

Provocation and Diminished Capacity in Nordic Criminal Law: Two Rationales for Mitigating Crimes of Violence Committed in an Agitated State of Mind

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Abstract

One of the key distinctions when assessing crimes of violence, such as intentional homicide and assault, is that between acts committed in ‘cold’ and ‘hot blood’. The last term refers to acts committed in an intense emotional state, usually in response to a perceived insult from the victim. In the penal codes of Denmark, Norway and Sweden, mainly two types of mitigating circumstances are associated with these acts. These mitigating circumstances can be referred to as ‘provocation’ and ‘diminished capacity’. In this article, the division between these two types of different provisions is challenged through an analysis of their rationale. Finnish criminal law is presented as an alternative to making the distinction. The article’s analysis highlights the underlying psychological and moral assumptions about emotions and violence on which these provisions on mitigating circumstances are built.

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1. Introduction

In a general context of criminal law, the concept of provocation can be defined as a situation in which a person has committed a crime in an agitated state of mind after being wronged by the victim.¹ In several countries, the question of provocation in criminal law has been debated and scrutinised.² One example of this is English law, where provocation has traditionally been both a mitigating factor of relevance in sentencing law and a so-called partial defence that reduces murder to manslaughter.³ In legal scholarship – as well as in philosophical and psychological literature – attention has been directed towards the moral and psychological premises for provocation as a partial defence. Among other things, critics have questioned the rationale for the defence. It has also been asserted that the legal system rewards outdated, stereotypically male responses to insulting behaviour by taking a more lenient approach to cases where a homicide has been committed spontaneously in a state of anger.⁴ As a result of this debate, the partial defence of ‘provocation’ was abolished in English law in 2010 and replaced by ‘loss of control’ as a partial defence to murder. While the partial defences of provocation and loss of control share many similarities, they also have significant differences. For example, while the partial defence of provocation could only be applied in cases where the offender had acted in a state of anger, loss of control can also apply in cases where the offender acted out of fear of serious violence from the victim against the offender or another person.⁵ Despite this reform, the academic debate about loss of control and provocation has been ongoing. For example, scholars have evaluated the defences from a psychological perspective and compared actions driven by anger, fear and other emotions.⁶

In the Nordic countries too, provocation constitutes a mitigating circumstance when assessing crimes of assault and intentional homicide. Furthermore, given that the concept of provocation is defined as above – *i.e.* as a situation in which a person has committed a crime in an emotional state of mind after being wronged by the victim – two different types of mitigating circumstances can be found, for instance, in the Swedish penal code that traditionally have been applied in cases of provocation. Only one of these is usually referred to as ‘provocation’.⁷ Regarding the other one, it seems

1 See e.g. von Hirsch and Jareborg (1988) p. 241.

2 For example, see several of the contributions in Reed and Bohlander (2011).

3 See Ashworth and Kelly (2021) pp. 114-115.

4 See e.g. Child *et al.* (2022) p. 428 and Percy *et al.* (2011) p. 391.

5 Coroners and Justice Act 2009, Pt. 2, Ch. 1, Sec. 55 (3).

6 E.g. Sorial (2019) pp. 255-266. The terms ‘emotion’ and ‘feeling’ are used differently by various scholars. For the sake of transparency, this article uses the same terminology as found in the source material that is discussed. Otherwise, within the article, these words are considered as synonymous.

7 See e.g. prop. 1987/88:120 p. 85.

close to hand to refer to this as a provision on ‘diminished capacity’⁸ Applying a Nordic perspective, the same distinction between two types of mitigating circumstances can be found in the Danish and Norwegian penal codes but not in the Finnish code. This observation calls for analysis.

However, the discussions on this matter have not been vivid in the Nordic context. Relevant preparatory works do not discuss the subject to any significant extent. Generally, provocation has been considered a self-evident mitigating factor in relation to crimes of intentional homicide and assault. The scholarly analysis of such mitigating circumstances and their justification has not been particularly extensive; instead, these issues have mainly been addressed in commentaries and textbooks on criminal law.⁹

The aim of this article is to address this gap, by challenging the distinction between mitigating circumstances based on the intensity of the offender’s emotions on one hand and a moral judgement of the reasons behind the offender’s emotions on the other hand. The argument will be presented through an analysis of the rationale for each respective type of mitigating circumstance, in which the moral and psychological premises underlying them will be highlighted. This article utilises findings in the author’s doctoral thesis, which was published earlier this year and provided an analysis of the Swedish regulation on provocation. It aims to develop a Nordic perspective on the subject, inviting further research in the Nordic context.¹⁰

The article is structured as follows. In the following section, Section 2, some provisions on mitigating circumstances found in the Danish, Norwegian, Swedish and Finnish penal codes are highlighted.¹¹ Thereafter, the rationales for these provisions are developed and scrutinised in Section 3. The final part of the article, Section 4, contains further analysis, challenging the mentioned distinction applied by several Nordic countries.

