

# Criminal Insanity: Concepts and Evidence

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## 1. Topic and Structure

Rules of law state what is required for legal action—law applies to facts. Rules on criminal insanity define mental states which exclude criminal responsibility. The point made in this article is that the choice of legal criteria for rules on criminal insanity has evidential implications, and that these implications need to be taken into account in the process of making and in the process of applying the law.

This article contributes to the international debate on criminal insanity by presenting an analytical model of possible legal concepts of criminal insanity and by highlighting the evidential aspects of these concepts. The model is illustrated with examples from different jurisdictions, including examples from the Norwegian debate on criminal insanity and the process that led to the amendment of the Norwegian rule on criminal insanity in 2019. The arguments made are general and of relevance to all types of legal regulations on divergent mental states.

In section 2, I show that rules on criminal insanity follow from general principles concerning the justification for punishment. In section 3, I identify different ways to model rules on criminal insanity. In section 4, I show that the choice of legal criteria has important evidential implications, and I discuss how to prove the mental states that different legal criteria refer to. In section 5, I address the regulation of uncertainty of mental states. Section 6 provides a summary of the findings.

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## 2. Justification

The use of punishment can be justified as retribution and as a tool for social policy. The first line of reasoning relies on criminal liability being reasonable and just. The second line of reasoning relies on assumptions concerning the benefits of punishment, including assumptions about how the threat of punishment prevents criminal acts.

Within western jurisdictions, there is a long tradition with a high degree of consensus stating that it is both unreasonable and nonsensical to punish offenders 'of unsound mind'. The justifications for the use of punishment are not considered valid for offenders with no or very limited choice of action. This is reflected in legislation and court practice concerning the requirements for imposing punishment: mental capacity and maturity are prerequisites for punishment. Moreover, we consider sufficient but limited maturity and capacity as mitigating sentencing factors.

The rules on criminal insanity hinge on fundamental questions about responsibility and human rationality, both of which are subject to continuous debate. There is no reason to be optimistic that there will ever be agreement regarding the justifications for punishment, or that a unified understanding of humans as rational actors will be reached. A comparison of insanity rules across jurisdictions makes this ongoing debate evident. When defining who to exempt from criminal responsibility, different jurisdictions rely on somewhat vague and cloudy concepts, and a wide range of formulations are used to pinpoint those considered to be of 'unsound mind'.<sup>1</sup>

In addition to having different underlying values and different understandings of human rationality, jurisdictions differ in their legal systematisation. In some jurisdictions, for example in Norway, the question of sanity is handled as a primary condition for criminal responsibility. In other jurisdictions, such as the U.S., a claim of criminal insanity is understood as a possible defence.

## 3. Conceptual Perspective

### 3.1 Introduction

Legal rules can be categorised in different ways, one of which is to differentiate between legal criteria based on their characteristics. In the following, I distinguish between different legal criteria for criminal insanity by identifying features of importance for the satisfaction of those criteria.

<sup>1</sup> For a comprehensive analysis of the law in Denmark, Sweden, Finland, Germany, England, the U.S. and in International Criminal Law, see Official Norwegian Report NOU 2014:10, Criminal Capacity, Expertise and Societal Protection, English Translation, Excerpts, chapter 7. The author was, together with Nils Gunnar Skretting and Anne Wie, secretary of the commission that delivered the report.

To apply most rules on criminal insanity, several criteria have to be fulfilled. In this article the focus is narrower, as the rules are broken down and features of the criteria are singled out. The purpose is to identify characteristics of these criteria, and not to present rules on criminal insanity.

The conceptual characteristics are clarified to ensure a point of departure for the discussion in section 4 concerning the evidential consequences of choice of criteria. Thus, the conceptual advantages and disadvantages of different criteria are not discussed in light of the justifications or ontological positions regarding human action addressed in section 2.

The clarification starts with the dichotomy between legal criteria with ‘medical reference’ on the one hand, and legal criteria with ‘non-medical reference’ on the other. The former refers to a group of criteria that make reference to categorisations in medical diagnosis systems or to other medical concepts, discussed in section 3.2. General features of this group are identified in section 3.2.1, and within this group I make further distinction between criteria referring to specific diagnoses and criteria referring to abstract diagnoses in section 3.2.2.

Criteria with non-medical reference rely on more ordinary and widespread understandings of mental illnesses and are discussed in section 3.3. Within this group, I distinguish between criteria formulated as legal standards, addressed in section 3.3.1, and criteria referring to plain value judgements, addressed in section 3.3.2. The former are discussed in general in section 3.3.1.1, and then in more detail as referring to specific, abstract and disputed mental phenomena in section 3.3.1.2.

Finally, in section 3.4 I discuss the strategy of combining different criteria to define those of ‘unsound mind’. This is addressed in general in section 3.4.1, and in light of the Norwegian discussion on criminal insanity regulations that resulted in an amendment of the Norwegian rule on criminal insanity in section 3.4.2.

## *3.2 Medical Criteria*

### *3.2.1 In General*

Legal criteria can refer to medical concepts and use these as tools to define and identify legally relevant mental states. This is useful since you ensure a concept based on research and clinical experience, developed over time and with a great degree of consensus.

