Official Norwegian Report NOU 2014: 10 English Translation, Excerpts

Criminal Capacity, Expertise and Societal Protection

Translation from the Norwegian. For information only.

English translation of excerpts from the Norwegian Public Report 2014: 10 Criminal capacity, expertise and societal protection (NOU 2014: 10 Skyldevne, sakkyndighet og samfunnsvern). Translator: Knut Engedal. Contact: anders.loevlie@gmail.com or nilsgskretting@gmail.com, secretaries of the commission that delivered the report.

Innhold

Part I
Introduction

1 Summary

1.1 Background

The Committee was appointed in the wake of the 22 July Case. The main issue addressed in the report is whether we shall have criminal insanity rules and, if so, how these should be formulated, what should be the role of psychiatry in the administration of criminal justice and how society should protect itself against persons of unsound mind who may be dangerous to the life and health of fellow citizens.

Experience from the 22 July Case has influenced the discussions of the Committee in various ways. Some themes from the said case and its many aspects are visible and addressed in the report. Others are not traceable, but have no doubt coloured the discussions. What can be said at the general level about the relevance of this tragic case for the issues on which the Committee has been requested to take a view is, on the one hand, that it should not, in all its extremity, have a decisive influence on the formulation of rules that shall virtually without exception be applied to cases that are altogether very much less serious. On the other hand, one cannot completely discount the possibility that this type of tragedy, or cases of similar seriousness, may happen again.

The highly versatile professional background of the members of this legislative committee, which also includes specialists in philosophy and ethics, has resulted in the Committee examining some fundamental issues in more depth than has been done in earlier reports. The Committee has also – in line with the mandate and to provide a broader foundation for the discussions – addressed certain aspects of foreign law in quite some detail. A number of the matters discussed raise human rights issues, which issues are therefore also discussed.

The very comprehensive mandate has resulted in a voluminous report. The Committee has therefore endeavoured to provide a summary of the report that can be read independently, as a distilled version of the report, although not complete in all respects. The report is submitted with only a small number of dissenting votes and dissenting opinions. Most of these dissenting votes and dissenting opinions relate to issues of a more technical legal nature, without any disagreement about the substance of the matter, but different views about the wording of the Penal Code. These are not addressed in the summary.

1.2 Criminal capacity

1.2.1 Current law

Section 44 of the Penal Code stipulates that the perpetrator was not criminally liable if he or she was «psychotic», «in a state of automatism» or «intellectually disabled to a high degree» at the time of committing the act. The provision is based on the medical model, which implies that once it has been concluded that the perpetrator was in one of the said states at the time of committing the act, the punishment exemption follows as a matter of course.

In principle, the court has the final word in deciding whether the perpetrator was in one of the said states, but the forensic medicine experts have in practice had a major, or even decisive, influence on the outcome through their report and conclusion. This has been different in the event of disagreement between the experts. The court has then adopted a more open approach.

The term «psychotic» refers to the identical medical term. It follows from the preparatory works for the legislative amendment that introduced this term in replacement of the older term

«insane» in 1997 that the punishment exemption only applies if the psychosis manifested itself through obvious symptoms, and not when these were contained through medication.

The term «in a state of automatism» refers to those very rare cases in which the perpetrator has acted without at all perceiving his or her surroundings, typically followed by complete memory loss (amnesia).

The term «intellectually disabled to a high degree» in Section 44 exempts offenders with severely deficient intellectual functions from criminal liability.

1.2.2 The deliberations and proposal of the Committee

1.2.2.1 The mandate

The mandate states that the Committee shall in its assessments place «a special emphasis on the psychosis criterion, whilst also addressing the criteria of automatism and intellectual disability of a high degree if deemed appropriate in the formulation of legislative amendment proposals». The following discussion will focus on the psychosis criterion, which is also the key criterion under current law.

This is the criterion that most frequently gives rise to a punishment exemption, and the most frequent cause of debate. It should, at the same time, be emphasised that only a very small proportion of persons suffering serious mental disorders commit offences that give cause for intervention under criminal law.

1.2.2.2 The rationale behind insanity rules

The Committee has, in its discussions as to whether we should have criminal insanity rules, and if so how these should be formulated, started out from the general justifications for, and purposes of, punishment.

It is a prerequisite for criminal liability that the perpetrator was faced with a choice of action and can be blamed for the choice he or she made. Some offenders are in such a confused and aberrant state of mind at the time of committing the act that they should not be held liable for such act. It would be fundamentally unreasonable to punish them. All civilised societies exempt from criminal liability those who cannot be blamed, i.e. those who cannot be held to account for the criminal act they have committed.

Nor does it serve any purpose to hold such persons liable. The effect of the penal system on behaviour – its ability to motivate citizens to law-abidingness through deterrence and the formation of norms – is not impaired by exempting such confused and aberrant persons from liability.

The main challenge in the formulation of criminal insanity rules is to achieve accuracy, thus ensuring that only those persons who ought to be exempted for such reasons are indeed exempted. It is unfortunate to exempt too many, but it is worse to punish persons who are not worthy of blame.

Some of the offenders of unsound mind who are exempted from criminal liability represent a danger to the life and health of their fellow citizens. Society has a legitimate interest in protecting itself against such danger. However, such societal protection considerations should in no way influence the delineation of who is held to be of unsound mind. The said considerations are accommodated through the rules on special sanctions.

1.2.2.3 The Committee's choice of model

Two different models are commonly discussed in formulating and debating insanity rules: The medical model, which is briefly outlined above under the discussion of current law, and

miscellaneous variants of a mixed model. The mixed model typically requires, in addition to a more or less severe mental aberration at the time of committing the act, a causal link between the aberration and the act (causality criterion), or that the offender is unable to comprehend the illegality or effects of the action (psychological criterion).

The report discusses advantages and disadvantages of the medical model and the mixed model.

The medical model has been criticised. Many have argued, especially in the wake of the 22 July Case, that Norway should change to a system based on a mixed model because, inter alia, the influence of psychiatry should be curtailed and the influence of the courts of laws should be strengthened. And it has been argued that the courts of law have assumed much too passive a role in their application of the current Section 44, accepting as a matter of course the uniform conclusions of the experts that the observee was or was not «insane» or «psychotic» at the time of committing the act.

It may therefore seem reasonable to adopt a rule based on a mixed model, which does not automatically exempt from liability an offender who suffered a severe mental aberration at the time of committing the act, but in addition requires that such state has had an impact of his or her conduct. One might initially assume that such a rule would better identify those of «genuinely unsound mind»; those who should not be held liable under reference to the justifications for punishment. It also makes a clear distinction between the role of the medical experts, which would be to report on the mental state of the offender, whilst the court has the final word in clarifying the relevance of the said state for the committed offence.

A rule based on a mixed model does, on the other hand, involve uncertainties and difficulties. There is no empirical or theoretical basis for making the decisive assessment as to whether the mental aberration has influenced the offence committed by the perpetrator. Within psychiatry, there is some degree of controversy as to whether a psychosis can be «partial» and thus only affect parts of a person's mind. The dominant position has long been, and still remains, that psychosis afflicts the mind as a whole. Consequently, considerable uncertainty will be involved in deciding whether there is a causal link between the aberration and the act, or whether the offender has comprehended the implications of the act. Psychiatry is unable to provide guidance for such assessment, and lawyers will have to rely on vague suppositions without any clear foundation. When confronted with such difficult issues, the judge will, reasonably enough, seek the assistance of the expert, who is presumed to be most familiar with the unsound mind. However, since psychiatry offers no empirical or consensual basis for establishing the existence of a link between a state of psychosis and an offence from the perspective of the person of unsound mind, the expert will also rely on suppositions and discretionary assessments. Hence, it cannot readily be concluded that the influence of the courts on the final outcome will necessarily be strengthened under such a rule.

The scope of such a rule is not made less uncertain by that fact that the legislation of several countries adopting a mixed model uses vague terms to describe the mental aberration forming the basis for assessing the impact of such aberration on the conduct of the perpetrator. It is also a fact that such insanity rules have been opposed and criticised in a number of these countries. Changeover to the medical model has also been proposed by, for example, the Standing Committee on Criminal Law in Denmark, but without such proposal having been endorsed by the lawmaker.

As mentioned, the primary objective for the Committee has been to propose an insanity rule that identifies, in the best possible manner, those severely mentally aberrant offenders who should not be held liable on account of the justifications for punishment. The Committee is of the view that a rule based on the medical model offers the best accuracy. The rule proposed

by the Committee makes it clear that only those offenders who were «psychotic» at the time of committing the act, exhibiting psychotic symptoms of considerable severity, shall be exempted from liability. This is the mental disorder with the strongest and most disruptive effect on the mind, and hence also the disorder best suited to distinguishing the «guiltless» – those who lack the ability to make a normal choice of action for reasons of disorder – from those who should be held liable. And it is, as mentioned, the general view in professional medical circles that psychosis afflicts the mind as a whole. It is therefore also difficult to exclude, in specific cases, the possibility that the disorder has influenced the choice of action.

It has been important for the Committee to make a clear distinction between psychiatry and law, thus limiting the participation of experts to the field they know and are trained in, and enabling the court to more clearly assume independent responsibility for determining, with final effect, whether the accused shall be acquitted or convicted.

It will, under the rule proposed by the Committee, be the *role of the experts* to examine the offender's state of mind on an exclusively medical basis and in accordance with the international classification system for mental disorders, which currently is ICD-10.

The diagnosis system is the result of broad professional collaboration and is used in most countries with which we compare ourselves. The court is thereby provided with a professionally based assessment of the observee, premised on a consensual diagnosis system. The experts shall, in submitting their opinion, conclude within the framework defined by this medical system, but shall not opine on whether the *statutory* criterion «psychotic» has been met.

This is an important change from practice under the current regime, in which the experts also frame their discussion and reach their conclusion within the statutory psychosis concept. This means that the psychiatric experts enter the legal field and engage in the application of law (interpretation of the Penal Code), whilst also making the medical and legal psychosis concepts virtually identical.

The Committee is of the view that such a practice is unfortunate. The medical psychosis concept, as developed at any given time within psychiatry and the international classification system, is delimited and defined for the purpose of diagnosing serious mental disorders in order to facilitate the best possible medical treatment. The legal psychosis concept, which forms the basis for the statutory insanity assessment under the Committee's proposal, serves a different purpose: It shall delimit those disorders that are so serious and mentally disturbing as to relieve the offender of any criminal capacity.

The Committee is nonetheless of the opinion that the medical psychosis concept is the most important tool available to the court for purposes of determining whether the perpetrator was psychotic, in the legal sense, at the time of committing the act. This is why the most distinguishing features of psychosis; its most characteristic symptoms, are also specified in the new Section 44, Sub-section 1, proposed by the Committee. The core of the rule is that the medical state of psychosis in which the accused was at the time of committing the act, must have manifested itself in so strong and prominent symptoms that he or she must be exempted from criminal liability. It follows from the wording of the statute that this is for the court to decide. It also follows from this that the legal psychosis concept will be narrower than the medical one.

Consequently, it is the *role of the court* to determine, on an independent basis, whether the aberration suffered by the perpetrator was of such a nature and manifested itself with such strong symptoms, that he or she should be exempted from criminal liability. Such legal assessment will have a clear empirical foundation in observed symptoms, which the expert will

be able to shed light on through his or her special professional expertise and his or her methodological tools. However, the psychiatrist is not professionally equipped to answer the decisive question, which is fundamentally of a legal nature: Was the accused at the time of committing the act so mentally disturbed that he or she should not and could not be held liable?

It may be appropriate to say that the proposed insanity rule is based on a somewhat modified medical model, inasmuch as it makes a sharp distinction between the technical medical assessments and the legal assessments, and thus between the medical and the legal psychosis concepts.

The Committee upholds, in the proposed Section 44, Sub-section 2, the current regime that exempts offenders who were «in a state of automatism» or «intellectually disabled to a high degree», at the time of committing the act, from punishment. However, to the latter category has been added «or correspondingly debilitated». The background to this proposal is that some persons who are not disabled from birth will later in life become so debilitated as to cognitively and otherwise function at the same low level as a person who is intellectually disabled to a high degree. This is particularly relevant in case of severe brain damage caused by, for example, accidents or an advanced stage of dementia. There is no reason not to exempt such persons from criminal liability to the same extent as those who are intellectually disabled.

1.2.2.4 Equivalent aberrations

The current Section 44 is in practice exhaustive. It does not extend the insanity rule beyond the aberrations mentioned therein. The Committee is of the view that it is too narrowing to strictly limit the insanity rule to those offenders who met, at the time of committing the act, the legal psychosis criterion under the proposed rule. The Committee has therefore proposed that any aberrations that are deemed equivalent to psychosis shall fall within the scope of the rule.

This is because the ethical, philosophical and pragmatic reasons for declaring certain severely mentally aberrant offenders to be exempt from liability and without criminal capacity, extend beyond those deemed to be psychotic in the legal sense. Such reasons also apply to certain persons afflicted by serious aberrations that do not qualify for such diagnosis, although these may suffer cognitive distortions, functional deficiencies or impaired perceptions of reality to the same extent and of the same intensity as a person who is «psychotic».

By allowing some scope for exemption from liability also in those few cases which could conceivably be of such a nature, and which the Committee has also sought to describe, one will prevent deeply unreasonable convictions. One also prevents an overly «flexible» interpretation of the term «psychotic» on grounds of reasonableness to encompass such special cases, which fall clearly outside the scope of the medical psychosis concept, which again forms the basis for the legal concept.

The rule proposed by the Committee clearly requires the court to determine whether the relevant aberration with its symptom intensity is of such a debilitating nature that it «must be deemed equivalent» to a psychotic state. In the same way as with psychoses, it will be the role of the expert to describe the aberration medically and conclude in medical diagnostic terms.

1.2.2.5 The standard of proof in the sanity assessment

What needs to be proven under current law is that the perpetrator was of sound mind at the time of committing the act – in the same way that the prosecuting authority needs to prove that the other prerequisites for criminal liability have been met. Consequently, the object of proof is clear. What standard of proof applies in assessing whether he or she was «psychotic» is less clear.

The general standard of proof in criminal law is typically held to be that any reasonable doubt shall be for the benefit of the accused («in dubio pro reo»). This implies that it is far from sufficient for a conviction that it is most likely that the accused is guilty. Definite evidence and a firm belief, close to full certainty, is required. This is the same requirement as is applied in the legal systems of most civilised countries, and its ethical foundation lies in the desire to prevent the innocent from being convicted.

The Supreme Court has concluded that the general standard of proof applies to all conditions for criminal liability, also including the requirement that the perpetrator must have been of sound mind to be held liable. However, the Supreme Court has at the same time stated that the strength required from the evidence as to whether the perpetrator was psychotic is not the same as that required as to whether the accused has committed the relevant act. It is also stated, in this context, that a preponderance of probability that the perpetrator is of sound mind does not suffice. Current law offers no further clarification.

The Committee discusses the standard of proof in relation to the matter of criminal insanity. This also includes a discussion of the views expressed in the judgment of the Oslo District Courts in the 22 July Case. The conclusion is that no weighty argument suggests that the standard of proof should be different in relation to criminal insanity than in relation to the other conditions for criminal liability. Since it is considered deeply unreasonable, in view of the justifications for punishment, to inflict criminal liability on persons who are completely confused or suffer from other fundamental mental deficiencies, there is no reason to lower the threshold for proving guilt in this respect, with the implication that a larger number of innocent persons are convicted. In other words, the threshold for proving guilt should be the same here as elsewhere. This improves predictability and ensures equal treatment, both of which are absolutely key elements of the rule of law ideal on which our society is based.

The Committee also analyses – in relation to the assessment of criminal insanity – the distinction between doubt as to the facts, where the said standard of proof is applied, and doubt as to the legal interpretation or doubt as to the state of the law, where the court shall apply the outcome best supported by the available sources of law. This important distinction, which is of relevance to the ambit of the standard of proof, has not been clarified in Norwegian case law. Much of what has been considered factual doubt has in reality been legal doubt. Doubt as to the existence of the symptoms in the perpetrator will, for example, be of a factual nature and subject to the standard of proof. Doubt as to whether the perpetrator was, in the medical sense, psychotic at the time of committing the act, or as to whether the aberration – once the factual circumstances have been established – falls within the scope of the legislative wording, will on the other hand be doubt of a legal nature, which the court will need to resolve in determining whether the perpetrator was in a psychotic state within the meaning of the statute.

1.2.2.6 Self-induced unsoundness of mind

The current Section 45 excludes the application of the exemption from liability under Section 44 from those who were in a state of automatism at the time of committing the act if such automatism was the result of self-induced intoxication. Case law has also applied the said provision to substance-induced psychosis. It is sufficient for full criminal responsibility under Section 45 that the *intoxication* was self-induced; there is no requirement that the automatism or the psychotic fit was thus induced. Norwegian law has no other rules on «self-induced unsoundness of mind».

The Committee proposes a rule on criminal liability for offences perpetrated in a state of self-induced unsoundness of mind. The rationale behind exempting persons with severe mental aberrations from criminal liability does not apply with the same strength when the relevant person has induced such mental aberration, well aware that it entails a risk of unacceptable

and possibly aggressive, violent behaviour. Besides, criminal liability for this form of risk inducement may have clear deterrent effects and reduce the incidence of such high-risk behaviour.

The wording of the rule is completely general and applies to psychoses, equivalent aberrations, as well as severely impaired consciousness. The aberration will be self-induced when it is induced intentionally or negligently. A relevant example of a blameworthy self-induced psychotic fit may be when a patient stops taking the prescribed medicine, which he or she knows is necessary to keep the disorder in check. He or she will in many cases also be aware that a breakthrough of, for example, schizophrenia symptoms may dangerous to his or her surroundings. Besides, the rule will obviously apply to anyone who drinks so much as to risk severely impaired consciousness, or who runs the same risk by ingesting a hallucinogenic drug.

The rule represents a clear break with the current Section 45, under which full criminal responsibility for offences committed in a state of intoxication follows automatically when such intoxication is self-induced, i.e. when one has been drinking so much that one must expect to become intoxicated. Not a lot is required under case law. And one is held fully liable for any offence committed in a subsequent state of automatism. However, the justification for criminal liability does not apply when a person has been drinking within a limit deemed generally acceptable in the society of today, and – without having previously reacted thus – ends up in a state of unsound mind and commits offences that he or she would otherwise never have committed. The current Section 45 has highly unreasonable implications in such cases.

The rule proposed by the Committee is formulated as a discretionary criminal liability rule, expressed by the wording that the perpetrator «may be punished». The rationale is precisely that there may arise situations in which a state of unsound mind is self-induced, but in which this should nevertheless not result in criminal liability for subsequent offences. The Committee has principally, in this context, considered exceptional cases in which the conduct cannot be considered «illegal», in which it falls within the scope of generally accepted behaviour and hence is not blameworthy from a socio-ethical perspective. For example, a person who intentionally refrains from taking his or her antipsychotic medicine, in consultation with a practising physician and as part of his or her treatment, must be exempted from liability if the unfortunate outcome is unsoundness of mind and offence. It follows from this that the predominant rule will be that criminal liability will apply when the prerequisites have been met.

It is the unanimous view of the Committee that it would not for the time being be appropriate to repeal the current Section 45, which has contributed to effective and evidentially simple administration of criminal justice in relation to crimes perpetrated in a state of impaired consciousness caused by self-induced intoxication. Consequently, it is proposed that the said rule be maintained alongside the new rule on criminal liability in case of self-induced unsoundness of mind. However, the Committee would like to see such rule being phased out in case law, with all offences perpetrated in states of unsound mind caused by self-induced intoxication falling within the scope of the new rule allowing for an exemption from liability in extraordinary cases. It is, at the same time, recommended that the current Section 45 be interpreted and applied in such a manner that a generally accepted quantity of alcohol does not exclude criminal insanity, although it may result in some extent of intoxication that is «self-induced», and thereafter in automatism and offence, unless experience shows that the perpetrator reacts atypically to relatively small quantities of alcohol or has special reason to exercise caution.

1.3 Expertise

1.3.1 Introduction – The criticism against forensic psychiatry

The Committee has been instructed to perform «a comprehensive assessment of the role of forensic psychiatry in criminal cases in which the sanity of the perpetrator is in doubt». The term «forensic psychiatry» refers, for purposes of the report, to the services provided by court-appointed expert psychiatrists and clinical psychologists in the administration of criminal justice in individual cases. Such services are primarily intended to clarify whether the accused suffers a mental disorder so serious that it may result in criminal insanity, and to provide the court with a basis for assessing whether a person of unsound mind represents a danger to the life and health of other people, thus implying that a special sanction may be imposed.

The role of psychiatrists in court has been criticised on a regular basis – from various perspectives. The most common criticisms will be briefly outlined in the following. The reform proposals deemed appropriate by the Committee will be presented thereafter.

Psychiatry has been criticised for being built on a weak scientific foundation. Such criticism is not addressed in the report. The Committee deems it evident that psychiatrists and psychologists have special experience and knowledge of the intricacies of the human mind – both when it is characterised by disorder and when it operates within normal bounds – and that such knowledge is what shall be communicated to the court.

Criticism has been voiced against ambiguities and conflicts in the role of providing guidance to the court. The profession of the expert – the physician and the psychologist – is normally associated with the treatment of the diseased and disordered, with the focus being on the interests of the patient. However, the observee becomes, for the expert physician or psychologist, the object of an evaluation intended to provide the court with a basis for correctly adjudicating a criminal case. The confidence and duty of professional secrecy applicable to the first role is, in principle, absent from the second role.

Experts have often been criticised for not being sufficiently independent; for having ties to various bodies, which colour their judgement and conclusions. They have, likewise, been criticised for being too dependent on each other; for having worked closely together for many years, either as providers of treatment or as experts – or in both roles. It may also have been the case that one of them was the subordinate of the other and has been influenced by this. It is in any case argued that such ties inhibit the independent assessment that each expert is required to perform, and that checking of each other's work is inadequate.

It is also argued that external checking of expert opinions is inadequate, and that the Norwegian Board of Forensic Medicine does not function satisfactorily.

Finally, there is the criticism that expert psychiatrists have more influence on the adjudication of criminal cases than is justified by their field of expertise. It has been argued that the courts of law almost uncritically adopt the views expressed by the experts and the conclusion reached by them. It is argued, in this context, that the courts of law are not sufficiently aware of which questions should be posed to the experts, and that adequate guidelines do not exist on how expert opinions should be formulated, and hence that communication between the court and the experts is inadequate.

1.3.2 Proposed changes

1.3.2.1 Delineation of the role

As already mentioned when discussing the proposed insanity rules, it is the role of the experts to examine the state of mind of the accused on a professional medical basis, thereby providing the court with a basis for assessing whether he or she was of unsound mind. The experts shall not, as part of their evaluation, reach any conclusion as to whether the state of mind of the accused falls within the scope of the legislative wording.

This is obvious when the statute refers to an aberration that «must be deemed equivalent» to a psychotic state or uses the terms «severely impaired consciousness» and «intellectually disabled to a high degree». These are legal terms, and cannot be found in medical diagnosis systems or in professional medical terminology.

However, the same also applies to the term «psychotic» in Section 44, which does indeed have its origin in medical science. It is for the court to determine whether the perpetrator was psychotic within the meaning of the statute. The legal term «psychotic» will require high symptom intensity, and shall be ruled on by the court of law on the basis of the expert report. This approach will clarify and highlight the distinct roles of medicine and law in the insanity evaluation.

1.3.2.2 Required qualifications

The minimum requirement for appointment as a psychiatric expert is that the expert is a qualified physician or psychologist. There is neither any requirement for any approved specialisation, nor any requirement for authorisation, etc. However, there exists a supplementary training scheme for those wishing to serve as experts, with specialisation in psychiatry or clinical psychology follow by a two-stage course.

The Committee neither proposes any changes to the basic education of physicians or psychologists, nor to their further education in the form of specialisation. The Committee is of the view that the best targeted initiative for ensuring high quality in the performance of expert duties is supplementary training in the form of courses. The established courses should continue and resources should be made available. The contents of such courses should, at the same time, be modified and tailored to the changed role of experts under the Committee's proposal; cf. 1.3.2.1.

Expert appointments should primarily be made amongst experts with an approved specialisation. It should be a requirement that one expert is an approved specialist when two experts are appointed, which is common practice and the main rule under the legislative proposal of the Committee. When, as a matter of exception, only one expert is appointed, it is a statutory requirement that such expert has the said specialisation. Although it is not reflected in the legislative proposal, the Committee is of the view that at least one of the experts should in general also be required to have updated clinical experience within his or her area of expertise.

1.3.2.3 Appointment of experts

1.3.2.3.1 Experts when needed in a case

It follows from the mandate that the Committee shall examine how it can be ensured that the prosecuting authority only requests the appointment of experts in cases where it is professionally and factually appropriate to do so. From a due process perspective it is clearly more of a cause for concern if experts are not appointed in cases where it may be appropriate to examine whether the accused is of sound mind, than if experts are appointed in too many cases. The outcome in the former case may be the conviction of an innocent person.

The police and the prosecuting authority will be introduced to a case at an early stage, and it is important for these to be alerted to potential indications of severe mental aberration on the part of the accused, and to arrange for a provisional psychiatric evaluation when such indications are present. The Committee finds it difficult to propose legislative amendments to effectively ensure that the police and the prosecuting authority will request expert assistance in the relevant cases, but suggests measures that may potentially be implemented within the scope of existing legislation in this field. It may under any circumstance be appropriate for the headline investigation provision of the Criminal Procedure Act (Section 226) to be expanded to remind the said bodies that clarification of the state of mind of the accused at the time of committing the act is part of the purpose of the investigation.

1.3.2.3.2 The independence of experts

In order for the judicial system and society to have confidence in the input from experts, it is necessary for them to be perceived as independent in the performance of their duties, as well as for them to actually be independent. Any suspicion of interdependence or a hidden agenda will undermine the credibility of experts and the trust they and their profession depend on.

In the current Criminal Procedure Act, the disqualification provision concerning experts in general, not only forensic psychiatric experts, has been given a mild formulation: «When it can be avoided», no person should be appointed as an expert who would be disqualified under the provisions applying to judges. And furthermore: «As a rule persons who have an interdependent relationship to each other should not be appointed as experts».

The Committee is of the view that the statutory qualification requirement should be stricter, and proposes the following rule:

> «No person shall be appointed as an expert who would be disqualified from serving as a judge in the case.»

The provision on independence should also be made considerably stricter. A key purpose of appointing two experts is that these shall work independently. The Committee is of the view that experts who have a close relationship with each other, irrespective of whether such closeness is fraternal or professional, or who have served together as experts for a number of years, may give cause for concern. It does not suffice for the expert to consider him- or herself to be independent, or for him or her to actually be independent – the court of law and society in general must also perceive that such is the case.

On the other hand, persons who collaborate closely with each other cannot automatically be excluded as experts. Many of them will be able to act in a professional manner, maintaining the necessary distance and independence in their role of expert. Automatic exclusion as mentioned could, in a small country like Norway with limited professional resources, represent a major obstacle to the appointment of qualified experts.

It is difficult to draw a clear line here, but the Committee proposes a stricter wording than under the current provision:

> «Appointment should be avoided if affiliation with the parties, other experts or other circumstances mean that doubt may arise as to the independence or impartiality of the expert.»

1.3.2.3.3 The number of experts

As mentioned, the current practice is to appoint two experts, although this is not the statutory main rule. The reason for this is that the relevant legal provision – Section 139 of the Criminal Procedure Act – pertains to expertise in general, not only to forensic psychiatric experts, where there is a special need for two experts.

The Committee is of the view that the main rule should continue to be the appointment of two experts in cases raising the issue of criminal insanity and the prospect of imposing a special sanction. This generally ensures improved quality control of the evaluation. When the experts act in accordance with their mandate and each perform an independent evaluation of the accused, also including dialogue and the exchange of views between themselves, they will supplement each other and contribute to properly establishing the facts of the case.

1.3.2.3.4 Appointment of additional experts

Section 139 of the Criminal Procedure Act also authorises the court to appoint additional experts, in addition to the two already appointed in cases concerning criminal insanity, «when it finds this necessary». The said provision was the direct authorisation invoked by the Appeals Selection Committee of the Supreme Court when the Committee accepted that the Oslo District Court had appointed two new experts in the 22 July Case without any of the parties having requested such appointment. The Appeals Selection Committee concluded that once two experts had been appointed at the request of the prosecuting authority, the court was at liberty to supplement such appointments without any new request from the parties.

The Committee analyses current law as defined by the said ruling. There are diverging opinions on whether this is an appropriate rule, and also on whether it conforms well with fundamental principles of criminal procedure. The Committee discusses the issue, but does not reach a clear conclusion in this regard. The Committee is of the view that it would be more appropriate to leave further clarification to the committee recently appointed to draft a new Criminal Procedure Act. The Criminal Procedure Act Committee is better placed to perform such fundamental assessment in the context of other procedural provisions.

1.3.2.4 Mandate and opinions

It follows from Section 142 a of the Criminal Procedure Act that the courts shall issue a written mandate to the relevant expert or experts in respect of all types of expert services rendered to the courts of law. The formulation of the mandate is important for the expert him- or herself and for his or her work, but not least as a means of establishing the facts of the case in the best possible manner. The provision applies correspondingly when the prosecuting authority engages experts at the investigation stage, with the difference that the mandate will in such cases be formulated by the prosecuting authority. The provision also authorises the King to issue regulations laying down detailed provisions on the formulation of the mandate and any supplementary mandate. Such regulations have not been issued. The Committee has been requested to examine whether detailed rules should be laid down on the formulation of mandates for psychiatric experts, and also to take a view on what requirements should apply to the contents of the opinion submitted by the experts.

It has for some years been the practice of the prosecuting authority to use a standard mandate, formulated in collaboration between the Director General of Public Prosecution and the Norwegian Board of Forensic Medicine. Such standard is also used by the courts when appointing experts. The question is whether such practice is satisfactory, or whether additional rules are needed. The standard mandate would, under any circumstance, have to be modified in conformity with the more limited role envisaged for experts by the Committee, principally inasmuch as they are no longer to express any opinion in relation to the statutory description of the states of criminal insanity, but keep strictly to professional medical terms, as currently described in the ICD-10 system.

The Committee has concluded that more detailed rules should be issued, including a minimum standard for the formulation of mandates. Such standard is intended to prevent omissions and unwanted variations in how experts discharge their duties. The standard mandate shall not be formulated in such detail as to impede specific adaptation to the various cases

which will arise, and which may involve special issues. The Committee also submits a draft set of regulations on guidelines for the formulation of mandates for expert engagements in general, as well as a standard mandate for psychiatric experts.

1.3.2.5 Performance of the expert engagement

1.3.2.5.1 Access to health details for experts

Health personnel are subject to a general duty of professional secrecy. Such duty of professional secrecy is premised on data protection considerations, including the importance of maintaining a relationship of confidence and trust between a physician and a patient. There are a number of exemptions from the said duty of professional secrecy, but none of these entail any general right for appointed experts to obtain access to the health details of the accused.

In order to answer the questions presented to court-appointed experts, it will usually be of importance to obtain access to the health details of the accused. Previous disorders, medical consultations and hospitalisations will often be able to shed light on the issue of whether the accused was of unsound mind at the time of committing the act. The accused will in most cases consent to the gathering of such details. If consent is not granted, the said details cannot be disclosed to the experts.

Consequently, the situation is, briefly summarised, that the need for a substantively correct resolution of the issue of criminal insanity, and thus of the criminal case, has been accorded less weight than the data protection considerations that are the rationale behind the duty of professional secrecy for health personnel. It is true that Section 119, Sub-section 3, of the Criminal Procedure Act stipulates an exemption from the duty of professional secrecy when the disclosure of the evidence «is needed to prevent an innocent person from being punished». The lifting of the duty of professional secrecy also applies when a person is at risk of being convicted, even though he or she was of unsound mind at the time of committing the act. However, this provision must be assumed to be narrow in scope and will not apply to all evidence that may shed light on the state of mind of the accused. It is probably a requirement that the evidence is of sufficiently material importance to give reason to expect that it will prevent an innocent person from being convicted.

The Committee outlines the current state of law and the conflicting considerations in this regard. The conclusion is that there are no weighty practical considerations to suggest that prevailing law should be amended to grant experts access otherwise confidential health details for purposes of the criminal insanity evaluation.

However, this position must be considered in view of the recommendation of the Committee to curtail the duty of professional secrecy in cases raising the question of whether to impose a special criminal sanction. Societal protection considerations, i.e. consideration for the life and health of fellow citizens, will take precedence in such cases, thus justifying an exemption from the duty of professional secrecy.

The current Section 5-6 a of the Mental Health Care Act already stipulates an exemption from the duty of professional secrecy in relation to experts for health personnel. The said provision authorises the mental health professional in charge of the treatment of a person sentenced to transfer to compulsory mental health care, irrespective of any duty of professional secrecy, to disclose to experts and to the court any details that are necessary to determine, inter alia, whether such special sanction shall be *maintained*.

The Committee proposes that the exemption from the duty of professional secrecy stipulated in the said provisions be expanded to also apply when such special sanction may be *imposed,*

with any current and former professionals who are or have been in charge of his or her treatment being exempted from any duty of professional secrecy. This will provide the experts and the court with access to important health details concerning a perpetrator of unsound mind when the question arises of whether he or she should be sentenced to transfer to compulsory mental health care, i.e. during the judicial proceedings at the latest.

The experts will thereby also be able to obtain details which would otherwise have been confidential, and which may also serve to clarify the issue of criminal insanity, at least in cases that are presumed to involve a special risk of new offences that may seriously harm the life, health or freedom of other persons.

1.3.2.5.2 Video and audio recordings

The Committee has been instructed to examine whether video or audio recordings should be made of the experts' observations of the accused. The background is presumably that this would provide insight into their method of work, their evaluations and the factual basis for these.

Neither do any rules governing such recordings exist at present, nor are such recordings prohibited. The general provisions on expert evidence in the Criminal Procedure Act will apply to audio and video recordings, and these should be accorded the same status as other information materials that form the basis for the expert opinion. It follows from Section 169 of the Act that forensic psychiatric observation shall be carried out in a considerate manner in order «that it causes no unnecessary inconvenience or offence to the accused or others». The said provision will also impose limits on recordings, for example if the accused is suffering very intensive symptoms.

The Committee outlines the considerations in favour of using video and audio recordings and the considerations against doing so. It is the conclusion of the Committee that such recordings should not be introduced as a general regime for psychiatric observation under the auspices of the courts. However, the Committee does not deem it appropriate to introduce any prohibition against recordings, as these may in certain cases be well justified, primarily as a tool for the experts in connection with actual observation. Objections may be considerably stronger if such recordings were to be used in court.

1.3.2.5.3 Compulsory psychiatric evaluation

Section 167 of the Criminal Procedure Act authorises the court to order the accused to be committed to an institution, preferably a hospital, for purposes of completing a psychiatric evaluation. Such committal is in some cases necessary to complete a proper examination.

The Committee deems it necessary to continue this regime. However, it is also a very serious involuntary intervention against the person concerned, which aspect the Committee believes should be emphasised more strongly than under the current provision. It is therefore proposed that it be stipulated in the provision that such involuntary committal for evaluation shall not represent «a disproportionate intervention», and reference is made to the principle of proportionality, which otherwise applies to the use of coercive measures in criminal procedure. Moreover, the Committee proposes the introduction of a time limit for committal. The time limit shall be as short as possible and no longer than four weeks. The time limit can be extended by up to four weeks at a time by way of a court order.

1.3.2.6 Checking of expert opinions

1.3.2.6.1 General remarks

In order for a ruling in a criminal case to be as correct as possible, the courts of law need to understand the evidence in the case. They also need to be aware of uncertainties and sources of error. Expert opinions are authored by physicians or psychologists. Checking of these therefore requires specialist knowledge not in the possession of the prosecuting authority or the courts of law. These will often have to rely on the statements of the experts. Opinions tend to assume an importance of their own accord and are often considered to be authoritative evidence.

However, legal practitioners have some scope for checking by posing the appropriate questions. They may thus examine whether the factual basis for the assessments and conclusion of the experts rests on a properly firm foundation. Moreover, they may also to some extent check whether the conclusion is consistent with the premises on which it is based.

It is, under any circumstance, an important prerequisite for adequate checking on the part of the court that the experts clearly express any uncertainty on their own part, irrespective of whether it pertains to the facts on which they base their opinion or to the medical diagnosis they have reached. Another important prerequisite is that the experts are conscious of their role in passing on knowledge and express themselves in a form and with a terminology that enables legal practitioners to understand what they mean.

Moreover, it is an important prerequisite for checking on the part of legal practitioners that they have some knowledge of the profession represented by the experts. Students of law receive no general training in the assessment of evidence or in psychiatry. And the majority of our 533 professional judges will only very occasionally, if at all, come into contact with cases relating to criminal insanity. The Committee is unable to identify any simple solution for remedying the lack of knowledge and believes that the most appropriate way forward is for the courts of law, the police and the prosecuting authority to themselves arrange for measures to enhance knowledge, since this only concerns a small number of cases per year. Assistance should be available from the Norwegian Board of Forensic Medicine or from the centres of expertise within the mental health care service.

1.3.2.6.2 The Norwegian Board of Forensic Medicine

The Norwegian Board of Forensic Medicine performs a general supervisory function across all disciplines of forensic medicine and is organised into groups with different expertise. The psychiatric group comprises six psychiatrists and three psychologists. The most important external checking of the work carried out by court-appointed experts is performed by the Board of Forensic Medicine, where it is performed by colleagues with presumably the same or a higher level of expertise. In addition to its checking of individual criminal cases, the Board of Forensic Medicine performs general guidance duties. The Committee has been requested to examine several aspects of the activities of the Board of Forensic Medicine.

The members of the Board of Forensic Medicine are currently appointed by the Government with the Norwegian Civil Affairs Authority as its secretariat. This satisfactorily guarantees the independence of the Board of Forensic Medicine. It is of decisive importance for the legitimacy of the Board of Forensic Medicine that chairs and members have a high level of scientific and professional expertise. In addition to ensuring a robust quality in its checking of individual cases, this enables the Board of Forensic Medicine to contribute to professional development and uniform practice amongst the experts who assist with the administration of crimi-

nal justice on a regular basis. The sharp distinction proposed by the Committee between professional medical assistance and the application of law, means that such guidance duties will also be more clearly defined and easier to perform.

In order to ensure a high level of expertise in the Board of Forensic Medicine, the Committee proposes the establishment of a professional appointment committee, at least one of the members of which shall be qualified for a professorship in psychiatry or psychology, to assist in the process of appointing new members of its psychiatric group. This will highlight and reinforce the independence of the Board of Forensic Medicine. The Committee also proposes strengthening the legal secretariat by adding a lawyer who will be at the disposal of the Board of Forensic Medicine, and who will play an important role in ensuring that the distinction between medicine and the application of law is clarified, with the result that the experts keep to their field of expertise at all times.

The primary duty of the Board of Forensic Medicine is to review and check the opinions issued by court-appointed experts to the courts, which opinions such experts are required to simultaneously file with the Board of Forensic Medicine. Three of the group members participate in such checking. In principle, the Board of Forensic Medicine has the power to reconsider all aspects of the work of the experts, including the factual basis on which the opinion is premised. In practice, the checking is limited to a review of the written opinion, with the Board of Forensic Medicine primarily examining whether the conclusion is consistent with the premises on which it is based, including whether any of the premises are incompatible with each other.

The Committee proposes that such checks be continued, subject to certain changes. These include changing the wording of the conclusions currently used by the Board of Forensic Medicine. It does, for example, use the conclusion «no material deficiencies», which may give the incorrect impression that the opinion is deficient, although not materially deficient. The conclusions of the Board of Forensic Medicine should better reflect the checks that have been carried out, and express a view on whether the opinion is deficient in terms of the requirements applied by the Board of Forensic Medicine with regard to compliance with the mandate, consistency between the conclusion and the premises on which it is based, as well as the reasons given. The Committee has drafted proposed new wording for those conclusions that may be relevant in relation to the checks performed by the Board of Forensic Medicine.

The Committee also proposes that provisional psychiatric opinions be filed with the Board of Forensic Medicine when these are going to be presented in court, and that any expert who is going to give testimony in relation to psychiatric issues without having been appointed by the court shall submit a written opinion to the court and immediately file a copy with the Board of Forensic Medicine for checking.

1.4 Societal protection

1.4.1 Introduction

When an offender is exempted from criminal liability because he or she was of unsound mind at the time of committing the act, although he or she may even have committed very serious violent crimes like homicide or other gross violence, it goes without saying that fellow citizens need to be protected if there is a high risk of further and similar crimes.

In the absence of special criminal sanctions one would have to rely on the existing coercive powers under the health and care legislation to protect citizens. The most important administrative coercive power is available under the Mental Health Care Act. An offender of unsound

mind who is immediately committed to hospital involuntarily, receives treatment and then, maybe shortly thereafter, is no longer «seriously mentally ill», shall under the Mental Health Care Act be released from compulsory mental health care – irrespective of how dangerous he or she may otherwise be.

This is, in brief, the reason why the Penal Code has for many years authorised the use of special sanctions intended to ensure that offenders of unsound mind who are presumed to be dangerous do not commit further offences, by implementing both coercive measures and measures seeking to treat his or her underlying mental disorder.

Sections 39 and 39 a of the present Penal Code authorises use of the special sanctions of judicially-imposed transfer to compulsory mental health care and judicially-imposed transfer to compulsory care. The former is intended for offenders who are of unsound mind because of psychosis or severely impaired consciousness, and the latter is intended for those who are intellectually disabled to a high degree. The prerequisites for imposing such sanctions are the same for both categories.

An offender of unsound mind is, as previously mentioned, guiltless – without criminal capacity – and thus in principle and in practice innocent. It is therefore a priority to ensure that a special sanction is altogether different from a punishment, and that there is no penal element to the contents of such sanction. This is also necessary out of consideration for our constitution, our human rights obligations and our values, which the Committee discuss in further detail.

1.4.2 The prerequisites for special sanctions

1.4.2.1 Basic premise

The Committee deems it necessary to maintain a system of special criminal sanctions. Society has a legitimate interest in protecting itself against danger to life and health represented by certain offenders of unsound mind. The Committee is also of the view that there is sufficient theoretical and clinical empirical evidence, generally and in individual cases, to establish when there is such a risk that society needs to protect citizens against.

Measures justified by deterrence, including special sanctions, sit uneasily with the strong emphasis in our culture on the right of individual citizens to liberty, although no one has the right to thus endanger other citizens. Consequently, there should be a high threshold for the deprivation of liberty implied by special sanctions. The Committee emphasises, as a general observation, that the said interventions will only be justified when these are suitable, when there is a need for such interventions, and when these are reasonably commensurate with the interests one seeks to protect.

The Committee believes that there are robust reasons for permitting judicially-imposed special sanctions to protect the same legal interests as are currently protected by Sections 39 and 39 a of the Penal Code on transfer to compulsory mental health care and compulsory care, i.e. the life, health and liberty of citizens. However, it may be appropriate to consider a somewhat lower threshold for imposing a special sanction. The Committee has reviewed and described some cases that involve the infliction of quite severe physical injuries, although the strict requirement under current law that serious crimes have been committed is nevertheless deemed not to have been met, despite some of these cases appearing to entail a high risk of further and serious crimes on the part of the person of unsound mind. Such cases should fall within the scope of special sanctions, also because the coercive powers under the Mental Health Care Acts provide insufficient protection. The Committee therefore proposes an expansion of the scope for protecting interests through special sanctions.

1.4.2.2 Requirements with regard to the risk

The required degree of risk must be high, and the threshold under the current statute represents a good point of departure. The Committee is of the view that the current statute attaches too much weight to the committed offence, and would recommend that the focus instead be placed on the risk posed to important legal interests. A higher risk must be required when the threatened legal interest is not of key importance, whilst a lower risk will be required when the threatened interest is of essential importance, as with a risk of homicide. This implies that the assessment of risk will involve an element of relativity, depending on the value of the threatened legal interest.

1.4.2.3 Requirements with regard to the act

The Committee is of the view that the initial criterion should be worded such as to say something about the risk posed by the perpetrator to the life, health and liberty of others, whilst at the same time not being defined too narrowly. Those who represent a real risk to important legal interests have to fall within its scope. It must be a minimum requirement that an act has been committed that impairs or exposes to risk the life, health or liberty of others. It is proposed that the requirement under current law that a «serious» offence has been committed be abolished.

1.4.3 Execution

1.4.3.1 Content

The Committee retains the principle that the mental health care service shall have general responsibility for the placement and treatment of persons sentenced to special sanctions. The manner in which the convicted person is treated must principally be informed by the consideration that he or she is without criminal capacity, is exempted from liability, and cannot be blamed for the misdeed that occasioned the sanction. This also implies that he or she shall not be subjected to other restrictions on liberty than those that are necessary to protect the life, health and liberty of others.

The time spent in an institution must, within these limitations, be filled with positive and meaningful content, and the institutions taking care of this group must be provided with satisfactory professional resources and be upgraded to an adequate physical standard. The members of the Committee have concluded, through personal inspection, that the regional security department at Dikemark leaves a lot to be desired in terms of building standard, and hence also in terms of what can be offered to persons sentenced to special sanctions. Several groups appointed to report on the situation have over the years proposed improvements to existing buildings as well as new buildings. These have not materialised. This is regrettable.

The Committee proposes a new provision in the chapter on persons sentenced to special sanctions in the Mental Health Care Act, to the effect that these shall not be subjected to other restrictions on liberty or other interventions than those necessary out of consideration for the treatment and safety of the convicted person him- or herself, as well as that of fellow patients and society outside the institution, and that one shall, furthermore, facilitate the self-realisation of the convicted person within these limitations. It is proposed that the said provision be applied correspondingly to intellectually disabled persons who are sentenced to compulsory care in an expert unit of the specialist health service.

1.4.3.2 Transfer to the correctional service

The current Section 5-6 of the Mental Health Care Act allows limited scope for transferring persons sentenced to special sanctions from the mental health care service to an institution under the correctional service. It is the unanimous view of the Committee that it is, as a matter

of principle, unfortunate and unsatisfactory that persons who are guiltless may be placed in an institution under the administration of a body with responsibility for the execution of sentences. However, the members of the Committee differ in their views on which implications this fundamental observations should have.

The majority is of the view that scope for making such transfers is needed in extraordinary cases, and that such scope should remain until the mental health care service has been provided with institutions and resources enabling it to take care of these difficult patients in a satisfactory manner. The need for transfer to the correctional service will arise when the mental health care service has nothing to offer the convicted person, and the costs and difficulties involved in continued committal under the mental health care service are excessive.

The majority proposes a number of modifications to Section 5-6 of the Mental Health Care Act, to tighten and clarify the prerequisites for such transfer. A basic prerequisite is that the convicted person is no longer in a state of unsound mind, but is nonetheless deemed to pose a special danger to the life, health and liberty of others. A further prerequisite is that it has already been established, under the auspices of the correctional service, a special treatment programme for the convicted person, which is without penal character and clearly distinguished from what is ordinarily offered to convicted persons. Such a narrow scope for transfer will not be contrary to international law or constitutional principles.

A minority of four members is of the view that the scope for such transfer should be abolished. They are of the opinion that the provision in Section 5-6 does, in practice, allow for the imprisonment of persons who suffer from very severe mental disorders and who cannot be blamed for the offences committed by them. This does, as a matter of principle, give cause for concern. The form of imprisonment that will inevitably result from such transfer cannot readily be distinguished from punishment, with all its attendant unpleasantness. This will apply irrespective of how «nicely» the legislative wording requires the transferred person to be treated. The minority is therefore of the view that Section 5-6 of the Mental Health Care Act should be abolished.

1.4.3.3 The role of the Mental Health Care Oversight Board

At present, persons sentenced to special sanctions undergo a mandatory three-week round-the-clock stay in an institution. It is thereafter for the mental health professional in charge to decide the further treatment programme. For those who are considered particularly dangerous it will of course be a relevant alternative to continue the round-the-clock stay in an institution, until such time as the person in charge deems it appropriate to try less intrusive measures.

The convicted person, his or her next of kin and the prosecuting authority can file an administrative appeal with the Mental Health Care Oversight Board against the decisions made by the mental health professional in charge with regard to measures during the execution of special sanctions. The regime under current law is that the Mental Health Care Oversight Board shall examine whether such measure is unreasonable, given concern for the convicted person, the alternative placements and the circumstances in general.

The key consideration that constitutes the rationale behind the special sanctions, i.e. the protection of the life, health and liberty of fellow citizens, is not expressly mentioned. The Committee is of the view that it should be stipulated in the legislation that this shall also be taken into consideration by the Mental Health Care Oversight Board when deliberating an administrative appeal over a decision made by the mental health professional in charge.

1.4.3.4 Committal to a secure institution.

At present, the court has no influence over the actual execution of special sanctions, and hence not over how societal protection considerations are attended to during such execution, apart from the mandatory three-week round-the-clock stay in an institution upon the initiation of the sanction. The Committee has therefore discussed whether this regime, which implies that the mental health professional in charge is thereafter able to opt for treatment forms that offer more liberty, adequately accommodates concern for the life and health of fellow citizens.

It is a fact that the special danger to the life and health of others posed by some of the persons sentenced to special sanctions is the result of a serious disorder or aberration that offers little prospect for treatment within the foreseeable future. Those who belong to this group can be identified with a high degree of certainty. The Committee has concluded that it should be possible to commit offenders of unsound mind who belong to this category to a secure psychiatric institution on a round-the-clock basis, to ensure a stable treatment programme for the offender, as well as to protect other citizens.

This implies that the court defines a framework within which the mental health professional in charge will work, which will mean that the latter will be less required to take a view on what risk the convicted person represents at any given time. Discharge from a secure institution into a form of treatment offering more liberty can in such case only be decided by the prosecuting authority or, if the said authority declines, by the court at the request of the convicted person; cf. 1.4.3.5. However, the detailed content of the execution of special sanctions, including the granting of leave, will remain the duty of the mental health professional in charge.

At present, the term «secure institution» is not defined on the statute books. The term is used within the mental health care service, and the term «secure ward» is well known. The Committee proposes that the court shall have the power to stipulate, in its judgment, that the offender shall be committed in a secure institution on a round-the-clock basis if there is no prospect for swift and material improvement to his or her state of health, and it is justified out of consideration for the protection of weighty interests. The Committee also proposes a definition of the term «secure institution».

1.4.3.5 Duration of the committal.

Like at present, the special sanctions will be of indefinite duration under the Committee's proposal. The prosecuting authority may decide that the sanctions shall be discontinued. Discontinuation must otherwise be requested by the convicted person or his or her next of kin, and such request may be submitted one year after the transfer judgment or a judgment denying discontinuation becomes final and binding. This is a continuation of current law; cf. Section 39 b of the Penal Code.

The Committee has been instructed to examine whether the seriousness of the committed offence should have an impact on the length of the intervals between re-assessments, but rejects such an approach. An important consideration in this regard is that this would result in the special sanctions assuming more of a penal nature.

Since the court will, as mentioned in 1.4.3.4, have the power to stipulate that the convicted person shall be committed to a secure institution on a round-the-clock basis, the question of the duration of such committal arises. The Committee is of the view that the prosecuting authority should be authorised to decide that such committal shall be discontinued when it is no longer needed, for example when circumstances have changed because of serious disorder on the part of the convicted person. This is a reasonable implication of the fact that the prosecuting authority is correspondingly authorised to decide that the special sanction as such shall be

discontinued. Apart from this, the convicted person and his or her next of kin may request the discontinuation of the committal to a secure institution in connection with a discontinuation request to the court, or one year after the court issued a ruling imposing such committal.

The Committee has discussed whether a foreign citizen whose special sanction execution is interrupted as the result of his or her removal from this country, can be confronted with the formerly imposed sanction as a basis for coercion in the event of his or her return to this country. The Committee is of the view that protection considerations suggest that renewed implementation should be permitted if the other prerequisites have been met. It would be inappropriate for persons deemed to be so dangerous to the life, health or liberty of others that special sanctions have been necessary, to be permitted to return to this country and continue to represent the risk one established protection against when they last stayed in this country.

1.4.3.6 Minimum period

Furthermore, the Committee has discussed whether one should allow for the stipulation of a minimum period for the committal of the convicted person to a secure institution, with the implication that the convicted person and his or her next of kin cannot request discontinuation for the duration of such minimum period. The issue will be of relevance to a small group offenders of unsound mind who represent a special risk to the life and health of fellow citizens, and in respect of whom societal protection considerations are especially weighty. It should be mentioned that it is not contrary to human rights conventions or other overarching restrictions to allow for the stipulation of a minimum period of, for example, up to three years.

The members of the Committee diverge in their views on whether a minimum period is needed. The majority does not find that the introduction of a minimum period is justified. Much can change during the time the convicted person is committed to a secure institution. He or she may have contracted an illness or suffered a physical injury that leaves him or her unable to commit further offences. It may also be asked how much one will gain by depriving the convicted person of the basic right to judicial review of the committal. As long as he or she is considered to be dangerous and is committed to a secure institution, judicial review at one-year intervals will not be overly resource intensive.

The minority is of the view that there is a need for stipulating a minimum period of up to three years. A minimum period is justified, in particular, by the need for stability with regard to the treatment programme, but also to some extent by the expectation of the population for more permanent protection against this group of offenders. One will also economise on resources by avoiding judicial review of cases where the outcome is given in advance. In case of changes to the situation of the convicted person, for example the contraction of a disease that results in secure committal no longer being required, there is a sufficient safety valve in the fact that the prosecuting authority may at any given time decide to discontinue such committal. A reasonable implication of the reasoning outlined by the majority in relation to a minimum period is that the court must have the power to stipulate a new minimum period in connection with proceedings concerning discontinuation of the special sanction as such or discontinuation of the committal to a secure institution.

2 Appointment and composition of the Committee

The criminal case in the wake of the terrorist action in the centre of Oslo and at Utøya on 22 July 2011 gave rise to a fundamental discussion of the insanity rules in the Penal Code and the role of psychiatry in the administration of criminal justice. The Government therefore appointed, by Royal Decree of 25 January 2013, a committee with broad representation to review the insanity rules in the Penal Code and the use of psychiatric experts in criminal cases.

The Committee has been chaired by Georg Fredrik Rieber-Mohn, and has comprised 11 members:

- Georg Fredrik Rieber-Mohn, former Director General of Public Prosecution and Justice of the Supreme Court
- Knut Erik Sæther, Deputy Director General of Public Prosecution
- Tor Langbach, former General Manager of the Norwegian Courts Administration
- Siv Hallgren, attorney-at-law and partner of Advokatfirmaet Elden
- Hilde Stoltenberg, public prosecutor at the Regional Public Prosecution Office in Nordland
- Linda Gröning, Professor of Law at the University of Bergen
- Marit Bjartveit, specialist in psychiatry and head of the Division of Mental Health and Addiction, Oslo University Hospital HF
- Jim Aage Nøttestad, specialist in clinical psychology, Division of Mental Health Care, Brøset Department, St. Olavs Hospital HF
- Tina Gram Larsen, specialist in psychiatry and chief medical director, Forensic Psychiatry, Aalborg University Hospital, Denmark
- Arne Johan Vetlesen, Professor of Philosophy at the University of Oslo
- Paul Leer-Salvesen, Professor of Ethics and Theology at the University of Agder

Anne Grethe Klunderud, former national leader of the Norwegian Mental Health Association, chose to relinquish her membership of the Committee for personal reasons in August 2014.

Anders Løvlie has headed the secretariat of the Committee, which has also comprised Nils Gunnar Skretting and Anne Wie-Groenhof.

3 Mandate

The mandate of the Committee is worded as follows:

«**1. Introduction**

A person can only be punished if he or she was of sound mind at the time of committing the act; cf. Section 44 of the Penal Code. Sections 44 and 46 specify the circumstances implying that he or she was not of sound mind. These are psychosis, automatism, intellectual disability of a high degree, as well as young age.

The rationale behind these rules is that it would be unreasonable to punish those who lack the requisite maturity, mental capacity and awareness. Nor will the threat of punishment have the same deterrent effect on those who are not of sound mind as on others. Section 20 of the new Penal Code of 2005/2009, which brings together the four bases for criminal insanity, represents a continuation of current law.

Some of those of unsound mind within the meaning of criminal law are so dangerous to others that there is nonetheless a need to implement measures. Psychotic persons and those who are in a state of automatism may be transferred to compulsory mental health care when deemed necessary to protect society; cf. Section 39 of the Penal Code; cf. Chapter 5 of the Mental Health Care Act. This is also subject to requirements as to the nature of the offence, and there must be a risk of recidivism.

Psychosis at the time of committing the act is an absolute ground for punishment exemption, irrespective of whether the offence is the result of such psychosis. This so-called medical model was applied in full in the Penal Code through a legislative amendment in 1929, and has been maintained in Section 20 of the new Penal Code. In determining which aberrations shall be classified as psychotic within the meaning of the Penal Code, decisive weight is attached to how the term psychosis is defined in psychiatry at any given time; cf. Proposition No. 87 (1993–94) to the Odelsting, page 22. This part of the statutory insanity rule is currently linked to the medical terminology in ICD-10, which is an international criterion-based diagnosis system introduced in Norway in 1996.

The Norwegian Board of Forensic Medicine has noted that the diagnostic categories and the terminology in the Penal Code are not fully in conformity with each other; cf. the report «Re-examination of the Criminal Insanity Rules, Special Criminal Sanctions and Preventive Detention», 30 April 2008 (the Mæland report), page 217 and Appendix 7 to the report.

The criminal standards of proof are non-statutory, being instead derived from case law from the Supreme Court. If there is reasonable doubt as to the sanity of the offender, the court shall acquit him or her. The burden of proof in relation to sanity is not as strict as in relation to whether the accused has committed the act referred to in the indictment, although a simple preponderance of the evidence will not suffice for a sanity ruling; cf. the Supreme Court judgment published on page 143 onwards of the 1979 volume of the Norsk Retstidende court reporter.

The criminal case against Anders Behring Breivik has occasioned extensive and fundamental discussion concerning the legal insanity concept under the Penal Code and the use of forensic psychiatric experts in criminal cases.

2. Assessment of the insanity rules

The Committee shall perform a comprehensive assessment of the insanity rules in Section 44 of the Penal Code, with a special emphasis on the psychosis criterion, whilst also addressing the criteria of automatism and intellectual disability of a high degree if deemed appropriate in the formulation of legislative amendment proposals. The fundamental issue is the extent to which persons with serious mental disorders shall be held criminally responsible for their actions.

The Committee is required to take a view on whether the medical model should be maintained. This shall include an examination of the extent to which a medical diagnosis system should determine the legal assessment. The Committee shall examine whether punishment exemption should be conditional upon additional criteria, such as a link between the disorder and the offence (causality criteria), or an inability to comprehend what one does and that the action is illegal (psychological criteria). Such a mixed model would make for a stricter insanity rule, as criminal insanity would no longer depend exclusively on the medical diagnosis. The Committee shall, in this context, discuss the insanity threshold in other countries with which Norway can reasonably be compared.

Which cases will in practice fall within the scope of the insanity rules in the Penal Code is affected by what standard of proof is applied. The onus of proof as to whether a person is of sound mind and whether the criminal liability criteria are met is on the prosecuting authority. The stricter the standard of proof, the more offenders will be adjudicated legally insane, despite not necessarily being psychotic. Although it may be wrong to convict the mentally ill to imprisonment, one may also ask how right it is to convict persons of sound mind to treatment.

The Committee shall take a view on how strict the standard of proof should be and on whether it should be codified. In Proposition No. 90 (2003–2004) to the Odelsting, the Ministry endorsed the position of the Norwegian Board of Forensic Medicine that one might consider codification of the implications of psychoses that are caused by self-induced intoxication, and that it would be appropriate to do so in connection with the re-examination of the new Penal Code of 2005/2009; cf. also paragraph 42 of the Supreme Court judgment published on page 549 onwards in the 2008 volume of the Norsk Retstidende court reporter.

The Committee shall examine the criminal insanity implications of psychoses caused by the use of intoxicating substances. It shall, furthermore, examine how societal protection considerations should be attended to when an offender who is not of sound mind is sentenced to the special sanctions of compulsory mental health care or compulsory care.

The Committee shall examine the provisions on the discontinuation of special sanctions, including whether the seriousness of the offence should have any impact on the length of the intervals between re-assessments. This will require a specific examination of the requirements implied by the human rights conventions. Furthermore, the Committee shall take a view on whether the current system of administrative appeal to the Mental Health Care Oversight Board is appropriate, or whether the prosecuting authority should be able to refer the matter to the courts of law if the mental health professional in charge decides to make changes to the implementation of compulsory mental health care.

The Committee shall also examine the scope for transfer from compulsory mental health care to the correctional service; cf. Section 5-6 of the Mental Health Care Act.

3. Assessment of the role of forensic psychiatry in criminal cases

The Committee shall perform a comprehensive assessment of the role of forensic psychiatry in criminal cases in which the sanity of the perpetrator is in doubt.

The Committee shall examine the commissioning and use of forensic psychiatric expert opinions by both the prosecuting authority and the courts of law, and outline strengths and weaknesses of the current system. The Committee shall also examine how it can be ensured that the legal practitioners; i.e. judges, defence counsel and prosecutors, have adequate knowledge within this specialist field and are in a position to critically check the assessments of the experts.

The Committee shall examine how it can be ensured that the prosecuting authority requests the appointment of forensic psychiatric experts in cases where it is appropriate to do so, and also that experts appointed or used by the prosecuting authority during the investigation are sufficiently independent; cf. Official Norwegian Report NOU 2001: 12, «Forensic Medical Expertise in Criminal Cases», from the Rognum Committee, page 119 onwards.

The Committee shall also take a view on whether responsibility for submitting expert opinions to the Norwegian Board of Forensic Medicine for quality control should lie with the prosecuting authority, and not with the expert.

The Committee shall examine whether assessments should, as a main rule, be obtained from two independent forensic psychiatric experts, or whether the court should specifically decide the number of independent expert assessments upon making appointments in each individual case.

The Committee shall also examine whether specific provisions should be introduced on the formulation of the mandates of forensic psychiatric experts. Moreover, the Committee shall take a view on whether special qualification requirements should be introduced for anyone appointed as expert psychiatrists and specialist psychologists, whether a certification scheme should be introduced, as well as whether provisions should be introduced on how a forensic psychiatric observation shall be conducted and what the opinions shall contain. It should be examined, in this context, whether the use of standardised methods of testing and assessment should be required.

It should also be examined how often experts shall be able to work jointly, to what extent they shall hold conversations with the observee alone, as well as whether and to what extent video or audio recordings should be made of the observee evaluations.

The Committee shall also examine whether and to what extent forensic medicine experts should be granted access to medical records and health details in cases where the accused refuses access.

Furthermore, the Committee shall compare the various thresholds in those provisions of the Criminal Procedure Act pursuant to which legal practitioners can request, decide or, if applicable, reject the appointment of experts, forensic psychiatric observation (judicial observation) and compulsory judicial observation in a psychiatric hospital; cf. Sections 237, 165 and 167 of the Criminal Procedure Act. The Committee shall in this context consider and assess Section 139, Sub-section 2, on the appointment of new experts and Section 294 on the responsibility of the court for establishing the facts of the case. The Committee shall, inter alia, take a view on whether the scope for using compulsory judicial observation should be expanded, as well as on whether the threshold for the appointment of new experts should be lower.

The provisions on the duty of experts to attend court proceedings shall be examined, including whether expert evidence should be presented at an earlier stage of the proceedings to improve the scope for challenging such evidence.

The Committee is furthermore requested to examine whether forensic medicine expert witnesses should be permitted to submit written opinions to the court, and also whether the parties should be permitted to require the submission of such opinions; cf. Official Norwegian Report NOU 2001: 12, Chapter 11.9, page 126 onwards.

The Committee shall assess whether the mandate of the Norwegian Board of Forensic Medicine meets the needs of the courts of law for the external control of forensic medicine expert assessments in an appropriate manner. The communications of the Board of Forensic Medicine with the court, including the form and contents of its comments on the expert assessments, shall also be reviewed.

Moreover, the Committee is requested to address the working methods of the Board of Forensic Medicine in cases where several experts are appointed, as well as the need for provisions on the independence of the members of the Board of Forensic Medicine.

4. Miscellaneous

The Committee may raise issues relating to the interpretation or delineation of the mandate with the Ministry of Justice and Public Security. The Ministry may supplement the mandate if deemed appropriate. The mandate neither extends to the organisation of forensic psychiatry, nor to forensic psychiatry research or education.

The Committee should at an early stage consider whether it would be appropriate to establish a reference group, hold discussion meetings or otherwise gather input from relevant professional circles. The Committee shall provide an overview of relevant international conventions and examine its proposals against these. The Committee shall also provide an overview of relevant Nordic law and practice.

The Committee shall formulate any proposed legislative amendments in accordance with the recommendations in the guide «Legislative Technique and the Preparation of Legislation». The Committee shall also propose amendments to other legislation to the extent occasioned by the proposals of the Committee. It needs to be examined what should be regulated by statute and what, if applicable, should be regulated in the form of regulations or guidelines.

The Committee shall outline the financial and administrative implications of its proposal. At least one proposal shall be based on unchanged resource commitment; cf. Section 3.1 of the Instructions for Official Studies and Reports.

The budget appropriation for the proceedings of the Committee will be determined separately. The Committee may, by specific agreement with the Ministry of Justice and Public Security, contract expert assistance with its proceedings. Remuneration shall be in accordance with the standard rates of remuneration, etc., for chairpersons, members and secretaries of committees, unless otherwise agreed. The Committee shall keep records in accordance with Section 1-2 of the Public Records Regulations.

The Committee shall submit its report by 1 September 2014.»

On 26 June 2014, the Ministry of Justice and Public Security informed the Committee that the time limit for the submission of the report from the Committee had been extended until 15 October 2014. Formal handover has been scheduled for 28 October 2014.

The Committee finds that the scope of the mandate can be classified into three main topics:

- The insanity rules under the Penal Code and related issues;
- the role of psychiatric experts in the administration of criminal justice, especially in cases that raise the issue of legal sanity; and
- sanctions against offenders who are not of sound mind (societal protection).

The Committee has based the overall organisation of the report on the said classification.

The mandate calls for an examination of how «societal protection considerations should be attended to when an offender who is not of sound mind is sentenced to the special sanctions compulsory mental health care or compulsory care». The Committee has considered this wording somewhat restrictive. It has therefore, in consultation with the Ministry, also discussed the situation prior to indictment and sentencing, in other words the criteria for imposing special sanctions. It does, on the other hand, fall outside the scope of the Committee to address the issue of so-called «bothersome» persons of unsound mind, who commit less serious crimes that do not cause particularly severe physical injury, and who are not encompassed by current special sanctions.

4 […]

Part II
Criminal capacity

5 Overview of Part II of the report

The topic of the following discussion is whether and, if applicable, how criminal insanity should be regulated in Norwegian law. This is considered an important and fundamental, although difficult and controversial, issue in all legal traditions.

Chapter 6 outlines current law and its background. 6.10 addresses whether Norway's obligations under international law impose requirements on the formulation of criminal insanity rules. Chapter 7 provides an overview of insanity rules in foreign and international law.

In other words, the report draws on older legal texts and the laws of other countries. The purpose of this is to use these as sources of arguments for a specific legal interpretation or as sources of inspiration for the development of new solutions. It is valuable to examine the legislative history and the legislation of other countries, not least because any prevailing law will be the product of hard-earned experience. There is, at the same time, reason to exercise some caution in the interpretation of older sources. The premises on which interpretation is based may change – with not the least of these changes being how society has viewed the mentally ill throughout history.

In Chapter 8, the Committee explains the reasoning behind its position on which insanity rule should apply under Norwegian law. In Chapter 9, the Committee presents a proposal for a rule on self-induced unsoundness of mind, which implies an amendment to the current rules on intoxication and criminal insanity. Chapter 10 addresses special evidential issue in relation to the insanity rule, and the Committee presents its recommendation as to which standard of proof should apply.

6 Current law

6.1 The conditions for liability

The criminal legislation is structured in such a way that certain conditions need to be met before punishment can be imposed, in reflection of the justifications for imposing punishment. Norwegian criminal liability theory commonly distinguishes between four basic conditions that need to be met. These are:

1. The committed act must fall within the scope of a penal provision.
2. There must be no grounds for punishment exemption, for example self-defence or necessity.
3. The perpetrator must have acted with the necessary culpability; intent or negligence.
4. The perpetrator must have been criminally responsible, which means that the perpetrator must have reached the age of 15 years and must not be psychotic, in a state of automatism or intellectually disabled to a high degree.

Whether an offender shall be acquitted as the result of inadequate mental capacity is part of the criminal responsibility assessment (No. 4) and is governed by Section 44 of the Penal Code. The provision is worded as follows:

> «A person who was psychotic or in a state of automatism at the time of committing the act shall not be liable to punishment.
>
> The same applies to a person who at the time of committing the act was intellectually disabled to a high degree.»

The rule has been maintained in Section 20 of the Penal Code of 2005, but with a different wording:

> «Punishment can only be imposed on an offender who was criminally responsible at the time of committing the act. The offender is not criminally responsible if, at the time of committing the act, he or she is:
>
> a) below the age of 15 years;
>
> b) psychotic,
>
> c) intellectually disabled to a high degree; or
>
> d) in a state of severely impaired consciousness.
>
> […] »

Criminal responsibility and criminal culpability, in the form of negligence or intent, cannot be understood independently of each other as conditions for criminal liability. It follows from the structure of the statutory provisions that the offender being of sound mind is a prerequisite for negligence or intent having any relevance as conditions for imposing criminal liability.

This relationship between criminal responsibility and culpability does not apply outside criminal law. A person may, for example, be of unsound mind within the meaning of criminal law and still be held liable for damages because he or she acted negligently or with intent.[1]

[1] The ruling published on p. 104 onwards of the 2005 volume of the Norsk Retstidende court reporter for the Supreme Court.

6.2 The justifications for punishment

6.2.1 The justifications for punishment in general

There is a tradition in Norway for defining punishment as suffering inflicted by the State on an offender in response to the offence with the intent that it shall be experienced as suffering.[2] Whether and, if applicable, how to distinguish between offenders on whom suffering shall inflicted by attributing criminal liability to them, and offenders to whom criminal liability is not attributed – those of unsound mind – depends primarily on how punishment is justified.

The justifications for punishment are the subject of continuous debate. This involves both the issue of which justifications actually underpin the use of punishment, and the issue of how punishment should be justified. Committee member Linda Gröning has authored an article addressing, inter alia, the implications of the justifications for punishment for the issue of criminal insanity, which is attached as Appendix 1 to the report.

The justifications for punishment, as traditionally specified and described, will be briefly outlined in the following. Ideas of retribution and punishment as a useful instrument of public policy are of key importance. These are also referred to as absolute and relative theories of punishment, respectively.

Retribution refers to society's reaction to the offence as such – per se – and not to any wanted or unwanted effects or implications of punishment. There are various justifications for punishment as retribution. Some emphasise subjective culpability on the part of the offender, whilst others are premised on the actual behaviour, irrespective of its subjective characteristics. Although there may be disagreement as to the true motives for justifying punishment along these lines, the latter approach must be characterised as «revenge» in its purest form.

The former position is reflected in, inter alia, G. W. F. Hegel's work Elements of the Philosophy of Right. He states that «What is contained in my purpose can be laid at my door, […]», which is elaborated on later in the text:

> «[T]he right of the will in acting is to recognise as its own deed only those results which were consciously in its end and were purposed. That responsibility shall extend to the will only so far as the results were known, is the right of knowledge».[3]

The use of punishment as a useful instrument of public policy refers to the deterrent effects of punishment – punishment is instead justified by its presumed deterrent effects. It deters citizens from committing offences because of the expected consequences of being detected and reinforces the norms expressed by the penal provisions – *the general deterrent effect of punishment*. An individual offender who has suffered a punishment will be deterred from committing further offences and will, at a minimum, be prevented from doing so for as long as he or she is deprived of liberty, or maybe become a better person – *the individual deterrent effect of punishment*.

The stated justifications for imposing punishment have, from the Penal Code of 1842 until now, primarily been focused on the benefits of punishment.[4] The general and individual deterrent effects of punishment represent the official rationale behind the criminal legislation.[5]

[2] Andenæs (2005), p. 10.

[3] Hegel (2006), p. 158.

[4] Leer-Salvesen (1991), pp. 251–265.

[5] Bratholm (1980), p. 131.

There is limited empirical evidence as to whether punishment does actually have a deterrent effect. Some find this to be problematic, and consider it an argument against justifying punishment by its presumed benefits. Such uncertainty raises doubt as to whether punishment has the beneficial effects attributed to it. However, such criticism does not affect the benefit theories as such, since taking a view on the issue of the benefits of punishment also include the implications of potential uncertainty about the effects of punishment.

This was most recently reflected in the legislative effort resulting in the Penal Code of 2005. The legislative proposition to the Odelsting includes a chapter titled «Retribution cannot be the purpose of punishment.[6] The position is that absolute theories of punishment are not recognised, and that retribution considerations can only be taken into account if punishment has a «mental hygiene effect»:

> «Consequently, the purpose of punishment as such is preventive - deterrence. The preventive purpose is dual: to prevent unwanted behaviour and to prevent social unrest in the wake of any unwanted behaviour that may nonetheless take place.»[7]

The possibility that social unrest may under certain circumstances be justified as a reaction to a failure of the penal system to work the way people want is not excluded. Consequently, where social unrest actually occurs as the result of failure to effect retribution in respect of offences, the desire for retribution on the part of some citizens may serve as a justification for punishment.

Hence, the fundamental and official justification for punishment is the effects of punishment. This is worded as follows in the said proposition to the Odelsting concerning the Penal Code of 2005:

> «Two of the effects relate to the direct deterrent purpose of punishment: Individual deterrent effects, which are the ability of punishment to induce individual offenders to refrain from committing further offences in future, and general deterrent effects, which are its ability to induce others to refrain from committing offences.
>
> The third intended effect of punishment has its origin in theories of retribution, and relates to the general effect on behaviour from punishing offences – i.e. from effecting retribution. The fact that offences are prosecuted and punished contributes to a safe and peaceful society. Reduced fear and suspicion facilitate an open society and prevents unwanted vigilantism and private law enforcement. Hence, the third intended effect of punishment is to promote social stability.»[8]

In other words, retribution considerations are only taken into account indirectly in the sense, and to the extent, that it is deemed useful to pay heed to citizens' sense of justice in order for punishment to have the intended effects, and not directly through an acceptance of the idea of the inherent necessity of retribution.

Although ideas and theories of retribution as an independent basis for punishment are not highlighted in the official justifications, and such ideas have not been accorded any prominent role in legal theory either, it may perhaps be somewhat premature to dismiss theories of retribution.

[6] Proposition No. 90 (2003–2004) to the Odelsting, pp. 77–78.

[7] Proposition No. 90 (2003–2004) to the Odelsting, pp. 77–78.

[8] Proposition No. 90 (2003–2004) to the Odelsting, p. 78, as endorsed on p. 14 of Recommendation No. 72 (2004–2005) to the Odelsting.

The penal system inherited and consolidated under the Penal Code of 1842 was premised on ideas of retribution. Few changes were made to this retribution-based system in terms of the scale and scope of punishments, and such system may thus be said to constitute part of the foundation for current criminal law.

The fact that ideas of retribution influence criminal legislation is also clearly reflected in certain provisions that are difficult to explain otherwise. One example of objective theories of retribution is criminal liability for actions committed under self-induced intoxication; cf. 9.2, with relates to the objective implications of the conduct, rather than to any actual culpability.

It is, at the same time, unlikely that ideas of retribution have at any time served as the sole justification for the use of punishment. One has over the centuries taken into consideration that punishment also has a deterrent effect, thus discouraging additional offences. The deterrent effects of punishment were noted already in ancient Greece. In his dialogue «Protagoras», Plato (427–347 BC) compares retribution and deterrence to each other as alternative approaches under the ethics of punishment, and states the following:

> «[…] no one punishes the evil-doer under the notion, or for the reason, that he has done wrong - only the unreasonable fury of a beast acts in that manner. But he who desires to inflict rational punishment does not retaliate for a past wrong which cannot be undone; he has regard to the future, and is desirous that the man who is punished, and he who sees him punished, may be deterred from doing wrong again. He punishes for the sake of prevention, thereby clearly implying that virtue is capable of being taught.»[9]

However, such potential benefits need to be held up against what constitutes fair retribution. This curtails the persuasive power of deterrence arguments – there is a limit to how much and how strict punishment should be used, also when it might be considered useful. Consequently, ideas of retribution also play a key role in current Norwegian criminal law, although predominantly as a limiting factor.