8 However, this mitigating circumstance should not be confused with the partial defence of diminished responsibility found in English law. The latter defence requires, among other things, that the offender’s mental state arises from a recognised medical condition. Regarding the partial defence of diminished responsibility, see e.g. Child *et al.* (2022) pp. 442-452.

9 See further Section 2 of the article for examples that document these observations.

10 See Rasmussen (2023). Continuous references will be made in the article to the thesis for readers who want to engage in a more detailed argumentation.

11 The presentation of the different provisions in this article will be very brief and no case law will be referred. A study of Swedish case law concerning diminished capacity and provocation can be found in Rasmussen (2023) pp. 164-170 and 203-211.

2. Provisions on Diminished Capacity and Provocation in the Nordic Countries

In Danish, Norwegian and Swedish criminal law, there are two different types of mitigating circumstances that, at least at a first glance, could be applied in cases of provocation (as these cases have been defined in the section above). One of these kinds of mitigating circumstances seems to be exclusively concerned with the fact that the offender was in an agitated state of mind at the time of the commission of the offence. The clearest example of such a provision is found in the Danish Penal Code, Section 82 (7), which lists as a general mitigating circumstance that the offence has been committed under the influence of strong emotion (dk: *stærk sindsbevægelse*). When commenting on this provision, Elholm and Baumbach remark that many crimes are committed under the influence of some emotion and they argue that something extraordinary should therefore be required if the provision is to be applied.¹² Elholm *et al.* note that 'strong emotion' is not a psychiatric concept, but a legal one. As typical examples of cases where the provision can be applied, the authors mention intentional homicide committed in affect, such as homicide committed in a state of jealousy or within a family.¹³

In the Norwegian Penal Code, there is a provision in Section 78 d) according to which strong emotion (no: *sterk sinnsbevegelse*) can constitute a mitigating circumstance if it has impaired the offender's perception of reality at the time of the act. It appears in the preparatory works that some referral bodies were critical of the provision, questioning if it would not be possible, in almost every physical conflict, to claim that the assault had been committed in a state of strong emotion.¹⁴ The government replied that the provision should not be applicable in *all* cases where the offender had been in an agitated state of mind at the time of the offence. Instead, the crucial factor should be to decide whether the situation was such that it could not be expected of the offender to act as an average sane and rational person.¹⁵

Lastly, the Swedish Penal Code will be mentioned. Chapter 29, Section 3 (2) provides that, *inter alia*, if a person as a result of an emotion (sw: *sinneströrelse*), had a reduced capacity to control their conduct, this is considered a general mitigating circumstance. From statements in the preparatory works, it is clear that this provision should only be applied in exceptional situations.¹⁶ As an example of a situation of this kind, the

12 Baumbach and Elholm (2022) pp. 472-473.

13 Elholm *et al.* (2023) p. 616.

14 Ot.prp. nr. 8 (2007-2008) pp. 45-46.

15 Ot.prp. nr. 8 (2007-2008) p. 46.

16 Prop. 1987/88:120 pp. 85-86.

preparatory works mention a situation where an offender, in an agitated state of mind due to personal problems, has committed a criminal act that is uncharacteristic of their personality.¹⁷

Even though they are designed in various ways, these three provisions have in common that they seem to focus exclusively on the offender's state of mind at the time of the offence. However, in the penal codes of all three countries, there can also be found another type of provisions applicable in cases of provocation. These provisions have in common that they require that the offender's reasons for being agitated qualifies in some way. For example, Section 80 e) of the Norwegian Penal Code allows the court to apply a less severe punishment when the offender has committed the act in a state of justifiable anger (no: *berettiget harme*). In the Norwegian legal literature, this provision is described as closely related to provisions on 'provocation'.¹⁸ In Norwegian law, provocation can – according to Section 271 second paragraph b) and Section 272 second paragraph of the Norwegian Penal Code – operate as a complete defence in some cases of assault.¹⁹ In the preparatory works, the provisions on justifiable anger as a mitigating circumstance and provocation as complete defence to assault, have been described as a recognition within criminal law of the 'human reaction of wanting to retribute a wrong to which one has been subjected'.²⁰

According to Section 82 (5) of the Danish Penal Code, it is viewed as a mitigating circumstance if the act has been committed in a state of agitation (dk: *oprørt sindstilstand*) provoked by an unlawful attack or by a gross insult (dk: *uretmæssigt angreb eller en grov fornærmelse*) on the part of the victim or individuals associated with the victim. In their commentary of this provision, Elholm and Baumbach note that violence is a phenomenon that society regards with strict disapproval and not as a socially acceptable means of conflict resolution.²¹ In another context, Baumbach has described this provision as 'anachronistic'.²²

It can be noted that the two aforementioned Norwegian and Danish provisions on provocation as a mitigating circumstance require the offender to have been angry or

17 Prop. 1987/88:120 p. 85.

18 Gröning *et al.* (2023) p. 690. See also Section 78 c) of the Norwegian Penal Code.

19 Further on this, see Jacobsen *et al.* (2020) pp. 41-45.

20 Ot.prp. nr. 90 (2003-2004) p. 80. The statement is made in a discussion about the purpose and effect of criminal law provisions in general. The provisions on provocation and justifiable anger are used as examples in this discussion. Therefore, it is not a direct commentary on the rationale of the provisions.