Today, most medical concepts will be rooted in a medical classification system, primarily ICD-10 or DSM-5.<sup>2</sup> These medical diagnostic norm systems are similar in

<sup>2</sup> International Statistical Classification of Diseases and Related Health Problems 10<sup>th</sup> version by the World Health Organization, and Diagnostic and Statistical Manual of Mental Disorders 5<sup>th</sup> version published by the American Psychiatric Association.

structure to judicial norm systems. The medical systems set out terms for diagnoses, and the law sets terms for legal effects. In both systems, you find conditions for consequences that ensure predictability, equal treatment and the possibility for control—features that make both systems rational.

However, the requirements and intentions underlying the systems differ in substance. Medical diagnosis systems are developed for health purposes, while the judicial system is developed to regulate society. Hence, the definitions of the medical system have no bearing on whether there should be legal consequences attached to specific diagnoses.

This substantial and functional difference between the systems is addressed in the U.S. classification system for psychiatry (DSM-5):

*[I]t is important to note that the definition of mental disorder included in DSM-5 was developed to meet the needs of clinicians, public health professionals, and research investigators rather than all the technical needs of the courts and legal professionals.<sup>3</sup>*

In other words, as a starting point there is no connection between the medical system and the judicial system, and it would be a result of a pure coincidence if a medical concept answers the societal need for a legal regulation.<sup>4</sup>

### 3.2.2 Specific or Abstract Reference

The characterisation of something as ‘specific’ indicates that it can be identified, detected and perceived. Hence, rules on criminal insanity which refer to diagnoses or diagnostic groups in a diagnostic system, or to otherwise pure medical concepts, can be said to have *criteria referring to specific diagnoses*. The Norwegian Penal Code section 20, first paragraph letter b, has a specific reference:

*‘To be liable for punishment the offender must be accountable at the time of the act. The offender is not accountable if, at the time of the act, he/she is [...] psychotic [...].<sup>5</sup>*

The rule refers to the specific medical condition of being psychotic. Neither of the medical systems DSM-5 or ICD-10 define the concept ‘psychotic’. The idea that certain disorders have a psychotic nature is, however, a clearly understood and has a long tradition of use among psychiatrists,<sup>6</sup> and there is a large degree of consensus in

<sup>3</sup> DSM-5 (2013) p. 25.

<sup>4</sup> Moore, The quest for a responsible responsibility test: Norwegian insanity law after Breivik, *Criminal Law and Philosophy* 9(4) (2015), pp. 651–652.

<sup>5</sup> LOV-2005-05-20-28 om straff (Penal Code), unofficial Lovdata translation. The law has recently been amended and the King in the Council of State has sanctioned the amendment (21 June 2019), but the amended rule is not yet in effect. For a discussion of the amended version of the rule, see section 3.4.2.

<sup>6</sup> Moore (2015), pp. 665–657.

modern psychiatry as to which abnormal conditions are to be considered as psychosis illnesses. This is also evident from the proposal for the new ICD-11, where these disorders are distinguished from non-psychotic disorders and put under the heading ‘Schizophrenia or other primary psychotic disorders.’<sup>7</sup>

Even though the starting point for this category of criteria is the reference to a specific medical diagnosis, the precise content of the rule requires further clarification through legal interpretation. The interpreter must then ensure that the rule is not applied either more widely or narrowly than the purpose of the rule implies.

For example, in the preparatory works to section 20 first paragraph letter b of the Penal Code, ‘psychotic’ was understood according to the medical concept, but there was still an intended difference between the legal concept and the medical concept. ‘Psychotic’ in the Penal Code was to be understood as psychotic symptoms of considerable severity. This is different from the concept of psychosis used in medicine, which includes states of mind with less severe symptoms. As such, the judicial concept of psychosis was narrower than the medical concept.<sup>8</sup>

Legal rules with criteria that refer to the diagnosis system as a whole, rather than to a particular diagnoses or diagnoses groups, can be said to have *criteria referring to abstract diagnoses*. The characterisation of something as abstract indicates that it is not possible to identify and single out specifically; it is, rather, a thought-based concept of meaning.

Such criteria differ from criteria referring to specific diagnoses in the number of mental conditions referred to. However, it is a question of systematisation where the line between the two types of criteria is drawn. It is, for example, possible to define a reference to psychotic disorders as an abstract reference, since the concept of psychosis includes several different diagnoses.

An example of a rule with a criterion referring to an abstract diagnosis, is the M’Naghten rule from England:

*[T]o establish a defence on the ground of insanity it must be clearly proved that, at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong [...]*<sup>9</sup>

The concept ‘disease of the mind’ is wide and is to be understood as referring to mental states that qualify as diseases according to scientific studies, diagnostic manuals and medical practice in general.

<sup>7</sup> ICD-11-6.

<sup>8</sup> See Grønning, Haukvik, and Melle, Criminal Insanity, Psychosis and Impaired Reality testing in Norwegian Law, *Bergen Journal of Criminal Law and Criminal Justice*, 7(1) 2019, pp 27-59.

<sup>9</sup> R v. M’Naghten (1843), 10 Clark and F 200; 8 ER 718.

### 3.3 Non-Medical Criteria

#### 3.3.1 Legal Standards

##### 3.3.1.1 In General

Most legal rules that attach legal consequences to mental conditions rely on conventional understandings of psychological abnormalities without reference to strict medical concepts. They typically reflect ordinary and widespread perceptions of humans as rational actors, and they regulate different types of non-rational behaviour.