6.2.2 The justifications for punishment and mentally aberrant offenders

The justifications for punishment do not apply to all offenders. The justifications are based on the assumption that the offender is in possession of certain specific qualities, i.e. that the offender can distinguish between right and wrong, has the ability to comply with penal provisions and is influenced by the threat of punishment.

Consequently, a certain degree of mental capacity, maturity and consciousness on the part of the offender is, as frequently noted, a prerequisite for subjecting him or her to punishment. Those who lack these qualities cannot be blamed, and prospects for influencing them through punishment are very limited.

This is most obvious with regard to children. Few people, if any, will be of the opinion that the justifications for imposing punishment apply to a three-year old. This is expressed as follows in Section 46 of the current Penal Code:

> «No person may be punished for any act committed before reaching 15 years of age».

Ideas of retribution and the general deterrent effect of punishment may nonetheless be invoked also in relation to those who lack mental capacity, maturity and consciousness. Some may argue, based on objective retribution considerations, that punishment will restore balance

[9] Plato (1999), p. 324.

in society by perpetrators «making up» for the offence. And it cannot be excluded, based on deterrence considerations, that punishment will have some form of beneficial effect on behaviour.

However, such justifications are not deemed to support criminal liability for the group we address here. This is because ideas of pure retribution have a weak standing, and because there is little reason to believe that the general deterrent effect of punishment is reduced appreciably by granting a punishment exemption for the small group of aberrant or immature offenders with whom we are concerned.

It has been argued that an acquittal on grounds of criminal insanity deprives the perpetrator of the opportunity to make amends. Such a perspective on punishment has similarities with the theory of retribution; the perpetrator provides «atonement». However, this is an effect of using punishment, which can hardly justify the use of punishment as a policy instrument. One can, in any event, only ask for «atonement» from persons of sound mind.

The basic criminal law perspective that punishment shall not be inflicted on those who are of unsound mind within the meaning of criminal law does not apply to all criminal or penal sanctions. Persons of unsound mind may, for example, be sentenced to confiscation pursuant to Section 34 of the Penal Code and be held liable for non-economic loss under the Compensatory Damages Act, which liability is partly justified by penal considerations, as a sanction against undesirable behaviour. However, expanded confiscation pursuant to Section 34 b of the Penal Code is not a sanction that can be used against persons of unsound mind.

There is a long tradition for treating mentally ill offenders differently from offenders of sound mind. The position that some person are so mentally ill that they cannot be held accountable in the same manner or to the same extent as persons of sound mind remains with us to this day.

There is a high degree of consensus on this within different legal traditions, and all civilised societies have criminal insanity rules.

6.3 Psychological, medical and mixed models

Legal rules may be categorised on the basis of which criteria are used to determine that legal implications shall apply. It has traditionally been common to distinguish between three alternatives or systems for the formulation of criminal insanity rules; the psychological, the medical and the mixed system, respectively.

Under the *psychological system*, the decisive criterion will often be the perpetrator's ability, insight and prospects for exercising «free» choice. The question when faced with a mentally aberrant offender will then be whether he or she retains such capacity. In order to be punished, he or she must, for example, have lacked the ability to understand the illegal nature of the act.

Under the *medical system*, whether or not a person shall be deemed to have been of unsound mind is exclusively determined on the basis of medical or biological characteristics. Enquiries are not made into whether the act was pathologically motivated, or whether the perpetrator understood what he or she did. The Norwegian insanity rule is based on a medical model.

The mixed *system* is based on a medical and a psychological criterion. In order for it to be concluded that the perpetrator was of unsound mind, her or she must have suffered a specified aberration, in addition to which there must have been some form of link between the disorder and the criminal act; cf. 8.3.3 for further details.

It is, in other words, common to distinguish between three varieties of criminal insanity rules. However, conceptually and practically one is faced with two alternatives: The rule must be based on either a medical or a mixed model. This is because it is difficult to envisage a psychological specification of ability that is detached from any medical aberration.

The mixed system may be structured in difficult ways. One option is to require some form of psychological link between the disorder and the act, for example that the perpetrator must, in order to be considered of unsound mind, have been mentally ill and therefore unable to realise the illegal nature of his or her actions. Another option is to require a causal link between the mental disorder and the specific offence. One may also envisage this as being determined on the basis of an overall assessment of the specifics of the case – the lawmaker leaves the specific delineation between persons of sound and unsound mind to the court, which may reach an appropriate solution on a more or less discretionary basis.

Under the criminal insanity rules of most countries, it is not sufficient for a punishment exemption that the offender was in an abnormal state of mind at the time of committing the act. It is an additional requirement that such act can, in one way or another, be considered consequent upon the aberration. Hence, these countries have adopted the mixed system; cf. Chapter 7.

6.4 Psychosis

6.4.1 «Psychotic»

Section 44, Sub-section 1, of the Penal Code stipulates that a «psychotic» person shall not be liable to punishment. The legislative wording «psychotic» encompasses a large and heterogeneous group of psychotic disorders that differ in terms of both cause and appearance. The term was incorporated into Section 44 of the Penal Code through a legislative amendment in 1997, which entered into effect in 2002. The said term then replaced the term «insane».

In determining whether an aberration falls within the scope of the legislative term psychotic, one starts out from what is classified by psychiatric science as psychotic at any given time. The key characteristic for purposes of determining whether there is a psychotic state is whether the offender is unable to realistically assess his or her relationship with the outside world.[10] The ruling published on p. 549 onwards of the 2008 volume of the Norsk Retstidende court reporter for the Supreme Court further defines the term psychosis as follows:

> «The ability to react adequately to ordinary impressions and influences is lacking. The psychotic person often loses control of thoughts, feelings and actions. The intellectual functions may, on the other hand, be intact. The distinction between psychoses and other mental disorders is not sharp.»[11]

There is not a complete overlap between the term psychosis as used in medical diagnostic practice and the legal application of the legislative wording. 6.4.3 clarifies that the legal psychosis concept is less far-reaching than the medical psychosis concept, and 9.2 specifically addresses substance-induced psychoses. There are also certain indications that the courts of

[10] Cf. Official Norwegian Report NOU 1990: 5, p. 38 and 51, Proposition No. 87 (1993–94) to the Odelsting, p. 22 and 28, Proposition No. 90 (2003–2004) to the Odelsting and Andenæs (2004), pp. 302–303.

[11] Paragraph 33 of the ruling published on p. 549 onwards of the 2008 volume of the Norsk Retstidende court reporter for the Supreme Court.

law have in individual cases attributed a broader meaning to the legal term than to the medical,[12] but this would not appear to represent any general tendency.

The issue of the mental state of the perpetrator also touches upon another condition for criminal liability, i.e. the condition of subjective culpability. In some cases, the criminal insanity will in itself preclude intent on the part of the perpetrator with regard to the act. The psychotic person does, for example, mistake her friend for a demon and kills the friend.

However, in most cases there will also be intent on the part of the psychotic person. The classic example is the person «who shoots another in the belief that he is Judas the traitor».[13] He has shot and killed another person and was aware of what he did. Consequently, the condition of intent has been met, but as a psychotic person he will be exempted from punishment pursuant to Section 44.

Section 44 of the Penal Code stipulates that the assessment as to whether the perpetrator was of sound mind shall be based on his or her state of mind at the time of committing the act. Aberrant states of mind that meet the statutory criterion, but precede the act, or only arise subsequent thereto, do not give rise to any punishment exemption.

However, subsequent developments in the mental state of the perpetrator may exclude further prosecution or execution of a sentence; cf. Sections 251 and 459, Sub-section 1, of the Criminal Procedure Act. If the perpetrator has started serving a term of imprisonment, a severe mental aberration may result in a transfer from prison to round-the-clock committal to a hospital or to the interruption of punishment; cf. Sections 13 and 35 of the Execution of Sentences Act.

In procedural terms, determining whether the prerequisites for a punishment exemption under Section 44 of the Penal Code have been met, forms part of the matter of guilt or innocence.[14] This has various implications. In proceedings before a jury, the issue of whether the perpetrator was of sound mind will be for the jury to decide. The issue of punishment reduction pursuant to Section 56, letter c, of the Penal Code does, on the other hand, form part of the matter of sentencing.[15]

6.4.2 Rationale behind the medical model

The principal reason why Norway premises its criminal insanity rule on a medical model is the view that mental aberrations generally affect the entire personality, or at least that this cannot be excluded, and that it is challenging to be called upon to prove anything more than the existence or non-existence of such an aberration, for example that there is no causal link between the aberration and the offence.

The Penal Code Commission, which referred to the Council on Criminal Law, put it as follows:

[12] Mæland et al. (2008), p. 217.

[13] Andenæs (2004), pp. 240–241.

[14] Proposition No. 87 (1993–94) to the Odelsting, p. 114.

[15] See Matningsdal (1998) for further details.

> «Although one is unable to say that all areas of mental life are equally affected, it would nevertheless […] be unreasonable to inflict imprisonment on such persons. Besides, there will always be a risk that the act may have been the result of the state of mind.»[16]

The Special Sanctions Committee also argued in favour of a medical model, and noted that it would otherwise be difficult to achieve adequate assurance that there is a causal link between the offence and the mental aberration. Its view was that there will always be a real possibility that the offence is pathologically motivated, although it may appear to be understandable. The Committee took the view that requiring a causal link would reduce predictability. A requirement for a causal link would allow for laborious proceedings in relation to such issue and might unnecessarily complicate the system.[17]

It was also the position of the Ministry at the time of the previous legislative amendment that the medical model should continue to apply. It expressed the view that although one might in some cases question whether there was a link between the disorder and the act, it would usually be the case that mental aberrations such as mental disease and intellectual disability of a high degree affected so large parts of the personality that such a causal link must under any circumstance be presumed to exist. However, the decisive arguments were the uncertainty associated with an assessment of the causal link between the aberration and the act, compared to the implications of an incorrect assessment:

> «The Ministry is of the view that decisive weight must, under any circumstance, be attached to the consideration that one would hardly be able to establish in any given case, with the necessary degree of certainty, that there is no causal link between a criminal act and a severe mental aberration. Besides, it is the view of the Ministry that persons with severe mental aberrations who commit criminal acts should primarily be taken care of by the mental health care service, and not by the criminal justice system. It would be particularly regrettable for such offenders to be put in prison.»[18]

6.4.3 Clarification – Symptom intensity requirement

It is of decisive importance for the punishment exemption whether the offender was, at the time of committing the act, «psychotic» within the meaning of the Penal Code. Whether the act was caused by the morbid state of mind – whether the action was pathologically motivated – is not taken into consideration. Andenæs states the following in this regard:

> «Once the medical psychosis diagnosis has been established, criminal insanity is a given, without any need for examining whether there is any link between the disorder and the criminal act.»[19]

However, this brief characterisation downplays an important aspect of the term psychosis as used in Section 44 of the Penal Code, and may therefore lead one to make untenable inferences. Having a medical psychosis diagnosis is, as also noted by Andenæs on the page preceding that quoted from above, not sufficient to establish criminal insanity.[20]

[16] Official Norwegian Report NOU 1983: 57, p. 163.

[17] See Official Norwegian Report NOU 1990: 5, pp. 46–47.

[18] Proposition No. 87 (1993–94) to the Odelsting, p. 27.

[19] Andenæs (2005), p. 305.

[20] Andenæs (2005), pp. 303–304.

Section 44 of the Penal Code pertains to perpetrators who, at the time of committing the act, were, as a matter of fact, unable to assess their relationship with the outside world.[21] The term «psychotic» refers to symptom-intensive states of mind, whilst the medical psychosis diagnosis is also used on persons who may be without manifest, current symptoms.

One was especially conscious of this distinction between the legal and the medical psychosis concepts in the legislative preparatory works. It is referred to repeatedly in the recommendation from the Special Sanctions Committee. The following is stated when discussing prevailing law at the time and the relationship between the statutory criterion «insane» and various medical diagnosis systems:

> «Norway is committed to using the ICD under international agreements, but developments towards a diagnosis system based on symptom intensity is most likely in the longer run. Consequently, Norwegian diagnostic practice will for still some time have to accept that a person may have a mental disorder categorised under the psychosis section of the diagnosis system, without him or her being considered psychotic at the relevant point in time. However, the Committee wants the absolute insanity rule under the Penal Code to premise the punishment exemption on symptoms that are manifest at the time of committing the act. It is against this background that the Committee has, in its draft for a new Section 44, chosen the wording «a person who was psychotic at the time of committing the act».»[22]

In its comments on Section 44 of the Penal Code, the Committee states the following:

> «Consequently, a punishment exemption under Section 44 will only be granted to those who are 'actively psychotic', both under current law and under the Committee's proposal. If the offence is committed whilst the psychosis is in an «inactive phase» due to medicinal or other treatment, the new Section 44 proposed by the Committee will not be applicable. This distinction can also be expressed by observing that not everyone diagnosed with psychosis is (actively) psychotic or unable to realistically assess his or her relationship with the outside world. It is against this background that the Committee proposes to link the punishment exemption to *being in a psychotic state* and not to being *diagnosed with psychosis*.»[23]

In other words, the prerequisite is in some contexts specified to mean that the perpetrator must be «actively psychotic».[24] Active here represents a contrast to a more passive and persistent psychosis diagnosis that one may have without the psychotic symptoms manifesting themselves. Since contrasting it with a «passive» psychosis is unlikely to be a suitable terminology, it would be more appropriate to characterise these as low-symptom or light-symptom psychoses. Consequently, it is also open to discussion whether «active» is a suitable term. Symptom-intensive psychoses would seem more appropriate.

A similar relevance of symptom intensity is also noted in other legal contexts, for example in the guardianship legislation when addressing the issue of who shall be deemed to require a guardian. It is here emphasised that some persons will only have a time-limited need for assistance during symptom-intensive periods.[25]

However, it would seem somewhat uncertain whether this legal interpretation and the nuances between the medical and the legal psychosis concepts have been taken on board by those who

[21] Official Norwegian Report NOU 1990: 5, pp. 38 and 41–43.

[22] Official Norwegian Report NOU 1990: 5, p. 39.

[23] Official Norwegian Report NOU 1990: 5, p. 51.

[24] Rosenqvist and Rasmussen (2004), pp. 59–60.

[25] Official Norwegian Report NOU 2004: 16, p. 125.

are confronted with this provision in their practice. Bodies charged with preparing legislation would also appear to have faced difficulties in interpreting current law in this respect. One example is the following statement from the Ministry of Justice in the preparatory works for the Penal Code of 2005, which was intended to represent a continuation of current law:

> «Psychosis within the meaning of criminal law encompasses those aberrations that are classified by psychiatry as psychosis at any given time».[26]

This and similar statements may perhaps by explained by appreciating the ambiguity of the term «psychosis» in view of the international diagnosis system ICD-10, which was first used by psychiatric experts after the turn of the millennium. The term is ambiguous under this system because it encompasses both persons with psychosis whose symptoms are in remission and psychotic persons suffering intense symptoms. Before that time, the term «psychosis» was principally used to denote the symptom-intensive states of mind, as for example expressed in the legislative preparatory works of the current legislation:

> «The current consensus amongst psychiatrists is that the principal characteristic of psychosis is that the perception of reality is distorted to a significant degree.»[27]

This interpretation of the term psychosis has not been discounted in the other preparatory works or in case law. It is therefore evident that a medical psychosis diagnosis is not in itself sufficient for acquittal under current law.[28] Besides, the lack of complete concurrence between the legislative psychosis concept, which the legal practitioners need to apply, and the general psychiatric meaning of psychosis, is reflected in the fact that substance-induced psychoses, which clearly qualify as psychoses from a medical perspective, fall outside the scope of the term psychosis for purposes of the Penal Code.[29] Within the group of persons diagnosed with a psychotic disorder under the ICD-10 system, only some will be considered, during certain periods or more permanently, to be of unsound mind within the meaning of criminal law.

6.4.4 The specific meaning of the term

The implementation of the medical model in Norwegian criminal law has meant that psychiatric expertise has in practice played a very significant role in determining whether the perpetrator was, for legal purposes, psychotic at the time of committing the act, and thus shall be acquitted. Nonetheless, the judicial premise is, here as elsewhere, that the assistance of the expert is of an advisory nature only, and that the court of law reaches an independent decision.[30]

However, the opinion of the court-appointed experts has often been decisive in practice, and they have thereby also in fact established the specific meaning of Section 44 of the Penal Code. One reflection of this is the following paragraph on the criminal law implications of developments in psychosis diagnostics and medicinal treatment from the 1950s onwards in the recommendations from the Special Sanctions Committee:

[26] Proposition No. 90 (2003–2004) to the Odelsting, p. 217. See also p. 423. See also Proposition No. 87 (1993–94) to the Odelsting, p. 28.

[27] Proposition No. 87 (1993–94) to the Odelsting, p. 22.

[28] See p. 2 of Circular No. 4/2001 from the Office of the Director of Public Prosecution.

[29] See the ruling published on p. 549 onwards of the 2008 volume of the Norsk Retstidende court reporter for the Supreme Court.

[30] Official Norwegian Report NOU 1974: 17, p. 47.

> «In assessing whether an aberration shall be considered a «mental disease» within the meaning of Section 44 of the Penal Code, the guidelines in ICD 9 are not formally binding on forensic psychiatrists. This is a matter of interpreting the legal term used in the Penal Code. Nonetheless, there is undoubtedly a close link between the general psychiatric diagnosis system and forensic psychiatry. The terms will normally be used concurrently. However, there has in forensic psychiatric practice within the administration of criminal justice been some development towards establishing a diagnosis on the basis of symptom intensity, at least in those cases where psychotic symptoms are in remission through medicinal treatment.»[31]

Some have argued that this ambiguity in the word psychosis has resulted in a criminal insanity regime under which persons who have been diagnosed with a psychic disorder, but who are not psychotic, have also been considered to be of unsound mind. Such a practice would clearly be contrary to the rationale behind the criminal insanity regime and to the intention of the lawmaker that only perpetrators who suffered sufficiently intensive symptoms at the time of committing the act shall be classified as being of unsound mind.

However, the Committee has not, in performing its duties, come across or noted any references to specific instances of a court having considered a diagnosis of psychosis sufficient to exempt a perpetrator from punishment. It would, on the contrary, appear that the courts of law are focused on whether the perpetrator was in a state of symptom-intensive psychosis at the time of committing the act. A medical disorder diagnosis is deemed to be a necessary, but not a sufficient, condition for concluding that the perpetrator was of unsound mind.

However, the Committee has in one area noted a tendency to use a more purely medical model. This is the area of provisional opinions. The Committee's review of some of these opinions suggests that establishing a diagnosis is the key priority. This is also largely what one would expect, given that these opinions are indeed provisional; cf. 12.2.6.

6.5 Automatism

A person who was «in a state of automatism» at the time of committing the act shall also be exempted from punishment under Section 44 of the Penal Code.

The term automatism encompasses states of complete coma, in which all ability to move and perceive stimuli has been lost. The person exhibits no indication of consciousness. For this type of states it is primarily criminal liability as the result of omissions that might otherwise have been applicable.

However, the term automatism is broader in scope and also encompasses what is referred to as relative unconsciousness.[32] These are states in which the musculoskeletal system works and certain external stimuli elicit a response, although the person in such a state acts without any ability to evoke misgivings.

Consequently, this is not coma in the medical sense, but a state in which sensory impressions are not registered, processed and retained in memory in the normal way. Consciousness is severely limited or narrowed. It is often said about such states that contact with the «ordinary

[31] Official Norwegian Report NOU 1990: 5, pp. 41–42.

[32] See Official Norwegian Report NOU 1990: 5, p. 43, Proposition No. 87 (1993–94) to the Odelsting, p. 23, and paragraph 34 of the ruling published on p. 549 onwards of the 2008 volume of the Norsk Retstidende court reporter for the Supreme Court.

self» has been lost.[33] The following is stated with regard to such relative unconsciousness in the report of the Special Sanctions Committee:

> «What has been suspended or severely impaired is the ability to receive and process information and to put it in a conscious context, and hence the ability to subsequently recall and remember such information and the ability to base actions on such received and processed information.»[34]

Although the person who is in a state of automatism is unable to register and process sensory impressions or to perform cognitive tasks, such person can nonetheless perform motor functions.[35]

Such states are often brief, and are characterised by a sudden onset and a sudden end. Examples are «somnambulism, hypnotic trance, febrile deliria, excessive sleepiness, epileptic fogginess, impaired consciousness after concussion of the brain, hysteric fits and pathological alcohol intoxication».[36]

It follows from this that impaired consciousness is understood to be a gradual phenomenon, in the sense that a disturbance of consciousness may be anything from slight to virtually total. This is reflected in the Penal Code inasmuch as a state of «automatism» qualifies for a punishment exemption under Section 44 of the Penal Code, whilst «severely impaired consciousness» may result in a punishment reduction pursuant to Section 56, letter c, of the Penal Code. However, the term «in a state of automatism» has in the Penal Code of 2005 been amended to «severely impaired consciousness»; cf. Section 20, Sub-section 1, letter d.

In 2003, three experienced forensic psychiatrists carried out a quantitative and qualitative study based on a review of all psychiatric opinions rendered during the period 1981–2000 in which the conclusion was automatism.[37] The material included a total of 42 cases, i.e. an average of about two per year.
Automatism may, as mentioned, have various and mixed causes. The main cause was stated to be intoxication in 64% of cases, of psychological origin in 24% of cases and organic (of somatic origin) in 12% of cases. Mixed aberrations occurred frequently.
The reviewed cases show that the conclusions of the court-appointed experts were not adopted by the courts as a matter of course. If follows from the court records that the court found the perpetrator to be of sound mind in 24% of cases.
Those who carried out the study also performed – based on the available case materials – their own assessments as to whether the perpetrator was in a state of automatism at the time of committing the act. In 12 of the 42 cases (29%) they disagreed with the conclusions of court-appointed experts, and in 15 cases (36%) they were in doubt as to whether such conclusions were correct.
The study concluded that many of the opinions were of inadequate quality. In order to remedy this, it was proposed, inter alia, to appoint neurologists as experts alongside psychiatrists, and that the police should always requisition analyses of intoxicants in cases involving violence.
The discrepancy between, on the one hand, the conclusions of the original court-appointed experts and, on the other hand, the judgments handed down by the courts and the assessments of those who carried out the study, indicates that there is some disagreement or uncertainty with regard to the aberrations involved and/or that there is some disagreement with regard to which aberrations fall within the scope of the legal term «in a state of automatism».

[33] Andenæs (2005), p. 307.

[34] Official Norwegian Report NOU 1990: 5, p. 43.

[35] Rosenqvist and Rasmussen (2004), pp. 63–69.

[36] Proposition No. 87 (1993–94) to the Odelsting, p. 23, with further references to Official Norwegian Report NOU 1990: 5, p. 43, and Official Norwegian Report NOU 1974: 17, pp. 46–47. See also Proposition No. 90 (2003–2004) to the Odelsting, pp. 218–220.

[37] Hartvig et al. (2003).

Disagreement or uncertainty with regard to impaired consciousness may be the result of different assessment of symptoms or different assessment of the implications of such symptoms for establishing the diagnosis. It is in many cases highly complex to determine whether the perpetrator suffered impaired consciousness at the time of committing the act.[38] One challenge is that some perpetrators simulate memory loss (amnesia).

Disagreement or uncertainty with regard to the term «in a state of automatism» is a legal issue, on which the courts of law shall rule. However, the practice is for court-appointed experts to opine on whether the aberration falls within the scope of the legislative term, as also illustrated by the said study.

6.6 Intellectual disability

Section 44, Sub-section 2, of the Penal Code stipulates that offenders who were, at the time of the offence, «intellectually disabled to a high degree» shall not be liable to punishment.

Intellectual disability denotes delayed or inadequate development of abilities and functioning. The aberration manifests itself in impaired cognitive, linguistic and social skills on the part of the affected person.

The legal term «intellectually disabled to a high degree» is based on the medical term «intellectual disability», which is discussed in 8.4.6.2, but is not identical to it. Section 44, Sub-section 2, of the Penal Code, will as a main rule exempt persons with an IQ of about 55 or less from punishment.[39] However, factors like personality and social functioning may also be important elements in determining the degree of intellectual disability.[40]

Offenders who are intellectually disabled to a lesser degree within the meaning of the law have an IQ ranging between 55 and 75 and fall within the scope of Section 56 of the Penal Code, which authorises the court to reduce the punishment below the minimum prescribed for the act or to a milder form of punishment.

The Special Sanctions Committee proposed, in Official Norwegian Report NOU 1990: 5, a lowering of the threshold, in order that a person «who at the time of committing the act was intellectually disabled to a lesser degree may be exempted from punishment when merited by special circumstances». The proposal was aimed at person with an IQ in the 55–75 range, but it was emphasised that a punishment exemption would primarily be considered for persons in the lower part of this IQ range.[41]

In criminal cases raising the issue of whether the accused is intellectually disabled, it is both common practice and considered desirable for a psychologist to be appointed as expert, or alternatively for the court-appointed psychiatrists to supplement their opinion with evaluations from a psychologist or separate psychological evaluations.[42]

The Norwegian Board of Forensic Medicine has recommended the use of WAIS tests, as well as supplementing these with additional tests, including neuropsychological tests, for cases that

[38] Rasmussen (2008).

[39] Proposition No. 87 (1993–94) to the Odelsting, p. 29.

[40] Official Norwegian Report NOU 1990: 5, pp. 52–53. See also Official Norwegian Report NOU 1974: 17, pp. 53–54 and 158.

[41] Official Norwegian Report NOU 1990: 5, p. 58.

[42] Norwegian Board of Forensic Medicine, Newsletter No. 4 (2000).

are bordering on criminal insanity.[43] The courts need to be conscious of the possibility that findings from different measurements may vary.[44]

There are legal implications of the basis on which a perpetrator is deemed to be of unsound mind. The basis for criminal insanity will, inter alia, determine the choice of special sanction – compulsory mental health care or compulsory care. And the choice of special sanction will in itself have implications for whether a transfer to an institution under the correctional service is available; cf. Section 5-6 of the Mental Health Care Act. Such transfers are not available in respect of persons sentenced to compulsory care.

6.7 Other aberrations

The preceding paragraphs show that the insanity rule in Section 44 of the Penal Code encompasses those who were «psychotic» or «in a state of automatism» at the time of committing the act, or «intellectually disabled to a high degree».

Certain aberrations neither fall within the scope of the wording in Section 44 of the Penal Code, nor are intended to fall within any of the three main categories of states of criminal insanity, but should fall within such scope based on the rationale behind the insanity rule. These include, for example, certain cases of dementia; cf. 8.4.6.6 and 8.6.5.2.6.

The specification of who should qualify for a punishment exemption on grounds of criminal insanity has varied throughout history. These groups have previously been referred to as, inter alia, «insane», «unconscious» and «highly retarded».[45] The reason why certain aberrations that might previously have qualified as criminal insanity fall outside the scope of the specification in Section 44 of the Penal Code may be that the legislative revisions leading up to the current provision have resulted in an unintended narrowing of the ambit of such provision.

The vague term «insane» was phased out in favour of the more precisely defined «psychotic». The amendment was primarily motivated by a desire to separate the group «retarded» from the category «insane», but was also effected to modernise the Act.[46] The term «insane» could more readily encompass states of dementia than could the term «psychotic». There is nothing to suggest that one wanted to narrow the ambit of the insanity rule in connection with such amendment.

Moreover, this change of wording was unproblematic in the context of the overall legislative proposal, because it was at the same time proposed that a punishment exemption might also be granted in respect of «another state of fundamental abnormality»; cf. for further details 8.6.4. «Another state of fundamental abnormality» was a collective term for a number of different severe mental aberrations, including serious and disabling obsessive-compulsive neuroses, as well as altogether distinctive and massive forms of personality disorder.

The implication of not following up on such proposal, whilst at the same time deleting the term «insane», may have been that certain true states of criminal insanity fell outside the wording of the insanity rule. It would therefore seem appropriate, based on the purpose of the

[43] Norwegian Board of Forensic Medicine, Newsletter No. 5 (2001).

[44] Ørbeck (1997), pp. 124–128. See 8.4.6.2 for further details.

[45] Official Norwegian Report NOU 1983: 57, pp. 160–161.

[46] Official Norwegian Report NOU 1983: 57, p. 161.

rule and the legislative preparatory works, to extend its scope by invoking an analogous interpretation. See also the ruling published on p. 634 onwards of the 1960 volume of the Norsk Retstidende court reporter for the Supreme Court and 8.6 below.

6.8 Age

The age of criminal responsibility under Norwegian law is 15 years; cf. Section 46 of the Penal Code. The reason why an offender needs to have reached a certain age before punishment can be imposed is that children lack the maturity on which the justifications for punishment are premised; cf. 8.2.

In practice, it will of course vary at what age the personality, including comprehension and moral qualities, develop and mature. There may also be differing views as to what degree of maturity should be required for criminal responsibility. The specific age of criminal responsibility has varied over time, and also varies from country to country at present.

The Penal Code of 1842 operated with two age limits in relation to criminal responsibility. Children under the age of 10 years were granted an absolute punishment exemption. Children between 10 and 15 years could be held liable for serious offences if they had «realised the criminal nature of the act».[47] For these children, criminal responsibility depended on individual maturity, assessed on the basis of a mixed model; cf. 8.3.3.

All reasons for abolishing this regime related to the ability of children to act in conformity with the norms of society.[48] Partly, it was noted that children were able to understand what was criminal at an early age, but that this did not necessarily imply that they understood the specific societal implications of this. Partly, it was noted that children act with less resistance to will than do adults, and partly that children in general have different cognitive faculties from adults.

6.9 Civil law regulations of mental aberrations

6.9.1 Theme and structure

Legal effects are linked to a person's state of mind within several areas of civil law. However, such regulations reflect other considerations than those underpinning the criminal insanity rule, and other concepts and terms are often used to denote the aberrations. The medical model, on which criminal law is premised, has not been implemented in other areas in which mental aberrations are accorded legal relevance.

It may for several reasons be useful to examine these when considering whether the criminal insanity legislation should be amended. The civil law rules may contribute to identifying mental aberrations that might be considered for inclusion under the criminal insanity rule, and such regulations may also serve to inspire the formulation of a criminal insanity rule. Moreover, practice under such regulations may shed light on how to handle evidential issues.

In the following will therefore be discussed four sets of civil law rules, which link legal effects to a person's severe mental aberration; the rule in the Guardianship Act on the basis for establishing guardianship, the non-statutory property and contract law rule on the invalidity of

[47] Ch. 6, Section 8, and Ch. 7, Section 1, of the Penal Code of 1842.

[48] Hagerup (1911), p. 289.

commitments motivated by insanity, the rule in the Inheritance Act on the invalidity of correspondingly motivated distributions under a will, and the liability for damages under the Compensatory Damages Act of persons suffering mental aberrations, respectively. These rules reflect, like the criminal insanity rule, that not everyone has the abilities normally required by the legal order on the part of individuals for their actions and commitments to have the desired legal effects.

6.9.2 The Guardianship Act

The purpose of the guardianship legislation is to attend to the interests of minors and adults who are unable to act on their own, and to do so with respect for the dignity and integrity of the individual person. In addition to the conditions relating to the mental state of the person in question, it is, as will be outlined below, a requirement that there is a specific need for guardianship because such person is unable to attend to his or her interests in an adequate manner. It is the need of the person who requires a guardian, and not the need of any next of kin, that is of relevance to such assessment.[49]

Section 20, Sub-section 1, of the Guardianship Act is worded as follows:

> «A person over the age of 18 years who, because of mental disorder, including dementia, intellectual disability, abuse of intoxicants, severe gambling addiction or seriously impaired health, is unable to attend to his or her interest may be placed under guardianship if there is a need for doing so.»[50]

The legislative wording shows that the group that can be placed under guardianship is larger than the group deemed to be of unsound mind within the meaning of criminal law. This is primarily because these sets of rules serve different purposes. The category «seriously impaired health» does, for example, include all forms of serious physical health impairment that may result in a person not being able to attend to his or her interests, including blindness and loss of speech.[51] That it is also wider in scope with regard to mental states is highlighted, in particular, by the alternative «severe gambling addiction».

The term «mental disorder», together with «intellectual disability», encompasses, inter alia, the group that can fall within the scope of the criminal insanity rule, and is a continuation of the terms «retardation or insanity» that were used in the former legislation.

The term mental disorder encompasses, inter alia, «psychoses (typically schizophrenia and bipolar disorder) and various types of mental disorder that have developed as the result of injury, disease or drug use».[52] Dementia is the condition specifically highlighted amongst the mental disorders because it is of special practical importance in a guardianship context. This includes, in addition to senile dementia in old age, dementia in younger persons.

The detailed meaning of the term «mental disorder» is not clarified in the Act or in the legislative preparatory works. However, case law sheds light on the specific meaning of the term, including how it relates to the requirement that there shall be a «need» for guardianship.

[49] Proposition No. 110 (2008–2009) to the Odelsting, p. 48.

[50] Guardianship Act.

[51] Proposition No. 110 (2008–2009) to the Odelsting, p. 177. See also p. 212.

[52] Proposition No. 110 (2008–2009) to the Odelsting, p. 176, and Official Norwegian Report NOU 2004: 16, p. 124 onwards.

6.9.3 Invalidity under contract law

The non-statutory doctrine of the invalidity of commitments motivated by insanity protects aberrant persons against contractual commitments irrespective of whether the other contracting party was aware of the aberration. The rule implies that legal commitments influenced by serious mental disorders may be declared invalid, and is formulated as follows by the Supreme Court:

> «A legal commitment made by a person suffering a serious mental disorder may be declared invalid if such commitment is influenced by the disorder. The mental disorder may in itself, depending on the nature of such disorder, give rise to some presumption that the commitment may be influenced by the said disorder. A serious mental disorder may be accorded more relevance in relation to large or unusual transactions than to simple and ordinary ones. The conclusion must be based on an overall assessment of the disorder, the circumstances surrounding the conclusion of the agreement, the substance of the commitment and subsequent events. If, based on such an overall assessment, the serious mental disorder is deemed to have influenced the commitment, such commitment is invalid irrespective of whether the other contracting party was aware or ought to have understood that said commitment was influenced by the mental disorder.»[53]

It follows from the quoted passage that the invalidity rule is based on a mixed model, since it is required that «such commitment is influenced by the disorder». The rest of the statement by the Supreme Court identifies circumstances that may be of relevance in determining whether such was the case. The Supreme Court specifies, in the same ruling, the object of proof as the issue of whether the agreement has been «concluded without, or with limited, understanding of what it entails», including whether the person in question had the «ability to assess the risk and implications of» such agreement.

It is, however, worth noticing that neither this case, nor other case law or legal theory, makes it entirely clear what it takes to prove that there is influence, including which criteria one may use to obtain evidence of pertinence to such objects of proof. It was stated in the said case that a serious mental disorder in the form of schizophrenia does in itself give rise to some general presumption of a lack of understanding. This was documented by a medical certificate that concluded with influence, and from which it followed that the person in question had an impaired ability to «realistically assess the outside world, with a tendency to thinking and assessing in a more autistic manner». The actual subject matter of the case was decided pursuant to Section 36 of the Contracts Act, thus making the said objects of proof irrelevant.

It may here by added that it is also of relevance under the Contracts Act whether a commitment is made by a person suffering a «serious mental disorder». Section 31, Sub-section 1, of the Contracts Act stipulates, inter alia, that an agreement is not binding on a party if the other party has exploited its «limited mental capacity». A key role is also played by Section 36, pursuant to which an agreement may be set aside, in full or in part, as unreasonable or contrary to good business practice, based on an overall assessment of the substance of such agreement, the situation of the parties, the circumstances surrounding the conclusion of the agreement and subsequent events. When compared to the non-statutory invalidity rule and Section 31 of the Contracts Act, Section 36 allows, to a higher extent, for reasonableness considerations to been taken into account.[54]

[53] p. 1544 of the ruling published on p. 1540 onwards of the 1995 volume of the Norsk Retstidende court reporter for the Supreme Court (dissent 4–1).

[54] See the ruling published on p. 1540 onwards of the 1995 volume of the Norsk Retstidende court reporter for the Supreme Court.

6.9.4 The Inheritance Act

Section 62 of the Inheritance Act governs which mental aberrations may result in distributions under a will being declared invalid:

> «A distribution under a will is invalid if the testator was insane or highly impaired in terms of mental development or highly impaired in terms of mental capacity at the time of the execution of the will, unless it is highly unlikely that his or her mental state has influenced the substance of such distribution.»[55]

The term «insane» is intended to reflect the so-called medical definition of a disorder, and it will in practice be for medical expertise to decide the scope of such term.[56] The other criteria, «highly impaired in terms of mental development» and «highly impaired in terms of mental capacity» are of a legal nature, but expert opinions will in practice be accorded considerable weight in these respects as well. It is stated in legal theory that it is «[b]oth theoretically and practically […] difficult to determine whether or not [a distribution] falls within the scope of the statutory provision».[57]

The provision does, when compared to the criminal law insanity concept, include psychotic conditions, relative unconsciousness and intellectual disability. However, it must be presumed to also extend beyond that, as it does for example included senility or dementia.[58] Moreover, it does not exclude aberrations caused by self-induced intoxication, as is the case under Section 45 of the Penal Code.

It is also of key importance to note that the structure of this rule differs from the Supreme Court's formulation of the non-statutory invalidity rule outlined above. The difference lies in the initial object of proof being not whether the «commitment is influenced by the disorder», but whether the person in question «was insane» – to be proven in accordance with the general civil law principle of preponderance.[59] It is only if it is highly unlikely that the aberration has influenced the distribution that the will shall be declared valid.

The prescribed assessment criterion is described as follows in the preparatory works of the provision:

> «It should […] not suffice to save the will that the testator has made a sensible distribution, if he or she has been unable, because of his or her state of mind, to recognise that there existed other equally obvious and equally sensible alternatives. If he or she has been unable to recognise this, the bequeathal has been affected by his or her mental deficiencies, and should not be valid.»[60]

The relevance of the mental disorder will depend on the distribution in question, and will vary from one area of law to another.[61] Since the legislative term «highly unlikely» is a strong wording, the practical implication of this statutory presumption is a strict standard of proof for

[55] See also the proposal for a new provision on this in Official Norwegian Report NOU 2014: 1, Chapter 25, Section 36 of the legislative proposal on p. 225 and the assessment of the Committee on pp. 112-113.

[56] Lødrup and Asland (2012), p. 149.

[57] Lødrup and Asland (2012), p. 149.

[58] Official Norwegian Report NOU 2014: 1, pp. 108–110.

[59] Lødrup and Asland (2012), p. 152.

[60] Draft Act relating to Inheritance (1962), p. 224.

[61] Hambro (2007), p. 452.

anyone arguing that the aberration has not influenced a distribution. Such is also the intention of the lawmaker.[62]

A judgment will conclude that the person in question has or has not been able to assess the relevant distribution in context.[63] However, it is also in this regard difficult to conclude from the judgments or other sources of law which specific criteria are applied in determining whether it is highly unlikely that the state of mind «has influenced the substance of such distribution».

As far as the ability of the testator to make judgements is concerned, legal theory has stated that this will normally be «extremely difficult to establish with any certainty. One will in this regard have to rely on highly uncertain assumptions.»[64] Moreover, case law shows that the statements and opinions of experts are invoked extensively for purposes of assessing the state of mind and its influence on the bequeathal.

The issue of validity often does not arise until after the death of the testator, thus implying that the experts, apart from examining medical records, need to base their opinions on more uncertain materials. This will create difficult situations with regard to evidence. The Supreme Court has made the following general observation with regard to the assessment of evidence in such cases:

> «There is, in the assessment of evidence, reason to place a special emphasis on what can be concluded from written sources from the period prior to the dispute. Subsequent testimony before the adjudicating court and in depositions must, generally speaking, be accorded less weight because such testimony may to a considerable extent be influenced by the conflict and by the preferred outcome of the case […]»[65]

Moreover, it would appear from the reasoning outlined in judgments that case law may have developed standards of an objective nature for determining validity when the testator has been insane or mentally impaired. The Supreme Court has, for example, concluded that a bequeathal from a person with senile dementia can be upheld if it is considered to be a so-called reproductive distribution. This means that the person in question has for a long time harboured specific preferences with regard to the distribution of the inheritance, but does not execute the will until after he or she has become affected by an aberration that falls within the scope of Section 62, or if it has been «made on the basis of a balancing of different bequeathal alternatives that it would be appropriate to consider in his or her situation».[66] It is also highlighted in legal theory that the courts sometimes refrain from ruling on the mental state of the testator if the contents of the will were reasonable and sensible, based on the assumption that the disorder will in any event not have influenced the distribution in such case.[67]

[62] Lødrup and Asland (2012), p. 151.

[63] See for example p. 1348 of the ruling published on p. 1342 onwards of the 1976 volume of the Norsk Retstidende court reporter for the Supreme Court.

[64] Hambro (2007), p. 452. See also Official Norwegian Report NOU 2014: 1, pp. 112–113.

[65] p. 448 of the ruling published on p. 440 onwards of the 1999 volume of the Norsk Retstidende court reporter for the Supreme Court.

[66] p. 1348 of the ruling published on p. 1342 onwards of the 1976 volume of the Norsk Retstidende court reporter for the Supreme Court.

[67] Hambro (2007), p. 452.

6.9.5 The Compensatory Damages Act

The liability for damages of persons suffering mental aberrations is governed by Section 1-3, No. 1, of the Compensatory Damages Act, under the heading «Liability of insane persons, etc.»:

> «A person who is insane, retarded, in a state of automatism or in a similarly impaired state of mind shall be liable for any damage caused by him or her to the extent deemed reasonable in view of his or her conduct and financial resources, as well as the circumstances in general. If the tortfeasor had him- or herself wilfully or negligently induced a temporary aberration as mentioned, his or her liability shall be as otherwise implied by general tort provisions.»

This provision encompasses a somewhat broader range of aberrations than do the criminal insanity rules. This is conveyed, in particular, by the term «similarly impaired state of mind».

The provision in Section 1-3 of the Compensatory Damages Act replaced Section 23 of the Penal Code Commencement Act, which applied a medical model to the assessment of the tortious acts of mentally aberrant persons also from the perspective of the law of torts, although it allowed for such persons to be held liable for damages if this would be reasonable and the tortfeasor had the financial means to discharge such liability:

> «If damage is caused by a person who was not of sound mind at the time of performing the relevant act because of any of the circumstances mentioned in Section 44 of the Penal Code, such person shall not be liable for such damage unless he or she had wilfully or negligently induced a temporary aberration of such a nature.
>
> If he or she is in possession of the requisite financial means, the court may nonetheless decide that the damage shall be compensated, in full or in part, from such financial means, provided that this is deemed reasonable under the circumstances.»

The principle encoded by the rule is that a person who at the time of causing the damage was mentally aberrant to such a degree that he or she was deemed to be of unsound mind within the meaning of criminal law, could not be held liable under the law of torts. This established a certain harmony with the liability provisions under criminal law. The provision in Section 1-3 of the Compensatory Damages Act reflects a different perspective, inasmuch as the mentally aberrant person is held liable under the law of torts to the extent this is deemed reasonable.[68]

The reasonableness assessment prescribed by the said provision may appropriately be described as a mixed model that is very broad in scope with regard to the potential grounds for liability. Any link between the state of mind and the act will often be of key importance in this respect; cf. for example the ruling published on p. 104 onwards of the 2005 volume of the Norsk Retstidende court reporter for the Supreme Court.

6.10 Obligations under international law

It follows from the mandate that the Committee shall take into account the requirements imposed on Norwegian criminal law and procedure by international conventions. In addition to any implications of Norway's international commitments, it would be appropriate to examine which considerations and values have been accorded weight by international bodies and states when acting in unison. It will in the following be examined whether the formulation of insan-

[68] See Nygaard (2007), pp. 436-437, for a more detailed discussion of the reasoning that resulted in the current legislative system.

ity rules is subject to restrictions under international law, including whether there are any restrictions on the scope for adopting a medical model, as has traditionally been done in Norway.

The Council of Europe's Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms, also referred to as the «European Convention on Human Rights» (ECHR), was incorporated into Norwegian law through Section 2, No. 1, of the Human Rights Act of 21 May 1999 No. 30.

Neither the wording of the Convention, nor case law from the ECtHR, suggest that there are any specific restrictions on the ability of states to adopt criminal insanity rules.

The UN Convention on the Rights of Persons with Disabilities (CRPD) came into force in 2008 and was ratified by Norway in 2013. The purpose of the Convention is to ensure autonomy and self-determination for persons with disabilities, and to ensure that general human rights are enjoyed in full by persons with disabilities; cf. its Article 1, which is worded as follows:

> «The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.
>
> Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.»

The provisions of the Convention address the special human rights challenges faced by this group, and is intended to counter discrimination and to promote a more inclusive society. The Convention is supplemented by an optional protocol that established an individual complaints procedure focused on the Committee on the Rights of Persons with Disabilities.[69] The optional protocol has not been ratified by Norway.

The theme addressed here is whether Norway's obligations under the Convention restricts the formulation of Norwegian insanity legislation. Is there a possibility that criminal insanity rules may come into conflict with the principle of non-discrimination, as reflected in its various manifestations in the Convention?

Article 14 of the Convention, which governs the scope of states for resorting to the deprivation of liberty, stipulates in paragraph 1 b that «[…] the existence of a disability shall in no case justify a deprivation of liberty». It follows from paragraph 2 of the said provision that any deprivation of liberty shall take place in «compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation».

The relevant provision with regard to criminal responsibility is Article 12, paragraph 2, which requires states to recognise the legal capacity of persons with disabilities, on an equal basis with other citizens in all aspects of life:

> «States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. »

[69] Optional Protocol to the Convention on the Rights of Persons with Disabilities.

Article 13 of the Convention stipulates a general obligation for states to ensure «effective access to justice» for this group, in addition to which it establishes a specific obligation to take active steps to ensure legal capacity for such group.[70]

The UN High Commissioner for Human Rights has stated the following concerning the implications of Article 12 for the formulation of responsibility provisions under criminal law:

> «In the area of criminal law, recognition of the legal capacity of persons with disabilities requires abolishing a defence based on the negation of criminal responsibility because of the existence of a mental or intellectual disability. [Footnote: Often referred to as «insanity defence».] Instead disability-neutral doctrines on the subjective element of the crime should be applied, which take into consideration the situation of the individual defendant. Procedural accommodations both during the pretrial and trial phase of the proceedings might be required in accordance with Article 13 of the Convention, and implementing norms must be adopted.»[71]

The Convention contents referred to here would, if the legal interpretation of the High Commissioner is to be applied literally, imply that the states parties to the Convention cannot have specific insanity rules in their criminal legislation that are based, either exclusively or partly, on the existence of a medically defined aberration on the part of the accused. The point is that each offender shall have the right to be assessed individually on the basis of disability-neutral standards, such as for example a requirement for intent within the meaning of criminal law.

The High Commissioner's statement has been referred to and quoted in the international and Norwegian debates on the formulation of insanity rules and the use of special sanctions. And it has been invoked in support of the position that the Convention prevents a system under which the criminal responsibility of the accused is determined exclusively on the basis of his or her disability.[72]

The Committee finds it difficult to conclude that this UN Convention restricts the formulation of states' criminal insanity rules. Two considerations, in particular, suggest that such is not the case.

Firstly, there is reason to emphasise that the High Commissioner has not provided any specific reasoning in support of the legal interpretation inferred from Article 12 of the Conventions. The High Commissioner is charged with promoting human rights in various ways, but cannot expand the obligations of states under the Convention.[73] Consequently, the contents of the Convention must be clarified, here as elsewhere, on the basis of general principles for the interpretation of treaties as laid down in Articles 31 and 32 of the Vienna Convention of 1969 on the Law of Treaties.

If follows from Article 12 of CRPD that persons with disabilities shall enjoy «legal capacity» in all aspects of life and on an equal basis with others. Such right is given a general phrasing, applies to all forms of disability, and offers little clarity as to what is referred to by the term «legal capacity». One possible interpretation is therefore that it refers to procedural capacity. Another possible interpretation is that it refers to equal substantive legal rights and obligations within all areas of law.

[70] See CRPD, Article 12, paragraph 3.

[71] A/HRC/10/48, p. 15, paragraph 47.

[72] Lund (2012). See also ICJ-Norway (2012), pp. 2–3.

[73] A/RES/48/141.

The latter interpretation, with has been invoked by some in the debates on criminal insanity rules and special sanctions, attributes very extensive scope to the said provision of the Convention. If such an interpretation were to be applied, it would imply a need for material changes to the legal systems of most countries, and within most fields of law, including inheritance law, marriage law, the law of torts and criminal law. It is not particularly likely that the state parties to the Convention have intended, through such a general and all-encompassing phrasing, for a fundamental part of the criminal justice systems of all Western countries, i.e. medically-defined insanity rules, to be abolished without further clarification. Psychological literature has characterised the statement of the High Commissioner as an «unrealistic unworkable suggestion for law reform».[74]

The primary purpose of the CRPD is not to establish new rights for persons with disabilities, but to ensure effective protection of pre-existing rights, and hence the scope of the Convention must be determined in view of prior rights declarations and conventions.[75] These are based on the presumption that guardianship arrangements may be used on certain conditions.[76] However, the issue of criminal insanity has not been brought up.[77] Moreover, there would not appear to be any suggestion that this issue was addressed in the negotiations that resulted in the CRPD. Nor has the issue been specifically discussed in subsequent Convention efforts.[78]

Besides, such a broad understanding is not compatible with the Convention being based on a so-called social model of disabilities. By this is meant that the overarching objective of the Convention is to ensure that persons with disabilities, including mental disorders, are not considered an object for treatment, but are on the contrary included in society and attributed social value in their own right.[79] Although it may be argued that being held criminally responsible is one way in which to be included in society, this will not promote, and may in fact complicate, the considerable continuous effort to achieve acceptance for mental disorders in general.

In addition to the fact that the High Commissioner's legal interpretation has a tenuous basis in the Convention, it is characterised by a low degree of compatibility with the insanity regulations under international law, especially within the area of criminal law.

One example is that it is specifically stipulated in the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities that it shall be considered discriminatory to curtail the legal capacity of persons with disabilities. A number of the states that have ratified the CRPD have also acceded to the Inter-American Convention. Article I, paragraph 2 b, of the Inter-American Convention is worded as follows:

[74] O'Mahony (2011).

[75] Paragraph f of the preamble to the CRPD.

[76] Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (1991), Appendix 1, Principle 1, Item 6.

[77] Declaration on the Rights of Mentally Retarded Persons (1971), Declaration on the Rights of Disabled Persons (1975), World Programme of Action concerning Disabled Persons (1982), Tallinn Guidelines for Action on Human Resources Development in the Field of Disability (1990), Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (1991) and Standard Rules on the Equalization of Opportunities for Persons with Disabilities (1993).

[78] CRPD Draft General comment on Article 12 (2013).

[79] CRPD, Article 1 and paragraph e of the preamble, and Kayess and French (2008), pp. 2–12.

> «If, under a state's internal law, a person can be declared legally incompetent, when necessary and appropriate for his or her well-being, such declaration does not constitute discrimination.»

One example of an international law framework pertaining to criminal insanity rules is the Rome Statute, which established the International Criminal Court (ICC). The Rome Statute, which was adopted to convict persons who commit severe international crimes, stipulates the following in Article 31, paragraph 1 a:

> «[A] person shall not be criminally responsible if, at the time of that person's conduct[,] [the] person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law.»

It may be noted that this rule is a natural implication of the fact that international criminal law can, by and large, be considered an aggregate representation of the criminal legislation of individual states. All states that have ratified the Rome Statute include sanity as a condition for criminal liability, or insanity as a defence, in their legislation.[80] It may here be added that such states are obliged to hand over persons for prosecution at the ICC.

A third example of an international law provision that presupposes, at least to some extent, a distinction between healthy and mentally ill offenders, is the UN Standard Minimum Rules on the Treatment of Prisoners. The Convention stipulates that: «Persons who are found to be insane shall not be detained in prisons and arrangements shall be made to remove them to mental institutions as soon as possible».[81] Besides, it follows from other sources of international law that convicted persons shall be provided with the same treatment for mental disorders as the rest of the population.[82]

The Committee is of the view that the Convention on the Rights of Persons with Disabilities and the High Commissioner's interpretation of such rights does not alter the fundamental and long-established understanding and regulation of criminal insanity, which is also clearly reflected in other sources of international law. Nor is the Committee able to conclude that any treaty obligations represent an obstacle to having criminal insanity rules.

The question is then whether the CRPD – the UN Convention on the Rights of Persons with Disabilities – nonetheless imposes requirements with regard to the formulation of the insanity legislation.

It is particularly apposite to discuss whether the Convention is an obstacle to relating the punishment exemption to a medical model rather than a mixed model, since such a rule may conceivably be too broad in scope, thus implying that persons who some would not consider to be of unsound mind for criminal law purposes may nonetheless be granted a punishment exemption; cf. 8.3.2. The main purpose of the UN Convention is to prevent discrimination on the basis of disability as such. If one chooses to formulate the legislation so imprecisely that it does not «target» those who actually have the capacity to assume criminal responsibility, it may be discriminatory or represent a disproportionate intervention in the «legal capacity» of individuals.[83]

[80] See 7.3 for details of the special regime under Swedish law.

[81] Standard Minimum Rules for the Treatment of Prisoners, paragraph 82, Item 1.

[82] A/RES/46/119, Principle 20.

[83] CRPD Draft General comment on Article 12 (2013), Item 21.

However, as will be noted from the discussion in 8.3.4, the Committee is of the view that an insanity rule based on a medical model will be the most accurate in terms of determining who lacks criminal capacity. The medical model includes a symptom intensity requirement that is of direct relevance to the rationale behind criminal insanity, whilst a mixed model is less amenable to a formulation that clearly and precisely delineates the group of persons intended to fall within its scope.

The Committee concludes, against this background, that the issue of whether current insanity legislation should be retained, as is or with clarifying amendments, is a matter for the lawmaker to decide at its unfettered discretion.

7 Foreign and international law

7.1 Theme and structure

It follows from the mandate that the Committee shall, in assessing which model should be adopted for the formulation of the criminal insanity rule, examine the insanity threshold in other countries that are appropriate to consider for purposes of comparison with prevailing law in Norway.

The Committee has chosen to examine this somewhat more thoroughly than has normally been done in Official Norwegian Reports which have included such comparative studies.

A more thorough examination of foreign law is of interest because the penal systems examined are largely premised on the same basic assumptions and reasoning as our own criminal law. The review of foreign law provides a broader basis for assessing how to define the scope of the punishment exemption under a criminal insanity rule.

The rules examined and reviewed in the following are all based on a specific rule model; cf. 6.3. It is characterised by first defining an *initial criterion* that comprises various more or less medically defined aberrations. It thereafter specifies *narrowing criteria*, which require that the aberration in question has had a certain implication or significance. These have in a Norwegian context often been referred to as insanity rules based on the «mixed model».

However, the following discussion does not aim to provide a detailed account of the contents of the narrowing criteria under the insanity rules, or how these are practised. In order to clarify the contents of such narrowing criteria, one would also have to examine case law from the courts of first instance in the respective countries. Such an analysis would have to be very extensive, and also address procedural issues and peculiarities in the various countries.

The narrowing criteria often require a highly specific discretionary assessment and, as we will note, it is also often the case that such criteria are not taken entirely at face value. Moreover, the criteria are applied differently under the different legal systems. They are, for example, of major practical importance in England and the United States, whilst they are not of such importance in Denmark; cf. 7.6–7.7 and 7.2, respectively. It is, in other words, difficult to precisely define the criminal insanity threshold in legal systems that operate with a mixed model. The Committee will nonetheless also outline, to the best of its ability, the contents of such narrowing criteria.

The criminal insanity rules of many countries may appropriately be compared to Section 44 of the Penal Code. However, some countries need to be selected. The Committee has deemed it most appropriate to focus on our neighbouring countries, which have major similarities with us in terms of both culture and legal tradition. The rules in Denmark, Sweden and Finland are outlined in 7.2–7.4.

In addition, the Committee has addressed the insanity rules of certain other major legal systems. These are the German rules in 7.5 and the Anglo-American rules in 7.6–7.7, including English law with its M'Naghten rule and certain US insanity rules. The Committee has also discussed the insanity rule in international criminal law in 7.8.

The Committee has chosen to address the legal situation in Denmark, Sweden and England in the most detail. Partly because the rules adopted in Denmark and England represent, in some

sense, opposites within a regime based on a mixed model. And partly because it has been argued that Norway should formulate its rule with reference to the criminal insanity rules of the said countries.[84]

7.2 Denmark

7.2.1 Rule

In Denmark, the issue of criminal insanity is governed by Section 16 of the Danish Penal Code, which is worded as follows:

> «Persons who at the time of committing the act were of unsound mind because of insanity, or aberrations that must be deemed equivalent thereto, shall not be liable to punishment. The same applies to persons who were mentally retarded to a high degree. If the perpetrator was, as the result of the ingestion of alcohol or other intoxicants, temporarily in a state of insanity or in a state that must be deemed equivalent thereto, punishment may nonetheless be imposed if justified by special circumstances.
>
> *Sub-section 2.* Persons who at the time of committing the act were mentally retarded to a lesser degree shall not be liable to punishment, unless special circumstances justify the imposition of punishment. The same applies to persons who were in a state that must be deemed reasonably equivalent thereto.»

The basic criterion here is that the perpetrator at the time of committing the act suffered from «insanity» or an aberration «that must be deemed equivalent thereto». This is discussed in 7.2.2. Even if the court were to conclude that one of these initial criteria for criminal insanity (i.e. mental disease or equivalent aberration) has been met, this does not imply, as also mentioned in the introduction, that the accused will automatically be acquitted. The narrowing criterion for criminal insanity, which is addressed in 7.2.3 below, must also be met.

7.2.2 Initial criteria

The key concept under the Danish criminal insanity rule is indicated by the term «insanity». This encompasses those aberrations that in Danish psychiatry are classified as mental disease or psychosis, and includes the disorders intended to fall within the scope of the term psychosis in Section 44 of the Norwegian Penal Code.[85] The Danish term is nonetheless somewhat broader in scope than the Norwegian one. This has to do with the fact that «psychotic» in Section 44 of the Norwegian Penal Code only refers to symptom-intensive psychoses – persons who are in a *psychotic state*, and not only have a psychosis diagnosis – whilst the term «insanity» in the Danish rule is not thus specified.[86]

The contents of the term «aberrations that must be deemed equivalent [to insanity]» – which expands the ambit of the rule beyond aberrations classified as «insanity» – is not readily defined. Danish legal theory has referred to it as a «mixed legal-medical term» because it does in practice draw on medical diagnoses.[87] This is also reflected in how it is envisaged that this initial criterion is practised by the courts of law: The experts communicate to the judges

[84] See Norwegian Psychiatric Association (2014), Boucht (2012), Grøndahl et al. (2012) and Syse (2006).

[85] Cf. Report No. 667/1972, p. 20, and Greve et al. (2013), p. 231, as read in conjunction with Official Norwegian Report NOU 1974: 17, p. 17, and Official Norwegian Report NOU 1990: 5, p. 31.

[86] Official Norwegian Report NOU 1990: 5, pp. 39, 41–42 and 51; cf. 7.2.3 for further details.

[87] See also Toftegaard Nielsen (2001), p. 277, and Waaben (2001), p. 134.

which symptoms the accused exhibits and how these are assumed to affect his or her mental life, without addressing considerations that are of decisive importance for purposes of determining criminal liability. The role of the psychiatrists is to provide a medical description of the aberration suffered by the indictee at the time of committing the act, whilst determining whether such aberration falls within the scope of the legislative term is a matter of legal assessment.[88]

Hence, this expansion of the scope of the rule is premised on a desire to ensure that the delineation of the punishment exemption is not solely determined by medical terms. Besides, the supplementary wording is considered useful because both the psychiatrists and the courts are led away from any temptation to stretch the term insanity in order to achieve desired outcomes. In other words, according equal status to psychosis and certain other severe aberrations for purposes of criminal law, is assumed to induce experts to express opinions that are sincere and based exclusively on a professional assessment when asked whether the accused was insane.[89]

In Danish law, these arguments have been highlighted by Professor Knud Waaben, especially in his thesis *Criminal Insanity and Special Treatment*:

> «The delineation of the concept of insanity (psychosis) may give rise to doubt in certain respects, just as the specific diagnosis may be uncertain. Hence, it is not desirable for too much to depend on the term «insanity». Physicians should to the extent possible be enabled to express their sincere opinion on the basis of their professional terminology and be led away from the temptation to use the label «insane» with excessive opportunism. It cannot be denied that such temptation would exist if the issue of punishment exemption was exclusively a matter of whether or not the medical certificate specified a diagnoses of insanity. Concern for the accused is also an argument in favour of not stretching the term «insane» too far. There will, even with a broad application of the insanity label, be abnormalities outside the scope of such term that should be exempted from punishment. It would not seem satisfactory to let the delimitation of the punishment exemption be defined by a delimitation used in medical terminology. One should be prepared to decide this matter on a more specific basis and attach weight to the nature and extent of the pathological aberration in question. If the need for such an expansion were to be accommodated within the confines of a legislative provision that only mentions «insanity», one would either have to apply the legislative wording analogously *or* use the term insanity «in the legal sense», which would not be in anyone's interest.»[90]

It is only rarely, and in highly heterogeneous situations, that an aberration is deemed equivalent to «insanity».[91] Consequently, it is not straightforward to specify which cases will typically be considered thus equivalent.[92] Some examples from case law may nonetheless be mentioned: epileptic fogginess,[93] progressive dementia with memory retention impairment

[88] See Waaben (1967), p. 429, and Waaben (1968), p. 46.

[89] See Report 667/1972, p. 29, Waaben (1968), pp. 43-44, and 2001, p. 134. See also Official Norwegian Report NOU 1974: 17, p. 17.

[90] Waaben (1968), pp. 43–44.

[91] See Report 667/1972, p. 32, and Waaben (1968), p. 46.

[92] See Greve et al. (2013), pp. 232–233 and 238–239, Waaben (1967), pp. 426-429, Waaben (1968), p. 46, and (2001), p. 134, and Report 667/1972, p. 31–32. The aberrations that must be deemed equivalent to insanity must to a large extent be assumed to include the same aberrations that one has sought to capture under a discretionary punishment exemption rule in earlier Norwegian reform attempts; cf. Report 667/1972, pp. 30–31, and Official Norwegian Report NOU 1990: 5, p. 54.

[93] The ruling of the Supreme Court of Denmark published on p. 314 onwards of the 1969 volume of the Ugeskrift for Retsvæsen court reporter.

and personality changes triggered by a cranial trauma,[94] and fogginess triggered by insulin shock.[95]

The expansion of the punishment exemption to also include equivalent aberrations was met with some resistance from health professionals, since it does not correspond to any established category within psychiatry. However, it would appear that such criticism has abated, as physicians have over time come to show more appreciation for the intentions of the lawmaker.[96]

The absence of clear criteria as to when a mental abnormality shall be deemed equivalent to insanity, has also given rise to some risk of unintended expansion of the ambit of the punishment exemption. However, it follows from the 1972 report of the Danish Council on Criminal Law that it was the view of the Danish Forensic Medicine Council, which view was subsequently adopted by the Danish Council on Criminal Law for purposes of its assessments, that one had in practice been able to keep the application of the criminal insanity rule within desired limits. The equivalent aberration concept was therefore retained.[97]

Even if the court were to conclude that one of the initial criteria for criminal insanity – i.e. insanity or an equivalent aberration – has been met, it will not automatically imply that the accused is acquitted. As mentioned, it is a requirement under Section 16 of the Penal Code that he or she was also «of unsound mind because of» his or her mental aberration. It is not entirely clear what is meant by this reservation; cf. 7.2.3 below for further details.

One consideration that merits mention in this context is that the assessment as to whether the accused suffered one of the equivalent aberrations and the assessment as to whether he or she was «of unsound mind because of» his or her mental aberration, may in practice blur into each other.[98] This is because both of these assessment criteria lack clear standards, thus implying that the courts of law will need to take the purpose of the provision into account in order to determine whether such criteria have been met.

An example illustrating this is the ruling of the High Court of Western Denmark published on p. 744 onwards of the 1964 volume of the Ugeskrift for Retsvæsen court reporter. A 43-year old woman had committed some thefts in a clothes shop in a state of severe medicine intoxication. The Danish Forensic Medicine Council deemed it highly likely that she had been suffered an equivalent aberration:

> «When, in addition, one takes into consideration the climacteric mental imbalance and tension of the indictee, as well as her temporary painful physical disorder, the Council deems it likely, although no definite conclusion can be drawn, that she was, at the time of committing the acts, characterised by unsound judgment and mental imbalance to such a significant extent that her state of mind must be deemed to have been temporarily equivalent to insanity».

[94] The ruling of the Supreme Court of Denmark published on p. 921 onwards of the 1993 volume of the Ugeskrift for Retsvæsen court reporter.

[95] The ruling of the Supreme Court of Denmark published on p. 199 onwards of the 2005 volume of the Ugeskrift for Retsvæsen court reporter.

[96] See Report 667/1972, pp. 18, 29, 32, 176–177, Waaben (1967), pp. 425–426, and Waaben (1968), pp. 44–45, with further references, and Waaben (2001), pp. 133–134.

[97] See Report 667/1972, pp. 32–33 and 176–177.

[98] Cf. p. 18 of Official Norwegian Report NOU 1974: 17, which assumed that the latter reservation would not be needed for the equivalent cases. See Waaben (2001), p. 134, to the opposite effect.

However, the court did «not find cause to conclude that the accused was of unsound mind because of an aberration that must be deemed equivalent to insanity», and referred to the witness testimony of the shop assistant and the uncertainty with regard to the quantity of medicine ingested by the indictee. It is not possible to determine, from the grounds outlined in the judgment, whether the reasoning of the court was that the aberration suffered by the indictee was not of such a nature as to be deemed equivalent to insanity, or whether its reasoning was that she did indeed suffer such an aberration, although it nonetheless had to be concluded that she was of sound mind for purposes of the criminal insanity assessment.

The term «mentally retarded to a high degree» in Section 16, Sub-section 2, corresponds largely to our term «intellectual disability of a high degree», and exempts this group from punishment. It has been assumed that the narrowing criminal insanity criterion is without relevance in these cases. However, also those who are intellectually disabled to a lesser degree, and who cannot under any circumstance be declared criminally insane under Norwegian law, will in Denmark be exempted from criminal liability «unless special circumstances justify the imposition of punishment», cf. Section 16, Sub-section 2, of the Danish Penal Code. The same applies to persons who at the time of committing the act were in a state that «must be deemed reasonably equivalent thereto», cf. the second sentence of the said provision. The reason why the provision does at all allow for the imposition of punishment on those who are intellectually disabled to a lesser degree is that it was desirable to retain the possibility of imposing fines on this group of persons, which will in practice often be difficult to avoid.[99]

7.2.3 Narrowing criteria

As mentioned, being insane or suffering an equivalent aberration at the time of committing the act does not suffice for an exemption from criminal liability under Danish law. It is a requirement under Section 16 of the Danish Penal Code that the perpetrator was also «of unsound mind because of» his or her mental aberration. This implies that criminal liability may be the outcome, even though the court has concluded that the accused suffered an aberration as outlined under 7.2.2 above. However, this happens very rarely in practice.

The combination of this narrowing criterion, which by its wording provides no guidance to the courts of law, very limited case law, as well as the tradition in the Danish judicial system for stipulating brief grounds for judgments, not least in the Supreme Court of Denmark, means that it is most difficult to specify which factors are accorded weight in assessing whether the accused should be deemed to be of sound mind for criminal liability purposes despite insanity or an equivalent aberration at the time of committing the act. Legal theory has therefore also at times referred to this as a «criterion void of content».

The prevailing view in Danish legal theory is that a causality perspective would appear to be prominent in the assessments of the courts of law. The question posed when discussing whether the criterion «of unsound mind because of» is met is whether there exists a causal link between the mental aberration and the criminal act.[100]

The ruling of the Supreme Court of Denmark published on p. 747 onwards of the 1962 volume of the Ugeskrift for Retsvæsen court reporter may be cited in support of such a position. The Supreme Court of Denmark did indeed invoke causality considerations in support of acquittal. Against the background of the aberration suffered by the indictee, as this was de-

[99] See Greve et al. (2013), pp. 236–237.

[100] See Report 667/1972, p. 23, Waaben (1968), pp. 30 onwards, 39 and 57, Waaben (2001), p. 133, Toftegaard Nielsen (2001), pp. 279–280, and Greve et al. (2013), pp. 232–233.

scribed by the Danish Forensic Medicine Council, and his peculiar conduct, it had to «be concluded that there has been such a link between the insanity and the committed offences that the indictee cannot be deemed to have been of sound mind within the meaning of the Danish Penal Code».[101]

However, the ruling cited most frequently to specify the contents of the criterion concerned a 45-year old dentist who was indicted for tax evasion over several years. The High Court stated that there was no «basis for assuming that there has been such a link between the insanity of the indictee referred to in the medical opinions and his submission of incorrect information to the tax authorities as to merit the conclusion that he was of unsound mind for purposes of the criminal liability assessment».[102]

In legal theory, it has been argued by Knud Waaben that the general deterrent effects of also punishing insane persons for less serious or white-collar crimes, such as for example embezzlement, fraud and tax evasion, is likely to be a consideration that is taken into account by the courts of law in deciding whether to nonetheless impose punishment.[103] If more serious crime that causes physical injury is involved, it is only in very rare instances that a perpetrator who is insane or equivalent is punished on the grounds that he or she was nonetheless of sound mind within the meaning of the Danish Penal Code. However, it may happen if the aberration in question is held to be limited in its manifestations or if there is doubt as to the evidence.[104]

It should nonetheless be noted, yet again, that convictions very rarely occur if the court concludes, following the presentation of evidence, that the perpetrator was insane or suffered from an equivalent aberration. The conclusion that the narrowing criterion under the Danish criminal insanity rule does not restrict the ambit of such rule to any appreciable extent is also illustrated by the fact that the discussion in Denmark has not been focused on whether such rule should be tightened, but exclusively on whether one should instead change to a more purely medical system; cf. 7.2.4.

7.2.4 In-depth discussion: Legislative basis of the Danish insanity rule, and reform proposals

One premise underlying the interpretation of the narrowing criterion – the Danish *criminal insanity criterion* – is that mental diseases may be partial, inasmuch as these only affect a certain part of the mental functions of the mentally ill person.[105]

Whether such premise is tenable on medical grounds is controversial; cf. 8.4.3.4. The rule has nonetheless gained some degree of acceptance in Danish psychiatric circles. Helweg was of the view that it was correct, theoretically speaking, that a mental disease always afflicts the entire psyche, but he nonetheless found it «slightly doctrinaire» to maintain that an insane person cannot commit criminal acts independently of the disorder:

[101] p. 753 of the ruling of the Supreme Court of Denmark published on p. 747 onwards of the 1962 volume of the Ugeskrift for Retsvæsen court reporter.

[102] p. 461 of the ruling of the High Court of Western Denmark published on p. 460 onwards of the 1966 volume of the Ugeskrift for Retsvæsen court reporter.

[103] Cf. Waaben (1968), p. 39, as read in conjunction with pp. 51–52.

[104] Cf. Greve et al. (2013), p. 232, and Waaben (1968), p. 39. See the ruling of the Supreme Court of Denmark published on p. 472 onwards of the 1944 volume of the Ugeskrift for Retsvæsen court reporter and the ruling of the High Court of Eastern Denmark published on p. 571 onwards of the 1959 volume of the Ugeskrift for Retsvæsen court reporter, both of which concerned homicide.

[105] See Toftegaard Nielsen (2001), p. 279.

> «One observes persons with definite, albeit less severe, mental disorders attend to their business affairs in a prudent and sound manner, and it would therefore seem in some sense unreasonable not to hold them to account if they start cheating in their commercial transactions for purposes of financial gain.»[106]

On the other hand, in preparing the major report on the issue of criminal insanity in Danish law; Report 667/1972, the Danish Forensic Medicine Council was of the view that the psyche is a totality that is affected completely by the mental disorder, thus implying that partial mental disease is not a possibility. And although delusions may in certain situations appear to be isolated, it was argued that the distinction, if any, between those cognitive processes of the perpetrator that are normal and those that are influenced by disorder is too difficult to make in practice for it to be appropriate to attribute any legal significance to such distinction. Although the regime with a supplementary criterion void of content would seem to have worked satisfactorily in practice, the Danish Forensic Medicine Council recommended the abolition of the criminal insanity criterion.

The Danish Council on Criminal Law also recommended the introduction of a purely medical model for the assessment as to whether the perpetrator was of sound mind, and proposed the following formulation:

> «Persons who at the time of committing the act were in a state of insanity or mental deficiency of a high degree, shall not be liable to punishment […]»[107]

In other words, what the Danish Council on Criminal Law wanted to move towards was the situation in current Norwegian law. The reasoning invoked in support of the proposal was mixed. Firstly, the Council on Criminal Law referred to certain arguments of a medical nature from the Danish Forensic Medicine Council and voiced the opinion that the idea of partial mental disease as such should be abolished for criminal law purposes.[108]

Secondly, the Danish Council on Criminal Law emphasised that the medical model is straightforward to practice: the Danish Forensic Medicine Council had noted that it involves an assessment criterion that falls naturally within the scope of the psychiatrist's field of expertise and lends itself to an empirically-based solution. A requirement for demonstrating a causal link between the disorder and the act, or a psychological principle, would on the other hand readily lead the psychiatrist into laborious formulations and hypotheses that he cannot in actual fact vouch for.[109] The Danish Council on Criminal Law added that such difficulties would similarly be encountered by the other practitioners in court.[110]

Thirdly, the Danish Council on Criminal Law notes that decisive weight should, on ethical and treatment grounds, be attached to whether the perpetrator was psychotic at the time of committing the act, at least if a custodial sentence is under consideration.[111]

[106] Helweg (1949), pp. 13–14. See also Waaben (1968), pp. 33–34.

[107] Report 667/1972, p. 138. See also Official Norwegian Report NOU 1974: 17, pp. 21–22. Its reception in Danish legal literature was mixed. In support of a medical model; see e.g. Waaben (1968), p. 147. Knud Waaben also chaired the work of the Council on Criminal Law on Report No. 667/1972. Alf Ross was highly critical to the introduction of a medical model in Danish law; cf. Ross (1973).

[108] See Report 667/1972, pp. 23–24, as read in conjunction with pp. 173–175.

[109] See Report 667/1972, p. 24 and 175–176.

[110] See Report 667/1972, p. 25.

[111] See Report 667/1972, p. 25.

Fourthly, it was noted that the position within Danish forensic psychiatry as to what represents insanity/psychosis was relatively uniform. Consequently, there was no reason to fear that introduction of the medical model would result in an ill-defined expansion of the scope for punishment exemption.[112]

However, the proposed introduction of the medical model met with opposition in the Danish Parliament, the Folketinget. It was rejected on the grounds that it was for the courts to determine the limits of the punishment exemption, and that it would «[…] from a due process perspective give cause for concern if the final decision with regard to a punishment exemption was to be made on the basis of purely medical criteria.»[113]

Such reform proposals may also be traced further back in time. A purely medical model was incorporated already in Carl Torp's opinion of 1917 on the draft new Penal Code submitted by the first Danish Penal Code Commission chaired by Carl Goos in 1912.[114] Goos and his Commission had, on the other hand, proposed the introduction of a mixed model for the criminal insanity evaluation. The punishment exemption would depend on whether the perpetrator, because of his or her aberrant state of mind, failed to understand the illegal nature of the act or lost control over him- or herself.[115]

According to Goos' Commission, the medical model, with its emphasis on professional psychiatric expertise, implied an unacceptable dislocation of the relationship between the experts and the judges of the court that was «in formal terms quite incompatible with the procedural and constitutional arrangements, as these must be at all times and under varying forms».[116] Torp rejected this general assertion of unconstitutionality under reference to, inter alia, a number of penal provisions that correspondingly implied a very narrowly defined and medically premised scope for discretion.[117] He argued that the mixed model resulted in a criminal insanity standard that was both scientifically untenable and, from a practical point of view, highly unfortunate.