21 Baumbach and Elholm (2022) p. 471.

22 Baumbach (2014) p. 536.

agitated.²³ However, Chapter 29, Section 3 (1) of the Swedish Penal Code, names as a mitigating circumstance that the act has been provoked by another person's manifestly insulting behaviour (sw: *uppenbart kränkande beteende*). From the wording of this provision, it is not obvious that the offender needs to be in an agitated or angry state of mind for it to be applied. In the Swedish preparatory works, Chapter 29, Section 3 (1) is referred to as a provision on 'provocation'.²⁴ Furthermore, it is emphasised that the assessment of whether a conduct qualifies as manifestly insulting must be conducted based on objective criteria.²⁵

Against this background, the conclusion can be drawn that the Danish, Norwegian and Swedish Penal Codes make a distinction between two types of mitigating circumstances that can be applied in cases where an offence has been committed in an agitated state of mind. While one of these provisions can be called a provision on 'provocation', the other can be called a provision on 'diminished capacity'. Even though these two types of provisions seem to have different rationales, there also seems to be a connection between them. Such a connection can be illustrated with reference to the Norwegian preparatory works, where the provision on impaired perception of reality as a result of strong emotion (diminished capacity) in Section 78 d) is described as a further development of the provision on justifiable anger (provocation) in Section 80 e).²⁶

Another way to illustrate the connection between the two types of provisions can be by referring to the Finnish Penal Code. Here, no distinction is made between two types of mitigating circumstances in the same way as is done in the penal codes of the countries mentioned above. According to Chapter 6, Section 6 (2) of the Finnish Penal Code, it is viewed as a mitigating circumstance if an exceptionally great contribution of the plaintiff (sw: *målsägandens exceptionellt stora medverkan*) has decreased the offender's ability to comply with the law and such inability has led to the offence.²⁷ This mitigating circumstance was introduced into the Finnish Penal Code in 2004. In

23 It can, however, be noted that no such prerequisite exists in regards to provocation as a complete defence in Norwegian law, see Section 271 second paragraph b) and Section 272 second paragraph of the Norwegian Penal Code.

24 Prop. 1987/88:120 p. 85.

25 SOU 2008:85 p. 394.

26 Ot.prp. nr. 8 (2007-2008) p. 46. From a practical point of view, it may be added that the sentencing practice in, for instance, Norwegian criminal law allows for the court to make an overall assessment of the seriousness of the act and the deserved punishment. This reduces the practical importance of the distinction. However, see the argument found in Rasmussen (2023) pp. 125-129.

27 A mitigating circumstance with similar wording can be found in the Norwegian penal code; see Section 78 c), which names as a mitigating circumstance that the offence was, to a significant degree, occasioned by the circumstances of the aggrieved party.

the preparatory works, it is referred to as a provision on ‘provocation’.²⁸ Originally, a provision similar to the one in Chapter 29, Section 3 (1) of the Swedish Penal Code was proposed. However, the Finnish Legal Council (sw: *Lagutskottet*) objected that it was unclear what types of behaviour should be viewed as grossly insulting.²⁹ The wording of the provision was therefore changed. As appears from the provision, the plaintiff’s behaviour needs to decrease the offender’s ability to comply with the law. In the preparatory works, it is stated that the mitigation is based on the strong emotions (sw: *känslösvall*) of the offender.³⁰

The conclusion can be drawn that the Finnish Penal Code does not make a distinction between ‘diminished capacity’ and ‘provocation’. Instead, it seems that the Finnish provision referred to as a provision of ‘provocation’ (Chapter 6, Section 6 (2) of the Finnish Penal Code) is justified by reference to the fact that in these cases strong emotions have reduced the offender’s capacity to control their actions. This fact also suggests a connection between provisions on provocation and diminished capacity. The following sections will further explore this connection through a closer examination of the rationales of these two types of provisions.

3. Two Rationales for Mitigating Actions in Anger

3.1 Introduction

In the previous section, it has been demonstrated that there are two types of mitigating circumstances that can be applied in cases where a person has committed a crime in an agitated state of mind after being wronged by the victim. While one of these mitigating circumstances seems to be exclusively concerned with the question of how the offender’s mental capabilities have been affected by the emotion (diminished capacity), the other one rather seems to focus on the offender’s reasons for being angry (provocation). As indicated above, there is a close connection between these two types of provisions. Most clearly this connection can be illustrated with reference to Finnish criminal law, where cases of provocation are mitigated due to the offender’s diminished capacity in these situations. The following sections will further explore the connection between the provisions on diminished capacity and provocation in the penal codes of Denmark, Norway and Sweden through an analysis of their respective rationales. Through this analysis, some conclusions will also be drawn regarding the construction and scope of application of each of the two types of provisions.

