

Autism in Norwegian Criminal Justice

A Thematic Analysis of Preventive Detention Cases Against Children

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Abstract

Autism is a neurodevelopmental condition characterised by differences in communication, social interactions, sensory processing, and cognitive functioning. While these features might have important legal and forensic relevance, research on the understanding and bearings of autism in criminal justice remains scarce. This article explores the approach to autism retained by Norwegian criminal courts in cases involving serious crimes committed by children. A thematic analysis of selected judicial decisions was conducted. The results highlighted a difficult and delayed diagnosis process, both before and during the judicial proceedings, and debated and questionable implications of autism on the defendants' criminal accountability, sentencing and risk assessments. Overall, the present study highlights a lack of knowledge about autism and its potential legal and forensic implications within the Norwegian child justice system.

Keywords

Autism spectrum disorders; Asperger's syndrome; Judicial decisions; Criminal justice; Criminal accountability; Risk assessment.

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1. Introduction

Autism is commonly considered as a neurodevelopmental condition characterised by deficits or differences in communication, social interactions, sensory processing and cognitive functioning.¹ The manifestations of autism vary from one individual to another, also depending on the presence, or not, of co-occurring conditions, and can evolve over time and context.² Autism is considered one of the most prevalent neurodevelopmental disorders, with a prevalence of around 1 to 2% of the population.³ While most research on autism has traditionally focused on its medical dimension, in the past decades a growing body of literature has developed regarding the social and legal dimensions of autism.⁴ Among other themes, the topic of autism in criminal justice has received an increasing attention from legal and forensic sciences, although it remains in great need of further research.

Within this topic, one axis of research has focused on how autism can affect the mental state of defendants and what legal implications this might have. Recognising the need of a case-by-case analysis, authors have for instance explained how autism can reduce or negate a defendant's criminal accountability.⁵ Similarly, authors have suggested that autism might impact and complexify risk assessment.⁶ More broadly, it has been suggested that autism will likely affect how a defendant is perceived and evaluated, not only by judges and juries but also by forensic experts, if not properly trained.⁷ The literature has highlighted that the knowledge and comprehension of autism by forensic experts and judges remained limited and sometimes erroneous.⁸

The different challenges related to autism and criminal justice will also likely be higher for children and young offenders,⁹ for whom assessments of criminal (un-)accountability and risk are already more complex than for adults, due to the significant developmental changes they undergo. Researchers in developmental psychology and law have emphasised that children's physical, cognitive, social, and emotional abilities are continually evolving, which influences the presentation and

1 APA (2013); Runswick-Cole et al. (2016).

2 WHO (2022).

3 CDC (2022); WHO (2022).

4 See for examples, Volkmar et al. (2021), Ducarre (2023), Ducarre (2024).

5 King and Murphy (2014); Heeramun et al. (2017); O'Sullivan (2018); Faccini and Burke (2021). N.B. In accordance with the relevant legislation (Section 20, Norwegian Penal Code), this paper uses the terms 'criminal unaccountability' instead of 'criminal or legal insanity'.

6 White et al. (2017); Faccini and Burke (2021).

7 Heeramun et al. (2017); O'Sullivan (2018); Crehan and Ury (2021); Freckelton (2021); Helverschou et al. (2015).

8 Helverschou et al. (2015); Crehan and Ury (2021); Freckelton (2021).

9 In this paper, the terms 'child' and 'children' refer to anyone under the age of 18 (see Article 1 CRC [UN, 1989]; Vergemålsloven § 2a).

progression of mental disorders, as well as risk and protective factors.¹⁰ Despite the issues at stake, research on the understanding and bearings of autism in criminal cases remains scarce, both in general and for children especially.¹¹

The present article aims to contribute to filling this knowledge gap by addressing the following research question: how is autism apprehended in the legal reasoning of Norwegian criminal courts. Rather than conducting a doctrinal or normative analysis, the objective is to explore how autism, as a phenomenon, is embedded within the courts' reasoning. Thus, the article will address the research question through a qualitative thematic analysis of preventive detention cases against children.¹² It was chosen to focus the analysis on these cases as they tend to raise multiple and complex legal questions (e.g., around criminal accountability, sentencing, risk of reoffending) thus allowing to explore how autism is apprehended with regards to these different key legal issues (see further in section 3).

In addition, Norway offers an interesting legal framework of study (see further in section 2). Indeed, while traditionally emphasising children's rights,¹³ Norway lacks specialised child justice and forensic systems.¹⁴ While youth delinquency appears relatively low, it remains overall a highly sensitive political and societal topic of preoccupation.¹⁵ In addition, Norwegian law relies on a specific approach to criminal unaccountability, highly dependent on the identification and conception of (neuro-)psychiatric diagnoses.¹⁶ It also allows for preventive detention to be imposed on children over 15-year-old.¹⁷ Briefly described, preventive detention is an indefinitely renewable prison sentence, justified by the risk of future commission of serious crimes.¹⁸ It constitutes a severe, potentially life-long, sanction, which remains heavily criticised.¹⁹ While research exists on the role played by other conditions (e.g., psychotic disorders and intellectual disabilities) in Norwegian criminal justice,

10 Rutter and Sroufe (2000); Scott and Steinberg (2008); Levick and Feierman (2016).

11 King and Murphy (2014); O'Sullivan (2018).

12 Preventive detention cases refer to cases where a sanction of preventive detention was discussed and/or adopted against the defendants. For more details on preventive detention, see the remaining of this introduction and section 2.

13 Haugli et al. (2019).

14 Fornes (2021).

15 Between 2015-2020 an average of 21 children a year were in jail, either awaiting judgement or executing a prison sentence, Kriminalomsorgensdirektoratet (2021). See also NOU 2023:7; NOU 2023:24.

16 Gröning et al. (2019); Gröning et al. (2022).

17 Gröning and Sætre (2019).

18 Section 40, Norwegian Penal Code.

19 Gröning and Sætre (2019); Holmboe (2020); Fornes and Gröning (2021).

including in preventive detention cases,²⁰ how autism is apprehended in these cases has not been investigated yet. While focusing on the Norwegian context, it is believed that the article will also contribute to informing larger international debates related to autism and criminal justice.

Regarding the terminology, while acknowledging that there is no consensus on the question,²¹ this paper will adopt an identity-first language. When not otherwise specified, the term “autism” is used as encompassing all shades of the autism spectrum. Additionally, it can be noted that, within the framework of criminal justice, autism is commonly defined as a mental or neuropsychiatric disorder. To not denature the context of the materials studied, the present article aligns with this definition. However, it is also recognised that the nature and definition of autism are contested, and that autism can be better defined and experienced as a disability, a difference and/or an identity rather than a mental disorder.²² Such a neurodiverse approach would also hold implications for criminal justice, as the literature has started to acknowledge.²³

The article is structured as follows: section 2 explains the Norwegian legal framework (i.e., the Norwegian child justice system and rules on criminal accountability, sentencing and preventive detention) in its relevance to the thematic analysis. Section 3 introduces the data (i.e., relevant legal decisions from Norwegian criminal courts) and methods (i.e., thematic analysis) of the study. The results of the thematic analysis are then presented in section 4, before being further discussed in light of the current literature on autism and criminal justice in section 5. Finally, a short conclusion is provided in section 6.