Torp therefore argued, instead, for the introduction of the medical model in Danish criminal legislation: To operate with both medical and psychological elements in the same rule will, in case of doubt as to the applicability of the criminal insanity rule in specific cases, necessarily result in decisive weight having to be attached to one criterion or to the other. Since the rationale behind operating with a mixed system is typically to ensure sufficient influence for the courts of law over the assessment as to whether the perpetrator was of sound mind, this will result in the narrowing element of the provision being placed at the forefront. Torp was therefore of the view, like the Danish Forensic Medicine Council and the Danish Council on Criminal Law in 1972, that criminal insanity rules that attached weight to other criteria than the purely medical ones implied a denial that mental disorder affects the entire mental life of the mentally ill person, and that psychiatric expertise was supressed in favour of an assessment criterion of which it was impossible to have any well-founded understanding, whether on scientific or any other grounds.[118]

In the third Danish Penal Code Commission, which was chaired by Carl Torp, he again reiterated his proposal, this time also with support from Goll.[119] However, there were also other views in the Commission as to how the criminal insanity rule ought to be formulated: The proposal that garnered the most support was drafted by

[112] See Report 667/1972, p. 25, as read in conjunction with pp. 172–173.

[113] See Hoeg (2013), pp. 31–32.

[114] Torp's draft for a General Danish Penal Code (Report concerning the proposal prepared by the Penal Code Commission appointed on 11 August 1905 (1917)), Section 15.

[115] See Report submitted by the Commission appointed to conduct a review of the general Danish civil penal legislation (1912), draft General Danish Civil Penal Code, Section 33.

[116] See Report submitted by the Commission appointed to conduct a review of the general Danish civil penal legislation (1912), legislative preparatory works, p. 40.

[117] See Torp's draft for a General Danish Penal Code, legislative preparatory works, pp. 23-24. See Skeie (1946), p. 202, in the same direction with regard to Norwegian law.

[118] See Torp's draft for a General Danish Penal Code, legislative preparatory works, p. 22.

[119] See Report submitted by the Penal Code Commission of 9 November 1917 (1923), legislative preparatory works, p. 45 onwards. See also Report 667/1972, p. 21, and Waaben (1968), pp. 28–29.

Glarbo, Johansen and Krabbe. Their proposal let criminal insanity depend on whether the perpetrator was insane and therefore could not be considered conducive to being influenced by punishment. Even if it was the case that the psychiatric insanity concept remained reasonably fixed, a position that this group essentially rejected, the criminal insanity rule was too important to be based exclusively on medical criteria. And one could under any circumstance not be certain that the term would remain within the desired boundaries in future. Furthermore, it would be difficult for physicians to be accorded responsibility for managing how society shall protect itself against mentally aberrant offenders. Glarbo, Johansen and Krabbe also rejected the assertion that the psyche of the insane person is totally disturbed. They were of the view that this is a postulate that is neither in conformity with ordinary experience, nor with medical science.[120]
A minority of one member; Justice of the Supreme Court Eyvind Olrik, was in agreement with the main aspects of the reasoning of Glarbo, Johansen and Krabbe, but did instead propose the criminal insanity criterion, void of content, which remains prevailing law in Denmark to this day. Olrik was of the view that an assessment of the extent to which the perpetrator is likely to be influenced by punishment is a key element of the criminal insanity evaluation, but that it was too one-sided on its own. It would under any circumstance be a matter of a comprehensive social, legal and ethical assessment that did not lend itself to further specification in a legislative text. It would therefore be better to include the term «of unsound mind» in the legislative wording and let its meaning depend on the «innate meaning» of the term.[121]

7.2.5 Comparison of the rule with Section 44 of the Penal Code

The term «insanity» refers to the type of aberrations that fall within the scope of the term psychosis in Section 44 of the Penal Code. However, this term is broader in scope than the Norwegian term, since it is not in the same way related to, or applied in conjunction with, any specific symptom intensity requirement; cf. 6.4.3.

In addition to its legislative insanity concept being broader in scope than the Norwegian term «psychotic», the ambit of the Danish criminal insanity rule is further expanded through its supplementary wording «aberrations that must be deemed equivalent thereto». This term refers to a number of aberrations that are not classified as insanity, but in respect of which the purpose of a criminal insanity rule is assumed to apply correspondingly, i.e. when the cognitive, emotional and volitional functioning of the perpetrator has been affected to the same extent as in case of insanity.[122]

As mentioned in 7.2.2 and 7.2.3, the narrowing criterion in Section 16 of the Danish Penal Code – the requirement that the perpetrator was «of unsound mind because of» his mental aberration – does not change the impression that the Danish rule, as applied, encompasses far more and less debilitating aberrations than the Norwegian rule in Section 44 of the Penal Code.

7.3 Sweden

7.3.1 Rule

Under Swedish law, the mental state of the perpetrator is only of relevance to the matter of sentencing – such mental state is not a condition for imposing criminal liability. The Swedish «criminal insanity rule» is found in Chapter 30, Section 6, of the Swedish Penal Code and is worded as follows:

[120] See Report submitted by the Penal Code Commission of 9 November 1917 (1923), legislative preparatory works, pp. 36–38.

[121] See Report submitted by the Penal Code Commission of 9 November 1917 (1923), legislative preparatory works, pp. 62–63.

[122] See Ross (1973), pp. 293–294.

«A person who has committed an offence under the influence of a serious mental aberration shall primarily be sentenced to another sanction than imprisonment. The court may only impose a sentence of imprisonment if there is special cause for doing so. In assessing whether there is such cause, the court shall take in to consideration

1. whether the offence qualifies for a strict punishment;
2. whether the accused lacks or has a limited need for psychiatric care;
3. whether the accused in connection with the offence has him- or herself induced his aberration through intoxication or in any similar manner; as well as
4. the circumstances in general.

The court may not impose a sentence of imprisonment if the accused because of the serious mental aberration has lacked the ability to realise the implications of the act or to adapt his or her actions to such insight. However, this shall not apply if the accused has induced his or her inability in the manner referred to in Sub-section 1, Item 3.

If the court concludes, in cases falling within the scope of Sub-section 1 or 2, that no sanction should be imposed, the accused shall not be subjected to any sanction. Act No. 320 of 2008.»[123]

The initial criterion under the Swedish «criminal insanity rule» is that the perpetrator must at the time of committing the act have suffered a «serious mental aberration». The legislative term is broad in scope and encompasses numerous aberrations of a highly diverse nature and with a multitude of symptoms. The meaning of the term is discussed in more detail in 7.3.2.

Chapter 30, Section 6, of the Swedish Penal Code defines two different narrowing criteria. Sub-section 1 is premised on a causality criterion, whilst Sub-section 2 – the so-called imprisonment prohibition, which is also discussed in 7.3.3 – goes somewhat further by also stipulating a psychological criterion.

The provision is interpreted to mean that one shall in general use other sanctions than prison if the perpetrator has acted under «the influence of a serious mental aberration».[124] It follows from Sub-section 2 of the provision that prison is in any event excluded if the perpetrator because of the aberration has lacked the ability to realise the implications of the act or to adapt his or her actions to such insight. This part of the provision, which was formerly the main rule, is referred to as the «imprisonment prohibition», and is aimed at those suffering the «most severe mental aberrations».[125]

The prohibition only pertains to imprisonment, including commitment to a secure young offender's institution. Consequently, the provision does not prevent the imposition of other sanctions, for example fines.[126] If the perpetrator suffers a «serious mental aberration» at the time of the judgment and the imposition of fines is not deemed sufficient, the courts of law may impose a sentence of compulsory mental health care pursuant to Chapter 31, Section 3, of the Swedish Penal Code. Perpetrators who did not suffer such an aberration at the time of committing the act may also be sentenced to transfer to compulsory mental health care; cf. 23.2 for further details. In Sweden, the matter of discontinuation of a special sanction is adjudicated by an administrative court.

[123] Proposition 1990/99:58, pp. 458–459.

[124] Proposition 2007/08:97, p. 21, and Swedish Government Official Report 2012: 17, p. 539.

[125] Proposition 2007/08:97, p. 26.

[126] Berggren et al. (2012), pp. 12–13.

7.3.2 Initial criteria

The term «serious mental aberration» includes psychoses, defined as aberrations involving «[…] distorted perception of reality […] with symptoms like delusions, hallucinations and confusion».[127]

The term also encompasses severely impaired mental functioning in the form of inadequate reality orientation caused by brain damage. It also includes neuropsychiatric disorders like autism and conditions similar to autism. Severe depressions involving the contemplation of suicide and serious personality disorders may also be encompassed.

Moreover, the term «serious mental aberration» encompasses aberrations caused by the use of intoxicants, including alcohol-related psychoses like delirium tremens, alcohol-induced hallucinations and obvious cases of dementia, as well as cognitive impairment caused by the use of other types of intoxicants.[128]

Whether the aberration is held to be «serious» depends on an assessment of the contents and intensity of the perpetrator's symptoms. Such assessment may, depending on the circumstances, be of a highly specific nature. The Supreme Court of Sweden has, based on the preparatory works of the provision, interpreted the criterion as follows:

> «Some types of mental aberrations are serious in both their nature and degree. Certain mental aberrations, e.g. schizophrenia, will always be considered serious in their nature, but are not necessarily serious in their degree and may progress in a relatively low-impact manner. Yet other mental aberrations, such as depressions, are not always of a serious nature, thus implying that the assessment will be more directly influenced by the degree of such aberrations. An overall assessment will have to be made in each individual case, based on the nature of the aberration, as well as the symptoms and other manifestations that shed light on the degree of the aberration. – In performing such assessment, it will be necessary to take into consideration any variations in the aberration, as well as the risk of relapse if care or treatment is discontinued prematurely. The mental aberration is of a serious nature as long as there is a notable risk that the psychological symptoms will recur if treatment efforts are discontinued.»[129]

Uniform practice is sought through guidelines for the performance of psychiatric evaluations.[130] It is noted in case law that it may be difficult to clarify whether the perpetrator suffered an aberration as referred to in the statute at the time of committing the act.[131] It is emphasised that one will often have to make inferences from external circumstances. The Supreme Court of Sweden rules on the issue on a regular basis and will typically draw on a number of different expert opinions.

[127] Proposition 1990/91:8, pp. 86–87. See also Berggren et al. (2012), pp. 4–5.

[128] Berggren et al. (2012), p. 4. However, such aberrations will not prevent the use of prison if the aberration is self-induced; cf. 9.4.2.

[129] The ruling of the Supreme Court of Sweden published on p. 48 onwards of the 1995 volume of the Nytt juridiskt arkiv court reporter.

[130] Provisions and general advice of the Swedish National Board of Health and Welfare, No. 14, 1996, p. 6 onwards.

[131] The ruling of the Supreme Court of Sweden published on p. 702 onwards of the 2004 volume of the Nytt juridiskt arkiv court reporter.

7.3.3 Narrowing criteria

One basic criterion for the applicability of Sub-section 1 is the existence of a causal link between the aberration suffered by the perpetrator and the criminal act. This is expressed in the statute through the stipulation that the action must have been committed «under the influence» of such aberration. In the preparatory works this is taken to mean that said aberration must have had «decisive influence».[132] The person shall in such case, as a main rule, be sentenced to another sanction than imprisonment. However, imprisonment may be imposed if there is «special cause».

Whether there is «special cause» depends on an overall assessment based on the elements listed in Nos. 1-4 of the provision. Situations that are intended for inclusion are, inter alia, serious criminal acts committed under the influence of a «brief state of psychosis» and situations in which the aberration is caused by the use of intoxicants.[133] It follows from the preparatory work that it will generally be required that the offence qualifies for at least four years' imprisonment. Moreover, the perpetrator shall not have a need, or only a limited need, for medical treatment.[134]

Although there is, as mentioned, a presumption against imprisonment in case of «serious mental aberration», and imprisonment shall only be imposed if there is special cause, the provision reflects a basic premise of Swedish criminal law: In principle, mental disorders do not prevent the imposition of criminal liability on the perpetrator. However, it does at the same time reflect that the psyche of the perpetrator is of relevance when assessing the degree to which the criminal act merits punishment. This is also reflected in Chapter 27, Section 3, of the Swedish Penal Code, which stipulates that it shall be considered a mitigating circumstance if the perpetrator had, because of his or her mental state, a limited ability to «realise the implications of the act or to adapt his or her actions to such insight». Besides, a waiver of prosecution may be granted if the perpetrator suffered a «serious mental aberration» at the time of committing the act.

The imprisonment prohibition in Sub-section 2 of the provision stipulates a stricter requirement with regard to the link between the state of mind of the perpetrator and the criminal act than is required under Sub-section 1. The perpetrator must *«because»* of the aberration have «lacked the ability to realise the implications of the act or to adapt his or her actions to such insight». The provision applies to those with the «most severe mental aberrations».[135]

The requirement for a link between the aberration and the act has remained on the statute book since the time when it was a condition for criminal liability under Swedish law that the perpetrator was of sound mind. The requirement was at that time justified on the grounds that failure to make a statutory distinction between the adequate behaviour of the perpetrator and his or her behaviour influenced by disorder would be perceived as unreasonable, and that a requirement for such a link ensured that the courts of law would have the final word in deciding the matter of punishment.[136]

[132] Proposition 1990/91:58, p. 458.

[133] Proposition 2007/08:97, pp. 18–24. See also Swedish Government Official Report 2012: 17, p. 508.

[134] See Proposition 2007/08:97, pp. 18–24, and Berggren et al. (2012), p. 9.

[135] Proposition 1990/91:58, p. 458.

[136] See Proposition 1990/91:58, pp. 456–457, with further references.

Whether there should be a requirement for a causal link has been the subject of considerable discussion.[137] It has, inter alia, been proposed to instead focus on the mental state of the perpetrator, although the degree of mental disturbance, its link to the criminal conduct and the need for sanctions would also be taken into account when making the choice of sanction.[138]

The legislative process that resulted in the current provisions emphasised that the requirement for a causal link highlights the justifications for a punishment exemption, whilst such justifications are, at the same time, less prominent under the Swedish system – the mental state of the indictee is of relevance to the matter of sentencing, and not to the matter of guilt or innocence. It has also for that reason been assumed that one may require «less of a causal link» for the imposition of sanctions and for decisions to discontinue prosecution.[139]

The link between the aberration suffered by the perpetrator and the criminal act will, at the same time, be accorded weight when it comes to sentencing, and especially when deciding whether the «imprisonment prohibition» is applicable. This is because the issue then becomes *to what extent* the perpetrator should be held liable for the act.[140]

The statute is based on the premise that it will not generally be challenging to determine whether there is a link between the aberration and the act: «[I]t [should] generally not be difficult to decide the matter of a causal link». This position was justified on the grounds that there was a long tradition for resolving such issues; the courts of law, the prosecuting authority and the experts «are [not] unused to this type of assessment». It was, at the same time, acknowledged that difficult borderline cases may arise, but it was assumed that such cases can be resolved through the use of psychiatric reports.[141]

The method for demonstrating a causal link is to examine the proximity in time between the aberration and the conduct, as supplemented by a presumption that the actions of the «severely mentally aberrant person» are sufficiently influenced by his or her aberration. Use of the said method is advocated in subsequent legislative preparatory works,[142] and the Supreme Court of Sweden has also stated that it can generally be presumed that the criminal act has also been committed «under the influence of the aberration».[143]

When imprisonment cannot be imposed, the matter of causal link is also of relevance to the choice of sanction. This has to do with the consideration that the dangerousness of the perpetrator may be related to, and derived from, the mental state. Hence, causal link is also an indication of the need for a special sanction.[144]

When the presumption that actions are influenced by the aberration is deviated from, the court has taken into consideration whether the action, despite the aberration, is perceived to be rational. In a case that concerned fraud through the use of false invoices, the majority opinion in

[137] Berggren et al. (2012), pp. 5–6.

[138] Swedish Government Official Report 1977: 23, p. 259 onwards and p. 267 onwards.

[139] Proposition 1990/91:58, p. 457, with further references.

[140] Proposition 1990/91:58, p. 458. See also Berggren et al. (2012), p. 9.

[141] Proposition 1990/91:58, pp. 458–459. See also Swedish Code of Statutes, Act 1137 of 1991, Section 1, Sub-section 2, and Berggren et al. (2012), pp. 10–11.

[142] Proposition 1990/91:58, p. 458 and 531, and the ruling of the Supreme Court of Sweden published on p. 180 onwards of the 2007 volume of the Nytt juridiskt arkiv court reporter.

[143] The ruling of the Supreme Court of Sweden published on p. 702 onwards of the 2004 volume of the Nytt juridiskt arkiv court reporter.

[144] Proposition 1990/91:58, p. 458.

the Supreme Court of Sweden included the following reasoning as to why there was no causal link:

> «The actions of R.J. have throughout the period referred to in the indictment been rational and characterised by an adequate and controlled approach. The fraud has been going on for a long period of time and the handling of the false invoices has involved ongoing and fairly complex interventions. The mental aberration cannot, in consideration of the aforementioned, be assumed to have had such a decisive influence on his course of action as is required in order for him to be deemed to have committed the offences under the influence of a serious mental aberration.»[145]

However, it follows neither from case law, nor from legal theory, which criteria are used in determining whether the aberration has had a decisive influence on the actions of the indictee. This division into degrees of influence would appear to largely correspond to what has in the Norwegian context been referred to as the «partial effects» of the aberration; cf. 8.4.3.4.[146]

7.3.4 In-depth discussion: The background to current Swedish law, subsequent reports and reform proposals

7.3.4.1 The background to current Swedish law

What characterises the Swedish solution is that the mental state of the perpetrator is only of relevance to the matter of sentencing – such mental state is not part of the conditions for imposing criminal liability. Sweden is the only country in Europe to adopt such a regime.

The regime was the result of a major reform effort and came into force through the Swedish Penal Code of 1965. One thereby deviated from a long tradition under which it was a prerequisite for criminal liability that the perpetrator was of sound mind, with such liability being excluded for aberrations like «insanity», «imbecility» and aberrations that must be deemed equivalent to «insanity».[147] There was also at that time a requirement for a causal link between the mental aberration and the act, expressed through a requirement that the action had to be committed «under the influence of» such aberration. This was carried over into the provisions on the choice of sanction, upon it being resolved that it would no longer be a prerequisite for criminal liability that the perpetrator was of sound mind.[148]

There was, until a legislative amendment in 2008, a total prohibition against the use of imprisonment for this group of offenders.[149] The provision was, as previously mentioned, referred to as the «imprisonment prohibition». However, it was for the courts of law to decide whether to impose coercive measures in the form of «transfer to secure psychiatric care».

As noted in 7.3.2, the criminal legislation and the mental health care legislation generally make use of a joint terminology, thus implying that the group of offenders who cannot be sentenced to imprisonment, but can be sentenced to compulsory mental health care, are encompassed by the generic term «serious mental aberration».

[145] The ruling of the Supreme Court of Sweden published on p. 180 onwards of the 2007 volume of the Nytt juridiskt arkiv court reporter. The dissent concerned whether the aberration suffered by the perpetrator could at all be classified as a «serious mental aberration».

[146] Recommendation of the Penal Code Committee, 1925, p. 65.

[147] Strahl (1976), pp. 76–78.

[148] Swedish Government Official Report 2012:17, p. 504, Proposition 1962: 10, Part C, p. 354, 572 and 602, and Sterzel (2005), p. 89.

[149] Proposition 2007/08:97.

Following the legislative amendment in 2008, the prohibition against the use of imprisonment is no longer directed at this group as such. The legislative amendment must be understood from the perspective that the joint terminology was held to be too broad in scope, combined with a desire to allow for flexibility and proportionate penal sanctions. A key consideration is also an assumption that punishment may have an individual deterrent effect on some individuals in this group.[150]

When it was decided in Sweden that it would no longer be a prerequisite for criminal liability that the perpetrator was of sound mind, thus implying that anyone, irrespective of their state of mind, could be held criminally liable, this was in conformity with the proposal of the Swedish Penal Code Commission.[151] The Commission was of the view that the previous regime was outdated:

> «However, the actual principle invoked to justify the distinction between those who qualify for punishment and those who are exempted from punishment, has gradually become obsolete.»[152]

This had to do with the emergence of theories focused on the role of deterrence in criminal law. The position of the Commission was that this group of offenders should instead be sentenced to committal in an institution based on the needs of each offender at the time of the judgment, and that the decisive factor would then have to be whether individual deterrence considerations were applicable. Imprisonment should not be imposed on this group of offenders under any circumstance, and other sanctions should also be curtailed.

The Commission itself did not consider this change to represent a fundamental reorientation of criminal law:

> «[T]o external parties, the [institutionalised] care will be perceived as occasioned by the criminal act, irrespective of whether or not the formality of grounds for punishment exemption [criminal insanity defence] is observed.»[153]

Moreover, it would appear to be implied by the reasoning invoked by the Commission that it did not intend to attribute criminal liability to this group of offenders, with the grounds for judgment only making a pronouncement on whether or not the indictee had in actual fact acted in the manner described in the indictment.

Also during the further preparation of the legislation was this change characterised as a matter of «essentially formal classification» without any major significance, despite it being noted that it impinged on a fundamental condition for criminal liability.[154] It was also then stated that the key consideration was to ensure adequate treatment for offenders with mental problems.

It may finally be added that although it is not a formal condition for the imposition of punishment that the perpetrator was of sound mind, most of those who describe this regime report that it does in reality operate with a sanity requirement, and that the practical implications of

[150] Proposition 2007/08:97, p. 16 and 18.

[151] Swedish Government Official Report 1956: 55, p. 45 and 266 onwards, and particularly p. 272.

[152] Swedish Government Official Report 1956: 55, p. 273.

[153] Swedish Government Official Report 1956: 55, p. 284.

[154] Proposition 1962:10, Part C, p. 106.

the abolition of this prerequisite for criminal liability are rather limited.[155] This may be explained by noting that although one discarded a retrospective criminal insanity theory, in which the state of mind at the time of committing the act was the decisive factor, for a forward-looking treatment- and deterrence-focused approach, in which the situation at the time of the judgment was the decisive factor, such change was not implemented in full. The rule has throughout this period remained that it is the state of mind at the time of committing the act that is the decisive factor in determining the sanction.

7.3.4.2 Evaluations and reform proposals

The Swedish regime, which as noted means that the state of mind of the offender is only of relevance to the choice of sanction, has been the subject of debate since it came into force in 1965.

The most recent contribution is the Compulsory Psychiatric Care Legislation Report, which was submitted in 2012, and which strongly recommended the reintroduction of a regime in which it is a prerequisite for criminal liability that the perpetrator was of sound mind. Such recommendation has remained firm throughout a prolonged reform process, and has elicited support in the consultative rounds.

The main reasoning behind the recommendation is that it is not considered reasonable to impose criminal liability on a person who is without the ability to comprehend and evaluate the outside world. The argument is that moral responsibility for actions and choices requires culpability; cf. the criminal law principle «nulla poena sine culpa» (no punishment without guilt). It is also noted that citizens must have the ability to take into account the orders and prohibitions laid down by the lawmaker before it can become reasonable to impose punishment in respect of the violation thereof. General deterrence considerations are also invoked as an argument, inasmuch as it is argued that many of those with serious mentally disorders are impervious to threats of punishment.

The report also cites other arguments in favour of amending the rule, partly of a theoretical nature and a partly of a practical nature. Firstly, it is argued, at the more practical level, that the current provision in Chapter 30, Section 6, of the Swedish Penal Code is too narrow in scope. The rule does not, for example, protect persons with autistic conditions against punishment. It has also been emphasised that Sweden is the only country with a criminal law regime that does not make criminal liability conditional upon the perpetrator being of sound mind, and that international cooperation considerations therefore constitute an argument in favour of adaptation to the regime of other countries.

The reasoning originally invoked in support of the abolition of the criminal insanity regime, is criticised for being «characterised by pragmatism» and is seen as an example of contemporary treatment ideologies being afforded more influence than was justified. In particular, it is emphasised that the legislative preparatory works were excessively influenced by the so-called positivist theories of criminal law. These theories are characterised by their assertion that notions like responsibility and guilt bear no relation to reality. These are purely metaphysical notions, and hence should not form the basis for the formulation of any doctrine of criminal liability. Everyone should comply with the law and be held accountable for violations thereof, whilst the sanctions should be tailored to each individual based on his or her needs, as well as the need for societal protection.

The regime proposed in the Compulsory Psychiatric Care Legislation Report is based on the current «imprisonment prohibition» in Chapter 30, Section 6, of the Swedish Penal Code, but

[155] See for example Reimer (2014), Official Norwegian Report NOU 1974: 17, pp. 33–34, and Ross (1973).

reassigns the assessment criterion to the matter of guilt or innocence. The current imprisonment prohibition is held to be correct in its contents, but to be misplaced as part of the sanction doctrine instead of the criminal liability doctrine. A key aspect of the proposal is that it does not enquire about the mental aberration as such, or let such aberration determine whether there is criminal liability, but instead focuses on whether there is a specific relationship between the mental state of the perpetrator and the criminal acts that have been committed; whether the perpetrator has had insight into the nature of the action. In other words, the proposal is based on a type of psychological principle. The report proposes that the criterion be defined as follows:

> «[A]n act [shall] not constitute an offence if it is committed by a person who, because of any of the four basic conditions (serious mental aberration, temporary insanity, severe mental disability or a state of severe dementia) has lacked the ability to understand the implications of the act in the situation in which he or she found him- or herself. Nor shall an act constitute an offence if the perpetrator has had such ability, but has lacked the ability to adapt his or her actions thereto because of a serious mental aberration, temporary insanity, severe mental disability or a state of severe dementia.»

The proposal differs from the current provision in its wording in that the term «understand the implications of the act» replaces «realise the implications of the act». The amendment is intended to signal that this is separate from the wilfulness assessment, which also addresses what the perpetrator was capable of realising. The criterion that the perpetrator shall have lacked the ability to «adapt his or her actions to such insight» has for the same reason been amended to «lacked the ability to adapt his or her actions [to such understanding]».

It is thereafter systematically specified which conditions are held to qualify: These are, as will be noted from the quote, «serious mental aberration», including psychosis, «severe mental disability», a «state of severe dementia» and «temporary insanity». The proposal is based on the premise that the relationship between the condition and the conduct can be demonstrated, i.e. either that the person in question has failed to understand «the implications of the act» because he or she had a distorted perception of reality, or that he or she has failed to adapt «his or her actions to such understanding».

The proposal differs, in its structure and terminology, from most legal traditions with criminal insanity rules, also including Norwegian law. The requirement that the perpetrator is of sound mind is traditionally an independent condition for criminal liability, whilst the approach under the Swedish proposal is that the perpetrator being of sound mind is a prerequisite for concluding that any criminal act has even been committed. The key observation here is that the perpetrator must be of sound mind before an action can even be said to «constitute an offence». This distinguishes the proposal from traditions in which the perpetrator being of sound mind is only a prerequisite for imposing criminal responsibility on the basis of an action. This difference must be understood against the background that the Compulsory Psychiatric Care Legislation Report argued in favour of using a special action concept. However, such difference is unlikely to be of any practical significance.

7.3.5 Comparison of the rule with Section 44 of the Penal Code

The Swedish «criminal insanity rule» would appear to be broader in scope than the Norwegian rule in Section 44 of the Penal Code. A key observation is also that the term «*serious mental aberration*» offers the courts of law more flexibility in assessing the degree to which the perpetrator is affected and the intensity of the symptoms, independently of the medical categorisations, than would be the case under Norwegian law.

The reviewed sources of law indicate that the Swedish courts do not impose imprisonment in a number of cases in which the aberration suffered by the indictee would fall clearly outside the ambit of Section 44 of the Penal Code. Such is likely to be the case even though the narrowing criteria under the Swedish the rule, which are outlined under 7.3.3 above, must be assumed to be of greater practical significance than, for example, the narrowing criminal insanity criterion in Danish law.

7.4 Finland

7.4.1 Rule

In Finnish law, the issue of criminal insanity is governed by Chapter 3, Section 4, of the Finnish Penal Code. Sub-section 2 of the said provision stipulates the requirements for declaring the perpetrator to be of unsound mind for reasons of inadequate mental capacity:

> «The perpetrator is of unsound mind if he or she at the time of committing the act, because of a mental disorder, a severe cognitive disability, a serious mental aberration or impaired consciousness, is unable to understand the factual or illegal nature of the act, or if his or her ability to control his or her actions is for any such reason reduced to a significant extent (criminal insanity).»

In order to be fall within the scope of the Finnish criminal insanity rule, the perpetrator must at the time of committing the act have suffered a «mental disorder», a «severe cognitive disability», a «serious mental aberration» or «impaired consciousness»; cf. Sub-section 2 of the provision.

The initial criteria under the Finnish rule are addressed in 7.4.2. However, additional criteria need to be met in order for it to be concluded that the perpetrator is of unsound mind. These narrowing criteria are discussed in 7.4.3.

7.4.2 Initial criteria

The term «mental disorder» is interpreted, in accordance with the terminology adopted in Finnish mental health care legislation,[156] such as to include psychotic conditions.[157] By «severe cognitive disability» is referred to what is normally termed intellectual disabilities. The term was chosen to prevent the legislative wording from having a stigmatising effect. In practice, the threshold has been put at IQ 55, but some persons within the IQ range 50-70 are encompassed by the term if these also suffer other aberrations, for example other diagnoses.[158]

The term «serious mental aberration» refers to borderline psychoses and confusional states, whilst «impaired consciousness» refers to certain conditions of poisoning, severe senility, dementia-related mental impairments and organic brain damage, as well as, depending on the circumstances, febrile diseases, poisoning, concussion of the brain and intoxication when it results in automatism. This alternative was chosen, inter alia, to encompass aberrations that may otherwise result in acquittal in comparable countries.[159]

[156] Finnish Mental Health Act of 14 December 1990 No. 1116.

[157] See Finnish Government Proposition No. 44/2002 to Parliament, p. 62.

[158] See Finnish Government Proposition No. 44/2002 to Parliament, pp. 62–63.

[159] See Finnish Government Proposition No. 44/2002 to Parliament, p. 63.

The initial criteria under the Finnish rule shall not be interpreted medically or on the basis of medical diagnosis systems, but be attributed their ordinary meaning in general language. The rationale behind this was to prevent «differences between various psychiatric factions from influencing the deliberations of the courts».[160] However, this perspective has not been applied consistently throughout, as the following is also noted immediately thereafter:

> «By taking this approach one has, on the other hand, not deliberately sought to depart from the medical-legal meaning of the said terms.»[161]

Consequently, the aberration criteria are not fully tied into medical terminology. The decisive factor is that the aberration has resulted in the psychological criteria being met:

> «How the aberrations encompassed by the current disorder classification match the statutory criteria is, however, not decisive. The key consideration is to what extent such disorder has affected the ability of the perpetrator to notice, understand and evaluate facts, as well as the moral and legal implications of the act. It needs to be asked in which way the disorder has affected his or her ability to control his or her actions.»[162]

The narrowing criteria under the Finnish rule must be assumed, against the background of the broad initial criteria, to play a somewhat larger role than under Danish and Swedish law; cf. below.

7.4.3 Narrowing criteria

Under Finnish law, the perpetrator will be deemed to be of unsound mind if, because of one of the aberrations discussed in 7.4.2, he or she is unable to «understand the factual or illegal nature of the act, or if his or her ability to control his or her actions is for any such reason reduced to a significant extent».

The following is noted in the preparatory works of the Finnish rule with regard to the narrowing criteria under such rule:

> «The manifestations of the morbid condition shall, in terms of volitional-cognitive and normative criteria, have presented themselves in such a manner that the perpetrator has failed to understand the factual nature of the act, or has failed to realise the illegal nature of such act, or in such a manner that his or her ability to control his or her actions for any such reason is reduced to a significant extent. Consequently, the mental health assessment opinion shall specify the implications of the identified mental condition for the ability of the perpetrator to distinguish between right and wrong, his or her ability to make reasonably precise observations of the surrounding world, and his or her prospects for exercising control over his or her own activities.»[163]

The requirement under the «control criterion» is not that the perpetrator has altogether lost the ability to control his or her actions, but only that such ability is materially impaired.[164] However, the Finnish sources provide very little detail with regard to the specific criminal insanity assessment under the narrowing criteria.

[160] See Finnish Government Proposition No. 44/2002 to Parliament, p. 62.

[161] See Finnish Government Proposition No. 44/2002 to Parliament, p. 62.

[162] Finnish Government Proposition No. 44/2002 to Parliament, p. 63.

[163] Finnish Government Proposition No. 44/2002 to Parliament, p. 63.

[164] See Finnish Government Proposition No. 44/2002 to Parliament, p. 64.

It will be noted from the quoted passage that one premise underlying Finnish law is that medical science can establish the ability of mentally ill persons to distinguish between right and wrong, etc.

Besides, it is acknowledged in the preparatory works that there will not under the rule be an entirely clear-cut distinction between criminal insanity and the absence of wilfulness, but the insanity rule is nonetheless assumed to be of independent relevance, especially due to the control criterion, and that ignorance in instances of criminal insanity is caused by disorder, and not by incidental external circumstances.[165]

7.4.4 Comparison of the rule with Section 44 of the Penal Code

The Finnish insanity rule has a very broad specification as to which aberrations give rise to the *possibility* of an acquittal. When compared to the rule in Section 44 of the Penal Code, the Finnish criminal insanity rule allows for a broader group of aberrations to be taken into account than does the Norwegian rule.

The narrowing criteria under the Finnish insanity rule are reminiscent of some of the criteria under the Swedish rule, as well as of certain Anglo-American insanity standards, i.e. M'Naghten rules and the «irresistible impulse» test; cf. 7.6.3, 7.7.3.2 and 7.7.3.3 for further details. These must be assumed to play a somewhat larger role than under Danish and Swedish law, but there are no grounds for concluding that the criminal insanity rule is in practice more narrow in scope than in the said countries.

7.5 Germany

7.5.1 Rule

It is a prerequisite for criminal liability under German law that the perpetrator was of sound mind, and the issue is governed by Section 20 of the German Criminal Code:

> «Any person who at the time of the commission of the offence is incapable of appreciating the unlawfulness of their actions or of acting in accordance with any such appreciation due to a pathological mental disorder, a profound consciousness disorder, debility or any other serious mental abnormality, shall be deemed to act without guilt.»[166]

In order to fall within the scope of the rule, it is a requirement that the accused at the time of committing the act suffered a *pathological mental disorder*, *profound consciousness disorder*, *debility* or *other serious mental abnormality*; cf. 7.5.2. The narrowing criteria, which must also be met, are addressed in 7.5.3.

This rule is also used in other German-speaking countries. The criminal insanity rule found in Section 11 of the Austrian Criminal Code is fairly similar to Section 20 of the German Criminal Code:

> «Whoever is at the time of the offence incapable of appreciating the unlawfulness of his or her actions or of acting in accordance with any such appreciation due to a mental disorder, a mental disability, a profound consciousness disorder or any other serious mental aberration equivalent to any of the aforementioned conditions, shall not be deemed to have acted culpably.»

[165] See Finnish Government Proposition No. 44/2002 to Parliament, p. 63.

[166] Official English translation of Section 20 of the German Criminal Code in the version promulgated on 13 November 1998, Federal Law Gazette, last amended by Article 3 of the Law of 2 October 2009, Federal Law Gazette I, p. 3214.

7.5.2 Initial criteria

By *pathological mental disorder*, the provision refers to various psychotic disorders of both organic and non-organic origin. *Profound consciousness disorder* encompasses extreme emotional disorders and affective disorders, for example extreme rage, hate, shock, panic and fear, as well as, in some cases, aberrations occurring in the wake of physical and/or sexual abuse. This category also includes intoxications; cf. 9.4.4 for further details. *Debility* encompasses cases of intellectual disability.[167]

The term *other serious mental abnormality* encompasses a heterogeneous group of aberrations that do not readily lend themselves to medical categorisation. These are characterised by being, for legal purposes, as serious in nature as the other three categories. Examples of aberrations that fall within the scope of this criterion are, inter alia, severe personality disorders, neuroses and paraphilias, as well as severe alcoholism and drug addiction.[168] Hence, the term is reminiscent of the separate category of *equivalent aberrations* under the Danish criminal insanity rule; cf. also the Austrian rule, which states this explicitly. This will also to a large extent serve the same purpose, but must generally be assumed, as illustrated by the examples, to be considerably broader in scope.

7.5.3 Narrowing criteria

Also under German law does it not suffice for the initial criterion under the rule to be met. The aberration encompassed by the initial criterion must in addition have resulted in the perpetrator being incapable of appreciating the «unlawfulness of [his or her] actions» or of «acting in accordance with any such appreciation».

These psychological states cannot occur simultaneously, as it cannot reasonably be argued that a person who is incapable of appreciating the unlawfulness of an action can act in accordance with any such appreciation, or vice versa. It is for the court to resolve the issue of whether the narrowing criteria under the rule are met, with the conclusion normally being that such criteria are indeed met since this issue is in practice often open to doubt.[169]

7.5.4 Comparison of the rule with Section 44 of the Penal Code

It follows clearly from the wording of Section 20 of the German Criminal Code that other mental aberrations than psychoses, automatism and intellectual disability may give rise to criminal insanity; cf. 7.5.2. In other words, there are more aberrations that may result in a punishment exemption on grounds of criminal insanity under German law than under Norwegian law. However, the narrowing criteria have significant similarities with those under Finnish law, and will curtail the scope of the rule.

[167] See Bohlander (2009), pp. 133–134.

[168] See Bohlander (2009), p. 135.

[169] See Bohlander (2009), p. 132.

7.6 England

7.6.1 Rule

In England, the criminal insanity rules have been established by the courts in the form of case law.[170] Conditions for criminal liability are classified as «defences». However, to begin with, and before ruling on the defences, a decision shall be reached on the separate issue of whether the accused is «unfit to stand trial».[171] The decisive assessment criterion at such stage is whether the accused understands the proceedings against him- or herself. If the accused understands these, and hence is deemed fit, the proceedings will continue and the defences become of relevance. The English regime is under evaluation by the Law Commission.[172]

The so-called *M'Naghten rules* from 1843 have had a formative influence on these defences – i.e. the insanity rule – in the Anglo-American legal tradition. These rules operate with initial criteria that are, generally speaking, very broad and narrowing criteria that are strict.

The M'Naghten rules have their origin in the spectacular criminal case against Daniel M'Naghten, whose acquittal on grounds of insanity caused such consternation that the House of Lords put direct questions to the Court of Common Pleas concerning the meaning of the insanity rules.[173] One of its answers was worded as follows:

> «The jury ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity it must be clearly proved that, at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong […]»[174]

Two requirements need to be met in order to pass the tests embedded in this insanity rule. Firstly, the perpetrator must at the time of committing the act have been labouring under a «defect of reason, from disease of the mind». This initial criterion, which is very broad in scope, is addressed in 7.6.2 below. Secondly, one must be able to establish that he, as a result of such defect, either «[did not] know the nature and quality of the act he was doing» or «that he did not know he was doing what was wrong»; cf. 7.6.3. The narrowing criteria define a fairly restricted scope for criminal insanity, at least by their wording. There are, however, some indications that these criteria are not applied quite so strictly in practice; cf. 7.6.4.

7.6.2 Initial criteria

7.6.2.1 «Disease of the mind» and «defect of reason»

In order to be deemed of unsound mind within the meaning of criminal law, the perpetrator must under the M'Naghten rules have been, at the time of committing the act, «labouring under […] a defect of reason, from disease of the mind».

[170] See also Andenæs' discussion of English law in an appendix to Official Norwegian Report NOU 1974: 17, on pp. 171–177.

[171] Ashworth (2003), p. 206 onwards, and Criminal Procedure (Insanity and Unfitness to Plead) Act 1991.

[172] Law Commission (2013).

[173] Daniel M'Naghten suffered delusions and believed himself to be persecuted by the Tories. He therefore decided to kill the then Prime Minister of the United Kingdom, Sir Robert Peel, but instead mistakenly killed his private secretary, Edward Drummond.

[174] (1843) 10 Cl. & F. 200.

In other words, the basic criterion is two-pronged. Firstly, the perpetrator must suffer a disease and, secondly, such disease must have affected his or her ability to make rational assessments.

By «disease of the mind», the rule refers to any disease that affected the mind of the perpetrator at the time of committing the act. It is of no import whether such disease is organic or functional in origin, or whether it is of a permanent or a more transient nature.[175] This is clearly expressed in Lord Diplock's opinion in the case *Regina v. Sullivan*, which was endorsed by the other Law Lords:

> «'[M]ind' in the M'Naghten Rules is used in the ordinary sense of the mental faculties of reason, memory and understanding. If the effect of a disease is to impair these faculties so severely as to have either of the consequences referred to in the latter part of the rules, it matters not whether the aetiology of the impairment is organic, as in epilepsy, or functional, or whether the impairment itself is permanent or is transient and intermittent, provided that it subsisted at the time of commission of the act.»[176]

In practice, this includes all diseases that have affected the mind of the perpetrator, and that are not caused by external factors; cf. 7.6.2.2 below.

By «defect of reason» is meant that the disease must have impaired the capacity of the perpetrator for rational thought. Transitory impairment of such capacity as the result of, for example, temporary confusional states or a lack of concentration, falls outside the scope of the term. Those who were in possession of such capacity, but who nonetheless were unable to make use thereof at the time of committing the act, also fall outside such scope.

This is expressed by the Court of Appeal of England and Wales (Criminal Division) in the case *Regina v. May Clarke*, which has had a formative influence on the interpretation of this criterion under the M'Naghten rules in England:

> «The M'Naghten rules relate to accused persons who by reason of a disease of the mind are deprived of the power of reasoning. They do not and never have applied to those who retain the power of reasoning but who in moments of confusion or absent-mindedness fail to use their powers to the full.»[177]

7.6.2.2 «Disease of mind» – delineation against the doctrine of automatism

The insanity rule represented by the M'Naghten rules needs to be distinguished from the doctrine of automatism. The rules on automatism concern criminal offences that have their origin in involuntary actions that are not caused by a «disease of the mind».

The distinction between the defences of insanity and automatism has implications in terms of available sanctions. If it is held that the perpetrator «was labouring under […] a defect of reason, from disease of the mind», and the other requirements under the M'Naghten rules are met, special sanctions will be available. Indeed, the imposition of special sanctions is conditional upon the perpetrator being of unsound mind and a verdict of «not guilty by reason of insanity».[178]

[175] Ashworth and Horder (2013), p. 142, and Law Commission (2013), pp. 7–8.

[176] *Regina v. Sullivan* [1984] AC 156. See also Lord Denning's opinion in the House of Lords case *Bratty v. Attorney-General for Northern Ireland* [1963] AC 386, quoted below.

[177] *Regina v. May Clarke* (1972) 56 Cr App Rep 225. See Ashworth and Horder (2013), p. 142, and Law Commission (2013), p. 7.

[178] See Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, Section 5 (1) (a).

If, on the other hand, the perpetrator prevails with a defence of automatism, the outcome will be an unqualified acquittal, without scope for the imposition of special sanctions.

In order to define the distinction between the ambit of the insanity rule and the ambit of the rules on automatism, the English courts have established a doctrine that makes such distinction on the basis of whether the relevant aberration was caused by internal or external factors.

Any disease that affects the mind, and that is caused by *internal factors* in the perpetrator, meets the requirement that there must be a «disease of the mind». Any mental impact caused by *external factors* is not a «disease of mind», and shall be considered from the perspective of automatism.[179] One example of automatism is *hypo*glycaemia in diabetics triggered by excessive doses of insulin.

Apart from psychoses and other aberrations that are clearly considered diseases of the mind within the meaning of the M'Naghten rules, the term «disease of mind» will also encompass certain aberrations that one would not necessarily find it obvious to characterise as thus. This has to do with the fact that many aberrations are caused by *internal factors*, for example arteriosclerosis (typically after having caused stroke),[180] epilepsy,[181] somnambulism[182] and hyperglycaemia.[183] In other words, a broad meaning is attributed to the term «disease of mind».

The distinction between internal and external factors that affect the mind of the perpetrator, implies an expansion of the scope of the insanity rule, accompanied by a corresponding narrowing of the scope of the rules on automatism. The intention behind the broad interpretation of the «disease of mind» criterion under the M'Naghten rules on the part of the English courts is to ensure wide scope for using special sanctions to attend to societal protection considerations.

This is clearly reflected in Lord Denning's opinion in the House of Lords case *Bratty v. Attorney-General for Northern Ireland*:

> «Again, if the involuntary act proceeds from a disease of the mind, it gives rise to a defence of insanity, but not to a defence of automatism. Suppose a crime is committed by a man in a state of automatism or clouded consciousness due to a recurrent disease of the mind. Such an act is no doubt involuntary, but it does not give rise to an unqualified acquittal, for that would mean that he would be let at large to do it again. The only proper verdict is one which ensures that the person who suffers from the disease is kept secure in a hospital so as not to be a danger to himself or others. That is, a verdict of guilty but insane.
>
> […]
>
> Upon the other point discussed by Devlin J. namely, what is a 'disease of the mind' within the M'Naghten Rules, I would agree with him that this is a question for the Judge. The major mental diseases, which the doctors call psychoses, such as schizophrenia, are clearly diseases of the mind. But in Charlson's case, Barry J. seems to have assumed that other diseases such as epilepsy or cerebral tumour are not diseases of the mind, even when they are such as to manifest themselves in violence. I do not agree with this. It seems to me that any

[179] The key cases in this regard, which are based on the *Bratty* ruling from which is quoted immediately below, are *Regina v. William George Henry Quick and William Paddison* [1973] QB 910 and, indeed, the House of Lord case *Regina v. Sullivan* [1984] AC 156. See Ashworth (2003), pp. 102–103.

[180] *Regina v. Kemp* [1957] 1 Q.B. 399.

[181] *Bratty* and *Sullivan*; cf. above.

[182] *Regina v. Burgess* [1991] 2 QB 92.

[183] *Regina v. Hennessy* [1989] 1 WLR 287.

> mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind. At any rate it is the sort of disease for which a person should be detained in hospital rather than be given an unqualified acquittal.»[184]

The delineation between aberrations caused by internal and external factors, respectively, may result in outcomes that will probably be perceived by many as somewhat absurd or arbitrary: For example, impaired consciousness caused by *hyperglycaemia* (which is the result of an inadequate physiological response to the excessive accumulation of glucose in the blood plasma (internal factor)), does as mentioned merit a verdict of insanity and the imposition of special sanctions. Mental disturbances that are, on the other hand, caused by *hypoglycaemia* (which aberrations may, for example, be the result of excessive doses of insulin (external factor)), merit acquittal under the doctrine of automatism.[185]

However, the peculiar implications that would appear to result from this rule may be remedied through the choice of sanction on the part of the courts of law, by way of the accused not being transferred to a psychiatric institution, but instead making an order for his or her immediate discharge.[186] However, this will not compensate for the fact that some diabetics will probably feel stigmatised by a verdict of «not guilty by reason of *insanity*». Besides, the required distinction can be difficult to implement. The reasons for a reduction in the mental capacity of the perpetrator will often be complex, and be the result of both internal and external factors.

7.6.3 Narrowing criteria

The first alternative under the narrowing criterion in the M'Naghten rules is that the perpetrator «[did not] know the nature and quality of the act he was doing». This alternative will apply if the aberration has resulted in the general requirement for subjective culpability not having been met, which under English law means that the perpetrator has acted in the absence of «intention», «knowledge» or «recklessness». The will normally result in an unqualified acquittal, but when the lack of subjective culpability is caused by a «defect of reason, from disease of the mind», the courts are required to make a verdict of «not guilty by reason of insanity», which as mentioned allows for the imposition of special sanctions; cf. 7.6.2.2.[187]

According to the ruling of the Court of Criminal Appeal in the case *Regina v. Georges Codère*, the criterion «[did not] know the nature and quality of the act he was doing» refers to knowledge of the factual circumstances that constitute the crime, and not to its moral aspects.[188] Such interpretation means that insanity is a narrow concept in this respect, and it has met with criticism for being premised on unrealistic assumptions with regard to serious mental disorders; cf. 7.6.4 below.

The second alternative under the narrowing criterion in the M'Naghten rules is that the perpetrator «did not know he was doing what was wrong». This criterion has also been given a strict interpretation in English law. Formally speaking, it does not suffice that the perpetrator was unable to comprehend that the action was morally reprehensible. The term «wrong» is in case law taken to mean that the perpetrator must, because of the aberration, be in a state of ignorance as to the illegal nature of the act.

[184] *Bratty v. Attorney-General for Northern Ireland* [1963] AC 386.

[185] See Ashworth and Horder (2013), pp. 91 and 142–143.

[186] See Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, Section 5 (2) (b) (iii).

[187] See Ashworth and Horder (2013), p. 143.

[188] See *Regina v. Georges Codère* (1916) 12 Cr. App. R. 21. See also Law Commission (2013), p. 10.

This interpretation of the word «wrong» is not entirely obvious from the pronouncements of the Law Lords on the M'Naghten rules, but is endorsed by subsequent case law, especially by the ruling of the Court of Criminal Appeal in *Regina v. Windle*:

> «In the opinion of the court, there is no doubt that the word 'wrong' in the M'Naghten Rules means contrary to law and does not have some vague meaning which may vary according to the opinion of different persons whether a particular act might or might not be justified.»[189]

The perpetrator in the said case suffered from shared psychosis (*folie à deux*), and was as the result of his delusions convinced that it was morally correct to kill his suicidal wife with one hundred aspirin pills. However, when apprehended by the police he said «I suppose they hang me for this». This indicated that he, despite having been in a state of «moral ignorance» about his actions, was nonetheless aware that the homicide was illegal from a legal perspective. Consequently, the perpetrator was deemed to be of sound mind, and the death penalty against him was upheld.

The legal interpretation outlined in *Windle* has subsequently been applied by the Court of Appeal Criminal Division in the ruling *Regina v. Dean Johnson*.[190] The strict interpretation of the word «wrong» has been heavily criticised, and such interpretation is not applied in most of the common law jurisdictions that use M'Naghten rules, including Australia and several US states; cf. 7.6.4 below.

It is likely that the reluctance to adopt a broader interpretation, thus also taking into account «moral ignorance» in the application of this criterion, has partly to do with the likelihood that this may bring up new legal issues and also have a litigious effect, as noted in the discussion paper of the Law Commission:

> «If 'wrongfulness' is to be interpreted as 'morally wrong' rather than legally wrong, that begs the question whose morality is to be used as the standard by which the accused's appreciation is judged. It would obviously not be desirable for a court to have to conduct an inquiry into what was generally regarded as morally wrong; on the other hand, the standard cannot be wholly subjective to the accused.»[191]

And partly its origin is likely to lie, as noted in the *Codère* case, in a fear of undermining the effectiveness of criminal law, at least if it is the standards of the perpetrator that shall be applied in determining what is «wrong»:

> «The question of the distinction between morally and legally wrong opens wide doors. […] It was suggested at one time in the course of the argument that the question should be judged by the standard of the accused, but it is obvious that this proposition is wholly untenable, and would tend to excuse crimes without number, and to weaken the law to an alarming degree.»[192]

Although the term «wrong» is assumed to refer to the perpetrator being ignorant of the law due to his or her state of mind, conviction may perhaps be the outcome if he or she was able to understand, despite his or her ignorance of the law, that the action was morally wrong, not on the basis of his or her moral views, but «according to the ordinary standards adopted by

[189] *Regina v. Windle* [1952] 2 QB 826. See also *Regina v. Georges Codère* (1916) 12 Cr. App. R. 21.

[190] *Regina v. Dean Johnson* [2007] EWCA Crim 1978.

[191] Law Commission (2013), p. 56.

[192] *Regina v. Georges Codère* (1916) 12 Cr. App. R. 21.

reasonable men», cf. *Regina v. Georges Codère*.[193] In such case, the ability of the perpetrator to comprehend the moral reprehensibility of the act may serve to expand, but not to restrict, this narrowing criterion under the M'Naghten rules, thus implying that the scope of the insanity rule becomes even narrower. There exists no judicial decision that directly endorses or rejects such an interpretation, but the position has been invoked in some theoretical works.[194]

There has not been a willingness in English law to apply the rules to the irresistible or uncontrollable impulse; cf. the discussion of the irresistible impulse test in 7.7.3.3 below.[195] Despite the scope of the M'Naghten rules being narrow in purely legal terms as the result of the higher courts' restrictive interpretation of the narrowing criteria under the insanity rule, several authors have suggested that the courts do not in practice apply such rules entirely in line with the interpretations outlined thus far; cf. 7.6.4 below.

7.6.4 In-depth discussion: Criticism of the M'Naghten rules

Criticism against the M'Naghten rules has been extensive and severe, and has addressed several different aspects. However, no reform attempts have succeeded. The following discussion will outline parts of such criticism that shed light on the substance of the rule and the problems that have materialised in the application thereof.

The criticism has concerned both the failure of the rules to pay sufficient heed to updated knowledge within psychiatry, as well as the contents of the narrowing criteria under such rules.

One type of criticism, which is addressed by the Committee in 8.3.4.2, is that the narrowing criteria, and indeed other types of narrowing criteria, are not entirely in harmony with the purpose of a criminal insanity rule.

Another, and closely related, type of criticism is that the criteria, if these are to be applied literally, lead to peculiar and unreasonable outcomes. The position is that the criteria are too strict. Even though the outcomes as such may be explicable in the strictly logical sense, these nonetheless give offence on a moral basis. One example is that the term «wrong» in the M'Naghten rule is interpreted as ignorance of the law.[196] This interpretation has elicited the following comment in legal theory:

> «The main difficulty with English law's insistence on confining the second limb to cases in which D knew that his or her act was legally wrong, is that it is using a test to judge those suffering from certain kinds of mental disorder that negate the moral relevance of the test. In terms of culpability, someone so deluded that he or she kills a boy because he or she thinks that the boy is the re-incarnation of Napoleon, is more or less on a par with someone so deluded that he or she kills a girl because he or she believes that the girl is at the moment trying to kill the Queen through the use of supernatural thought powers. Yet, formally, only the latter comes within the scope of the insanity defence.»[197]

[193] *Regina v. Georges Codère* (1916) 12 Cr. App. R. 21.

[194] Cited in *Regina v. Dean Johnson* [2007] EWCA Crim 1978, paragraphs 17–18. See, however, the general statement in *Regina v. Windle* [1952] 2 QB 826, quoted above, which may point away from such an interpretation, but the issue neither come to a head in this case, nor was it subjected to specific discussion.

[195] Royal Commission (1953), p. 81, and Law Commission (2013).

[196] *Regina v. Windle* [1952] 2 QB 826, *Regina v. Dean Johnson* [2007] EWCA Crim 1978; cf. 7.6.3.

[197] Ashworth and Horder (2013), pp. 143–144.

Nor is this taken into account, as mentioned in 7.6.3, in the interpretation of the alternative «[did not] know the nature and quality of the act he was doing», which is taken as a reference to what the perpetrator has comprehended with regard to the purely physical aspects of the act.[198] The strict interpretation of the term «wrong» in the M'Nagthen rules has, as mentioned, also been rejected by most other common law jurisdictions that based their insanity rule on the M'Naghten rules.

In *Stapleton v. Regina*, for example, the High Court of Australia was not prepared to apply the interpretation in *Windle*, as it was held to represent an incorrect understanding of the substance of this criterion under the M'Naghten rules, as originally articulated by the Law Lords.[199] Nor has case law provided a clear solution to this matter in those jurisdictions of the US legal system that practice the M'Naghten rules. The typical approach is for the judge not to take an express view on this interpretational issue in summing up the case for the jury.[200]

These interpretations, which exclude the relevance of «moral ignorance», imply a narrow criminal insanity concept and have given rise to a third type of criticism, i.e. that the M'Naghten rules are based on unrealistic assumptions with regard to serious mental disorders and fail to pay sufficient heed to updated knowledge within psychiatry.

This position holds that the rules do not facilitate a real medical assessment of the perpetrator. The Law Commission has, for example, stated the following in its discussion paper from 2013 concerning the alternative «[did not] know the nature and quality of the act he was doing» and the legal interpretation occasioned by the *Codère* case:

> «It is clear that in this (physical) sense it will be very rare indeed for a person with a relevant medical or physical condition not to know the nature and quality of his or her actions. Secondly, an exclusive focus on cognitive questions excludes other sorts of problems in the functioning of minds and brains, such as mood disorders or emotional problems.»[201]

The Law Commission is of the view that the criterion «wrong» and the interpretation from the *Windle* case, which implies that the said criterion only concerns ignorance of the law, is «unwarrantedly narrow, and does not reflect the reality of the psychiatric assessments»:[202]

> «Assessing whether a person knew what they were doing was wrong is part of the test which psychiatrists currently apply. Empirical studies show that psychiatrists are more likely to refer to this capacity than to the cognitive limb when providing evidence in insanity cases. The studies also reveal that the psychiatrists interpret this limb of M'Naghten as referring to the accused's awareness of his or her act as morally wrong, not just legally wrong.»[203]

That the narrowing criteria under the M'Naghten rules are very narrow, and do not facilitate a real psychiatric assessment of the perpetrator on professional psychiatric terms, has given rise to two additional forms of criticism. One of these criticisms, which may be labelled a form of legal realism critique, is that the English courts, at least the lower courts, do not apply the M'Naghten rules in conformity with their true and formal legal meaning. The courts of law do

198 See 7.6.3 above for further details on *Regina v. Georges Codère* (1916) 12 Cr. App. R. 21.

199 *Stapleton v. Regina* [1952] HCA 56.

200 See LaFave (2010), pp. 406–407, for further details, including also certain observations on the discussions relating to this issue in US legal theory and case law. See also Goldstein (1967), p. 52.

201 Law Commission (2013), p. 10.

202 See Law Commission (2013), p. 56.

203 Law Commission (2013), p. 56.

not take the narrowing criteria seriously, and cut these down to achieve reasonable outcomes in individual cases. This gives rise to a gap between theory and practice – a discrepancy between «law on the books» and «law in action ». This was noted already in the report of the Royal Commission on Capital Punishment in 1953, which considered this to be highly unfortunate and grounds for the introduction of alternative rules:

> «In our view the test of criminal responsibility contained in the M'Naghten Rules cannot be defended in the light of modern medical knowledge [. … In] most cases where the strict application of the M'Naghten Rules will require a verdict of «guilty» to be given against a person of unsound mind, this consequence is obviated by the common sense of juries and the readiness of judges to recognise that, when common sense must prevail. But the fact that usually a way is found of obviating the evil consequences liable to flow from the Rules is not a sufficient reason for retaining them.»[204]

Felix Frankfurter (1882–1965), Associate Justice of the Supreme Court of the United States, took this one step further. He argued (convincingly, in the view of the Royal Commission) that the M'Naghten rules could be characterised as mere «shams»:

> «I do not see why the rules of law should be arrested at the state of psychological knowledge of the time they were formulated. . . . If you find rules that are […] discredited by those who have to administer them […] – they are honoured in the breach and not in the observance – then I think the law serves its best interests by trying to be more honest about it . . . I think that to have rules which cannot rationally be justified except by a process of interpretation which distorts and often practically nullifies them […], is not a desirable system . . . I am a great believer in being as candid as possible about my institutions. They are in large measure abandoned in practice, and therefore I think the M'Naghten Rules are in large measure shams.»[205]

It should, however, be mentioned that some have considered this divergence between the «true meaning» of the rules and how these as practised to be a strength.

In the US debate, Abraham S. Goldstein has criticised those wanting to amend the insanity rules on the basis of the type of observations referred to above. He argued that there has been an excessive focus on the purely legal content of these criteria, and more generally on the formulation of the insanity rule. Professor Goldstein argued that the focus should be on how the rules actually work within the overall judicial process, and especially on how the rules are understood and applied by the jury. The formulation of the insanity rule is, according to this view, only a small piece of a large puzzle, and hence there is not necessarily a lot to gain from reform of the actual rule.[206]

The second criticism against the narrowing criteria under the M'Naghten rules is that these – at least in formal terms – are highly restrictive and fail to pay sufficient heed to psychiatric knowledge. It has been argued in support of a reform of English criminal insanity regulation that it is questionable whether the M'Naghten rules are in conformity with the European Convention on Human Rights (ECHR).

The relevant provision in this context is ECHR Article 5(1)(e), on the detention of persons of unsound mind, and the legal precedent established on the basis of, inter alia, the ECtHR case

[204] Royal Commission (1953), p. 103. The Royal Commission conducted a comprehensive study into how the M'Naghten rules were interpreted in practice; cf. Royal Commission (1953), pp. 81–85.

[205] Justice Frankfurter's testimony before the Royal Commission, quoted in Royal Commission (1953), p. 102.

[206] See Goldstein (1967), pp. 213–214.

Winterwerp v. Netherlands.[207] It is argued that the English insanity rule is problematic from the perspective of the said provision because it allows for the use of special sanctions (which previously were mandatory) if the criteria under the M'Naghten rules are met. The criticism is, inter alia, that it is doubtful whether sufficient weight is attached to the medical evaluations, i.e. whether the stipulations that such detention «calls for objective medical expertise» and that the courts need to be in a position to assess compliance with the requirement that «the mental disorder must be of a kind or degree warranting compulsory confinement» have been met.[208]

7.6.5 Comparison of the rule with Section 44 of the Penal Code

The above discussion illustrates that M'Naghten rules, as currently practised in England, are in principle broader in scope than the Norwegian insanity rule in Section 44 of the Penal Code. The initial criterion is considerably less precise than the term psychosis in the Norwegian rule. The M'Naghten rules must also be assumed to be broader in scope when taking into consideration the other bases for insanity in Norwegian law.

This initial impression is of course modified by the narrowing psychological criteria under the M'Naghten rules, but one needs to bear in mind that these are in practice not taken entirely at face value. In any event, the broad initial criterion means that the English courts can, unlike the Norwegian courts, make an assessment as to whether the perpetrator was of sound mind even if the aberration is not as serious as to qualify as a psychosis. This is also done in practice.

7.7 United States

7.7.1 Rules

US law also treats as «defences» some of what we refer to as conditions for criminal liability.[209] If the accused prevails with such a defence, there will instead of an ordinary verdict of acquittal be entered a special verdict establishing the grounds for acquittal – «not guilty by reason of insanity».[210]

There are a number of different standards for the insanity evaluation in the various states and at the federal level; cf. 7.7.3.[211] A common feature of all such standards is that terms like «mental disorder» and «mental aberration» are used as initial criteria, although these vary somewhat in how their scope is defined. Another common feature is that the mental aberration in question must have had an impact on the abilities or actions of the perpetrator.

Considerable space would be required to provide a detailed account of current regulation of the issue of criminal insanity in the United States, since different standards are as mentioned used in different states and since, moreover, there may be differences in case law. The Committee will therefore instead set out to provide a brief general account of the various standards

[207] Ashworth and Horder (2013), pp. 144–145. *Winterwerp v. Netherlands*, Application No. 6301/73, Judgment of 24 October 1979.

[208] See *Winterwerp v. Netherlands*, Application No. 6301/73, Judgment of 24 October 1979, paragraph 39.

[209] LaFave (2010), p. 389 onwards.

[210] LaFave (2010), p. 390.

[211] See also Andenæs' discussion of US law in Official Norwegian Report NOU 1974: 17, pp. 178–185.

used, rather than a more thorough descriptive account of the legal substance of the relevant rules.[212]

7.7.2 Initial criteria

Many US states use the English M'Naghten rules or variants of these. There are no judicial precedents that clarify which aberrations fall within the scope of the initial criterion «disease of the mind», but it is assumed that the criterion can be met in respect of any mental abnormality, for example psychoses, neuroses, organic brain disorders and mental disabilities. The indeterminate nature of the criterion is reflected in the normal practice when summing up a case for the jury of only quoting the term «disease of mind», without making any specific attempt at construing its meaning.[213]

Some examples from case law may serve to illustrate the broadness of the term *disease of mind*. Post-traumatic stress disorder has resulted in acquittals, as observed in some cases against Vietnam veterans.[214] Homophobia and so-called homosexual panic (experienced by a latent homosexual and manifest homophobe who becomes exceptionally upset by the homosexual advances of others), have also formed the basis for insanity findings and acquittals, even in cases of serious violence and homicide, which may seem objectionable from a Norwegian perspective.[215]

The «irresistible impulse» rule and Section 4.01 of the Model Penal Code, which apply in some states, are also similarly broad in scope. The initial criteria under these rules would appear to be largely concurrent with those implied by the M'Naghten rules, with the exception that Section 4.01 of the Model Penal Code expressly excludes psychopathy and anti-social behaviour; cf. 7.7.3.4 below.[216] Under the so-called «Durham test», which is currently only applied in the state of New Hampshire, the contents of the aberration criterion under the rule is different and somewhat more restrictive, whilst the psychological criteria are, on the other hand, less narrowing. In brief, the said test implies that the perpetrator shall be acquitted if the act was an «offspring or product of mental disease or defect».[217]

There is reason to take a closer look at this rule, inasmuch as it materialised in response to objections and counterarguments invoked against the M'Naghten rules and the irresistible impulse test.

It was intended that the rule would offer psychiatric experts better prospects for rendering testimony about the aberration suffered by the perpetrator on a medical basis, thus enabling the courts to make better use of their knowledge. However, since the proposed narrowing psychological criteria were less restrictive than under the M'Naghten rules and the irresistible im-

[212] For more thorough discussions, see Goldstein (1967) and LaFave (2010), p. 389 onwards.

[213] See LaFave (2010), p. 399 onwards.

[214] See LaFave (2010), pp. 399–400.

[215] These acquittals have not gone unheeded in the US either, and have been criticised in legal theory; cf. LaFave (2010), p. 401, with further references. In Norway, such impulses of a homophobic nature have for criminal law purposes neither been considered as a state of unsound mind, nor as a particularly exculpating or mitigating circumstance; cf. for example the rulings published on p. 147 onwards of the 1978 volume and p. 455 onwards of the 1991 volume, respectively, of the Norsk Retstidende court reporter for the Supreme Court.

[216] See LaFave (2010), p. 411 and 420–421.

[217] The test was launched by the U.S. Court of Appeals for the District of Columbia Circuit in the case *Durham v. United States*, 214 F.2d 862 (D.C.Cir.1954). See LaFave (2010), p. 414 onwards, and Moore (1984), pp. 224–228, for further details on the so-called «New Hampshire Experiment».

pulse rule, the question immediately arose of whether it was not also intended for the aberration criterion to be interpreted somewhat more restrictively. Of not the least significance was that this occasioned considerable dissension amongst psychiatric experts (the experts are called by the parties in the US) as to which aberrations qualified as «mental disease or defect».

The outcome was that the «mental disease or defect» concept under the Durham rule was made somewhat more restrictive, but probably nevertheless broader than that used in Norwegian law. A legal meaning was attributed to the term in the case *McDonald v. United States*:

> «What psychiatrists may consider a 'mental disease or defect' for clinical purposes, where their concern is treatment, may or may not be the same as mental disease or defect for the jury's purpose in determining criminal responsibility. Consequently, for that purpose the jury should be told that a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls.»[218]

However, in reality the interpretation in *McDonald* resulted in the Durham test ending up fairly close to the rule in Section 4.01 of the Model Penal Code in terms of substance.[219] The initial criterion established in this ruling probably extends, generally speaking, beyond the ambit of Section 44 of the Penal Code.

7.7.3 Narrowing criteria

7.7.3.1 General remarks

What all the narrowing criteria have in common is that these, like the insanity rules reviewed thus far, require the existence of a mental aberration and that such mental aberration has had an impact on the abilities or actions of the perpetrator.

However, some states have abolished insanity rules as such, and only permit psychiatric experts to testify before the court to the extent their testimony is relevant for purposes of ruling on other subjective conditions for punishment.[220] It has repeatedly, and on various grounds, been argued that abolition and restrictive formulation of the insanity rule are in violation of the Federal Constitution, an assertion that has thus far not gained much sympathy in the Supreme Court of the United States.[221]

7.7.3.2 M'Naghten rules

The M'Naghten rules are much used in the United States, as noted in 7.7.2.[222] The Committee does not, as mentioned, consider it expedient to address the details of how this standard is

[218] *McDonald v. United States*, 312 F.2d 847 (D.C.Cir.1959).

[219] See LaFave (2010), pp. 419–420.

[220] These are Idaho, Kansas, Montana and Utah. See Bureau of Justice Statistics (2006), Table 35. See also Elkins (1994) and Rosen (1998).

[221] See *Clark v. Arizona*, 548 U.S. 735 (2006), and most recently the denial of petition in *John Joseph Delling v. Idaho*, 568 U., p. ____ (2012). It is, in particular, the «due process clause» in Amendment XIV and the prohibition against «cruel and unusual punishment» in Amendment VIII to the Federal Constitution that have been invoked as preventing the abolition or modification of the insanity rule. See also briefly on this in LaFave (2010), p. 396.

[222] As at August 2006, the following states were using miscellaneous variants of M'Naghten rules: Alabama, Alaska, Arizona, California, Colorado, Florida, Georgia, Iowa, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Virginia, Washington. See Bureau of Justice Statistics (2006), Table 35.

practised in various US states, but notes that such practice is, according to its formulation, close to that established by the Law Lords in 1843; cf. therefore 7.6 for further details.

7.7.3.3 The «irresistible impulse» rule

The irresistible impulse rule is found in some states that have adopted the M'Naghten rules, and is then used as a further alternative within the narrowing criteria under such rules.[223] The irresistible impulse rule opens up the prospect of a punishment exemption also when the perpetrator realised what he or she was doing and that it was wrong; cf. the M'Naghten rules, provided that there was an irresistible impulse. There are different variants in different states, but the basic ruling often referred to for purposes of describing the contents of this rule is *Parsons v. State*:

> «Did he know right from wrong, as applied to the particular act in question…if he did have such knowledge, he may nevertheless not be legally responsible, if the two following conditions concur: (1) if, by reason of the duress of such mental disease, he had so far lost the power to choose between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed; (2) and if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it solely.»[224]

It follows from the rule that the perpetrator must, because of the mental aberration, have lost control of his or her actions and thus the ability to resist the wrong choices.[225] Some have therefore observed that this insanity standard should instead be referred to as a «loss of control» test.

7.7.3.4 Section 4.01 of the Model Penal Code

Section 4.01 of the Model Penal Code, which was drafted by the American Law Institute, is the model for the insanity rule in some US states.[226] The rule is worded as follows:

> «A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.
>
> As used in this Article, the terms «mental disease or defect» do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.»

The rule is not materially different from that implied by the M'Naghten rules and the irresistible impulse rule. It is, nonetheless, less strict. This is because it only requires the lack of «substantial capacity» to perform what is stipulated in the narrowing criteria under the M'Naghten rules and the irresistible impulse rule.[227]

[223] As at August 2006, miscellaneous variants of this insanity standard were used as a supplement to M'Naghten rules in the following states: Colorado, Georgia, New Mexico, Texas and Virginia. See Bureau of Justice Statistics (2006), Table 35.

[224] *Parsons v. State*, 81 Ala. 577, 2 So. 854 (1887).

[225] See LaFave (2010), p. 411 onwards, for details on the rule.

[226] As at August 2006, miscellaneous variants of this insanity standard were used in the following states: Arkansas, Connecticut, Delaware, Hawaii, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, New York, North Dakota, Oregon, Rhode Island, Tennessee, Vermont, West Virginia, Wisconsin and Wyoming. Besides, the standard is used in Puerto Rico and in the District of Columbia. See Bureau of Justice Statistics (2006), Table 35.

[227] See LaFave (2010), p. 420 onwards, for further details.

7.7.3.5 The Durham rule

The Durham rule is outlined and discussed in 7.7.2 above.

7.7.4 Comparison of the rules with Section 44 of the Penal Code

It can be concluded that all US insanity rules allow for a ruling of insanity in relation to a broader range of mental aberrations than under the Norwegian rule in Section 44 of the Penal Code. However, the contents of the rule must of course, as for the other legal systems examined, be modified in accordance with how the narrowing criteria under the various tests are applied. This may vary from test to test and from state to state.

7.8 International criminal law

7.8.1 Rule

In the Rome Statute, the implications of the perpetrator being of unsound mind are regulated in Article 31(1)(a), which stipulates a punishment exemption if:

> «[…] (a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law […]»

The criminal insanity rule in the Rome Statute is seldom invoked as grounds for acquittal before international criminal courts and tribunals. It is likely that this is because, as argued by Marchuk, «the magnitude and gravity of international crimes is such that it almost precludes the absence of cognition and will on the part of the defendant».[228]

Consequently, the rules on insanity have not been developed to any significant extent in international criminal law. Hence, it is also difficult to define the specific ambit of such rules, including what falls within the scope of the «mental disease or defect» criterion, and how the narrowing criteria shall be interpreted.[229]

Mental aberrations were invoked, and to some extent probably also recognised as a potential basis for a finding of criminal insanity and a verdict of acquittal for war crimes, already during the Nuremberg trials.[230] After his unsuccessful flight to Scotland in 1941 and the peace initiative that resulted in his incarceration, as well as during the preparation for, and implementation of, his trial, Rudolf Hess was perceived to be sufficiently aberrant for his defence counsel to move for him to be declared not of sound mind, and petitioned for him to be subjected to a psychiatric examination. Such petition was indeed granted.
It follows from the report from the examination that Hess during his stay in England attempted to commit suicide several times, and also presented symptoms of mental disorder, including amnesia and certain delusions, including, inter alia, a fear that the English would poison or kill him, and that his death would be covered up as a suicide, all of this under the auspices of the Jews who controlled the English people through hypnosis. It was true that he might have experienced some psychotic episodes during his stay in England, but the conclusion of both the psychiatric team that examined him and the prison psychologist was nonetheless that Hess was only an unstable person who suffered a psychopathic personality disorder, abnormal reactions and delusions as the result of his failed peace mission, as well as general amnesia. It was therefore the conclusion of

[228] See Marchuk (2013), p. 256.

[229] This is illustrated by observing that standard textbooks on international criminal law, such as for example Schabas (2010), pp. 484–485, do not discuss the specific meaning of the terms.

[230] Cassese (2008), p. 263 onwards, also mentions some war crime cases from both before and after WWII in which national courts of law have considered the issue of whether the perpetrator was of sound mind.

the experts that Rudolf Hess was of sound mind within the meaning of the law and fit to stand trial before the Tribunal.[231]
Nor was the motion for a finding of criminal insanity and unfitness to stand trial upheld by the Tribunal, which concluded as follows:

> «As previously indicated, the Tribunal found, after a full medical examination of and report on the condition of this defendant, that he should be tried, without any postponement of his case. Since that time, further motions have been made that he should again be examined. These the Tribunal denied, after having had a report from the prison psychologist. That Hess acts in an abnormal manner, suffers from loss of memory, and has mentally deteriorated during this Trial, may be true. But there is nothing to show that he does not realize the nature of the charges against him, or is incapable of defending himself. He was ably represented at the trial by counsel appointed for that purpose by the Tribunal. There is no suggestion that Hess was not completely sane when the acts charged against him were committed.»[232]

After the ruling of the Nuremberg Tribunal, the international courts have only, it would appear, addressed the issue of insanity in international criminal law in one single case, i.e. the International Criminal Tribunal for the former Yugoslavia (ICTY) in its ruling in *Prosecutor v. Zenjil Delialic, Zdravko Mucic (aka «Pavo»), Hazim Delic and Esad Landžo (aka Zenga)*.[233] However, this part of the case is only concerned with which implications, if any, «diminished mental responsibility» would have for the scope of criminal liability.[234] The Appeals Chamber, which emphasised that insanity was recognised as grounds for acquittal in international criminal law, concluded that diminished mental responsibility was only of relevance in determining the specific sanction (cf. Section 56, letter c, of the Penal Code).[235]

The insanity rule in Article 31(1)(a) of the Rome Statute is based on Section 4.01 of the Model Penal Code; cf. 7.7.3.4 above.[236] Hence there is much to suggest that the same broad meaning should be attributed to the term «mental disease or defect» in Article 31(1)(a) as is conferred on the term «disease of mind» as applied in the Anglo-American insanity standards; cf. 7.6.2 and 7.7.2 above.[237] Some have assumed that there is a certain qualitative limitation in the term «suffers», thus implying that more transitory conditions and disorders are not necessarily encompassed.[238]

7.8.2 Comparison of the rule with Section 44 of the Penal Code

The initial criteria under the international criminal insanity rule are very broad, and much broader than under the Norwegian rule in Section 44 of the Penal Code. Consequently, the

[231] See, for further details, Trial of the Major War Criminals Before the International Military Tribunal Nuremberg, Volume I, Nuremberg 1947, Report of Commission to Examine Defendant Hess; see pp. 159–165, and Report of Prison Psychologist on Mental Competence of Defendant Hess; see pp. 166–167. The prison psychologist, who was the only one of the experts to directly express an opinion on the issue of criminal insanity, obviously based his conclusion that Hess was of sound mind on an assessment under the narrowing criteria in the M'Naghten rules: «The psychiatric commissions have agreed, and my further observations have confirmed, that Hess is not insane (in the legal sense of being incapable of distinguishing right from wrong or realizing the consequences of his acts).» See p. 167.