In general, there will be an overlap between such understandings of mental deviations and what is reflected in medical diagnosis systems, even though the non-medical understandings are normally vaguer. From a legal perspective, however, the point is that a rule relying on a conventional understanding refrains from the use of medical diagnoses to clarify and limit the rule.

Such rules can be seen as legal standards, which implies that the legal criteria are often vague and open to factual changes and value-based interpretation. The exact content of the legal concept often needs to be clarified and updated in court practice. In other words, such criteria differ from criteria referring to diagnoses by being more open to the kinds of mental illness that will qualify under the rule.

The Finnish insanity rule requires a ‘mental disorder’, which is a concept to be understood in accordance with the terminology adopted in the Finnish mental health care legislation, and includes psychotic conditions.<sup>10</sup> The criterion is, however, not fully tied to medical concepts, and it will be sufficient to rely on non-medical understandings of abnormality to apply the rule. In the preparatory works, it is specifically stated that the criterion is not to be understood medically or on the basis of medical diagnosis systems, but according to its ordinary meaning in everyday language. This is to prevent ‘differences between various schools of psychiatry from influencing the deliberations of the courts.’<sup>11</sup> At the same time, it specified that this does not imply a complete departure from ‘the medical-legal understanding of the terms.’<sup>12</sup>

Another example of a rule with criteria that refers to a non-medical concept is the criminal insanity rule in section 20 of the German Penal Code:

*‘Any person who at the time of the commission of the offence is incapable of appreciating the unlawfulness of their actions or of acting in accordance with any such appreciation*

<sup>10</sup> See chapter 3, section 4, of the Finnish Penal Code, Finnish Mental Health Act of 14 December 1990 No. 1116 and Finnish Government Proposition No. 44/2002 to Parliament, p. 62 (RP 44/2002 rd: Regeringens proposition till Riksdagen med förslag till revidering av lagstiftningen om straffrättens allmänna läror).

<sup>11</sup> Finnish Government Proposition No. 44/2002 to Parliament, p. 62.

<sup>12</sup> Ibid.

*due to a pathological mental disorder, a profound consciousness disorder, debility or any other serious mental abnormality, shall be deemed to act without guilt.*<sup>13</sup>

As can be seen, the rule starts with the criterion ‘pathological mental disorder’, which refers to a concept that includes various psychotic disorders of both organic and non-organic origin, but this medical criterion is complemented by ‘other serious mental abnormality’, a non-medical concept that encompasses a group of mental states not subject to medical categorisation.

### 3.3.1.2 *Specific, Abstract and Disputed Reference*

Legal standards can be more or less specific in their description of the mental entities they refer to. The above-mentioned criteria in the Finnish and German rules both have an *abstract reference*, but in the same rules you also find criteria with *specific reference*.

As shown above, the German rule includes a large number of divergent mental states. But it also limits the extent of the rule by specifying certain criteria in addition to the relevant mental states: it requires that the deviation must have resulted in the perpetrator being ‘incapable of appreciating the unlawfulness of [his or her] actions’, or of ‘acting in accordance with any such appreciation’.

We find a similar limiting criterion in the Finnish legislation, where the rule requires that the person, because of his or her illness, ‘is unable to understand the factual or illegal nature of the act’. Alternatively, the person will be exempt from criminal responsibility ‘if his or her ability to control his or her actions is for any such reason reduced to a significant extent.’<sup>14</sup>

There is, however, an inherent risk in specifying mental entities by relying on conventional understandings without reference to medical concepts: This leaves room for discussion as to whether the mental phenomena referred to exist at all. And, assuming they do, there might not be consensus on how the defining characteristics of these mental states are to be understood. This is less of a risk for legal rules that refer to medical concepts, as these concepts are developed within a profession relying on extensive experience, research and theories.

For example, the above-mentioned specific references in the Finnish and German rules at first seem reasonable from a conceptual perspective, as they address features in the perpetrator’s mind that are normally considered highly relevant according to the justifications for punishment as described in section 2.<sup>15</sup>

<sup>13</sup> Section 20, German Penal Code (Strafgesetzbuch) in the version promulgated on 13 November 1998, Federal Law Gazette (Bundesgesetzblatt) last amended by Article 3 of the Law of 2 October 2009, Federal Law Gazette I p. 3214.

<sup>14</sup> Chapter 3, section 4 of the Finnish Penal Code (Strafflagen).

<sup>15</sup> For a critique see Moore (2015) pp. 657–663 and 666–669.

On the other hand, however, there is a general point of view in medicine that a psychosis will afflict the mind as a whole.<sup>16</sup> And if psychosis by definition—and therefore in all cases—afflicts the mind as a whole, one can argue that all psychotic perpetrators with symptoms of considerable severity will fulfil the criterion ‘is unable to understand the factual or illegal nature of the act’ or any similar criteria. In other words, it won’t make sense to single out persons by the limiting criteria in the Finish and German rules when the person has a psychosis or any other disease that afflicts the mind as a whole.

Hence, conventional understandings might deviate from medical understandings of mental entities, and one might ask whether the mental entities referred to in the rules exist at all. In other words, legal standards might refer to *disputed mental phenomena*.