2. Legal framework

In Norway, the minimum age of criminal responsibility (MACR) is 15 years.²⁴ Norway has incorporated the UN Convention on the Rights of the Child (CRC) in its legislation in 2003. Norwegian courts must therefore apply the CRC dispositions, including Article 37, which prohibits life imprisonment of children, Article 40 on the right to a fair trial, and Article 3 (1) on the child’s best interests. Overall, the Norwegian criminal child justice is embedded within the general criminal justice and children above the MACR are trialed before common district courts and appellate courts, by a panel of professional and lay judges.²⁵

20 Gröning et al. (2019); Søndena et al. (2019).

21 Lorcan et al. (2016).

22 See for examples Wheeler (2011); Davidson and Orsini (2013); Milton and Ryan (2023).

23 See for examples Lollini (2018); Shields and Beversdorf (2021); Volkmar et al. (2021).

24 Section 20, first paragraph, Norwegian Penal Code.

25 Winterdyk et al. (2016); Fornes (2021).

Children are also subject to the same general rules on criminal (un)accountability as adults. These rules are provided by Section 20 of the Norwegian Penal Code, which, in its applicable version at the time of the decisions included in the thematic analysis (i.e., before 2020), enounced that:

‘a defendant shall be considered unaccountable if at the time of the crime they were, a) under 15 years of age, b) psychotic, c) mentally retarded to a high degree, or d) had severely impaired consciousness.’

The criterion in letter b) (psychotic) referred to serious psychotic states, as mental states with ‘severely impaired reality understanding’. Thus, a diagnosis of psychotic disorder, like Schizophrenia, was in itself not sufficient to qualify for criminal unaccountability on this ground.²⁶ Such a diagnosis was also not formally required, even though it was often necessary in practice. Nonetheless, it could be argued that other severe disorders (including autism) may involve such an impaired reality understanding, therefore qualifying for criminal unaccountability on this ground.²⁷

The criterion in letter c) (mental retardation to a high degree) was legally demarcated by a guiding IQ-limit of 55 or lower, which corresponded to a diagnosis of Moderate or Severe mental retardation (ICD-10).²⁸ Here again, while not formally mandatory nor sufficient, this IQ-limit was often in practice decisive for judgments about criminal unaccountability.²⁹ Autism is not an intellectual disability and was therefore not directly covered by this criterion. However, intellectual disabilities are a common comorbidity of autism, and the cognitive, sensorial, social or communicative particularities of autism are known to render intellectual measurement more complex in autistic people.³⁰

The criterion in letter d) (severely impaired consciousness) referred to conditions of an altered state of consciousness where the defendant did not have conscious control over their actions (e.g., sleepwalking, epilepsy, diabetes related conditions).

26 Gröning et al. (2019); Gröning (2024).

27 Gröning and Melle (2024) p. 431.

28 WHO (2019). N.B. The authors acknowledge that the terms ‘mentally retarded / mental retardation’ can be offensive for the persons concerned. The authors will nonetheless keep this formulation when referring to official legal/medical texts to reflect the approach taken at the time.

29 Søndena et al. (2019).

30 See for examples Roberts (2019); Wood (2019).

It should be mentioned here that these criteria have been modified by a law reform in 2020.³¹ The reform intended to introduce a more holistic assessment of criminal unaccountability, where legally relevant impairments may follow from a broad range of disorders, including autism, either in isolation or in combination with each other. Nonetheless, there has been no significant difference as to what conditions might be considered relevant and the decisive matter remains the degree of failure in the defendant's perception of reality and functional capacity at the time of the crime. There has not yet been any judgments clarifying the specific relevance of autism and the central role of psychotic disorders has so far been continued by the Supreme court.³² There has also not yet been any new cases involving preventive detention against children since the reform was passed.

Overall, it can be noted that Norwegian law does not require that the defendant's mental state at the time of the act has influenced the commission of the crime.³³ As such, and while the courts must evaluate the question of (un)accountability with regards to the legally relevant functional impairments of the defendant at the time of the crime,³⁴ there has been a strong association between some psychiatric diagnoses and criminal unaccountability. The Norwegian approach thus also highly relies on the ability of psychiatry to assess and identifies mental states in a scientific, non-discretionary manner and forensic experts are regularly appointed by the court (not by the parties) to provide a consultative clinical evaluation of the defendants.³⁵ However, there are few forensic child mental health experts in Norway.³⁶

When it comes to the question of sentencing, offenders who were unaccountable at the time of the crime cannot be subjected to punishment. However, provided that they were above the MACR, these offenders can be subject to the special sanctions of committal to compulsory care/psychiatric care.³⁷ In this regard, it can be noted that Norway does not have specific units for compulsory care/psychiatric care for children.³⁸

31 Most notably, criteria b) and c) were replaced by, respectively, 'unaccountable due to severely deviant state of mind' and 'unaccountable due to severe mental disability'. For a further discussion about the reform and the current rules about criminal unaccountability, see Westrum and Gröning (2022).

32 See HR-2023-1242-A; HR-2023-1243-A; and Gröning and Melle (2024).

33 Gröning et al. (2019); Søndena et al. (2019); Gröning et al. (2022).

34 Gröning (2024).

35 Gröning et al. (2019); Gröning (2021).

36 Gröning et al. (2021).

37 Sections 62 and 63, Norwegian Penal Code; see also Gröning (2023).

38 Although it is currently planned for. See Helse- og omsorgsdepartementet (2024) p. 5; NOU 2025:2 p. 286.

For offenders who are deemed criminally accountable but were under 18-year-old at the time of the crime, Norwegian law does provide for specific dispositions and alternative sanctions.³⁹ General mitigating circumstances are also applicable, including those based on the defendant's mental state.⁴⁰ However, once the incurred sentence has been determined, and regardless of the presence or not of mitigating factors, Norwegian law allows for a sentence of preventive detention to be pronounced, even against offenders who were under 18-year-old at the time of the crime. Preventive detention is a specific form of imprisonment sentence which can be prolonged indeterminately after its initial time frame. Contrarily to the overall logic of criminal law, which adopts a backward-looking approach focused on guilt, preventive detention relies on a forward-looking approach focused on risk.⁴¹ Indeed, while it does necessitate the commission of a criminal act to be pronounced, preventive detention is justified by the risk of a further, not yet perpetrated, crime and can be maintained as long as such a risk exists. To be applied, the offender must have committed a serious offense, there must be a qualified danger that they will again commit a serious offence, and imprisonment must be deemed insufficient to protect others.⁴² For children (above the MACR), the use of preventive detention is even more restricted and can only be applied in 'completely extraordinary circumstances'.⁴³ What amounts to completely extraordinary circumstances has been interpreted in a very restrictive way in the preparatory work, where it is explained that preventive detention should 'almost never be used against children'.⁴⁴

It must be noted that preventive detention is strictly regulated, that it preserves the possibility for parole, and requires a judicial decision for every renewal.⁴⁵ Nonetheless, this form of sentence has been heavily criticised.⁴⁶ While it is not formally considered in breach of Article 37 of the CRC, its use against children remains particularly contested,⁴⁷ and it has recently been proposed to be abolished.⁴⁸ Indeed, scholars have

39 See for examples Section 33 and Chapter 8a, Norwegian Penal Code.

40 Such as, for example when the defendant has 'a significantly impaired perception of reality because of a severely deviant state of mind, mental disability or impaired consciousness, but is not unaccountable [...]' (Section 80, f, Norwegian Penal Code).