[232] Trial of the Major War Criminals Before the International Military Tribunal Nuremberg, Volume I, Nuremberg 1947, Judgement, Hess; see p. 284.

[233] *Prosecutor v. Zenjil Delialic, Zdravko Mucic (aka "Pavo"), Hazim Delic and Esad Landžo (aka "Zenga")*. Judgment, Case No. IT-96-21-A, 20 February 2001.

[234] See Rules of Procedure and Evidence (ICTY), Rule 67 (A) (ii) (b).

[235] See, for further details, *Prosecutor v. Zenjil Delialic, Zdravko Mucic (aka "Pavo"), Hazim Delic and Esad Landžo (aka Zenga),* paragraphs 580–590.

[236] See Eser (2008), p. 874. Schabas (2010), p. 485, on the other hand, adopts the perspective that the provision is reminiscent of the M'Naghten rules, but this is less apposite.

[237] In reality also Eser (2008), pp. 873–874, to the same effect, but providing a much more thorough discussion.

[238] See for example Eser (2008), p. 874.

rule allows for a punishment exemption in respect of more mental aberrations than psychoses, automatism and intellectual disabilities.

The psychological criterion under the rule, which will probably restrict its application to a very considerable extent, and which in this respect also goes further than its model in Section 4.01 of the Model Penal Code, obviously modifies this initial perspective. The reasons for the very strict narrowing criterion in Article 31(1)(a) of the Rome Statute need to be sought in the particular seriousness of the type of crimes addressed by the Statute.[239]

However, it has been assumed in Norwegian legal theory that the said provision encompasses the same aberrations as are mentioned in Section 44 of the Penal Code.[240] This is probably due to the unofficial Norwegian translation of the Rome Statute, which for Article 31 (1)(a) may incorrectly convey the impression that it refers to «insanity or learning disability».[241] «Insanity» will convey associations with Section 44 of the Penal Code as it was worded prior to the legislative amendment in 2002. This term was taken to encompass psychosis and some other of the most severe aberrations. A term like «mental disorder» or «mental aberration» would therefore be better suited for conveying the indeterminate nature of the initial criterion under the insanity rule of the Rome Statute in a Norwegian context.

An assertion that the Norwegian insanity rule will result in a punishment exemption to a greater extent than the rule under the Rome Statute rule is therefore unlikely to be accurate.[242] The opposite may also be the case, i.e. that the rule under the Rome Statute may, depending on the circumstances, result in a punishment exemption to a greater extent than Section 44 of the Penal Code. However, that there is only a «theoretical possibility» that the International Criminal Court would impose criminal liability in a case where Norwegian rules would result in acquittal, as indicated by the Ministry of Justice in the preparatory works for Chapter 16 of the Penal Code of 2005, is an assumption that is difficult to endorse.[243]

7.9 Concluding observations

Although adaptation to other legal systems in this field is not an objective in itself, the above discussion has provided a basis for further reflection on how the scope of criminal insanity is defined in our legislation.[244]

The legal traditions addressed above are largely based on the same justifications for imposing punishment, although there will of course be nuances from one country to the next. The rules show that there are a number of different alternatives for regulating how to define an act perpetrated by a person of sound mind, and hence what shall qualify as criminal insanity.

Legislation and case law from all the countries examined above show, when compared to Norwegian insanity legislation, that a ruling of criminal insanity and acquittal is a possibility for a large number of aberrations that will fall clearly outside the scope of our current rule in Section 44 of the Penal Code. It can also be concluded that this does happen in practice. A

239 See Eser (2008), p. 875.

240 See Eskeland (2011), pp. 264–265.

241 The Norwegian translation reads «*sinnssykdom eller et psykisk handikap*». The said translation is included in the preparatory works of the Act relating to the Implementation of the Statute of the International Criminal Court of 17 July 1998 (the Rome Statute); cf. for example appendix to Proposition No. 95 (2000–2001) to the Odelsting, p. 135 onwards.

242 Cf. Eskeland (2011), p. 265.

243 See Proposition No. 8 (2007–2008) to the Odelsting, p. 72.

244 See, however, the discussion of international law limitations and international criminal law in 6.10 and 7.8 above.

reservation must be made with regard to international criminal law, in particular, where limited case law is available.

The comparison between foreign law and Norwegian law shows clearly that there is no justification for characterising the Norwegian insanity rule as a rule that is particularly broad in scope with regard to which aberrations merit further criminal insanity assessment. However, the final outcome will necessarily depend on how the narrowing criteria are applied.

All of the legal systems discussed above use broader disorder criteria as initial criteria than the Norwegian insanity rule. Consequently, these provisions also open up the prospect of a criminal insanity ruling in respect of a larger group of mental aberrations than is the case under Norwegian law.

Of particular interest is the situation in Denmark, which merits some further observations. Danish law operates, as previously mentioned, with a category of equivalent aberrations in addition to «insanity», although its insanity concept is already at the outset broader in scope than the Norwegian psychosis concept.

In addition, it should be noted that the narrowing criterion under the Danish rule has not played much of a discernible role in Danish case law. Such criterion has only resulted in a ruling that the perpetrator was of sound mind in a small number of cases, principally in some cases of tax evasion and other offences for which general deterrence considerations are assumed to be of particular importance. It must be assumed, against this background, that the Danish insanity rule, which is not based on a medical model, is in every respect broader in scope than the Norwegian rule.

8 Criminal insanity rule

8.1 Theme and structure

The topic of the following discussion is whether we should have an insanity rule in Norwegian criminal law, and how such a rule, if any, should be formulated, including whether it is appropriate to retain the medical model.

The overarching and decisive consideration in the formulation of an insanity rule must be the criminal law justifications for having such a rule. The reasons for having an insanity rule are outlined in 8.2.

The justifications for punishment imply that the perpetrator must possess a certain degree of maturity, mental capacity and awareness before society can impose liability and sanctions of a penal nature on him or her. What this means, and the implications of how such characteristics in people are perceived, is addressed in 8.2.2.

The Committee has considered whether there is cause for undertaking a more thorough revision of the rules on criminal insanity for persons who are in a state of automatism or who are intellectually disabled to a high degree; cf. 6.5 and 6.6, but has concluded that these are adequate and work satisfactorily. Certain minor issues of a technical legal nature are nonetheless discussed in relation to these alternative bases for insanity; cf. 8.6.5.3.

The discussion is therefore predominantly focused on the psychosis criterion under the insanity rule. 8.3.2–8.3.3 address two alternative models for the formulation of an insanity rule; the medical and the mixed model, respectively. Thereafter, in 8.3.4, follows a discussion as to which model is preferable.

8.4 addresses aberrations that are of relevance to the issue of criminal insanity. In 8.5 and 8.6, the Committee discusses the specific formulation of the insanity rule, and in 8.7 whether the proposal of the Committee is discriminatory. In 8.8, the Committee examines a proposal from the Norwegian Medical Association for an alternative insanity rule.

Finally, in 8.9, the Committee presents a proposal for legislative wording and comments on this, before making some observations, in 8.10, on implications for other legislation in view of the reasoning invoked in support of the said proposal.

8.2 Basic premises

8.2.1 The justifications for punishment

The Committee has been instructed to examine the rules on criminal insanity, and not the justifications for punishment. However, these two topics cannot be separated from each other – it is necessary to discuss the ethical basis for punishment when the topic is criminal insanity.

A general discussion of the purposes of punishment can be found in Chapter 6. It follows from such discussion that there are multiple and manifold reasons for having criminal insanity rules. These reasons will, by and large, complement each other.

If the same group of offenders should be granted a punishment exemption based on all of the justifications for punishment, it would be of no relevance to the issue of criminal insanity how these various justifications are balanced against each other. In the formulation of a criminal

insanity rule, it is only when the various justifications for punishment differ in their indications with regard to which persons should be considered of unsound mind that it is necessary to take a view on which of these justifications should take precedence.

The key issue from the perspective of theories of retribution is who has the capacity for guilt of the nature that is required in order for retribution to be just. Reasoning premised on culpability and the use of punishment in response thereto acknowledges the offender as a responsible moral agent and as a legal person.

It follows by implication from this that it is neither reasonable, nor just, to impose punishment on all offenders. This is because some of them are so aberrant in mental terms, through no fault of their own, that retribution would be inappropriate. They are not, unlike the person of sound mind, «deserving» of the «acknowledgement» implied by criminal liability. They are, for reasons of their aberration, excluded from society from a criminal law perspective.

There are also other reasons than those relating purely to reasonableness and fairness for strongly opposing the imposition of punishment on mentally aberrant offenders. Based on theories of punishment as a mechanism for influencing behaviour, the question is who has the ability to be motivated by a threat of punishment. It may also be asked whether it can have any positive effect on general law-abidingness that a few persons who lack criminal capacity can nonetheless be punished.

There is definitely reason to ask whether the threat of punishment can have an incentivising effect on persons suffering severe mental aberrations. And even if the threat of punishment were to have an effect on behaviour, it is highly uncertain whether such effect is achieved in the same manner as in relation to persons of sound mind.

Nor is it likely that the general deterrent effect of punishment will be reduced by not imposing criminal liability on the small group of offenders who are of unsound mind. There is no reason to believe that ordinary citizens are motivated by society punishing persons who suffer severe mental aberrations, just to make an example of them. It must therefore be assumed that the benefits from punishing such persons are limited. To the extent that there is a need for protection against their unlawful acts, such need should instead be met through other measures and arrangements, which unlike punishment are not expressions of condemnation on the part of society; cf. Part IV.

Punishment may be justified on the grounds that it represents a balancing of accounts in relation to past rights and wrongs, at least inasmuch as it satisfies the ideas of citizens in this regard. The legal system promotes social stability and order in society, which is a key purpose of punishment, precisely by paying heed to citizens' sense of justice and their potential desire for retribution; cf. 6.2.1. Such desires may materialise, in particular, in individual criminal cases in which horrifying crimes have been committed. Subjective ideas of revenge and retribution assume a dominant role, with a demand that the crimes as such be punished, whilst any mental disorder and lack of criminal capacity on the part of the offender has no decisive impact on the reaction of the general public.

There is, however, little reason to believe that the social order will be appreciably undermined by not imposing condemnation and imprisonment on an offender who suffers a severe mental aberration – one would indeed hope that such an approach could instead be expected to cause indignation and unease, and turn out to be counterproductive. The normally evolved conception of justice; i.e. the general sense of justice, would generally not require the imposition of punishment in such cases, quite the reverse. And hence there is no reason to believe that there would be any positive effects from punishment.

Consequently, the justifications for punishment are not relevant in relation to every person who violates the provisions of the Penal Code, and the Committee endorses the basic rationale behind the insanity rules as formulated by the Council on Criminal Law in 1974:

> «The Council on Criminal Law will attach the most weight to culpability considerations, noting the fact that some persons are so abnormal that they must, based on the general conception of justice, be said to lack criminal capacity. Weight will be attached, in line with this, to the observation that punishment is not required for reasons of general deterrence in these special cases.»[245]

8.2.2 Characteristics that merit criminal liability

The criminal law distinction between offenders of sound and unsound mind is based on the premise that some persons exhibit characteristics that make it either unreasonable or futile to confer criminal liability on them, in view of the justifications for punishment.

The justifications for punishment suggest that such sanctions should be reserved for perpetrators who are assumed to have a real ability to choose between right and wrong, and hence are presumed to be free agents. This is commonly summed up by observing that the perpetrator must have a certain maturity, mental capacity and awareness at the time of committing the act.

There are differing opinions about the specific meaning of this. The diverging views on these issues probably reflect different perspectives on what it actually means to be a free agent and/or different views on what should be required to confer criminal liability on a person.

One perspective on what characterises the group of persons who should not be deemed criminally liable is the absence of the ability to let ordinary considerations, not least counterarguments, determine one's choice of action. Concluding that a person is not of sound mind will thus imply that his or her actions are not the result of ordinary freedom of choice.

Another approach is to consider a human being the sum total of qualities. A person of unsound mind will from such perspective lack one or more qualities – either at a specific point in time or more permanently.

Whether one of these perspectives is more correct than the other, or whether one should instead seek other explanations for what characterises this group, are questions that will be answered differently within and across disciplines like psychology, psychiatry, philosophy and law.

There will always be discussion with regard to how human actions should be understood, and no definite clarification can be expected as to what characterises the degree of «mental capacity» that is a prerequisite for punishing a person for unlawful acts either.

The Committee does not consider it necessary to embark on a more comprehensive discussion of such abstract and philosophical questions here. However, by formulating a criminal insanity rule one will, to a greater or lesser extent, also take a view on certain of these fundamental issues. The significance of this is addressed in 8.3.4.2.

[245] Official Norwegian Report NOU 1974: 17, p. 52.

8.3 Choice of model

8.3.1 Theme and structure

The theme in the following is what formulation of a rule is best suited for identifying severe mental aberrations that should, based on the justifications for punishment, result in a punishment exemption.

Two main alternatives present themselves for a criminal insanity rule. One may either formulate and continue with a rule based on the medical model, or one may introduce a rule based on the mixed model; cf. 6.3.

8.3.2 and 8.3.3 outline aspects that are specific to the medical and the mixed model, respectively. The assessment of the Committee follows in 8.3.4.

8.3.2 The medical model

A rule based on a medical model is characterised in that it links the punishment exemption to a term denoting a set of aberrations, which term is typically premised on medical-diagnostic criteria. One example of such a rule is Section 44 of the current Penal Code:

> «A person who was psychotic at the time of committing the act […] shall not be liable to punishment».

Medical terms, including diagnoses, and criminal law terms are established and used for different purposes. Whilst the categories used by the medical profession in its daily practice are developed and interpreted from the perspective of a purpose of diagnosing, prescribing remedies and treating the disorders of a patient, criminal law insanity rules are intended to determine which degree of mental capacity and maturity is required to make it morally acceptable and appropriate for the State to confer criminal liability on an offender.

There may, despite these differences in purpose, nonetheless be a close correlation between medically-defined aberrations and the severe mental aberrations that should be encompassed by a criminal insanity rule. This observation was highlighted already by the Penal Code Committee:

> «The role of the psychiatrist is to cure and by other means than punishment to protect society and the mentally ill person him- or herself against the danger represented by his or her disorder; the role of the psychiatrist is not that of a judge. And the distinction made by psychiatry, within the area of mental disorders, between insanity in the technical sense and all other types and degrees of disorder, has not been made for the purpose of serving as a threshold for criminal insanity in the legislation. However, this does not exclude the possibility that such distinction represents a suitable threshold and is the best available also for criminal law purposes.»[246]

By basing a legislative wording on a medical terminology, the lawmaker provides the judicial system with an empirically-based tool for addressing the issue of whether the perpetrator is of unsound mind.

How one goes about the establishment of a diagnosis is discussed in 8.4 and 18.4.3, from which it follows that medical diagnoses are determined on the basis of an international diagnosis system; ICD-10. The system is premised on the evaluation of specified symptoms on the

[246] Recommendation of the Penal Code Committee, 1925, p. 64.

basis of a discretionary clinical medical assessment. The decisive factor is the nature of the symptoms, including their seriousness, intensity and duration.

There is an element of vagueness to the diagnosis system. There may be uncertainty as to what significance the diagnosis system ascribes to the symptoms, and the use of such system is premised on the performance of a discretionary clinical medical assessment that is difficult to specify in detail, but requires abilities acquired through theoretical training and experience. However, there is generally a high degree of consensus on the establishment of a diagnosis, and certain areas have benefited from the development of standardised methods of testing and assessment that promote a uniform evaluation practice; cf. 18.4.3.

Of decisive importance to whether it is appropriate to adopt a medical model is whether there exists a medical category that encompasses such severe mental aberrations as should fall within the scope of a criminal insanity rule, and whether there exists, outside medicine, no other concept that defines such group in a better manner.

It may be argued that such is the case with the category «psychosis». Psychosis encompasses a number of mental disorders characterised by positive and/or negative symptoms under the ICD-10 system, which is currently used to define the group that should be exempted from punishment. It is, at the same time, in no way a given conclusion that the aberrations intended to fall within the scope of the criminal insanity rule ought to fully correspond with the medical psychosis concept.

There may be reason to modify the medical term «psychosis» before using it in a legal rule, for example by requiring a symptom intensity indicating that the person in question lacks the ability to perceive the outside world in a realistic manner; cf. 8.5 for further details. The key issue is in such case the specific state of mind of the perpetrator at the time of the offence, and not whether he or she suffered a psychotic disorder in the medical sense.

There is necessarily an element of vagueness in an insanity rule that thus modifies a medical term. The required symptom intensity, and what it takes to fall within its scope, can hardly be specified exactly. Such an insanity rule will allow for an element of discretionary assessment with regard to which of these medically-defined aberrations shall qualify for a punishment exemption. However, the degree of discretionary assessment will typically be less than under a rule based on the mixed model.

8.3.3 The mixed model

A rule based on a mixed model is characterised by an initial criterion comprising a more or less defined medical condition and a narrowing criterion. Such a rule may, for example, be worded as follows:

> «A person who was, because of a mental disorder, without any ability to control or comprehend the implications of his or her act at the time of committing such act, shall be exempted from punishment.»

Various types of link between the aberration suffered by the offender and the act committed by such offender may be required under a mixed model, and hence there are various ways of formulating the narrowing criterion. These include requirements for a psychological link, a causal link, as well as criteria that are more or less void of content; cf. 6.3.

What such criteria largely have in common is that they address, in various ways, the perpetrator's insight into his or her actions, as well as his or her ability to control his or her conduct. It may thus be said that the function of such criteria is to specify what type of mental aberration must be exist before a punishment exemption is granted.

The impression is, irrespective of the specific formulation of an insanity rule based on the mixed model, that such rules are especially vague and unpredictable, in the sense that it is unclear which cases fall within and which cases fall outside the scope of such rules.

The Committee's review of key sources in this field, including national and foreign case law and psychiatric literature, has not resulted in the identification of any clear criteria for the type of link required under narrowing criteria in rules based on a mixed system; cf. Chapter 7 and 8.4. All criteria give rise to considerable problems when it comes to determining whether such links exist in each individual case.

It follows from 6.9 that rules based on the mixed model are used within a number of legal fields outside criminal law. Nor has the review of case law and legal theory within such fields resulted in any criteria for links that clearly define how to go about establishing that such, for instance psychological, links exist. There would rather appear to be a tendency towards using more objectified assessments; cf., inter alia, 6.9.4.

Moreover, no other stakeholders who want the Norwegian criminal insanity rule to be formulated on the basis of a mixed model, whether the Committee has been in direct contact with them or their views are known to the Committee, have succeeded in clarifying what should be examined for purposes of determining whether such a link exists.

Although the criteria for deciding whether such narrowing criteria are met are not expressly stated in the said sources, it does not necessarily imply that such criteria are without meaning. One will regularly have fixed and certain views on subjective factors on the part of other persons, without clarifying the basis for such views – more or less in the same way that grammar guides written language, without the writer at the same time reflecting over the grammatical rules.

The Committee is nonetheless of the view that there is a general uncertainty associated with the criteria for determining the type of psychological links focused on by legal rules that are based on a mixed model. Such uncertainty derives from the fact that complex and controversial issues are encountered in these contexts; cf. 8.3.4.2 for further details.

It is, for example, a controversial issue what constitutes causality in such a context. Some also question whether it is at all meaningful to talk about causality between an aberration and an action.[247] The disagreement on these and similar issues also extends, not unexpectedly, to disagreement on which criteria to apply, if any.

It may also be worth noticing that rules based on a mixed model are characterised by requiring, in addition to the narrowing criterion, in the form of causality or other some other circumstance, that the perpetrator suffers an aberration as defined by medical diagnostic criteria. If one had criteria enabling causality or the type of psychological circumstance typically required under the narrowing criteria – and taken to justify the punishment exemption – to be determined with certainty, it would seem unnecessary to operate with an initial criterion of a medical nature. However, such an initial criterion can be understood and explained on the basis of a need for criteria that clarify *when there are grounds* for invoking causality or some other circumstance.

8.3.4 The assessment of the Committee

8.3.4.1 Basic premise

The Committee is of the view that the justifications for punishment, as outlined under 8.2.1, do not justify criminal liability for all offenders, and hence that Norwegian criminal law should include a criminal insanity rule. There is little cause for reproach against anyone who,

[247] Moore (2014).

due to a severe mental aberration, has a distorted perception of reality and a very limited ability to conform to the norms of society. Such a person lacks criminal capacity.

The criminal insanity rules should specify what mental deficiencies and aberrations are required to exclude moral and criminal responsibility. Immaturity in healthy persons may also indicate that they should not be convicted. It is obvious that children should fall outside the scope of criminal responsibility. Besides, the issue of insanity is relevant for persons who are genuinely mad and those who are in a state of automatism at the time of committing the act. However, the delimitation of these groups raises complex and manifold issues.

The group exempted from punishment under an insanity rule should be defined narrowly and as precisely as feasible. It should, to the extent practicable, exclude persons and situations within the scope of any of the traditional justifications for punishment.

The first issue to be addressed is which principle should underpin a criminal insanity rule. This will be discussed in the following by comparing a rule based on a medical model with a rule based on a mixed model.

It follows from the discussions in 6.10 that the Committee holds the current insanity rule in Section 44 of the Penal Code to be compatible with Norway's obligations under international law. International law does not, more generally, entail any specific restrictions on the formulation of an insanity rule.

8.3.4.2 The significance of fundamental issues

The formulation of a criminal insanity rule is, as previously mentioned, premised on opinions as to what it specifically means that the perpetrator exhibits the necessary degree of mental capacity and presence of mind.

If, for example, one believes that criminal liability should be determined by the ability of the perpetrator to let his or her choice of action be ruled by ordinary considerations, and that a link between a mental aberration and an action, for example in the form of a causal relation, best indicates whether such is the case, it will be appropriate to anchor the insanity rule in such a link. The underlying statutory premise will then be that such a link either does or does not exist, as the case may be, and that whether or not it exists can be demonstrated.

If one believes that there is no such link, or any similar link, between aberrations and actions, or that such link cannot in any case be demonstrated, and thus can never be excluded, or that criminal liability should depend on an integrated set of mental and psychological attributes, it will be more appropriate to let the punishment exemption depend solely on whether or not there is a certain mental aberration.

This issue is closely related to the matter of whether mental disorders are best understood as impairing the overall cognitive and functional ability of a person, or whether such disorders can also be partial, with the implication that any loss of touch with reality only pertains to specific and limited areas of the psyche of a person. There is uncertainty about this matter, and it has been the subject of only limited medical research; cf. 8.4.3.4.

The Committee is of the view that the formulation of a criminal insanity rule should, to the extent possible, be in conformity with our understanding of humans and human actions.

This premise does not, in itself, provide any specific guidance as to the choice of principle to underpin the formulation of the rule. Both a rule based on a medical model and a rule based on a mixed model can be formulated in such a way as to at least give the appearance of conforming well to a general understanding as to what characterises persons who cannot be held criminally responsible.

However, a rule based on a mixed model necessitates the presentation of evidence on, and the adjudication of, highly complex issues, such as the ability of the perpetrator to control his or her actions, whether he or she had insight into the illegal nature of the action, and whether there is otherwise any relationship between the mental disorder and the action. Partly, it may be argued that these issues are of an almost metaphysical nature and quite unsuitable as a focus for any specific judicial assessment. Partly, such issues are premised on postulates such as the potential absence of any causal link between a serious mental disorder and a committed crime, although many people will be of the opinion that such a link can never be excluded.

It is indeed an advantage of a mixed model that it specifies and defines directly, through the wording of the statute, which aberrations shall lead to a punishment exemption based on a conception of what insanity *is*. And thus expectations as to the formulation of the rule are also met. It may, for example, be stipulated that only those aspects of the disorder that are related to the criminal act shall be of relevance, or that the disorder must have resulted in the loss of certain specified abilities or insights, for example insight into what constitutes an illegal choice of action. However, this also presupposes that the fact identified as relevant by the rule, and for which evidence is required – i.e. various relationships between a disorder and an action, or between a disorder and the loss of an ability – both exists in reality and can be demonstrated.

An insanity rule premised on a symptom-based medical diagnosis system eliminates the need to address such underlying issues. Such a rule will be compatible with most views as to what constitutes or may constitute a state of unsound mind. The Committee holds this to be an independent argument in favour of the proposed rule.

Although it is not necessary for the Committee to take any final view on fundamental issues, it may nonetheless be mentioned that the American legal theorist Michael S. Moore has argued forcefully against most of the basic assumptions that could conceivably underpin rules based on a mixed model, including all Anglo-American standards for determining insanity.[248] This line of argument will not be presented in its entirety here, but his criticism of a rule premised on the requirement for a causal link between a mental disorder and an action is briefly outlined for illustration.

Moore argues that if severe mental aberrations as a cause of criminal conduct constitute the actual rationale behind the punishment exemption, it means that practically everyone must be exempted from criminal liability, because causes of conduct can always be demonstrated. He presents five arguments in support of the said position.

The first argument is that mental aberrations, like all other circumstances, only represent a part of the overall causal background, and that it is not meaningful to classify these into more and less important causes as long as all of them are necessary prerequisites. The key observation is that the fact that the person was greedy is as important to the final choice of action as is the fact that he or she was psychotic. Moreover, there is no reason to assume that mental aberrations constitute a major part of the totality of the factors causing conduct.

The second argument is that it is not meaningful to argue that mental aberrations in combination with other circumstances prevent the exercise of free will, whilst such other circumstances do not prevent this in themselves. In other words, it is not meaningful to argue that certain choices of action are fully determined, whilst others are only partly determined. It is not meaningful to argue that a choice of action was partly voluntary (for example 70%) and partly involuntary (for example 30%).

The third argument is that there is no merit in arguing that certain causes, i.e. severe mental aberrations, entail a form of complete causality, whilst other factors only provide potential or probable causality. This involves, in actual fact, the confusion of two causal concepts inasmuch as one is simultaneously referring to causal links of which one has knowledge and causal links of which one does not have full knowledge.

[248] Moore (2014).

Fourthly, he argues that one cannot premise exemptions from punishment on the assumption that we know more about certain types of causal links than about others.

Fifthly, he argues that it is not viable to select some causes over others if everything is assumed to be determined. If, for ideological reasons, one would like to make a punishment exemption for those suffering serious mental disorders rather than, for example, for those who commit criminal acts out of boredom, it will not be possible to identify relevant differences to justify this.

8.3.4.3 The significance of empirical knowledge

A criminal insanity rule should, to the extent feasible, prevent arbitrary and subjective considerations on the part of professional judges or lay judges from influencing whether a punishment should be imposed in any given case. This is of special importance, from a due process perspective, in horrifying and spectacular criminal cases, where the outside pressure for punishment, especially from the media, can be relentless.

Consequently, the assessment criterion under the rule should draw on updated and structured empirical knowledge about severe mental aberrations. This would favour a rule based on the medical model, under which the assessment is based on diagnostic criteria reflecting a high degree of professional consensus. Under a rule based on the mixed model it is necessary for the court to apply a method lacking any solid professional foundation, leaving it to rely on rather vague hypotheses as to whether the accused retained the freedom of the will at the time of committing the offence.

It should be noted, in this context, that all known rules based on a mixed model, under which the narrowing criteria seek to specify which delusions on the part of the perpetrator shall result in him or her being exempted from punishment, also restricts the group via an initial criterion requiring the perpetrator to suffer from a more or less clearly defined mental disorder.

The question is what this achieves. If the answer to such question is that the narrowing criterion is necessary, but not sufficient, to establish criminal insanity, a new question arises, i.e. why those who are mentally ill shall be exempted from liability and not those who are persons of sound mind, if both categories meet the narrowing criteria under the rule.

Why, for example, does English law (M'Naghten rules; cf. 7.6 and, in particular, 7.6.3–7.6.4) make a distinction between those who are ignorant of the law due to mental disorder and those who are ignorant of the law for other reasons? Or, under those legal systems that accept «moral ignorance» as a narrowing criterion, why should not those who are not mentally ill benefit from such ignorance? Ultimately, the implication of rules based on a mixed model would appear to be discrimination against persons of sound mind who are in such a state as is required under the narrowing criteria, but for other reasons than mental disorder. It remains unclear why a mentally ill person shall be exempted from criminal liability in case of an involuntary action or a cognitive or emotional deficiency or ignorance, but not a person of sound mind who is also in such a state, but for a different reason, for example because a difficult childhood has rendered him or her unable to understand the norms of society. It is not immediately obvious how such a criminal justice distinction can be justified.

If a punishment exemption shall be granted to those who actually do not understand what they have done, or do not understand what is illegal about what they have done, it is not readily understandable why it should be an additional requirement that such lack of understanding is caused by a disorder. However, the initial criterion of mental disorder is explainable if its relevance is to identify perpetrators who are, in empirical terms, so aberrant as to make them, generally speaking, not worthy of blame.

8.3.4.4 The significance of vagueness

Vagueness typically refers to expressions that are not sharply defined. The discussion in 8.3.2 and 8.3.3 has shown that an insanity rule involves vagueness irrespective of whether it is based on a medical model or a mixed model.

However, the Committee is of the view that a rule based on a mixed model involves significantly more vagueness. A rule based on a medical model can be defined with reasonable clarity by specifying which symptoms of mental aberrations are indicative of a punishment exemption. A rule based on a mixed model must, to a larger extent, remain unclarified. This issue was also highlighted by the Special Sanctions Committee in its report:

> «The introduction of a causality principle may also result in less predictability. Whether an offender is psychotic can be determined with considerably greater certainty than whether there is, with regard to this particular offender in relation to the relevant action, a causal link between an aberration and such action.»[249]

A rule based on a medical model must also involve vagueness. Such will be the case even if a purely medical diagnosis is applied. The rule will also be discretionary in nature if formulated with an emphasis on certain specified symptoms and their strength. It will, however, be possible to establish relatively clear standards through case law.

The extent to which an insanity rule is vaguely defined is of relevance in a number of respects.

The choice of principle for the formulation of the rule and the degree of vagueness implied by such choice, have implications for the relationship between the branches of government. It is a matter of either anchoring the insanity assessment in terms whose meaning has become fairly well established through medical science, or letting the criminal insanity ruling depend, to a greater extent, on a specific discretionary assessment of the perpetrator's insight into the nature of the action, his or her ability to be influenced by motives, etc.

The lawmaker will under the medical model, at least if it is anchored in clear aberration criteria, assume active responsibility for the specific delimitation of the scope of the punishment exemption, and thus reduce the complexity arising from the problem of insanity already when formulating the rule. This provides a relatively clear delimitation of the scope of insanity. A rule based on the mixed model, on the other hand, will to a greater extent leave the issue of insanity at the discretion of individual judges.

It will also be relatively straightforward to construe the meaning of an insanity rule based on a medical model for those who are going to apply it in practice, whether they are members of the legal profession or lay judges. This will, when compared to a rule based on a mixed model, make communication in court between judges, experts and others considerably easier. There is reason to believe that a rule based on a medical model will pose fewer challenges in terms of clarifying the distinction between sanity and insanity. Hence, there is also reason to believe that such a rule will have less of a litigious effect.

Consequently, one risk of using terms without any foundation in psychiatric practice and recognised medical diagnosis systems, is that the legislative wording will be interpreted heterogeneously. This may result in the delimitation of insanity being fluid, or even blurred. It may to some extent be counteracted by providing as precise descriptions as possible, in the preparatory works, of those aberrations intended to fall within the scope of the legislative wording, but this is unlikely to completely prevent the risk of fluidity and variation. This is because reality is complex, and not all types of scenarios can be described in advance.

One potential advantage of a statute based on a mixed model, i.e. a vaguer insanity rule, may be precisely the consideration that it allows for a more specific and comprehensive assessment of each individual case. Such a rule can make it easier for the court to adjudicate individual

[249] Official Norwegian Report NOU 1990: 5, p. 47.

cases based on the purpose of the insanity rule, and to establish in each case what does or does not merit punishment. However, there will in general be such a degree of uncertainty associated with the basis for such assessments – what is reasonable and fair – and hence with what will be the outcome of specific criminal cases, that it is preferable – for reasons of predictability and equality before the law – for the scope of the rule to be as clearly defined as possible. The need for specific adaptation of the statutory basis to individual cases can in any event be accommodated under a medical model, by stipulating requirements as to the strength of the symptoms; cf. 6.4.3 and 8.3.2.

The vagueness of insanity rules also has direct implications for the relationship between the court and the expert. Irrespective of what type of insanity rule one opts for, it will to a large extent be necessary for the court to rely on statements from psychiatric experts in identifying and assessing symptoms. A rule providing vague criteria as to which aberrations shall entail insanity will give the expert more influence over who shall or shall not be convicted, than will a more clearly defined rule.

It may be argued that a mixed model can contribute to a clear distribution of roles and responsibilities between experts and courts, inasmuch as the statute can make it clear that these are charged with handling one set of assessment criteria each – law and medicine. However, such a distinction will be equally clear under a medical model where it is stipulated in advance that experts, when explaining the state of the offender at the time of the offence, shall use medical terms and methods reflecting the professional consensus. It is then left to the courts of law to decide which facts to apply, as well as to determine the judicial implications of such facts.

A rule based on a medical model will give experts less influence over the application of law than will a rule based on a mixed model. Such a rule makes it clear that the expert shall only express an opinion on matters of a purely medical nature. It will, on the other hand, be contrived for the expert not to express any opinion on the application of narrowing criteria under a rule based on the mixed model, for example on a potential link between the disorder and the action, since these are also matters on which expertise may shed light. And once experts express opinions on such matters, but without any agreed diagnosis system as a frame of reference for their views, the outcome may be more – and not less – influence from experts than at present.

An insanity rule based on a mixed model will, to a greater extent than a rule based on a medical model, entail a risk of over- or underinclusion of aberrations. A rule based on a medical model must be assumed to offer better accuracy, and hence to be better suited for realising the purpose of the insanity rule.

One may, on the other hand, object that the vagueness implied by a rule based on a mixed model is found in numerous legal fields outside criminal law. No significant objections have been raised against the application of such rules. Moreover, it can be argued that it may for various reasons be appropriate to leave statutory provisions vague, for example because it enables the courts of law to adapt such provisions to developments in society, or because it allows them to develop, through experience, more objective standards for the apportionment of risk between the parties, which may be a sound approach within the legal fields encompassed by civil law; cf. 6.9 for further details.

However, special considerations apply within the area of criminal law. The ideal of clear legislation and the importance of predictability have a special prominence in that area. It is true that predictability considerations may not necessarily be of major concern in relation to individual perpetrators when it comes to the issue of insanity. But it is nonetheless, as will be evident from the above, of utmost importance for the legal system to have an insanity rule that

clearly specifies who shall be exempted from liability, and who can be punished. A rule based on a mixed model leaves more legal uncertainty than a rule based on a medical model.

The Committee has considered whether the group exempted from criminal liability should be referred to by a generally used word like «mad», «insane» or similar. The legislative ideal that legislation should use language that is in general use and as simple as possible suggests that such a word should be used. This can ensure the best possible communication between government and citizens, and promote general knowledge of applicable legislation. However, in addition to being potentially stigmatising, such words are also very vague. Although there is likely to be some consensus about their meaning, there is significantly more uncertainty about their scope than about that of rules based on a medical model, which are characterised by their area of application being defined by medical terms.

8.3.4.5 The significance of evidential issues

Legal rules stipulate the legal effects of a defined set of factual circumstances. In order to ensure that the circumstances one wishes to regulate are also targeted in practice, it is necessary to consider, in the formulation of a rule, the extent to which such factual circumstances can be demonstrated.

Even if one has a clear idea as to which aberrations on the part of a perpetrator should be encompassed by the punishment exemption rule, the said rule will not necessarily be applied to such perpetrators unless it is clear how such aberrations shall be proved.

As mentioned, a rule based on a medical model is less vague than a rule based on a mixed model. This also facilitates the assessment of evidence. If it is unclear what needs to be proved, it will also tend to be unclear how to prove it.

Consider, by way of illustration, a rule based on a mixed model under which the narrowing criterion implies that there needs to be a causal link between a disorder and an action. A statement to the effect that such causality has been proven will, by and large, be considered an unverifiable postulate by a third party, as it is unclear how to proceed, or which criteria to apply, in establishing such a link. A rule based on a medical model will not give rise to corresponding ambiguity, as it is definitionally established what needs to be proved.

And even if it was clear how to prove the type of causalities that tends to be called for by the narrowing criterion under a mixed model, the actual assessment of evidence will pose considerable challenges.

In principle, the same method is applied in establishing aberrations defined in a rule based on a medical model as in establishing aberrations and narrowing criteria under a rule based on a mixed model. This is because evidence of a specific medical diagnosis, as well as evidence of psychological relations or causal links, needs to be premised on specific symptoms and their significance.

However, there are clear differences when moving from there to the final assessment of evidence. Under a rule based on a medical model it will initially be a matter of classifying the symptoms according to medical criteria – often defined in a diagnosis system – and thereafter to assess the weight of such symptoms, but without addressing how these have influenced the offender's choice of action.

A rule based on a mixed model will typically require proof of a causal link between the mental disorder and the specific offence, or some other connection between a disorder and an action. One challenge facing the court is therefore how to proceed in determining whether such connections exist. Medical science will not be of appreciable use in performing such assessment, which will have to be subjective in nature. One's own experience from similar situations is of key importance when it comes to proving subjective states; cf. 10.4.3.3. Very few

people in our society have any personal experience of relevance in determining the influence of a severe mental aberration on the choices and actions of another person. This also means that it is difficult to prove the type of circumstances stipulated by a narrowing criterion under a rule based on the mixed model.

Basing the rule on the medical model means that the criminal standard of proof is accorded weight already in the formulation of the insanity rule. The general underlying premise is that it can never be excluded that a very severe and pathological condition may have had an impact on the action. However, it is considerably more challenging to establish this type of link in any specific case, which is the requirement under a rule based on the mixed model. This was also highlighted in the report submitted by the Council on Criminal Law in 1973:

> «The doubt that may always arise in the application of an insanity rule based on a causality criterion makes it reasonable to adopt a rule stipulating an unconditional punishment exemption for offenders suffering, at the time of committing the act, from the most pronounced abnormalities (mental diseases or deficiencies). In other words, such doubt should result in the most favourable outcome for these groups of individuals, i.e. that they are granted an unconditional statutory punishment exemption.»[250]

Corresponding views are also expressed in the report submitted by the Special Sanctions Committee in 1989:

> «It is of decisive importance to the Committee's endorsement of the medical model that one cannot, even if there may be much to suggest that the disorder has not determined the action in any given case, adopt a criminal law assumption to such effect without running the risk of doing the accused an injustice. There will always be a real possibility that an offence perpetrated by a psychotic person may have been pathologically motivated, even though the offence is seemingly understandable.
>
> The wording proposed by the Committee for Section 44 includes the phrase «psychotic and thus unable to realistically assess his or her relationship with the outside world». There will often, for persons who fall within the scope of the said description, be a causal link between the mental aberration and an action. However, the introduction of a causality criterion would make this a matter to be adjudicated by the courts. In practice, one would admittedly expect the outcome to be the same in most cases if introducing a causality criterion, since the accused shall be given the benefit of any reasonable doubt. The onus of proof principle under criminal law will in most cases mean that it has to be assumed that there is a causal link between an action and a disorder. However, the Committee is of the view that this would unnecessarily complicate the system. It is also an advantage of the medical model that it is straightforward to apply.»[251]

In other words, the evidential perspective suggests that the legislation should be based on a medical model irrespective of what position one might otherwise wish to adopt on the more fundamental issues raised by the formulation of insanity rules.

8.3.4.6 The significance of consistency

A legal system should be consistent and without internal contradictions. Concern for the consistency of legal provisions may favour a mixed model, inasmuch as such a rule would conform better to other provisions under Norwegian law, including the provisions on damages, which are often applied in the context of criminal proceedings; cf. 6.9.5 and 8.10.3. However, it needs to be recalled that the rationale behind the criminal insanity rule is altogether different

[250] Official Norwegian Report NOU 1974: 17, p. 53.

[251] Official Norwegian Report NOU 1990: 5, pp. 46–47.

from that of such civil law regulations, with the latter allowing more room for according weight to considerations as to the apportionment of risk in the formulation of legal provisions.

The argument concerning the consistency of legal provisions can, on the other hand, be «reversed». One could think of good reasons why it would be preferable to amend the civil «insanity rules» in the direction of a medical model. It would appear that the issue has not been as thoroughly discussed in private law as in criminal law, and it is hard to escape the conclusion that the objections raised in the preceding paragraphs would also apply in a number of other areas of law in which legal effects depend on mental aberrations. However, the clarification of such issues would require comprehensive discussion, and is clearly outside the mandate of the Committee.

However, within the area of criminal law it would be more in conformity with prevailing law in other countries, as well as with international criminal law, to apply a mixed model. Effective international cooperation in criminal cases will in general be facilitated by making legal provisions as homogeneous as possible. This also applies to the provisions defining sanity within the meaning of criminal law. However, the relevant provisions in the various countries with which we cooperate extensively, which provisions tend to be based on a mixed model, differ so much from each other that this is no major argument for not applying the medical model in Norway.

The widespread use of provisions based on the mixed model illustrates, incidentally, that such model can be applied in practice. It is, at the same time, worth noticing that provisions based on a mixed model are frequently criticised. It is also, as mentioned in 7.1 and 7.9, difficult to say anything specific about how such provisions work, including whether their implementation is in conformity with the ideals underpinning Norwegian criminal law.

8.3.4.7 Summary

The Committee is of the view that a criminal insanity rule based on a medical model is distinctly preferable to a rule based on a mixed model. Such a rule obviates the need for making pronouncements on problematic and controversial issues concerning the background to human actions. Such a rule can be premised on empirical and structured knowledge about those aberrations that should, in general, result in punishment exemption. Such a rule will, to a greater extent than a rule based on a mixed model, ensure predictability in terms of who falls within and outside the scope of the rule, thus also ensuring a clear demarcation of the respective roles of the courts and other parties with regard to the issue of insanity. Finally, such a rule will present less challenging evidential issues than a rule based on a mixed model.

8.4 Mental symptoms and disorders deemed by the Committee to be of relevance to criminal insanity

8.4.1 Theme and structure

The Committee is required to examine «the extent to which persons with serious mental disorders shall be held criminally responsible for their actions» and «the extent to which a medical diagnosis system should determine the legal assessment».

The relationship between medical classification systems and criminal law will be discussed in the following. Thereafter will be provided an overview of mental disorders and mental symp-

toms that could be envisaged as constituting a basis for criminal insanity. The discussion includes mental disorders that are of relevance to the matter of criminal liability under current law, but also other mental symptoms of potential relevance.

An absolutely key role is played by the medical psychosis concept, since it includes various symptoms that are characterised by various forms of loss of touch with reality (distortion of reality). However, the overview also extends to symptoms that fall outside the scope of that diagnostic term. The discussion must not be read as an exhaustive catalogue, but as an overview of typical cases illustrating key mental symptoms and mental disorders of potential relevance.

Mental symptoms and disorders are categorised by the psychiatric profession. However, somatic disorders, poisoning and injuries may also trigger psychotic symptoms, and hence the overview will also include some of these somatic conditions.

It has been sought to make the presentation accessible to readers without a medical background. Consequently, the discussion will not elaborate on the complexity of each mental disorder, with its many contributory etiological factors of a psychological, social, cultural and biological nature. The description of some of the diagnoses is accompanied by examples from case law to illustrate how the disorder may manifest itself and be of relevance from a criminal law perspective.[252]

Firstly, in 8.4.2, there is a general discussion of what diagnoses and classification systems are. 8.4.3 specifically addresses the various psychotic symptoms and how these are organised under the current international classification system; ICD-10. 8.4.4 focuses on psychotic disorders. The discussion in 8.4.5 addresses other disorders that may cause psychotic symptoms, although the underlying disorder is not a psychotic one. 8.4.6 discusses other disorders that do not involve psychotic symptoms, although consciousness, emotional functions or cognitive functions (attention, concentration, memory and integrating brain functions) may be impaired in a similar manner as in case of psychosis, thus implying that there may be reason to examine whether criminal liability should apply. 8.4.7 addresses comorbidity, i.e. simultaneous occurrence of one or more mental and/or somatic disorders in addition to the main disorder present.

8.4.2 Diagnoses and classification systems – clarifications and limitations

8.4.2.1 General remarks

Medical classifications have evolved over a long period of time and are based on clinical experience and research, including methodical developments.

The classifications may be described as a language that eases communication amongst professionals and between the persons involved at the various treatment levels within the health services. Uniform and correct use of the classifications is of decisive importance for ensuring reliable information on health conditions at the individual and group levels.

The internationally used classification system *International Statistical Classification of Diseases* (ICD) has been developed and is owned by the World Health Organisation (WHO). The system classifies all known disorders and health problems, and clarification on how to use the system is provided through frequently updated coding guidelines. In Norway, ICD-10 was entered into use by the psychiatric specialist health service in 1997 and by the specialist health

[252] For a more thorough and purely medical presentation, see Malt et al. (2012), Dahl and Aarre (2012), as well as Gelder et al. (2012).

service for somatic health care in 1999. ICD-10 replaced older ICD versions (ICD-8, followed by ICD-9), which had previously been used by the specialist health services.

There are different versions of the ICD diagnosis manuals. There are older and newer versions, and there are special editions for mental health – diagnostic guidelines in a so-called «Blue Book» and proposed research criteria for mental disorders in a so-called «Green Book». The «Blue Book» provides clinical descriptions and diagnostic guidelines.[253] The «Green Book» is much more detailed in its specification of the diagnostic criteria.[254] Only the Blue Book has been translated into Norwegian and approved by Norwegian health authorities.

The classifications are revised at irregular intervals because new knowledge is accumulated. The WHO is currently in the process of preparing a comprehensive revision of ICD-10. It is intended for the revised version; ICD-11, to be released in 2017.

An important supplementary diagnosis system for ICD-10 is the diagnosis system of the American Psychiatric Association (the DSM system). A major part of available international clinical psychiatric research is based on diagnoses from the latter system, which is much more reliable than the ICD-10 diagnoses because of better researched diagnostic criteria. The three most recent editions; DSM-III (1980), DSM-IV (1994) and DSM-5 (2013), are based on sets of continually improved diagnostic criteria. It is therefore important for psychiatrists to be familiar with both the DSM system and the ICD system. Unlike the Swedish and Finnish health authorities, the Norwegian and Danish health authorities have not approved the DSM system for clinical use.

ICD-10, DSM-III, DSM-IV and DSM-5 are all so-called value-free classification systems. This means that these are not based on possible etiological factors, but only on description of self-reported symptoms and observable behaviour. The reason for this is that there is, generally speaking, little professional disagreement about symptoms and behaviours, but considerable disagreement about their etiological factors, which are typically classified as neurobiological, psychodynamic, cognitive, learning-related and social. Value-free classification systems therefore offer better reliability, but not necessarily better validity.

Different professional views and interests tend to express themselves, and professional debates tend to arise, in connection with the revision processes for the mental disorder classifications. One example is the extensive debate on the formulation of the US diagnosis manual for mental disorders upon the launch of the revision in 2013 (DSM-5).[255] A key issue was how the DSM-5 manual defined the distinction between the ill and the healthy, and whether or not the system had its foundation in biological explanatory models.[256]

8.4.2.2 Diseases, disorders and symptoms

The international disease classification ICD-10 defines four groups of diseases:

- Somatic diseases (e.g. diabetes)
- Mental disorders (e.g. depressions)
- Poisoning, including withdrawal states (e.g. alcohol use)
- Injuries (e.g. fractures or brain damage)

It will be noted that what is called mental diseases amongst laypeople is here labelled as mental disorders. The word «disorder» has been chosen to highlight the fact that the underlying

[253] ICD-10 a.

[254] ICD-10 b.

[255] DSM-5 (2013).

[256] Pihlstrøm (2013).

etiological factors of these conditions are in many cases not known. Within the part of medicine concerned with the physical state of the body, i.e. somatic medicine, the etiological factors are, in general, better known and the diagnostic methods offer better reliability and validity.

All forms of mental and behavioural disorders are described in the F Chapter of ICD-10. This also includes mental disorders that are a consequence of the three other groups of disorders.

A distinction is commonly made between mental disorders and mental symptoms. Disorders are used when the symptom burden is sufficient to entail a distinct subjective burden and/or a clear functional deficiency, socially or workwise. Mental disorders range all the way from simple phobias, as well as mild anxiety and depressive disorders, to far-reaching and severe disorders like schizophrenia or dementia in Alzheimer's disease. Conditions with a lesser symptom burden than a fully-fledged disorder, but a clearly experienced subjective burden and/or functional deficiency, are typically referred to as subclinical disorders, but these are not specifically classified in ICD-10.

Mental symptoms are various forms of cognitive, emotional, behavioural and relational disturbances, which point toward one or more psychiatric diagnoses.

8.4.2.3 Use of medical classification systems

8.4.2.3.1 General use

The classifications in ICD-10 serve various purposes. They are used in both the examination and the treatment of disorders, for example to clarify what treatment should be initiated, in medical research, although only to a limited extent in psychiatric research, which is based on separate research diagnostic criteria, in communication between persons within the health service, for example between health personnel, patients and next of kin, and in communication with social services. Besides, such classifications play a key role in health sector funding arrangements and support schemes for citizens.

There is professional disagreement within psychiatry as to how the classification system shall or should be understood. One of the reasons for this is that scientific knowledge about mental disorders is in continuous development.[257]

Moreover, there may be medical uncertainty with regard to the use of the classification systems. It can be difficult for psychiatrists and psychologists to determine a basis for arriving at a «correct» diagnosis. Psychiatric diagnoses are established on the basis of the patient's self-reported symptoms and behaviours, as well as information from those closest to the patient. In addition, there are observable and objectively verifiable findings. The symptoms are weighted on the basis of factors like frequency, duration and intensity. If, for example, one is to assess how entrenched a delusion is, it may be important to have detailed knowledge of the values in the culture from which the patient originates.[258]

The best foundation for psychiatric diagnoses is based on adherence to the so-called LEAD procedure. This procedure comprises three elements: 1) Longitudinal: The patient has been examined long enough; 2) Expert: Those examining the patient are experienced specialists; and 3) All Data: They have gather all relevant data concerning the patient. The diagnosis of mental disorders is not helped by the fact that these generally cannot be substantiated through blood tests, X-rays or microscopic examination of tissue, as in somatic medicine.

[257] Norwegian Directorate of Health (2013a), p. 158.

[258] Norwegian Board of Forensic Medicine, Newsletter No. 10 (2004).

It is common practice to use standardised tests; so-called structured interviews, to arrive at a diagnosis. See 18.4.3.2 for a discussion of these.

8.4.2.3.2 Judicial use

Medical classification systems (ICD-10 or DSM-5) are used in a number of countries as a basis for examining the factual aspects of judicial rulings.

In Norwegian criminal law it is of relevance to determine what was the mental state of the perpetrator at the time of committing the offence, and there is a long tradition for using psychiatric experts to shed light on this. It follows from a newsletter of 1999 from the Psychiatry Group of the Norwegian Board of Forensic Medicine that ICD-10 shall be used as the general diagnostic tool in opinions submitted to the courts of law. Since 2000, the Norwegian Board of Forensic Medicine has filed observations with the court if the court-appointed experts do not use ICD-10.[259] Statistics from the Norwegian Board of Forensic Medicine present, inter alia, the main diagnoses in expert opinions as classified in terms of ICD-10 diagnoses.[260] It also follows from the statistics that multiple psychiatric diagnoses will often be established in respect of the observee.

However, these systems do not address a number of issues that may arise in the application of legal rules. Such systems cannot, for example, be used to explain behaviour, or to determine what should be the legal implications of such behaviour. It has, for this reason, been deemed necessary in various contexts to specify the limitations of classification systems in their judicial use, also internally within such classification systems. One example of this is found in the introduction to the latest revision of the US classification system for psychiatry (DSM-5):

> «[I]t is important to note that the definition of mental disorder included in DSM-5 was developed to meet the needs of clinicians, public health professionals, and research investigators rather than all of the technical needs of the courts and legal professionals.» [261]

This consideration is of general validity for medical classification systems, including ICD-10. In the same place is also outlined one reason why one should exercise caution – it is emphasised that classification systems are prepared for purposes that are altogether different from answering the questions likely to be posed by the courts:

> «[T]he use of DSM-5 should be informed by an awareness of the risks and limitations of its use in forensic settings. When DSM-5 categories, criteria, and textual descriptions are employed for forensic purposes, there is a risk that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis.»[262]

This quote also makes a fundamental and general observation concerning the relationship between psychiatric classification systems and the administration of justice. It should, at the same time, be emphasised that there is nothing wrong as such about allowing the application of a legal rule to be based on a psychiatric diagnosis defined through a classification system, provided that such system is best suited for identifying the circumstances to which one wants to attach legal effects.

[259] Norwegian Board of Forensic Medicine, Newsletter No. 3 (2000) and Newsletter No. 7 (2002).

[260] Norwegian Board of Forensic Medicine, Annual Report 2011, p. 22 onwards.

[261] DSM-5 (2013), p. 25.

[262] DSM-5 (2013), p. 25.

8.4.3 Psychosis

8.4.3.1 Psychosis – disorder and symptoms

Psychiatry uses the term psychosis to denote conditions characterised by a deficient, incorrect or distorted perception or interpretation of reality.

Psychosis may accompany a number of disorders in ICD-10, including the ingestion of medications and illegal chemical substances. A specific definition was provided in the previous version (ICD-9):

> «Psychoses are mental disorders in which there has evolved an impairment of mental functions of such a nature that it severely affects the person's insight into such disorder, his or her ability to meet the requirements of daily life and his or her ability to remain in touch with reality. The term is not exact and well-defined. Intellectual disability does not fall within the scope of the term psychosis.»[263]

The committee that drafted the Norwegian version of ICD-9 gave the following characterisation of the term:

> «ICD-9 uses a fairly broad psychosis concept. Certain mental disorders that only periodically or in their most severe forms exhibit clear indications of distortion of reality, can be found here. This pertains, in particular, to some mental disorders of organic origin and low-intensity forms of bipolar disorder that in some periods exhibit no manifest distortion of reality.»[264]

However, the psychosis concept in ICD-10 differs somewhat from that in ICD-9. It primarily uses the symptoms outlined above, without explaining the underlying reasons why these occur:

> «Its use does not involve assumptions about psychodynamic mechanisms, but simply indicates the presence of hallucinations, delusions, or a limited number of severe abnormalities of behaviour, such as gross excitement and overactivity, marked psychomotor retardation, and catatonic behaviour.»[265]

Although the ICD-10 system does not link the term psychosis directly to disorders, there is a clear understanding amongst Norwegian psychiatrists that certain disorders are considered to be of a psychotic nature. This is because these are defined in the classification system in a manner that turns psychotic symptoms into the characteristic and distinctive feature of such disorders; cf. 8.4.4. One will, *at the same time, consider a* disorder without such general characteristic to be a psychotic disorder if the patient exhibits psychotic symptoms.

It would appear that a reversal to the terminology in ICD-9 is proposed in the process of developing the new version, ICD-11. This is reflected, inter alia, in the recommendation of the Working Group on the Classification of Psychotic Disorders to change the heading of Chapter F2 from the current «F2 Schizophrenia, schizotypal and delusional disorders» to «Schizophrenia spectrum and other primary psychotic disorders». The intention is precisely to distinguish psychotic disorders from non-psychotic disorders.[266]

The following categories in Chapter F of ICD-10 are characterised by the presence of psychosis:

[263] Quoted in Statistics Norway (1993), p. 248.

[264] Quoted in Statistics Norway (1993), p. 248.

[265] ICD-10 a (print version), p. 4

[266] Gaebel (2012), pp. 895–898.

- F00–F09 Organic, including symptomatic, mental disorders. These are mental disorders with their demonstrable cause in cerebral disease, brain injury or other conditions leading to cerebral dysfunction (for example toxic substances or hormones).
- F10–F19 Mental and behavioural disorders due to use of psychoactive substances, such as for example alcohol, hashish or solvents.
- F20–F29 Schizophrenia, schizotypal and delusional disorders. These are disorders in which psychotic symptoms will normally form part of the clinical condition
- F30–F39 Affective disorders or mood disorders, in which significant mood disturbance with subsequent abnormalities of behaviour form an important part of the clinical condition.

The following disorder categories in Chapter F of ICD-10 are characterised by the presence of psychosis in tandem with another diagnosis (comorbidity):

- F44 Dissociative disorders
- F50 Eating disorders
- F60–F69 Disorders of adult personality and behaviour
- F70–F79 Mental retardation

Disorder categories that normally do not involve the presence of psychotic symptoms are:

- F40–49 Neurotic, stress-related and somatoform disorders
- F50–59 Behavioural syndromes associated with physiological disturbances and physical factors, apart from F50, Eating disorders
- F80–89 Disorders of psychological development, in which specific developmental disorders with their onset in childhood may lessen as the child grows older
- F90–98 Behavioural and emotional disorders with onset usually occurring in childhood and adolescence

8.4.3.2 Aetiology

Some biological and chemical causes of psychosis are well known, for example lack of vitamin B6 (beriberi) and use of amphetamine. For other psychotic conditions there is, as mentioned in 8.4.2.2, little knowledge about causes and links, but it is known that psychoses may for example accompany brain damage or cerebral dysfunction caused by somatic disorders, in connection with mental disorders like schizophrenia and affective disorders, and in case of poisoning. A psychotic state is often understood to be the result of an interaction between genetic and environmental risk factors.

8.4.3.3 Symptoms of psychosis

Impairment or absence of the ability to test reality (the sense of reality) is the most typical symptom of psychosis. There is a high degree of agreement as to what are symptoms of psychosis, and that these imply distortions in the perception of reality, significantly impaired mental functions or considerable cognitive impairment.

There is some degree of variation in how psychiatric literature presents and groups the various psychosis symptoms.[267] It is often deemed appropriate to start out by classifying the symptoms as either positive – something comes in addition to – or negative – something is missing or lost; cf. Box 8-1. Some of these key symptoms are outlined in the following. Reference is made to 18.4.3 for a more detailed presentation.

By *positive symptoms* is meant that something new has emerged, in addition to normal mental functioning, which affects functioning and self-realisation, for example that the person suffers from delusions, that the person hears threatening voices not heard by others (hallucination), or

[267] Norwegian Directorate of Health (2013a), pp. 129–133, and DSM-5 (2013), pp. 87–88.

that the person exhibits persistent uncontrolled physical aggression. The symptoms must have been manifestly present most of the time for more than a month.

Box 8.1 Psychotic symptoms

Key positive symptoms of psychosis

- Hallucinations
- Delusions
- Cognitive distortions
- Agitation/Excitation
- Marked grandiosity (delusion of grandeur)
- Markedly bizarre behaviour (undressing in public, etc.)
- Marked motor hyperactivity (inability to stand still, etc.)
- Aggression
- Catatonia (prolonged motor immobility)
- Unreasonable preoccupation with bizarre ideas/events

Key negative symptoms of psychosis

- Blunted affect (apathy, indifference in relation to important matters)
- Lack of spontaneity
- Social withdrawal
- Cognitive impairment (difficulty in abstract thinking)
- Complete collapse in «Activities of Daily Living» (food rejection, faecal incontinence, etc.)
- Serious lack of discernment
- Paralysis of will

By *negative symptoms* is meant that aspects of normal mental functioning are significantly changed or absent. Negative symptoms are in most cases demonstrated in relation to the previous behaviour of the person, for example social withdrawal, absence of adequate emotional expression and lack of initiative.[268]

Positive and negative psychotic symptoms may be identified through structured interviews for such symptoms, such as BPRS (Brief Psychiatric Rating Scale) or PANSS (Positive and Negative Syndrome Scale). Reference is made to the discussion in 18.4.3.2.

8.4.3.4 «Partial psychosis»…

8.4.3.4.1 … in a medical context

The term «partial psychosis» or «partial mental disorder» is at times used to denote that the delusions of the observee appear to be clearly limited to one single theme, whilst the remainder of the personality is considered to be healthy.

However, the term is not used in ICD-10. The main databases of articles within medicine and psychology only feature a small number of articles using the term «partial psychosis» or similar in their title or summary.[269]

[268] Norwegian Directorate of Health (2013a), pp. 129–130, DSM-5 (2013), pp. 87–88.

[269] Opjordsmoen (2014), Johnstone et al. (1996) and Bjerg Hansen (1963).

In other words, the idea of «partial psychoses» is not generally incorporated into modern psychiatric literature. One example is provided by a Danish psychiatry textbook that explicitly rejects the existence of such a phenomenon, or at least rejects that said phenomenon can be demonstrated:

> «The term «partial insanity» refers to the assumption that it is not the entire personality that has been changed – as generally argued in psychiatry – but that some parts are not afflicted, and hence that [the person in question] may be of [partly] sound mind. Traditional forensic psychiatry is of the view that all actions in a psychotic patient are coloured by his or her state of psychosis – and rejects the term «partial psychosis». It cannot be demonstrated where the disorder ends and where normal cognition begins.»[270]

8.4.3.4.2 … in a legal context

In a legal context it may be of particular interest to establish whether or not behaviour can be explained as the result of a state of psychosis. Whether it is meaningful to talk of «partial psychoses» was addressed in the recommendation submitted by the Penal Code Committee in 1925:

> «What those supporting the mixed model are arguing is […] that certain mental diseases only have a partial effect on cognition and will. And they have been able to invoke the teachings of some psychiatrists in support of such theory. However, the general position amongst today's psychiatrists is that mental life as a whole is afflicted (abnormal) in all aberrations that are labelled as mental diseases, that certain disorders would appear to primarily express themselves in certain forms of abnormal actions, but that one in no person of unsound mind can have the usual assurance of normal conduct in any respect.» [271]

The term «partial psychosis», as used within criminal law, is probably best understood as expressing that not all psychotic disorders should necessarily result in a punishment exemption. Such an understanding was suggested in Danish theory at a fairly early stage:

> «It was surely correct, theoretically speaking, that a mental disease always afflicts the entire psyche, and hence that the term partial insanity is not appropriate, but to take such a perspective to its ultimate conclusion seems slightly doctrinaire in practice. One observes persons with definite, albeit less severe, mental disorders attend to their business affairs in a prudent and sound manner, and it would therefore seem in some sense unreasonable not to hold them to account if they start cheating in their commercial transactions for purposes of financial gain.»[272]

It is also a premise underpinning the current Danish insanity rule that psychoses can be partial; cf. for 7.2.4 further details. So although it is doubtful whether such an assumption is viable in medical terms, the rule has nonetheless gained some degree of acceptance in Danish forensic psychiatric circles in line with the thinking expressed in the above quote.

However, forensic medical literature includes descriptions of mental aberrations in which the psychosis only pertains to a specific area of life.[273] This is taken to mean that the mentally disordered person may in certain areas engage in criminal conduct that would not appear to be a reflection of the existing disorder. The idea that it is meaningful to talk of «partial psycho-

[270] Hemmingsen et al. (2002), p. 599.

[271] Recommendation of the Penal Code Committee, 1925, p. 65.

[272] Helweg (1949), pp. 13–14.

[273] Rosenqvist and Rasmussen (2004), p. 61.

ses» in such a context would also appear to underpin the insanity rule proposed by the Norwegian Medical Association, which as a recurring example of a person who should be held liable from a criminal law perspective refers to «[…] a psychiatric patient [who] well aware that it is wrong, commits burglary and steals a crate of beer […]».[274]

However, this is not, as was noted in 8.4.3.4.1, an agreed or common term within general psychiatry.

8.4.4 Psychotic disorders

8.4.4.1 Phases and symptom intensity

In the following will be outlined various psychotic disorders, i.e. disorders with psychotic symptoms as specific characteristics. Most of the disorders are syndromes. This means that the diagnosis is based on a set of signs and symptoms.

The presentation is based on a so-called phase-specific understanding of, and approach to, these disorders, reflecting the observation that the intensity and extent of the symptoms vary over the course of the disorder. These form part of the disorder's progression, and the most serious psychoses progress through the following phases:[275]

- *Premorbid phase;* refers to the period before any positive psychotic symptoms can be identified.
- *Prodromal phase;* the phase of impending onset of the mental disorder, when the first symptoms of disorder can be identified, but then in most cases as unspecific signs, such as for example symptoms of anxiety and depression. Early negative symptoms may materialise in this phase in the form of withdrawal from friends or the sudden interruption of education.
- In the *active psychotic phase,* positive psychotic symptoms are prominent. The psychotic phase may comprise an «active untreated phase» and an «active treated phase».
- *Remission denotes the phase when the crucial* psychotic symptoms have abated or possibly cannot be observed, typically as the result of active treatment with antipsychotic medications.

The progression of psychotic disorders varies from person to person, and symptom intensity varies within each phase of the disorder. Some persons experience one episode of a disorder over the course of a lifetime, whilst others may suffer several such episodes and yet others may be exposed to a chronic, lifelong course of the disorder. Some persons with psychotic disorders may be relatively well-functioning between the periods of disorder.

8.4.4.2 Psychotic disorders

8.4.4.2.1 Schizophrenia (ICD-10 F20)

Schizophrenia is a syndrome, i.e. a mental disorder characterised by a set of symptoms that occur at the same time. The clinical manifestations of schizophrenia are manifold, and the diagnosis is split into subgroups.[276] If a person is followed over the course of his or her life, it turns out that symptoms and subgroups of the diagnosis may vary.

[274] Norwegian Psychiatric Association (2014), p. 38.

[275] Norwegian Directorate of Health (2013a), p. 124.

[276] Hebephrenic schizophrenia (ICD-10 F20.1), Catatonic schizophrenia (ICD-10 F20.2), Paranoid schizophrenia (ICD-10 F20.0), Undifferentiated schizophrenia (ICD-10 F20.3), Residual schizophrenia (ICD-10 F20.5), Schizoaffective disorders (ICD-10 F25, DSM-5 Schizoaffective disorder), Schizotypal disorder (ICD-10 F21, DSM-5 (2013) Schizotypal personality disorder).

Distorted self-perception is a key feature for use of the diagnosis. This may manifest itself in the form of various unreal and estranged experiences of own identity, of other people and of physical surroundings. These typically occur in the prodromal phase of the disorder, without being characteristics of an established psychotic episode.

Positive psychotic symptoms can be demonstrated in acute psychotic phases, whilst negative symptoms can be found in all phases, also where the positive symptoms has lessened, with or without treatment.

If the patient has clear affective symptoms, for example pronounced mood swings or deep sadness, clear schizophrenia symptoms must be present before the commencement of the affective episode. The symptoms must have been extensive, and present for most of the time during a period of at least one month. The symptoms shall not be caused by an organic condition.

8.4.4.2.2 Paranoid psychoses (persistent delusional disorders) (ICD-10 F22)

Paranoid psychoses are mental disorders characterised by long-standing delusions. ICD-10 defines delusions as incorrect convictions about oneself and/or one's surrounding that are not compatible with reality and not shared by others with the same sociocultural background as the person in question, and are uncorrectable.

Paranoia, or persecution complex, is the origin of the term paranoid psychoses, and the most frequently occurring delusion is that of being persecuted. Other common delusions are that one is being defrauded, is being observed, is a victim, is the object of an infatuation, that one's partner is unfaithful, that one suffers from a serious illness or has special abilities and greatness, a religious calling, is of noble origin, or other unreasonable and incorrigible conceptions of one's own identity or looks. Some cases feature a combination of several delusions. The person may suffer one single delusion, or several closely related delusions that may be connected in a paranoid system.

The conviction is maintained despite facts that disprove it, and the patient cannot be corrected through logic argument or common sense. The person suffering the disorder may at times act in conformity with the delusion; the notion that one is being defrauded may for example result in violent behaviour directed at the «fraudster».

It follows definitionally from the ICD-10 system that the criteria for schizophrenia, affective disorders or organic psychoses shall not have been met, because in such cases these latter diagnoses shall be used instead. Moreover, chronic psychoses shall have a duration of more than three months, as these are otherwise considered to be acute and transient.

8.4.4.2.3 Acute and transient psychotic disorders (ICD-10 F23)

Acute and transient psychotic disorders [are] characterised by an acute onset of fully psychotic syndrome dominated by positive symptoms. The symptom mix is rapidly changing and the condition is variable. There is often an emotional instability and psychomotor agitation, and the patient may be perceived as confused and deeply affected by the psychotic condition.

ICD-10 classifies the acute and transient psychoses into four forms, i.e. acute polymorphic psychotic disorder without symptoms of schizophrenia, acute polymorphic psychotic disorder with symptoms of schizophrenia, acute schizophrenia-like psychotic disorder and acute predominantly delusional psychotic disorders.

Acute stress in one's life, like losing one's job or receiving unexpected information about unfaithfulness, is often deemed to be the factor triggering the psychosis. Treatment usually results in swift abatement of the symptoms. Most patients will also regain their former functioning within a relatively short time.

8.4.4.2.4 Schizoaffective disorders (ICD-10 F25)

Schizoaffective disorders are episodic disorders in which symptoms of both affective disorders and schizophrenia are prominent, simultaneously and exhibited in the same episode of the disorder. The latter diagnoses are not used, because the symptoms are present at the same time and to a definite extent, which is the reason for the mixed categorisation.

One finds, on the one hand, symptoms that are typical of affective disorder with highly volatile mood changes and, on the other hand, symptoms that are typical of schizophrenia with delusions that are unusual for the current mood of the person (mood-incongruent delusions).

8.4.4.2.5 Affective disorders (ICD-10 F30–32.3)

The key symptoms of affective disorders are changes in affect, or mood, to depression or elevation of the mood to mania. The mood change is usually accompanied by a change in general activity level. Other symptoms are either secondary or readily understandable in the context of the change in mood and activity. Affective disorders have a recurring tendency, and individual episodes can be triggered by stressful life events or situations.

One example of such a disorder is «manic episode», which denotes single episodes in which the elevation of the mood, the excessive motor activity, the racing thoughts and loquaciousness can be so extreme that the person is unintelligible or unavailable to ordinary communication. Another example is «bipolar affective disorder», which is characterised by one mania and two or more episodes of elevated or lowered mood and significantly disturbed activity levels. A third example is «depressive episode», in which the patient suffers significantly depressed mood, reduced energy and activity, and which may include, inter alia, hallucinations and delusions of a self-reproaching nature (mood congruent).

8.4.4.2.6 Mental and behavioural disorders associated with the puerperium (ICD-10 F53)

Important life events, like giving birth, may trigger serious mental disorders, for example bipolar disorder. Consequently, postnatal psychoses are not an independent group, but known types of psychosis that will start with a puerperal psychosis. It is an acute psychotic reaction that will normally occur immediately after or during the first weeks after birth, often with a set of symptoms corresponding to an acute polymorphic psychotic reaction.

Puerperal psychosis is often characterised by depression or unusual agitation (mania), delusions (impaired sense of reality) or confusion with regard to time, place or situation. A puerperal psychosis may also have a more schizophrenia-like clinical manifestation, without distinct elation or depression.[277]

The risk of psychosis is 20–25 times higher in the puerperium than at other times in life, but the risk is nonetheless very low and only one to two of every 1,000 women giving birth are affected. This implies that about 60–120 women suffer a puerperal psychosis in Norway every year. If a woman has suffered a psychosis previously in life, there is a 30–50 percent risk of relapse in the postnatal period.

Box 8.2 Mental and behavioural disorders associated with the puerperium

A young woman had killed her child in immediate connection with the birth. She was described as inconspicuous immediately after birth, but was unable to recall emotions and thoughts in connection with pregnancy and birth during the psychiatric examination after the

[277] Norwegian Institute of Public Health (2007).

homicide. The examining physician considered her to be somewhat immature, but found her to be neither psychotic, nor suffering from a personality disorder.

Danish case law, Danish Forensic Medicine Council, annual report 2000, p. 91 onwards.

8.4.4.2.7 Unspecified nonorganic psychosis (INA) (ICD-10 F29)

The unspecified psychosis diagnosis includes cases in which it is evident that a person suffers a psychotic disorder, but in which it cannot be established with any certainty what type it is.

One example is a person with persistent auditory hallucinations without clear delusions or a clear loss of functioning. Another is psychoses in which it is unclear whether the use of intoxicants may play a role. Unspecified psychosis is, in other words, an exclusionary diagnosis. It requires thorough examination and regular reassessment.

Box 8.3 Psychotic disorder in the perpetrator

A had abused alcohol since he was 13 years, and illegal intoxicants since he was 15 years. He had subsequently been given methadone, but had still continued to abuse intoxicants. He had suffered mental symptoms since he was 16 years, partly serious, and been committed to a psychiatric institution 20 times. There had been doubt about his diagnosis, which had changed between mental disturbance caused by the abuse of intoxicants and personality disorders.

A had a criminal record. His last two convictions concerned threats and violence, partly serious, committed over a number of years and primarily against his mother. On this occasion he was indicted for, inter alia, threats likely to provoke serious fear. The experts found that A qualified for the diagnoses F20.0 Paranoid schizophrenia, F60.2 Dissocial personality disorder, F11.23 Opioid dependence during substitution treatment with methadone and F90.1 Hyperkinetic conduct disorder – ADHD.

Ruling published on p. 346 onwards of the 2010 volume of the Norsk Retstidende court reporter for the Supreme Court

8.4.5 Conditions associated with vulnerability to psychosis

8.4.5.1 Mental disorders

Persons with other mental disorders than psychotic disorders may experience symptoms and episodes of psychosis during stressful events like bereavement, intoxication or life threatening experiences.

This pertains, inter alia, to specific personality disorders categorised in ICD-10 F 60, which are characterised by deeply ingrained and enduring behaviour patterns, manifesting themselves as inflexible responses to a broad range of personal and social situations.

These include dissocial personality disorders (F60.2) and emotionally unstable personality disorders (F60.3). Persons with personality disorders may react with short-lived psychoses that come to an end either without intervention or through active treatment. See also 8.4.7 on comorbidity for further details.

8.4.5.2 Somatic disorder or injury

Somatic medicine is, as previously mentioned, the branch of medicine addressing the physical aspects of the body, in contrast to psychiatry, which is concerned with the disorders of emotional life.

Disorders that are traditionally considered somatic may also entail psychotic symptoms. Infectious and parasitic diseases (ICD-10 A00–B99) are well-known examples. These includes,

inter alia, malaria, which may cause conditions involving febrile delirium and psychosis. Diseases of the nervous system (ICD-10 G00–G99) may give rise to symptoms of psychosis, for example in case of epilepsy (G40)[278] and multiple sclerosis (G35). It may also happen that a person develops symptoms of psychosis following serious head injuries.[279]

8.4.5.3 Use of dependence producing substances – psychosis triggered by intoxicants (ICD-10 F10-F19)

8.4.5.3.1 General remarks on intoxicants

Intoxication is a specific mental and physical state of euphoria that occurs fairly immediately after the ingestion of various chemical substances. Substances that cause intoxication include both lawful merchandise like alcohol, solvents, glues and medicines, as well as unlawful narcotic drugs such as, for example, amphetamine or cocaine.[280]

The pharmacological effects of intoxicants can be classified into three main categories: Sedative (tranquilisers, soporifics, analgesics, morphine/heroin, GHB), stimulating (cocaine, amphetamine) and hallucinogenic (LSD, miscellaneous mushroom species). The manifested symptoms will depend on the type of intoxicant and the quantity of such intoxicant ingested. Some intoxicants may have different effects; cannabis may for example have both a sedative and a hallucinogenic effect; cf. 9.5.3.2.2 for further details.

Common side effects following the ingestion of intoxicants are lack of concentration, memory lapse, reduced learning capacity, poor judgment, increased impulsivity and impairment of the brain function that ensures coordination between what one has intended to do and what one does. In addition, individual intoxicants will entail specific effects associated with the substance in question, such as for example a feeling of tranquillity, well-being or apathy when using sedatives like alcohol or soporifics. Individual behaviour in a state of intoxication is determined by the interaction between the pharmacological effects of the intoxicants and person-specific factors.[281]

There is often a link between intoxication disorders and violence. Most studies of violence have concluded that intoxication disorders are the most important mental health factor alongside dissocial personality disorder. The use of alcohol is related to a larger portion of serious violent incidents than any other intoxicant.[282]

8.4.5.3.2 Substance-induced psychoses

Substance-induced psychoses are psychotic symptoms induced by intoxicants. Such symptoms may occur during or shortly after the ingestion of these.[283] Both healthy and non-healthy persons are, to varying degrees, susceptible to such reactions.[284] Psychotic symptoms may also be triggered by the absence of a substance that has produced dependence, in which case these are termed withdrawal reactions.