### 3.3.2 Value Judgments

Legal rules usually consist of criteria referring to more or less specific entities in the world and, as shown by the examples above, law applies to more or less predefined facts of a medical or non-medical nature. On the state level, rules with clear legal concepts ensure the separation of powers, and for the citizens they secure predictability and equal treatment.

In some areas of the law you find rules that leave a great deal of judicial discretion to the decision-maker, in the sense that he or she decides whether the rule applies to the facts. Normally, a rule on criminal insanity will consist of criteria that give a more or less substantial definition of criminal insanity, but it is also possible to structure these rules such that it is left to the decision-maker to decide and justify the concept of criminal insanity.

The Danish rule on criminal insanity defines the group not liable to punishment as whoever was, at the time of the act, of ‘unsound mind because of insanity’.<sup>17</sup> According to the wording, the concept of insanity is left open, as the criterion presupposes the existence of a suitable definition with the reference ‘because of insanity’. It is left to the decision-maker to conduct a value judgment deciding whether the unsound mind is to be considered a result of insanity.

A criterion with an even more unmitigated value judgment is found in the amended Norwegian insanity rule:

*‘Offenders who at the time of the act are insane due to a severe divergent state of mind are not accountable. When deciding whether a person is insane emphasis shall be placed on the degree of failure of understanding reality and functional ability.’<sup>18</sup>*

<sup>16</sup> Criminal Capacity, Expertise and Societal Protection, NOU 2014: 10 English Translation, Excerpts, pp. 122–124, <https://www.regjeringen.no/contentassets/42efeed9ff864a8f891aa6536748e264/en-gb/pdfs/nou201420140010000engpdfs.pdf> (Last accessed 9<sup>th</sup> September 2019)

<sup>17</sup> Section 16 of the Danish Penal Code (Straffeloven).

<sup>18</sup> My translation.



The definition is close to circular and, as a result, the rule contains no clear reference to what mental conditions are relevant (see section 3.4.2). In practice, the proposal leaves it to the courts to clarify the concept of criminal insanity.

### 3.4 *Combination of Criteria*

#### 3.4.1 *In General*

Awareness of the distinction between medical criteria and non-medical criteria, and to what degree the criteria refer to specific entities, is essential for making rational decisions about laws on criminal insanity.

Most legal rules on criminal insanity define the group not to be held liable for their actions on the basis of several legal criteria. There are several possible combinations of criteria one can use to define groups with divergent mental states, both for rules on criminal insanity and for other rules which take divergent mental states to be a mitigating factor.

The rule can rely on *a single criterion*, such as the Norwegian rule on criminal insanity, which refers to the specific medical condition ‘psychotic’, as well as the amended Norwegian rule, which refers to a value judgment (see section 3.2.2 and 3.3.2).

The rule can *combine a medical criterion with a non-medical criterion*, a strategy which would be sensible if certain serious illnesses fall outside the scope of a specific or abstract diagnosis, but still is considered legally equivalent to mental states that fall within. For example, one could, in addition to the criterion ‘psychotic’, add a criterion with a non-medical reference to mental states resembling psychotic states.

The rule can also start out with *a criterion with a medical or a non-medical reference and limit the scope with a narrowing criterion*. In the English M’Naghten rule, also adopted by many U.S. states, the initial criterion is that the person must have been ‘labouring under [...] a defect of reason, from disease of the mind’,<sup>19</sup> narrowed by a requirement that the perpetrator ‘[did not] know the nature and quality of the act he was doing’ or ‘did not know he was doing what was wrong’. As shown in section 3.3.2, the Danish rule on criminal insanity has a similar structure with a value-based limiting criterion.

#### 3.4.2 *The Amendment of the Norwegian Rule on Criminal Insanity*

The Norwegian rule on criminal insanity has been under continuous debate, eval-

<sup>19</sup> Regina v. M’Naghten, 10 Clark and F 200, 8 Eng. Rep. 718 (1843).

uated by different state commissions, and amended on several occasions.<sup>20</sup> Traditionally, the construction of the rule has been considered as a choice between three models.<sup>21</sup>

The first alternative is characterised as a *psychological model*, which is based on a non-medical criterion with reference to conventional understandings of psychological abnormalities, as described in section 3.3.1. The decisive criterion concerns the perpetrator's ability, insight, and prospects for exercising free choice. The question when faced with a mentally aberrant offender is whether the person retains such capacity. In order to be punished, he or she must, for example, have been without the ability to understand the illegal nature of the act.

The second alternative is characterised as a *medical model*, which is based on a medical criterion. Whether or not a person shall be deemed to have been of unsound mind is exclusively determined on the basis of medical characteristics, and no enquiries are to be made into whether the act was pathologically motivated or whether the perpetrator understood what he or she was doing.

Finally, we have the *mixed model*, which is based on a medical criterion and a non-medical criterion. In order to conclude that the perpetrator was of unsound mind, he or she must have suffered a specified aberration, and, in addition, there must be some kind of link between the disorder and the criminal act.