41 Gröning and Sætre (2019); Fornes and Gröning (2021).

42 Section 40, Norwegian Penal Code; see further Gröning et al. (2023).

43 Section 40, Norwegian Penal Code.

44 Prop. 135 L (2010-2011), p. 167 – authors' translation.

45 Section 40, Norwegian Penal Code.

46 See footnote 19 above for references.

47 Gröning and Sætre (2019).

48 NOU 2025:2, pp. 271 – 272.

underlined that identifying and assessing risk in children is especially difficult, due to the developmental period they are in.⁴⁹ This is even further complicated for children with mental or developmental disorders, as has been the case in all preventive detention cases against children in Norway.⁵⁰

3. Methods and data

3.1. Data selection

A qualitative thematic analysis of preventive detention cases against children was conducted to explore how autism is apprehended in the legal reasoning of Norwegian criminal courts. It was decided to focus only on preventive detention cases for several reasons. Firstly, these cases involve serious crimes and entail a severe freedom-depriving sanction, based on a risk of future crime commission. They therefore represent high stakes cases for both society's security and defendants' rights. Secondly, preventive detention cases require to assess the danger/risk of reoffending of the defendants, including through a personal and/or forensic psychiatric examination.⁵¹ In addition, as of today, all cases of preventive detention against children have concerned children with mental/developmental disorders and disabilities and have included an evaluation of the defendant's criminal accountability.⁵² Focusing on preventive detention cases therefore allows to explore how the courts have apprehended autism with regards to multiple and complex legal (and forensic) questions, i.e., the evaluation of the defendants' mental state and criminal (un)accountability, the assessment of the defendants' danger/risk of reoffending, and the appropriate sentencing. As such, while covering only preventive detention cases against children, the thematic analysis extended to the whole of the included decisions and was not limited to the discussions on preventive detention.

The included decisions were identified through the use of Lovdata⁵³ and the previous knowledge of two of the authors who are academic and professional experts in the field. The inclusion criteria were: a) judicial decision/judgement from a Norwegian court in a criminal case; b) involving a defendant above the MACR but under the age of 18 at the time of the crime; c) where a sentence of preventive detention was considered and/or applied; d) where a diagnosis of autism was discussed and/or retained in relation to the defendant.

49 Gröning et al. (2021).

50 Fornes and Gröning (2021).

51 Section 40, Norwegian Penal Code.

52 Fornes and Gröning (2021).

53 Official online website for announcement of changes in Norwegian laws and regulations, offering free access to current laws and regulations, treaties, and judgments. < <https://lovdata.no/> >

Since the possibility of imposing preventive detention on children above the MACR was introduced in Norwegian criminal law in 2012, this sentence has been considered in eight cases, all from 2015-2020.⁵⁴ In three of these cases (which comprised in total seven judicial decisions), a diagnosis of autism was explicitly discussed and/or retained regarding the defendants during the judicial proceedings. The thematic analysis thus focuses on these three cases. Although quite specific by nature, this sample will allow for an in-depth qualitative analysis of how autism was apprehended in these decisions, which can constitute a valuable contribution to a developing field of research both nationally and internationally.

All the included decisions were publicly available and retrieved from Lovdata. Related forensic experts' assessments were also available to the authors.⁵⁵ The forensic assessments were however not made part of the thematic analysis, and the coding researcher only read them after the initial coding rounds, to obtain more contextual information.

3.2 Data summary

The three cases that were identified, comprised in total seven judicial decisions, from District courts, Appeal courts and the Supreme Court (Table 1).

Case I	Case II	Case III
1 District court decision	1 District court decision	1 District court decision
1 Appeal court decision	1 Appeal court decision	1 Appeal court decision
1 Supreme court decision		

Table 1. Included decisions repartition

Apart from the Supreme Court decision (20 pages), each of the decisions consisted of around 35 pages. In every decision except the Supreme Court one, the question of the defendant's criminal (un-)accountability was also examined. All the defendants were charged and ultimately convicted with serious crimes, including homicide or attempted homicide. In each case, only one defendant had been identified and charged. The following paragraphs present a summary of the main forensic and judicial conclusions for each of the cases.

54 Fornes and Gröning (2021). N.B. One of the cases (not included in the thematic analysis) was re-opened and re-trialled in 2022.

55 They were obtained as part of a larger research project [DIMENSIONS project]. The project's ethical statement has been attached to the article submission.

In Case I, a total of three forensic evaluations were conducted. From what is reproduced in the decisions, it appears that the defendant was first diagnosed with Harmful use of cannabinoids only. Following the district court trial, the forensic experts additionally diagnosed him with Childhood autism. The defendant was not considered as having had a severely impaired consciousness at the time of the crime. The experts also consistently concluded that the defendant had not been psychotic at the time of the crime, nor during their evaluations, and that he was only ‘mildly mentally retarded’. Both the forensic experts and other medical professionals involved in the defendant’s follow-up however formulated doubts regarding his actual level of functioning. In addition, some medical professionals also reported a suspicion of psychotic symptoms and/or disorders. Regarding the judicial proceedings, Table 2 provides a summary of the decisions in this case.

	Criminal accountability	Sentence		
District court	YES (dissenting minority in favour of criminal unaccountability based on high mental retardation)	Mitigating circumstances	Prison sentence	Preventive detention
		YES (due to mental state)	3 years and 8 months	General conditions: YES Special conditions for minors: NO
Appellate court	YES (dissenting minority in favour of criminal unaccountability based on high mental retardation)	Mitigating circumstances	Prison sentence	Preventive detention
		YES (due to mental state)	4 years	General conditions: YES Special conditions for minors: NO (dissenting minority on this question)
Supreme court⁵⁶	/	/	/	General conditions: YES Special conditions for minors: YES Initial duration: 4 years

Table 2. Case I – Summary of judicial decisions

56 Both the defendant and the prosecution appealed to the Supreme Court, but only the prosecution’s appeal, concerning the question of preventive detention, was allowed (see HR-2019-466-U).

In Case II, a total of three forensic evaluations were conducted. From what is reproduced in the decisions, the defendant was not considered ‘highly mentally retarded’ nor as having had a severely impaired consciousness. The forensic experts ultimately concluded that the defendant had a drug-induced psychosis, not severe enough to justify criminal unaccountability but which could potentially lead to a sentence reduction. Other medical professionals in charge of the defendant follow-up also considered a diagnosis of autism and/or of personality disorders, although this was not concluded to. It appears that the defendant has latter on been diagnosed with Paranoid schizophrenia. Regarding the judicial proceedings, Table 3 provides a summary of the decisions in this case.⁵⁷

	Criminal accountability	Sentence		
		Mitigating circumstances	Prison sentence	Preventive detention
District court	YES	YES (due to confession)	11 years	General conditions: YES Special conditions for minors: YES Initial duration: 11 years with a minimum of 7 years
Appellate court	YES	NO	12 years	General conditions: YES Special conditions for minors: YES Initial duration: 12 years with a minimum of 8 years

Table 3. Case II – Summary of judicial decisions

In Case III, a total of five forensic evaluations were conducted. The defendant was not considered ‘highly mentally retarded’ nor as having had a severely impaired consciousness. The question of psychosis was more debated. In their first evaluation, the forensic experts diagnosed the defendant with Undifferentiated schizophrenia and concluded that he had been psychotic at the time of the crime and still was at the time of the evaluation. In an additional statement, they changed their diagnosis to Simple schizophrenia and concluded that the defendant had not been psychotic at the time of the crime but was at the time of their evaluation. In a third statement