3.2 Diminished Capacity

When it comes to the provisions concerning diminished capacity, the underlying rationale is sometimes evident directly from the provisions themselves. For example,

28 RP 44/2002 rd p. 199.

29 LaUB 28/2002 rd pp. 11-12.

30 RP 44/2002 rd p. 199.

Chapter 29, Section 3(2) of the Swedish Penal Code requires that the emotion diminishes the offender's ability to control their actions in order to be considered a mitigating circumstance. Correspondingly, Section 78 d) of the Norwegian Penal Code requires that the offender's agitated state of mind has impaired their perception of reality. Conclusion can thus be drawn that underlying these provisions are psychological assumptions regarding how people are affected by emotions. Strong emotions are regarded as a phenomenon that has the potential to reduce a person's ability to control their actions and impair their perception of reality.

It is obvious, yet important to note, that assessments of an offender's degree of capacity or perception in criminal law are not scientific evaluations. Rather, such assessments address the question of what society can demand of a specific individual in a particular situation.³¹ This question is ultimately a normative one, which means that conclusions of psychological research may not – without further discussion – be of decisive importance when designing and applying provisions regarding an offender's capacity to control their actions or perceive reality. It can be argued that rules of criminal law, whose purpose is to express an offender's degree of culpability, should not reflect ideas about human psychology that appear to be directly counter-intuitive to most people. Nevertheless, it is crucial to acknowledge that criminal law not only mirrors prevailing perceptions of human behaviour, but also plays a role in upholding them. Psychological research can thus be used to challenge long-established, and potentially outdated, notions of human psychology reflected by criminal law. Furthermore, psychological research is likely to play a role, especially in the long term, in shaping the public's understanding of human behaviour. Given this background, the importance of incorporating and referencing psychological research in discussions about an offender's capacity and perception within the context of criminal law becomes evident.³² Consequently, it becomes relevant to confront assumptions concerning emotions within criminal law with empirical findings from psychological research on emotions and violence.

Turning to research of this kind, it is clear that there is a link between an agitated state of mind and violent crime.³³ Many crimes of violence are committed impulsively by a person who is upset at something that the victim has done or said.³⁴ However, several authors have noted that impulsive violent crime, driven by anger, are mainly committed in certain types of situations. People who commit violent crime in an

31 See e.g. Feinberg (1970) pp. 282-283, Fletcher (2000) pp. 802-803, Ross (1970) p. 142 and Wennberg (1990) pp. 822-823.

32 The argument is further developed in Rasmussen (2023) pp. 175-179.

33 The terms 'violent crime' and 'crimes of violence' are used interchangeably in this article. Crimes such as assault and intentional homicide, which are the focus of this article, can be described as core components of both concepts.

34 E.g. Katz (1988) pp. 18-19.

angry state of mind generally do not do so, for example, at work; instead, they tend to engage in such behaviour at home or while socializing with friends.³⁵ This implies that these crimes are committed in situations where a person can 'afford' to commit them.³⁶ Some writers, such as Isdal, have described violence as a phenomenon that is carried out in safe environments and directed downwards in the hierarchies.³⁷ According to Isdal, all violence has both an emotional aspect and a rational one. Emotions, such as rage, anger, and fear, may serve as motivating factors for violence, but the decision to commit a violent act in a specific location, within a particular context, and to a particular extent is always the result of a rational choice.³⁸

Based on this context, it appears that an angry state of mind does not inevitably lead to crimes of violence. This is a point that also has been recognised within psychological research. Historically, emotions have been regarded as a phenomenon capable of hijacking a person's capacity for reasoning and diminishing their ability to control their actions. However, in contemporary psychology, this conception of emotions appears to be outdated. Numerous authors have argued that there is no inherent contradiction between rationality and emotion.³⁹ Neither does emotion in general automatically lead to certain actions.⁴⁰ At most, emotions are viewed as something that entails a preference or preparation to commit certain actions.⁴¹

However, a reservation can be raised concerning these two last statements, as their validity depends on how the concept of emotion is defined. Research by, among others, neuroscientist LeDoux shows that in the brain of all mammalian species, including the amygdala of the human brain, there are so-called survival circuits designed to enable the organism to detect and respond to various kinds of challenges and opportunities.⁴² These survival circuits help organisms survive and thrive by

35 See e.g. the discussion on homicide in Katz (1988) p. 21 and the discussion on violence in Isdal (2017) p. 78. Compare the discussion on aggression in Sapolsky (2018) p. 17.

36 See Law Com no 290 2004 p. 36 and Sorial (2019) p. 261.

37 Isdal (2017) p. 78. It can be noted that Isdal's discussion on the nature of violence is based on a broad definition of the concept of violence. Within this definition, physical violence, such as acts that qualify as assault or homicide, is only one of several subcategories. See Isdal (2017) pp. 33-43.