A commission appointed after the tragic incident of July 22<sup>nd</sup> 2011 is the latest to evaluate the Norwegian rule on criminal inanity. In addition, the commission evaluated the role of psychiatry in the administration of criminal justice, and addressed the incapacitation of persons of unsound mind who may be dangerous.<sup>22</sup>

The commission's deliberations on the rules on criminal insanity made use of the above-mentioned models when it evaluated whether or not the rule based on a criterion with reference to a specific medical condition should be changed (see section 3.2.2). The commission recommended to keep a medical criterion as the core of the rule, and to add an alternative non-medical criterion formulated as a legal standard referring to states of mind that must be equated to the states of mind that fall within the medical criterion:

<sup>20</sup> See Bill Draft nr. 87 for 1993–94 (Ot.prp. nr. 87 (1993–94) Om lov om endringer i straffeloven m.v (strafferettslige utilregnelighetsregler og særreaksjoner), Official Norwegian Report 1990: 5 (NOU 1990: 5 Strafferettslige utilregnelighetsregler og særreaksjoner –Straffelovkomisjonens delutredning IV) and Official Norwegian Report 1974: 17 (NOU 1974: 17 Strafferettslig utilregnelighet og strafferettslige særreaksjoner).

<sup>21</sup> See Syse Strafferettslig (u)tilregnelighet juridiske, moralske og faglige dilemmaer (Criminal Insanity – Judicial, moral and professional dilemmas) in *Tidsskrift for strafferett* 2006 pp. 141–175 and Official Norwegian Report 2014: 10 English Translation, Excerpts Criminal Capacity, Expertise and Societal Protection pp. 44 and 100–114 (NOU 2014: 10 Skyldevne, sakkynndighet og samfunnsvern).

<sup>22</sup> Criminal Capacity, Expertise and Societal Protection, Official Norwegian Report NOU 2014: 10 English Translation p. 11.

*'A person deemed by the court to have been in a psychotic state at the time of committing the act or in a state that, with regard to functional impairment, distorted thinking and otherwise inability to understand his or her relationship with the outside world, must be deemed equivalent to a psychotic state, shall not incur criminal liability. The same applies to a person who acted in a state of severely impaired consciousness.*

*Nor shall a person who was intellectually disabled to a high degree, or correspondingly debilitated, incur criminal liability.<sup>23</sup>*

If such a state is the consequence of self-induced intoxication, however, this shall not exclude punishment according to the proposal.

According to the proposal the perpetrator must, then, have been in a 'psychotic' state at the time of committing the act. 'Psychotic' shall be understood as a legal concept limited by the use of a medical concept, but the legal criterion is only met if the offender suffered from a psychotic disorder *and* the symptoms were of a certain intensity. This is clear from the symptom specification included in the wording of the proposal. This part of the regulation was meant to maintain and clarify the current regulation.

The suggested rule also includes aberrations not classified as psychosis in the medical sense. The term 'must be deemed equivalent to a psychotic state' implies that the rule also captures other mental deviations, including non-medical ones. This alternative is to be understood narrowly, and the question to be asked is whether the disorder interfered with the psyche and motivations of the perpetrator in a similar and correspondingly fundamental manner as a state of psychosis with severe symptoms.

The government chose not to follow the commission's recommendation and instead proposed a rule on criminal insanity with a non-medical criterion formulated as a value judgment:

*'Offenders who at the time of the act are insane due to a severe mental illness are not accountable. When deciding whether a person is insane emphasis shall be placed on the degree of failure of understanding reality and functional ability.*

*Nor shall a person who was intellectually disabled to a high degree, or correspondingly debilitated, incur criminal liability.<sup>24</sup>*

The proposal was under consideration by the parliamentary Standing Committee on Justice from 19 October 2017 to 5 May 2019. The committee substituted the term 'severe mental illness' with the term 'severe divergent state of mind' (see section 3.3.2).

<sup>23</sup> Criminal Capacity, Expertise and Societal Protection, Official Norwegian Report NOU 2014: 10 English Translation p. 277 (Proposal for amending the General Civil Penal Code 1902 section 44. Not official translation. The Code has itself been amended since the proposal).

<sup>24</sup> Norwegian Government Proposition 154 L (2016–2017) to Parliament, p. 236 ((Prop. 154 L (2016–2017) Endringer i straffeloven og straffeprosessloven mv. (skyldevne, samfunnsvern og sakkyndighet)) and recommendation Innst. 296 L (2018–2019) by The Standing Committee on Justice to the Storting. ((Innst. 296 L (2018–2019) Innstilling fra justiskomiteen om Endringer i straffeloven og straffeprosessloven mv. (skyldevne, samfunnsvern og sakkyndighet)). My translation and restatement.

During the period the proposal was heavily criticised in two hearings before the committee and in the media, and the decision to propose it as an amendment was postponed several times.<sup>25</sup>

Finally, the committee split into two factions. The majority rejected the proposal and recommended the parliament to return the proposal to the government. Its main arguments were that the proposal had not been adequately prepared and not been subject to a public consultation process. It also found that the criteria were too vague and left too much discretion to the courts, risking arbitrary decisions.

However, the minority in the committee, representing the majority parties in parliament, recommended passing the bill.<sup>26</sup> Its main argument was that the courts should decide on whether the perpetrator had sufficient mental capacity for punishment, as medical experts were too influential in the process of applying the law under the existing rule. The minority found the content of the rule sufficiently clear when taking the preparatory work into account, and also argued that it would be clarified through court practice.