⁵⁷ The defendant appeal to the Supreme court was not allowed to proceed (see HR-2020-530-U).

they changed their diagnosis again, this time to Asperger syndrome, and concluded that the defendant was not psychotic, either at the time of the crime or during their evaluation. These diagnosis and conclusions were maintained in the two following forensic evaluations. One of the professionals involved in the defendant's follow-up however maintained their diagnosis of Undifferentiated schizophrenia rather than Asperger syndrome. Regarding the judicial proceedings, Table 4 provides a summary of the decisions in this case.⁵⁸

District court & Appellate court	Criminal accountability	Sentence		
	YES	Mitigating circumstances	Prison sentence	Preventive detention
		NO	13 years	General conditions: YES Special conditions: YES Initial duration: 13 years with a minimum of 8 years

Table 4. Case III – Judicial decisions

3.3. Data analysis

The decisions were analysed following the thematic analysis method developed by Braun and Clarke.⁵⁹ This method can be used both in qualitative and quantitative research and allows to identify, analyse and report on patterns within a data set.⁶⁰ It offers the possibility to both describe and explore the data while allowing for theoretical contributions to be added as well. Thematic analysis is generally conducted through six phases: 1) familiarisation with the data; 2) generating initial codes; 3) searching for themes; 4) reviewing themes; 5) defining and naming themes; 6) producing a report.⁶¹

Accordingly, the included decisions were read several times (Phase 1).⁶² Then, extracts mentioning or referring to autism were identified, through both reading and full-text searching.⁶³ The extracts were then coded, following an inductive and descriptive

58 The defendant appeal to the Supreme court was not allowed to proceed (see HR-2020-1505-U).

59 Braun and Clarke (2006), (2012).

60 Ibid.

61 Braun and Clarke (2006).

62 The original decisions were written in Norwegian. To facilitate their processing and analysis by non-native researchers and to allow their communication to a non-Norwegian speaking audience, they were translated from Norwegian to English by the authors. The thematic analysis was conducted on the translated texts.

63 Search items: autism*; asperger.

approach, i.e., data extracts were coded by describing their content without trying to fit them into an existing coding frame (Phase 2). After having been refined, the codes were regrouped under themes (Phases 3, 4, and 5). The themes were developed through a mixed inductive/deductive approach, and more specifically, through a bottom-up, data driven approach relying on the identified codes, but within the frame of a pre-existing research question and legal/judicial context. This implied considering both the literal content of the codes, their relevance to the research question, and their place within the decisions' structure (i.e., discussions on criminal accountability, sentencing in general, or preventive detention). This was chosen to allow an exploratory approach of the data that would also best address the research question and acknowledge the particularities of legal decisions as a specific type of qualitative data.⁶⁴

3.4. Limitations

As with every research, the present study comports certain limitations which are important to address. The study covers only three cases (seven decisions) and, since the diagnosis of autism was not retained in one of them, most of its analysis focuses on two cases only (five decisions). While the included materials are thus quantitatively limited, which is a common challenge in studies on autism and criminal justice,⁶⁵ the sample is nonetheless exhaustive as it includes all the existing decisions meeting the required criteria. In addition, while the coding phase of the thematic analysis was conducted by a single researcher, which might heighten the risk for subjectivity and potential biases, the prescribed process was thoroughly followed and documented. Moreover, thematic analysis as a method tolerates and even requires (informed) subjective judgement from researchers.⁶⁶ As such, notwithstanding its limitations, the present study provides valuable and potentially transferable,⁶⁷ insights on the interplay between autism, criminal justice, and psychiatry, particularly on the issues of (un-)accountability and risk assessment, two important yet under-researched topics.⁶⁸

64 Mitchell (2023).

65 Helverschou et al. (2015); Woodbury-Smith (2021a).

66 Braun and Clarke (2006).

67 On the issues of generalisability, validity and transferability of qualitative research see Maxwell and Reybold (2015) or Drisko (2024).

68 King and Murphy (2014); O'Sullivan (2018).

4. Results

4.1. Summary

Within the included decisions, autism was mostly discussed in relation to the diagnosis process and the questions of criminal (un-)accountability, sentencing and preventive detention. The thematic analysis resulted in two main themes: Theme 1 – Diagnosis process of autism (section 4.2), which highlights the difficulties and delays encountered in the diagnosis process of the defendants; and Theme 2 – Legal implications of autism (section 4.3), which includes two sub-themes: Autism, mental states, and criminal (un-)accountability (section 4.3.1), and Autism, risk assessment, and sentencing (section 4.3.2).

Figure 1 offers a visualisation of the different themes, sub-themes, and codes.

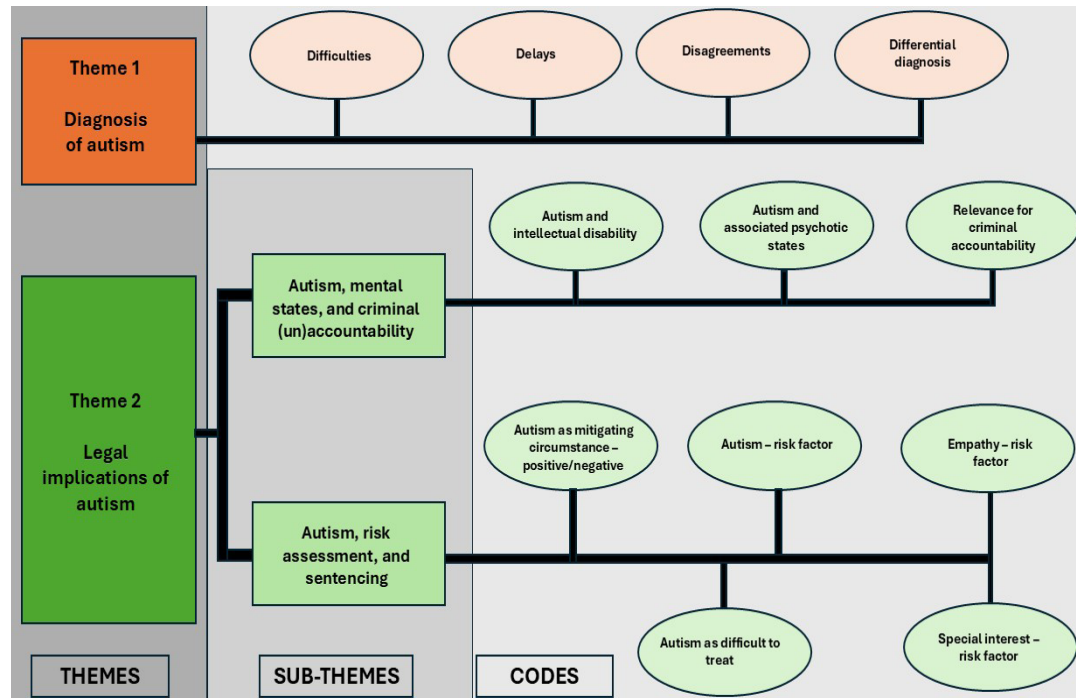


Figure 1. Thematic map [visual map of the different codes, sub-themes and themes of the thematic analysis]

The extracts identification legend operates as follows:

- Cases: Case I (I); Case II (II); Case III (III)
- Court level: District court (DC); Appellate court (AC); Supreme Court (SC)
- Decisions section: Criminal (un-)accountability (Sa); Sentencing – general (Sen); Sentencing – preventive detention (SenPP).

