

In conclusion, we have the following understanding of the Israeli Supreme Court’s decisions.

1. The courts do not tend to accept the claim of severe mental disturbance if, among other things, it is not proven that the defendant has a psychiatric history, including psychiatric hospitalizations. They do not tend to recognize a defendant’s claim of a severe mental disturbance that has only recently been revealed.

2. The courts tend to be influenced by a history of psychiatric treatment in their determination of whether the issue is one of a severe mental disturbance.

3. There are circumstances that are so enraging that even when severe mental illness is recognized by the court, it will not consider reducing punishment for reasons of justice or policy.

As of now, there have only been a few appeals in the courts, and no “golden rule” has been established. Moreover, psychiatrists find it difficult to agree on a common definition. More research is needed on this subject.

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