Parliament ultimately passed the bill, and the amendment to the Penal Code section 20 was sanctioned by the King in the Council of State on 21 June 2019, but it is not yet in effect.

## 4. Evidential Perspective

### 4.1 Introduction

All rules on criminal insanity presuppose certain characteristics in the psyche of the offender. Rules on criminal insanity differ *conceptually*, and the choice of legal criteria is decisive for whether legal consequences are attached to a mental phenomenon.

But it is not only the conceptual level that decides the scope of the law. The legally relevant phenomenon must also be identified and proven to a certain degree for the rule to apply in a given case. The point made in the following is that the conceptual choice is also an evidential choice, as it determines the characteristics of what can be the object of proof, and different characteristics require different types of evidence.

When discussing objects of proof, it is necessary to distinguish factual questions from

<sup>25</sup> See Vi risikerer å få en utilregnelighetsbestemmelse som åpner for altfor stor grad av skjønn (We risk a rule on criminal insanity that allows for far too much discretion), Feature story in *Aftenposten* April 28th 2019 and Utilregnelighet til besvær – igjen (Insanity trouble – again), Feature story in *Morgenbladet* January 5. 2018. See also the majority's argumentation in Innst. 296 L (2018–2019) pages 8–10. The author has been a part of a group criticising the government's proposal.

<sup>26</sup> Recommendation Innst. 296 L (2018-2019) by The Standing Committee on Justice to the Storting. ((Innst. 296 L (2018-2019) Innstilling fra justiskomiteen om Endringer i straffeloven og straffeprosessloven mv. (skyldevne, samfunnsvern og sakkyndighet)).

legal questions. Legal questions relate to the assessment of phenomena to which legal effects are linked, whereas factual questions relate to the existence of such legally relevant phenomena. For a rule on criminal insanity, the legal question is whether the mental state of the offender is such that it fulfils the legal definition of insanity, whereas the factual question is whether the offender in fact suffered from the relevant mental state.

Section 4.2 addresses some questions of general interest when evaluating evidence for assertions about mental entities. In section 4.3 different evidential features following from the conceptual choice of criteria are addressed, and I distinguish between features that follow from a medical criterion on the one hand, and features that follow from a non-medical criterion on the other. Finally, in section 4.4 the role of medical expertise under different criteria is addressed.

#### 4.2 General Evidential Issues

With evidence, we normally refer to something that demonstrates something else—a fact invoked to establish or refute another fact. For a legal rule on criminal insanity the evidential question is what kind of facts can be considered evidence of the psyche of the offender.

Firstly, *external behaviour* may function as evidence for states of mind. The use of such external factors itself relies on evidence in the form of observation and experience. To understand the rationale of letting behaviour count as evidence, it is necessary to understand the connection between the evidence and the object of proof.

Our understanding of human behaviour derives from the understanding of human beings as rational agents, and there exist more and less explicit and clear theories about what kind of behaviour is to be expected in specific situations and cultures. The interpretation of certain behaviours may vary across different times and settings, as it depends on experience and cultural factors. Behaviour considered irrational in some social groups might be considered rational in other groups.

There can be uncertainty and disagreement as to how an offender's external behaviour is to be understood, and what inferences that can be drawn from the behaviour. Uncertainty may also arise as to whether the external behaviour actually took place, or precisely how it manifested itself.

Secondly, *internal mental entities* like ideas, thoughts, and feelings may be evidence for states of mind. Such entities can be inferred from the person's external behaviour as described above, but an additional source of evidence might be the person communicating their own perception of the entities based on *introspective experience*.

Uncertainty concerning introspective experience can arise if it is unclear whether the person is capable of or willing to engage in introspection and whether the information is communicated correctly through common concepts.

### 4.3 *Special Evidential Issues*

#### 4.3.1 *Medical Criteria*

Legal criteria referring to medical entities use diagnosis systems as tools to clarify and define the group not to be held criminally liable. As shown in section 3.2.2, the reference to the diagnosis system can be broad or narrow, and from an analytical perspective we may distinguish between criteria that make specific reference to these systems and criteria that make abstract reference to them.

The medical systems ICD-10 and DSM-5 define diagnoses partly based on the nature of the symptoms, partly on their intensity, and partly on duration. However, the systems themselves do not stipulate any final conclusions, but leave this to a discretionary clinical assessment of the relevant medical symptoms.

The special evidential feature of criteria referring to specific medical concepts (i.e., those that rely on specific diagnoses) is that they impose on the fact-finder to *clarify the content of the relevant diagnostic norm system*. In addition to the *general evidential features* as described in section 4.2, the fact-finder must also identify what significance the evidence has as symptoms according to the criteria in the diagnosis system.

It is a matter of systematisation whether this activity should be understood as a part of the interpretation process when clarifying the precise content of the legal norm, or as an identification of an institutional fact to which the legal norm attaches consequences. However, from a functional perspective, the diagnosis system lays outside of, and is required by, the legal norm.

#### 4.3.2 *Non-Medical Criteria*

As shown in section 3.3, it is possible to construct a rule on criminal insanity from criteria without reference to medical concepts. These criteria were categorised as legal standards and value judgments, and refer more or less directly to the perpetrator's ability, insight, and prospects for exercising free choice.