4.2. Diagnosis process of autism

The most commonly identified codes, present in every decision, revolved around the diagnosis process of autism, and the difficulties, delays, sometimes even disagreements, within this process. In all three cases, none of the defendants were properly diagnosed before committing their crimes, and the diagnostic process (both of autism and/or of other conditions) during the investigations and trials appeared to be highly complicated.

In Case I, as the following extracts illustrate, autism had been suspected years before the commission of the crime.

‘During the time when the observer lived in Kristiansand [i.e., years before the commission of the crime] [...] [i]t appears that the possibility of whether the observer could have autistic traits was discussed there.’ [I_AC_Sa]

‘Psychological specialist [name and place removed] had contact with the defendant from 3 August to 11 September 2017 [i.e., in the weeks before the commission of the crime] and [...] suspected that he had an autism diagnosis and a low level of ability.’ [I_DC_Sa]

Regardless, autism was excluded by the forensics experts in their first report. They however changed their assessment following the district court trial and the diagnosis of autism was afterwards maintained by the different medical professionals involved in the defendant’s follow-up.

In Case II, difficulties and uncertainties with regards to the defendant’s diagnoses were also reported. An autism diagnosis was considered by several professionals but was not concluded to:

‘[Names removed] found that the defendant was difficult to read, and were unsure whether he could have Asperger syndrome with psychotic breakthrough, an incipient development of psychosis since secondary school, or whether he was simulating psychosis. In their later contact with the defendant, they still found a complex picture, and kept open the possibility of Asperger’s or a serious psychosis.’ [II_DC_Sa]

In Case III, the forensic experts were also faced with a difficult diagnosis process. In particular, disagreements emerged on the interpretation of the defendant’s symptoms, leading to several changes in diagnoses and in the evaluation of the defendant’s (psychotic) mental state. It appears that the main point of disagreement focused on the interpretation of the defendant’s behaviour, and its timeline in relation to autistic and/

or psychotic disorders. Here it might be noted that, while autism manifestations are present (although not always visible) from early childhood, psychotic disorders tend to develop and manifest themselves more abruptly, and typically during adolescence or in young adult years. Most of the medical professional eventually concluded that the symptoms of the defendant were more conclusive with autism rather than a psychotic disorder:

‘The Court of Appeal further indicates that the defendant was admitted for observation for possible psychosis [...] The youth psychiatric clinic assess the issue of psychosis as follows: The most marked symptoms (monotone in behavior and speech, deviant eye contact, alexithymia, lack of mentalizing ability) [...], together with the patient’s deviant social functioning over time, give rise to the suspicion of an autism spectrum disorder [...]’ [III_AC_Sa]

However, one medical professional interpreted these symptoms as indicative of a schizophrenic disorder:

‘[Name removed] [...] maintained per 18 September 2019 schizophrenia as a diagnosis: The patient is assessed to have a diagnosis of F20.3 Undifferentiated schizophrenia. The patient has extensive negative symptoms with social withdrawal, emotional flattening, reduced interests and thought disturbances. Autism spectrum disorder is considered to be an unlikely explanation for the patient’s problems, partly due to the parents’ clear statements about changes in the patient over the past 2 years. This coincides with the patient’s own statements and is not contradicted by descriptions from the contact teacher at the secondary school. In addition, classic symptoms of schizophrenia are observed in the patient bedside records.’ [III_AC_Sa]

In the end, the courts retained the diagnosis of Asperger syndrome. Regarding the diagnosis of Undifferentiated schizophrenia, the court of appeal commented that:

‘[this] assessment is based on too weak a foundation. According to [name removed], decisive importance was placed on the parents’ statement that the defendant had a normal development throughout his upbringing and normal contact with other children. Furthermore, great emphasis was placed on the fact that the defendant had a marked decline in his social functioning at the age of 14, without consideration being given to the fact

that it is often during adolescence when social interaction becomes more demanding that people with autism spectrum disorder ‘fall through’. Psychiatrist [name removed] stated that for this reason, the diagnosis of 1/3 within the autism spectrum is made late.’ [III_AC_Sa]

Overall, the delay in diagnosis and its detrimental effect on the defendants, has been underlined by the courts, especially in Case I and Case III. In the latter, the court of appeal for example referred to a medical report highlighting that:

‘The patient fulfils the criteria for an autism spectrum disorder and probably has major difficulties understanding social interaction and communication, including both the social and actual consequences of their own actions. These difficulties have not been caught and he has not received adequate help, even though the difficulties have been described as visible to parts of the environment during secondary school [...]’ [III_AC_Sa]

In Case I, the Supreme court clearly deplored the delay in properly diagnosing and therefore addressing the defendant’s needs:

‘In conclusion, the court finds reason to note that the defendant should have been better looked after with a view to clarifying what serious health challenges he has. It is a puzzle that it was only after he had committed a very serious criminal offense that it was possible to clarify what serious challenges he has in relation to mental health.’ [I_DC_SePP]

Overall, this theme illustrates how complex, slow and disputed the defendants’ diagnosis processes have been before and after the commission of their crimes.

4.3. Legal implications of autism

4.3.1. Autism, mental states and criminal (un-)accountability

Throughout the cases, it appeared that both the experts and the judges seemed to struggle to fully capture the interplay of autism with other conditions, in particular mental retardation and psychosis. In addition, while the experts underlined the negative impact of autism on the defendants’ functioning, the courts’ consideration of this detrimental impact in relation to the question of the defendants’ criminal accountability was, however, more mixed.

In Case I, the interplay of autism and mental disability and its impact on the defendant’s level of functioning and criminal accountability was the topic of considerable discussions and persisting disagreements, both between the medical professionals and the judges. Here it might be important to recall that only being ‘mentally retarded

to a high degree’ constituted a ground for criminal unaccountability. By contrast, a ‘mild mental retardation’ could only justify a sentence reduction (see section 2).

As the following quote shows, the courts have highlighted that, partly due to his autism, the exact degree of ‘mental retardation’ and functional level of the defendant remained hard to assess for the experts and medical professionals involved:

‘[...] there has been disagreement about the degree of functional impairment in the defendant as a result of the autism diagnosis.’
[I_DC_Sa]

The difficulties of establishing the defendant’s level of functioning can be summarised by the following extract from the appellate court decision, quoting a medical report:

‘The diagnosis of mild mental retardation is considered to be an acceptable description of the patient’s cognitive abilities [...]. However, due to his childhood autism and lack of adaptation over many years, the patient is considered in practice to function far worse than what his cognitive and intellectual functioning alone would indicate [...]. The diagnosis of mental retardation is primarily a description of cognitive and intellectual functioning. The fact that this, viewed in isolation, is within the area of F70 Mild mental retardation means that this diagnosis is maintained under some doubt. This despite the fact that the patient’s actual functional level is weaker in several areas, closer to what is usually seen with F71 Moderate mental retardation.’ [I_AC_Sa]

Following these doubts, disagreements emerged within the judges in both the district court and the court of appeal on the question of the defendant’s criminal accountability. In both courts, a dissenting minority considered that, in part due to his autism diagnosis, there were such doubts as to the actual level of functioning of the defendant that he should be considered ‘mentally retarded’ to a high degree and therefore not criminally accountable:

