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Criminal Insanity in Norwegian Law: Theory and Practice

Introduction

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The legal understanding and regulation of criminal insanity, and criminal incapacity more broadly, is a contested matter. Criminal capacity at the time of the offence is in most countries a basic condition for criminal responsibility and punishment, and only certain narrowly defined conditions may entail criminal incapacity. These are typically immaturity (young age) and serious forms of mental disability, mental disorder and impairments of consciousness.

Although there is wide-ranging agreement that certain such serious conditions should excuse and exempt offenders from criminal responsibility, it is hugely contested which specific impairments matter in this regard and in what way. This discussion has several dimensions. The legal doctrines of criminal capacity and incapacity rely on controversial philosophical premises of rationality and free will. The doctrines also relate to diagnostic classifications of mental disorders, which themselves are subject to controversy and critique. In addition, judgements about criminal insanity can mandate reactions such as compulsory care and preventive detention, some of them with their own inherent challenges.

In this special edition of Bergen Journal of Criminal Law and Criminal Justice we bring together different important perspectives on criminal incapacity. Although many of the issues that are raised are of general importance, the focus will be on Norwegian law. Norway is of specific interest as a country with a distinctive ‘medical model’ for the regulation of criminal incapacity. In contrast to many countries, criminal incapacity has been exclusively defined in terms of a particular medical/biological condition at the time of the offence. This condition has led to unconditional exoneration from criminal responsibility, regardless of whether the condition affected the defendant’s cognitive or control capacities with regards to the commission of the crime. Currently, however, there are ongoing changes to both the legislation and

legal and forensic practices concerning criminal incapacity, initiated in the aftermath of the terrorist attack on the 22nd of July 2011.

This edition includes seven articles providing different legal, philosophical, ethical, medical, and historical-theoretical perspectives on criminal insanity and related matters concerning evidence and special criminal sanctions. In addition, some of the articles provide practical perspectives from forensic experts working within the Norwegian legal framework for dealing with criminally insane offenders.

The first article, written by Atle Ottesen Søvik, provides a philosophical perspective on the meaning and justification of criminal capacity and incapacity. More specifically, the article presents the main features of a theory of responsibility and the conditions for whom can or cannot be held responsible, with a focus on different types of incapacity for responsible behaviour. Inspired by Antonio Damasio's understanding of the mind and Manuel Vargas' revisionary theory of responsibility the author argues that criminal capacity and incapacity is best explained and justified on consequentialist grounds.

The second article is written jointly by Linda Gröning, Unn Kristin Haukvik and Karl Henrik Melle. This article combines legal, forensic, and clinical empirical perspectives on the medical model of criminal insanity in Norwegian law. The article explains and discusses this medical model and how it has related criminal insanity to the concept of psychosis in law and legal and forensic practice. The authors argue that the legal meaning of psychosis is unclear, and that there are several challenges in legal and forensic practice.

The third article is written by Randi Rosenqvist. This article presents the challenges in construing a legal rule regarding the insanity defence that can be adequately understood by courts, attorneys, psychiatrists and psychologists. It describes and critically analyses these challenges primarily from a forensic practical perspective. The author also includes a discussion about the recent law reform, and argues that the proposed changes are highly problematic

The fourth article is written by Anders Løvlie. This article looks at the construction of an insanity rule from the point of view of evidence problems. Løvlie argues that the choice of legal criteria for rules on criminal insanity has important evidential implications, and that these implications should be taken into account both when it comes to making and applying these rules.

The fifth article is written by Martin Mindestrømmen. This article discusses the legal meaning of 'danger' as a requirement for compulsory psychiatric treatment in Norwegian law. On the basis of a legal analysis of legal doctrine, preparatory works and court cases, the author shows that the legal meaning of 'danger' is unclear in this context. He argues that this lack of clarity produces a risk for arbitrariness in legal judgements, and that there is a need for further legal and conceptual clarification.

The sixth article is written by Øyvind Holst. This article presents and discusses the prosecutor's control function with regard to compulsory psychiatric care for

criminally insane offenders. The author explains the content and background of the prosecutor's control function in Norwegian law, with a focus on the tension between the perspectives of the health sector and the criminal justice system. The author argues that the control function, from a criminal protection perspective, has been weakened in favour of the latitude of the health sector.

The seventh and final article is written by Erik Søndena, Christine Friestad, Birgitte Storvik, and Berit Johnsen. This article presents and discusses the Norwegian legislation concerning intellectual disability and criminal responsibility. The authors explain the Norwegian criminal justice system with regard to offenders with intellectual disabilities and the challenges the system faces in this regard.

By bringing together these perspectives on criminal capacity in Norwegian law we aim to not only gain more knowledge about this important subject, but also to highlight the broad and ongoing discussions that currently occur in Norway in this field.