38 Isdal (2017) pp. 82-85. Another perspective on this matter is found in Sapolsky (2018).

39 See e.g. Damasio (1994) and Feldman Barrett (2018).

40 De Waal (2020) p. 204.

41 De Waal (2020) pp. 86 and 125. Another perspective on this matter is found in Feldman Barrett (2018).

42 LeDoux (2014a) p. 16

organising brain functions. When these circuits are activated, they prioritise specific types of responses while inhibiting other activities.⁴³ Consequently, activation of these survival circuits can lead individuals to engage in automatic behaviours.

Some authors refer to these survival circuits as ‘fear circuits’ and to the amygdala as the ‘emotional center’ of the human brain.⁴⁴ However, LeDoux himself opposes such a language. Instead, LeDoux makes a distinction between human emotions on one hand and the activation of survival circuits on the other hand. He argues that the activation of survival circuits is not equal to an emotional experience of, for example, fear. Instead, he stresses that feelings of fear come in various forms: an individual can for example be afraid of snakes, arriving late, loving again or not living a full life. Not all these types of fear involve the activation of survival circuits.⁴⁵ Neither is there any causal link between survival circuits and feelings. Survival circuits can only indirectly influence feelings.⁴⁶

As previously discussed, legal assessments of a person’s degree of capacity are not scientific evaluations, but ultimately reflect societal expectations regarding what can reasonably be expected of a specific person in a given situation. Consequently, from a criminal law perspective, it may not necessarily be unreasonable to argue that a person experiencing intense emotional turmoil had impaired self-control, regardless of what psychologists argue. Emotions obviously play a significant role in the interaction between people. In sociological research, the concept of ‘feeling rules’ is used to illustrate this. This concept was introduced by Russell Hochschild, and it refers to cultural norms regarding, among other things, which emotions are considered reasonable to feel in different situations and how they should be expressed. Russell Hochschild elaborates on this argument as follows:

In common parlance, we often talk about our feelings or those of others as if rights and duties applied directly to them. For example, we often speak of ‘having the right’ to feel angry at someone. Or we say we ‘should feel more grateful’ to a benefactor. [...] We know feeling rules, too, from how others react to what they infer from our emotive display. Another may say to us, ‘You shouldn’t feel so guilty; it wasn’t your fault,’ or ‘You don’t have a right to feel jealous, given our agreement’.⁴⁷

The quoted passage illustrates how people internalise feeling rules to the extent that they often know what they *should* feel in situations where they deviate from them.

43 LeDoux (2014a) p. 21.

44 See e.g. Damasio (1994) p. 133, Kahneman (2013) pp. 301 and 366, Sapolsky (2018) pp. 36-37.

45 LeDoux (2014b) p. 2876.

46 LeDoux (2014a) p. 21.

47 Russell Hochschild (1979) p. 564.

Regardless of the biological connection between specific emotions and actions, it is evident that strong societal norms exist regarding emotions and their expressions. It could be argued that these norms should be considered when assessing an individual's capacity in criminal law. For example, there could be cases where an offender has experienced such intense internal pressure to respond aggressively in anger to an insult that it is reasonable to assess their capacity for self-control as impaired.

However, emotions are a ubiquitous aspect of daily life and something that all people have to deal with. It is likely that a majority of crimes are committed under the influence of some form of emotion. Building on the aforementioned insights into emotions, especially concerning actions in emotional states, it also appears that the assessment in each individual case must be remarkably normative. The court cannot automatically assume that a very upset person has had a reduced ability to control their actions, but what the person reacted to and how they reacted must also be relevant in the assessment. Against this background, only in exceptional cases, such as various types of threat situations, does it seem appropriate to claim that a person, due to the activation of survival circuits, had a diminished capacity to control their behaviour.⁴⁸ However, in the majority of cases where a person has committed a crime in an agitated state of mind after being wronged by the victim, it should not be automatically assumed that they had a diminished capacity to control their actions or an impaired perception of reality, regardless of how angry they have been.

3.3 Provocation

Regarding the other type of provisions found in the penal codes of Denmark, Norway and Sweden, the rationale for these seems less obvious. A starting point may be that in these cases, mitigation does not relate to the offender's diminished capacity to control their actions due to strong emotions, as such a consideration would render them irrelevant in relation to the provisions mentioned above. Despite this, it can be noted that for instance the Danish provision on provocation as a mitigating circumstance requires that the offender has committed the act in a state of anger. The Swedish provision does not expressly do so, but it requires the offence *to be caused* by the manifestly insulting behaviour of another person.⁴⁹

Closest to hand may be to regard these provisions as related to an assessment of the motive of the offender; in these cases, the offender's motive is considered morally superior to 'regular' motives for the crime in question. As a starting point for developing on the premises for this moral assessment, von Hirsch and Jareborg's theory on provocation can be used. According to von Hirsch and Jareborg, it is essential for mitigating cases of provocation that the offender committed the act in

48 In these cases, the question even arises whether mitigation is sufficient, or whether the offender should not be held liable at all. See further Rasmussen (2023) pp. 189-193.