‘The court’s minority, co-judge [name removed], has come to the conclusion that there is doubt as to whether the defendant had such a large cognitive impairment at the time of action that he has functioned as mentally retarded to a high degree, cf. § 20 of the [Penal] Code. [...] The diagnosis of autism combined with his mental retardation, and the fact that it cannot be ruled out that the defendant had psychotic symptoms at the time of the act, means that doubts can be raised as to whether he functioned as mentally retarded to a high degree at the time of the crime [...]’ [I_DC_Sa]

‘The minority has come to the conclusion that there are such doubts about the defendant’s real level of functioning and cognitive abilities that he must be considered mentally retarded to a high degree. [...] the minority believes that the defendant’s diagnosis of autism helps to further strengthen the doubt.’ [I_AC_Sa]

However, the majority concluded otherwise, considering that it had not been established that the defendant was ‘mentally retarded to a high degree’ and that he therefore did not qualify for criminal unaccountability on this ground:

‘Even if the defendant were to have a moderate diagnosis of autism, this, combined with his mild mental retardation, would not lead to him being considered mentally retarded to a high degree, Section 20 letter c of the [Penal] Code. The majority of the court is of the opinion that it is not evidence that the defendant functions right down to the recommended IQ – the limit of 55, which is the limit for severe mental retardation. The majority of the court has subsequently come to the conclusion that it has been proven beyond any reasonable doubt that the defendant was not mentally retarded to a high degree at the time of the act.’ [I_DC_Sa]

‘The majority has further understood the [forensic] experts, as well as other expert witnesses, that the defendant’s diagnosis of childhood autism – even when combined with his mild mental retardation – does not mean that he is therefore to be regarded as mentally retarded to a high degree.’ [I_AC_Sa]

In case III, although ‘mental retardation’ was not considered relevant, medical professionals still noted that, due to his autism:

‘[the defendant] probably has major difficulties in understanding social interaction and communication, including both the social and actual consequences of their own actions.’ [III_AC_Sa]

Autism was also claimed by the defendant as a ground for unaccountability in the appellate court:

‘The defendant [...] believed at the time of the appeal that he was not criminally sane. [...] he stated that he was unsure whether he acknowledged criminal guilt, and that it was connected to the fact that he has now been diagnosed with Asperger’s syndrome.’ [III_AC_F]

However, the courts did not consider that the diagnosis of Asperger syndrome, nor the difficulties mentioned above, could play a role with regards to the defendant's criminal accountability.

Finally, a topic that was subject to many discussions, in both Case I and Case III, was the frequent link made between autism and an increased risk of developing an associated psychotic disorder or of experiencing associated psychotic episodes. Here it can be noted that, alongside 'mental retardation to a high degree', being psychotic at the time of the crime constituted a ground for criminal unaccountability.

To start with, in Case I, many medical professionals involved in the defendant's follow-up reported what they identified as psychotic symptoms. However, none concluded with a diagnosis of a psychotic disorder. Despite this, several medical professionals emphasised the increased risk for the defendant to experience psychotic episodes and/or develop a psychotic disorder due to his autism:

'[Name removed] has indicated that it is too early to say whether the defendant's psychotic symptoms are due to the fact that he is in the process of developing an underlying psychotic disorder or whether they are psychotic symptoms that come and go as a result of stress (referred to as reactive psychosis). The defendant must also be vulnerable to the development of a serious underlying psychosis as a result of the diagnosis of autism.' [I_DC_Sa]

'[...] In the event of great unpredictability or insufficient accommodation, it is known that some people with autism spectrum disorders can be vulnerable to having episodes corresponding to acute psychosis in connection with severe anxiety or great stress. The course and the clinical picture described in the patient seem to be in line with such an understanding. However, this means that the patient must be assumed to be very vulnerable to new such episodes.' [I_AC_Sa]

This heightened risk of experiencing psychotic episodes and developing a psychotic disorder was however not further considered with regards to the defendant's criminal accountability evaluation, to the exception of the dissenting minority in the district court:

'The diagnosis of autism combined with his mental retardation, and the fact that it cannot be ruled out that the defendant had psychotic symptoms at the time of the act, means that doubts can be raised as to whether he functioned as mentally retarded to a high degree at the time of the crime. As regards the suspicion of psychotic symptoms, it is shown that he easily

becomes psychotic under stress. The defendant has explained that he found the loud music in the apartment stressful and that he felt attacked by the victim.’ [I_DC_Sa]

It can be noted, however, that these doubts were only mentioned as arguments for unaccountability on the ground of ‘mental retardation to a high degree’, not on the ground of psychosis. Overall, it seems difficult to reconcile the repeated mentions of an increased likeliness of experiencing psychotic episodes on the one hand, and the conclusions regarding the defendant’s mental state (i.e., not psychotic) and his criminal accountability on the other hand.

Moreover, as shown below, the higher risk for psychotic episodes or disorders incurred by autism was also raised in both Case I and Case III within the courts’ discussions on sentencing and preventive detention:

‘However [the defendant] has had short-term episodes with possible psychotic symptoms, even when he has been drug-free. It is assumed that, due to his autism, [the defendant] is “very vulnerable to new such episodes”’. [I_SC]

‘The experts have concluded [...] that they consider the defendant to have an increased risk of future violence that they assume will not abate for several years [and that] [m]easures must be put in place with treatment [...] which are aimed at the underlying disorder and any worsening with depression and possible psychotic breakthrough, as some with Asperger’s disorder may experience.’ [III_DC_SenPP]

While the purpose of these mentions is not entirely clear, their placement in the discussions on the justification of preventive detention might imply that this heightened likelihood for psychotic episodes, allegedly associated with autism, was perceived as a risk factor. As will be developed in the following sub-theme, autism indeed played an important role in the sentencing of the defendants, and in particular in the discussions surrounding the questions of risk assessment and justification for preventive detention.

4.3.2 Autism, risk assessment and sentencing

From the included decisions, it appears that autism had an important impact on the defendants’ sentencing. To start with, in Case I, the diagnosis of autism and its implication for the defendant’s level of functioning were retained as a mitigating circumstance during the sentencing evaluation. Indeed, both the district and appellate courts considered that the fact that the defendant had been diagnosed with

autism contributed to justifying a reduction of the applicable criminal sentence. The autism diagnosis was here considered as an additional criterion to this of the age of the defendant:

‘[...] account must be taken of the defendant’s young age and Section 80 letter g of the [Penal] Code, as well as the defendant’s diagnosis of autism.’
[I_AC_Sen]

In contrast, in Case III, both courts rejected the diagnosis of Asperger syndrome as a basis for sentence reduction:

‘The defendant has been diagnosed with Asperger’s syndrome, which is a pervasive developmental disorder, not a serious mental illness with a significant impaired ability to realistically assess his relationship with the outside world, without being psychotic. There is therefore no basis for a sentence reduction [...]’ [III_AC_Sen]

In addition, and regardless of its acceptance as a mitigating circumstance or not, autism also played a key role in the defendants’ risk assessments and for the justification of preventive detention. As developed below, autism was indeed referred to as a difficult condition to treat, therefore necessitating a long-term sentence, and as a risk factor for violence and recidivism, justifying preventive detention.