[278] Henning and Nakken (2013).

[279] For example ICD-10 F06.0 Organic hallucinosis, DSM-5 Psychotic disorder due to another medical condition, With hallucinations, and ICD-10 F06.2 Organic delusional disorder, DSM-5 Psychotic disorder due to another medical condition, With delusions.

[280] Norwegian Institute of Public Health (2008).

[281] Official Norwegian Report NOU 2010: 3, p. 270.

[282] Norwegian Directorate of Health (2012a), p. 30.

[283] ICD-10 F1x.5.

[284] Official Norwegian Report NOU 2010: 3, p. 63.

The psychotic symptoms will usually abate after a week of abstaining from the ingestion of intoxicants. Consequently, the duration of psychotic symptoms after the use of intoxicating substances has been discontinued is often used as a criterion for distinguishing substance-induced psychoses from other psychoses. In case of the persistent abuse of intoxicants, the requirement under ICD-10 is that the person with psychotic symptoms shall have partial recovery after one month and full recovery after 6 months.[285]

It is challenging to distinguish, in clinical practice, between, on the one hand, substance-induced psychosis and, on the other hand, psychosis (primary psychosis) not caused by the use of intoxicating substances, although accompanied by the simultaneous use of intoxicants. This is because of the considerable similarity between clinical symptoms. The Norwegian Directorate of Health's national medical guidelines on the examination, treatment and follow-up of persons with simultaneous intoxication disorder and mental disorder state, inter alia, the following:

> «Abuse of intoxicants and mental disorders represent an interaction between biological dispositions and psychosocial experience. A psychosis may, for example, be the direct result of the use of intoxicants, but be perceived as a non-substance-induced psychosis. On the other hand, persons who are obviously under the influence of intoxicants may also suffer an underlying state of psychosis that is not discovered because it is camouflaged by the intoxicated behaviour».[286]

Knowledge of any medical history in relation to psychiatric symptoms and the use of intoxicants, and knowledge of any prolonged period of non-use of intoxicants, are key factors in the assessment as to whether it is an independent psychotic disorder or one is faced with the secondary effect of the use of intoxicants. The guidelines of the Norwegian Directorate of Health also emphasise that interpretation of the findings from the examination must reflect whether the patient was using intoxicants during the examination period, suffered withdrawal reactions or experienced a compulsion to take the substance.[287]

There is assumed to be various temporal relationships between psychotic disorders and intoxication disorders. The person may have a primary intoxication disorder and a secondary psychotic disorder, or a primary psychotic disorder and secondary intoxicant abuse, or these may occur simultaneously through joint triggers.

Box 8.4 Psychosis triggered by intoxicants in the perpetrator

A young man of 17 years and 9 months had late at night hidden in his father's bedroom on the first floor of the home, having beforehand equipped himself with a knife, which he had tucked inside his waistband to enable him to defend himself against demons and evil spirits.

Quarrelling and tongue-lashing ensued when his father encountered him in the bedroom. He believed the father to be a demon. The course of events subsequently involved him stabbing and cutting his father repeatedly in the head, face and neck, which resulted in his death. Following the father's death, the accused thrust a ballpoint pen into the father's left eye, with only a minor part of the pen being visible on the outside. He thereafter called the police.

[285] ICD-10 F1x.5.

[286] Norwegian Directorate of Health (2012a), p. 41.

[287] Norwegian Directorate of Health (2012a), pp. 45–46.

At the time of committing the homicide, the perpetrator had hashish in his body corresponding to a blood alcohol concentration of less than 0.05 (percent by volume). He had used hashish regularly and, after a while, very frequently for about two years. The experts were of the view that the man was psychotic when he committed the homicide.

Ruling published on p. 774 onwards of the 2011 volume of the Norsk Retstidende court reporter for the Supreme Court. The ruling concerned the sentencing.

8.4.5.4 Abuse of non-dependence producing substances (ICD-10 F55)

Medicines may trigger symptoms of psychosis. Examples are anti-malarial medication and corticosteroids used in the treatment of chronic inflammation and cancer, as well as in connection with transplants.[288]

Harmful use or abuse of non-dependence producing substances covers a wide range of medications, including, inter alia, hormones like anabolic steroids. The use of such substances is considered a fairly rare phenomenon in Norway, but has been widespread in certain circles.[289] The possibility that anabolic steroids are a risk factor for violent crime cannot be excluded, but research-based knowledge on this is rather limited.[290] It is unclear, and subject to some disagreement, whether anabolic steroids may result in psychotic symptoms.

8.4.6 Diseases and disorders without psychotic symptoms in which consciousness, as well as emotional or cognitive functions, may be affected to a significant extent

8.4.6.1 Theme

In the following will be discussed certain medical conditions in which consciousness, as well as emotional or cognitive functions, may be affected to a significant extent, but which are not categorised as psychotic disorders and which are not associated with the occurrence of psychotic symptoms.

8.4.6.2 Mental retardation (ICD-10 F70–F79)

Mental retardation, or intellectual disability, denotes a low intellectual functional ability which is congenital or has occurred in infancy, and which persists for the rest of the person's life. The condition may be caused by hereditary factors, congenital metabolic abnormalities, chromosome abnormalities (e.g. Down's syndrome), injuries or disorders in the embryonic stage, at birth or in infancy. The condition must be distinguished from conditions characterised by impaired cognitive abilities in which the person has previously been within the normal range of intellectual function (dementia).

In ICD-10, the codes F70–F79 specify the medical understanding of «mental retardation». The ICD-10 classification uses intelligence quotient (IQ) to assess the degree of retardation, as supplemented by a clinical evaluation, which may involve the use of structured evaluation forms.

Scores on IQ tests are calculated on the basis of the number of correct answers to a range of questions. The calculation takes age and education into account. The average quotient (the av-

[288] Norwegian Institute of Public Health (2014), Norwegian Medicines Handbook (2013a) and Norwegian Medicines Handbook (2013b).

[289] Sandøy (2013).

[290] See Thiblin et al. (2013), pp. 12–13, Report No. 30 (2011–2012) to the Storting, pp. 55–57, Official Norwegian Report NOU 2010: 3, Appendix 4, p. 269, and Rashid et al. (2007).

erage score) on such tests in the adult population has been set at 100. A test provides a measure of performance in a defined situation. This means that the score on any test, including an IQ test, depends on various individual circumstances, such as e.g. whether the person is having a good day, and external circumstances, including which society one grew up in.

Scores on IQ tests shall always be examined in the context of other information one may have about the person sitting the test, and decisions based on IQ tests need to be evaluated against general knowledge about intelligence. The most common test for measuring IQ in adults is the Wechsler Adult Intelligence Scale (WAIS).

Mental retardation is commonly classified into four categories. IQ does not enable intelligence to be determined with absolute precision, and the various diagnoses are therefore defined by the use of intervals, accompanied with a description of functioning in each of the four categories:

- *Mild mental retardation (F70).* Indicative IQ range of between 50 and 69 (in adults, a mental age of between 9 and 12 years), normally resulting in learning difficulties at school. Many adults are capable of working, maintaining good social relations and playing a useful role in society.
- *Moderate mental retardation (F71).* Indicative IQ range of between 35 and 49 (in adults, a mental age of between 6 and 9 years), normally resulting in marked disability in childhood, but most persons can be trained to develop some extent of independence in terms of looking after themselves, achieving adequate communication and acquiring some educational skills. Adults will need varying degrees of support in order to live and work in society.
- *Severe mental retardation (F72).* Indicative IQ range of between 20 and 34 (in adults, a mental age of between 3 and 6 years), normally resulting in a need for continuous care.
- *Profound mental retardation (F73).* IQ of less than 20 (in adults, a mental age of less than 3 years), resulting in severely limited capacity for self-care, bladder and bowel continence, communication and mobility.

These are supplemented in ICD-10 by the residual diagnoses F 78; Other mental retardation, and F79; Unspecified mental retardation.

Several complicating factors may be encountered when it comes to examining and diagnosing psychotic disorders in disabled persons. There may, inter alia, be a considerable overlap in symptoms between intellectual disability and psychosis. See 8.4.7 on comorbidity. Such diagnostic overlapping may result in all difficulties experienced by persons with disabilities being attributed to their disability, which may result in persons with both disability and psychosis not getting the appropriate diagnosis and treatment.[291]

Box 8.5 The perpetrator had an intellectual disability

A 28-year old disabled man was sentenced to compulsory care for two instances of violence and attempted rape of two women. The court concluded, based on a psychiatric expert evaluation, that the perpetrator was arrested in his mental development already from birth, and he was reported to have exhibited considerable aggression and acting-out in relation to peers, teachers and family throughout his childhood. He had been committed numerous times to psychiatric institutions as a child, youth and adult. The Court of Appeal found that there was a

[291] Norwegian Directorate of Health (2013a), p. 146.

significant risk of repetition of further serious sexual offences and sexualised violence unless he was subjected to compulsory care.

Judgment of 30 September 2009 from the Gulating Court of Appeal.

Box 8.6 The perpetrator had an intellectual disability

A 16-year old intellectually disabled boy committed several instances of sexual abuse over time against a friend who was 5 years younger, by the use of threats. The Court of Appeal concluded that A was intellectually disabled to a high degree at the time of committing the act. This was in line with the psychiatric opinions. The experts had concluded that A qualified for the diagnosis F71.0; Moderate mental retardation.

Judgment of 11 April 2011 from the Gulating Court of Appeal.

8.4.6.3 Pervasive developmental disorders (ICD-10 F80–F89)

8.4.6.3.1 General remarks

Autism spectrum disorders are a type of developmental disorders that are characterised by abnormalities in reciprocal social interactions and in patterns of communication, as well as by repetitive behaviour.[292]

A Swedish report has concluded that the disorders may result in «such a distorted perception of reality or impaired ability to exercise control that he or she is unable to relate his or her actions to their factual context».[293]

Some persons with such disorders have severe intellectual disabilities and very limited command of language, whilst other have good intellectual abilities and normal language skills. Difficulties in understanding other people and participating in reciprocal social interactions with others are the most distinctive characteristics in those with normal intellectual abilities.

The extensive variation in the range of symptoms has given rise to the concept of a «spectrum» of disorders. Childhood autism,[294] atypical autism,[295] Rett's syndrome[296] and Asperger's syndrome[297] are the most common diagnoses in the autism spectrum.

The incidence has increased in recent years, i.e. more people receive diagnoses in the autism spectrum now than before. The main reason for this is probably that more knowledge has been accumulated about autism spectrum disorders, and that those who work in kindergartens, public health centres, as well as psychiatric policlinics for children and youth, know more about which signs to look for. There are also more people with milder symptoms and normal intellectual abilities who receive diagnoses in the autism spectrum now than before.

8.4.6.3.2 Asperger's syndrome (ICD-10 F84.5)

The diagnostic description of Asperger's syndrome under ICD-10 is the existence of qualitative abnormalities of social interaction, together with a restricted, repetitive and stereotyped

[292] Norwegian Institute of Public Health (2006).

[293] Swedish Government Official Report 2012:17, pp. 544–545.

[294] ICD-10 F 84.0.

[295] ICD-10 F 84.1.

[296] ICD-10 F 84.2.

[297] ICD-10 F 84.5.

repertoire of behaviour, interests and activities. There may also be problems in communication similar to those associated with autism, including highly literal interpretations.

One key problem for many of those with Asperger's syndrome is that they do not understand how their conduct affects other people. This is often termed empathy deficit (or lack of mentalisation), and is characterised by lacking the necessary qualities, both cognitive and emotional, for appreciating how one's actions affect other people.

Official Norwegian Report NOU 2010: 3, *Homicides in Norway over the period 2004–2009*, raised the issue of whether persons with Asperger's syndrome were overrepresented amongst persons who commit serious violence, or whether there exists any causal link between such syndrome and acts of serious violence.[298] The authors were unable to identify any studies that have taken account of any overrepresentation of other risk factors amongst persons with Asperger's syndrome.

Box 8.7 The perpetrator had Asperger's syndrome

A young woman had killed her mother. During observation after the homicide, several examples were discovered of the woman having misinterpreted the wishes and intentions of other people. Besides, she had many rituals with regard to meals and toilet visits. She talked monotonously and could be difficult to break off. She was literal in her perception of the outside world and focused on details. She was found, on the basis of an overall assessment, to meet the diagnostic description of Asperger's syndrome. See also the examples in Box 8.13 and Box 8.15 in 8.6.2.

Danish case law, Danish Forensic Medicine Council, Annual Report 2003–2005.

8.4.6.4 Diabetes-related disorders (ICD-10 E10–E16)

Hypoglycaemia is a state of abnormally low blood sugar levels and hyperglycaemia is a state of abnormally high blood sugar levels.[299] Common symptoms of hypoglycaemia are shakiness, sweating, thirst, hunger, irritability and aggression, blurred vision, concentration difficulties and slurred speech. Very severe hypoglycaemia may result in convulsions and a state of coma. Severe hypoglycaemia over a protracted period may result in brain damage. However, hypoglycaemia can also be without symptoms.

Hypoglycaemia may be caused by disease or by the use of medications. Diabetes is a disease caused by reduced or impaired insulin production, potentially in combination with a failure of the cells to respond to insulin properly (insulin resistance). Diabetes I and II are associated with hyperglycaemia if untreated, and may result in hypoglycaemia in case of excessive doses of insulin or anti-diabetic medications, in case of low food intake or in case of high physical activity.[300] The disease is a chronic metabolic disorder with many causes. Well-regulated diabetes will almost never result in hypoglycaemia.

Symptoms of hypoglycaemia vary from person to person, but symptoms in any given individual will often occur at specific blood sugar levels and may serve as an indicator of how serious the hypoglycaemia is.

[298] Official Norwegian Report NOU 2010: 3, pp. 48–49.

[299] Norwegian Directorate of Health (2009), p. 13.

[300] ICD-10 E10. Type 1 diabetes mellitus.

Box 8.8 Hypoglycaemia

A man was convicted of negligently causing death by dangerous driving after violation of Section 239 of the Penal Code and Sections 3 and 21 of the Road Traffic Act. The accused had type 1 diabetes. He became hypoglycaemic towards the end of a long drive (250 km), and had a head-on collision with an oncoming vehicle. The driver of the other car was killed. The Court of Appeal concluded that the accused was to blame for showing gross negligence by failing to monitor his blood sugar levels during the drive through blood sugar measurement, and instead assuming that hypoglycaemia could be staved off through food intake and refraining from taking insulin.

Judgment of 29 August 2013 from the Gulating Court of Appeal. See also judgments of 14 September and 3 November 2011, respectively, from the Hålogaland Court of Appeal.

8.4.6.5 Epilepsy (G40)

Epilepsy (convulsive seizure) is a symptom of various disorders sharing the common characteristic that these result in a functional disturbance in the brain in the form of a sudden and uncontrolled interference with electric activity in the cerebral cortex. The cause of epilepsy can be brain disease or injury, but in most cases no definite cause can be established.

Epileptic seizures can be classified into two main groups, depending on where in the brain the seizure starts. Generalised epilepsy starts simultaneously throughout the brain and is typically manifested in convulsive seizures. The person will then lose consciousness, the body will become rigid, and convulsive movements will follow.

Focal or partial epilepsy have their onset in one specific area of the brain. The nature of the seizures depends on where in the brain the functional disturbance occurs. These may occur when the person is fully conscious, in the form of, inter alia, twitching in a hand or mental symptoms like anxiety or hallucinations. The seizures may also manifest themselves through impaired consciousness and longer response times, for example in the form of arbitrary movement and other automatisms.

Periods of consciousness disturbance may occur in the wake of a seizure. Epilepsy may also cause mental disorders, for example organic personality disorder and dementia.

8.4.6.6 Dementia (ICD-10 F00–F03)

Dementia is a syndrome caused by disease of the brain, usually of a progressive and chronic nature. The disorders are characterised by significant cognitive impairment in the form of disturbance of memory, attention, orientation, concentration, comprehension, calculation, learning capacity, language and judgement. Potential accompanying symptoms are paranoid symptoms, hallucinations and affective symptoms. The level of consciousness is not impaired.

In incipient dementia, the cognitive impairment becomes gradually more extensive over time. Dementia will in most cases develop over several years, but may evolve more rapidly. The primary criterion for determining the existence of the disorder is a definite impairment of memory, concentration and attention, which reduces the ability to perform the activities of daily life.

Box 8.9 The perpetrator was dement

A 69-year old physician was sentenced to 12 months' imprisonment, of which 10 months was suspended, by the District Court for having on numerous occasions engaged in sexual acts with a drug-addicted female patient, in return for prescribing medications to her without any adequate medical basis. The physician appealed the sentencing.

When the case was heard before the Court of Appeal, the physician was committed to a nursing home in an advanced stage of dementia. He did not attend the appeal hearing. The Court of Appeal noted that it was concluded in the opinion from the experts that it was obvious that «A also at the time of committing the act was suffering a certain degree of dementia (senility) that would appear, in particular, to have inflicted cognitive impairment symptoms on him, with attendant lack of discernment, poor judgement, enfeebled memory, emotional regression and brutalisation of the personality.»

The quoted passage was further supplemented and emphasised in the testimony rendered by one of the experts during the appeal hearing, and it was concluded that it had to be assumed that A also at the time of committing the act had «a significantly impaired ability to realistically assess his or her relationship with the outside world».

Judgment of 23 March 2004 from the Agder Court of Appeal.

The dementia diagnosis is based on conversations with the patient and next of kin, as well as various tests. Examination of cognitive functions takes the form of neuropsychological evaluation. An important part of the process of establishing a diagnosis is to exclude other potential causes of impairment in the memory function, such as for example depression and general physical frailty: The syndrome of dementia is encountered in the form of Alzheimer's disease,[301] cerebrovascular diseases,[302] Parkinson's disease,[303] other degenerative cerebral diseases, systemic diseases leading to cerebral dysfunction, as well as other and unspecified dementia.[304]

Box 8.10 The perpetrator was dement

A was in his fifties and ran his own estate agency. He embezzled money in connection with an instruction to assist in the sale of a home, with the purchaser paying the amount as a deposit against the purchase price. Prior to the criminal acts, A was subjected to a comprehensive neuropsychological examination in hospital, which showed that «there was encephalopathy (disease of the brain), which was assumed to be caused, in part, by long-term alcohol abuse, but with the possibility that there could also be premorbid contributory personality traits, alternatively traumatic brain injury, alternatively early onset dementia».

Subsequent radiological examination of the brain by computed tomography (CT) demonstrated cerebral atrophy. The medical certificate from the hospital stated that A's intellectual functioning was «quite clearly» «significantly impaired». It also followed from the opinion that A had «very poor impulse control» and that these factors «are associated with a predilection for impetuous acts».

Ruling published on p. 632 onwards of the 1989 volume of the Norsk Retstidende court reporter for the Supreme Court

8.4.6.7 Delirium (ICD-10 F05)

Delirium is a state of acute non-specific disturbances of brain functioning. The symptoms of delirium are concurrent rapid onset fluctuations in consciousness, reduction in attention and ability to concentrate, amnesia, language disturbances, impairment of the ability to formulate

[301] ICD-10 F 00.

[302] ICD-10 F 01.

[303] ICD-10 F 02.

[304] ICD-10 F 03.

problems, as well as to plan and perform tasks, and changes in psychomotor speed. Brief hallucinations and aggression may occur.

Factors that reduce the delirium threshold are, inter alia, old age and various chronic disorders like dementia, Parkinson's disease and stroke. The triggers include sudden onset fever, pain, infections, traumas, operations and various medications. Norwegian studies show that 15 to 30% of patients above the age of 75 years in emergency admissions to medical wards suffer a delirium. About 25% of patients with dementia disorder suffer periods of delirium. Most are cured within four weeks.

8.4.6.8 Psychoactive substance use

8.4.5.3.1 and 8.4.5.3.2 provide a general description of the impact of intoxicants on the brain and of pathological intoxication. Ingestion of intoxicants may result in significantly impaired consciousness.

Some effects of intoxicants are known to be less frequently than others. A distinction is made between poisoning and self-induced poisoning in relation to acute intoxication. «Pathological intoxication» (F10.07) applies to alcohol and is defined as follows:

> «Sudden onset of aggression and often violent behaviour that is not typical of the individual when sober, very soon after drinking amounts of alcohol that would not produce intoxication in most people.»

Box 8.11 The perpetrator had ingested psychoactive substances

A was a middle-aged man with a permanent job. He had previously been fined twice in connection with criminal acts committed during alcohol intoxication. A had no previous convictions for acts of violence. A had been drinking a considerable amount of alcohol during the course of the night.

B was going to work early in the morning and was walking on a public road close to the city centre. B was pulled down from the road and sexually abused, with A using extensive violence during the fight to hold on to B and undress B. A then continued the use of violence by placing B in a stranglehold until B died, following which A flew from the scene and tried to hide from the police.

Ruling published on p. 1521 onwards of the 2005 volume of the Norsk Retstidende court reporter for the Supreme Court

Reference is made to 9.5.3.2.1 for further details.

8.4.6.9 Dissociative disorders (ICD-10 F44)

Dissociative disorders or conversion disorders are mental conditions characterised by partial or complete loss of the normal integration between consciousness, memory and awareness of identity, coupled with a loss of control of bodily movements.[305] Dissociative symptoms may be part of the clinical picture of other mental disorders.

The onset of the symptoms is in most cases sudden, without any other identifiable disorder (e.g. neurological disorder) that can explain such symptoms. Development of the symptoms is associated closely in time with traumatic life events or serious conflicts with others. Persons with dissociative disorders will often themselves deny such events and conflicts, and it can be

[305] DSM-IV, p. 766.

very challenging to assess whether some of the loss of functions has been under voluntary control.

8.4.6.10 Head injuries (ICD-10 F00–09)

A head injury may cause disorders and afflictions of a neurological, cognitive, emotional and behavioural nature. A neurological implication may be sensory disturbance, a cognitive implication may be attention deficit, and an emotional implication may be personality change or depression.[306] Mental disorders caused by head injuries are diagnosed as organic mental disorders (F00–09).

8.4.6.11 Isolated symptoms relating to cognition, perception, emotional state and behaviour

Human cognition, perception, emotional state and behaviour may under certain circumstances be impaired by a number of mental disorders. Symptoms of these, when they do not form part of a mental disorder pattern, are classified under ICD-10, Chapter R.

The diagnoses specified therein shall, inter alia, be used when no more specific diagnosis can be made even after all the facts bearing on the case have been investigated, or when the signs and symptoms proved to be transient and their causes could not be determined.

Of particular relevance are the categories R40 «Somnolence, stupor and coma» and R41 «Other symptoms and signs involving cognitive functions and awareness», since these include, respectively, coma or unconsciousness and confusional states. In addition, R55 «Syncope and collapse» may be mentioned, including fainting.

8.4.7 Comorbidity

Comorbidity is the simultaneous presence of two or more disorders within a defined period of time.[307] Other terms denoting the same phenomenon are «multiple morbidities», «co-occurring disorders» and «dual diagnosis».

Comorbid mental conditions occur frequently in persons with psychotic disorders. The most common of these are anxiety disorders, depressive disorders, personality disorders and the use of intoxicants.[308] As far as the use of intoxicants and addictive behaviour is concerned, it has been found that persons with psychosis are more likely than the general population to use illegal drugs and alcohol.[309] And a number of studies find that patients with bipolar disorder or schizophrenia abuse intoxicants more frequently than do persons with other mental disorders.[310] Symptom combinations complicate the diagnostic evaluations.

Persons with intellectual disability may contract the same mental disorders as others. Findings from epidemiological studies suggest that persons with intellectual disabilities are more vulnerable to mental disorders and somatic disorders than the general population. The reasons for this are assumed to be partly biological (genetic faults, brain damage) and partly psychological (stigmatisation, lack of social integration).[311]

[306] Solbakk et al. (2008).

[307] Dahl and Grov (2014), Norwegian Directorate of Health (2013a), pp. 33–37, and Norwegian Institute of Public Health (2009), p. 21.

[308] Norwegian Directorate of Health (2013a), p. 33.

[309] Norwegian Directorate of Health (2013a), p. 36.

[310] Norwegian Directorate of Health (2012a), p. 30.

[311] National Institute on Intellectual Disability and Community (2010).

8.5 The insanity rule – the criterion «psychotic»

The Committee recommends that the insanity rule be based on a medical model, and believes that the conditions falling within the scope of the medical psychosis concept should qualify for punishment exemption if symptom intensity exceeds a certain threshold; cf. 8.3.4 and 8.4.

The reasons why it is appropriate to formulate the insanity rule on the basis of the medical term «psychotic» will be outlined in more detail in the following. Thereafter will be discussed whether a rule granting punishment exemption on the basis of a medical model is too broad in scope, and whether the rule should be supplemented by narrowing criteria. The issue of whether the term «psychotic» does, on the contrary, overly restrict the scope of the rule is addressed in 8.6 below.

The medical psychosis concept encompasses the most confused persons in society – those who because of their condition are unable to perceive the outside world in a realistic manner; cf. 8.4.3. These are usually considered in the context of mental disorders such as schizophrenia, but the symptoms may also be caused by other factors such as poisoning or brain damage.

What characterises psychotic conditions is that these lead to a distorted perception of reality or a lack of control. Key positive symptoms include, inter alia, hallucinations, delusions and cognitive distortions. Key negative symptoms include, inter alia, apathy, cognitive impairment and paralysis of will.

The Committee is of the view that the said symptoms are of general relevance in determining the criminal capacity of the perpetrator. If a person is profoundly affected by such symptoms, the fundamental prerequisites for imposing criminal liability have not been met; cf. 6.2 and 8.2.

The basic perspective is that the medical psychosis concept focuses, in a suitable and relatively clear manner, the insanity rule on the group of severe mental aberrations that should result in a punishment exemption. The term «psychotic» defines, more precisely than any other available term, the group of severe mental aberrations that deprive a person of criminal capacity.

The term «insane» was previously used to label this group, which was expedient since it was used as a medical terms, which had a relatively clear meaning. The term «insane» is nowadays predominantly used in colloquial language, and then as a synonym for «mad», etc.
The position of the Committee is, as noted in 8.3.4.4, that such terms are too vague to be used in a criminal insanity rule. Another argument against using terms like «insane» and «mad» in the legislative wording is the need to avoid unnecessarily stigmatising this group of persons.
By using medical terms to define the scope of criminal insanity one may ultimately risk that the general public gets the incorrect impression that there is a causal link between medical diagnoses and criminal acts. This may again result in those with such a diagnosis being considered dangerous, including those who have never committed, or can be expected to commit, any crime. However, it would not seem likely that such unfounded conclusions would gain widespread acceptance. See 9.5.3.3 and 24.1.3 for further discussion of links between mental aberrations and crime.

However, a criminal insanity rule should only apply to a person who was, as a matter of fact, unable to assess his or her relationship with the outside world. Only then can it be concluded that he or she was generally without insight into the factual and legal aspects of the case, and hence without the capacity to control his or her own conduct.

The medical psychosis concept, as defined in the ICD-10 diagnosis system, does not distinguish between more and less intense symptoms. Consequently, a criminal insanity rule cannot be fully based on the medical psychosis concept, which has been established for the purpose

of diagnosing and subsequently treating disorders; cf. 8.4.2.3 above. There is a need for further clarifying the term, to prevent the scope of the rule from being too broad for criminal law purposes.

In order for a person to be deemed of unsound mind for criminal law purposes, it must be a requirement that the psychosis symptoms are of such intensity that he or she is generally, and with a high degree of certainty, unable to assess his or her relationship with the outside world. This is also the rule under current law; cf. 6.4.3.

When drafting the current insanity rule, the question arose of whether the psychosis criterion should be defined more precisely in the legislative wording. The Special Sanctions Committee proposed that the term «psychotic» be supplemented by the following clarification: «and thus unable to realistically assess his or her relationship with the outside world». On that occasion, the said proposal was not endorsed by the Ministry:

> «It must be expected of those persons who will first and foremost be applying the provision, i.e. lawyers with the assistance of psychiatrists, that these are aware of what characterises a state of psychosis. For them, such clarification will be unnecessary. Most people, on the other hand, probably do not know much about what characterises a psychosis. However, the Ministry is of the view that for them such a clarification would be confusing rather than informative, since some psychotic offenders might nonetheless retain, to a greater or lesser extent, a capacity for realistic assessment.»[312]

The Committee recommends a legal clarification of the term psychosis, not least in view of experience with the application of the current rule. There is, for pedagogic reasons, a need for highlighting what characterises aberrations that shall result in the perpetrator not being considered criminally responsible. However, the Committee does not recommend the earlier clarification proposal, since the rationale behind the punishment exemption is not exclusively related to the cognitive and emotional abilities of individuals. The Committee proposes a specific supplement to the legislative wording, specifying the most prominent and severe symptoms of psychosis, i.e. «functional impairment, distorted thinking and otherwise inability to understand his or her relationship with the outside world». This is discussed in more detail in 8.6.

The question is whether the said rule and current law are nonetheless too broad in scope. Said question arises because it cannot necessarily be excluded that a symptom-intensive psychotic person has adequate «pockets» in which his or her behaviour is virtually normal; cf. 8.4.3.4. And even if the psychosis affects the entire personality, it is not necessarily the case that there is always a link between the disorder and the committed acts. However, as noted by the Special Sanctions Committee at the time, such is highly unlikely to be the case when the meaning of the initial criterion «psychotic» is already as restrictive as outlined above; cf. also 8.3.4.5 for further details.[313]

In any circumstance, a further clarification of the rule to exclude the above possibilities would require specific narrowing criteria, thus resulting in a rule based on a mixed model. There are weighty arguments against such a formulation of the rule; cf. 8.3.4.

This suggests, all in all, that a criminal insanity rule featuring a restricted psychosis criterion provides an appropriate specification of the mental aberrations that should exclude criminal liability.

[312] Proposition No. 87 (1993–94) to the Odelsting, pp. 28–29.

[313] See Official Norwegian Report NOU 1990: 5, p. 47.

A rule starting out from the term «psychotic» is focused on the absolutely key aberrations and symptoms that constitute the rationale behind a criminal insanity rule, primarily because it requires the symptoms to be of a certain intensity; cf. 6.4.3 and 8.3.2.

8.6 The insanity rule – further delineation

8.6.1 Theme and structure

One of the issues addressed in 8.3 and 8.5 was whether the term «psychotic» in a punishment exemption rule based on the so-called medical model is too broad in scope, and whether such rule should be supplemented by narrowing criteria. The issue addressed in the following is, in line with the mandate of the Committee, whether current insanity rules are too narrow in scope.

There are two main reasons why this issue arises: Firstly, it may be asked whether the term psychosis encompasses all aberrations that should potentially qualify for a punishment exemption. Secondly, the delineation of the term may give rise to doubt, and the specific diagnostic and legal assessment may be subject to uncertainty.[314]

Current law does not allow for any punishment exemption for a person who commits a criminal act when suffering a mental aberration that cannot be characterised as psychosis, automatism or intellectual disability of a high degree. However, Section 56, letter c, of the Penal Code allows for the possibility of a reduction in punishment in respect of certain mental aberrations that fall outside the scope of Section 44 of the Penal Code.

In the following will first be outlined, in 8.6.2, certain aberrations which are not encompassed by the psychosis criterion in the Penal Code, but which can nonetheless be said to have the same bearing on the criminal responsibility of the perpetrator, in view of the criminal law rationale behind the insanity rule.

Thereafter, in 8.6.3, is provided an account of current law and the background to why the provisions do not, in fact, allow for a punishment exemption in respect of such severe aberrations that are not encompassed by the term psychosis. 8.6.4 and 8.6.5 discuss previous reform proposals and related assessments of prevailing law. The legal situation in some other countries is reviewed in Chapter 7, which review shows that the Norwegian insanity rule deviates, in this respect, from the regime in countries with which Norway is often compared.

Finally, the assessment and recommendations of the Committee are presented in 8.6.5.

8.6.2 Examples of severe mental aberrations that may fall outside the scope of the insanity rule

The Committee has in 8.4 provided an overview, based on medical methodology, of various mental aberrations that are so severe that these should, depending on the circumstances, qualify for a criminal insanity ruling. Most of the aberrations discussed fall within the scope of the medical psychosis concept, but some of them fall outside such scope.

Certain of the aberrations not encompassed by the term psychosis, will be encompassed by the categories «automatism» and «intellectually disabled to a high degree» in the current leg-

[314] See for example Waaben (1968), pp. 43–44, quoted in 7.2.2.

islation. However, others also fall outside the scope of these categories, or there may be reason to look into whether such is the case. Besides, there are some cases in which it may be unclear what type of aberration one is presented with.

This gives rise to the question of whether a punishment exemption rule should also be introduced in respect of such cases, because it may be unreasonable, or serve no purpose, to use punishment.

One category of such aberrations may be those that are clearly borderline with regard to the criminal law categories «psychotic», «in a state of automatism» and «intellectually disabled to a high degree». Such may, for example, be the case with a patient who has an underlying psychotic disorder, and receives treatment, thus resulting in reduced symptom intensity, but who nonetheless is highly aberrant in his or her manner of being as the result of comorbidity.

Examples of other aberrations that may be of relevance are diabetes-related conditions, dementia, such as in the context of Alzheimer's disease and Parkinson's disease, delirium, such as cognitive impairment and, potentially, hallucinations resulting from withdrawal reactions or high fever, mental and behavioural disturbances in the puerperium, as well as developmental disorders such as autism and Asperger's syndrome. Boxes 8.12–8.15 provide four examples illustrating that there may be a need for inclusion of certain of these aberrations.

The person discussed in Box 8.12 does not fall within the scope of the current Norwegian insanity rule. Her condition is not of a psychotic nature, and although she may at times have lost control of her temper, fits of rage are not encompassed by the legislative term «in a state of automatism». If, at certain times, her condition expresses itself with a certain vigour, with intense symptoms of confusion and impairment, it might be argued that it would be appropriate to make a specific assessment as to whether she is of sound mind within the meaning of criminal law.

Box 8.12 Brain damage

A 37-year old woman was convicted for threats of violence against a police officer who assisted in the involuntary committal of her – she was holding a large kitchen knife and stated repeatedly that she would stab him. She had previously led a completely ordinary life, and been well-functioning and well-adapted. She had never experienced problems in social contexts or suffered symptoms of mental disorder.

Four years prior to the threats, she was bitten by a tick, which resulted in a general impairment of her immune system. A herpes infection evolved in the frontal lobe of her brain, which resulted in brain damage. Indications of changes, especially to the right hand side of the frontal lobe, had been uncovered at the hospital, where epileptic seizures had also been observed. Her personality had changed after the tick bite, and she had noticed that other people had reacted to that. She talked a lot, suffered memory impairment and had a feeling of being continually inebriated. She had not previously suffered intoxication problems, but experienced intense reactions to alcohol and medications subsequent to these events.

Psychological tests uncovered reduced functioning, limited working memory, learning difficulties and problems with structure and independence in everyday life, as well as personality changes. This was accompanied by a significant increase in verbal activity, incoherent speech, a tendency to move away from topics of conversation and a willingness to pursue very far-fetched associations.

She remembered almost nothing of the acts that resulted in her conviction. It started with her nine-year old daughter lying on the floor «because she had given up», but she was unable to

explain what this meant. She recalled an altercation in the kitchen with all members of the family, before the police had «suddenly» arrived.

The specific circumstances and conduct of person A in the example in Box 8.13 are those of a highly aberrant person. He suffers Asperger's syndrome and borderline intellectual disability – his intellectual functioning is in the absolute bottom range of the normal spectrum – and obviously lacks an adequate understanding of his surroundings and what constitutes acceptable behaviour in relation to other people.

Box 8.13 Asperger's syndrome

A had been relocated several times during his childhood and had at times been placed in care by the child welfare services. He had experienced limited social contact with others and had no friends. He started to drink alcohol from his mid-twenties, which consumption could go on for several weeks with only brief intermissions. He has neither attended upper secondary school or vocational school, nor participated in working life, and had twice been committed to an institution for youth with behavioural difficulties. The observee was tested using WAIS-III, and was found to have an IQ of 73.

A was convicted of two counts of attempted rape. The modus operandi was much the same in both cases; burglary and attempted rape. In one of the cases he attempted to rape a woman whilst she had her child next to her in bed; a three-year old boy. The child started crying, and A had then tried to console the child by stroking its hair and saying «so, so, there is no danger». He simultaneously tried to penetrate the mother. When he did not succeed, he got dressed, entered the kitchen and got something to drink, before asking the woman, on his way to the exit and seemingly unperturbed, whether there was any possibility of him dropping by the following day as well.

Some people might object that everyone committing crimes like those committed by A are aberrant in their own way, and that A should therefore not be exempted from punishment unless he falls within the scope of one of the aberration categories already encompassed by Section 44 of the Penal Code. The reason why A is nonetheless used as an example in this case is that he belongs, in the view of the Committee, to an altogether distinct category, and that he illustrates, in a striking manner, the implications of current law not allowing for a nuanced assessment of his criminal capacity.

It would in itself take a lot to rape a woman when her child is sitting next to her on the bedside. Even the mildly aberrant person would shy away from letting a sexual urge run wild in such a situation. When such obstacle is nonetheless overcome, and A even starts consoling the child during the attempted rape to assure the three-year old that what he is doing is not dangerous, and that he should not cry, there can be no doubt that A is a person who is so aberrant that it would seem reasonable to conclude that he is of unsound mind within the meaning of criminal law.

It is true that A does not suffer delusions and hallucinations, as is observed in most persons with psychosis. However, his complete lack of any notion of the moral reprehensibility of his conduct, and his pervasive empathy deficit, both of which are the result of his condition, represent a distinct discrepancy from what is normally encountered in the ordinary assailant. It seems contrived to argue that A should be held liable in the same way as a rapist with ordinary intellectual abilities, who will have a much better understanding of what suffering he inflicts on his victims.

Without drawing any conclusion as to how the persons in these examples, or in the examples in Boxes 8.14 or 8.15, ought to be treated from a criminal law perspective, the Committee will

examine whether aberrations like those just mentioned suggest that there is a need for the scope of the insanity rules to be extended somewhat beyond their ambit under current law, potentially by allowing for more specific criminal insanity assessment in certain special cases. It is possible that the justifications for punishment are also not applicable in relation to some perpetrators who have suffered an aberration that does not qualify for any definite medical diagnosis. Besides, the medical diagnostic systems are not final or complete, as reflected in the fact that such systems are subject to continuous development and debate; cf. 8.4.2 for further details.

Box 8.14 Dementia

A man in his eighties, without any history of mental disorder, found it increasingly difficult, over a period of several years, to perform practical tasks around the home, and seemed confused to next of kin and neighbours in a number of situations. He became increasingly suspicious of the people around him and feared that someone would take his money. He was at times perceived as short-tempered and aggressive, and had on a few occasions used violence on his wife. He had put a knife in a handy place, to enable him to protect himself. One day he stabbed his wife so severely that she died from the wounds.

Box 8.15 Potential autistic disorder

B is a young man who has been convicted for several instances of sexual molestation of young boys. When B was 17 years old, he was convicted for having pulled down the pants of a nine-year old boy and licked the boy's sexual organ. B was after this examined by a psychologist, who found that he was lagging a number of years behind his peers in terms of emotional age. B was given a five-month suspended prison sentence, with a deferment period of two years. When B reached the age of 20 years, he was sentenced to prison for having repeatedly asked two boys of eight and nine years if he could «mess around with them» and «have a peek at their underpants». The psychiatric experts considered B to be intellectually disabled to a lesser degree, and diagnosed him with Asperger's syndrome. At the age of 21 years, B masturbated a five-year old, and was then sentenced to preventive detention, which he remains in.

B tends to use words that he does not understand and answers questions without any regard for the truth, based on what he believes to be expected of him. His ability to function in daily life is severely impaired. The experts in the earlier cases had trouble establishing any clear diagnosis. The test findings show that he had significant problems with planning, memory, organisation, implementation, evaluation and self-control. During his time in the preventive detention facility, B had an extensive need for help with daily tasks, and seemed to be in a worse condition than was indicated by the case documents. B does, for example, have a large vocabulary, but he does not understand the meaning of the words. If he feels that he is not being understood, he goes hiding in a cupboard. He does not remember instructions given only a short time ago, and constantly needs to be explained what preventive detention is.

It was very difficult to engage B in ordinary everyday activities, because of his poor functioning. He needed help even with the most mundane of tasks. On one occasion it turned out that he was unable to close a window – he failed to understand how a completely ordinary window latch works. Furthermore, B harbours a strong desire to get married once he is released from preventive detention. Apart from a wife to eat breakfast with, he would like to have «1.8 children, since that is normal». Since B neither suffered from a psychotic disorder, nor was in a state of automatism or intellectually disabled to a high degree at the time of committing the act, the court was not in a position to rule that he was of unsound mind within the meaning of criminal law.

8.6.3 Current law and the legislative reform of 1929

8.6.3.1 Theme and structure

It would appear, as mentioned, that Norwegian law offers little scope for interpreting the terms «psychotic», «in a state of automatism» or «intellectually disabled to a high degree» in Section 44 of the Penal Code liberally or to apply these analogically to other severe mental aberrations. This is summed up in legal theory through the observation that the rules are, according to their wording, «exhaustive in principle».[315] Also in this respect does the Penal Code of 2005 represent a continuation of current law.[316]

The restrictive stance reflected in prevailing law needs to be understood in the context of the reform process that resulted in the amendments to the insanity rules in the Penal Code in 1929. In fact, prior to the said reform the provision also allowed scope for acquittal in respect of a broader range of mental aberrations than insanity, in the medical sense, and automatism. In the following, these developments will be examined in 8.6.3.2 and 8.6.3.3, before addressing current law more specifically in 8.6.3.4.

8.6.3.2 The original regime under the Penal Code

Section 44 of the Penal Code was worded as follows before it was amended by Act of 22 February 1929 No. 5:

> «An act shall not give rise to criminal liability if committed by a person who at the time of committing such act was insane, in a state of automatism or otherwise of unsound mind due to deficient development of mental capacity or impairment or morbid distortion thereof or as the result of coercion or imminent danger.»

The provision combined a medical model with a mixed model: the medical model would apply exclusively in relation to «true insanity», i.e. insanity in the medical sense, but the criminal insanity assessment would be based on a mixed model outside the scope of said medical term – in relation to somewhat less severe aberrations.[317]

According to Francis Hagerup, who during the Odelsting's deliberation of the insanity rules in the Penal Code of 1902 himself drafted the legislative wording that was subsequently adopted, the legislative wording «morbid distortion [of mental capacity]» referred to «miscellaneous other morbid conditions […]» outside the scope of true insanity and automatism – conditions that by their nature were not suited for the application of an absolute punishment exemption rule:

> «The other conditions that merit consideration in this regard are, in particular, epilepsy and hysteria or other neuroses (e.g. disturbances in the nervous system, caused by underlying physical or mental disorders). Such conditions, which are encompassed by the term «morbid distortion of mental capacity» in Section 44 of the Penal Code and which cannot be classified as true insanity, need not necessarily result in any reduction in criminal responsibility, but may more or less periodically give rise to disturbances of consciousness

[315] Andenæs (2004), p. 311. See 8.6.3.4 below for further details on the implications of the ruling published on p. 634 onwards of the 1960 volume of the Norsk Retstidende court reporter for the Supreme Court.

[316] See its Section 20, Sub-section 1, letter b, and Proposition No. 90 (2003–2004) to the Odelsting, p. 218.

[317] Cf. Hagerup (1911), p. 293, Proposition No. 8 (1927) to the Odelsting, pp. 7–8, Andenæs (1956), p. 258, and Official Norwegian Report NOU 1974: 17, p. 41. See differently Skeie (1946), p. 205, who on the contrary reads the wording as pointing in the direction of a mixed model, also in respect of those who are insane in the medical sense. Its narrowing criterion, which as noted only applied to those aberrations that were not classified as insanity in the medical sense or automatism, is in its wording most reminiscent of the type of criterion void of content that is currently found in the Danish insanity rule; cf. 7.2.

and cognition (hallucinations and obsessions), and partly to morbid inclinations of abnormal strength or even urges of an outright compulsive nature.»[318]

The original insanity rule in the Penal Code of 1902, which as noted combined the medical model and the mixed model in one single legislative provision, represented a continuation of the approach that was, at least, expressed in the older Penal Code of 1842.

Chapter 7, Section 2, of the Penal Code of 1842 was worded as follows:

> «Any act shall be exempted from punishment that has been committed by those who are mad or insane, or by those who have lost their powers of reasoning as the result of disease or infirmities of old age.»

Although the wording may indicate that a purely medical model applied in respect of those who are «mad» or «insane», whilst allowing for a more specific assessment of the perpetrator's powers of reasoning in relation to less severe aberration (a mixed model), it is likely that some convictions were handed down despite the perpetrator having been insane, in the medical sense, at the time of committing the act. It would appear that prevailing law was somewhat ambiguous.[319]

The formulation of the insanity rule was the subject of extensive discussion in the lead-up to the adoption of the Penal Code. The solution that was agreed is probably best characterised as a compromise between the views of the various factions: The lawyers had argued that some persons were neither insane, nor in a state of automatism, but could nonetheless not be classified as having criminal capacity. These would have to be exempted from punishment out of, inter alia, humanitarian considerations, which there would be ample opportunity for doing within a rule based on a mixed model in which the aberrations were broadly defined. Psychiatry was opposed to such an approach, because it would mean the abolition of the absolute punishment exemption for the insane and those who are in a state of automatism.[320]

The underlying proposal of the Penal Code Commission was premised on a mixed model:

> «An act shall not give rise to criminal liability if committed by a person who at the time of committing such act was unable to understand its nature and unlawfulness due to deficient development of mental capacity or impairment thereof, or who was not in control of his or her own actions as the result of coercion, imminent danger or mental aberration.»[321]

As will have been noted, this proposal did not get the necessary support in the subsequent legislation process in relation to the Penal Code of 1902.

8.6.3.3 The legislative reform of 1929

The insanity rules were tightened through a revision of the provision in Section 44 in 1929. The reasons given for abolishing the scope for a ruling of criminal insanity in respect of other relatively severe mental aberrations than psychoses, were primarily based on technical legal arguments and societal protection considerations.

[318] Hagerup (1911), p. 295. The term «deficient development of mental capacity» primarily included the type of conditions currently encompassed by the legislative term «intellectual disability of a high degree». By adding the term «impairment of mental capacity», the statute allowed for an exemption in relation to individuals who suffered similar conditions due to infirmities of old age or disease. See Hagerup (1911), pp. 294–295. For discussion of the terms «coercion» and «imminent danger», see Hagerup (1911), pp. 296-297, Andenæs (1956), pp. 264-265, Andenæs (2004), pp. 311–312, as well as Recommendation of the Penal Code Committee, 1925, pp. 68-69, where the reasons for abolishing these criminal insanity criteria are also outlined. After the effective date of the Penal Code of 2005, such cases may fall within the scope of the new punishment exemption rule in Section 81, letter b.

[319] For further details, see Hagerup (1911), p. 291, as read in conjunction with p. 293, in note 4, Andenæs (1956), p. 258, Official Norwegian Report NOU 1974: 17, p. 41 and p. 188 onwards, as well as Syse (1997), pp. 29–30. In Recommendation of the Penal Code Committee, 1925, which also provides an account of legal developments all the way back to our oldest statute books (p. 43 onwards.), it is, on the other hand, assumed that the Penal Code of 1842 is based on a purely medical model, cf. p. 48.

[320] See Langfeldt (1950), p. 61. An account of the background and the numerous legislative proposals that led to the original version of Section 44 of the Penal Code is provided in Recommendation of the Penal Code Committee, 1925, pp. 48–58. See also Official Norwegian Report NOU 1974: 17, p. 167 onwards. For an overview of certain theoretical works and contributions to the general debate, see Vogt (1906), pp. 149-150.

[321] Quoted in Recommendation of the Penal Code Committee, 1925, on p. 51.

The Penal Code Committee operated on the premise that certain mental disorders covered a continuum from relatively mild aberrations to insanity in its purely medical sense, and admitted that punishment would often not serve much of a purpose in relation to this group of aberrations either, which group the Penal Code had originally included amongst those that might qualify for a punishment exemption. The Committee nonetheless took the view that punishment would be appropriate if the aberration could not, in purely medical terms, be categorised as insanity. This was because there was no scope for taking precautionary measures in relation to this group:

> «But for as long as no such preventive supervision exists, one is forced to use punishment as a means of protection. Society cannot have an interim category, with the rights of the free person, but no liability for own actions.»[322]

It may of course be objected against this that societal protection considerations should not, as a matter of principle, determine the scope of criminal insanity. Such considerations should instead be accommodated through the formulation of the special sanctions; cf. Part IV. However, the Committee also emphasised that it was a problem with the original provision in the Penal Code that it did not in any way «restrict the individual discretionary assessment of the judge […]», and that the rule was «[…] fundamentally incorrect, because it is bound to result in the uncertain and arbitrary administration of criminal justice»:[323]

> «If one wishes to expand the exemption from liability, it would have to be done on the basis of rules that provide a firm foundation for a proper expert evaluation of the mental deficiency, in the same manner as a medical insanity diagnosis.»[324]

However, the Penal Code Committee provided no specific analysis as to whether the rule – which by that time had been in effect for just over 20 years – had given rise to such an unsatisfactory practice.

In any case, the preparatory works relating to the reform of 1929 leave the impression that it was a basic premise on the part of the Penal Code Committee that no punishment exemption should be granted outside the scope of the term insanity in its strict medical meaning.[325]

However, it would appear that the implications of this amendment of the scope of criminal insanity may have escaped the attention of the Ministry of Justice in its subsequent examination of the proposal from the Penal Code Committee:

> «The Committee has proposed a consistent implementation of the biological method, inasmuch as it proposes medical insanity and automatism as the sole grounds for a punishment exemption.
>
> The Ministry agrees that this is the appropriate regime at the level of principles, and therefore has not wanted to refrain from including the provision in the proposition, despite the proposed amendment being in actual fact of no practical relevance.»[326]

It is somewhat unclear what is meant by the statement that the proposed amendment is «in actual fact of no practical relevance». It is, on the one hand, conceivable that the Ministry was of the view that the term «of unsound mind due to deficient development of mental capacity

[322] Recommendation of the Penal Code Committee, 1925, p. 69.

[323] See Recommendation of the Penal Code Committee, 1925, p. 69.

[324] Recommendation of the Penal Code Committee, 1925, pp. 69–70.

[325] Criticised in Andenæs (2004), pp. 311–312, and more elaborately in Andenæs (1956), pp. 263–265.

[326] Proposition No. 8 (1927) to the Odelsting, p. 8.

or impairment or morbid distortion thereof» had not had any impact on case law, and that the changes were therefore in actual fact of no import. It is, on the other hand, possible that the Ministry held the amendment to be at the level of principles only, and that the scope of the insanity rule would remain the same. In any case, both of these alternative interpretations of the said statement are not in harmony with the reasoning invoked by the Penal Code Committee in support of its proposed amendments to Section 44 of the Penal Code.

8.6.3.4 Review of current law

This raises the issue of what implications the older preparatory works relating to the reform of Section 44 in 1929 – and especially the observations of the Penal Code Committee – have for the contents of current law and the specific delineation of criminal insanity at the present time.

Case law has not completely excluded the possibility of handing down a ruling of criminal insanity in respect of mental aberrations outside the ambit of Section 44 of the Penal Code. The ruling published on p. 634 onwards of the 1960 volume of the Norsk Retstidende court reporter for the Supreme Court may be interpreted to mean that the rule in Section 44 does not exhaustively define the scope of criminal insanity.

A farmer, who was deeply affected by morbid jealousies, had killed his wife in a state of agitation. This was not held to constitute a state of insanity, and hence he did not qualify for a punishment exemption under Section 44 of the Penal Code as worded at the time. Defence counsel argued before the Supreme Court that the Court of Appeal had incorrectly operated on the understanding that Section 44 exhaustively defines the scope of criminal insanity. However, the Supreme Court did not explicitly rule on such issue, since the case was held to be of such a nature that a criminal insanity ruling on the basis of analogous or liberal interpretation would under any circumstance not be applicable:

> «As far as concerns the second objection – that only medical insanity and automatism can exclude criminal insanity pursuant to Section 44 of the Penal Code – I hold that it was not incorrect of the presiding Court of Appeal judge, in summing up the case for the jury, to have refrained from stating anything as to whether one might conceive of extraordinary situations in respect of which Section 44 is not exhaustive, cf. Andenæs: General Criminal Law, pages 263-65. I am of the opinion that the mental or psychopathological factors that have been invoked and asserted to merit the exclusion of criminal capacity in the present case are, by their nature, such as must be assumed to have been contemplated at the time of the adoption of the statute and, moreover, that such factors would have fallen within one of the two alternatives mentioned in Section 44 of the Penal Code if these have been of sufficient intensity.»[327]

The preparatory works relating to Section 44 of the Penal Code do not exclude the possibility that there may exist mental aberrations that should qualify for a punishment exemption, although these are not encompassed by the alternatives listed in the statutory provision itself.[328]

The opposite position – that Section 44 of the Penal Code is exhaustive – would appear to be reflected in the repeatedly negative responses of the Storting to the reform proposals launched in recent years; cf. 8.6.4.1 and 8.6.4.2 for further details.[329] However, such opposition concerned a legislative proposal that went much further than one could ever conceivably go

[327] The ruling published on p. 634 onwards of the 1960 volume of the Norsk Retstidende court reporter for the Supreme Court, p. 635. The ruling was rendered with dissenting votes (3–2), but none of the minority votes related to this issue.

[328] See Proposition No. 87 (1993–94) to the Odelsting, p. 22.

[329] See for example Jacobsen (2004), p. 41, who argues along these lines.

through a liberal interpretation of Section 44. Consequently, it may also be argued that significant weight should not be attached to the lawmaker's rejection of the discretionary punishment exemption rules in solving the altogether specific issue under consideration here, and that the issue of whether Section 44 of the Penal Code is exhaustive still remains unresolved, under reference to the statements made in the ruling published on p. 634 onwards of the 1960 volume of the Norsk Retstidende court reporter for the Supreme Court.

It is only in very special situations that one might envisage the possibility of interpreting Section 44 of the Penal Code liberally.

For many of the aberrations of practical importance, which are not classified as psychosis or automatism in purely medical terms, current law does not provide a good basis for a specific and more nuanced assessment of the implications of such aberration for the criminal capacity of the perpetrator. This is what one sought to remedy through the proposed discretionary punishment exemption rules; cf. below.

8.6.4 Reform proposals

8.6.4.1 The proposals for a discretionary punishment exemption rule

8.6.4.1.1 The specification of the relevant aberrations

The Council on Criminal Law proposed, in Official Norwegian Report NOU 1974: 17, to expand the ambit of the criminal insanity rules. Such proposals were subsequently submitted anew, in non-amended form, by the Penal Code Commission.[330]

It was assumed that certain abnormalities that could not be classified as «insanity» (including mental deficiency of a high degree) or «automatism» within the meaning of Section 44 of the Penal Code as worded at the time, might also have such implications for the criminal capacity of the perpetrator that acquittal ought to be the outcome. It was therefore proposed, as a supplement to the absolute punishment exemption rule in Section 44, to adopt a discretionary punishment exemption rule in Section 45, Sub-section 1, with following wording:

> «If the perpetrator has acted in a state of severely impaired consciousness or in another state of fundamental abnormality, the court may exempt him or her from punishment.»[331]

The criterion «severely impaired consciousness» was intended to encompass both the relative unconsciousness and the absolute automatism already assigned to Section 44 of the Penal Code. However, it was also intended to extend somewhat beyond that to encompass such conditions as may currently result in punishment reduction under Section 56, letter c, final alternative, of the Penal Code. It was concluded that its specific ambit could not be specified by means of diagnostic descriptions, and that it would have to be left to case law to establish which aberrations can be characterised as «severely impaired consciousness». There would, as a general observation, have to be severe impairment of the person's powers of comprehension, contextualisation and perception, as well as his or her ability to make judgements, whilst the ability to act might remain intact. It would be relevant, as is the case in relation to psychoses, whether the perpetrator lacked the ability to be guided by normal motivations. He or she would have to deviate to a very considerable degree from what is usual for him or her with regard to mental state and behaviour.[332]

[330] See Official Norwegian Report NOU 1983: 57, on pp. 162–163.

[331] Official Norwegian Report NOU 1974: 17, p. 149.

[332] See Official Norwegian Report NOU 1974: 17, on pp. 56–57.

The criterion «another state of fundamental abnormality» was intended as a collective term for a number of different abnormalities of a stable nature or of a certain permanence. The legislative proposal was based on the premise that such abnormalities would present certain symptomatic similarities with a state of psychosis, whilst not exhibiting equally distinct and unambiguous psychotic symptoms.[333] The Council was also of the view that certain abnormalities that are bordering on severe intellectual disability, at an IQ level in the range of 56–75, should fall within the scope of the said criterion, provided that the person in addition to impaired intellectual abilities suffered other organic brain damage or personality deviations that had a decisive impact on his or her ability to make judgements or exercise self-control.[334] On the other hand, the more stable personality deviations and disorders, such as psychopathy, would as a main rule fall outside the ambit of the discretionary punishment exemption rule.[335]

However, the proposed rule in Section 45 was given a different wording in the Special Sanctions Committee's report of 1990, although the substance was not very different. The criteria for assessing the aberration suffered by the perpetrator were partly changed, and the discretionary punishment exemption rule distinguished between three different groups of aberrations:

> «A person who at the time of committing the act suffered a serious mental disorder involving a significantly impaired ability to realistically assess his or her relationship with the outside world, but who was not psychotic; cf. Section 44, may nonetheless be exempted from punishment.
>
> A person who at the time of committing the act was intellectually disabled to a lesser degree may be exempted from punishment when merited by special circumstances.
>
> A person who acted in a state of severely impaired consciousness, may also be exempted from punishment.»[336]

The expression «serious mental disorder involving a significantly impaired ability to realistically assess his or her relationship with the outside world, but […] not psychotic» was intended, as clearly indicated by the wording, to cover aberrations that in terms of seriousness and intensity are close to the clearly psychotic disorders. It was envisaged that such aberrations would be very close to the threshold for acquittal under Section 44 of the Penal Code, for example certain cases of treated schizophrenia, paranoia, mood disorder, organic brain damage and dementia.[337]

The Special Sanctions Committee proposed, like the Council on Criminal Law, that lesser intellectual disabilities should also qualify for a potential punishment exemption. By «intellectually disabled to a lesser degree», the Committee referred to persons with an IQ in the range of 56-75 – a category that does not conform to the classifications in ICD-10. Normally, a punishment exemption would only be considered in the lower part of this range, but one would also have to take into consideration the social functioning and personality of the perpetrator,

[333] See Official Norwegian Report NOU 1974: 17, p. 58. See pp. 58–61 for further details, including some descriptions of symptoms and cases intended to more specifically illustrate the ambit of the term.

[334] See Official Norwegian Report NOU 1974: 17, p. 61.

[335] See Official Norwegian Report NOU 1974: 17, pp. 61–62.

[336] Official Norwegian Report NOU 1990: 5, p. 9.

[337] Cf. Official Norwegian Report NOU 1990: 5, p. 54. A more detailed description of the specific aberrations the Special Sanctions Committee intended to include is provided in the following pages.

as well as whether there was any organic brain damage or indication of psychotic functioning.[338]

The criterion «severely impaired consciousness» represented a continuation of the category for which the Council on Criminal Law also wanted a discretionary insanity rule.[339] The Special Sanctions Committee was of the view that the term «in a state of automatism» in Section 44 of the Penal Code was unfortunate because of its literal meaning in Norwegian («unconscious»), and that it provided an inadequate description of the aberrations for which it was primarily intended. The state of unsound mind labelled «relative unconsciousness» manifests itself in a manner that can hardly be described as unconsciousness, at least not within the ordinary meaning of the word. Since such aberrations were highly heterogeneous and difficult to clearly delineate by way of any medically recognised criterion, the Committee was of the view that the term «severely impaired consciousness» provided an adequate description of the type of aberrations for which it would be reasonable to consider a punishment exemption, for example excessive affective reactions in unstable persons with personality disorder, poisoning, impaired consciousness as the result of epilepsy, as well as withdrawal reactions.[340] Aberrations that would not be encompassed by the discretionary rule included, under the assumptions adopted by the Special Sanctions Committee, a number of neurotic aberrations and disorders as well as personality deviations and disorders (psychopathy).[341]

8.6.4.1.2 The discretionary assessment

The rules proposed by the Council on Criminal Law and the Special Sanctions Committee were of a discretionary nature, i.e. they required the courts to perform a specific discretionary assessment as to whether the accused ought to be convicted or acquitted. It follows from both proposals that such powers would be allocated to «the court». However, it was stipulated in the preparatory works that such assessment should also be performed at the prosecution stage, where it could potentially result in the discontinuation of prosecution.[342]

A punishment exemption was not conditional upon any causal link between the aberration and the act, under the proposals of either the Council on Criminal Law or the Special Sanctions Committee. The matter of causality would nonetheless be an important consideration in performing the specific discretionary assessment as to whether the accused should be acquitted.[343] Other considerations highlighted in the preparatory works for the legislative proposals are the extent to which the perpetrator is susceptible to be influenced by the threat of punishment, a specific evaluation of general deterrence considerations, the general sense of justice, what would constitute an appropriate sanction, as well as the consideration that it is not exclusively advantageous to be declared of unsound mind. Major weight should of course be attached to the seriousness of the aberration in making such specific assessment.[344] The Special

[338] See Official Norwegian Report NOU 1990: 5, p. 58.

[339] See Official Norwegian Report NOU 1990: 5, p. 58.

[340] See Official Norwegian Report NOU 1990: 5, p. 58 onwards.

[341] See Official Norwegian Report NOU 1990: 5, p. 60 onwards, for further details.

[342] See Official Norwegian Report NOU 1974: 17, p. 64, by way of implication, and Official Norwegian Report NOU 1990: 5, p. 61.

[343] See Official Norwegian Report NOU 1974: 17, pp. 63–64, and Official Norwegian Report NOU 1990: 5, p. 61. The Special Sanctions Committee also deemed it inappropriate to include the causality criterion in the legislative wording. This would result in little flexibility and complicate the assessment of the courts in cases where it was difficult to have any reasoned opinion about causal link; cf. Official Norwegian Report NOU 1990: 5, p. 61.

[344] See Official Norwegian Report NOU 1974: 17, p. 64, and Official Norwegian Report NOU 1990: 5, pp. 61–62.

Sanctions Committee also assumed that Danish case law on the *equivalent aberrations*; cf. 7.2.2, could provide guidance in the application of the rule.[345]

The Special Sanctions Committee specifically discussed whether it should have any impact on the discretionary assessment performed by the court whether the aberration could be blamed on the accused. The Committee took the view that allowances would have to be made for holding some persons with personality types that are particularly susceptible to impaired consciousness triggered by strong affect (for example jealousy, anger, despair, panic), criminally responsible in certain cases. Such would especially be the case if he or she was aware of his or her predilection for aberrant reaction, and nonetheless sought out situations that he or she ought to have anticipated, based on experience, might trigger the aberrant pattern of behaviour.[346]

Both the Council on Criminal Law and the Special Sanctions Committee took the view that the guiding perspective in making such assessments would have to be whether it would seem reasonable or fair, all circumstances taken into consideration, to punish the offender.[347] A key underlying premise was that the rule would be narrow in scope.[348]

8.6.4.1.3 The role of the expert under the proposed discretionary punishment exemption rules. Procedural issues.

The discretionary punishment exemption rules proposed by both the Council on Criminal Law and the Special Sanctions Committee were based on the assumption that psychiatric expertise would continue to play a key role in clarifying whether the initial criteria were met, for example in examining whether the perpetrator was in a state of «severely impaired consciousness». However, unlike the proposed absolute punishment exemption rule, none of the aberration criteria included by the Council and the Committee in their legislative proposals matched any established psychiatric terms. The underlying assumption was that medical expertise would in practice have to play a somewhat different and less prominent role under a discretionary rule than under the absolute rule in Section 44 of the Penal Code.

Both the Council on Criminal Law and the Special Sanctions Committee operated on the assumption that the experts would opine on the potential aberration, and not on whether the court ought to make use of its powers to grant a punishment exemption. Performance of the discretionary assessment would be a matter for the courts exclusively. The role of the experts under these rules would be to provide a diagnostic description of the indictee's aberration at the time of the offence and then express their opinion as to whether such aberration met the statutory criterion.[349]

One alternative that the Council on Criminal Law rejected was to relieve the experts from having to draw any conclusion as to whether the statutory aberration descriptions had been met. This might have resulted in the psychiatric experts also having less influence over the issue of whether the aberration was sufficiently severe.[350]

[345] See Official Norwegian Report NOU 1990: 5, p. 54.

[346] See Official Norwegian Report NOU 1990: 5, pp. 61–62.

[347] See Official Norwegian Report NOU 1974: 17, p. 64 and 159, and Official Norwegian Report NOU 1990: 5, p. 50 and 61.

[348] See Official Norwegian Report NOU 1974: 17, p. 55, and Official Norwegian Report NOU 1990: 5, p. 54.

[349] See Official Norwegian Report NOU 1974: 17.

[350] See the thorough discussion in Official Norwegian Report NOU 1974: 17, pp. 62–63. The issue of the role of the experts is only briefly addressed in Official Norwegian Report NOU 1990: 5, on pp. 50–51 and p. 54, which endorses the observations made by the Council on Criminal Law.

The Council on Criminal Law took the view that the application of the discretionary rule would in its entirety – both with regard to whether the aberration criterion was met and with regard to the specific discretionary assessment – belong under the matter of sentencing. Hence, such issues would be outside the powers of the jury, which the Council on Criminal Law deemed necessary to ensure that sufficient grounds were given in support of the ruling and to enable the Supreme Court to ensure uniform practice under the provision. Besides, such solution is more in harmony with the punishment reduction provision in Section 56 of the Penal Code.[351] The said solution, and the Council on Criminal Law's discussion of this procedural matter, was endorsed by the Special Sanctions Committee.[352]

8.6.4.2 The subsequent deliberation of the proposals in the legislation process

The Committee will here address the subsequent legislation process. The objective is to uncover which arguments may be invoked, and have been invoked, with regard to the specific delineation of criminal insanity in a legislative provision. This represents an important part of the background to the Committee's assessment of these issues in 8.6.5.

The proposal of the Council on Criminal Law for reform of the criminal insanity rules and special sanctions was discussed in the Criminal Policy Report of 1978 from the Ministry of Justice, but the discretionary rule was only commented on briefly.[353] Nor did the Standing Committee on Justice make any comments on this specific amendment proposal in its deliberation of the said report to the Storting. The Standing Committee would instead await a more comprehensive proposition that would pave the way for the joint deliberation of the issues raised for discussion by the Council on Criminal Law.[354]

However, the Ministry of Justice put the matter on hold. This was a reflection of massive opposition in the consultative round, especially from health professionals, against a number of the proposals submitted by the Council on Criminal Law, including the discretionary punishment exemption rule. Consequently, the previously announced proposition was never submitted. The criticism, which was reiterated when the Penal Code Commission revived the Council on Criminal Law's proposal for a discretionary punishment exemption rule for renewed discussion, was primarily along the following lines:

- *Admission to the psychiatric institutions.* A discretionary rule might, together with the Council on Criminal Law's proposal for special sanctions against persons deemed to be of unsound mind, result in non-psychotic persons being admitted to psychiatric hospitals for extended periods of time, without the mental health care service being in a position to offer them adequate treatment.
- *The professional role of physicians.* The mental health care service would have less control over admissions to, and discharges from, the institutions, which control would be replaced by the courts of law's application of an unclear criterion without any basis in precise medical diagnoses.
- *Unclear rules and lack of stringency.* The delineation of the term «another state of fundamental abnormality» was too uncertain and might in practice result in an undesirable lack of stringency.

[351] See Official Norwegian Report NOU 1974: 17, pp. 159–160.

[352] See Official Norwegian Report NOU 1990: 5, pp. 62–63.

[353] See Report No. 104 (1977–78) to the Storting, p. 130.

[354] See Recommendation No. 175 (1979–80) to the Storting, p. 47 onwards.

– *The general sense of justice.* The rule might result in pressure on the courts of law to acquit mentally aberrant persons to an extent that might be deemed objectionable by public opinion and offend the general sense of justice.[355]

As will be evident from the following, it was largely the same objections that were raised in the subsequent processes in relation to the proposals for discretionary punishment exemption rules.

To begin with, the Special Sanctions Committee's proposal for a discretionary punishment exemption rule met with a more favourable reception than the Council on Criminal Law's proposal. In its proposition to the Odelsting, the Ministry also performed a renewed assessment of the proposal from the Council on Criminal Law, but favoured the rule proposed by the Special Sanctions Committee instead. In addition to having met with considerably more support from the consultative bodies, it was the view of the Ministry that this proposal provided a clearer delineation of the scope of the rule, and was also more in conformity with both psychiatric terminology and ordinary usage.[356]

However, during the deliberations of the Storting's Standing Committee on Justice, the proposal for a discretionary punishment exemption rule was only supported by a minority comprising the members from the Labour Party. These attached weight to the type of arguments highlighted by the Council on Criminal Law and the Special Sanctions Committee in their reports:

> «The members of the Standing Committee from the Labour Party note that there are clear limits to which aberrations are encompassed by the absolute punishment exemption rule. In practice it is, however, medically impossible to establish such clear limits. Some mental disorders may fall outside the scope of the term psychosis, but will nonetheless affect the personality in such a way that the rationale behind the punishment exemption is as least as relevant as in cases that clearly qualify as psychosis. These members find it unreasonable and contrary to our principles on punishment exemption for persons of unsound mind to not allow for the aforementioned cases to qualify for a punishment exemption, or for sentencing to a special sanction, based on a specific overall assessment on the part of the court. These members believe that it is a fundamental principle that all persons shall be held to account for their actions. However, the corollary to this principle must be that it only applies when the person in question is in such a state that he or she has criminal capacity, and thus can be held criminally responsible.
>
> These members consider it undesirable for the issue of punishment exemption to depend exclusively on the established psychiatric diagnosis. Practice demonstrates that this may result in forensic psychiatrists stretching their description of the aberration suffered by the indictee beyond what is, strictly speaking, medically appropriate, precisely to capture cases in which it would be unreasonable to impose punishment.
>
> These members also consider it a positive development that a discretionary punishment exemption rule would enable the experts to focus more on the purely medical evaluation of the accused, whilst the final assessment as to whether a punishment exemption should be

[355] For a more detailed discussion of the criticism raised against the proposals for a discretionary punishment exemption rule in the consultative rounds in the wake of Official Norwegian Report NOU 1974: 17 and Official Norwegian Report NOU 1983: 57, see Official Norwegian Report NOU 1990: 5, p. 20, p. 64 onwards, and especially pp. 48–49 and p. 70.

[356] See Proposition No. 87 (1993–94) to the Odelsting, pp. 34–35.

granted is the responsibility of the courts of law. These members believe such a development to be appropriate. It is important, as a matter of principle, for the final and definite assessment and decision to be made by the court.»[357]

The majority, however, which comprised the members from the Conservative Party, the Christian Democratic Party, the Liberal Party, the Progress Party and the Centre Party, did not endorse an amendment in line with the proposal of the Special Sanctions Committee and the proposition of the Ministry of Justice in this regard, and took a different view. The majority wanted an absolute punishment exemption rule for psychotic persons, but believed, at the same time, that «it shall be possible to hold all persons to account for their actions» and found the Swedish «insanity rule» to be of interest at the level of principles:[358]

«The majority is unable to conclude that it would be desirable to expand the punishment exemption rules to encompass persons as described in a new Section 45. It is noted that the Ministry emphasises that a punishment exemption would only be granted as a matter of exception, and that it specifically states that the rule would be intended for cases bordering on true psychosis, and not for e.g. psychopathic or neurotic disorders. The majority believes that it is undesirable, as a matter of principle, to have unclear punishment exemption rules. Punishment exemption should be reserved for those aberrations where there can be no doubt about the basis for the punishment exemption. The majority notes that there has recently been a sharp increase in the number of preventive detention orders, and many of those subjected to preventive detention have a mixed diagnosis in which the clinical picture is a composite of several conditions, which may include lesser intellectual disability, personality disorder, abuse of intoxicating substances, as well as psychotic or borderline psychotic traits. The majority anticipates that it would in many of those cases in which preventive detention is currently imposed on the grounds of deficient development or permanent impairment of mental capacity, be considered whether one should make use of a discretionary punishment exemption rule. Hence, recent developments indicate that use of a discretionary punishment exemption rule may be considered in a large number of cases.

The majority believes, as a matter of principle, that it is appropriate for individuals to be held to account for their actions to the maximum possible extent, and thereby be convicted for any offence committed by them as outlined above.

The majority also takes the opportunity to note that inmates in Norwegian prisons, and others for whom the correctional service is responsible, are entitled, in the same way as the rest of the population, to any necessary health care. This also implies, of course, that any inmates with a need for admission to psychiatric hospital shall qualify for a transfer into such treatment.»[359]

The discussions in the Odelsting reflected the same divisions as in the Standing Committee on Justice.

Particularly active in the discussions were Arild Hiim from the Conservative Party and Ane Sofie Tømmerås from the Labour Party, both of which members of the Storting were at that time members of the Standing Committee on Justice. The member Hiim highlighted a number of factors that he considered to be negative implications of the proposed rule: Firstly, he deemed it undesirable to introduce new grey areas into the criminal insanity rule. Secondly, such a rule would require the lawyers to decide on an issue that does in fact have its origin in psychiatry. Thirdly, the possibility of obtaining a punishment exemption might be used by some

[357] Recommendation No. 34 (1996–97) to the Odelsting, on p. 8.

[358] See Recommendation No. 34 (1996–97) to the Odelsting, p. 7. See 7.3 for further details on the Swedish insanity rule.

[359] Recommendation No. 34 (1996–97) to the Odelsting, p. 7.

defence counsel for all it is worth and put considerable pressure on psychiatrists to conclude that the perpetrator suffered from a serious mental disorder. Fourthly, the aberration definition «serious mental disorder» was too broad and unclear. Fifthly, any considerations favouring a discretionary rule could be better accommodated through the punishment reduction provision proposed (and adopted) in Section 56, letter c, of the Penal Code at the same point in time. Sixthly, the proposed rule implied, in the view of the member Hiim, an assessment criterion that the courts of law have absolutely no qualifications for applying.
The member Tømmerås argued, on the other hand, that the rejection of the proposal for a discretionary rule in Section 45 of the Penal Code reflected a detachment from reality and a failure to address the underlying principle. She was of the view that the majority in the Standing Committee on Justice had neither taken into consideration that it is medically impossible to sharply define the scope of the term psychosis, nor that there are also other severe aberrations than psychoses that merit a finding of criminal insanity. Moreover, there would in the absence of such a rule be a risk that a broader meaning would in practice be attributed to the term psychosis in Section 44 of the Penal Code than was intended or medically viable. This suggested, in the view of the member Tømmerås, that the statute should explicitly give the courts of law the power to handle borderline cases in a discretionary and nuanced manner, without being entirely reliant on medical terminology and descriptions. It would under any circumstance apply to a very small group of persons, and not represent a major expansion of the scope of criminal insanity.[360]

Although the proposal was not adopted by the Storting following the deliberations in 1996, the Penal Code Commission nonetheless resubmitted, in Sub-Report VII, which was published in 2002, the proposal for the introduction of the discretionary rule recommended by the Special Sanctions Committee:

> «In deliberating Proposition No. 87 (1993–94) to the Odelsting, a majority of the members of the Storting were opposed, as mentioned, to any form of discretionary punishment exemption rule. […] Despite the matter having recently been examined by the Storting, the Commission is of the view that the proposals from the Special Sanctions Committee are sufficiently well-founded to merit renewed consideration.»[361]

However, in preparing the proposition to the Odelsting on the general part of the Penal Code of 2005, the Ministry of Justice did not deem it appropriate to submit the proposal to the Storting anew at that point in time, preferring to await the more general re-examination of the new insanity and special sanction provisions that would take place after such provisions had been practised for a few years:

> «There are sound arguments in favour of the courts being enabled to grant exemptions from punishment in such cases, as well as to reassign the person exempted from punishment to one of the special sanctions for persons of unsound mind. However, the Ministry has attached decisive weight to the consideration that the current system – under which the relevant aberrations cannot result in a punishment exemption, but result in punishment reduction pursuant to Section 56, letter c – should be allowed somewhat more time to operate before considering changes. The more general re-examination of the rules on insanity and special sanctions that will be conducted when such rules have been practised for about five years may, inter alia, provide an indication as to whether the absence of a discretionary punishment exemption rule has resulted in pressure on the current punishment exemption rule to avoid unreasonable convictions.»[362]

[360] See Proceedings and Debates of the Storting 1996–97, Volume 8, Minutes of the Deliberations of the Odelsting and the Lagting, p. 260 onwards.