49 In the provision, this requirement of causation is expressed by the Swedish word *föranletts*.

a state of resentment, which they define as anger with a legitimate reason.⁵⁰ With reference to Murphy, the authors describe resentment as a means for an individual to defend their self-respect. Murphy has asserted that individuals who do not resent moral injuries done to them almost necessarily lack self-respect.⁵¹

Against this background, a normative starting point in von Hirsch and Jareborg's argumentation is that a person who feels resentment is entitled to express their emotion in some way. von Hirsch and Jareborg argue that an outburst of anger can be the morally correct or best reaction to an insulting behaviour, and that the person's conscience in these cases therefore should have a divided role; both encouraging the actor's anger and expression of it, and discouraging certain kinds of expressive behaviour.⁵² If the person commits a crime it is not, at its core, entirely morally wrong, and therefore they deserve some mitigation.⁵³ von Hirsch and Jareborg express that, in cases of provocation, the actor is less to blame for overstepping the bounds since they had the right to feel angry at the victim.⁵⁴

A similar rationale for provocation is found in Nussbaum. Her perspective on the rationale for mitigation in cases of provocation can be summarised by the following quote:

*The homicidal act is not justified, but it is partially excused, in the sense that a lesser punishment is given for it. The reason is not simply that the person's emotion is comprehensible. It is that the emotion itself, though not the act chosen under its influence, is appropriate.*⁵⁵

A critique against a view of this kind can be found in Horder's monography on provocation. Here, Horder argues that the justification of provocation as a mitigating circumstance cannot be based solely on reasoning about the appropriateness of the offender's emotions, but also must depend on an evaluation of the action taken by the offender. According to Horder, a provision on provocation cannot be justified without being linked to a moral acceptance also of the fact that the angry person has retaliated against the wrongdoer by inflicting harm on them.⁵⁶

From this latter perspective, it is not enough to refer to the appropriateness of an emotion – and the notion that it should be expressed in some way – to motivate provocation as a mitigating circumstance in criminal law. Even though provisions on

50 von Hirsch and Jareborg (1988) pp. 248-249.

51 Murphy (1988) p. 16.

52 von Hirsch and Jareborg (1988) p. 250.

53 von Hirsch and Jareborg (1988) p. 251.

54 von Hirsch and Jareborg (1988) p. 251.

55 Nussbaum (2004) p. 39.

56 Horder (1992) p. 194.

provocation might not be based on a direct moral acceptance of the act committed by the offender, the application of them in specific cases is based on the idea that there is something natural or comprehensible about the commission of the violent crime in response to the provocative behaviour. Moreover, this understanding of the violent act as a natural reaction to an insulting behaviour seems to build upon ideas regarding the concept of anger. It can be noted that all of the authors mentioned above – von Hirsch and Jareborg, Nussbaum, Horder – stress that the offender needs to be angry for provocation to function as a mitigating circumstance. Furthermore, the authors have in common that they view anger as an emotion that entails an impulse to retaliation. According to Horder, this impulse is strong yet temporary, and it distinguishes anger from other emotions.⁵⁷ Also, Nussbaum argues that the desire for retribution is part of what defines anger as a concept.⁵⁸

Against this background, it can be suggested that the rationale for provocation as a mitigating circumstance is based on two central premises. One premise is a normative assumption that it is desirable for people to resent and speak out against certain types of insulting conduct to which they are subjected. The second premise is that the act of violence is seen as a natural reaction for a person who is angry. Consequently, although at first glance the Swedish provision in Chapter 29, Section 3 (1) appears to be a provision that has nothing to do with the emotional state of the offender, it is nevertheless a provision whose relevance in the criminal justice system is justified precisely by notions of emotions.

The view of anger reflected by criminal law in this matter can find support in some psychological theories on emotions. One example of such a theory is De Waal's. De Waal believes that emotions are objectively ascertainable biological states linked to specific changes in an individual's body and mind.⁵⁹ According to De Waal, these bodily changes can give rise to certain expressions or behaviours typical of the emotion. However, these expressions or behaviours are not inevitable. One key point made by De Waal is that emotions are a more suitable concept than instincts, even in the animal kingdom. While instincts are rigid and reflex-like, emotions merely prepare the body for certain reactions, allowing room for experience and judgement.⁶⁰ From De Waal's perspective, emotions are a desire or a preparation for the body to act in a certain way.⁶¹ Consequently, anger can be understood as an emotion that doesn't necessarily lead to aggressive behaviour but still causes an impulse for it.