The difficulty to treat autism, and the associated need for long-term support it entails, was emphasised, to varying extent, in all the cases and mainly in support of preventive detention. In Case II, although the experts did not conclude that the defendant had an autism diagnosis – nor an antisocial personality – it was highlighted by the court that both conditions would be difficult to treat:

‘It has been suspected that the defendant has a disorder on the Autism spectrum, but it has not been concluded. There are also conditions that may indicate that he has an antisocial or dyssocial personality disorder [...]. What the disorders have in common is that they are difficult to treat.’ [II_AC_Sa]

In Case I, the courts all referred to the long-term issues caused by autism, in conjunction with the defendant’s other diagnoses, when considering the relevance of preventive detention instead of imprisonment.

For example, the district court stated that:

‘The court has therefore come to the conclusion that today there is an imminent danger of new serious acts of violence. As the court sees it, this danger will not change after the end of serving a prison sentence of three years and eight months. [...] The defendant’s developmental disorder and functional capacity are conditions that cannot be significantly changed in the short term.’ [I_DC_SenPP]

In Case III, when arguing in favour of preventive detention, the district court quoted the following developments from a forensic experts’ report:

‘Measures must be put in place with treatment from both the prison health service and the specialist health service, which are aimed at the underlying disorder and any worsening with depression and possible psychotic breakthrough, as some with Asperger’s disorder may experience. However, it is not certain. The primary need for treatment will be his severe fixation on violence. The experts believe that he needs long-term treatment and rehabilitation and that the measures must be there for many years.’ [III_DC_SenPP]

Here it can be noted that, besides the diagnosis of Asperger syndrome itself, the decisive factor for justifying preventive detention appeared to be the defendant’s fascination for violence. However, this factor is identified as a symptom of Asperger syndrome (i.e., a specific interest). Indeed, as it will now be developed, in addition to being a difficult condition to treat, requiring a longer sentence than a fixed-term imprisonment, autism/Asperger syndrome was also considered a risk factor for violence and recidivism, either in itself or due to its (perceived) manifestations.

In Case I, all three courts referred to the defendant’s poor functioning, due to his autism and low ability level, when assessing his risk for violence and recidivism:

‘In the court’s view, the act of violence must be seen in the context of the defendant’s failure to function, where, as a result of his developmental disorder and ability level, he easily misperceives the situation he is in as an offence, and then reacts explosively and violently. The experts have shown that if the defendant is found guilty of the attempted murder, then this action is considered an example of how difficult it is for him to understand social situations and regulate his own behaviour.’ [I_DC_SenPP]; [I_AC_SenPP]; [I_SC]

The appeal court and the Supreme court have also explicitly referred to the diagnosis of autism as a risk factor:

‘The defendant has now been diagnosed with childhood autism, which constitutes a further risk factor.’ [I_AC_SenPP]

‘The experts believed that the fact that [the defendant] had now been diagnosed with childhood autism and that more information had come to light about his poor social functioning further increased the risk of new acts of violence.’ [I_SC]

‘Despite [the defendant’s] young age, the danger of repetition in this case is solidly substantiated. I [i.e., supreme court judge] am referring to what I have previously said about his pattern of action and the diagnoses which now seem to have been established.’ [I_SC]

In Case III, the court of appeal did not consider Asperger syndrome as a risk factor in itself. Nonetheless, it did regard autism as a causal foundation for the defendant’s fascination for violence and lack of empathy, both decisive risk factors for violence and recidivism and strong arguments in favour of preventive detention.

‘Reference is made in this context to the defendant’s obvious fascination with violence. A fascination that appears as a special interest, which, according to the Court of Appeal’s assessment, has not diminished after the murder.’ [III_AC_SenPP]

‘Reference is also made to expert [name removed]’s explanation about the risk of violence. He pointed out that Asperger’s syndrome does not pose a risk of violence in itself. When the special interest is violence, as with the defendant, and he is unable to explain what this is about and why, it entails risk. Then dangerous situations may arise in the future, given the action he has committed and the lack of empathy that is a trait associated with people with Asperger’s syndrome.’ [III_AC_SenPP]

As can be seen from the decisions, autism had strong implications for the risk assessments and justifications for preventive detention, including in Case I where autism had been simultaneously retained as a mitigating circumstance.

Overall, the results of the present thematic analysis contribute to raise questions around the proper identification and understanding of autism by judicial and forensic professionals.

5. Discussions

Overall, the present results are illustrative of a lack of knowledge and understanding of autism in legal reasoning, partly due to similar flaws found within (forensic) psychiatry. These challenges reflect some of the wider discussions around autism and criminal justice found in other jurisdictions and internationally.

To start with the diagnosis process of autism, the delays and difficulties identified within the included decisions reflect the limited knowledge of autism within general and forensic psychiatry, as similarly documented in studies from other countries.⁶⁹ Indeed, in part due to the relatively recent understanding of autism as a spectrum condition with varying degrees and manifestations, it has been suggested that many experts might not have received any appropriate formal training on autism.⁷⁰ From what is reproduced in the included decisions and the related available forensic assessments, it is unknown whether the forensic experts had specific expertise in autism (and only a few had a stated specific competence regarding children). In addition, it can be mentioned that forensic experts in Norway are recommended to use the ICD classification,⁷¹ which, at the time of the included decisions, provided a more limited comprehension of autism than its American equivalent (DSM V [APA, 2013]) or recent research on autism. On this point, although a new ICD version has since been published, providing a more detailed presentation of autism, the former version is still used by Norwegian forensic experts.⁷²

This lack of knowledge on autism is also reflected throughout the included decisions in the limited and sometimes arguably misinformed, understanding of the impact of autism on the defendants' functioning and their legal implications. Indeed, beside a proper diagnosis, what will matter most during the judicial process is the ability of psychiatric experts to identify and communicate the impact of autism on the defendants' abilities, experience, and behaviour, as well as their legal relevance.⁷³

To start with the relevance of autism for criminal accountability, Cases I and III illustrate how complex this question appeared to be. A growing body of literature indicate that autism, either with or without comorbid intellectual disability, can influence a defendant's behaviour and functional abilities, and thus in turn their criminal accountability.⁷⁴ Nonetheless, the judicial reception of autism as a ground for criminal

69 Helverschou et al. (2015); Freckelton (2021).

70 O'Sullivan (2018).

71 Helverschou et al. (2015); Den rettsmedisinske kommisjon (2022) p. 5.

72 Partly because the ICD-11 requires a national system implementation, including translation into Norwegian. Helsedirektoratet (2024).

73 Freckelton (2021).

74 King and Murphy (2014); O'Sullivan (2018); Faccini and Burke (2021); Freckelton (2021).

unaccountability has so far been relatively limited and controversial.⁷⁵ As a legal question, the relevance of autism and autistic symptoms on criminal accountability will also differ according to the legal frameworks of different jurisdictions.⁷⁶ As explained in the introduction, within the Norwegian legal framework, the emphasis lies mostly on psychosis and intellectual disability as relevant conditions for criminal unaccountability. As such, it is not surprising that autism was only considered in relation to these conditions.