[361] Official Norwegian Report NOU 2002: 4, p. 230. See also p. 228.

[362] Proposition No. 90 (2003–2004) to the Odelsting, p. 225.

During the deliberation of the proposition in the Standing Committee on Justice, the proposal for a discretionary punishment exemption rule was only supported by the member from the Socialist Left Party.[363]

8.6.4.3 The re-examination of current rules

Following the legislative amendment in 2002, it was decided to conduct a re-examination of the criminal insanity rules, special criminal sanctions and preventive detention.[364] The re-examination was carried out by a working group appointed by the Ministry of Justice and the Police in 2006, which submitted its report in 2008.[365]

The working group was requested to examine existing practice, as well as to consider and, if applicable, recommend changes to current law and practice, including how the terms in Section 44 of the Penal Code are applied, and whether there had been any change in the delineation defining which aberrations fall within the scope of the punishment exemption rule. The group was also requested to consider whether there is a need for introducing a discretionary punishment exemption rule for aberrations bordering on unsoundness of mind.[366]

The group's review showed that whenever the experts had unequivocally concluded that the perpetrator was of unsound mind, such was also the conclusion of the court. There were a few examples of cases where the experts had been in doubt and the court of law had handed down an acquittal despite the experts concluding that the perpetrator was of sound mind. The group also stated that the Norwegian Board of Forensic Medicine was under the impression that the courts had in some cases stretched the criminal insanity concept to include lesser intellectual disabilities and non-psychotic conditions, in order to be able to sentence offenders to treatment if these were obviously suffering major problems.[367] The group nonetheless concluded that there was no indication that the scope of Section 44 of the Penal Code had in practice been modified as the result of the legislative amendment.

The group did not perform a more detailed analysis of case law relating to Section 44 of the Penal Code, and only examined changes to the ambit of the provision that were a direct «consequence of the legislative amendment in 2002». Such causal links are difficult to demonstrate, and there is reason to ask to what extent light was shed on these through the chosen approach. Nor did the mandate force the working group to only examine changes to the ambit that were a consequence of the legislative amendment.[368] Based on the underlying materials and findings of the group, which indeed indicated a certain pressure towards expanded application of Section 44 in practice, the conclusion of the group in this regard is somewhat surprising.[369]

As far as concerns the issue of whether there was a need for a discretionary punishment exemption rule, the underlying materials of the group were limited and its discussion sparse. It was concluded that Section 56, letter c, of the Penal Code had been used in a small number of cases, and then in relation to the type of convicted person for whom it was intended. Consequently, it had worked as intended by the lawmaker.[370] However, as will be noted by the Committee in 8.6.5.2.2 below, how the courts apply the punishment reduction provision in

[363] See Recommendation No. 72 (2004–2005) to the Odelsting, p. 52.

[364] See Propositions No. 87 (1993–94) and No. 46 (2000–2001) to the Odelsting.

[365] See Mæland et al. (2008).

[366] See Mæland et al. (2008), pp. 19–20.

[367] See Mæland et al. (2008), pp. 217–218.

[368] Mæland et al. (2008), p. 19.

[369] See Mæland et al. (2008), p. 217, for further details.

[370] See Mæland et al. (2008), pp. 219–220.

Section 56, letter c, of the Penal Code is not a good indicator of whether the delineation of the criminal insanity rule is satisfactory.

8.6.5 The assessment of the Committee

8.6.5.1 Theme and structure

The issue is whether it would be appropriate to expand the ambit of the Norwegian insanity rule and, if so, how this should be done.

The fundamental perspective of the Committee is that mental aberrations which severely distort the perpetrator's perception of reality and his or her motivations should result in punishment exemption; cf. 8.2. The Committee furthermore believes, as will be noted from 8.1, 8.5 and 8.6.5.3, that such aberrations are adequately defined, in most respects, by using the terms «psychotic state», «severely impaired consciousness» and «intellectually disabled to a high degree» in the legislative wording.

It is acknowledged, at the same time, that this delineation as to which aberrations should result in a punishment exemption will not necessarily produce a satisfactory outcome in all cases. These terms may be too broad in scope, and result in perpetrators who should be considered criminally liable nonetheless being exempted from punishment. But the terms may also be too narrow in scope, with the result that perpetrators who should have been excluded from criminal liability being punished instead. The question addressed in the following is whether certain types of aberrations that result in criminal liability under current law should instead be encompassed by the insanity rule, i.e. whether the aberration criteria in the current insanity rule are adequate, or whether these should be expanded or supplemented?

At the more fundamental level, the issue is whether one can justify different treatment of, on the one hand, perpetrators who act in a psychotic state and, on the other hand, all other severe mental aberrations that do not fall within the scope of the terms «severely impaired consciousness» or «intellectually disabled to a high degree».

The theme in 8.6.5.2 is whether there is a need for a supplement to the psychosis criterion. In order to answer this question, a distinction should be made between arguments that may, at the more fundamental level, be invoked for or against such an expansion; cf. 8.6.5.2.1, and arguments that only concern more or less desirable implications of also letting the insanity rule encompass other mental aberrations that are, from a criminal law perspective, as severe as psychoses; cf. 8.6.5.2.2 and 8.6.5.2.3.

8.6.5.2.3 also discusses how such a supplement to the psychosis criterion, if any, should be formulated in terms of its legislative wording, and 8.6.5.2.5 and 8.6.5.2.6 take a closer look at how it should be practised. Finally, the corresponding issue is discussed for the alternative bases for criminal insanity; severely impaired consciousness and intellectual disability of a high degree, in 8.6.5.3.

8.6.5.2 On the equal treatment of psychoses and certain other severe aberrations

8.6.5.2.1 Arguments in favour of including severe aberrations outside the scope of the term psychosis in the insanity rule

If the ambit of the insanity rule is defined on the basis of a psychosis criterion, the rule will readily become too narrow, as there will be cases that fall outside the scope of such term, but for which a ruling of criminal insanity and acquittal should nonetheless be the outcome based on an ethical, philosophical and criminal law assessment. Certain other mental aberrations may, as will be evident from 8.4 and 8.6.2, be just as severe as psychoses in their impact on the perpetrator's perception of reality and his or her motivations.

This is hardly surprising. The categorisation of various disorders serves a different purpose from the criminal law delineation as to who lacks criminal capacity and should be exempted from criminal liability: Whilst the categories used by the medical profession in its daily practice are developed and interpreted from the perspective of a purpose of diagnosing, prescribing remedies and treating the disorders of a patient, criminal law insanity rules are intended to determine which degree of mental capacity and maturity is required to make it morally acceptable and appropriate for the State to confer criminal liability on an offender.

It is difficult to see any good reason why aberrations that for legal purposes seem as relevant and severe as symptom-intensive psychoses should not fall within the scope of a criminal insanity rule. That it has in other countries been deemed desirable to somewhat expand the scope of criminal insanity outside psychoses is evident from the comparison outlined in Chapter 7 on foreign law. The Danish rule provides a particularly clear illustration, inasmuch as it allows for a ruling of criminal insanity in the event that the accused was not psychotic at the time of committing the act, but nonetheless in such an aberrant state that a punishment exemption should be the outcome; cf. 7.2.2.

Since the proposals for discretionary punishment exemption rules were not adopted, it is also likely that the ambit of criminal insanity in Norwegian law was somewhat reduced when the term «insane» was replaced by the term «psychotic». Consequently, it would not represent any marked break with tradition to somewhat expand the rule.

The Committee is of the view that the current insanity rule provides too narrow a specification of which aberrations may qualify for a ruling of criminal insanity and acquittal. The rule in Section 44 of the Penal Code is, in terms of scope, not entirely in harmony with the moral foundation on which the criminal insanity regime is premised. Consequently, there is a need for adjusting the narrow Norwegian insanity rule in the Danish direction, to increase its accuracy. The same may, it should be noted, also be argued on the basis of the other legal systems examined, although the conclusions will necessarily be somewhat more uncertain since the contents of the mixed criteria are not fully known and difficult to uncover.

In other words, the Committee recommends that the insanity rule be expanded to include certain aberrations that fall outside the scope of the current legislative term «psychotic». The question is how this can best be achieved.

It is hard to see that there exists any term, medical or otherwise, that in a precise and unambiguous manner specifies the very restricted residual group of especially serious aberrations that may be of relevance.

It is difficult to envisage any other solution than for the rule to allow the courts of law, in these altogether exceptional cases, to perform a more specific assessment of the aberration and its implications for the criminal capacity of the perpetrator. This would enable the courts to assess, on the basis of a thorough medical report, the symptom intensity of each perpetrator and then rule on the legal issue of whether such symptom intensity, although the offender was not «psychotic» at the time of the offence, is nonetheless of such a nature that it is neither reasonable, nor appropriate, to impose punishment, for reasons corresponding to those applicable in relation to psychosis.

Such scope for a more specific assessment of certain severe mental aberrations must have its basis in the rationale behind the punishment exemption. If the accused is deemed to have been, at the time of committing the act, highly aberrant and suffering from intensive symptoms, although not psychotic in the medical sense, the Norwegian courts of law should there-

fore, in the view of the Committee, be enabled to render a criminal insanity ruling. Such conclusion is based on the premise that the ethical justification underpinning the criminal insanity regime applies correspondingly.

That the legislation should allow for such assessment is also an implication that follows from the Committee's fundamental position that a sharp distinction should be made between the duties of lawyers and psychiatrists; cf. 8.3.4.4 and Chapter 14. To exclusively use criteria with their origin in medicine to determine who shall be deemed to be of sound mind, will imply that the delineation of the punishment exemption will in practice largely have to depend on developments and opinions within psychiatry. Besides, the legislation should allow for the possibility that one may encounter aberrations and situations that have not been contemplated, or that are new in character. It would thus be unfortunate to have structured criminal law in such a manner that it necessitates the use of punishment when the rationale behind such intervention does not apply.

As far as the specific structuring of the criminal insanity rule is concerned, there are several ways in which to amend the rule to allow for such assessments. The Committee will address this in more detail in 8.6.5.2.3 below.

8.6.5.2.2 Arguments against expanding the insanity rule

The Committee is aware, as will be noted from 8.6.4, that the Storting has on previous occasions considered whether to allow for a ruling of criminal insanity beyond cases of psychosis, and that it has thus far not been deemed desirable to amend the rules. The rule proposed by the Committee may meet with opposition similar to that encountered by the earlier proposals for discretionary punishment exemption rules. The Committee will therefore reiterate, and in the following make some comments on, the main arguments previously invoked against an expansion as mentioned; cf. the detailed discussion in 8.6.4.2:

1. Admission to the psychiatric institutions.
2. Considerations favouring an expansion can be accommodated through punishment reduction provisions.
3. It is of value for citizens to be held to account for their actions.
4. Unclear rules create a risk of undesired liberalisation in practice, contrary to the general sense of justice.

Re. 1: There was extensive criticism from medical circles in the consultative rounds in the wake of the proposals for discretionary punishment exemption rules. It was argued that physicians would lose control over the institutions, and that persons without any need for treatment would be admitted to hospital by courts without any psychiatric expertise.

The Committee is of the view that this argument is of little relevance to the formulation of an insanity rule. The specific delineation of criminal insanity will have to depend on who it would be fair and appropriate to punish.

The Committee is of the view that the need to ensure that only persons who need treatment are in fact treated, whether guilty or innocent, needs to be attended to through the formulation of the special sanctions, by the health service within the correctional service and of course in the application of the mental health care legislation – and not through the criminal liability rules.

Re. 2: It has been argued that the sentencing rule in Section 56, letter c, of the Penal Code already accommodates the considerations suggesting that the courts of law should be allowed to make a more specific assessment as to whether the indictee is of sound mind. The provision in Section 56, letter c, allows for punishment reduction for an offender who «at the time of committing the act suffered a serious mental disorder involving a significantly impaired ability to

realistically assess his or her relationship with the outside world, but who was not psychotic; cf. Section 44».[371]

For the severe aberrations, in respect of which the rationale behind the punishment exemption applies with the same force as in relation to psychotic offenders, this argument is not viable at the level of principles and is insensitive to the actual implications of the current regime. There is a significant difference between being acquitted and being convicted, even if the punishment is made less strict. In one of these scenarios, the legal order has mercy on the guilty person and expresses this by imposing a less severe punishment on him or her. In the other scenario, the offender has an unconditional right to be declared innocent by the legal order, because he or she cannot be blamed for his or her conduct. Such right has its parallel in the duty of society to express the innocence of the perpetrator through an acquittal. Nor should one in this context underestimate the social and moral stigma associated with a conviction, which may make itself felt irrespective of whether the punishment is light or severe.

Re. 3: A third argument that has been invoked in favour of not introducing discretionary punishment exemption rules is that it is of value for citizens to be held to account for their actions, and that the group exempted from punishment should therefore be defined as restrictively as possible.

The Committee is in full agreement with the principle that offenders should be held to account for the actions to the maximum possible extent. However, there must be a limit. In those cases where the offender was, at the time of committing the act, in such an aberrant mental state that the justifications for punishment are not applicable, he or she should not be found guilty. Such must be the case irrespective of how the said aberration is classified in medical terminology.

Re. 4: It was forcefully argued against the proposals for discretionary punishment exemption rules that it was undesirable for the scope of criminal insanity to be unclear and vague. Unclear insanity rules may cause a gradual expansion of their scope in practice, with the result that persons who should have been held criminally liable are instead acquitted. This was deemed to be problematic in terms of the general public's sense of justice.

It has also for the Committee been a weighty consideration to prevent unintended liberalisation in the formulation of the insanity rule.

It is nonetheless possible to attend to this important consideration whilst at the same time enabling the courts to render a ruling of criminal insanity on a more discretionary basis in those exceptional cases where a punishment exemption is held to be well founded.

Once the threshold for a lack of criminal capacity, and hence for criminal insanity, has been established and explained, its manifestations in the legislation need to be consistent, thus ensuring that equal cases are treated equally. Such must be the case irrespective of which diagnosis systems are applied and which diagnostic practices are pursued at any given time. Medical diagnoses are, as previously mentioned, developed and used with entirely different purposes in mind than the delineation of criminal insanity.

By «discretionary basis» is not meant, in other words, that the courts of law shall have unfettered discretion over who to exempt from punishment, but that the term psychosis does not provide the final answer to who is of unsound mind and shall not be held criminally liable. Very considerable value is attributed to the equal treatment of very similar cases in our society.

[371] A corresponding rule is found in Section 78, letter d, of the Penal Code of 2005.

8.6.5.2.3 How should the rule be formulated?

The challenge lies in formulating a rule that enables the courts of law to perform a nuanced assessment as to whether the perpetrator is of unsound mind. The aberrations need to be specified with sufficient precision, and the cases that would typically be encompassed must be described and delineated as clearly as possible in the legislative preparatory works. The group of perpetrators that might qualify for punishment must be restrictively defined, as it can hardly be envisaged that the rationale behind the insanity rule will apply very far beyond the aberrations encompassed by the term psychosis. This would need to be clearly reflected in the wording of the statute.

One is here faced with a choice between different legislative techniques. One option is to adopt a discretionary rule that explicitly leaves it at the discretion of the court to determine the outcome. Such a rules has, as will be noted from 8.6.4, been considered and proposed for adoption on previous occasions, but the lawmaker has thus far not deemed such a solution to be desirable. Although this Committee also believes that such a formulation might be a viable approach in several respects, one has deemed it inexpedient to discuss such alternative in further detail in view of the legislative history. The Committee is in any case of the view that the said legislative structure does not offer the best solution to the problem one is faced with.

If the event that the lawmaker's position on this have changed, the Committee is of the view, as was the Penal Code Commission in Sub-Report VII, that the discussions of the Special Sanctions Committee and its proposal for a discretionary punishment exemption rule can still provide a basis for further examination of such a rule.[372] However, the proposal of the Special Sanctions Committee is, both in its wording and in its intended scope, somewhat broader than the narrow expansion proposed by the Committee.

Another option, which was also the solution adopted in the Penal Code of 1842; cf. the small-font paragraph in 8.6.3.2 above, is to use more «popular» terms and approaches to mental aberrations, for example through the wording «psychotic, *or otherwise mad*». Such a formulation might seem correct in principle, but it entails an unreasonable and unacceptable stigmatising effect on the group in question. Besides, such a wording will not necessarily contribute to a satisfactory delineation of the ambit of the criminal insanity rule.

A third option is the Danish regime, in which a specific group of aberrations are deemed *equivalent* to psychotic conditions *for criminal law purposes*. The Committee believes that this approach represents a good solution to the fundamental problem one is faced with. There is consequently a need for making some comments on the criticism that has emerged against such a formulation of a rule in older legislative processes in this field.

In the report of the Council on Criminal Law, which proposed a discretionary punishment exemption rule (see 8.6.4 above), the following was stated in relation to the Danish approach of stipulating a separate group of equivalent aberrations:

> «[…] the term «aberrations deemed equivalent to insanity» [is] not well suited for an insanity rule based on the medical model, cf. also the opinion of the Danish Council on Criminal Law, page 33. It is a term created by lawmakers, and is not based on any recognised psychiatric diagnosis. A better approach is to tackle the matter head on by formulating a discretionary rule, which leaves it at the discretion of the court to determine whether to grant a punishment exemption to an offender who at the time of committing the act suffered an abnormality, without such abnormality being linked to any specific psychiatric diagnosis.»[373]

[372] Cf. Official Norwegian Report NOU 2002: 4, on p. 230.

[373] Official Norwegian Report NOU 1974: 17, p. 56.

Corresponding comments are made by the Ministry of Justice in the proposition to the Odelsting that endorsed the proposal of the Special Sanctions Committee for a discretionary punishment exemption rule:

> «An alternative to a discretionary punishment exemption rule that will largely capture the same aberrations is to also apply the absolute punishment exemption rule to persons who, at the time of committing the act, suffered an aberration that «must be deemed equivalent to» the aberrations encompassed by the main rule. Such solution was discussed by the Council on Criminal Law, but was rejected. The Ministry agrees that such an alternative would be inferior to adopting a separate discretionary rule. Scope for granting a punishment exemption on a discretionary basis would sit uneasily with an insanity rule based on the medical model.»[374]

These objections are understandable if the «medical model» implies that the evaluation and conclusion of the experts shall be decisive as far as the matter of punishment exemption is concerned. And this is indeed how Section 44 is largely understood, and to some extent applied. However, the absolute punishment exemption rule proposed by the Committee makes the role of the experts less decisive, inasmuch as these shall only render their opinion in medical terms; cf. 8.3.4. Consequently, the court will assume a much more prominent role, since it must in each case independently determine whether the medical description of the accused entails such a severe aberration that he or she must for legal purposes be deemed to be «psychotic». It is made clearer that the court needs to use the legal term «psychotic», which will be narrower in scope than the corresponding medical term. The objection referred to above, that it would be inappropriate to link a punishment exemption to equivalent aberrations in a rule based on a «medical model», will not apply to such a rule. After all, the discretionary legal assessment will always be the key and decisive factor, in relation to whether the accused was «psychotic» or in an «equivalent» state at the time of committing the act.

The Danish approach is good because its intention is clear from the wording; it is those who suffer mental disturbances that are as debilitating and comprehensive as those who are psychotic who will be exempted from criminal liability. This provides a consistent and good solution because the rationale behind criminal liability is not applicable to such persons. Besides, the practical experience with such a provision in Denmark is favourable. One has succeeded in not extending the ambit beyond the narrow and not readily definable group that the Committee believes should also be deemed to be of unsound mind under Norwegian law. In this respect, Danish law accommodates the conflicting considerations in a satisfactory manner. However, this does not imply that the Committee is of the view that the Danish formulation of the rule in such regard is necessarily the best conceivable solution.

To safeguard the ambit of the insanity rule against undesirable expansion in practice, and to express more clearly what is meant by *deeming an aberration to be equivalent to psychosis*, there is reason to formulate the rule more precisely than in the Danish provision. This can be achieved by clearly stipulating, in the legislative wording, characteristics of the aberrations one would want to deem equivalent. In order to indicate how severe the mental aberration must be before one might consider exempting the perpetrator from punishment on the basis thereof, and in order to keep the insanity rule narrow in scope, the Committee proposes the following formulation in the legislative wording:

[374] Proposition No. 87 (1993–94) to the Odelsting, p. 31.

> «A person deemed by the court to have been in a psychotic state at the time of committing the act or in a state that with regard to functional impairment, distorted thinking and otherwise inability to understand his or her relationship with the outside world, must be deemed equivalent to a psychotic state, shall not incur criminal liability.»

There are several arguments in favour of precisely this formulation of the legislative wording. Firstly, the wording «functional impairment, distorted thinking and otherwise inability to understand his or her relationship with the outside world» specifies key characteristics of psychosis. It is, as a matter of principle, advantageous for the key symptoms of being in a psychotic state to be clearly reflected in the legislative wording. This makes it clear that the lack of criminal liability on the part of the perpetrator is not due to his or her disorder or diagnosis as such, but due to the impact of such disorder on his or her cognitive ability and perception of reality, as well as his or her ability to be guided by normal motivations, i.e. the implications of the disorder for his or her *criminal capacity*.

Secondly, the symptom description serves to keep the group of equivalent aberrations within a narrow limit. When the accused must have been suffering from intensive symptoms to such an extent that there is reason to deem his or her state equivalent to a psychotic state, there is little reason to fear unwanted liberalisation in practice. The explicit requirement in the provision for such an impairment of the perpetrator's functional ability, thinking or ability to realistically understand the outside world, constitutes an unambiguous signal to both the court and the experts: The ambit is restricted to cases where there can be no doubt about the basis for a punishment exemption.

Thirdly, the symptom specification highlights which aspects of the state of mind of the accused are of interest. The legislative wording thereby also provides the court with a clear indication as to the subject matter of its ruling, and the experts are instructed about the subject matter of their opinion.

Fourthly, the symptom specification will make it clearer that the criminal insanity assessment involves making a decision in an ethical matter that cannot be pared down to medical diagnostics and clinical evaluation. This is highlighted in the wording through the term «*must be deemed equivalent* to a psychotic state», instead of for example *in a corresponding state with regard to functional impairment*, etc. The term «deemed equivalent» is more prescriptive in character, has more normative connotations, and thus also signals more clearly that it is for the court to make the assessment.

This will also make the division of responsibilities between the court and the experts clearer; cf. Chapter 14 in particular. If it is evident that the accused was not in a psychotic state at the time of committing the act, or that his or her aberration cannot be considered a psychosis for legal purposes, the criminal insanity assessment will, under the proposal, focus on whether such aberration should be deemed equivalent to a psychotic state. Although the court will of course also benefit considerably from the advice provided by the experts in performing its assessment under the said criterion, it is clearly reflected in the wording that deciding the issue of criminal insanity is a legal matter, in respect of which the court of law will always have the last and final word.

Fifthly, a rule on equivalent aberrations will clarify how to handle uncertainty with regard to aberrations that may give rise to unsoundness of mind. The implications of any uncertainty associated with establishing a diagnosis in relation to such aberrations shall be resolved through interpretation of the punishment exemption rule, whilst any uncertainty as to the factual basis for establishing such diagnosis shall be resolved through the applicable standard of proof; cf. 10.4.3 for further details.

Finally, it should be noted that a rule implying that equivalent aberrations qualify for a punishment exemption, may presumably also have a favourable effect on the application of the legislative psychosis concept. There are indications that the term psychotic has been stretched somewhat by the courts to achieve desired outcomes in individual cases; cf. 8.6.4.3. If equivalent aberrations are encompassed by the rule, there is no longer the same need for contrived use of the term to avoid unreasonable outcomes.

The alternative can probably also contribute to medical uncertainty being brought to light: The experts might otherwise end up, when providing assistance to the courts, expressing opinions that are more definite than would be medically justified, for example because the accused is, based on a medical assessment, in need of treatment at the time of the judgment and therefore should preferably be transferred to the mental health care service.[375] Such a risk is reduced if the issue of criminal insanity is not exclusively a matter of whether the accused was «psychotic» at the time of committing the act. In other words, there is reason to believe that the amendments proposed by the Committee to the insanity rule in this respect may result in the experts handling their assignments in a medically more correct manner when providing their account of the perpetrator's symptoms and clinical picture.

8.6.5.2.4 The specific assessment as to whether there is an equivalent aberration. The significance of expertise.

Some brief comments are outlined here in relation to the provision, including how it is intended to be applied by the courts of law. Corresponding assessments must of course also be made at the prosecution stage.

The mental aberrations encompassed by the proposal will vary in strength and nature. The decisive factor shall be the offender's symptoms as these manifested themselves at the time of the offence. The key assessment criterion is the seriousness of the aberration, and what impact it must be assumed to have had on the offender's cognitive and emotional abilities, including his or her perceptive capacity, perception of reality and motivations.

The proposal is based on the premise that the ruling of the court shall be based on an overall assessment of the aberration suffered by the indictee, and not on the medical-diagnostic classification of psychiatrists. Psychiatric expertise will nonetheless be of value to the judge in performing the specific assessments. Since the term «equivalent aberration» is not a known quantity, whether in psychiatry or for the psychiatric experts who appear in criminal cases, the function of the experts will necessarily be somewhat different from when they are expressing opinions on the basis of their own medical terminology.

The psychiatric opinion commissioned to provide guidance for the court should therefore be restricted to discussing the symptoms of the accused and presenting general information about what impact the aberration suffered by the accused might generally be assumed to have in terms of functional ability, thinking and comprehension of the outside world.[376] In the report

[375] See also Waaben (1968), pp. 43–44, quoted in 7.2.2 above. Cf. Proposition No. 87 (1993–94) to the Odelsting, on p. 31, where it may appear that these arguments, which were invoked in both Official Norwegian Report NOU 1974: 17, on p. 56, and in Official Norwegian Report NOU 1990: 5, on p. 49, have been misunderstood: «Such an alternative [(a rule on equivalent aberrations)] may, moreover, result in the term psychosis being stretched beyond what is medical justified, with the intention of achieving reasonable and appropriate solutions in individual cases. This may again result in unnecessary stigmatisation of the offender.» Indeed, the motivation behind a supplement reflecting the Danish approach would, after all, be precisely to avoid the kind of situation feared by the Ministry of Justice. One cannot exclude the possibility that the said misunderstanding was carried into the deliberations of the majority in the Standing Committee on Justice; cf. Recommendation No. 34 (1996–97) to the Odelsting, on p. 7, where the views of the Ministry are outlined, cf. the minority, on p. 8, which undoubtedly has understood the arguments of the Council on Criminal Law and the Special Sanctions Committee as these were intended.

[376] See Chapter 14 for further details on the role of the expert.

from the Council on Criminal Law on the insanity rules, this was expressed as follows in relation to the proposal for a discretionary punishment exemption rule:

> «The psychiatrist makes his or her expertise available in a context in which ethical and legal considerations also play a key role […] It is a deeply entrenched ethical belief that certain persons are so aberrant that they should not be held criminally liable. Such belief is assumed to apply independently of profession and milieu, but probably has – for good reason – an especially secure foundation in psychiatrists and lawyers. However, when seeking to identify the mental abnormalities that ought to qualify for a punishment exemption, based on such fundamental ethical belief, the psychiatrist has qualifications not held by the lawyer. He or she can evaluate the intensity and nature of a pathological aberration, and compare the various abnormalities to each other.»[377]

This must also be the role of the experts under the rule on equivalent aberrations: The psychiatrist and specialist psychologist must, based on their professional background and terminology, evaluate the intensity and nature of the perpetrator's mental aberration and indicate, to the best of their ability, how such aberration manifested itself at the time of committing the act. However, it is emphasised that it is the *role of the court* to reach a final conclusion with regard to the nature of the aberration, thus ruling on whether the state of the perpetrator in the specific case in question should be deemed *equivalent* to a psychotic state. This is a judicial assessment that shall also serve legal purposes. The punishment exemption is justified by the state of the offender. Whether he at the time of committing the act was so aberrant that it would *not be reasonable, fair or appropriate* to hold him or her criminally responsible is therefore the fundamental question the judge needs to ask him- or herself.

These observations may seem abstract and without much value as guidance. It is easy to agree with such observations at the level of legislative considerations, but difficult to operationalise these in real life and in relation to specific cases without ending up with empty phrases. This is of course unwanted and must be avoided.

In practice, the judge must therefore only assess the extent of the aberration suffered by the accused, and ask him- or herself whether the accused was, at the time of committing the act, so affected by intense symptoms that he or she should be held criminally liable. This is no different from the role of the judge in ruling on the issue of whether the accused was «psychotic» at the time of committing the act – he or she needs to assess the existence and intensity of the symptoms, and thereafter reach a conclusion as to whether these were so massive that he or she was «psychotic». And the Committee is of the view that this is all that a criminal insanity rule should focus on; cf. 8.3.4.

Considerations like, for example, the seriousness of the crime, causality or psychological factors (for example the ability to understand how seriously society and the legal order consider the offence to be, or the ability to comprehend the illegal nature of the act) or whether a transfer to compulsory mental health care would be an appropriate reaction, shall *not* be included in the assessment of the courts as to whether the perpetrator should be acquitted.

However, circumstances relating to the misdeed and the accused's comprehension of the outside world and the act may, depending on the situation, offer an indication as to whether he or she suffered a mental aberration that should qualify for a punishment exemption. It is in such context also important to be aware that such aberrations as should be encompassed by the rule may fluctuate, i.e. vary in symptom intensity and be especially prominent at certain times.

[377] Official Norwegian Report NOU 1974: 17, p. 63.

After the provision has been in effect for a while, guidance will also be available in the form of case law, here as in other legal fields. Besides, it is conceivable that case law under the Danish rule may provide some inspiration.

The implications, if any, of the accused being to blame for the aberrations is, in the view of the Committee, best considered under the new Section 45 of the Penal Code proposed by the Committee; cf. Chapter 9 below.

8.6.5.2.5 Conditions that may merit an exemption from criminal liability

The Committee has in 8.4 provided a medical overview of conditions that may merit inclusion under a criminal insanity rule. 8.6.2 provides some examples of conditions that fall outside the scope of current criminal insanity rules, or may potentially fall outside such scope.

Conditions that the Committee believes may merit a punishment exemption are diabetes-related conditions, dementia, delirium, dissociative disorders, pervasive developmental disorders, as well as special symptoms in relation to cognition, perception, emotional state and behaviour.

This is of course under the assumption that the symptoms are of sufficient intensity. These conditions may fluctuate, and whether criminal insanity and punishment exemption should be the outcome would have to depend on a specific assessment of the symptom intensity at the time of committing the act.

An important question is what implications the emotional abilities of the perpetrator shall have for the issue of moral responsibility. On the one hand, it is evident that the ability to show empathy; to understand or be affected by the emotional life of others, and the ability to show sympathy; to have a positive attitude to others, is of major importance in all well-functioning social interaction. Consequently, such abilities are in this sense important requirements for any moral being.

On the other hand, such abilities are not necessary in order to conform to the behavioural requirements of society, provided that the cognitive abilities are intact. That this is a generally held view is reflected, inter alia, in the fact that psychopaths; persons with personality disorders that involve a shallow emotional life, including a lack of empathy and sense of responsibility, have always been held criminally liable for their actions.

The Committee is of the view that it would take a lot for any lack of emotional abilities to lead to a punishment exemption. There nonetheless exists conditions where the lack of such abilities may, possibly in combination with other mental aberrations, have so comprehensive implications that punishment exemption ought to be the outcome. One example of an aberration that should potentially merit a criminal insanity ruling is provided by the person with Asperger's syndrome mentioned in 8.6.2.

8.6.5.3 «In a state of automatism» and «intellectually disabled to a high degree»

The Committee is of the view that there is no need to revise the contents of the insanity rule in respect of aberrations that are encompassed by the alternatives «in a state of automatism» and «intellectually disabled to a high degree»; cf. 8.1. There is, however, reason to ask, in view of the above discussion, whether these should be specified differently in the statute.

In the same way that certain aberrations are, in their nature or manifestations, close to the term psychosis, certain aberrations will be close to the aberrations «in a state of automatism» and «intellectually disabled to a high degree», which like «psychotic» qualify for a punishment exemption. The question arises of whether these criteria for punishment exemption should, in the same manner as with psychoses, be supplemented by «equivalent aberrations».

The answer must be in the negative; there is no need for such an expansion. This has to do with the said two terms being, unlike the legal psychosis concept that is linked to the medical psychosis concept, legal terms with their own meanings. To the extent that it is deemed appropriate to let these terms encompass «new» or other aberrations, the scope can be expanded through case law, or alternatively by way of the lawmaker deciding that new aberrations shall be encompassed by such terms.[378]

The Committee has nonetheless considered whether it might be appropriate to link these alternatives to medical diagnoses, and then supplement them through the inclusion of equivalent aberrations. One might, for example, let the group of perpetrators currently encompassed by the term «intellectually disabled to a high degree» instead be defined by medical diagnoses under ICD-10.
The group might be defined using the diagnoses in F70-F79, which address mental retardation. Those who are currently classified as «intellectually disabled to a high degree», which corresponds to an IQ level of less than 55, will qualify for either the medical diagnosis «mild mental retardation» in F 70 or the medical diagnosis «moderate mental retardation» in F 71, which correspond to IQ levels in the ranges 50–69 and 35–49, respectively.
There is reason to emphasise that IQ measurements are not precise, and that this is in any event not the only factor taken into consideration when determining whether a person is of unsound mind within the meaning of criminal law or whether he or she qualifies for these diagnoses under ICD-10. IQ does not saying everything about a person's functional ability, and it is therefore necessary to involve an element of discretionary assessment in which the person's social functioning is also taken into account.
Although it would have resulted in a uniform structure for the punishment exemption rule if all alternatives for a punishment exemption were first specified by way of a medical term and thereafter by a supplementary and clarifying term of a purely legal nature, the Committee has not considered this to be an appropriate legislation strategy. The statutory wording should primarily use terms from ordinary language that clearly and unambiguously indicate the legal contents of a provision to both citizens and professional parties. Unless there are special reasons for doing so, one should avoid using terms from specific professional traditions that have been developed with other purposes in mind.

There are weighty reasons for using the medical psychosis concept as the core of the legal rule on punishment exemption for those who were «psychotic» at the time of committing the act, although the ultimate application of the rule to a specific situation will not necessarily be in conformity with the medical diagnosis. The medical term is a good indicator as to which aberrations should result in a punishment exemption; cf. 8.5. There exist no medical terms that specify, in the same manner, the aberrations encompassed by the terms «intellectually disabled to a high degree» or «in a state of automatism», or the term «severely impaired consciousness» used in the Penal Code of 2005. Besides, the meaning of these terms is well known, not least in legal circles.

However, the Committee will recommend a supplement to the alternative «intellectually disabled». The said alternative encompasses low intellectual functional ability that is congenital or has arisen in early childhood; cf. 6.6. Corresponding impairment of functional abilities occurring in adults who were healthy at the outset, for example as the result of brain injury, falls outside the scope of the term. Such cases were encompassed by the wording of the earlier criminal insanity rule, and the rationale behind such rule clearly applies to these cases. It is therefore proposed that the alternative «intellectually disabled to a high degree» be supplemented by the wording «or correspondingly debilitated.»

[378] The former has for example taken place by way of the term «automatism» also being applied to transient substance-induced states of psychosis; cf. the ruling published on p. 549 onwards of the 2008 volume of the Norsk Retstidende court reporter for the Supreme Court.

8.7 Is the proposed criminal insanity rule discriminatory?

It follows from 6.10 that Norway's obligations under international law are not an obstacle to the type of criminal insanity rule proposed by the Committee, and that such rule will not be considered discriminatory within the meaning of such obligations.

However, there is reason to discuss whether any criminal insanity regulation results in equal cases being treated unequally, thus discriminating in an inappropriate or offensive manner, irrespective of which restrictions might apply under international law.

The argument that criminal insanity rules have a discriminatory effect was voiced in the debate also before it became linked to the UN Convention on the Rights of Persons with Disabilities. The Norwegian Mental Health Association wrote the following in a consultative statement on the report from the Penal Code Commission:

> «The arguments invoked in favour of exempting seriously mentally ill persons from criminal liability do not seem particularly convincing. The arguments are largely based on a distinctly Norwegian and unconvincing 'humanism' pursuant to which it is not reasonable, or alternatively contrary to the 'general sense of justice', to punish offenders who were seriously mentally ill at the time of the offence. However, the reason why this is considered unreasonable […] is that such sense of justice is premised on prejudices with regard to the nature of mental disorders, and it cannot be the role of legislation to consolidate such prejudices. The fact of the matter is that the vast majority of seriously mentally ill persons are fully capable of acting responsibly in a great many respects.»[379]

It is argued that the criminal insanity rule constitutes one element of an «extensive and discriminatory legislation targeting persons with severe psychosocial disabilities in the form of psychoses».[380]

The Penal Code Commission, which can presumably be considered a representative of the generally held and official position on the need for criminal insanity rules had stated, inter alia, the following:

> «It will in most cases be contrary to the general sense of justice to punish offenders who were severely mentally aberrant at the time of committing the act. Such is also the case if the abnormality is no longer manifest at the time of the judgment. Nor will offenders with such mental aberrations be influenced by a threat of punishment to the same extent as normal persons. However, not all of them will be totally unaffected. One should also least in relation to some groups of persons of unsound mind consider the levying of fines as allowed for under Swedish law […]»[381]

The discrepancy between the views of the Association and the Commission relates to whether and to what extent the group referred to as «mentally ill» persons can be criminally responsible. The disagreement can have two explanations.

Firstly, that there are diverging views as to which criteria should define who is «fully capable of acting responsibly [for purposes of criminal law]». Diverging views as to which offenders should be held responsible for their actions, and to which extent, raise large and complex issues that have been discussed by the Committee in 8.2 and 8.3.4.2. The Committee is of the view, as will be noted form the said discussion, that some persons lack the qualities required

[379] Quoted in Official Norwegian Report NOU 1990: 5, p. 44.

[380] Lund (2012).

[381] Official Norwegian Report NOU 1983: 57, p. 161.

to be held criminally liable. The decisive factor must be the extent to which the offender is capable of «acting rationally and being motivated by a threat of punishment».[382]

The Committee does not consider it an appropriate alternative to treat different cases equally by subjecting anyone to punishment, not even as a means of inclusion. Punishment is the strictest intervention used on individuals. It should not be used beyond the extent dictated by the justifications for punishment, as punishment will otherwise be perceived as unfair and fail to serve its purpose.

It may be added that the significance of not considering some persons to be criminally responsible depends on the perspective one adopts. One may argue that it is discriminatory, and thus stigmatising, not to hold persons with serious mental disorders criminally responsible for their actions. But one may also argue that being held criminally responsible – as an offender and criminal – is in itself a stigmatisation, which it is discriminatory to impose on those who do not meet the requirements applicable to such stigma. However, this will not be accepted as an argument by those who might hold the view that such a sense of justice is premised on prejudices with regard to the nature of mental disorders, and who believe that seriously mentally ill persons could and should be held responsible like everyone else.

Another basis for the strong difference of opinion reflected here may be differing views as to who actually falls within the scope of the criteria. Even if, for example, one agrees that the decisive factor in determining criminal liability is what capacity the offender has had for acting rationally and for being motivated by a threat of punishment, there may be general or specific evidence-related disagreement as to whether or not such is the case.

The Committee is of the view that it can be determined, with a sufficient degree of certainty, who belongs to the groups that must be classified as being of unsound mind within the meaning of criminal law under the proposed rule. Consequently, the proposal does not entail a risk of treating equal cases differently such as to discriminate against persons with serious mental disorders, or such as to represent a disproportionate intervention against those who suffer such disorders and commit offences. A key premise is that the rule requires a pronounced symptom intensity, in the sense that the offender shall have been unable to assess his or her relationship with the outside world in a realistic manner.

8.8 The comments of the Committee on a proposal for amendments to the criminal insanity rule from a working group appointed by the Norwegian Psychiatric Association with the support of the Norwegian Medical Association

8.8.1 Theme and structure

The Board of the Norwegian Psychiatric Association has issued a report from an appointed working group – *«How should Norwegian Forensic Psychiatry be Developed?»*. The report is also signed by Hege Gjessing, president of the Norwegian Medical Association. The report and the proposals have been discussed in the daily press, and were published during the proceedings of the Committee.[383]

[382] Official Norwegian Report NOU 1983: 57, p. 161.

[383] See the article in the morning edition of the newspaper Aftenposten on Tuesday 18 March 2014, p. 5, which also included an interview with the chairperson of the working group, Àsgeir Bragason, as well as the editorial in the newspaper VG on 19 March 2014, on p. 2.

The report, which discusses key issues that the Committee has also been requested to address, has made, together with meetings with the Association, valuable contributions to the proceedings of the Committee. In order to elucidate the reasoning behind the choice of criminal insanity rule, it is useful to present some comments on the proposal and observations of the working group. The Committee has noted that the working group recommends that the Norwegian criminal insanity rule be based on the mixed model.

First, in 8.8.2.1, the rule proposed by the working group is outlined briefly. Thereafter, in 8.8.2.2, the Committee discusses the reasons given by the working group for amending the current insanity rule, whilst 8.8.2.3 outlines the views of the working group with regard to the implications of its own proposal. The Committee then presents its views on the amendments to the insanity rule proposed by the working group in 8.8.3.1–8.8.3.4, before providing a summarising conclusion in 8.8.4. In 8.8.5, the Committee makes some observations on the comments of the working group concerning practice with regard to the discontinuation of prosecution.

8.8.2 The deliberations of the working group

8.8.2.1 The insanity rule proposed by the working group

The working group is advocating a mixed model. In other words, a legal rule comprising a criterion referring to a medical condition supplemented by a criterion requiring a link between such condition and the action; cf. the general discussion of this in 6.3 and 8.3.3. If a rule is going to be formulated on the basis of a reasonable reading of the deliberations of the working group, it would have to be formulated more or less as follows:

> A person who commits a criminal act as the result of him or her being psychotic at the time of the offence and unable to understand the criminal nature of such act, and whose ability to exercise control over his or her own will is materially impaired, shall not be liable to punishment.

The working group has not itself presented any such specific proposal for the formulation of the legislative wording, but the rule envisaged and wanted by the group is nonetheless fairly clearly expressed in some extracts from the report. The following example of a case that should in the view of the group fall outside the scope of a criminal insanity rule is illustrative:

> «[I]f a psychiatric patient, well aware that it is wrong, commits burglary and steals a crate of beer, it may offend the sense of justice if he or she is deemed to be of unsound mind because he or she has ideas about communicating with birds.»[384]

The working group believes, based on this example, that there is a need for amending the current rules. A person with clear psychotic symptoms should not be exempted from criminal liability if he or she «understands that he or she is committing an illegal act and he or she is capable of choosing whether or not to perform such act.»[385]

Certain other statements serve to clarify the views of the working group as to how an insanity rule should preferably be formulated:

> «An amendment should be made by way of also developing *supplementary criteria*, as an addition to the *main criterion* for punishment exemption, i.e. psychosis with active psychotic symptoms of a certain duration and intensity. The supplementary criteria may relate

[384] Norwegian Psychiatric Association (2014), p. 38.

[385] Norwegian Psychiatric Association (2014), p. 39.

to the understanding of criminal capacity by taking implications of the psychosis symptoms into account».

The statements of the working group on the basic criterion or aberration criterion («main criterion» in the report) of the provision, shows that it wants to keep the current psychosis concept:

> «A fairly narrow meaning has been attributed to the term 'psychosis' in Norwegian case law. In order for psychotic symptoms to result in a punishment exemption, these must not only have been manifest at the time of a criminal act, but must also have been of a certain intensity and a certain duration. The working group does not recommend changes to this interpretation of the term psychosis.»[386]

The statements of the working group on narrowing criteria («supplementary criteria» in the report) in the insanity rule show that one would like these to be based on a modified psychological criterion:

> «A strict version of the psychological principle under which a punishment exemption can only be granted if the criminal acts are the direct consequence of the psychotic symptoms, or if the person in question is unable to understand the nature of the act and its illegal nature, will in the view of the working group be too narrow. Allowance must also be made for a punishment exemption in cases where the criminal acts are related to the psychosis in a less direct manner. The legislation must stipulate that in order for psychotic symptoms to qualify for a punishment exemption, such symptoms must result in a loss of the ability to perceive and understand that an act is criminal. In addition, the disorder must imply a material impairment of the ability of the perpetrator to exercise control over his or her own will. This may, for example, apply to psychoses involving disorganised thinking and behaviour, or cases in which control functions have been lost.»[387]

In other words, the working group would like to see an insanity rule based on the current narrow legal psychosis concept – the requirement that the perpetrator must have been suffering intensive symptoms at the time of committing the act; cf. 6.4.3 – but with such aberration criterion being supplemented by criteria that further restrict the scope of the insanity rule. This also follows from the working group's summary of its discussions and recommendations:

> «The introduction of a mixed biological/psychological principle in Section 44 of the Penal Code is recommended. The statute must include a main criterion of psychosis, dementia disorder of a high degree and severe organic brain disorder. In addition, there should be introduced a supplementary criterion addressing how psychotic symptoms result in a material impairment of the understanding of the criminal nature of an act, impairment of the ability to exercise control over one's own will, etc. The supplementary criteria must not only address acts that are the direct result of psychotic symptoms, but also acts that are related to the psychosis in a less direct manner.»[388]

8.8.2.2 The reasons invoked by the working group for amending the insanity rule

The working group has given several reasons for amending the insanity rule. Firstly, it is argued that the current rule needs to be amended to bring it more into line with the term «criminal capacity»:

386 Norwegian Psychiatric Association (2014), pp. 39–40.

387 Norwegian Psychiatric Association (2014), p. 39.

388 Norwegian Psychiatric Association (2014), p. 57.

> «There is broad support in society for the principle that a person must have criminal capacity in order to be punished […] By criminal capacity is meant that a person has the ability to understand what he or she does and to grasp the link between an action and the consequences of such action, including the ability to understand that an action is illegal. Moreover, the person must have the ability to control his or her actions.»[389]

The group also believes, in an extension of this argument, that consideration for the «general sense of justice» suggests that the current insanity rule should be amended:

> «However, it is likely that an amendment that also takes into account the consequences of a psychosis will be more readily acceptable to most people, i.e. be aligned with the general sense of justice.»[390]

Thirdly, the working group refers to private law provisions that require various forms of links between a disorder and a commitment in order for the latter to be deemed invalid. Correspondingly, reference is made to the delineation of the liability for damages for actions perpetrated by mentally aberrant persons.[391]

Fourthly, the working group assumes that a mixed model would enable the matter of so-called «bothersome persons» to be dealt with. The group has stated the following, in reference to the example of the person who steals beer and has psychotic delusions about communicating with birds:

> «This latter type of offender is in many cases too healthy to be involuntarily committed to an institution under the provisions of the Mental Health Care Act. They cannot, at the same time, be punished because they fall within the scope of the criminal insanity rules in Section 44 of the Penal Code. The end result is that society has no means of sanctioning their bothersome and disruptive behaviour.»[392]

The argument of the working group would appear to be that a mixed model will better enable the judicial system to sanction this group, which neither is in such need of treatment, nor represents such a danger to others, as to qualify for compulsory treatment under the Mental Health Care Act or for a special sanction, by allowing for such persons to be convicted. In other words, the working group is of the view that it is necessary to sanction the «bothersome and disruptive behaviour» of such group by way of punishment.

Fifthly, the working group notes that society's views on patients' responsibility for their own health and actions has evolved, from a paternalistic perspective in which the «doctor knows best» to a recognition of individual responsibility and freedom of choice. This is reflected in, inter alia, provisions on consent-based treatment in Section 2-1 of the Mental Health Care Act, and the compulsive treatment provision in Section 3-3 of the said Act, which is conditional upon voluntary arrangements having been tried or deemed not appropriate:[393]

> «Upon the introduction of the proposed supplementary criteria in Section 44 of the Penal Code, the Penal Code will be in harmony with the thinking behind the provisions in Chapter 3 of the Mental Health Care Act. This operates with a main criterion (serious mental disorder) and supplementary criteria (prevent prospects for recovery/significant improvement

[389] Norwegian Psychiatric Association (2014), p. 37.

[390] Norwegian Psychiatric Association (2014), p. 40.

[391] See Norwegian Psychiatric Association (2014), p. 38.

[392] Norwegian Psychiatric Association (2014), p. 38.

[393] See Norwegian Psychiatric Association (2014), pp. 37-38.

and avert danger). One thereby reduces discrepancies between society's general thinking on responsibility, i.e. a transition from paternalism to autonomy as the fundamental perspective in society, and the provisions of the Penal Code.»[394]

Sixthly, the working group is of the view that the need for a clear division of responsibilities between the court and the experts suggests that the rule needs to be amended:

«The working group is of the view that one must in this regard provide a clear definition and delineation of the responsibilities of those involved. The responsibility of the experts will be to opine on whether the existing symptoms are in conformity with general knowledge about psychotic disorders, and to describe how symptoms in the specific case have affected cognitive capacity and control functions. However, it must be for the court to determine, based on its own discretionary assessment, whether any deficiency in the perception of reality and control functions is so marked as to meet the supplementary criteria under the legislation.»[395]

8.8.2.3 The views of the working group on the consequences of amending the insanity rule

The report of the working group discusses the consequences of introducing the type of rule envisaged by the group. The following is stated in relation to the continued application of the requirement for active psychotic symptoms, which the working group as mentioned wanted to retain as part of the psychosis criterion:

«Consequently, it is not necessarily the case that the introduction of the proposed supplementary criteria, and thus the mixed biological/psychological principle, will in practice result in major quantitative changes with regard to who is deemed to be of unsound mind.»[396]

Furthermore, the following is stated under the heading «Consequences of introducing a mixed biological/psychological principle»:

«Although the introduction of a mixed biological/psychological principle may not necessarily affect a particularly significant number of perpetrators, there may be some persons who at present are exempted from punishment, but who will in future be convicted. This implies, in other words, that some persons with psychotic disorders, but an intact ability to understand consequences of their actions and intact control functions, may in future be sentenced to imprisonment.»[397]

8.8.3 The comments of the Committee

8.8.3.1 The premises underpinning the proposal of the working group

All countries and legal systems that have been examined by the Committee and whose criminal insanity rules are based on the mixed model, use aberration criteria that are much broader than the strict psychosis criterion laid down in current Norwegian legislation; cf. Chapter 7. It would appear that the working group has not taken this into consideration when writing the following concerning the rule it proposes, which retains the strict psychosis criterion in a rule based on the mixed model:

394 Norwegian Psychiatric Association (2014), p. 39.

395 Norwegian Psychiatric Association (2014), p. 39.

396 Norwegian Psychiatric Association (2014), p. 40.

397 Norwegian Psychiatric Association (2014), p. 41.

> «If such a solution is selected, one will in addition to the medical/biological principle have introduced the psychological principle, thus implying that the legislation will be based on a mixed biological/psychological principle, various variants of which are found in most Western countries. […]»[398]

The broader the aberration criterion, the more reason to operate with narrowing criteria to delineate the group of offenders of unsound mind in a satisfactory manner. If the aberration criterion is already narrow in scope at the outset, and only encompasses those who are the most confused of all, as is the case with the term psychosis in the Norwegian rule in Section 44 of the Penal Code, there is much less of a need for narrowing criteria. This is not specifically commented in the discussions of the working group.

8.8.3.2 Reasons for introducing a new insanity rule

The Committee is of the view that the working group's discussion of the term «criminal capacity» is too restricted. The working group has discussed the term without reference to the general justifications for punishment, from which justifications such term must, in the view of the Committee, be derived. The Committee refers to the discussion in 8.2.1. As far as concerns the working group's references to the implications of the «general sense of justice» for the formulation of the rule, the Committee refers to the general observations in 8.3.4.2.

Nor does the Committee agree with the working group that a desire to solve the problems associated with the so-called «bothersome persons» is an argument in favour of basing the insanity rule on the mixed model, or on any other type of formulation of the rule for that matter. The delineation of the scope of criminal insanity should, as a matter of principle, not depend on practical considerations relating to societal protection requirements, on who should fall within or outside the scope of measures seeking to meet such requirements, or on what type of crime the offender has committed. Such delineation must, on the contrary, depend on who is so aberrant that it would not be reasonable or fair to punish him or her based on the general justifications for punishment. The question is then how one can ensure, through the formulation of a legislative provision, that such purpose is realised in practice; cf. 8.3.4.1.

The Committee nonetheless notes that it is difficult to see that the ability of society to deal with the issue of «bothersome persons» is to any significant extent related to the formulation of the insanity rule. Although it may perhaps be the case that «bothersome persons» would be held criminally liable more often under the proposal of the working group, this would not necessarily imply that we would be more capable of reducing the problem of «bothersome persons». Their offences do not qualify for enough of a sentence to protect society for any length of time in the event of them being punished, and their disorder, social status and presumably more challenging financial circumstances mean that they will, when they have served their sentence, quickly revert to their former pattern of behaviour. Moreover, this group of persons with severe mental aberrations may give rise to considerable problems in prison. Consequently, the solution does not lie in how the criminal insanity rule is formulated, and probably not within criminal law at all. This is principally a matter of how far the political will extends when it comes to protecting society against offenders who are predominantly just «bothersome persons» and not dangerous, combined with financial considerations and improved collaboration between various government bodies. Since it does not form part of the mandate of the Committee to take a view on how society should deal with «bothersome persons», the Committee will not address this issue in further detail; cf. also Chapter 3 on the mandate of the Committee.

As far as concerns the references of the working group to civil law provisions on the implications of mental disorder and the use of a mixed model, the Committee notes that such sets of rules serve other purposes than those constituting the rationale behind criminal law. Reference is also made to the discussions in 8.3.4.6.

[398] Norwegian Psychiatric Association (2014), p. 39.

The Committee is of the view that the fact that we have consent-based regulations within health care law and the mental health care service provides little guidance as to how the criminal insanity rule should be structured. The decisive factor must be, in this regard as well, the underlying justifications for criminal responsibility.

Nor is the Committee able to endorse the argument that society's general thinking on responsibility will be better reflected as the result of the purely technical legislative formulation of the rule, i.e. that this issue is in some way related to whether one operates with one or two criteria in the legislative wording. A rule that would best ensure such conformity, but which cannot be adopted for obvious reasons, would have consisted of one single criterion – «a person who is of unsound mind at the time of committing the act, shall not be liable to punishment».

Part of the intention behind the proposal of the working group has been to make a clear distinction between expert activities and adjudicating activities.[399] This is an objective that the Committee can endorse unequivocally. A clear division of responsibilities has also been a key and overarching consideration in the proceedings of the Committee; cf. Chapter 14 in particular.

8.8.3.3 Other aspects of the proposal from the working group

The working group refrains from further clarifying how the narrowing criteria in the proposed rule shall be formulated or practised. In one context, it would appear that one would like narrowing criteria of a more psychological nature – punishment can only be used if the perpetrator understood that he or she committed an illegal act and was capable of choosing whether or not to perform such act. In another context, it would appear that the working group is also proposing to introduce the causality criterion defined through case law under Section 16 of the Danish Penal Code, but which almost never results in punishment – when the group states that the criminal act must be a «consequence of the psychotic symptoms», provided, however, that punishment should also be exempted if «acts are related to the psychosis in a less direct manner»; cf. 7.2 for further details on Danish law.

Both of the indicated criteria raise issues that are not addressed in the report, at least not to any appreciable extent. It remains unclear whether the group wants the legislation to operate with both a causality criterion and more traditional psychological criteria at the same time. And if such is the case, how would any causality criterion and the more traditional psychological criteria relate to each other within the confines of one and the same rule?

Other issues also arise in relation to the psychological criteria. What does, for example, illegality mean in this context? It is, indeed, stated that the aberration must «result in a loss of the ability to perceive and understand that an act is criminal». This may indicate that the group proposes that the perpetrator must be ignorant of the law in order to be acquitted. In such case, it is arguing in favour of a regime that has been subjected to comprehensive and consistent criticism throughout the Common Law tradition for many years, without explaining why such regime should nonetheless be used in Norway. See 7.6 for the Committee's detailed discussion of English law, and especially 7.6.3–7.6.4 on the narrowing criteria under the M'Naghten rules.

Another issue is how the «illegality criterion» and the «control criterion» should relate to each other. If the requirement is that the perpetrator, as the result of the state of psychosis, did not understand the illegal nature of the act, and that the disorder must in addition «imply a material impairment of the ability to exercise control over his or her own will», it uses very strict psychological criteria – and much stricter than the corresponding narrowing criteria in other

[399] Conversations with some members of the working group in Bergen on 11 March 2014 and meetings with representatives of the working group and the Norwegian Medical Association on 7 May 2014.

jurisdictions studied by the Committee; cf. Chapter 7. The Committee is of the view that it goes beyond the justifications for punishment – i.e. that it is not fair – to punish a person because he or she understood that the action was prohibited under the laws of the land, when he or she had at the same time, because he or she was psychotic, totally lost control over him- or herself, and vice versa.

The working group believes that «[a]llowance must […] be made for a punishment exemption in cases where the criminal acts are related to the psychosis in a less direct manner». However, it remains unexplained how one should proceed in defining the limit between acts that are related to the aberration in a less direct manner, and actions that are only related to the psychosis in a more indirect manner.

8.8.3.4 The consequences of the proposal from the working group

The Committee is of the understanding, as noted in 8.8.2.1, that the working group would like to see a rule that is worded more or less as follows:

> A person who commits a criminal act as the result of him or her being psychotic at the time of the offence and unable to understand the criminal nature of such act, and whose ability to exercise control over his or her own will is materially impaired, shall not be liable to punishment.

The Committee is of the view that the consequence of such a rule would be an increase in the use of punishment on highly confused and aberrant persons – persons who in the view of the Committee lack «criminal capacity». It may appear, as also noted in 8.8.2.3, that such has not been the intention of the working group or, alternatively, that it has not envisaged that the rule might be thus applied in practice.

8.8.4 Conclusion

The Committee believes, as will be noted from 8.8.3 and as implied by the more general reasoning of the Committee in 8.3.4, that the criminal insanity rule proposed by the working group is not well founded. Several of the arguments invoked do not provide good guidance for the drafting of an insanity rule, and there is also reason to be concerned about the introduction of narrowing criteria of the type proposed by the working group.

8.8.5 Other issues addressed in the report of the working group – Discontinuation of prosecution

The working group has also made some comments on practice with regard to the discontinuation of prosecution in relation to the soundness of mind requirement:

> «[T]he prosecuting authority discontinues the prosecution of a large number of criminal cases because of doubt as to whether the perpetrator was of sound mind at the time of committing the act (often referred to as «065 discontinuations», in reference to the coding system of the police). In 2012, the prosecution of 1830 felonies and 940 misdemeanours was discontinued on such basis. (Source: National Police Directorate; personal communication to Bjørn Østberg)

- There exist no precise data on which aberrations are hidden behind these figures. It may be assumed that the group of perpetrators is heterogeneous. One may, inter alia, envisage the following categories:
- There is a well-documented psychotic disorder (for example in the form of statements from those in charge of treatment, provisional forensic psychiatric observation

or previous forensic psychiatric observation) and the criminal offences are not serious enough to fall within the scope of the provisions in Section 39 No. 1 of the Penal Code, on judicially-imposed transfer to compulsory mental health care.

- There is a well-documented psychotic disorder, but the perpetrator is already provided with adequate treatment pursuant to the civil law provisions of the Mental Health Care Act, thus making the institution of proceedings to effect a transfer to compulsory mental health care superfluous.
- There is only vague information about mental instability, but the offence is of a less serious nature, thus implying that a decision is made to discontinue prosecution without further examining the state of mental health, in order to save on procedural costs.

The working group is of the view that society needs knowledge about what is hidden behind the «065 discontinuations». This type of data will be of key importance in the continued effort to improve psychiatric health services and develop the legislation.»[400]

Prosecution of a large number of criminal cases is discontinued every year. In some cases, this is the result of doubt as to the issue of criminal insanity. If the perpetrator cannot be assumed to be dangerous and the action is not of a serious nature, the imposition of a special sanction is not relevant either; cf. Part IV. In some cases it may also happen that the prosecuting authority, in addition to being in doubt as to whether the perpetrator was of sound mind, is not in possession of sufficiently strong evidence that he or she has committed the action.

There may also be other reasons why the prosecution of such cases should be discontinued. When the relevant offences are of a less serious nature, and there may seem to be some likelihood that acquittal will be the outcome, based on the information in the case, it may not be appropriate to initiate a comprehensive and expensive procedure to clarify the state of mind of the perpetrator. The interests of society may, in other words, be better served by a discontinuation of prosecution than by the institution of legal proceedings.

The Committee is of the view that existing practice on the part of the prosecuting authority with regard to the discontinuation of prosecution is not of decisive importance for how criminal insanity rules or special sanctions should be structured. However, for the health services that are in continual contact with the relevant group, it may – as noted by the working group – be of interest and importance to know what is hidden behind the figures.

The Committee has conducted an extensive study of discontinuations of prosecution on grounds of criminal insanity. Figures from such study are enclosed as an attachment to the report; cf. Appendix 2. A key finding is that it is *not* a small number of persons that are behind many of the discontinuations of prosecution taking place on grounds of doubt as to whether the perpetrator was of sound mind.

[400] See Norwegian Psychiatric Association (2014), p. 45.

8.9 The recommendation of the Committee – Specific comments on the criminal insanity rule and special remarks from committee members

8.9.1 Rule

It is proposed, against the background of the discussion in the present Chapter, that Section 44 of the Penal Code from now on be worded as follows (amendments in italics):

> «A person *deemed by the court to have been in a psychotic state at the time of committing the act or in a state that with regard to functional impairment, distorted thinking and otherwise inability to understand his or her relationship with the outside world, must be deemed equivalent to a psychotic state, shall not incur criminal liability. The same applies to a person who acted in a state of severely impaired consciousness.*
>
> *Nor shall a person who was* intellectually disabled to a high degree*, or correspondingly debilitated, incur criminal liability.*»

The medical model has existed for a long time in Norwegian law and was applied when Section 44 was revised in 1929. It has been concluded in earlier studies and revisions that the model has by and large worked satisfactorily. The Committee has not concluded otherwise in such regard.

8.9.2 «A person deemed by the court …»

The premise underpinning the statutory provision – both in the current Section 44 and in the Committee's proposal – is that *the court* shall decide whether the criteria under the criminal insanity rule have been met, since it is for the court to rule on the matter of guilt or innocence. It is nonetheless necessary to indicate this clearly and unequivocally. The Committee is of the view that the time has come to lay to rest a tradition in which the conclusions of the experts have in practice been adopted more or less unconditionally, thus implying that the courts have given the physicians the final word in defining the scope of the punishment exemption.

This is reflected in the provision inasmuch as the scope of criminal insanity is not defined exclusively on the basis of a word obtained from medical terminology, by also allowing for the equivalent aberrations, whilst at the same time expressly stating the key symptoms «functional impairment, distorted thinking and otherwise inability to understand his or her relationship with the outside world».

The psychiatric experts, and any other experts, shall in their assessments keep within the bounds of their fields of expertise – general psychiatry and psychology. A thorough clinical description of the accused at the time of committing the act, as well as during the preceding and subsequent period, shall be provided, and if necessary with corrections towards the end of the main hearing, with regard to the degree and quality of psychotic symptoms, including functional deficiency. The key role of the experts is to provide the court with a factual basis for its criminal insanity assessment, by using their special professional expertise.

A diagnosis shall be established in accordance with generally recognised professional standards. The experts shall *not* themselves draw any conclusion as to whether the observee was at the time of committing the act in a «psychotic» or «equivalent» state – i.e. of unsound mind – within the meaning of the statute. It is for the court to apply the statutory provision, based on the clinical description provided by the experts. The court will, through the application of the statutory provision to the specific facts of the case, informed by expert assessments, develop

standards as to what degree of symptom burden is required to meet the statutory requirements «psychotic» and «equivalent» state.

The special role of experts in establishing the factual basis for the application of the insanity rule means that it is of special importance for the professional judge and the parties themselves to be conscious of the fact that it for the court itself to independently conclude on the issue of criminal insanity, on an ethical and normative basis within the scope of Section 44 of the Penal Code – now as before.

Although it is not sufficient for the experts to have diagnosed a person with a psychotic disorder or with psychotic symptoms based on a medically recognised diagnosis system, this will reasonably enough be a very weighty consideration in the assessment of the court. However, the court shall independently assess the identified psychotic symptoms, and whether these were sufficiently intense to imply that the offender was in a psychotic state within the meaning of the law.

It is quite likely that this will result in a more restrictive meaning being attributed to the legal term «psychotic», which is decisive for purposes of establishing criminal insanity unless there is an «equivalent» aberration, than to the medical psychosis concept, which has been developed for a different purpose and which serves a different function; cf. 8.4.2.3 and 8.6.5.2.1.

The Committee has on reflection concluded that the said division of responsibilities should be clearly expressed in the legislative wording. Although the legislation is based on the unequivocal assumption that it is for the court to apply the legal rules, including to independently rule on whether the statutory criteria have been met, the Committee is of the view that it should be further highlighted where the adjudicatory power lies. The initial part of the statutory provision should be worded as follows:

> «A person *deemed by the court to have been* […]».

8.9.3 «psychotic …»

The term «psychotic» shall be interpreted as a symptom intensity requirement, in the same way as was stipulated in the legislative preparatory works upon the amendment of Section 44 in 1997. Reference is made to the following comments of the Special Sanctions Committee in relation to Section 44:

> «Consequently, a punishment exemption under Section 44 will only be granted to those who are «actively psychotic», both under current law and under the Committee's proposal. If the offence is committed whilst the psychosis is in an «inactive phase» due to medicinal or other treatment, the new Section 44 proposed by the Committee will not be applicable. This distinction can also be expressed by observing that not everyone diagnosed with psychosis is (actively) psychotic or unable to realistically assess his or her relationship with the outside world. It is against this background that the Committee proposes to link the punishment exemption to *being in a psychotic state* and not to being *diagnosed with psychosis*.»[401]

The Committee fully endorses the observations made in the above quote. A symptom-free schizophrenic person who takes his or her medications falls outside the scope of the provision, and can be punished. The same will apply to others with a serious mental disorder that is under control and without conspicuous symptoms. A relatively massive accumulation of symptoms of a psychotic or similar nature will be required under the proposal.

[401] See Official Norwegian Report NOU 1990: 5, on p. 51.

Although the legal assessment is to some extent «hidden» behind a term that is also of a medical nature, it will in making such assessment be the quantity and quality of psychotic symptoms or symptoms reminiscent of psychosis that are the decisive factors in determining whether or not a criminal insanity ruling shall be rendered. Consequently, massive disorder of the mind is the key consideration, which is also at the core of the rationale behind the criminal insanity rule.

The requirement for a certain quantity and intensity of the symptoms is indirectly reflected in the description of states that *must be deemed equivalent to a psychotic state,* and that will also result in punishment exemption under the Committee's proposal. The key factor will then be whether the perpetrator at the time of committing the act had symptoms of «functional impairment, distorted thinking and otherwise inability to understand his or her relationship with the outside world». Consequently, the key contents of the term psychosis, and the characteristics of the aberrations that in their symptom intensity and in their similarity to a state of psychosis *for purposes of criminal law* shall result in a punishment exemption, is clearly expressed in the legislative wording.

«Functional impairment» and «distorted thinking» are key characteristics of schizophrenia, which is the most relevant diagnosis under Section 44 of the Penal Code; cf. 22.1.7.5, in particular, where the overrepresentation of this diagnosis amongst mentally aberrant offenders and persons sentenced to special sanctions is addressed. Hence, this symptom is specifically highlighted as characteristic of the psychotic state.

Delusions and hallucinations are, at the same time, key characteristics of the functioning of the psychotic person. The term «otherwise» in front of «inability to understand his or her relationship with the outside world» is chosen as a collective term for such symptoms.

Specification of symptom intensity is an important aspect of the rule. As mentioned, the Special Sanctions Committee proposed, in Official Norwegian Report NOU 1990: 5, to add the wording «and thus unable to realistically assess his or her relationship with the outside world» after the term «psychotic» in Section 44, but the Ministry deemed such supplementary wording to be unnecessary and omitted it. It has been argued that this is the reason why case law has not consistently required high symptom-intensity psychoses to acquit an indictee. Whether such is the case is somewhat uncertain, but there is under any circumstance reason to highlight that a certain symptom intensity is required.

Which types of aberrations may fall within the scope of the rule if the symptoms are sufficiently intense is outlined in 8.4. These will predominantly represent breakthrough of symptoms from an underlying psychotic disorder, but «exogenous psychoses», for example in case of poisoning, and «reactive psychoses» with massive symptoms triggered by acute life crises, may also be encompassed by the statutory alternative of «psychotic» state under the Committee's proposal, as well as under current law.

The rule represents an absolute impediment to imposing criminal liability on a symptom-intensive psychotic offender. The Committee has not deemed it appropriate to distinguish between serious and less serious offences in its formulation of the insanity rule. For offenders who are so mentally aberrant as those for whom the rule proposed by the Committee will be reserved, the justifications for punishment are generally inapplicable. Consequently, it cannot be accepted, from an ethical perspective, to let the scope of the provision depend on the seriousness of the offence, either one way of the other.

8.9.4 «… or in a state that […] must be deemed equivalent to a psychotic state»

The Committee believes that the group of persons that may be deemed to be of unsound mind as the result of highly aberrant and pathological mental symptoms should be cautiously expanded. The perspective of the Committee is that the scope of potential punishment exemption shall only extend to persons who at the time of committing the act suffered aberrations that are as debilitating in their impact on emotional life, cognition, functional ability and perception as an active psychosis.

Consequently, this is an expansion that takes place within the legislative premise on which current law is already based, and it is thus narrower in scope than the earlier, rejected proposals for discretionary punishment exemption rules. The Committee is of the view that this part of the proposal thereby also indicates clearly that an acquittal pursuant to this rule requires a normative assessment that only the court can perform, based on the materials presented to it.

The aberrations in question have considerable similarities with psychoses, thus implying that the offender should not be deemed criminally liable on the basis of the justifications for punishment. Such similarity has informed the formulation of the rule, inasmuch as it refers to key symptoms of psychosis in the offender, including functional impairment, distorted thinking and otherwise inability to understand his or her relationship with the outside world.

There is reason to emphasise that this is a very limited expansion. The term «psychotic» encompasses the vast majority of aberrations that should result in a punishment exemption; cf. 8.5. However, such expansion is necessary. There are aberrations which fall outside the scope of the said term and which should result in a punishment exemption, and the delineation of the term psychosis may be subject to uncertainty. Consequently, the punishment exemption should not be exclusively linked to the term psychosis, which was not originally developed for purposes of defining the scope of insanity within the area of criminal law, but for medical purposes. The rule should allow for the court to determine, to a greater extent and on a specific and independent basis, whether or not the offender shall be held criminally liable.

It may be mentioned that the reason given for the changeover to a purely medical model upon the revision of the insanity rule in 1929 was that the supplementary wording included at that time, which encompassed other aberrations than the purely medical ones, resulted in an uncertain and arbitrary administration of criminal justice; cf. 8.6.3.3. If one wanted to go beyond the purely medical, the aberrations would have to be specified by using clear criteria. The Committee is of the view that the proposed rule on equivalent aberrations offers such necessary clarity.

In the absence of such an alternative, persons with clear symptoms of serious mental disturbances cannot be exempted from punishment under Norwegian law because of the purely medical categorisation of their disorder. Mental aberrations encompassed by the equivalent state alternative are, for example, severe states of dementia, serious cases of Asperger's syndrome and certain forms of serious brain damage; cf. 8.6.2.

In addition to ensuring that the rule targets the relevant group of persons, this will also have certain structural effects that are highly favourable. The rule will clearly signal that the court has the final word in the matter of criminal sanity, and not the experts.

8.9.5 «… shall not incur criminal liability»

A person who is in such a state as is specified in the insanity rule is not to blame. This should be expressed clearly in the statutory provision, and the Committee is of the view that this is best done by using the term «shall not incur criminal liability». The term «shall not be liable to punishment», which is used currently, specifies the legal implication. By instead anchoring the wording in the concept of liability, it is also signalled that the justifications for punishment are not applicable. This makes it clear that the perpetrator can in fact not be blamed for the offence.

There is also another reason for the said wording. The term makes it clear that neither can any of the sanctions that do not constitute «punishment» within the meaning of the Penal Code be applied in relation to this group of persons, such as a waiver of prosecution and a suspended sentence in the form of a conditional discharge. These sanctions require criminal liability on the part of the offender. It could thus be argued, based on a literal reading, that the wording «shall not be liable to punishment» prevents the person of unsound mind from being sentenced to «punishment», but not from being subjected to the said type of sanction. The term «shall not incur criminal liability» excludes any criminal law sanction, apart from special sanctions intended for offenders of unsound mind. Besides, this formulation is preferable, as indicated, at the level of principles.

8.9.6 Special remarks from committee members

Committee member Vetlesen

When joining the Committee, I held the view that the medical model currently practised in Norway should be replaced by a mixed model requiring the mental disorder to have caused the act, i.e. a causality requirement.

I have nonetheless chosen to endorse the version of a medical model now proposed by a unanimous Committee. I am able to do so because (1) causality is very difficult to determine, in some cases probably impossible, (2) a causality requirements may give the psychiatric experts an unreasonably leverage over, and influence on, the courts, and (3) the wording now proposed by the Committee for Section 44 so clearly emphasises the autonomy of the court vis-à-vis the forensic psychiatric experts.

I nonetheless acknowledge that current practice is perceived as resulting in too many offenders being declared of unsound mind and exempted from punishment, which may offend the sense of justice, especially on the part of the next of kin and the bereaved. I hope, however, that the wording now proposed by the Committee for Section 44 will result in such perceived bias being corrected in future practice.

Committee members Stoltenberg and Sæther

The committee members Stoltenberg and Sæther endorse the general discussion as to how a supplement to the criterion «psychotic» should be formulated, but are of the view that it should follow from the legislative wording that the equivalent aberrations shall only exempt from punishment if these must «obviously» be deemed equivalent to being in a «psychotic» state. Such modification will emphasise that this represents a very limited expansion, and serve to prevent unintended liberalisation. The word «obviously» will in this context not refer to the assessment of evidence or to any special standard of proof, but to the requirement that the aberration in question – after the facts of the matter have been clarified and the symptoms have been established – must be of such a nature that it would be altogether unreasonable to

hold the perpetrator liable. However, the members have not deemed it appropriate to draft a separate legislative proposal to such effect.

8.10 Consistent application throughout the statutory framework

8.10.1 Theme and structure

The rationale behind exempting perpetrators from punishment is general in its formulation. This suggests that such rationale should be given general application, at least in relation to all sanctions – formal and informal – of a penal nature. The Committee will in the following identify two areas in which such is not the case under current law.

8.10.2 Lay judges

8.10.2.1 The majority of the Committee members

Section 72 of the Courts of Justice Act is an example of current legislation not fully acknowledging offenders of unsound mind as being exempted from liability. Moreover, the rule is discriminatory; cf. 8.7. The provision stipulates that a person who has been sentenced to a special sanction pursuant to Section 39 or Section 39 a of the Penal Code shall be excluded from ever serving as a lay judge.

It is problematic, in view of the rationale behind the criminal insanity rule, that a person who cannot be held liable at a specific point in time, and against whom society nonetheless for a while found reason to protect itself, shall be permanently excluded from performing a civic duty introduced for democratic control purposes. Many persons suffering serious mental disorders regain good health and functioning after treatment.

The Committee is of the view that the provision represents an unnecessary intervention against the relevant group of offender. It is a separate matter that it is conceivable that this group would rarely want to serve, or be deemed suitable for serving, as lay judges; cf. Section 70, Sub-section 1, of the Courts of Justice Act.