In addition to clarifying the content of the rule on a conceptual level, one will have to identify relevant mental states when applying the rule. Due to the lack of a theoretical and empirical basis for conventional understandings of mental concepts and psychological abnormalities this can turn out to be an epistemic and evidential challenge, as there are no clear directives for how to define relevant symptoms or their intensity and duration.

This challenge increases for legal standards referring to *disputed mental phenomena* (see section 3.3.1.2), where uncertainty on the conceptual level transfers to the evidential level. Provided that the phenomenon in question exists at all, the lack of empirical and theoretical bases makes it questionable whether it can be identified.

For example, the English M’Naghten rule consists of the initial criterion ‘labouring under [...] a defect of reason, from disease of the mind’. This broad scope is then narrowed by the use of the following non-medical criteria: ‘[did not] know the nature and quality of the act he was doing’ or ‘did not know he was doing what was wrong’.

These narrowing criteria first meet resistance on a conceptual level, as the general view in medicine is that psychosis, which is a common ‘disease of the mind’ under the M’Naghten rule, affects or afflicts the mind as a whole (see section 3.3.1.2).

Furthermore, even if we accept the concepts in question and find it clear what we are looking for, the medical understanding of the effects of psychosis implies that it will be very difficult, if not impossible, to exclude the possibility that the mental disorder affected the person’s knowledge about his actions or the wrongness of them in one way or another.

It seems then that we meet obstacles on the conceptual and evidential level when deciding on whether someone who had a defect of reason from disease of mind actually knew ‘the nature and quality of the act’ and similar criteria. This challenge can arise for most criteria referring to the perpetrator’s insight into his own actions.

One can observe that this challenge is also reflected on a conceptual level in the structure of the rule, as there would be no point having the initial criterion ‘a defect of reason, from disease of the mind’, if there were no conceptual or evidential challenges in identifying persons who ‘[did not] know the nature and quality of the act he was doing’ or ‘did not know he was doing what was wrong’, as these criteria reflect the excusing grounds.<sup>27</sup>

#### 4.4 Medical Expertise

Psychiatrists and psychologists have special knowledge about mental illness, and persons from these professions are often consulted in both the process of making and of applying rules on criminal insanity.

The role of the medical expert in court is defined by the fact-law dichotomy described in section 4.1. Fundamentally, it is a *legal question* to decide whether a given mental condition or state of mind is of relevance according to the rule. The experts are not professionally equipped to answer whether the accused was mentally disturbed to such a degree that the rule on criminal insanity applies.

The experts are to supply the court with information about how to understand the *facts*, and it is for the court to decide whether the accused is liable. This role implies that the expert shall aid in *general evidential issues* (see section 4.2). He or she is to report on the offender’s mental state on the basis of both experience and theoretical knowledge. More specifically, the expert is to help the factfinder understand

<sup>27</sup> For a critique of such criteria, see Moore (2015) pp. 661–663.

the evidence by identifying external and internal symptoms and clarify what these symptoms imply (see section 4.2).

The medical expert's further role depends on the conceptual design of the legal rules. If the rule consists of *medical criteria*, it will be sensible for the fact-finder to seek assistance from experts on *special evidential issues*. More precisely, medical experts can share knowledge about the relevant diagnostic norm system, and their experience from the systematisation of mental illnesses within the system (see section 4.3).

It is also common to seek assistance from medical experts when applying rules with *non-medical criteria*. However, it is important to be aware that expert faces the same evidential challenges as the nonprofessional when it comes to concepts that are without empirical, theoretical or consensual basis. This is especially the case for *disputed mental phenomena* (see section 3.3.1.2 and 4.3.2).

## 5. The Standard of Proof

### 5.1 Introduction

From sections 3 and 4 it follows that the legal criteria define what has to be proven to apply a rule on criminal insanity, and that different evidential features follow from the choice of criteria. To *what extent* an object of proof must be proven follows from the *standard of proof*, a rule that establishes a threshold of certainty that must be met before a factual proposition is considered to be proven for the purposes of the trial.

In the following, the importance of formulating the object of proof and the burden of proof is addressed in sections 5.2 and 5.3. Then, arguments for setting the threshold under the standard of proof are addressed in section 5.4. Finally, I clarify more precisely which evidential features are regulated by the standard in section 5.5.

### 5.2 Object of Proof

The content of the standard of proof is closely connected to *the object of proof*. The standard depends on what is to be proven and it is, therefore, regardless of the choice of concept, necessary to first decide whether the object of proof is to be the perpetrators *soundness* of mind or the perpetrators *unsoundness* of mind. This choice must be made before the threshold for proof is set for a rule on criminal insanity.

Normally, the formulation of the object of proof will follow from the structure of the jurisdiction's criminal law and criminal procedure law. As the state generally has the burden of proof in criminal cases, in that they are to fulfil certain legal criteria before punishment can be imposed, the default object of proof is the perpetrator's sound-



ness of mind and it is for the prosecution to prove that this requirement is fulfilled.

This default position might be waived depending on the jurisdiction's systematisation of criteria for punishment (see section 2). But also in traditions where it is said that the defence has the burden of proof, the default rule applies as the government asserts sanity by the indictment. It has been argued that the object of proof should always be the person's unsoundness of mind, since every citizen should *prima facie* be considered as a responsible human actor. However, in cases concerning the rule on criminal insanity, it is exactly this presumption which is at stake.