In this regard, Case I here illustrates the difficulty to fully apprehend the interplay between autism and intellectual disability. Indeed, several medical professionals underlined that, due to his comorbid diagnosis of autism, the level of functioning of the defendant appeared much lower than what his formal diagnosis of ‘Mild mental retardation’ would otherwise entail. However, this did not impact the ultimate diagnosis given to the defendant, nor the conclusions on his criminal accountability. Although the relationship between autism and comorbid intellectual disability is intricate, a more in-depth examination of the holistic impact of the defendant’s poor level of functioning on the perception of external reality and ability to regulate responses could have resulted in different conclusions.⁷⁷

In addition, the included decisions also raise the question as to why the supposed heightened risk of psychotic episodes, repeatedly mentioned throughout Cases I and III, was not more thoroughly evaluated concerning the defendants’ mental states during their crimes and, consequently, their criminal accountability. Indeed, to be considered criminally unaccountable, Norwegian law only requires that the defendants be in a serious enough psychotic state (i.e., impaired reality understanding) at the time of the crime.⁷⁸ Whether this mental state is caused by a psychotic disorder or by another condition, like autism, is legally irrelevant. Especially in Case I, for example, it was repeatedly mentioned that, due to his autism, the defendant was more likely to experience psychotic episodes, especially when stressed – as was reportedly the case at the time of the crime. However, only a dissenting minority in the district court considered that this might then indicate that he was, then, unaccountable.

Overall, the diagnostic process and its impact on the legal evaluation of criminal accountability seems to reflect an overreliance of the judges on the forensic experts’ formal evaluation and diagnoses. This appears problematic for two reasons. First, as explained previously, the forensic knowledge and understanding of autism remains limited. An overreliance of judges on forensic experts’ opinions on this topic therefore allows for potential oversights to remain unchecked. Moreover, the absence of

75 Helverschou et al. (2015); Freckelton (2021).

76 For a comparative overview, see Mackay and Brookbanks (2023).

77 Gröning et al. (2021).

78 Gröning et al. (2019).

contextualisation of the forensic diagnoses and conclusions in light of the facts of the case prevents a holistic and grounded legal evaluation of the defendant's functional mental state and criminal accountability.

When it comes to the question of sentencing, and more particularly the justification of preventive detention, the approach to autism retained in the judges' legal reasoning appears even more questionable. In particular in Case I, the repeated declaratory mentions of autism as constitutive of a risk factor for future violence, including in the Supreme court decision, seem highly problematic. Indeed, the recent literature on autism and violence risk has proven to be relatively inconclusive and in need of more research. Overall, recent studies have consistently confirmed that autism in itself does not increase the risk of violent or offending behaviour,⁷⁹ and might even contribute to reducing it.⁸⁰

In Case III, while the approach to Asperger syndrome was more nuanced, the declaratory interpretation of the defendant's fascination for violence and his lack of empathy as autistic symptoms can also be questioned. To start with, the lack of empathy traditionally associated with autism is wildly contested.⁸¹ In addition, the relationship between violence risks and violence-related intense interests (killings, war, weapons, fire, etc.) is still broadly misunderstood.⁸² Some studies have also demonstrated how a persistent fascination for violence could rather be indicative of a personality disorder rather than, or in addition to, autism.⁸³ The understanding of the relationship between autism and personality disorders (especially psychopathy) also remains in need of more research.⁸⁴ On this point, it can be noted that throughout the cases and decisions, several medical professionals have suspected a personality disorder in the defendants but have decided not to assess this matter further due to their young age. While this reflects a common practice among clinicians, both the DSM V and the ICD-10 and -11 allow for diagnosing personality disorders in adolescents. Recent literature and guidelines have also highlighted the importance of early diagnosis of personality disorders and appropriate differential diagnosis between such disorders and other conditions, including autism, for proper treatment and positive outcomes.⁸⁵

79 Helverschou et al. (2015); Heeramun et al. (2017); Rutten et al. (2017); Allely (2021); Westphal and Loftin (2021); Woodbury-Smith (2021b).

80 Helverschou et al. (2015); Heeramun et al. (2017); Allely (2021).

81 Chown (2020); Stenning (2020).

82 Allely (2021); Westphal and Loftin (2021); Woodbury-Smith (2021a).

83 White et al. (2017).

84 Ibid.

85 Laurensen et al. (2013); Bach and Vestergaard (2023); Bo and Lind (2023).

Given the current uncertainty on the relationship between autism and violence risk, the approach to autism as a direct or indirect risk factor and justification for preventive detention adopted in the included decisions appears questionable. The understanding of both autism and other neuropsychiatric conditions is still evolving and contested, including in their relationship to violence. For example, research has shown that most of the increased risk for violence previously linked to schizophrenia, could instead be better explained by associated substance abuse disorders.⁸⁶ Finally, risk assessment is inherently an uncertain field and practice, and even relatively undisputed risk factors (e.g., male sex, adverse childhood experiences) do not equal prediction of violence or re-offending in individual cases. Therefore, the lack of legal reasoning, evaluation, and contextualisation of forensic (risk) assessments in relation to the defendants' sentencing is questionable. This can then lead to puzzling results, as in Case I, where, based on the forensic experts' opinions, autism was legally retained as both a mitigating circumstance, justifying a reduced imprisonment sentence, and as a major justification for imposing preventive detention (i.e., a long-term, potentially life-long, prison sentence).

Finally, although outside of their scope, the included decisions also raise the question of the pre- and post-conviction follow-up and trajectories of the defendants. To start with, none of the defendants had received a proper diagnosis, nor proper mental health support and care, before the commission of their crimes. This does not appear to be specific to these cases. For example, in their study of forensic examinations of adult autistic defendants in Norway, Helverschou et al. found that almost half of them had not received a proper diagnosis before the commission of their crime.⁸⁷ As they concluded: 'this raises the question of whether the criminal act could have been prevented if [autism] had been identified earlier and appropriate services and support provided'.⁸⁸ The issue of late diagnosis of autism, and the potential implications it holds for crime prevention, is also regularly highlighted in the literature.⁸⁹

When it comes to post-conviction, autism is a lifelong condition and there is currently no medication available to lower or subdue the degree of autism or autistic symptoms. Consequently, if autism is viewed as a risk factor, it is unlikely that this risk will recede overtime, which is nonetheless a condition for release from preventive detention. In addition, if some symptoms constitutive of risk factors (e.g., lack of empathy, fascination for violence, psychotic episodes) are mistakenly attributed to autism, this may hinder their appropriate treatment and mitigation. Overall, in the included decisions, the difficult and sometime contested diagnosis process coupled to the potential confusion or misattribution of their symptoms do not allow to foresee

86 Woodbury-Smith (2021b).

87 Helverschou et al. (2015).

88 Ibid., p. 857.

89 Heeramun et al. (2017); Rutten et al. (2017).

proper post-conviction treatment for the defendants. This appears highly problematic as a regular proper legal and forensic re-evaluation and possibility for release, coupled to proper mental health treatment, is what differentiate preventive detention from life-long imprisonment sentences, which are expressly prohibited against children by international human rights law.⁹⁰

6. Conclusion

Overall, this study has highlighted a lack of knowledge about autism and its potential legal implications within the Norwegian criminal justice system. This limited comprehension, coupled to repeated unnuanced or misled declaratory statements, appears in turn highly problematic both for the treatment of the involved defendants and due to the stigmatisation that it might generate for autistic people in general.

The article acknowledges that the present results are specific to the included cases and decisions and that their factual, legal and institutional context must also be taken into account. Nonetheless, they do seem to reflect the established difficulties that criminal justice encounters when dealing with defendants presenting complicated and evolutive neuropsychiatric profiles and among them children.⁹¹ The present article therefore confirms and highlights that more research is needed to avoid a double-edged sword effect of criminal law on defendants with highly complex mental states and support needs. On a final note, integrating a rights-based and neurodiverse perspective within this research could also help provide a much-needed binder to this complex issue, situated at the crossroad of legal and forensic sciences.

90 Article 37 CRC.

91 Gröning et al. (2021).

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