57 See Horder (1992) p. 194 and Horder (1996) p. 66.

58 Nussbaum (2016) p. 15.

59 De Waal (2020) p. 85.

60 De Waal (2020) p.86.

61 De Waal (2020) p. 86.

Based on a perspective that associates the presence of anger with a tendency towards aggression, it appears reasonable to assert that criminal law should sometimes show understanding towards individuals who surrender to this impulse. This approach does not mean that the violent crime is considered to be an inevitable, uncontrollable reaction to an insulting behaviour, but rather a 'natural' or 'understandable' one. A similar connection between violence and anger is made in many areas of psychology and philosophy. For example, Arendt, in one of her essays on violence, has called the absence of outbursts of rage and violence 'the clearest sign of dehumanization.'⁶² By Solomon, revenge has been called 'an inescapable part of our psychology.'⁶³ From such quotations, it is not far-fetched to draw parallels with the Norwegian preparatory works, in which – as noted above – the criminal law regulation of provocation has been called a recognition of the 'human reaction of wanting to retribute a wrong to which one has been subjected', or with the Swedish preparatory works, in which it has been stated that a key point when applying Chapter 29, Section 3 (1) is that 'it appears understandable that the defendant acted as they did.'⁶⁴

The key point of this argument is to show that the perception of anger as an emotion connected to the impulse of retribution is very common. This perception can be challenged by theories of emotions like Feldman Barrett's. According to her theory, the connection between anger and violence is cultural rather than biological. Even though there may be statistical tendencies at population level regarding certain emotions and brain reactions, Feldman Barrett asserts that these tendencies do not support that specific emotions presuppose certain brain reactions.⁶⁵ Instead, she emphasises that variation is the norm for emotions and that the most visible commonality of all emotional instances called 'anger' is the very naming of them.⁶⁶

Even putting aside this perspective, the crucial question revolves around when criminal law should consider it a mitigating circumstance that the offender has followed an impulse of aggression. Concerning this question, it can be noted that researchers have observed a change in the use and perception of violence. It appears that there is a consensus within research that the actual use of violence in society has decreased over time, while violence today is valued in a different way than it has been previously in history.⁶⁷ For example, today, violence against children and women is regarded as blameworthy to a higher extent than earlier in history.⁶⁸

62 Arendt (1970) p. 63.

63 Solomon (1995) p. 40.

64 Ot.prp. nr. 90 (2003-2004) p. 80 och prop. 2009/10:147 p. 44.

65 Feldman Barrett (2018) pp. 23-24 och 222.

66 Feldman Barrett (2018) pp. 23 and 103.

67 E.g. Nilsson and Eriksson (2020) pp. 17-22, von Hofer (2011) p. vii, Kaspersson (2000) pp. 200-225.

68 von Hofer (2011) p. vii.

In the criminal law of several of the Nordic countries, provisions on provocation date back over one hundred and fifty years.⁶⁹ From a historical viewpoint, provocation can be described as a provision that was primarily applicable in cases where a man killed another as a result of an insult to his honour.⁷⁰ Typical examples of provocation mentioned in the legal literature include cases where individuals out of jealousy murder a cheating spouse or their lover.⁷¹ However, in later years, there has been notable criticism regarding the application of provisions on provocation in such scenarios.⁷² This criticism often juxtaposes cases involving domestic abuse as a counterpoint, *i.e.* cases where a family member has committed intentional homicide or assault against another as a result of years of physical and psychological abuse. The key point for these critics has been to highlight the moral offensiveness of the fact that infidelity more clearly has been regarded as a provocation in criminal law compared to domestic abuse.⁷³

In the light of this criticism, it becomes plausible to suggest a change in the perception of what constitutes such provocative conduct that makes the use of violence understandable. In today's context, one could argue for a reversal; rather than instances of jealousy and infidelity, instances of domestic violence should form the core of the provisions. One way to express this might be to say that the provisions on provocation today should apply in cases where a person's self-esteem has been offended, rather than their honour. This assertion is based on the perspective that a person's honour is dependent on how they are perceived by others, while self-esteem is viewed as a concept that lacks this kind of social dimension and is more closely tied to the individual and their characteristics.⁷⁴ Based on such a change in the perception of what constitutes a provocative conduct, it could be argued that provisions on provocation still have a relevant role to play in criminal law.

69 Regarding the history of provocation in Swedish criminal law, see Rasmussen (2023) pp. 49-87. Regarding the historical provision on provocation in Danish criminal law, see Goos (1887) pp. 33-36. See also regarding German criminal law, Dubber and Hörnle (2014) p. 561.