### 5.3 *The Burden of Proof*

*The burden of proof* determines which party has the obligation to produce evidence to pass the standard of proof. As a result of different procedural structures, rules on burden of proof differ between jurisdictions.

Anglo-American criminal procedure tends to leave the investigative element with the parties. In England, the burden of proof under the M'Naghten rule is put on the defendant who invokes the defence of criminal insanity. This is in contrast to the Norwegian system, which by and large leaves the investigation to the prosecuting authority in the initial stages, but leaves the ultimate responsibility for establishing the facts of the case on the courts. In this system, it is for the prosecution to prove that all criteria for the use of punishment are present.

### 5.4 *The Standard Threshold*

The standard of proof regulates to which degree a party that has the burden of proof must prove the object of proof. For a rule on criminal insanity the standard threshold defines the acceptable level of risk of convicting a criminally irresponsible perpetrator.

In criminal law, the default standard of proof is that any reasonable doubt shall benefit the accused (*in dubio pro reo*). The values underlying this threshold are that it is considered extremely important to prevent innocent persons from being convicted. An additional argument is that a lower threshold might undermine citizens' confidence in the administration of justice by signalling that incorrect convictions are accepted.

Even though this high threshold is accepted as the general default standard in criminal law, most jurisdictions do not apply the standard when it comes to the question of criminal insanity. In England, for example, the standard under the M'Naghten rule is a 'preponderance of evidence' that the perpetrator was in a state of unsound mind. In Norway, it is stated in court practice that the principle of proof beyond rea-

sonable doubt applies to the question of whether the accused was of sound mind, but that the threshold is lower than for questions relating to the perpetrator's physical movements.<sup>28</sup>

If one accepts the general justifications for the standard of proof in criminal law, lower thresholds like these imply an acceptance of innocent persons being found guilty. There has not been much discussion about how a lower threshold affects the initial value judgment that it is extremely important to avoid erroneous convictions, or why the standard of proof with regard to soundness of mind should be lower than that used with regard to the person's physical movements. In some jurisdictions it is not quite clear what the value arguments are for lowering the threshold. In other jurisdictions we find arguments regarding societal protection and treatment, but one might ask whether such considerations are relevant for the distribution of risk when it comes to the use of punishment.<sup>29</sup>

However, an evidential argument for lowering the threshold has been raised, which is that it is generally considered difficult to determine whether the perpetrator was of unsound mind. The argument is that since the object of proof in itself is more difficult to prove than the other requirements for the use of punishment, without a lower threshold one might risk that criminal responsibility is too difficult to demonstrate. The quality of this argument depends on one's conceptual perspective on mental entities and how they are proved (see section 3) and on one's understanding of general evidential issues as to what can be proved (see section 4).

### 5.5 Different Evidential Issues

The object of proof will, as shown in section 5.2, also be decisive for the nature of the uncertainty that the standard of proof is to distribute. As it is the persuasive power of the evidence that determines the extent to which a factual circumstance is proven, the standard of proof is linked to the different characteristics of evidence as described in section 4.

Uncertainty related to *general evidential issues* that concern inferences drawn from *external behaviour* and *internal mental entities* (described in section 4.2), is normally understood as regulated by the general standard of proof. The external and the internal symptoms are epistemically distinct, and one can therefore say that the standard is versatile as it regulates uncertainty relating to different characteristics.

Uncertainty relating to *specific evidential issues* is not necessarily regulated by the standard of proof. Doubt as to whether the perpetrator's established mental condition falls within the scope of the rule is a doubt of a legal nature and is to be handled

<sup>28</sup> Criminal Capacity, Expertise and Societal Protection, Official Norwegian Report NOU 2014: 10 English Translation, Excerpts pp. 239–240.

<sup>29</sup> *Idem*, pp. 250–256.

through an interpretation of the insanity rule. And, further to this, when applying rules with medical criteria, uncertainty about the content of the medical diagnosis system will have to be handled as a question of legal interpretation, as this is uncertainty about the content of the constituent criteria defining which facts that are legally relevant, and not about the specific facts.

## 6. Summary

The presentation has shown that there is a large variety of possibilities when designing a rule on criminal insanity. As for all legal rules, it is important to be aware of the underlying justifications to ensure that the rule is designed to be as precise as possible. The models presented in section 3 do not grasp all relevant aspects, but clearly show different alternatives for constructing rules on criminal insanity. The choice of criteria is conceptual, but it has evidential consequences and might also affect the standard of proof and the distribution of risk between the parties.

My purpose has not been to recommend any specific design for a rule on criminal insanity, but to highlight features relevant to the law maker when designing such a rule. When defining the group that falls outside the justification for the use of punishment, the core values for the Rule of Law should be taken in consideration. The main competing values are, on the one hand, legal ideals such as predictability and equality, as well as the possibility of control and verifiability, and, on the other hand, the need for flexibility and the ability to ensure the rule fulfils its purpose. One could say that the rule should be as minimal, clear and constant as possible. In addition, one must have in mind that the rule on criminal insanity depends on an understanding of the physical and psychological world, and to what extent the decision-maker has access to entities out there—law applies to facts.