Since preventive detention is defined as a type of punishment under Section 15 of the Penal Code, such detention should be included in the provision regulating exclusion from appointment as the result of being sentenced to punishment. This falls outside the mandate of the Committee, but it is nonetheless mentioned that the following amendment to Section 72 of the Courts of Justice Act would attend to the said consideration:

> «Excluded from appointment because of conduct is:
>
> 1. anyone subjected to a non-suspended sentence of imprisonment for more than one year or preventive detention;
>
> 2. anyone subjected to a non-suspended sentence of imprisonment for one year or less, provided that the judgment in question became final and binding less than 15 years prior to the date of commencement of such appointment;
>
> […]»

8.10.2.2 Special remark from committee members Langbach, Nøttestad and Vetlesen

The committee members Langbach, Nøttestad and Vetlesen are unable to endorse this proposal. Certain statutory requirements need to be met in order to serve as a lay judge or juror. These include that the person in question is «suited» (Section 70 of the Courts of Justice Act),

that he or she shall not be excluded because of his or her conduct (Section 72) and that he or she is not biased. Anyone sentenced to a special sanction shall under current law be excluded because of conduct. Even if this is amended, it is highly unlikely that anyone sentenced to compulsory mental health care would be found «suited» for serving as a lay judge or juror, and thus the proposed legislative amendment is unlikely to have any practical implications. However, the proposal gives cause for concern at the level of principles.

It is certainly the case that anyone who has committed a serious criminal act whilst being of unsound mind is not to blame for what happened. Whether such a person should be able to serve in a court of law is a different matter. The ethical foundation of the courts of law comprises three core values: independence, due process and trust. The background to the conduct requirement (as well as other statutory requirements) is precisely the importance of trust in the courts of law and the judges who will adjudicate the case.

It is not likely to reinforce general trust in the courts of law if the statute is amended to allow a person who was psychotic, has committed a serious offence and had to be subjected to compulsory treatment out of societal protection considerations, to serve as a lay judge or juror. Such a person would, because of the impartiality assessment, have to disclose his or her conviction in open court – if not in all, then at least in many, cases. Consideration for those who were victims or next of kin in the case that resulted in such judgment also suggests that these should not suffer the burden of experiencing the perpetrator in an adjudicating role.

8.10.3 Liability for non-economic loss

It follows from the Supreme Court ruling published on p. 104 onwards of the 2005 volume of the Norsk Retstidende court reporter that the term «indemnify […] damage» in Section 1-3 of the Compensatory Damages Act, which governs the liability for damages of persons suffering mental aberrations, also encompasses damages for non-economic loss pursuant to Section 3-5 of the said Act, although it was long assumed that such damages fall outside its scope because of their penal nature.[402] It is not uncommon for liability for non-economic loss to be a relevant issue in relation to perpetrators who are of unsound mind within the meaning of Section 44 of the Penal Code. Since persons who commit criminal acts in a state of unsound mind frequently behave in a manner that raises the issue of awarding damages, the Committee will make some observations on the key ruling published on p. 104 onwards of the 2005 volume of the Norsk Retstidende court reporter for the Supreme Court and prevailing law in this area.

The provision in Section 3-5 of the Compensatory Damages Act requires culpability in the form of intent or gross negligence. In the said ruling published on p. 104 onwards of the 2005 volume of the Norsk Retstidende court reporter, the Supreme Court concluded that there was culpability within the meaning of the law of torts. B, who had tried to kill, was – under reference to the general observation in criminal law that a person of unsound mind may in purely factual terms also understand what he or she is doing, and thus act intentionally within the meaning of criminal law – held by the Supreme Court to have acted intentionally within the meaning of Section 3-5 of the Compensatory Damages Act. He had understood that he was stabbing a person with a knife.[403]

It followed from the expert opinions in this case that B believed that he was receiving coded or secret messages from Allah, that he had been selected as a key person in Allah's deeds in

[402] See the ruling published on p. 104 onwards of the 2005 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraph 35 (the majority), and Nygaard (2007), p. 437.

[403] See the ruling published on p. 104 onwards of the 2005 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraphs 39–51.

relation to mankind and that he had a bright future as ruler of the world in the role of Mahdi.[404] He believed himself to be pursued when outside the prison, where he felt safe, and often heard his thoughts as voices, also the voices of others, was adamant that someone had used magic on him, and that he was continually discussed in, or talked to via, the media. It had to be concluded that it was «doubtful whether B would have been able to prevent the act […] at the time of the offence. He was fully convinced that he had acted correctly, and there is reason to believe that he had no misgivings or ideas of the wrong or reprehensible nature of the act.»[405] The Supreme Court itself stated the following with regard to the state of the perpetrator:

> «It is unlikely that such a fundamental psychotic process leaves any freedom of action on the part of the relevant person.»[406]

The Committee is of the view that one may question, in line with general principles of the law of torts, the reasonableness of imposing liability for non-economic loss in respect of an act when there was no other realistic course of action open to the tortfeasor and there is absolutely no basis for blaming him or her.

It may be argued that current law, at this point of intersection between two areas of law, sends a «mixed message»: Those of unsound mind are exempted from punishment because they cannot be blamed for their actions. To award damages for non-economic loss pursuant to Section 3-5 may seem somewhat inconsistent when such damages – as noted in the ruling published on p. 1203 onwards of the 2010 volume of the Norsk Retstidende court reporter for the Supreme Court – are intended to, inter alia, «serve as a «punishment» [, …] provide the injured party with a compensation for the violation he or she has suffered [and express] society's disapproval of the action».[407] Although subsequent case law from the Supreme Court has stipulated that damages for non-economic loss shall primarily compensate for the violation suffered, with its penal function assuming a less prominent role, the above objection against current law remains viable.[408]

The Committee is of the view, shared by the minority of two justices in the ruling published on p. 104 onwards of the 2005 volume of the Norsk Retstidende court reporter for the Supreme Court, that acts committed in a state that is so aberrant and so clearly psychotically motivated should not result in the imposition of any liability for non-economic loss. Such a solution may either be reached by exercising the discretionary powers of the court under Section 3-5 of the Compensatory Damages Act or through the reasonableness assessment under Section 1-3. Compensation considerations may to some extent be attended to via the criminal injuries compensation scheme.[409]

[404] In Islamic eschatology, the «Mahdi» is the prophesied redeemer of Islam who will rule the world for a certain period of time before the Day of Judgment and rid the world of injustice and tyranny together with Isa (Jesus).

[405] Ruling published on p. 104 onwards of the 2005 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraph 49.

[406] Ruling published on p. 104 onwards of the 2005 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraph 50.

[407] Ruling published on p. 1203 onwards of the 2010 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraph 38.

[408] See paragraph 31 of the ruling published on p. 745 onwards of the 2014 volume and paragraph 13 of the ruling published on p. 1576 onwards of the 2012 volume, respectively, of the Norsk Retstidende court reporter for the Supreme Court, with further references.

[409] See the minority's reasoning in the ruling published on p. 104 onwards of the 2005 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraphs 61–69.

9 Self-induced unsoundness of mind

9.1 Theme

The key reason why soundness of mind is a prerequisite for criminal liability is that persons with severe mental aberrations cannot be blamed for their actions. The occurrence of such aberrations will normally be outside the control of the person in question, but may in some cases be caused by the person him- or herself.

Since the punishment exemption for persons of unsound mind is premised on the offender not being blameworthy, it is appropriate to ask whether the statutory provisions should also be invoked in one's favour if one is to blame for the occurrence of the mental aberration. The mandate of the Committee specifically instructs it to examine «[…] the criminal insanity implications of psychoses caused by the use of intoxicating substances».

The offender may be held liable irrespective of actual culpability if the intoxication was self-induced. Consequently, actions committed under self-induced intoxication have a special status under current criminal law, which has been the case since the criminal insanity rules were revised in 1929. This is a key issue discussed by the Committee in the following.

The Committee has, at the same time, kept in mind that the world has changed since then, that severe mental aberrations may also be triggered in other ways than through intoxication, for example by way of a person with an underlying psychotic disorder refraining from taking his or her medicines, and that the time may now have come to discuss the broader issue, of which the substance-induced aberrations constitute one element, on a more general basis. Hence, the question that the Committee will seek to answer through its discussions can be formulated as follows: Should persons who have caused their own state of unsound mind be held liable for their actions and, if so, to what extent and how? The purpose is, in other words, to specify who shall fall outside the scope of the criminal insanity regime on such basis. The term «self-induced unsoundness of mind» will be used for the sake of simplicity.

9.2 Current law

9.2.1 General remarks

The general prerequisites for criminal liability – that there must be actual culpability on the part of the perpetrator and that he or she must have been of sound mind at the time of committing the act – are largely deviated from when such perpetrator has acted in a state of intoxication.

Section 45 of the Penal Code is structured as an exception from the main rule in Section 44, pursuant to which any person who was *in a state of automatism at the time of committing the act* shall be exempted from criminal liability. The provision is worded as follows:

> «Automatism that is a consequence of self-induced intoxication (caused by alcohol or other substances) shall not exclude punishment.»

The main rule in Section 44 on punishment exemption also applies to any person who was in a *psychotic* state at the time of committing the act. However, the Supreme Court has, despite the strict principle of legality in the area of criminal law, concluded that psychotic states trig-

gered by self-induced intoxication do not exclude punishment. In other words, transient substance-induced psychoses shall for legal purposes be construed as «automatism», and are hence encompassed by the exclusion provision in Section 45.[410]

The expanded criminal law liability in case of self-induced intoxication also applies to the issue of intent. Previously, Section 45 of the Penal Code was interpreted to imply such a rule.[411] This is now stated expressly in Section 40 of the Penal Code, which stipulates that the court shall «disregard the intoxication in assessing whether the act was intentional», and in Section 42, Sub-section 3, which stipulates that «Ignorance resulting from self-induced intoxication shall be disregarded».

The Penal Code of 2005 represents a continuation of prevailing law.[412] As far as the matter of criminal insanity is concerned, this is reflected in Section 20, Sub-section 2, which stipulates that «a state of impaired consciousness that is a consequence of self-induced intoxication», shall not exempt from punishment. The reason why the statutory provision does not mention substance-induced psychoses, and thus has yet to reflect the legal interpretation established in the ruling published on p. 549 onwards of the 2008 volume of the Norsk Retstidende court reporter for the Supreme Court, is that the Ministry wanted to postpone such a clarification until a re-examination of the provisions had been completed.[413]

The exception from the rule of punishment exemption in case of criminal insanity is applicable when three requirements have been met. Firstly, the perpetrator must have been in a state of *intoxication*; cf. 9.2.2. Secondly, it needs to be clarified whether his or her state of unsound mind is *the result of* intoxication; cf. 9.2.3. Finally, it needs to be determined whether the intoxication was *self-induced*; cf. 9.2.4.

9.2.2 Intoxication

Intoxication is characterised by a change in the mental and physical state of the person in question. This may entail an impairment of the person's state, such as for example limpness, impaired judgement, delusions or automatism, or such change may entail an enhancement of such state, for example improved endurance, enhanced concentration or clear-headedness. The specific nature of the change in the person's state will largely depend on what type of intoxicant has been ingested.

Some persons are assumed, to a higher degree than others, to be particularly susceptible to intoxication, either permanently, for example due to brain damage or personality disorder, or more temporarily, for example due to non-chronic illness, exhaustion or mental pressure.

As far as concerns the exception from the criminal insanity punishment exemption rule, the relevant aberrations are, as mentioned, automatism and psychosis. In this context the said aberrations are often thought of as the final stage of a gradual progression, which for alcohol intoxication has, inter alia, been described as follows:

[410] Ruling published on p. 549 onwards of the 2008 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraphs 18–46. The application of law was brought before the European Court of Human Rights as being in violation of the "no punishment without law" provision in ECHR Art. 7, but the Court declined to hear the complaint.

[411] Proposition No. 87 (1993–94) to the Odelsting, p. 24. See also the rulings published on p. 202 onwards of the 1983 volume, p. 547 onwards of the 1961 volume and p. 1096 onwards of the 1934 volume, respectively, of the Norsk Retstidende court reporter for the Supreme Court.

[412] Proposition No. 90 (2003–2004) to the Odelsting, pp. 423 and 429.

[413] Proposition No. 90 (2003–2004) to the Odelsting, p. 221. In addition, it may be noted that the Supreme Court had not yet stated that the exclusion also pertains to such aberrations by the time the Ministry made its pronouncement on the issue.

> «Alcohol intoxication typically involves gradual muddling of consciousness as alcohol consumption increases, with the ability to move in a coordinated manner being correspondingly impaired. Unconsciousness will normally only occur after consuming a large quantity of alcohol, and will then in most cases be absolute.»[414]

A detailed description of the aberrations of automatism and psychosis is provided in 6.3 and 6.4.2. It may be appropriate to recall, in this context, that persons with substance-induced psychosis may, unlike those with severely impaired consciousness, vary considerably in terms of memory retention, from intact memory to varying degrees of amnesia (memory loss).

9.2.3 The state of unsound mind must be substance-induced

Section 45 of the Penal Code applies to automatism and transient psychosis caused by «alcohol or other substances». The specification of substances is not included in the Penal Code of 2005, but no substantive change was intended through such omission.[415]

By intoxicants or intoxicating substances are meant all types of substances that cause intoxication by affecting the nervous system and the sensory apparatus. The lawfulness or unlawfulness of the intoxicants, and whether or not these are medically classified as intoxicants, is not decisive in determining whether these are considered to be intoxicating substances within the meaning of the Penal Code.

At times, the aberration is assumed to be caused by several interacting factors, and not exclusively by the intoxicant. The ruling published on p. 1354 onwards of the 1977 volume of the Norsk Retstidende court reporter for the Supreme Court is illustrative. The following statement in an expert opinion was referred to by the Supreme Court in support of a decision to reduce the punishment below the minimum prescribed for the act, pursuant to the then Section 56, No. 1 b, of the Penal Code:

> «The cause [of the aberration] may be a series of especially unfortunate simultaneously occurring circumstances – alcohol, mental state of conflict with jealousy and blow to the head. The experts assume that it is unlikely that any one of the said causes could have caused as intense a disturbance of consciousness as occurred here.»[416]

It may in such cases be difficult to establish whether the aberration is substance-induced. The assessment may be complex and multidimensional, and it will often be necessary to consider the role of multiple intoxication, head injuries, somatic disorders and emotional reactions.[417]

Case law relating to Section 56 of the Penal Code, which has applied the same assessment criterion, has concluded that the intoxication must have been a «prominent cause in the interacting chain of causality».[418] Since the wording in Section 56 is identical to that of Section 45, and concerns similar phenomena, it must be assumed that this is also the causality requirement in Section 45 of the Penal Code; cf. the wording «is a consequence of».

414 Proposition No. 87 (1993–94) to the Odelsting, p. 24.

415 Proposition No. 90 (2003–2004) to the Odelsting, p. 233.

416 Ruling published on p. 1354 onwards of the 1977 volume of the Norsk Retstidende court reporter for the Supreme Court, on p. 1355.

417 Norwegian Board of Forensic Medicine, Newsletter No. 3 (2000).

418 Rulings published on p. 9 onwards of the 1983 volume and on p. 1046 onwards of the 1978 volume, respectively, of the Norsk Retstidende court reporter for the Supreme Court.

The courts of law will in this respect seek the assistance of the court-appointed experts, by instructing them in their mandate to examine whether or not any psychosis is independent of intoxication.

Persons with an underlying psychotic disorder shall be exempted from punishment if in a symptom-intensive state of psychosis; cf. Section 44. Consequently, the decisive factor in determining whether Section 45 is applicable in such cases is whether it must be assumed that the intoxication, rather than the underlying disorder, was the prominent cause of the state of unsound mind that occurred at the time of committing the act.[419]

No sources of law address the causality requirement in Section 45 in further detail, but certain guidelines for the *assessment of evidence* have been established on the basis of the legislative preparatory works, case law from the Supreme Court and recommendations from the Norwegian Board of Forensic Medicine.

In deciding whether or not a state of psychosis is substance-induced, the duration of the psychosis following the ingestion of intoxicants must be considered the key fact on which evidence will be sought. This is described as follows in Official Norwegian Report NOU 1990: 5 in relation to the use of hallucinogenic drugs:

> «The use of such drugs may cause states of psychosis or states reminiscent of psychosis. If such a state is caused solely by ingestion of the drug, and comes to an end when the toxic effect has ceased to apply, it is considered to be a state of impaired consciousness. If the symptoms persist beyond the toxic effect, the offender may be considered under Section 44.»[420]

Also in case law has it been concluded that substance-induced psychoses that do not last beyond the effects of the intoxicant fall outside the scope of the punishment exemption rule in Section 44.[421] The Norwegian Board of Forensic Medicine has indicated that one will be inclined to consider an offender to be exempt from punishment under Section 44 if the psychosis persists for more than one month after the substance has left the body, and that substance-induced psychoses which last significantly less than one month after the intoxication has ended will result in criminal liability pursuant to Section 45. This has been followed up by the Supreme Court. It is at the same time stipulated that this must, reasonably enough, be based on a specific discretionary assessment.[422]

9.2.4 The intoxication must be self-induced

The requirement that the intoxication shall be «self-induced» may be said to comprise two elements. Firstly, the perpetrator must have voluntary ingested an intoxicant. The intoxication will be considered non-self-induced if the intoxicant was ingested under duress or if the person in question was neither aware of such ingestion, nor ought to have been aware of it.[423]

[419] Ruling published on p. 346 onwards of the 2010 volume of the Norsk Retstidende court reporter for the Supreme Court.

[420] Official Norwegian Report NOU 1990: 5, p. 59.

[421] Rulings published on p. 92 onwards of the 2014 volume and on p. 549 onwards of the 2008 volume, respectively, of the Norsk Retstidende court reporter for the Supreme Court.

[422] Ruling published on p. 549 onwards of the 2008 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraphs 39-40 and 46.

[423] Matningsdal and Bratholm (2003), Section 44.

Secondly, the said person must have understood, or ought to have understood, that such ingestion would result in a loss of complete control over him- or herself.[424] Whether the perpetrator is to blame for the intoxication depends on an overall assessment of the situation. This is a matter of legal assessment, and the Norwegian Board of Forensic Medicine has repeatedly emphasised that the experts shall not examine whether the intoxication is self-induced.[425]

Special circumstances are required for an intoxication to be considered non-self-induced.[426] In other words, the threshold for concluding that the intoxication is self-induced is low. If one has consumed alcohol in such a quantity that it will normally result in intoxication, Section 45 of the Penal Code will apply. This is described as follows in the ruling published on p. 1393 onwards of the 2008 volume of the Norsk Retstidende court reporter for the Supreme Court, using a quote from an earlier ruling:

> «'The accused was aware of his consumption of alcohol, and he must have been aware that he exposed himself to intoxication through such alcohol consumption. I am of the view that the intoxication is thereby self-induced.' Whether the intoxication was pathological is, as a main rule, of no relevance.»[427]

In other words, the provision in Section 45 of the Penal Code encompasses any state of unsound mind arising as the result of self-induced intoxication.[428] Pathological alcohol intoxication has traditionally been characterised as potentially occurring upon the consumption of very small quantities of alcohol. This means that it is also more likely to be non-self-induced, unless the perpetrator was aware, based on previous experience, of his or her susceptibility to react pathologically.

The phenomenon has been discussed in psychiatry since the late 19th century. The term «pathological intoxication» has long been used in a legal context to denote a pathological reaction to intoxication.[429] In 1875, the German psychiatrist Richard von Krafft-Ebing (1840-1902) described pathological alcohol intoxication as characterised by a disproportionality between the consumption of a small quantity of alcohol and a high degree of intoxication. Moreover, he believed such intoxication to be qualitatively different from ordinary intoxication. There has been some controversy about the terminology, but it has until now been used in European forensic psychiatry.[430]

Strong symptoms of impaired consciousness after low alcohol consumption, i.e. a blood alcohol concentration of about 0.02–0.05 percent by volume, is considered pathological intoxication in a Norwegian context.[431] It is held to be a rare phenomenon. Pathological alcohol intoxication is addressed in further detail in 9.5.3.2.1.

Multiple intoxication may pose special challenges. As an example, certain medications that normally do not produce intoxication may increase the effect of other ingested intoxicants.

[424] Ruling published on p. 1393 onwards of the 2008 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraph 15.

[425] Norwegian Board of Forensic Medicine, Newsletters No. 3 (2000) and No. 18 (2007).

[426] Proposition No. 87 (1993–94) to the Odelsting, p. 24, and the ruling published on p. 1393 onwards of the 2008 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraph 15.

[427] Ruling published on p. 1393 onwards of the 2008 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraph 15. See also paragraphs 16 and 17.

[428] Ruling published on p. 46 onwards of the 1963 volume of the Norsk Retstidende court reporter for the Supreme Court 1963, on p. 47. See Høgberg and Tøssebro (2012), p. 233, note 42.

[429] Official Norwegian Report NOU 2010: 3, Appendix 4, p. 271.

[430] Gottlieb et al. (2008).

[431] Official Norwegian Report NOU 2010: 3, p. 270.

The factual circumstances in the ruling published on p. 254 onwards of the 1988 volume of the Norsk Retstidende court reporter for the Supreme Court are illustrative. A hospital administered substances to a severely inebriated man, although the potential side effects of such substances included «drowsiness, depressive reactions, acute confusional states», with the specification that said substances should not be combined with alcohol. The Supreme Court stated that one could not exclude the possibility that the medication had triggered a state of automatism or confusion later in the day, and hence that such state could not be considered self-induced.[432]

A special case is states of unsound mind caused by non-self-induced ingestion of intoxicants after self-induced intoxication has already occurred. In the ruling published on p. 1393 onwards of the 2008 volume of the Norsk Retstidende court reporter for the Supreme Court, a distinction is made between alcohol consumed over an evening and the subsequent ingestion of intoxicants. The key question is then whether the powers of discernment of the person in question had been impaired as the result of the initial consumption, and if such was the case it would also «be reasonable to conclude that the subsequent criminal acts were committed in a state of intoxication that must be considered self-induced».[433]

The same case illustrates the complexity of the objects of proof one is confronted with when determining whether the aberration is self-induced. The underlying issue in the case was whether the correct standard of due care had been applied in acquitting the convicted person on a charge based on automatism caused by self-induced intoxication. The convicted person had first been drinking wine and thereafter, prior to committing the criminal act, she inadvertently drank mixed vodka drinks in the belief that these were lemon soda. The Court of Appeal concluded that the accused was in a state of automatism at the time of committing the act, and that she was not aware that she had been drinking vodka. It was deemed likely that the consumption of vodka triggered the state of automatism, and the Court of Appeal concluded that the accused could not be blamed for not having taken into consideration the possibility that this could happen.[434] However, the majority in the Supreme Courts questioned the viability of the actual causality assessment. The convicted person had drunk «a [not] insignificant quantity of alcohol», and she had subsequently been measured as having an exceptionally high blood alcohol concentration. These two factors indicated that the wine and the vodka had jointly triggered the state of automatism. The majority further noted that it «[…] from the facts of the case [was] difficult to understand that the vodka consumption in itself would have caused the state of automatism», and also that it was not clear from the grounds of the judgment «[…] on what basis the Court of Appeal had concluded that the vodka, and not its combination with the preceding wine consumption, had triggered the state of automatism».[435] Despite the clear signals from the Supreme Court with regard to the matter of causality, the woman was acquitted in the Court of Appeal when it heard the case anew.[436]

9.2.5 The sentencing implications of self-induced intoxication

In cases not encompassed by the punishment exemption rule in Section 44, but in which the perpetrator suffered a serious mental disorder involving a significantly impaired ability to re-

[432] Ruling published on p. 254 onwards of the 1988 volume of the Norsk Retstidende court reporter for the Supreme Court, on p. 255.

[433] Ruling published on p. 1393 onwards of the 2008 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraph 17.

[434] Ruling published on p. 1393 onwards of the 2008 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraph 18.

[435] Ruling published on p. 1393 onwards of the 2008 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraph 20.

[436] Judgment of 11 March 2009 from the Gulating Court of Appeal, published on p. 393 onwards of the 2009 volume of the Rettens Gang court reporter.

alistically assess his or her relationship with the outside world, Section 56, letter c, of the Penal Code offers general scope for reducing the punishment below the minimum prescribed for the act or to a milder form of punishment.

However, the said provision is not applicable if the aberration was the result of self-induced intoxication. Punishment may nonetheless be reduced in such cases as well as in the event of «especially mitigating circumstances»; cf. Section 56, letter d, of the Penal Code. And it follows from case law from the Supreme Court that the said provision also applies to psychotic states caused by self-induced intoxication.[437] This represents a continuation of case law under an older provision, which was interpreted as also encompassing a severe disturbance of consciousness.[438] It is assumed in legal theory that the same remains the case under current law.[439]

In determining whether there are «especially mitigating circumstances», the same type of considerations will be taken into account as are of relevance in assessing whether to grant a punishment exemption; cf. 9.2.4. It may, for example, be of relevance whether the act was committed in a state of pathological intoxication, or whether there has been an interaction between alcohol consumption and the use of medications.[440] The provision does not stipulate any requirement for a causal link between the aberration and the criminal act, but it is assumed to be of relevance to the discretionary assessment anticipated by the provision.[441]

Although substance-induced psychoses that come to an end after the effects of the intoxicant have ceased to apply fall outside the scope of the punishment exemption rule in Section 44, the aberration suffered by the perpetrator may, depending on the circumstances, be of relevance to the issue of whether the act shall be deemed to have been committed under *especially aggravating circumstances*. The Supreme Court has stated, in the ruling published on p. 774 onwards of the 2011 volume of the Norsk Retstidende court reporter, that whether and, if applicable, how this is of relevance will depend on the specific facts of the case.[442] Considerations that were taken into account in the said case included the degree of intoxication, whether the perpetrator has tried to reduce his or her use of intoxicating substances, whether the perpetrator has previously suffered a similar aberration and the quality of the treatments available to the perpetrator.

9.2.6 The relationship between unsoundness of mind and intent – with a focus on implied intent

Soundness of mind, as a condition for criminal liability, requires criminal capacity on the part of the perpetrator. A lack of criminal capacity does not prevent a person of unsound mind from acting intentionally. Psychotic offenders will normally have sufficient insight for there

[437] Ruling published on p. 774 onwards of the 2011 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraph 35.

[438] Ruling published on p. 979 onwards of the 1984 volume of the Norsk Retstidende court reporter for the Supreme Court.

[439] Matningsdal and Bratholm (2003), Section 56, No. 2.

[440] Matningsdal and Bratholm (2003), Section 56, No. 2. See the rulings published on p. 1404 onwards of the 1985 volume and p. 688 onwards of the 1967 volume, respectively, of the Norsk Retstidende court reporter for the Supreme Court.

[441] Ruling published on p. 1324 onwards of the 2004 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraph 26.

[442] Ruling published on p. 774 onwards of the 2011 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraph 15.

to be intent. They may, for example, intend to kill or understand that they are committing rape.

An illustrative example from case law showing that unsoundness of mind and intent are not incompatible with each other is the ruling published on p. 104 onwards of the 2005 volume of the Norsk Retstidende court reporter for the Supreme Court, which concerned the award of damages for non-economic loss. The perpetrator was at the time of committing the act in a «fundamental state of psychosis with a very severely distorted perception of reality», and was nonetheless held liable for damages because he had «insight into the act, what he wanted to do, and was aware of the time, place and situation, as well as his own role».[443] The case and the specific factual circumstances are discussed in 8.10.3.

It was concluded already upon the adoption of Section 45 of the Penal Code that a state of unsound mind does not exclude intent:

> «The inebriated persons with whom we are here dealing are […] those who are in a so-called state of «relative unconsciousness». What they lack is self-awareness; their connection with their ordinary «self». They do not, on the other hand, lack either perception or imagination; and they are able to act just as methodically as anyone else […] Consequently, they are able to act intentionally, and they are able to act negligently, just as much as anyone else.»[444]

However, severely impaired consciousness will often affect the ability of the perpetrator to comprehend his or her surroundings and what he or she is actually doing. It was stipulated, upon the adoption of Section 45 of the Penal Code, that an exception would be made from the general requirement of intent if such requirement had not been met as the result of self-induced intoxication.[445] This now follows directly, as mentioned at the outset, from Section 40, Sub-section 1, and Section 42, Sub-section 3, of the Penal Code. The person is assessed as if he or she was sober - intent is «implied».

However, not all forms of intent can be implied. If the provision requires a specific subjective element, for example in the form of a requirement that an act was committed «for the purposes of gain», such element cannot be implied.[446] It has been considered both problematic and undesirable to embark on an assessment as to what the person would have done if sober.[447] Another matter is that one will often be able to present evidence with regard to the intent of the perpetrator, including what he or she wanted or tried to achieve, independently of the intoxication, which may reduce the need for implying culpability.

[443] Ruling published on p. 104 onwards of the 2005 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraphs 49 and 50.

[444] Proposition No. 11 (1928) to the Odelsting, p. 6.

[445] See Proposition No. 11 (1928) to the Odelsting, p. 6, and Official Norwegian Report NOU 1974: 17, pp. 49–50.

[446] See Andenæs (2005), pp. 319-320, for further details on implied intent.

[447] Recommendation of the Penal Code Committee, 1925, p. 91, and Proposition No. 87 (1993–94) to the Odelsting, p. 39.

9.3 The background to current law

9.3.1 The revision in 1929

States of unsound mind caused by self-induced intoxication were originally treated differently for criminal law purposes under the Penal Code of 1902 than at present. A person who had placed him- or herself in a state of intoxication with the intent of committing a criminal act were held criminally liable for such act even if he or she was in a state of unsound mind. And a person who placed him- or herself in such a state, without the intent of committing any criminal act, could be convicted for having committed such acts negligently. This applied irrespective of whether the person in question had any reason to assume that such acts would be committed. This regime represented a continuation of prevailing law as previously reflected in the ruling published on p. 289 onwards of the 1893 volume of the Norsk Retstidende court reporter for the Supreme Court:

> «I am of the view that when a person, through the excessive imbibition of intoxicating beverages, places him- or herself in a state of intoxication, and he or she has experience of such intoxicating effect from previous occasions, he or she must also accept criminal responsibility for those acts committed by him or her in such a state, provided that such acts are also punishable in their negligent form.»[448]

The regime from 1902 was abandoned upon the legislative revision in 1929, which introduced Section 45 of the Penal Code as worded at present. The reasoning behind the reform was two-pronged. Firstly, it was explained by evidential considerations. It was noted that it is in practice not possible to present evidence to the effect that a person has placed him- or herself in a state of automatism with the intent of committing a criminal act.[449]

Secondly, the reform was motivated by an ambition to hold persons who commit crimes in a state of intoxication to account to a greater extent. Sexual offences, in particular, were highlighted. These fell outside the scope of Section 45 as it was worded at the time, partly because the perpetrators did not place themselves in a state of intoxication with the intent of committing such acts, and partly because the relevant provisions did not attach criminal liability to negligent acts.[450] It was only a small number of sexual offences that had been committed in a state of relative unconsciousness, thus resulting in acquittal pursuant to Section 44.[451] However, it is evident from the deliberations of the Storting that certain acquittals had caught the intention of the general public and caused resentment. The Storting's Standing Committee on Justice stated, for example, the following:

> «The acquittals resulting from the prevailing legal provisions in this field have caused justifiable indignation and consternation.»[452]

Two potential liability formats were outlined in the recommendation from the Penal Code Committee.[453] One of these sought to retain the principle of culpability, and involved the es-

[448] Ruling published on p. 289 onwards of the 1893 volume of the Norsk Retstidende court reporter for the Supreme Court

[449] Recommendation of the Penal Code Committee, 1925, p. 87.

[450] Recommendation of the Penal Code Committee, 1925, pp. 87–88.

[451] Official Norwegian Report NOU 1974: 17, p. 49.

[452] Recommendation No. II (1929) to the Odelsting, p. 5. Two specific cases are discussed in the Recommendation of the Penal Code Committee, 1925, pp. 181–182. See also Røstad (1981), pp. 27–28.

[453] Recommendation of the Penal Code Committee, 1925, p. 88.

tablishment of general liability for those who deprive themselves of control of their own actions, through the use of intoxicants, thus causing danger to others. The degree of risk was of decisive importance for such liability, and would be determined on the basis of previous experience with intoxicated behaviour. The second alternative was to deviate from the traditional justifications for imposing punishment and link criminal liability directly to offences committed under self-induced intoxication.[454]

The first alternative was rejected. Sanctioning such behaviour with punishment would make it necessary to pay invasive attention to people's alcohol habits, and was held to be incompatible with privacy considerations. Besides, such liability would entail evidential difficulties, and depend on the habits and financial position of individuals.

The second alternative, which as noted involved establishing a direct link between liability and the committed acts, was deemed desirable out of legal protection considerations. Such a regime was deemed justifiable because the Penal Code generally imposes liability based on the consequences of committed acts, and because those who place themselves in a state of intoxication often act negligently. Besides, alternative regimes would be difficult to practice because of evidential considerations.[455] It was not deemed desirable to expand the use of negligence assessments, both because it would be without meaning outside the intoxication cases, and because such criminal liability might be very broad in scope.

The Ministry endorsed the latter alternative, and proposed at the outset that acts committed in a state of «automatism» caused by self-induced intoxication would qualify for lower sentences. This position was subsequently abandoned, as it might result in outcomes that are contrary to the «general conception of justice».[456] The majority in the Standing Committee on Justice endorsed the new proposal of the Ministry, and the proposed Section 45 of the Penal Code was eventually adopted unanimously by the Odelsting after the minority had admitted defeat and withdrawn its proposal.[457]

9.3.2 Reform proposals

The criminal law implications of self-induced intoxication, and especially the relationship with subjective culpability and criminal insanity, has been extensively addressed and discussed also after the 1929 reform. The position signalled in legislative processes has typically been that the special liability should continue to apply, but be curtailed.

The process that resulted in the legislative amendments of 1997 proposed replacing the absolute punishment exemption for «those who are in a state of automatism» with a discretionary rule that left the matter of punishment exemption for impaired consciousness to the court.[458] The Special Sanctions Committee proposed that the implications of self-induced intoxication be regulated as follows:

[454] Recommendation of the Penal Code Committee, 1925, pp. 93–94.

[455] Recommendation of the Penal Code Committee, 1925, p. 89. See also Proposition No. 11 (1928) to the Odelsting, pp. 4–5.

[456] Proposition No. 11 (1928) to the Odelsting, pp. 4–5. See also Recommendation No. II (1929) to the Odelsting, p. 5.

[457] Minutes of the Deliberations of the Odelsting (No. 3), 28 January 1929, pp. 20–25.

[458] The Council on Criminal Law in Official Norwegian Report NOU 1974: 17, p. 53, and the Special Sanctions Committee in Official Norwegian Report NOU 1990: 5.

> «A person who acted in a state of severely impaired consciousness, may also be exempted from punishment. If the state of impaired consciousness was the result of self-induced intoxication, the offender may only be exempted from punishment when merited by extraordinary circumstances.»[459]

The proposal may be traced back to the recommendation of the Council on Criminal Law from 1974. The Council started out from the justifications for punishment, and took the view that holding the perpetrator liable for acts committed in a state of automatism caused by self-induced intoxication was disproportional to the blame that could appropriately be placed on the offender. The idea was that a discretionary rule like that quoted above would imply a cautious liberalisation of the absolute rule in Section 45 of the Penal Code. One could thereby avoid unreasonable outcomes. The Council on Criminal Law illustrated this with the example of a perpetrator who had no previous experience of pathological reactions to alcohol consumption, and who ended up committing acts that would seem incompatible with his or her personality as such.[460]

The term «severely impaired consciousness» was primarily intended to include aberrations formerly encompassed by the term «automatism», but was also intended to encompass certain forms of severe disturbance of consciousness – aberrations previously held to belong in a border zone between «automatism» and «a severe transient disturbance of consciousness».[461] The aberration is characterised by the person's powers of comprehension, contextualisation and perception, as well as his or her ability to make judgements, being severely impaired or seriously disturbed, whilst his or her ability to act remains intact.

In other words, the Council on Criminal Law proposed a continuation of the regime with special criminal liability for actions committed in a state of self-induced intoxication. The predominant reason invoked in favour of such regime was the general conception of justice, although to some extent supplemented by general deterrence considerations, inasmuch as one wanted the Penal Code to clearly express the risk entailed by intoxication.

It may be worth noticing that Council member Johs. Andenæs, who argued forcefully against rules on implied culpability, had no objections to the continuation of liability pursuant to Section 45 of the Penal Code. This was despite the arguments invoked against implied intent – the general justifications for imposing punishment – also constituting viable arguments against liability for actions committed in a state of unsound mind caused by self-induced intoxication:

> «I find it objectionable that it shall be possible to convict an indictee for having wilfully committed a crime when in fact there has been no intent on his or her part, and the only thing her or she can subjectively speaking be reproached for is that he or she drank too much. This means setting aside ordinary criminal law principles on the relationship between culpability and punishment, without any likelihood that this will make the fight against crime any more effective. What has here been stated about alcohol intoxication also applies, in my view, to intoxication caused by the abuse of drugs or medications.»[462]

However, the Ministry did not endorse the proposal of the Council on Criminal Law and the Special Sanctions Committee for allowing a punishment exemption for acts committed in a state of impaired consciousness caused by self-induced intoxication. The main reason given

[459] Proposed new Section 45, Sub-section 3; cf. Official Norwegian Report NOU 1990: 5, p. 9. See also Official Norwegian Report NOU 1974: 17, p. 56.

[460] Official Norwegian Report NOU 1974: 17, p. 67.

[461] Official Norwegian Report NOU 1974: 17, p. 53.

[462] Official Norwegian Report NOU 1974: 17, pp. 71–72. See also Andenæs (1974), p. 166.

was that the current regime had not been unreasonably strict in practice.[463] A punishment exemption could be perceived as offensive and be in conflict with the general conception of justice. It was also noted that the proposed regime would entail procedural costs and a risk of incorrect acquittals. However, it would appear that the decisive factors were the general deterrence and individual deterrence considerations that were held to constitute arguments against the proposal – such a new rule would emit «unwanted signals»; cf. also 9.5.2 below.[464] These arguments were again emphasised and quoted from by the Ministry when it gave its reasons for not including such a provision in the Penal Code of 2005.[465]

The Ministry did, on the other hand, deem it desirable to have a provision allowing for punishment reduction for acts committed in a state of severely impaired consciousness due to self-induced intoxication, and for acts committed in a less severe state of impaired consciousness due to self-induced intoxication with implied culpability. The primary reason given for this was that general deterrence and public education considerations suggested that self-induced intoxication should result in criminal liability, but not to the same extent when there was no demonstrable intent.[466]

The Storting was opposed to the proposed discretionary punishment exemption regime, and did not adopt the punishment reduction provision either. The majority in the Standing Committee stated the following:

> «The majority notes that both general deterrence considerations and consideration for the general conception of justice suggest that reduction of, or complete exemption from, punishment for an illegal act committed in a state of self-induced intoxication shall not occur.»[467]

This unequivocal attitude was subsequently demonstrated in connection with the preparation of the Penal Code of 2005.[468]

9.4 Foreign law

9.4.1 Denmark

Danish law allows for imposing criminal liability on a severely mentally aberrant perpetrator when the aberration has been triggered by self-induced intoxication. See 7.2 for details on the Danish insanity rule. Section 16, Sub-section 1, third sentence, of the Danish Penal Code is worded as follows:

> «If the perpetrator was, as the result of the ingestion of alcohol or other intoxicants, temporarily in a state of insanity or in a state that must be deemed equivalent thereto, punishment may nonetheless be imposed if justified by special circumstances.»

The standard rule is that intoxicated persons are sentenced like other perpetrators. However, such is not the case if the perpetrator was «in a state of insanity or in a state that must be

[463] See also the Council on Criminal Law in Official Norwegian Report NOU 1974: 17, p. 66, to the same effect.

[464] Proposition No. 87 (1993-94) to the Odelsting, pp. 37–38.

[465] Proposition No. 90 (2003-2004) to the Odelsting, p. 222.

[466] Proposition No. 87 (1993-94) to the Odelsting, pp. 37-38.

[467] Recommendation No. 34 (1996–97) to the Odelsting, p. 10.

[468] Proposition No. 90 (2003–2004) to the Odelsting, p. 368.

deemed equivalent thereto». Then he or she is as a main rule exempted from punishment, unless he or she was «temporarily» in the said state as the result of the ingestion of intoxicants. Criminal liability may be imposed in such cases in «special circumstances».

It is, in other words, a requirement that the aberration is substance-induced. Traditionally, the focus has been on alcohol, but the provision also applies to other intoxicants. Persons suffering an underlying «insanity» shall be exempted from punishment pursuant to the main rule.[469] Case law has concluded that an insulin shock occurring after alcohol consumption constituted a «state of insanity» that fell outside the scope of the exception in Section 16, Sub-section 1, third sentence, and thus resulted in a punishment exemption.[470]

The decisive factor is whether the aberration has occurred acutely as the result of the ingestion of intoxicants, and whether it is a brief temporary occurrence.[471] This will in practice often concern persons who are already mentally aberrant, and who exacerbate such aberration through their own deliberate use of intoxicants. The requirement that the aberration shall be temporary implies that long-term disorders caused by intoxication fall outside the scope of the provision.

It follows from Danish forensic psychiatric practice that «pathological intoxication» is a narrow concept with strict criteria, and that the courts of law are cautious about concluding that the evidence supports a finding of pathological intoxication. Consequently, intoxication rarely results in punishment exemption.[472]

And criminal liability may as mentioned be imposed even in case of a pathological intoxication. The preparatory works provide some examples of what may constitute «special circumstances», including that the perpetrator has previously experienced the form of aberration stipulated in the statutory provision, and that he or she can therefore be blamed for his or her use of intoxicating substances.[473] If, on the other hand, the aberration is caused by lawful medications prescribed by a physician, such circumstances will normally not be deemed to have applied.[474]

9.4.2 Sweden

In Swedish law, soundness of mind is not, as previously mentioned, a condition for criminal liability; cf. 7.3 for further details.

In determining whether imprisonment shall be imposed, Chapter 30, Section 6, Sub-section 1, of the Swedish Penal Code stipulates that it shall be taken into account «[…] whether the accused has, in connection with the offence, him- or herself caused his or her aberration through intoxication or in some other similar way». Aberrations caused by self-induced intoxication also fall outside the scope of the absolute imprisonment prohibition in Sub-section 2 of the

469 Gottlieb et al. (2008), p. 178 and 183.

470 Supreme Court of Denmark ruling published on p. 199 onwards of the 2005 volume of the Ugeskrift for Retsvæsen court reporter.

471 Greve et al. (2013), pp. 233–234. See also the Supreme Court of Denmark ruling published on p. 683 onwards of the 2008 volume of the Ugeskrift for Retsvæsen court reporter.

472 Greve et al. (2013), p. 234.

473 Report 667/1972, pp. 45–46, and Gottlieb et al. (2008), pp. 185–186.

474 Greve et al. (2013), p. 236.

provision, which in practice means that the decisive factor in determining whether imprisonment is imposed is whether the grounds required under Sub-section 1 apply.[475]

The decisive factor in determining whether the aberration shall be considered self-induced is whether the perpetrator had reason to believe that the use of intoxicating substances might result in such aberration. If the reaction is pathological, and the perpetrator had no experience indicating that he or she might react pathologically, the imprisonment prohibition will apply. Such is the case irrespective of the quantity of intoxicants ingested.[476]

A further prerequisite for disapplication of the imprisonment prohibition is that there is a proximity between the self-induced aberration and the offence. A psychosis that occurs as the result of withdrawal reactions following long-term drug use will, for example, fall within the scope of the imprisonment prohibition, as is generally the case with psychoses.[477]

One example from Swedish case law of a psychosis that fell outside the scope of the imprisonment prohibition, at least partly as the result of self-induced intoxication, is the Flink case. The perpetrator had in a state of psychosis killed seven and injured three persons in Falun in 1994. The Supreme Court of Sweden stated, in connection therewith, that the imprisonment prohibition did not encompass «temporary psychosis-like aberrations triggered by alcohol or drug intoxication».[478]

In the ruling of the Supreme Court of Sweden published on p. 563 onwards of the 2011 volume of the Nytt juridiskt arkiv court reporter, it was concluded that the general culpability requirement shall apply to self-induced intoxication as well. This represented a change of course in Swedish law, which had previously, like current Norwegian law, implied culpability on such basis. The fundamental reason for the change was that deterrence considerations are less prominent than before in determining criminal legislation, whilst «legality, equality before the law and proportionality» was being accorded more weight in the formulation of such legislation.[479]
The ruling is addressed in the Compulsory Psychiatric Care Legislation Report, which proposed soundness of mind as a condition for criminal liability in Swedish law, and which was published in 2012; cf. 7.4.2 for further details. However, the reasoning in the judgment is not followed up on by the committee preparing the said report. Its reason for the proposed exception from the criminal insanity punishment exemption rule in case of self-induced intoxication, which is also the proposal of the committee, is that it is «reasonable» to make such an exception.[480]

9.4.3 Finland

In the Finnish Penal Code, the significance of soundness of mind is regulated in Chapter 3, Section 4; cf. 7.4. It follows from Sub-section 1 of the said provision that soundness of mind is a prerequisite for criminal liability. Certain severe mental aberrations qualify for a punishment exemption. Sub-section 4 allows for an exception from this:

[475] Ruling of the Supreme Court of Sweden published on p. 899 onwards of the 2001 volume of the Nytt juridiskt arkiv court reporter and Proposition 2007/08:97, pp. 28–29.

[476] Ruling of the Supreme Court of Sweden published on p. 899 onwards of the 2001 volume of the Nytt juridiskt arkiv court reporter.

[477] Proposition 2007/08:97, p. 28.

[478] Ruling of the Supreme Court of Sweden published on p. 48 onwards of the 1995 volume of the Nytt juridiskt arkiv court reporter.

[479] Ruling of the Supreme Court of Sweden published on p. 563 onwards of the 2011 volume of the Nytt juridiskt arkiv court reporter. See also Boucht (2011), pp. 634–642.

[480] See proposed new Chapter 1, Section 2a, Sub-section 3, in Swedish Government Official Report 2012:17, pp. 551–552.

> «Self-induced intoxication or any other temporary self-induced impairment of consciousness shall not be taken into consideration for purposes of the criminal insanity assessment, unless there is special and weighty cause for doing so.»[481]

The provision is premised on utilitarian considerations:

> «Considerations of general deterrence and certain practical considerations require fairly strict liability.»[482]

The practical considerations related to the difficulties of proving the actual state of the perpetrator at the time of committing the act.

Whether the intoxication shall be considered self-induced depends on whether the ingestion is voluntary and conscious. Factors that may imply that there is such «special and weighty cause» for not holding the perpetrator liable for the aberration, despite it being self-induced, are in the preparatory works exemplified by cumulative intoxication, pathological effects, the perpetrator's inexperience, tiredness or reduced tolerance as the result of long-term use of intoxicating substances.[483]

9.4.4 Germany

Soundness of mind is, as mentioned in 7.5, a condition for criminal liability under German law. Section 20 of the German Criminal Code is, as also noted there, worded as follows:

> «Any person who at the time of the commission of the offence is incapable of appreciating the unlawfulness of their actions or of acting in accordance with any such appreciation due to a pathological mental disorder, a profound consciousness disorder, debility or any other serious mental abnormality, shall be deemed to act without guilt.»[484]

No special rules have been laid down on the significance of intoxication in the application of the criminal insanity rules. Consequently, it is generally only a matter of whether or not the perpetrator was of sound mind at the time of committing the act and whether or not the culpability requirement is met. In other words, the cause of any unsoundness of mind or absence of culpability is of no relevance under German law.[485]

Although no direct exclusion has been made from soundness of mind as a condition for criminal liability in case of self-induced intoxication, criminal offences committed under self-induced intoxication are subject to a specific criminal liability provision. Section 323 a of the German Criminal Code carried the heading «Committing offences in a senselessly drunken state», and is worded as follows:

> «(1) Whosoever intentionally or negligently puts himself into a drunken state by consuming alcoholic beverages or other intoxicants shall be liable to imprisonment not exceeding

[481] Chapter 3, Section 4, of the Finnish Penal Code of 19 December 1889 No. 39.

[482] Finnish Government Proposition No. 44/2002 to Parliament, p. 67.

[483] Finnish Government Proposition No. 44/2002 to Parliament, p. 67.

[484] Section 20 of the German Criminal Code in the version promulgated on 13 November 1998, Federal Law Gazette, last amended by Article 3 of the Law of 2 October 2009, Federal Law Gazette I, p. 3214.

[485] Bohlander (2009), p. 134.

five years or a fine if he commits an unlawful act while in this state and may not be punished because of it because he was insane due to the intoxication or if this cannot be excluded.»[486]

These provisions seek to avoid a deviation from the general criminal law principle of culpability by criminalising, on certain conditions, the act of placing oneself in a state of intoxication that subsequently results in a criminal offence, instead of imposing punishment for acts committed in a state of unsound mind caused by self-induced intoxication. Another way of putting this is that the perpetrator is in such cases held liable for having caused his or her own unsoundness of mind, but not for the offence committed by him or her in such a state. The maximum sentence is, it will be noted, five years' imprisonment, and it follows from Sub-section 2 of the provision that the specific sentence shall not exceed what would otherwise have been handed down.

The rationale behind such liability is to counter the general risk posed by intoxication, and it is to some extent practised in such a way as to require the intoxicants to have been ingested under circumstances suggesting that protected interests are at risk.[487] The provision is structured as an abstract rule attaching criminal liability to behaviour that entails a risk of causing damage or injury, which gives rise to objective, but limited, liability in respect of damage or injury inflicted as the result of self-induced intoxication.

9.4.5 England

English law classifies certain conditions for criminal liability as «defences», which defences include «automatism» and «insanity»; cf. 7.6.

The «insanity» defence is the most relevant as far as self-induced intoxication is concerned, and may also be invoked in such cases,[488] unless the perpetrator has placed him- or herself in a state of intoxication with a view to committing the criminal act. A decisive assessment criterion is whether the accused suffers a «disease of the mind» or was in a more ordinary state of intoxication. It would appear that the threshold for prevailing with such a defence is very high in practice.[489]

9.4.6 United States

The significance of self-induced intoxication under US law is structured on the same legal premise as in English law. The contents of US criminal law vary somewhat from state to state. Also US law treats some of what we refer to as conditions for criminal liability as «defences»; cf. 7.7.1.

The «insanity» defence cannot be invoked in relation to states of unsound mind that are temporary and caused by intoxication, if such intoxication is self-induced. A person with an underlying disorder suggestive of insanity may, on the other hand, invoke such defence irrespective of whether or not he or she has been drinking. The same also applies to mental states caused by long-term use of intoxicating substances.[490]

[486] Section 323 a of the German Criminal Code in the version promulgated on 13 November 1998, Federal Law Gazette, last amended by Article 3 of the Law of 2 October 2009, Federal Law Gazette I, p. 3214.

[487] Herrmann (1986), pp. 765–766.

[488] *Davis* (1881) 14 Cox C.C. 563, see also Haque and Cumming (2003), p. 148.

[489] (1974) 58 Cr. App. R. 364. See also Law Reform Commission, Ireland (1995), pp. 13–16.

[490] LaFave (2010), p. 508, with further references to case law.

9.5 The assessment of the Committee

9.5.1 Theme and structure

What shall be the criminal law implication of an offence having been committed in a self-induced state of unsound mind, should to begin with be considered from the perspective of the general justifications for punishment and the reasons derived therefrom as to why certain perpetrators must be deemed to be, and treated as being, of unsound mind for purposes of the administration of criminal justice.

The Committee has opted for a general approach to the issue of the criminal law implications of self-induced unsoundness of mind. The discussion is not restricted to substance-induced states of unsound mind, as is the case under current law, but seeks to address all conceivable varieties of «self-induced unsoundness of mind». The term «self-induced» unsoundness of mind means, as indicated, that the perpetrator is somehow to blame for the occurrence of such state of unsound mind.

Some of the justifications for punishment are discussed in 9.5.2, and a view is taken on whether and, if applicable, how criminal liability for offences committed by perpetrators in a self-induced state of unsound mind can be thus justified.

Whether a certain behaviour should be criminalised is often answered on the basis of the so-called *harm principle*, according to which the decisive consideration is whether such behaviour may have harmful effects suggesting that it should be prohibited.[491] Whether self-induced unsoundness of mind entails a risk of such harmful effects is addressed in 9.5.3. This includes a discussion in 9.5.3.2 of links between various types of behaviour and mental aberrations, and a discussion in 9.5.3.3 of links between mental aberrations and crime. In 9.5.3.4, the Committee expresses its view on the implications of such links for the matter of criminalisation. How the Committee's position compares to current law is specifically addressed in 9.5.3.4.6.

In 9.5.4, the Committee presents its recommendation for a provision on criminal liability for offences committed in a self-induced state of unsound mind, by outlining which conditions should be met in order for such liability to apply.

9.5.2 Liability for offences committed in a self-induced state of unsound mind, in view of the justifications for punishment

9.5.2.1 General remarks

The justifications for punishment are discussed in 6.2 and 8.2. The issue addressed in the following is whether and to what extent these justifications suggest that society should punish those who have themselves induced such a state of unsound mind as would otherwise merit a ruling of criminal insanity and a punishment exemption.

Criminal liability for offences committed in a «self-induced state of unsound mind» can to some extent be justified by *individual deterrence*. Imposed criminal liability may have a deterrent effect on anyone who might consider placing him- or herself in such a state anew. In addition, an individual deterrent effect may be achieved during execution of the sentence in the form of addiction control programmes, etc. Such programmes may increase the likelihood that the perpetrator will in future refrain from inducing severe mental aberrations.

[491] Official Norwegian Report NOU 2002: 4, p. 80, and Proposition No. 90 (2003–2004) to the Odelsting, pp. 88–89.

Criminal liability for offences committed in a self-induced state of unsound mind is also likely to have a certain *general deterrent* effect. Although a person who at the time of committing the act suffers a severe mental aberration may not have the same capacity for being influenced by whether the act is sanctioned by punishment as do healthy offenders, such criminal liability may serve to specifically highlight the risks associated with such aberrations and to some extent limit behaviour that causes those aberrations that may be dangerous.

Social peace considerations may also favour criminal liability for offences committed in self-induced states of unsound mind. However, it is difficult to establish a well-founded view on the extent to which such is the case. Part of the reason for this is that the said justification for criminal liability depends on what one means by the term «social peace». It is a complex and partly impenetrable concept. The term is closely associated with the social reality hinted at by the term «general sense of justice».

It is not difficult to envisage that most people will demand that some form or other of liability be imposed on a person who commits a horrifying crime in a self-induced state of unsound mind. There is much to suggest that the current liability for offences committed in a «self-induced state of unsound mind» is to some extent based on such a rationale. A key premise underpinning the legislative revision in 1929, as well as subsequent reform processes, was precisely that the general public might find it difficult to accept self-induced intoxication as grounds for acquittal; cf. 9.3. It has even been assumed that such grounds for acquittal might in themselves undermine the authority and legitimacy of the penal system. But it is likely that alcohol policy considerations specific to Norway did also have an impact on the regime that was chosen in 1929.

At the same time, these concerns must not be exaggerated when evaluating the implications of *social peace* considerations for the matter of liability for offences committed in a self-induced state of unsound mind. It is both widespread and socially accepted amongst a major part of the population to behave in ways that entail a risk of causing aberrations. Norwegians consume large quantities of alcohol, especially at weekends, and many will, especially when the offences are not very serious, consider it a mitigating circumstance that the offence was committed in a state of unsound mind and not by a person who was compos mentis. It is certainly not a rare occurrence for such views to dominate the social and human reaction - «blame it on the booze». Very few people can muster much indignation over a «decent young lad» who when intoxicated for the first time «break[s] a window, make[s] a bit of a commotion and ha[s] an altercation with the police […]».[492]

Retribution linked to subjective culpability can hardly justify liability for actions committed in a severely mentally aberrant state. A perpetrator is without criminal capacity when sufficiently aberrant. As far as concerns a state of «unsound mind» induced by the perpetrator him- or herself, the perpetrator may at times be blamed for the occurrence of such state. There may, for example, be reason to blame a person who places him- or herself in a state of intoxication or who suspends the use of antipsychotics if such person was aware of the possibility that a serious aberration might occur.

On the other hand, a preference for sanctioning the actual behaviour of the perpetrator and its consequences, irrespective of criminal capacity and actual culpability, for example motivated by a desire for pure and arbitrary revenge, would suggest that the perpetrator should be held fully liable also for criminal acts committed in a state of unsound mind. Such a justification

[492] From the speech made by Helga Karlsen, member of the Storting (Labour Party), during the debate in the Storting on Section 45 in 1929; cf. Minutes of the Deliberations of the Odelsting (No. 3), 28 January 1929 - Amendments to the General Civil Penal Code - Sections 44 and 45.

for punishment, which means that mental aberrations and other ethical considerations are disregarded, represents a decisive break with the proportionality otherwise required by society between culpability and punishment; cf. 6.2.1.

9.5.2.2 The assessment of the Committee

The Committee is of the view that even though the justifications for punishment suggest that one should not impose criminal liability on persons with severe mental aberrations, the situation is different for a person who induces such an aberration him- or herself with the intent of committing a specific criminal act. A person who relies on Dutch courage to commit crimes, cannot retrospectively invoke the excuse that he or she was in a state of severely impaired consciousness at the time of committing the act. Said offender is as deserving of punishment as anyone else, and all justifications for the use of punishment apply in full. Such criminal liability was derived directly from the Penal Code prior to the revision in 1929; cf. 9.3 for further details.

Apart from cases in which the perpetrator has intentionally caused the state of unsound mind in order to commit a criminal act, it is difficult, based on the general justifications for punishment, to find viable arguments for imposing full criminal liability for criminal acts committed in a mentally aberrant state that would otherwise have excluded criminal capacity.

However, even if the person in question cannot be held directly liable for what happens after the occurrence of the aberration, there may be reason to blame him or her for the fact that a high-risk aberration occurred. Consequently, there may be reason to use punishment in respect of certain actions that are known from experience to cause severe mental aberrations involving an impaired sense of reality and cognitive control.

Certain of these aberrations may, as the result of misinterpretations and aggressiveness, result in considerable risk to other people, with the outcome that important interests are harmed. One example of such an action, which is not criminal at present, is for a person who is well aware that he or she gets seriously mentally ill and violent if he or she fails to take the prescribed medicines, to nonetheless stop taking the medicines and subsequently assault another person.

It may be argued against holding anyone criminally liable on such grounds that any basis for reproach is contrived. Crime in the form of violence will be an objective implication of the suspension of medicine use, and may also be situational in nature. Besides, the equal treatment of citizens is a key rule of law ideal. Criminal liability for acts committed in a «self-induced state of unsound mind» may result in the unequal treatment of some citizens because of their special proclivities.

It is nonetheless the position of the Committee that the justifications for punishment apply with full force to a person who with a sufficient degree of culpability exposes other people to such risk as may generally result from self-induced states of unsound mind. Society cannot accept the risk created by individuals themselves unnecessarily causing such aberrations, and is entitled to sanction such risk inducement, also by means of criminal law sanctions.

Although some persons will have their freedom of action restricted to a greater extent than others, for example by having to be cautious about alcohol consumption, this does not amount to an unreasonable unequal treatment that prevents criminal liability for acts committed in a «self-induced state of unsound mind». Society's need for protection justifies equal treatment of the risks involved.

However, criminal liability for acts committed in a self-induced state of unsound mind must be conditional upon a demonstrable general link between certain types of behaviour and the

occurrence of states of unsound mind, as well as a general link between states of unsound mind and crime. Such links are addressed in 9.5.3.

9.5.3 Liability for offences committed in a self-induced state of unsound mind, in view of links between behaviour, mental aberrations and crime

9.5.3.1 Theme and structure

In order for there to be criminal liability for acts committed in a «self-induced state of unsound mind», it first needs to be clarified which actions entail a risk of severe mental aberrations, and thereafter whether such aberrations create a risk of crime.

The key question for the Committee is whether there are demonstrable links between behaviour that results in states of unsound mind and risk of damage or injury, and whether such links, if any, are sufficiently well documented to justify criminal liability for acts committed in self-induced states of unsound mind.

The link between various types of behaviour and states of unsound mind is addressed in 9.5.3.2. It follows from such discussion that two categories of behaviour, in particular, raise the question of criminal liability for «self-induced unsoundness of mind». One of these categories is the use of intoxicants and steroids. The link between alcohol consumption and aberrations is discussed in 9.5.3.2.1. The link between the use of narcotic drugs and aberrations is addressed in 9.5.3.2.2. The other category is failure to take medicines. This is the theme in 9.5.3.2.3. Certain other types of behaviour that may result in mental aberrations are outlined in 9.5.3.2.4. However, the link between behaviour and such aberrations is complicated by potential complexities as far as causality is concerned. The effects of narcotic drugs may, for example, depend on physical and mental factors on the part of the user. Complex links are addressed in 9.5.3.2.5.

Links between severe mental aberrations and crime are discussed in 9.5.3.3. The focus is on links between such aberrations and acts of violence. Most studies that have been conducted concern such crime, and it is predominantly the need for protection against violent crime that may justify criminal liability for acts committed in a «self-induced state of unsound mind».

The Committee would like to emphasise that although links between severe mental aberrations and crime are identified in the following, the majority of persons suffering severe mental aberrations present no danger to others. Consequently, the analyses and assessments of the Committee offer no reason to stigmatise this diverse group as such as being dangerous.

In 9.5.3.4, the Committee presents its opinion as to whether it is legitimate, in view of the said links, to make use of criminal law sanctions, i.e. to criminalise behaviour likely to induce a state of unsound mind.

9.5.3.2 Link I: Behaviour and aberrations

9.5.3.2.1 Alcohol consumption

Alcohol is used extensively as a stimulant in our culture. The intoxicating effect of alcohol on the brain will often produce a feeling of pleasure and well-being. Inhibitions and tensions may be reduced, and communication with others becomes easier.

The concentration of alcohol in the blood increases a few minutes after ingestion, thereby also initiating the body’s breakdown of the substance in the liver. The higher is the concentration in the blood and the brain, the more severe is the alcohol intoxication. The specific degree of intoxication will depend on a number of factors, including how used the body is to alcohol

and whether other intoxicants are used at the same time. Alcohol consumption may, depending on blood alcohol concentration and individual factors on the part of the user, result in seriously impaired consciousness.

Long-term use of alcohol may also cause mental aberrations.[493] Firstly, long-term intense alcohol abuse may cause alcohol-induced hallucinations or paranoia with delusions. Secondly, long-term regular consumption of alcohol may cause dementia, which may ultimately result in psychosis. Thirdly, long-term alcohol abuse entails a risk of vitamin B1 (thiamine) deficiency. This vitamin is necessary for the body's metabolism of carbohydrates, and is required for the normal functioning of the brain, nerves, muscles and heart. Lack of the said vitamin may cause Wernicke-Korsakoff syndrome, which is characterised by impaired consciousness, coordination difficulties and paralysis of ocular muscles. The syndrome often manifests itself acutely in connection with delirium tremens. If the vitamin is not administered, chronic brain damage may be the outcome.

Treatment of the said conditions requires sobriety, which may again entail a risk of alcohol withdrawal reactions in the form of severe mental aberrations. One example is delirium tremens. This is a brief state of psychosis involving intense hallucinations, and occasionally somatic disturbances that may be life threatening. The condition may occur in seriously addicted long-term abusers as a consequence of reduced or suspended alcohol consumption.[494] However, it is not an intoxication in itself, inasmuch as it may occur without any alcohol in the blood.

One effect of alcohol that differs from the aforementioned more ordinary effect is so-called pathological intoxication. Whilst the typical effect of intoxicants comprises a gradual loss of control in line with ingestion, pathological intoxication is characterised by sudden changes in the consciousness of the intoxicated person. These may involve acute mental disturbances, delusions and hallucinations, whilst the motor functions will typically remain intact. A person with pathological alcohol intoxication will often have no memory of the period of such intoxication. ICD-10, F10.07, provides the following description of pathological alcohol intoxication:

> «Sudden onset of aggression and often violent behaviour that is not typical of the individual when sober, very soon after drinking amounts of alcohol that would not produce intoxication in most people.»

It follows from the definition that a necessary condition is disproportionality between consumption and intoxication. However, some studies have argued that pathological intoxication effects may also arise upon the consumption of large quantities of alcohol.[495] A review of practice amongst Norwegian experts shows that there is no difference in the level of blood alcohol concentration between persons who have been found to have a pathological intoxication and those who have been found to have a normal intoxication (an average of 0.196 percent by volume), which has also given rise to criticism.[496] A high level of blood alcohol concentration cannot rule out this diagnosis, irrespective of what position one has on the above matter, already for the reason that one may consume alcohol after the said aberration has occurred.

[493] Gottlieb et al. (2008), pp. 179–180.

[494] ICD-10 F10.4.

[495] Gottlieb et al. (2008), pp. 178–179.

[496] Hartvig et al. (2003), pp. 1833–1834.

Some persons are deemed to be more susceptible to pathological intoxication effects than others.[497] One example is persons with brain damage or in special states of emotional tension or exhaustion.[498] Official Norwegian Report NOU 1990: 5 describes pathological intoxication as follows:

> «The classic pathological alcohol intoxication is triggered already by small quantities of alcohol and has a fairly sudden onset. Behaviour is completely out of character for the person in question. The condition ends suddenly and is accompanied by a complete loss of memory [from] the relevant period. It was previously thought that such pathological intoxications only occurred upon the consumption of very small quantities of alcohol. One has recently also become aware of definite episodes of pathological intoxication at a somewhat higher level of alcohol intake. However, the condition must not be confused with ordinary symptoms of poisoning. Pathological intoxication occurs in persons who are particularly susceptible to such intoxication, or may occur as the result of a more temporary reduction of the brain's resistivity, such as for example fever, long-term sleep deprivation, very severe mental or physical exhaustion, situations of very serious mental conflict, etc.»[499]

The implications of «pathological intoxication» under current law are outlined in 9.2.4.

9.5.3.2.2 Drug use

Severe mental aberrations may also be induced by the use of narcotic drugs. However, whether this happens, as well as the specific nature of such aberrations, is highly dependent on what type of narcotic drug is ingested and how it is ingested. Typical effects of using various drug groups are outlined in the following.

Reference is also made to 8.4.5.3.

Drug groups are commonly distinguished on the basis of their active ingredient, with the main categories being those whose active ingredient is hallucinogenic drugs (such as LSD and psilocybin mushrooms), central nervous system stimulants (such as amphetamine and cocaine), cannabis (such as hashish and marihuana), opiates (such as heroin and opium) or benzodiazepines (such as Valium and Rohypnol).[500]

Hallucinogenic drugs are characterised by, inter alia, causing disturbances of consciousness that are reminiscent of psychosis and distorting sensory perception through delusions and hallucinations. Experience shows that the ingestion of hallucinogenic drugs may result in one's surroundings being perceived as threatening, with the intoxicated person acting on the basis of such perception.[501]

Central nervous system stimulants stimulate mental functions and eliminate fatigue. The drugs act on the central nervous system and induce a feeling of intoxication, accompanied by elevated alertness, self-esteem and mood, as well as suppressed appetite and discernment. Psychotic states with delusions may arise through repeated and long-term use. These will in most cases abate when use of the central nervous system stimulant is discontinued. This group of drug also includes khat, which is an intoxicant most commonly used by persons originating

[497] Andenæs (2005), p. 314.

[498] Official Norwegian Report NOU 1974: 17, p. 50.

[499] Official Norwegian Report NOU 1990: 5, p. 43.

[500] Gottlieb et al. (2008), p. 180 onwards.

[501] Official Norwegian Report NOU 1974: 17, p. 69.

from East Africa. Amphetamine and methylphenidate are central nervous system stimulants that are also registered as medications in Norway.

Cannabis induces biological and psychological effects. Intoxication depends on the quantity of drugs ingested and on susceptibilities on the part of the user. At higher doses, the user may experience visual and auditory hallucinations and psychotic states. In some cases the user will be aware that these are hallucinations, whilst the experience will at other times be perceived as more complete or real.

Although it is held to be beyond doubt that cannabis use may trigger psychotic states, it is more doubtful what risk is associated with the use of such intoxicants. It is noted in medical literature that it may be difficult to delineate what constitutes a psychosis.[502] It is discussed in research circles whether behaviours associated with regular cannabis use, which behaviours are detrimental to the performance of other tasks, should to a higher extent be considered initial phases of schizophrenia rather than resulting from the abuse of intoxicating substances. Such states are typically characterised by a lack of initiative and social isolation, as well as by aimlessly passing time. It has also been argued that there are links between cannabis use and subsequent schizophrenia diagnoses.[503]

Opiates induce strong euphoria and are highly addictive, but generally do not cause psychotic symptoms or symptoms that are reminiscent of psychosis.

Benzodiazepines have, inter alia, anti-epileptic, anxiolytic, muscle relaxant and soporific effects. However, psychotic effects or effects that are reminiscent of psychosis are not registered for such drugs either.

A general feature of narcotic drugs that may induce psychotic effects is that long-term use may result in more permanent hallucinations and delusions. Suspended ingestion after long-term drug use may, as with long-term alcohol abuse (see above), result in withdrawal reactions. Which mental aberrations may then arise vary with what drug one refrains from abusing.

Unlike in relation to alcohol, there is no tradition for identifying pathological states of drug intoxication, in the sense of sudden and temporary abnormal states, and no diagnosis systems use such a category. It is, at the same time, known that interacting causes may result in extraordinary aberrations. One example is that drug abuse may aggravate psychotic symptoms in persons with psychotic disorders; cf. 8.4.5.3.2 for further details.

9.5.3.2.3 Suspension of medicine use

Severe mental aberrations can often be treated by therapy or medications. One example is that antipsychotics may eliminate or subdue delusion and agitation in persons with underlying psychotic disorders.

The mechanism of action of all *antipsychotics* is to inhibit the signal transmission between brain cells by way of dopamine. Dopamine is a chemical substance that transmits a neural impulse from nerve cell to nerve cell, and plays a decisive role in the central nervous system.

[502] Bramness (2013), p. 76.

[503] Bramness (2013), pp. 77–78.

A distinction is typically made between first- and second-generation antipsychotics. The former group originates from the period after antipsychotic effects of medications were discovered in 1952. A new type of antipsychotics was introduced from the mid-1970s, which are typically referred to as second-generation antipsychotics.[504]

There are side effects associated with such medications, since dopamine is of decisive importance for motion and motivation, and also affects memory, attention and learning. The side effects nonetheless vary between different antipsychotics and from person to person. The medication will often affect cognitive processes, behaviour and emotional life beyond that already resulting from outbreaks of psychosis. Another key side effect for almost all types of antipsychotics is tiredness in the patient, and many patients experience weight gain and metabolic side effects like diabetes.

Antipsychotics are typically used over a period of several years. It may take time to find the correct dose, and it may be necessary to make modifications along the way. One will normally try to reduce the medication dose to limit the side effects following acute medication. It will often take a long time to arrive at the desired balance between the antipsychotic effects of the medicine and its side effects, and this may also change over time. The ideal is to reduce medicine use to the extent possible at any given time, as long as the balance between desired effects and side effects can be considered defensible. The extent to which one reduces the dose will depend on whether psychotic symptoms re-emerge.

If a person with a psychotic disorder refrains from taking medicines or swiftly suspends medicine use, psychoses may occur. In some cases this will be desired by the patient him- or herself. There may be different reasons for this, for example that he or she would like to live out the psychosis, wants to avoid side effects or believes that the medicines are not working. However, the most common cause is probably a lack of insight into own diagnosis and the effects of the medicine. It also occasionally happens that a patient has absconded from compulsory mental health care, and hence is without access to medicines.

9.5.3.2.4 Other behaviours

Seriously impaired consciousness, psychoses and states reminiscent of psychosis may also be provoked otherwise than by using intoxicants and refraining from taking medicines. In particular, situations that are experienced as extreme may have such an effect. It is known that stressful events, such as for example periods of intense military combat training or sleep deprivation, may result in psychotic symptoms. Some women also develop psychosis in connection with the puerperium (postnatal psychosis); cf. 8.4.4.2.

Some persons are more susceptible than others to reactions as the result of extreme experiences. Experience of war and other brutal events, in particular, may severely influence the psyche. Studies of survivors of the 2011 massacre at Utøya show, for example, that the average post-traumatic stress level of this group is six times higher than that of the general population.[505] Another example is that soldiers returning from Afghanistan suffer mental health problems that must be attributed to experiences during such posting.[506]

Post-traumatic stress disorder is a relevant diagnosis in this context. The various aberrations may be characterised by muddle, confusion and incomprehension, and more rare cases may involve a total loss of control, massive confusion and bodily agitation.

[504] Official Norwegian Report NOU 2011: 9, Chapter 9.2.

[505] Dyb et al. (2014).

[506] Reichelt et al. (2012).

9.5.3.2.5 Complex links

It is difficult to establish the exact links between various forms of behaviour and mental aberrations. One of the reasons for this is that a number of causes, of both a physical and mental nature, interact with each other.

The link between intoxicant ingestion and mental disorder is especially complex and intricate.[507] This is clearly reflected in medical theory and diagnostic classifications, which distinguish between three main types of links, i.e. intoxication disorders in the true sense, use of intoxicants that over time causes fundamental psychiatric disorders, as well as withdrawal states resulting from abstention following long-term use; cf. 9.5.3.2.1 for further details.

Some persons are more susceptible to aberrations than others. A person treated for schizophrenia may, for example, suffer a relapse with intense psychotic symptoms as the result of ingesting intoxicants. Another example is that the use of intoxicants under considerable stress and in an uncontrolled environment is more likely to induce mental aberrations than ingestion in a tranquil and controlled environment. Ingestion of a combination of various intoxicants is more likely to result in mental aberrations than is isolated ingestion.

9.5.3.3 Link II: Mental aberrations and crime

9.5.3.3.1 General remarks

A number of studies identify links between certain severe mental aberrations and dangerous criminal conduct.[508] An illustrative finding is that persons with mental disorders are overrepresented amongst those who committed homicide in Norway over the period 2004–2009. A government-appointed committee that reviewed all of these cases summarised its findings as follows:

> «A total of 92 (71%) of perpetrators had a diagnosable mental disorder at the time of the offence, and 97 (75%) had suffered a mental disorder at some point in life. The most common mental disorders at the time of the offence were intoxication-related diagnoses (38%), personality disorders (30%) and schizophrenia/paranoid psychosis (18%). The portion with the diagnosis schizophrenia or paranoid psychosis was considerably higher than in the general population. Personality disorders and intoxication-related disorders were also overrepresented.»[509]

In other words, the frequency of homicide is considerably higher amongst persons with serious mental disorders than amongst the rest to the population. A reading of underlying case law makes these links conspicuous, in that many of the cases concern homicides that would be difficult to explain by other causes.[510] Crime studies in other countries show the same,[511] and international survey articles conclude that persons diagnosed with schizophrenia are overrepresented in homicide cases.[512]

[507] Boles and Miotto (2003).

[508] See 24.1.3 and Salize et al. (2005), pp. 12–14, with further references.

[509] Official Norwegian Report NOU 2010: 3, p. 31.

[510] See for example the ruling published on p. 774 onwards of the 2011 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraph 34.

[511] See for example Golenkov et al. (2011) and Nielssen et al. (2007).

[512] Large et al. (2009).

It is also a generally held view amongst health professionals who are clinicians that there is a link between psychoses and violent behaviour.[513] This is also evidenced by the reports from the regional security departments in Norway.[514] And these links are confirmed by a number of systematic studies conducted internationally.

Some types of psychotic symptoms carry a higher risk of violent behaviour than others.[515] It has, for example, been argued in empirical studies that there is a link between delusions and violent behaviours, which is explained by, inter alia, the aggression being aimed at the delusions.[516]

Studies that review and compare other studies in the field – so-called meta studies – also conclude that there is a link between psychoses and violence, and especially between schizophrenia and violence.[517] The risk of violent behaviour on the part of adults with serious mental disorders is held to be significantly higher if they have suffered behavioural disorders before reaching the age of 15 years.[518] Certain other mental aberrations than psychosis also entail an elevated risk of violence, for example severe depressive disorder.[519]

Some studies show a link between mental aberrations and other criminal conduct than violent offences. A Swedish study has, for example, demonstrated that perpetrators diagnosed with schizophrenia were overrepresented amongst arsonists.[520]

9.5.3.3.2 Complex links

Nor are *all* triggers known as far as the links between aberrations and crime are concerned. One of the main reasons for this is that human behaviour and human choice of action are difficult to predict. Irrespective of what one may believe with regard to whether humans have free will, the factors determining why we react as we do and why we act as we do are complex. For this reason it is more meaningful to phrase a discussion of the link between mental states and criminal conduct in terms of various *risk* factors, and *not* in terms of specific causes.[521]

When one specific behaviour is held to be dangerous, it implies that one potential link between behaviour and effect is isolated, whilst at the same time assuming that other conditions are met. The dangerousness of ingesting narcotic drugs will, for example, partly depend on conditions relating to the person's susceptibility to intoxication and partially on the social context of such ingestion. In attempting to understand the causes of violent behaviour on the part of persons with mental disorders, it is important to be aware that other factors, such as for example the use of intoxicants and the overall social situation of the offender, may also influence the outcome, and that the interaction between various risk factors is complex and difficult to determine.[522]

[513] Douglas et al. (2009), p. 679.