70 See Rasmussen (2023) pp. 224-225.

71 See e.g. Bergendal (1928) p. 275. See also Ambos and Bock (2020) p. 254 and Horder (1992) p. 193.

72 See e.g. Horder (1992) p. 194.

73 See e.g. Horder (1992) p. 191. See also McColgan (1993) pp. 508-514.

74 The argument in this section is further elaborated in Rasmussen (2023) pp. 224-229.

4. Rethinking the Distinction Between Diminished Capacity and Provocation

As has been shown in the above discussion, the Danish, Norwegian and Swedish penal codes make a distinction between two different types of mitigating circumstances applicable in cases where an offender has committed a violent crime in an agitated state of mind. One of these circumstances can be referred to as a provision on 'diminished capacity' and is based on the notion that strong emotions can impair a person's ability to control their actions or perceive reality. At first glance, an assessment of whether there are mitigating circumstances in a case, according to this provision, should focus on the intensity of the offender's emotions and disregard the reasons behind them. Regarding the second mitigating circumstance, it is referred to as 'provocation' and appears to be exclusively normative in nature. This means that it entails a moral assessment of the motives behind the action. The key point is that the act is perceived as a comprehensible reaction to the insulting behaviour that the offender has been subjected to. In conclusion, it appears that an agitated state of mind can constitute a mitigating circumstance in Swedish, Danish and Norwegian criminal law based on both its intensity and the reasons behind it.

However, in this article, this division between two rationales for mitigating acts committed in an agitated state of mind has been challenged. It has been argued that the comprehension of the violent act within cases of provocation is rooted in a specific notion of anger, where this emotion is considered to presuppose a desire for retaliation. Similar to diminished capacity, provocation can thus be described as a mitigating circumstance based on perceptions about the function and impact of emotions on the human psyche. At the same time, assessments of a person's capacity within criminal law are not scientific evaluations but are ultimately based on normative assumptions regarding what can be demanded of persons. In this article, it has been argued that this means that assessments of capacity within criminal law must take into account not only the intensity of the offender's emotions, but also the reasons behind them and the nature of the reaction. In other words, the assessment of whether an agitated state of mind affects an offender's degree of capacity must closely resemble the assessment of whether it constitutes a mitigating provocation. Clearly, there is a close connection between assessments of what, to a greater or lesser extent, can be demanded of a person in a particular situation and what constitutes an understandable reaction to certain behaviour.

An ideological connection of this kind can help to explain why for example Finnish law does not make a distinction between the two types of mitigating circumstances. Instead, in Finnish law, the provision on provocation is motivated by direct reference to how strong emotions affect the human psyche.⁷⁵ In Denmark, Norway and Sweden, it can be discussed whether there are reasons for keeping diminished capacity and

75 RP 44/2002 rd p. 199.

provocation as two separate provisions in the context of emotions, or if it would be more appropriate to combine them into one provision as in Finnish law or the partial defence ‘loss of control’ found in English law. Extraordinary instances where a person’s act is likely to be a result of the activation of survival circuits could then be incorporated into a broader regulation of accountability or excessive force in self-defence and necessity.⁷⁶

A change of this kind would probably not lead to a revolution of case law in the respective countries, where some instances of violent crime would be judged more severely than earlier. On the contrary, as a result of feeling rules in society and the potential human experience of self-restraint, it is likely that there is always an implicit, evaluative filter present when assessing emotions in courts. An example from Swedish case law can be used to illustrate this point. In earlier case law from the Supreme Court, there are several examples where it has been deemed as a mitigating circumstance in cases of domestic violence that the offender was in an agitated state of mind at the time of the offence due to their spouse’s wish to separate from them.⁷⁷ Often the court would formulate the mitigating element as ‘strong affect’, indicating that the reasons for the offender’s mental state were not central.⁷⁸ However, in a 2021 Supreme Court case, a man was held responsible for the murder of his wife. According to psychiatrists, the act was committed impulsively in anger following conflicts with the wife, who desired a divorce.⁷⁹ The Supreme Court found that there were no mitigating circumstances in the case. Instead, it asserted that it constituted an aggravating circumstance that the act was particularly ruthless, among other things, because it was a reaction to the wife’s wish to divorce.⁸⁰ One could say that the offender’s mental state indirectly contributed to the court’s conclusion that the circumstances were *aggravating* in this case. It is likely that this development does not reflect a different perception of emotions in general, but rather a change in the perception of domestic violence. Instead of being regarded as a comprehensible reaction to provocative conduct, such violence is now seen as a means of power and control. In summary, the argument presented here suggests that most people share the experience of being able to control their actions in an emotional state and that emotions, therefore, are always assessed in their context. However, in this article, it has been argued that provisions on mitigating circumstances in the penal codes of Denmark, Norway and Sweden can be redesigned to more directly reflect this.

76 See Rasmussen (2023) pp. 189-191 and 194.

77 See e.g. NJA 1978 p. 244 and NJA 1990 p. 776.

78 See the cases mentioned in the footnote above. See also NJA 1975 p. 594, which concerned the homicide of a man who had made sexual advances towards the offender’s wife, and NJA 1995 p. 464, which concerned the homicide of a homosexual man who had made sexual advances towards the offender.

79 NJA 2021 p. 583 pt. 35.

80 NJA 2021 p. 583 pt. 37-39.

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