[514] See, inter alia, St. Olavs Hospital HF, Regional Security Department Brøset, Annual Report 2012, and Legislative Proposition No. 108 (2011–2012) to the Storting, p. 13 onwards.

[515] Bjørkly (2002).

[516] Coid et al. (2013).

[517] Douglas et al. (2009) and Fazel et al. (2009).

[518] Fulwiler and Ruthazer (1999).

[519] Elbogen and Johnson (2009).

[520] Anwar et al. (2011).

[521] Official Norwegian Report NOU 2010: 3, p. 42 and 28–41.

[522] See for example Official Norwegian Report NOU 2010: 3, p. 43, and Fazel et al. (2009).

Some empirical studies do indeed highlight the observation that other risk factors than mental disorders are also of relevance in establishing any link between severe mental aberrations and crime.[523] One has sought to demonstrate that there is less or no difference in violent behaviour between the seriously mentally ill and other groups in society when taking other risk factors into account.[524]

An illustrative example showing this complexity is the use of cannabis. Many consider this to be a substance that has a relaxing effect and curbs aggressiveness.[525] It has, at the same time, long been assumed that there is a link between cannabis use and violent behaviour.[526] Some of these studies examining the link between cannabis use and violence/aggressiveness find a higher degree of violent behaviour and exposure to violence in cannabis users than in non-users. However, whether this implies any causal link between such use and violence is much discussed. This has to do with users also differing from non-users in terms of other circumstances, for example with regard to the use of other intoxicants.

It may be added, in relation to this example, that experimental studies are also unable to unambiguously characterise any link between cannabis use and aggression. Some studies show aggressiveness, whilst others show reduced aggressiveness following ingestion. This depends on the time elapsed since ingestion, but also on what quantity of the active ingredient (THC) has been ingested.[527]

If one chooses to combine mental aberrations and other risk factors, one will observe a stronger link between severe mental aberrations and violent behaviour. A Swedish study has demonstrated, for example, that the risk of persons diagnosed with schizophrenia and intoxication disorder engaging in intoxication-related violence is four times higher than the risk of persons without mental disorders doing so.[528] The seriousness of the act of violence will also vary with mental states and combinations of intoxicants.[529]

It is assumed that the state of persons with mental disorder tends to deteriorate after the use of intoxicants. There also exist studies suggesting that the combination of intoxicant use and failure to take medication on the part of persons with serious mental disorders results in a higher risk of violence.[530] A complicating element is that violence and the use of intoxicants may also be early indicators of the development of psychosis, in which case the mental disorder may be a main cause of the violence.

It will be evident from this that the links between the various risk factors and violence and other criminal conduct are complex and partly uncertain. However, this does not mean, as argued by some in the public debate, that one should not focus, or that it is not relevant or important to place a special focus, on serious mental disorders and aberrations as one out of several key factors associated with a risk of violence and crime in our society.

[523] Golenkov et al. (2011) and Large et al. (2009).

[524] See Elbogen and Johnson (2009) and the brief synopsis thereof in Official Norwegian Report NOU 2010: 3, pp. 44–45 and 47.

[525] Gottlieb et al. (2008), p. 180.

[526] Rossow (2013), pp. 102–104.

[527] Hoaken and Stewart (2003), p. 1542.

[528] Fazel et al. (2009).

[529] Elbogen and Johnson (2009).

[530] Swartz et al. (1998).

9.5.3.4 The significance of links I and II: The causal chain behaviour-aberration-crime

9.5.3.4.1 Theme and structure

The discussions in 9.5.3.2 and 9.5.3.3 show that certain types of behaviour may result in seriously impaired consciousness and severe mental aberrations. Moreover, links exist between such aberrations and serious offences. This shows that behaviour likely to induce a state of unsound mind gives rise to a risk of damage to interests protected by society.

The issue addressed in the following is whether and to what extent it is legitimate to use criminal law measures against behaviour likely to induce a state of unsound mind.

This depends on two variables. Firstly, it needs to be clarified which legal interests are threatened, i.e. how dangerous the serious mental state would have to be. The more valuable the legal interests, the lower the degree of risk that society would have reason to accept.

Secondly, it needs to be clarified whether and, if applicable, to what extent the behaviour in question is undesirable. There is reason to accept a higher risk when such risk is caused by behaviour otherwise valued by society. It may be mentioned, by way of illustration, that the criminalisation of motoring is not under consideration although about 200 people are killed on Norwegian roads each year. It would seem more likely that base jumping might be criminalised, which is estimated to involve only one death per 1000 jumps, but also in this regard has the right of citizens to free self-realisation thus far been accorded more priority than the said risk, the expenses incurred in connection with rescue operations and the risks that health personnel often need to expose themselves in connection with these.

A key issue in relation to both variables is how certain the links between behaviours and desired effects are. Any criminalisation of «self-induced unsoundness of mind» will depend on experience-based knowledge to the effect that certain forms of behaviour may cause states of unsound mind, which again entail a risk of damage or injury. Such knowledge is, and will necessarily be, more or less well founded – in many cases one will have nothing more to rely on than mere risk assumptions.

However, this is a general feature of much legislation. In introducing any penal provision used to regulate the conduct of citizens, the lawmaker will be making more or less well-founded assumptions as to how various factors are related to each other. The requirements in the Road Traffic Act that all persons shall drive carefully and be vigilant and cautious when driving, do for example reflect experience-based knowledge about motorised travel, as well as an assumption that a cautious driver will be less exposed to danger and also pose less of a danger to other persons on the road.[531]

The discussion of the issue of criminal liability for self-induced unsoundness of mind is concentrated on the two behavioural categories highlighted in 9.5.3.2 as especially relevant and typically occurring, i.e. the use of intoxicants and the suspension of medicine use; cf. 9.5.3.4.2 and 9.5.3.4.3, respectively. 9.5.3.4.5 discusses what implications interacting causes should have for the issue of criminalisation. 9.5.3.4.6 addresses the relationship between the current rule in Section 45 of the Penal Code and the assessment of the Committee.

[531] Section 3 of the Road Traffic Act.

9.5.3.4.2 Intoxicants

Both mental and physical states may be affected by the ingestion of intoxicants. Effects include, inter alia, coordination and concentration difficulties, and ultimately complete loss of control over bodily functions; cf. 8.4.5.3.1, 9.5.3.2.1 and 9.5.3.2.2.

In medical terms, intoxication is a form of poisoning. However, because of its prevalence and – as far as alcohol is concerned – its long history as a generally accepted stimulant, it has a special social status. However, what that status is nonetheless depends on the intoxicant and on the social and cultural context. Intoxicants include both legal and illegal substances.

For some intoxicants there is a clear risk that a severe mental aberration will occur. It is for example generally known that the ingestion of hallucinogenic drugs in the form of the prohibited substance LSD may result in psychoses or states reminiscent of psychosis. There are also established links between use and aberrations for other intoxicants; cf. 9.5.3.2.2.

It may here be added that the general link between the use of intoxicants and acts of violence is well documented. Intoxication is considered the main mental risk factor for violence in society, alongside the diagnosis dissocial personality disorder.[532]
The study of homicides in Norway over the period 2004–2009 showed that use of alcohol and other intoxicants was strongly overrepresented amongst persons who have committed homicide, compared to the rest of the population. Moreover, a large portion of perpetrators were intoxicated at the time of committing the homicide.[533]
In absolute numbers, alcohol intoxication is the most frequently linked to acts of violence, but links have also been established between other intoxicants and violent behaviour. A key role is played by acute substance-induced psychoses and personality changes resulting from long-term use of intoxicants.[534]

These links must be of decisive importance in determining whether a behaviour should be criminalised. When citizens in general are aware of the risk that offences will be committed in these states of aberration, they should be held liable for causing such states.

The rationale here invoked for criminalising the said behaviour is the risk resulting from the use of intoxicants. However, criminalisation would from this perspective only apply to the ingestion of substances that we know from experience to be a likely cause of aberrations that actually lead to a risk of harmful behaviour.

Not all use of intoxicants entails a risk of dangerous mental aberrations. There is, for example, no empirical evidence to suggest a link between use of the opiate heroin and psychoses. However, the use of opiates may in combination with other risk factors trigger severe mental aberrations, thus also raising the issue of criminal liability.

For legal intoxicants, and especially alcohol, this may have to be considered from a somewhat different perspective. Major parts of the population value the consumption of alcoholic beverages, and especially its intoxicating effects on body and soul. Given current alcohol habits, general criminal liability for risks associated with alcohol consumption would have criminalised major parts of the population, which would for obvious reasons not be viable.

Moreover, it is problematic to impose criminal liability on a person who ends up in a state of unsound mind following normal alcohol consumption. A sudden onset of aggression and violent behaviour that is a consequence of first-time atypical or pathological alcohol intoxication

[532] See Official Norwegian Report NOU 2010: 3, Chapter 7, and Elbogen and Johnson (2009).

[533] Official Norwegian Report NOU 2010: 3, p. 50.

[534] Boles and Miotto (2003).

following generally accepted alcohol consumption will, for example, clearly not be encompassed by the rationale for criminal liability.

However, although there is for historical and cultural reasons acceptance for a certain risk in relation to alcohol consumption, there is nonetheless a limit as to what type of use and what degree of risk there is reason to accept. A person who from experience knows that there is a distinct risk of reacting pathologically and entering a state of severely impaired consciousness and turning violent upon alcohol consumption may, depending on the circumstances, reasonably be held criminally liable for having him- or herself caused his or her state of unsound mind and the subsequent crime.

9.5.3.4.3 Suspension of medicine use

It will in the following be discussed whether it is appropriate to criminalise failure to take medicines when it results in severe mental aberrations, for example outbreaks of psychosis; cf. 9.5.3.2.3. Whether such suspension should be criminalised will, in this and in other respects, depend on a trade-off between consideration for the autonomy of individual citizens and the interest of the State in countering dangerous behaviour.

Criminal liability for self-induced unsoundness of mind on such basis will strike at the core of private autonomy – citizens' control over their own health and welfare. For a person with mental disorders, such criminalisation will amount to an order, backed up by penal sanctions, to subject him- or herself to the treatment and medication prescribed by physicians. From the perspective of the patient, a desire not to use medicines may in many cases be understandable; cf. 9.5.3.2.3 for further details.

The Committee believes that it is, generally speaking, legitimate to impose criminal liability on those who fail to take for example antipsychotic medicines. If a person provokes aberrations that represent a danger to key legal interests like life and health, society should be able to use punishment to avert or curtail such danger.

Such an intervention may, in terms of proportionality, reflect the risk posed to society. It may here be added that situations that could give rise to criminal liability are not a rare occurrence. Patients failing to adhere to treatment programmes, including absconding from institutions, is a frequently experienced feature of the mental health care service.

This position is in conformity with values already embedded in current law. It does, for example, follow from the mental health care legislation that society has a duty and right to look after individuals who, on a medical basis, represent a danger to themselves or others, as reflected in, inter alia, rules on the use of compulsive measures in psychiatry. It is true that the use of penal sanctions against failure to take medication is quite a different means of safeguarding such interests, but one of the underlying objectives – to protect society against risk – is the same. Besides, ordering patients to take medication may reduce the need to use compulsive measures.

It is important to ensure that persons with an underlying mental disorder and a lack of insight into such disorder, who are therefore unable to understand the importance of taking medication, are not held criminally liable for failing to take medication. This will be achieved by making such liability conditional upon the aberration being «self-induced»; cf. 9.5.4.4 for further details.

It is also important to ensure that patients are not held criminally liable for suspension of medicine use when the objective of such suspension is medically justified. This will be achieved by making such liability conditional upon inducement of the aberration being «illegal»; cf. 9.5.4.5.

9.5.3.4.4 Other behaviours

Other behaviours than the use of intoxicants and the suspension of medicine use may cause mental aberrations. Extreme physical strain may, as mentioned in 9.5.3.2.4, also trigger severe mental aberrations. One example is to place oneself in situations that involve extreme physical strain. Another example is that certain types of medicine have psychoses as potential side effects, for example anti-malarial medications; cf. 8.4.5.4. It will in many such cases be difficult to justify criminal liability, but not in all.

It may be different if a person with diabetes refrains from eating to trigger a hypoglycaemic reaction. A state of unsound mind triggered on such or a similar basis should not exclude criminal liability. This may also entail aberrations implying that the person in question represents a danger to key legal interests like life and health, which danger society should be able to protect itself against through the use of punishment.

9.5.3.4.5 Complex links

Links between behaviour, severe mental aberrations and crime are reflected in various risk factors. It is generally known what these risk factors are. It is therefore of lesser importance, as far as the issue of criminalisation is concerned, that such links involve interacting causes.

A different matter is that it may be of relevance whether a number of causes have interacted when deciding whether to impose criminal liability in a specific case. It may under the circumstances be reasonable to exclude behaviour that only entails a very limited risk of severe mental aberrations. It may be difficult to determine, in view of the available evidence, the specific cause of an aberration; cf. 9.5.3.2.5 for further details.

9.5.3.4.6 Current law in view of the assessment of the Committee

The Committee deems it appropriate to criminalise behaviour that may cause severe mental aberrations, which may then entail a risk of potentially dangerous offences. The Committee believes that other reactions and sanctions are not appropriate or obviously insufficient for purposes of responding to such risk. The benefits from using punishment against such behaviour must be assumed to clearly outweigh the negative effects.

The assessment of the Committee, as outlined in the above discussion, suggests a generally formulated liability for «self-induced unsoundness of mind». The regime under current law will in the following be considered from this perspective.

The current regime, as codified in Section 45 of the Penal Code and interpreted in case law, is, in simplified terms, that automatism and psychoses caused by self-induced intoxication do not exclude criminal liability even if the action is committed in a state of unsound mind; cf. 9.2. The Committee is of the view that this rule results in criminal liability being both too narrow and too broad in scope at the same time.

Liability is *too narrow* in scope because the exception from the punishment exemption is limited to aberrations caused by self-induced intoxication. The Committee is of the view that criminal liability for «self-induced unsoundness of mind» must be justified by the risk associated with such aberrations. In determining whether criminal liability is appropriate it is principally of interest whether the aberration is self-induced, and not what is its underlying cause.

Although the use of intoxicants is probably the most widespread, the justifications for punishment suggest that other types of behaviour would also merit criminal liability. One example is a person refraining from taking antipsychotic medicines in the knowledge that the outcome may be violent outbreaks of psychosis, and such outbreaks materialise and result in violence. Such behaviour falls outside the scope of the current Section 45.

A possible explanation for the formulation in Section 45 of the Penal Code not having been given a general formulation, and instead applying to self-induced intoxication only, is that the lawmaker may have envisaged that only the use of intoxicants could cause such aberrations. Liability for refraining from taking antipsychotics was, for example, not relevant. Such medicines were not entered into use until the 1950s.

Also in one other respect is liability under current law too narrow in scope. Current law may be interpreted as meaning that a punishment exemption may result if a person with an underlying psychotic disorder or susceptibility to psychosis induces a «psychotic» state through the use of intoxicants; cf. 9.2.3. The decisive factor in such a situation must be whether the perpetrator can be blamed for having induced the state of psychosis through intoxication, irrespective of whether or not such state of psychosis can be linked to an underlying psychotic disorder.

Current liability is also *too broad* in scope. Current law allows for persons who were of unsound mind at the time of committing the act, and therefore cannot be blamed for their conduct, to nonetheless be held fully liable under criminal law. This is most clearly reflected in criminal liability attaching to any offence committed in a state of severely impaired consciousness caused by self-induced alcohol consumption, provided that one is aware of or ought to be aware of the fact that one exposed oneself to intoxication through such alcohol consumption. Consequently, how one has reacted to the said intoxication is without relevance to criminal liability, even if such reaction has been pathological and completely unexpected for the person in question.

Such criminal liability is not compatible with the justifications for punishment, irrespective of whether the retribution or the deterrence justifications are invoked. One cannot normally blame a person who has consumed a few glasses of red wine on a social dining occasion or a few pints of beer at a Christmas party. To impose punishment on such a person for a serious crime committed in a state of unsound mind caused by a, for him or her, completely alien and unknown reaction to a moderate and acceptable level of alcohol consumption is unreasonable. Such a person will have ended up in a highly unfortunate situation even without punishment, which situation is likely to mark him or her for life. Nor can deterrence considerations justify society imposing liability for acts that he or she cannot be blamed for.

In order to prevent criminal liability from being too broad and imprecise in scope, the decisive factor should be whether the actual state of unsound mind is self-induced, and not whether the intoxication is self-induced.

It may here be added that a desire to curtail high-risk behaviour would also appear to be the decisive consideration behind current law's exception from the punishment exemption in relation to unsoundness of mind resulting from self-induced intoxication. The reasons given for rejecting certain proposals that would liberalise the strict intoxication provision in Section 45 of the Penal Code are particularly illuminating:[535]

> «It may be perceived as offensive and in conflict with the general conception of justice to allow for a punishment exemption in cases of self-induced intoxication. General deterrence and individual deterrence considerations also suggest that such a punishment exemption rule would be inadvisable.
> Above all, it may in the view of the Ministry send undesirable signals if the Penal Code is no longer going to highlight the risk associated with intoxication and that impaired consciousness as the result of self-induced intoxication does not exempt from punishment.»[536]

[535] The idea was to grant the courts a discretionary power to acquit the perpetrator when merited by extraordinary circumstances. The proposals and their rationale are outlined in Official Norwegian Report NOU 1974: 17, p. 149 and pp. 66–68, Official Norwegian Report NOU 1983: 57, p. 164, Official Norwegian Report NOU 1990: 5, p. 9 and p. 60, and Official Norwegian Report NOU 2002: 4, p. 230 and p. 476.

[536] Proposition No. 87 (1993–94) to the Odelsting, p. 38, reiterated in Proposition No. 90 (2003–2004) to the Odelsting, p. 221.

It has in previous revision processes advocating a continuation of current law and its lack of basis in the fundamental justifications for imposing punishment, been argued that Section 45 of the Penal Code in its current form has not resulted in unreasonable outcomes in practice; cf. 9.3.

Apart from the consideration that the above conclusion may be open to discussion, such a pragmatic attitude to the use of punishment is unlikely to be a satisfactory ideal, unless prevailing law is deemed to be necessary, and its objective cannot otherwise be realised to a sufficient extent. The position of the Committee is, as will be evident from the following discussion, that the idea behind the current rule in Section 45 of the Penal Code can be realised in a different way that is better targeted in terms of serving its purpose, and that is more consistent and defensible in terms of the justifications for punishment.

9.5.4 The recommendation of the Committee as to the specific conditions for liability for self-induced unsoundness of mind

9.5.4.1 Theme and structure

The Committee is of the view that it is appropriate to criminalise behaviour that may induce severe mental aberrations involving a risk of criminal offence. The topic addressed in the following is how best to formulate a statutory provision targeting such behaviour.

One overarching objective for all formulation of rules is that these must, to the extent possible, serve to realise the values and purposes that motivate such rules. Two general considerations need to be taken into account. In the area of criminal law one needs to be especially conscious of what behaviour should be subjected to punishment and what formulation of the rules will most precisely define such behaviour. The other consideration relates to the matter of evidence, and concerns what formulation of the rules best ensures that the behaviour one wants to target can also be proved in practice.

The following discussion will first address four conditions that must, in the view of the Committee, be met before anyone can be held criminally liable for self-induced states of unsound mind. Thereafter, in 9.5.4.6, is discussed whether the said conditions will result in objects of proof that are manageable in practice. Finally, in 9.5.4.7, the relationship between the legislative proposal of the Committee and the regime under current law is clarified.

9.5.4.2 Criterion 1 – Inducement of aberration

When it is deemed desirable to target behaviour that may cause severe mental aberrations and risk of criminal offence, one may either require that a risk of such an aberration has been induced, or that such aberration has in fact also been induced. The Committee is of the view that liability for risk inducement would involve too much uncertainty, since the links between various types of behaviour and mental states are uncertain. The basic criterion under the rule should therefore, generally speaking, require that an aberration has been induced.

One potential formulation is liability for «self-inducement of a state of severely impaired consciousness, psychosis or similar». Such a criterion means that it is sufficient to establish whether the perpetrator has caused a severe mental aberration, whilst it will be an underlying factual assumption that the aberration in question does under the circumstances entail a risk of offence.

Another potential solution is to incorporate the said factual assumption into the legislative wording by formulating the liability as a rule attaching criminal liability to behaviour that entails a risk of causing damage or injury. One may, for example, stipulate a liability for «self-

inducement of a state of severely impaired consciousness, psychosis or an equivalent aberration that by its nature entails a risk that an offence may be committed». Under this solution, the courts of law have to determine, in each individual case, whether the perpetrator has induced a severe mental aberration *and* whether such aberration was dangerous.

A rule attaching criminal liability to behaviour that entails a risk of causing damage or injury highlights the consideration that criminal liability is indeed intended to protect society against risks that may be associated with mental aberrations, and not against the mental aberrations as such. Such a formulation of the rule will also make it clear that aberrations that do not present much of a danger fall outside the scope of criminal liability.

However, an argument against the adoption of a rule attaching criminal liability to behaviour that entails a risk of causing damage or injury is that it will give rise to complex and partially unsurmountable assessment of evidence challenges in relation to persons and situations, and there will generally be uncertainty as to which risk factors are applicable in each individual case. Nor should one expect a high level of accuracy if the courts of law are called upon to perform such risk assessments. It would probably also have a litigious effect.

Besides, the courts of law will in practice have to resort to an abstract assessment of risk, thus taking a view on whether there is a general link between the induced aberration and criminal offences. This suggests that the formulation of this criterion should be limited to the former of the above two alternatives. By restricting the criterion to the inducement of a severe mental aberration, one targets the behaviour one would like to target, whilst at the same time making the rule straightforward to apply because the courts will, generally speaking, not be called upon to engage in elaborate discussions of the issue of risk.

In some contexts the courts will nonetheless be required to perform assessments of risk. It will for example in practice be necessary to distinguish between high-risk behaviour that is subject to criminal liability and behaviour that has resulted in a severe mental aberration, although the risk of such aberration was absolutely minimal at the outset. However, this will form part of the assessment as to whether the aberration was self-induced and whether the behaviour was illegal; cf. 9.5.4.4 and 9.5.4.5.

9.5.4.3 Criterion 2 – Criminal offence

9.5.4.3.1 The deliberations of the Committee

The scope of the rule will be sufficiently and adequately defined by way of a criterion requiring that an aberration has been induced. However, in order to ensure that criminal liability attaches to inducement that does in fact pose a danger, it is of decisive importance for the court to also identify which aberrations are dangerous.

This poses an evidential challenge. The assessment of risk is subject to uncertainty. In order to ensure that the courts are in fact able to identify the dangerous situations, there may be reason to supplement the basic criterion of inducing a severe mental aberration with further criteria.

An especially good indicator that a state of unsound mind has involved risk is that an offence has been committed in such state. A requirement that an offence has been committed in the state of unsound mind establishes a presumption that it was in fact associated with risk to induce the mental aberration.

Such a rule will have similarities with the German rule that imposes criminal liability on self-induced unsoundness of mind, provided that it has resulted in criminal acts; cf. 9.4.4. Under the said rule, the perpetrator is not punished directly for the offence, but for the risk inducement and its consequences. The maximum sentence is five years' imprisonment.

However, the rationale behind the Committee's position that the commitment of a criminal offence should be one of the criteria for liability is not to hold the perpetrator liable for the objective implications of his or her conduct, i.e. for the offence. The rationale is that such a criterion ensures that criminal liability only attaches to those situations in which it was in fact dangerous to induce the aberration. A rule that is only premised on a general assumption of risk associated with behaviour likely to induce a state of unsound mind does not suffice. Consequently, a criterion implying that criminal liability is limited to situations in which an offence has in fact manifested itself will provide added assurance that the situation was indeed dangerous, whilst at the same time offering the accused a further due process safeguard.

However, the inducement of aberrations that cause very dangerous situations may happen without resulting in any offence being committed, for example in connection with the ingestion of drugs. The Committee is of the view that the need to sanction such dangerous behaviour is adequately attended to by Section 162 of the Penal Code and Section 31, Sub-section 2, cf. Section 24, of the Medicinal Products Act.

Since the Committee is of the view, as mentioned, that it should be a basic criterion that an offence has been committed, it will also be appropriate to formulate such criminal liability as an exception from the general punishment exemption rule in Section 44 of the Penal Code.

One challenge of applying a criminal offence criterion in relation to persons of unsound mind it that what does «objectively» constitute an offence is in some contexts closely tied in with a criminal law requirement of intent on the part of the offender, i.e. that such intent is embedded in the definition of the offence. This pertains, inter alia, to punishable attempt, which is defined such as to require subjective culpability, inasmuch as an act needs to have been done whereby the commission of the crime «is intended to begin»; cf. Section 49 of the Penal Code.

Psychotic persons who commit crimes are generally aware of what they are doing, but their motivations are morbid. Consequently, the requirement for intent will normally not pose much of a problem. However, the mental state of the person of unsound mind may in exceptional cases exclude intent, and thus also punishable attempt. A psychotic person may, for example, be hallucinating to such an extent that he or she believes that he or she is attacking a lion with a knife when he or she is in fact attacking a human being, but without managing to inflict any injury. Since there is in such a situation no intent, there is no attempted homicide within the meaning of Section 233, cf. Section 49, of the Penal Code either, thus implying that it may be argued that no penal provision has been violated.[537]

Whether it is appropriate to classify actions taking place in a scenario like that outlined above as constituting an «offence» will to some extent depend on how the state of unsound mind has been induced. If such state is substance-induced, intent will be implied under reference to Section 40, second sentence, and Section 42, Sub-section 3, of the Penal Code. This means that the requirement under Section 49 of the Penal Code for intended commission of the crime has also been met, and hence one is faced with a criminal act. This somewhat reduces the practical relevance of the exceptional case outlined above.

If, however, the aberration is not induced by intoxication, one cannot rely on the implied intent provisions under the Penal Code. Such will, for example, be the situation in cases involving the suspension of medicine use. Such inducement of aberrations falls outside the ambit of the implied intent provisions under the Penal Code. And an act committed in such an aberrant

[537] If, on the other hand, injury is inflicted, there will objectively speaking be actual bodily harm and hence also an «offence».

state, although it is in purely technical terms not a criminal offence, will depending on the circumstances indicate that there is considerable risk associated with suspended ingestion of, for example, antipsychotics on the part of the perpetrator.

The justification for criminalising self-induced states of unsound mind suggests that criminal liability should apply in such cases as well. However, the principle of legality in Article 96 of the Constitution will represent a restriction since such dangerous acts do not fall within the scope of any of the existing descriptions of the elements that constitute a criminal offence within the meaning of the Penal Code. It may be argued that this problem requires a solution. There is dissent within the Committee in this regard.

9.5.4.3.2 The majority of the Committee members

The majority of the Committee members are of the view that the outlined and purely technical legislation problem should be dealt with by expanding the scope of the provisions on implied intent in Section 40 and Section 42 of the Penal Code. It is emphasised that the purpose of such expansion is not – as is the case with the existing provisions on implied intent – to establish any criminal liability for acts when there is no actual culpability in relation to the relevant criminal offence. The amendment is proposed solely for the reason that the structure of the Penal Code is based on the assumption that offenders in general have the ability to act intentionally. One implication of this is that the offence categories defined under the Penal Code do not capture all the dangerous situations that it would be appropriate to respond to with liability for self-induced unsoundness of mind.

Section 40, Sub-section 1, second sentence, of the Penal Code stipulates that the court shall disregard self-induced intoxication when judging whether an act was intentional. A corresponding rule should be introduced in relation to self-induced unsoundness of mind. One will otherwise not be able to convict a person of unsound mind who has committed a very dangerous act, if such act has been committed without intent as the result of a state of unsound mind that was all-encompassing and self-induced. The provision should refer to the rule on self-induced unsoundness of mind and be worded as follows (amendments in italics):

> «If the perpetrator has acted in a state of self-induced intoxication caused by alcohol or other substances, the court shall disregard the intoxication in assessing whether the act was intentional. *The same shall apply if he or she was in a state encompassed by Section 45, first sentence.*»

Section 42, Sub-section 3, of the Penal Code stipulates that ignorance resulting from self-induced intoxication shall be disregarded. This provision should also be supplemented by a rule to the effect that ignorance resulting from an illegally self-induced aberration shall be disregarded. The rule should be worded as follows (amendments in italics):

> «Ignorance resulting from self-induced intoxication shall be disregarded. In such cases the offender shall be judged as if he or she was sober. *The same shall apply if he or she was in a state encompassed by Section 45, first sentence.*»

If these provisions are adopted, the situation will be that persons who lack intent because of self-induced states of unsound mind can be held liable for the materialised risk associated therewith, also when such risk has materialised in the form of, for example, a punishable attempt.

9.5.4.3.3 Dissenting vote with dissenting opinion from the chairperson of the Committee, Rieber-Mohn

I am in agreement with the main aspects of the reasoning behind the proposed rule on self-induced unsoundness of mind. I am, furthermore, in agreement with the fundamental criticism

raised against the current Section 45 of the Penal Code, and with the conclusion that it would not be justifiable to abolish the said provision; cf. 9.5.4.6.2. Consequently, I am in a position to endorse the new rule on self-induced unsoundness of mind that is now being proposed.

However, I am in disagreement in one respect. I am unable to endorse the proposal that the implied intent regime constitutes a necessary element of this rule. Such regime has for many years had its foundation and practical application in the important provision in Section 45 of the Penal Code. It implies that it is not necessary to present evidence as to the intent of the perpetrator in the event of severely impaired consciousness as the result of self-induced intoxication. He or she shall automatically be judged like a sober person in a corresponding situation. The implication is that he or she is convicted as having intentionally committed an offence without such intent having been proved.

It goes without saying that the implied intent regime represents a sharp break with ordinary principles of criminal law and criminal procedure, inasmuch as one of the conditions for criminal liability is excluded from the requirement that necessary evidence must be presented in order to meet such condition. However, the rule has an historical explanation and is premised on considerations of deterrence and pragmatism: It will readily be the case that a perpetrator in a state of impaired consciousness lacks intent, and it will under any circumstance often be very difficult to prove that there was such intent, at the same time as many serious violent crimes are committed by severely intoxicated and confused persons. Consequently, the purpose of the concept of implied intent has been to ensure the effective administration of criminal justice.

However, the implied intent regime should be no broader in scope than is strictly necessary, precisely for the reason that it is contrary to key legal principles. I am unable to see that the reasoning invoked in support of introducing such regime into the new rule on self-induced unsoundness of mind is sufficient to demonstrate that there is a real need for doing so.

I would firstly like to note that the proposal for a rule on self-induced unsoundness of mind is not the result of any pressing need having arisen in the judicial system. It is rather the result of theoretical and fundamental considerations on the part of the Committee, and has its background in a desire for more consistent rules. Consequently, we do not know what actual application the rule will have, and how it may turn out to work in practice. Already for this reason should one be cautious about assuming that there is a need for implying intent.

The typical scenario that would appear to be the most «tailored» to the rule on criminal liability for self-induced unsoundness of mind, is suspended use of antipsychotic medicines. However, other inducements of a psychotic breakthrough can probably also be envisaged, although it may be harder to perceive these as being «self-induced» (I am here disregarding the brief psychotic fits triggered by intoxicants, which shall still be governed by Section 45 of the Penal Code). I will generally note in this regard that psychotic persons who commit crimes will normally have acted with the necessary intent. The psychotic person knows that he or she kills his or her parents, although his or her motive is confused; he or she may for example want to «help them into eternity». If it were to happen, as a matter of exception, that the induced psychosis produces hallucinations so powerful as to make the person of unsound mind believe that he or she is being attacked by a monster, whilst he or she is in fact killing an innocent person, it may already at the outset be problematic to argue that the unsoundness of mind is «self-induced», unless he or she has previously reacted in a similar manner. But we are then entering the realm of remote improbabilities.

In addition, there is a specific factor in relation to what is considered the typical scenario, i.e. suspended use of antipsychotics, which further restricts the scope of the rule. If a patient has for an extended period of time held the psychotic symptoms in check by taking medicines,

and suddenly stops taking these, it is quite conceivable that this is an early indicator of a psychotic breakthrough. This is also confirmed by psychiatric experts. But if such is the case, the person is already of unsound mind and we are outside the scope of the rule: There exists no person of sound who has «self-induced» a state of unsound mind.

The state of unsound mind that will most readily imply that there is no intent is severely impaired consciousness or automatism. Apart from the intoxication cases, which shall continue to be governed by Section 45, it is difficult to envisage that self-induced states of impaired consciousness will occur with any frequency, let alone result in serious crime. The typical cases mentioned are failure to take important medicines, which for epileptics and diabetics may cause bouts of impaired consciousness. For the first-mentioned group there exist no known cases that would be relevant under the new rule. For diabetics we have at least one example of a road traffic offence, cf. the case from the Gulating Court of Appeal; cf. 9.5.4.4. If road traffic offences are the most relevant scenarios, which may quite conceivably be the case, negligence will as a rule be sufficient to secure a conviction. Intent will not be required, and would also be of little relevance in such cases. And if a diabetic, or an epileptic, negligently induces (self-induces) a state of impaired consciousness and also heads into traffic, he or she may also, depending on the circumstances, be convicted of the offences committed there by him or her; cf. the said judgment. This would be altogether obvious if it was a matter of repeated offences with the same background.

It will generally be the case that persons who have self-induced a state of unsound mind can be convicted for criminal acts committed in such state if such acts are criminal in their negligent form, at least if the person in question has thus reacted and acted previously.

Finally, I will briefly comment on the situation that would appear to concern the majority. Such situation reportedly arises when intent is one of the elements in the description of what constitutes the criminal offence. The majority mentions the example of a psychotic person who attempts, in a hallucinatory state, to kill a person in the belief that he or she is a monster. The majority also writes that «the offence categories defined under the Penal Code do not capture all the dangerous situations that it would be appropriate to respond to with liability for self-induced unsoundness of mind.» However, I find it difficult to conclude that any real and practical needs suggests that intent should be implied in order to impose criminal liability for attempted homicide on the perpetrator in the said example under the rule on self-induced unsoundness of mind. Apart from the example seeming somewhat contrived, it should under any circumstance be feasible to attend to societal protection considerations by invoking the Mental Health Care Act in such a case; cf. Section 3-3 of the said Act. In addition, there is the fact that if the perpetrator has injured the intended victim in attempting to kill him or her, which will of course often be the case when the perpetrator is waving a knife around and attempting to stab a person, there will in any event be actual bodily harm, and hence objectively speaking an «offence». Already the fact of possessing a knife and using it will, depending on the circumstances, constitute an «offence». This means that the matter of imposing the special sanction transfer to compulsory mental health care will in any event arise. But such may also be the case in the «pure» situation envisaged by the majority as a true attempted homicide, when disregarding the subjective circumstances on the part of the perpetrator; cf. my dissenting vote and dissenting opinion in 24.2.5.2.3 below.

9.5.4.4 Criterion 3 – Self-inducement

Criminal liability presupposes that the perpetrator was somehow to blame for the occurrence of the severe mental aberration. It is a general principle of criminal law that whoever puts him- or herself in a situation that implies a loss of control of his or her own actions or choices

of action, must also be held responsible for any consequences of such loss of control – *actiones liberae in causa*.[538]

This suggests that one criterion should be that the aberration was «self-induced».

The specific meaning of this criterion will determine how effective such criminal liability is. The lower threshold for criminal culpability is negligence. To be negligent is to act incautiously or imprudently. Traditionally, a distinction has been made between minor negligence (culpa levissima), ordinary or simple negligence (culpa levis) and gross negligence (culpa lata). By this is meant – in plain terms – that the offender could, should and must have foreseen, respectively, the consequences of his or her behaviour.

The negligence assessment is objective at its core, but not to a greater extent than potentially allowing for subjective excuses based on the perpetrator's own capabilities, such as for example intellectual disability, mental disorder, etc. If one enters areas of life that require special insight or knowledge, it may under the circumstances be appropriate to blame the perpetrator for precisely a lack of such insight or knowledge.

The Committee is of the view that liability should be imposed when the perpetrator *ought to have understood* that the action would result in a state of unsound mind. However, the assessment of such behaviour must be specific. It will therefore, fundamentally speaking, be one standard of due care associated with each of the behavioural categories discussed in 9.5.3.2. The standard of due care will in the following be described with reference to each of these behavioural categories.

The negligence assessment must start out from the premise that citizens are expected to be aware of potential effects of the behavioural categories discussed above, such as for example the ingestion of intoxicants or the suspension of medicine use. This is a reasonable expectation, since these are to a large extent generally known, and detailed information on such effects is available in the public domain, including on the Internet and in the present Official Norwegian Report. A psychiatric patient who is undergoing treatment with antipsychotic medications will in any case be informed of the effects of refraining from taking such medications.

To act contrary to such knowledge is blameworthy, and altogether extraordinary circumstances would be required to conclude that the perpetrator could not be expected to understand that such behaviour could induce the aberration. Consequently, the main rule is that such aberration is only non-self-induced if he or she is forced or tricked into behaving in such a manner.

Borderline issues will nonetheless arise as the result of the general uncertainty associated with which types of behaviour may cause mental aberrations. One may, especially when causalities are complex, be faced with objective degrees of risk which are not generally known, and which the perpetrator could not be expected to be aware of either. The situation may be particularly challenging if intoxication-induced, brain organic and affect-induced aberrations are interacting with each other.

The negligence assessment is, as mentioned, not more objective than to allow for the person to be considered on the basis of his or her own capabilities. The ability of the person in question to understand the consequences of his or her actions needs to be taken into consideration. The question in performing the negligence assessment is whether the person has done his or her best, based on his or her capabilities.

[538] Andenæs (2005), pp. 294–295.

This aspect of the negligence assessment is of considerable importance in determining whether an aberration should be classified as «self-induced». The issue of responsibility is of special relevance for persons who were also mentally aberrant at the time of causing the state of unsound mind. If the mental aberration implies that he or she lacked insight into the consequences of his or her own actions, this will readily be accepted as an excuse, thus implying that the aberration is not classified as «self-induced».

One example is a state of unsound mind induced by a person who lacks the ability to understand that, for example, the ingestion of intoxicants or the suspension of medicine use may cause psychosis. Such situations must be expected to be of practical relevance, since a prominent symptom of a number of psychotic disorders is precisely lacking or inadequate insight into the disorder, including a lack of insight into one's own need for medication. But it here needs to be taken into consideration that the actual suspension of medicine use may be the result of impending psychosis, and that he or she may already be of unsound mind.

The decisive consideration must be what the perpetrator ought to have anticipated as a potential reaction to his or her actions, in view of his or her knowledge and the specific circumstances. Of key importance to this aspect of the negligence assessment is the relevant person's awareness of his or her own weaknesses and susceptibilities.

When the Special Sanctions Committee proposed a rule on discretionary punishment exemption, outlined in 9.3.2, it was also discussed whether the fact that the aberration could be blamed on the accused ought to be accorded weight in applying the rule. The Committee concluded that it would, depending on the circumstances, be appropriate to hold the offender liable, especially if he or she was aware of his or her tendency to react aberrantly, and despite such awareness sought out situations that might trigger the aberrant pattern of behaviour.[539]

A person who, for example, tends to react pathologically to alcohol intoxication is more to blame than a person without such experience. The aberration should therefore be considered self-induced if the perpetrator is aware of his or her susceptibility, based on for example long-standing experience with pathological reactions. And such would be the case in this situation even if the quantity of alcohol consumed is very small. A person who knows that his or her psychosis will flare up when medicine use is suspended will, for the same reason, be more to blame than a person without such knowledge, subject, however, to the reservation that he or she may, as mentioned, already be in a psychotic phase. It must also be appropriate to hold an epileptic who refrains from taking his or her medicines liable for the occurrence of a state of impaired consciousness, in the same way as with a diabetic who fails to take his or her insulin.

A ruling of some relevance here is a judgment of 29 October 2013 from the Gulating Court of Appeal. The case concerned a driver with diabetes who had a head-on collision with an oncoming vehicle. The court concluded that it was grossly negligent of the driver not to monitor his blood sugar level by measuring it, and instead relying on being able to stave off hypoglycaemia through food intake and refraining from taking insulin. In this case the matter of criminal liability was resolved on the basis of the penal provisions' description of the elements that constitute the relevant criminal offences, formulated as a question of whether the perpetrator could be blamed for having entered the state of hypoglycaemia whilst driving and, in relation to Section 239 of the Penal Code, whether such negligence also extended to the resulting death. It should be emphasised that the rule proposed by the Committee will avoid such extensive interpretation of the description of the elements that constitute the criminal offence under each penal provision, since liability does instead attach to inducing the state of unsound mind.

[539] See Official Norwegian Report NOU 1990: 5, pp. 61–62.

A specific question is how one should assess those who have over time engaged in behaviour that entails a risk of causing an aberration, but without that ever having occurred. One example is a person who for years has used a certain intoxicant for relaxation and pleasure, but on one single occasion experiences hallucinations and commits an offence. Of decisive importance to the negligence assessment in such a situation must be the general risk associated with such behaviour. The links between behaviour, serious mental disorder and crime are characterised precisely by not being absolute, and it would in any event not be reasonable to reward the person who for a long time has been taking such a risk with a punishment exemption when things finally take a turn for the worse and the said risk materialises in the form of a criminal offence and the damage or injury associated therewith.

The situation may conceivably be different for some alcoholics and drug addicts, since severe addiction to the relevant substances limits the actual prospects for keeping away from intoxication. However, this is an issue best dealt with, thematically speaking, in reference to the illegality criterion also proposed by the Committee; cf. 9.5.4.5.

9.5.4.5 Delimitation of criminal liability: Illegality criterion

Considerations relating to societal protection, citizens' private self-realisation and certain other interests may suggest that one should not in all contexts be held liable for offences committed in self-induced states of unsound mind.

Liability based on the criteria reviewed thus far may be too broad in scope. However, this may be countered by a narrowing criterion in the form of an illegality criterion. Such an illegality criterion should exclude situations involving the very lowest degrees of risk, although it will in such cases rarely be relevant to consider a state of unsound mind as being «self-induced». Moreover, it should exclude situations in which it is generally accepted or desirable that citizens run a risk of inducing severe mental aberrations.

Of decisive importance in determining what degree of risk can be accepted should be the legal interests at risk. The stakes are potentially high, as perpetrators with severe mental aberrations are, inter alia, overrepresented in relation to acts of violence and homicide. Consequently, the illegality criterion should be reserved for the lower degrees of risk.

Consequently, the threshold as to what degree of risk can be accepted must generally speaking be considered as fixed. The empirical materials available in relation to the causal chain of behaviour–mental aberration–crime does not enable any differentiation to take place in terms of the degree of risk based on which legal interests are at stake.

Criminal liability should clearly be excluded in situations where there is no moral basis for punishment. A person with malaria infection must, for example, be permitted to use the antimalarial medication mefloquine, even though one of its side effects is that it may trigger states of psychosis.

An example of more practical relevance concerns the suspension of medicine use with a view to determining the appropriate dose of antipsychotics. It will often be challenging and time consuming to establish the ideal balance between the therapeutic effects and the side effects of medications. Consequently, patients and their physicians must be allowed considerable leeway in seeking to identify the appropriate dose. It would be clearly unreasonable to let the patient run a risk of incurring criminal liability if it turned out that he or she became psychotic during, or as the result of, self-induced suspension of medicine use as part of a course of medical treatment, even if the patient may have been well aware that there was a significant risk that this would happen.

Another practical example is that withdrawal reactions as the result of discontinued alcohol consumption or drug use may cause mental aberrations. This is well known amongst therapists and those suffering from alcoholism and drug addiction. Since it is a societal objective to wean alcoholics and drug addicts off the abuse of intoxicating substances, one obviously cannot at the same time confront this group with punishment for potential consequences of self-induced abstention from intoxication.

The risks that may arise as the result of states of unsound mind triggered by alcohol and drug detoxification should be handled by society through other means. A specific issue in relation to the use of intoxicants is how to deal with severe mental aberrations induced by persons who are addicted to drugs. The issue arises because the inducing behaviour, which in itself would best be characterised as self-inducing, will in many cases be the result of a strong, almost insurmountable, compulsion to ingest the drug. Addiction is often associated with opiates, which typically will not result in mental aberrations, but central nervous system stimulants like cocaine and amphetamine may also be addictive.

This is, at the level of principles and fundamentals, a difficult issue, since both physical and mental addiction may have an all-encompassing impact on the person concerned. It is hard to envisage that punishment for actions committed in a self-induced state of unsound mind would curtail the behaviour of this group that is likely to induce a state of unsound mind, i.e. the intense drug use.

It is, at the same time, evident that addiction to intoxicants should not be admissible as grounds for acquittal in relation to offences committed in a state of unsound mind. It would emit an unfortunate signal, whilst also presenting the courts with a virtually intractable object of proof. These two considerations must be accorded decisive weight in relation to the matter of guilt or innocence, thus implying that addiction is disregarded, as under current legislation. However, the addiction should be taken into consideration, but then as a mitigating circumstance during sentencing; cf. 9.5.5.

It may be argued that there is reason to differentiate the accepted degree of risk based on the moral acceptability of the behaviour. It may for example be argued that it is more blameworthy to ingest narcotic drugs that entail a risk of mental aberrations, than to refrain from taking medications with the same risk. It may also be argued that it is unreasonable for a person who suffers a schizophrenia disorder and who refrains from taking medicine because the side effects are unendurable, to be held liable on the same basis as a person who takes the hallucinogenic drug LSD to have some fun at a party.

However, such reasoning should not be taken too far. The idea behind criminal liability for self-induced unsoundness of mind is that society shall be protected against unnecessary risk. Such moral considerations should therefore, generally speaking, be accorded little weight in determining the matter of criminal liability, but instead be taken into account during sentencing; cf. 9.5.5.

However, a special challenge is posed by the social and cultural role played by alcohol use in society. This suggests a higher acceptance of risk than in relation to other substances. One should not run the risk of being held criminally liable for drinking alcohol within generally accepted limits.

There will, at the same time, be a limit to what risk society can accept with regard to alcohol as well. It is reasonable to start out from the alcohol habits of Norwegians for purposes of determining the scope of criminal liability. Alcohol consumption levels in this country are not modest. In 2012, every Norwegian over the age of 15 years purchased an average of 6.2 litres

of pure alcohol.[540] Almost half of this was in the form of beer. Unregistered consumption from cross-border trading, smuggling and home brewing is additional to this. However, there are no published statistics or official estimates as to what constitutes normal consumption in various social situations like dinner parties, Christmas parties or a «night on the town».

There is also a dearth of statistics showing how much alcohol will normally have been consumed before the onset of severely impaired consciousness. However, it follows from a study of all forensic medicine opinions relating to automatism within the meaning of criminal law over the period 1981–2000 that the level of blood alcohol concentration was high in the cases in which alcohol was the intoxicating agent.[541] The Committee's review of case law also shows that the quantities involved are often large when the issues of automatism and seriously impaired consciousness have arisen, apart from in cases of pathological intoxication.

It is emphasised that the liability proposed in no way implies any prohibition against the consumption of large quantities of alcohol, although one will be held liable for crimes committed in a state of unsound mind that was self-induced through intoxication, as is also the case under current law. Because of general knowledge about alcohol consumption and individual knowledge of own consumption, it will in practice amount to the same whether such liability is considered a matter of the state of unsound mind being «self-induced» or a matter of the inducing behaviour being illegal.

The Committee believes, as mentioned, that the decisive factor in establishing liability is whether the quantity of alcohol consumed exceeds what is generally accepted. It is not feasible to specify the exact number of alcohol units one should be able to consume without running any risk of criminal liability for actions committed in a subsequent state of unsound mind. The specific contents of such limit will need to be determined on the basis of an overall assessment of each individual case, and to be further clarified in case law. This is an appropriate approach. Reactions to alcohol are individually specific and depend on a number of variables, such as for example body volume, gender and whether consumption takes place on an empty stomach or during a meal. The risk associated with consumption will be higher for persons with previous experience of mental aberrations in the wake of alcohol consumption. What amount of experience should be required, as well as the nature of such experience, will have to be specifically examined.

9.5.4.6 Evidential matters

9.5.4.6.1 General remarks

In the following will be clarified certain evidential matters that will be relevant under the proposed criteria. The purpose is to show that it will be feasible to apply the criteria effectively in practice. It is also specified what role the forensic medicine experts should have.

The evidential matters of particular interest relate to the basic criteria that a severe mental aberration has been induced, and that such inducement can be attributed to the perpetrator him- or herself (self-inducement).

The basic criterion that an *aberration has been induced* is unlikely to present evidential challenges in general. It will in many situations be evident what caused the aberration, for example that the perpetrator has used psychosis-inducing narcotic drugs, refrained from taking antipsychotics that have worked well for a long time, ingested anabolic steroids or drunk large quantities of alcohol.

[540] Intoxicants in Norway 2013, p. 79.

[541] Hartvig et al. (2003), p. 1833.

The difficulties in practising the criterion arise when there are competing causal explanations – the causal background may be complex and impenetrable. It may typically be difficult to establish whether the mental aberration is caused by one of the abovementioned factors, or whether the aberration would under any circumstance have occurred as the result of an underlying susceptibility for such aberrations. Illustratively, studies show that clinical practice finds it difficult to determine whether psychoses are caused by intoxicants or triggered by underlying psychotic disorder.[542]

Such challenges have also been confronted in existing case law. The ruling published on p. 549 onwards of the 2008 volume of the Norsk Retstidende court reporter for the Supreme Court addressed whether a state of psychosis was exclusively substance-induced or had to be understood as the result of an underlying psychotic disorder; cf. 9.2.3. It was concluded in the ruling that the duration of the psychosis is the most reliable indicator for clarifying this, and it was indicated that a presumption can be made that psychoses lasting no longer than one month are substance-induced.[543]

The viability of such a presumption is probably debatable. The duration of psychosis is also a difficult piece of evidence to rely on for other reasons, not least because it will typically be eliminated when antipsychotics are administered to the perpetrator. It will in many cases be desirable precisely to intervene in the natural development of the psychosis through medication, out of humanitarian considerations, treatment considerations or investigational considerations. It will therefore be of decisive importance to have secured the best possible documentation of potential causal links during the investigation, in the form of, inter alia, blood, urine or hair samples from the period close to the criminal offence.

However, the evidential challenges should not be exaggerated. If, for example, the use of intoxicants and a state of psychosis are closely related in time, there is strong presumption that such state is induced by the use of intoxicants. In order for such presumption to be deviated from, one must in practice require clear indications that the opposite was the case. Such must also be the case in situations with a more complex causal background, since available knowledge shows that the link between behaviour and aberrations is reinforced when additional risk factors are taken into consideration; cf. 9.5.3.2.5. There is, in other words, special cause for reproaching a person for using alcohol when there is already an elevated risk of a psychotic episode for other reasons, for example the suspension of medicine use.

The objects of proof occasioned by the criterion that an aberration shall have been induced make it appropriate for the court to use medical experts to clarify the prior state of health of the perpetrator, the general links between various behaviours and severe mental aberrations, the duration of aberrations, etc. However, the court must itself make the normative assessments relating to whether it is appropriate to conclude with criminal liability.

The criterion that an *offence* has been committed in the aberrant state is motivated by evidential considerations – the criterion serves to guarantee that the inducement of the aberration was in fact dangerous.

The criterion that the aberration was *self-induced* does not present any major evidential difficulties. This generally calls for an objective assessment – what the ordinarily diligent person in a corresponding situation ought to have understood. Hence, it is not necessary to establish

[542] Mordal et al. (2013), pp. 415–419.

[543] See also the ruling published on p. 92 onwards of the 2014 volume of the Norsk Retstidende court reporter for the Supreme Court.

what the perpetrator actually did understand, although this may, depending on the circumstances, be of some relevance to sentencing.

The perpetrator's own understanding may be of decisive importance for the matter of criminal liability. One example is that it will be an excuse if he or she lacked the ability to realise the consequences of his or her actions. Conversely, awareness of own weaknesses and susceptibilities will be of relevance to the negligence assessment. However, such issues are not specific to this particular legal field, and will need to be dealt with here as in other aspects of criminal law.

9.5.4.6.2 Self-induced intoxication

The topic addressed in the following is whether the rule outlined thus far should define the full scope of criminal liability for self-induced unsoundness of mind. There is reason to discuss this separately, in view of the strong past and present position of the exclusion provision in Section 45 of the Penal Code in Norway. The rule is essentially premised on evidential considerations. In order to ensure that a person who had drunk him- or herself into a stupor («a state of automatism») would not be considered of unsound mind within the meaning of Section 44, it was for reasons of effectiveness necessary to introduce a separate rule on self-induced intoxication. One would otherwise only be able to punish those who have deliberately induced a state of automatism with the intent of committing a criminal act; cf. 9.3.1. Apart from the fact that such will rarely be the case, it would be practically impossible to prove.

The Committee believes, as a general perspective, that the criteria outlined above should suffice for purposes of specifying who should be held liable for self-induced states of unsound mind. This also applies to states of unsound mind triggered by the use of alcohol or other intoxicants.

There is, at the same time, some uncertainty as to which evidential situations will arise under the rule. One object of proof that will presumably arise with some frequency under the proposal is whether the level of alcohol consumption was below or above the threshold for criminal liability. This may include the issues of whether the alcohol had actually been absorbed in the body or whether the alcohol had been metabolised, thus bringing the perpetrator back beneath the liability threshold.

Such issues can be handled by the courts, or by the prosecuting authority when determining whether an indictment is appropriate. It will often be known how much alcohol was consumed, and if this cannot be established with any precision, one will know whether it was much or little. Besides, there will in the cases where the issue arises often having been obtained blood samples, breath samples or other evidence that can shed light on the level of blood alcohol concentration and the degree of intoxication. Corresponding assessments are to a large extent made under current law in determining whether the offender understood or ought to have understood that the ingestion would result in a loss of complete control of him- or herself; cf. 9.2.4.

The Committee is nonetheless of the view that it is, all in all, somewhat uncertain what will be the effects of the rule on self-induced unsoundness of mind. It would be unfortunate if evidential matters were to result in the rule not being effective in the intoxication cases. The Committee therefore recommends that the current rule remain in place as a supplement to the recommended general rule on self-induced unsoundness of mind. This will enable the courts of law to try out the new rule in practice, without risking unwarranted expansion of the scope of punishment exemption as the result of challenging evidential issues.

However, the rule in the current Section 45 should, in order to avoid unreasonable outcomes, be applied with the «illegality criterion» described in 9.5.4.5. This is hardly incompatible with

the legislative wording, which stipulates that self-induced intoxication shall not «exclude» punishment. Although punishment is not excluded, the wording does not force the courts to impose punishment in all cases.

However, the Committee would encourage the application of the proposed rule in solving these issues as well, as its rationale and formulation are more satisfactory at the level of principles, predominantly because it is not sufficient for the intoxication to be self-induced, since it is also a requirement that the unsoundness of mind – the severely impaired consciousness – can be blamed on the offender. Furthermore, it is recommended that statistics be collected on the application of the new provision, with the lawmaker evaluating this rule after a few years prior to the potential abolition of the current Section 45 of the Penal Code.

The chairperson of the Committee, Rieber-Mohn adds the following observation:

If the above recommendations of the Committee are adhered to, and Section 45 ceases to be used or is abolished, and all self-induced unsoundness of mind is dealt with pursuant to the provision proposed by the Committee, the rules on implied intent in cases of self-induced intoxication; cf. Section 40, Sub-section 1, second sentence, and Section 42, Sub-section 3, of the Penal Code, will remain in place. I refer to my dissenting opinion in 9.5.4.3.3 above, and note that the scope of implied intent should not be expanded to encompass other cases of self-induced unsoundness of mind. There is no real need for doing so. There is, however, such a real need when self-induced intoxication results in severely impaired consciousness («automatism»), which will typically exclude intent, or at least give rise to significant evidential difficulties.

9.5.4.6.3 Formulation of the rule

The Committee proposes that criminal liability for self-induced unsoundness of mind be formulated as an exception from the rule on punishment exemption for non-self-induced unsoundness of mind. Such liability shall apply to self-inducement of a state of automatism, psychosis or similar, provided that an offence has been committed when in such state.

The issue addressed here is the specific formulation of such rule. One option is to stipulate a general criminal liability for self-induced states of unsound mind, subject to a punishment exemption in special cases. Another option is to formulate the provision on the basis that punishment exemption is the main rule in these cases as well, whilst allowing scope for imposing criminal liability.

Section 45 of the Penal Code is structured, in its current formulation, as an exception from the main rule in Section 44 that a person who was in a state of automatism at the time of committing the act shall not be criminally liable. Danish law has opted for the opposite solution. It operates with punishment exemption as the main rule also when the aberration is self-induced, although punishment may nonetheless be imposed if merited by special circumstances; cf. 9.4.1.

Although the substance of the rule might be more or less the same irrespective of which of these options is chosen, it is not insignificant how the rule is communicated externally. The Committee believes that it is of key importance to clearly and unequivocally signal that some types of risk behaviour are not accepted and «may be punished». Consequently, the rule stipulates criminal responsibility for self-induced unsoundness of mind as the main rule.

The next question is whether the illegality criterion should be included in the legislative wording or whether it should be non-statutory. An explicit illegality criterion is somewhat awkward in a rule on discretionary criminal liability, although it may in principle be of relevance

under such a rule as well. Irrespective of the approach adopted, the purpose will be to communicate that the legislative wording, with its specified criteria, does not apply to all actions encompassed by such wording.

The Ministry concluded, during the drafting of the Penal Code of 2005, that the disadvantages of codifying a general illegality criterion outweigh the advantages. One consideration that was highlighted was that it might be misinterpreted as allowing general scope for granting exemptions from punishment on the basis of a specific reasonableness assessment in each individual case. The Ministry was of the view that the principle of narrow interpretation is not suitable for general codification, and that it is difficult to find a wording that would make such a provision sufficiently precise and informative.[544]

The Committee is of the view that the provision should be formulated as a discretionary rule on the imposition of punishment. It is the intention of the Committee that the punishment exemption shall primarily apply to those contraventions that are not deemed to be illegal, i.e. are not deemed improper on the basis of a socio-ethical assessment, and thus are not considered to belong to the type of risk inducements that are deserving of punishment. One criminal procedure implication of making such assessment part of the matter of sentencing, and not part of the matter of guilt or innocence, is that the grounds on which the ruling is based will be specified in full in all cases before the Court of Appeal, hence enabling the Supreme Court to hear all aspects of the issue on appeal and thus assume an important role in clarifying the legal status in this new and challenging legal terrain.

The Committee proposes, against this background, that Section 45 of the Penal Code be worded as follows in future (amendments in italics):

> «*Self-inducement of a state as mentioned in Section 44, Sub-section 1, may be punished. Such a state* that is a consequence of self-induced intoxication, shall not exclude punishment.»

9.5.4.7 The proposal and current law

The first sentence of the provision proposed by the Committee deviates from current law. This reflects, as also noted in 9.5.3.4, that the Committee is of the view that the current regime is not fully in harmony with the justifications for punishment. However, the proposal, if adopted, will not result in fundamental changes in practice.

The most important and fundamental difference between current law and the proposal is an *expansion* of criminal liability. Current law only stipulates criminally liability for substance-induced states of unsound mind, whilst the proposal has a general formulation stipulating such liability irrespective of how such states have been induced. The proposal implies that criminalisation is expanded relative to prevailing law, although it is uncertain how far such expansion will reach. It is likely that the new reach of criminal liability will primarily be of relevance to those who induce states of unsound mind through the suspension of medicine use.

It should, at the same time, be emphasised that such expansion will primarily apply to areas in which the offender is currently held liable on other grounds. It may under current law be relevant to hold the perpetrator criminally liable for actions committed in a state of unsound mind, principally severely impaired consciousness, because he or she should have anticipated the course of events in advance. Such will primarily be the case with criminal liability for negligent behaviour.

[544] Proposition No. 90 (2003–2004) to the Odelsting, pp. 214–215.

An example is mentioned in 8.4.6.4 of a driver with diabetes who became hypoglycaemic, had a head-on collision with an oncoming vehicle, and was convicted of negligent homicide because he could be blamed for having entered the state of hypoglycaemia whilst driving. The legislative provision proposed by the Committee will encompass a case like this by stipulating the relevant assessment criterion for criminal law purposes: Was he or she to blame for the state of unsound mind? This is also more in conformity with the principle of legality.

The proposal will, at the same time, imply a *narrowing* of criminal liability in one respect. Section 45 of the Penal Code stipulates liability if the perpetrator was in a state of automatism as the result of self-induced intoxication. This has in case law been interpreted to mean that the intoxication is self-induced if such quantities of intoxicants have been ingested as to make the perpetrator lose full control over him- or herself. Sub-section 1 of the proposal deviates from this. The assessment criterion under the proposal is whether the state of unsound mind is self-induced, and not whether the intoxication is self-induced. This implies that the threshold as to how much alcohol can be consumed before criminal liability may arise is increased somewhat.

The rule proposed in the first sentence of the provision ensures that the perpetrator cannot be held criminally liable beyond what he or she can be blamed for. A key implication is that one cannot be held liable for acts committed in a state of severely impaired consciousness induced by moderate quantities of alcohol. Weighty objections can be made against holding citizens criminally liable for the consequences of «normal» alcohol consumption at a dinner party. Criminal liability should be excluded in an isolated unfortunate case, although the person has admittedly been imbibing to the point of slight intoxication, whilst it should become relevant if he or she was aware of being particularly susceptible to entering a state of unsound mind.

There is little reason to expect that such a limitation to the scope of criminal liability will reduce deterrent effects or lead to other judicial outcomes than at present. Firstly, the specified quantity lies within what is already considered normal alcohol consumption, although such consumption will result in criminal liability for offences committed in a state of unsound mind under current law. And secondly because severely impaired consciousness will ordinarily only occur after consuming large quantities of alcohol. In addition, the issue of automatism only arises in a small number of cases each year.[545] Consequently, the Committee's proposal will have little impact in this regard.

However, as will be noted from the discussion in 9.5.4.6.2, the Committee is unable to recommend that Sub-section 1 be entered into effect without the rule in Section 45 of the Penal Code being retained for the time being and practised subject to an illegality criterion. This is because there is some evidential uncertainty as to whether the proposed rule will be sufficiently effective.

9.5.5 Sentencing framework and sentencing practice

The issue addressed in the following is which sentencing limits and sentencing levels should apply in relation to those who commit offences through self-inducement of a state of unsound mind.

This must, as with the matter of guilt or innocence, be considered from the perspective of the justifications for punishment. The reasons that justify criminal liability for self-induced unsoundness of mind are therefore also of relevance to the matter of sentencing.

[545] Hartvig et al.(2003).

A key aspect of the rationale behind criminal liability for «self-induced unsoundness of mind» is the danger invoked in inducing aberrant states, and not the specific offences committed in such an aberrant state. It will in general be less deserving of punishment to induce a risk of damage or injury than to induce such damage or injury. This is also clearly reflected in current criminal legislation, through the provisions on stricter punishment in the event of unwanted, although foreseeable, consequences.

The extent to which self-inducement of a state of unsound mind is deserving of punishment will depend on the degree of risk and the value of the legal interests at risk. It is difficult to provide a more specific general description of the extent to which this is deserving of punishment. The situations are too different in terms of actual culpability and degree of risk to make this feasible. This is illustrated by some typical cases.

Where high alcohol consumption has regularly resulted in a state of seriously impaired consciousness and violent behaviour, it will be highly deserving of punishment to induce such a state. A person who more unexpectedly has a mental reaction and displays violent behaviour quite uncharacteristic of him or her will be correspondingly less deserving of punishment.

Those who retain their full freedom of action may be more deserving of punishment than those suffering the very most severe drug and alcohol addictions, for whom the compulsion towards intoxication is all-encompassing and determines the behaviour that induces the state of unsound mind.

It may also be appropriate to judge a person with diabetes who has refrained from taking his or her medicine, or refrained from eating food, well aware of the risk of uncontrollable hypoglycaemia, differently from a person who ingests anabolic steroids and knows well from experience that it can result in him or her becoming psychotic.

It has in some previous proposals on criminal liability for «self-induced unsoundness of mind» been recommended rules allowing for sentences below the minimum sentence stipulated for the criminal act in question. It has also been proposed to reduce minimum sentences.[546]

The Committee is of the view that the situations, and thus the extent to which the perpetrator is deserving of punishment, will vary so much that it seems most appropriate to indicate the desired sentencing level in the preparatory works and leave the specific clarification of this to the courts of law. This is a legislative technique that has proved to be effective in other contexts.[547]

Although this means that guidance is provided, it is important to note the key principle that it is for the courts of law to adjudicate individual cases, including to determine the «appropriate» punishment. The courts of law must therefore be allowed sufficient room for manoeuvre, thus enabling them to consider each criminal offence separately and take individual circumstances on the part of the offender into consideration. This is expected to be of particular importance in, precisely, cases relating to self-induced unsoundness of mind.

However, the courts should as mentioned not be permitted too much discretion over sentencing in cases involving «self-induced unsoundness of mind». The specific sentence must be de-

[546] Recommendation of the Penal Code Committee, 1925, pp. 90–91.

[547] See for example the ruling published on p. 1412 onwards of the 2009 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraph 10 onwards.

termined on the basis of the justifications for punishment as outlined in 9.5.2. This may, however, carry different weight depending on whether it is a matter of establishing criminal liability, or whether it is a matter of the specific sentencing.

Even if one would not, for example, wish to primarily justify criminal liability under reference to retribution considerations, such considerations may nonetheless be of relevance to sentencing. The idea behind this would be that a person who creates a risk with a sufficient degree of culpability must also accept the consequences when such risk materialises in the form of damage or injury. Such an approach is found in German law, where not only criminal liability is related to the resulting damage or injury, but also sentencing, with a separate maximum sentence; cf. 9.4.4.

The Committee is of the view that criminal liability for «self-induced unsoundness of mind» can be handled within the existing sentencing framework applicable to the offences in question, as well as the general sentencing rules. However, one should amend the contents of, and make certain editorial adjustments to, Section 56, letter d, of the Penal Code, such as to enable the punishment to be reduced below the minimum prescribed for the act or to a milder form of punishment in cases involving self-induced unsoundness of mind. Section 80 h of the Penal Code of 2005 must be amended correspondingly.

The Committee's position is that the blameworthiness of behaving in such a way as to create a risk of mental aberration must generally be considered less deserving of punishment than the actual violation of the relevant penal provision. The Committee is of the view that the maximum general sentencing level for offences committed in a «self-induced state of unsound mind» should be in the region of five years' imprisonment. This is also the solution adopted under German law; cf. 9.4.4.

Specific sentencing should be proportionate, in view of the violated penal provision and the general sentencing level within the available sentencing framework. A key factor in this regard should be what risk there is that the aberration will occur. The higher was the degree of risk, the more deserving of punishment will the behaviour normally be.

10 Evidence

10.1 Theme and structure

Rules on the standard of proof are used to address uncertainty regarding *factual circumstances*. The Committee has been requested to take a view on how strict the standard of proof for soundness of mind should be and on whether such standard should be codified. The underlying issue is how the legal system should handle the risk of reaching an erroneous conclusion on whether or not the perpetrator was of sound mind and thus acquit or convict the accused on an incorrect factual basis. The discussion is primarily focused on evidential issues in relation to psychotic and equivalent aberrations.[548]

The Committee outlines current law in 10.2. 10.2.1 discusses the assessment of evidence. 10.2.2 is focused on the general criminal standard of proof. The Committee addresses the *object of proof* – what is to be proved – and the *standard of proof* in relation to the issue of whether the perpetrator was of sound mind. Which requirements, if any, follow from the Constitution, and whether the European Convention on Human Rights (ECHR) restricts which standard of proof can be applied in relation to the issue of criminal insanity under Norwegian law are discussed in 10.2.2.3 and 10.2.2.4, respectively.

10.3 discusses objects of proof and standards of proof with regard to soundness of mind in some other countries. The purpose of such discussion is to search for arguments concerning the formulation of the standard of proof with regard to soundness of mind that are of relevance in a Norwegian context. Comparing standards of proof across legal traditions is challenging, since the procedural systems are based on different premises. Anglo-American criminal procedure tends, for example, to leave the investigative element with the parties, in contrast with our system in which ultimate responsibility for establishing the facts of the case rests with the courts of law. Such differences, which may be more or less fundamental, suggest that caution should be exercised before directly applying arguments to a Norwegian law context.

The assessment of the Committee follows in 10.4. This starts out, in 10.4.1, with a discussion of what should be the object of proof – whether it is the state of sound mind or the state of unsound mind that should be proved – and who should prove such state. This is followed, in 10.4.2, by identification and assessment of arguments of potential relevance to formulating the standard of proof in criminal cases, with a special focus on the issue of criminal insanity.

In 10.4.3, the Committee takes a closer look at how the courts of law should address the various types of uncertainty that may arise under the criminal insanity rule proposed by the Committee. This is followed, in 10.4.4–10.4.6, by a discussion of certain specific issues concerning the effects of the standard of proof proposed by the Committee. These include the role of legal uniformity, application of the standard of proof during sentencing and whether it would be appropriate to codify such standard. Finally, in 10.4.7, there follows a summary and some observations on the implications of the Committee's proposal.

[548] On automatism, see Andenæs (2005), p. 310, and Strandbakken (2003), p. 408 onwards.

10.2 Current law

10.2.1 Assessment of evidence

The principle of the free assessment of evidence is currently a clear main rule in Norwegian criminal procedure. The principle was codified in Section 349 of the Criminal Procedure Act of 1887, which stipulated that «[W]hat shall be deemed to have been proven […] shall be determined at the unfettered discretion [of the court] based on a conscientious assessment of the presented evidence». One refrained from codifying the principle in the Criminal Procedure Act of 1981 because it was held to be obvious.[549]

By evidence is generally meant anything invoked to establish or refute a specific fact – something that demonstrates something else – and by assessment is typically meant the weighing of pieces of evidence. Consequently, the assessment of evidence is a cognitive process that involves evaluating and taking a view on evidence. It is this weighing of evidence that is characterised as «free», which means that it is the persuasive power of the pieces of evidence that determines the extent to which a factual circumstance of legal relevance shall be deemed to have been proven by the court.

However, the outcome of such weighing of evidence can be that the court is uncertain about what are the actual facts with regard to a certain object of proof. The court will in such case have to resort to rules determining what degree of certitude is necessary and sufficient to base a judgment on a specific fact. These are the rules on the standard of proof.

10.2.2 Object of proof and standard of proof

10.2.2.1 The general criminal standard of proof and its justification

Standards of proof are typically interpreted as knowledge or certitude thresholds that need to be passed before factual arguments can be accepted as part of the basis for a judicial ruling. These regulate how the courts of law shall handle uncertainty regarding the factual circumstances in relation to which legal rules stipulate certain legal effects.[550]

Norwegian law does not have a tradition for codifying standards of proof in the area of criminal law. This has to do with the general criminal standard of proof being considered a fundamental due process principle, which is assumed to be well known. In order for a factual assertion to form the basis for a conviction, it needs to be proven beyond any reasonable doubt. This standard is applied throughout the Western world.

The criminal standard of proof pertains to factual circumstances of direct relevance to the matter of guilt or innocence. Doubt regarding certain aspects of the actual course of events that are not of direct relevance to resolving the matter of guilt or innocence does not prevent a conviction.[551]

The standard of proof has historically had its foundation in religion. The standard was intended to ensure that judges had adequate moral justification for imposing punishment, and

[549] Recommendation 1969, p. 308.

[550] A concept that is closely related to standard of proof is onus of proof, and these are occasionally used as synonyms. The extent to which one needs onus of proof as a separate concept depends on the meaning of other evidence-related concepts. If the meaning of the object of proof and the standard of proof have been clarified and one has reached a conclusion as to the certitude of the alleged fact, there is probably no need for onus of proof as a separate legal concept to address the issue of criminal insanity.

[551] Ruling published on p. 1063 onwards of the 2004 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraph 9.

was motivated by the «sanctions» judges were risking, especially from God, if an incorrect judgment was rendered.[552]

The purpose of such standard is now to offer the accused robust protection against an incorrect conviction.[553] The rationale behind the standard is an ethical assessment to the effect that the consequences of an incorrect conviction are much worse than those of an incorrect acquittal.

This perspective is deeply rooted in Western legal thinking. It is typically reflecting in the saying that it is «better that ten guilty persons be acquitted, than that one innocent person is convicted» - a formulation that hails back to Sir William Blackstone's (1723-1780) seminal work *Commentaries on the Laws of England*:

> «[…] all presumptive evidence of felony should be admitted cautiously: for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer.»[554]

This standard differs from the main civil law standard – the principle of preponderance – which instead holds that the factual interpretation considered to be the most probable, or the best supported by the evidence, shall be applied. The principle of preponderance is normally justified by a preference for a standard of proof that results in the maximum possible number of correct judicial rulings over time.

In addition to due process concern for the accused, the criminal standard of proof also reflects other important societal considerations. It will generally cause considerable consternation when a conviction turns out, in retrospect, to have been incorrect. This may again undermine the necessary confidence of citizens in the administration of justice, and may ultimately undermine their general confidence in the public administration. Society therefore also has a strong interest in only holding liable persons who actually meet the conditions for criminal liability. However, the popular formulation – «the accused shall be given the benefit of the doubt» – may lead one's thoughts away from the role played by such considerations in justifying this standard of proof, in addition to concern for the individual indictee.

The justifications for punishment and the structuring of criminal procedure are matters of continual debate, and the legislation has undergone considerable changes since the general criminal standard of proof was first established. One example of a debate having resulted in changes to criminal procedure is that the aggrieved party has been given a more prominent role than before through various procedural rights. There is nothing to suggest, substantively or in available sources of law, that arguments from this or other such debates should have any impact on the specifics of the general criminal standard of proof; cf. 10.4.2 below.
This is not to say that there exist no arguments in favour of a different formulation of the standard of proof. Some may for instance argue that deterrence considerations and the trade-off between society's costs of incorrect acquittals and concern for the prevention of incorrect convictions would suggest that a lower standard of proof would be preferable. However, such arguments should not be accorded weight in formulating the standard of proof; cf. also 10.4.2.2 below.

The criminal standard of proof – «the accused shall be given the benefit of any reasonable doubt» – is focused on how the judge perceives the evidential situation in the case and any «doubt» associated therewith. The standard may thus be said to be at the crossroads between «rationality and psychology».[555]

[552] Whitman (2008), pp. 10–11, 18–20 and 204.

[553] See the ruling published on p. 1945 onwards of the 1998 volume of the Norsk Retstidende court reporter for the Supreme Court, on p. 1947, Strandbakken (2003), p. 80, and Halvorsen (2002), pp. 234–236.

[554] Volume 4, Chapter 27.

[555] Kolflaath (2011), p. 154.

Whilst the standard defines a very high threshold for conviction, it is no higher than as to require any doubt to be reasonable. What is meant by «reasonable» in this context is the subject of frequent discussion. The basic perspective must be that effective criminal procedure will not be achieved if the threshold is put so high that criminal offences cannot be proven in practice. Legal theory has characterised the standard of proof as «a loose, imprecise norm», which indicates that there is some leeway on the part of the courts of law.[556]

An incorrect conviction need not have its origin in the court having misunderstood the criminal standard of proof. The evidence presented before the court may be such that there was every reason to believe, at the time of the judgment, that the factual description provided in the indictment was correct, although it may subsequently transpire that such evidence was incorrect. Such may, for example, be the case if the accused has incorrectly confessed to the offence, if witness testimony is false, or if an expert opinion subsequently turns out not to be tenable.

10.2.2.2 Object of proof and standard of proof for soundness of mind

What was the object of proof, and what standard of proof should apply, with regard to soundness of mind remained unclarified for a long time after the enactment of the Penal Code of 1902. The Penal Code Committee operated on the assumption that the object of proof was unsoundness of mind:

> «A person must be considered normal until the opposite has been demonstrated. However, when it has been established that the accused has carried out the action in a state of insanity, he or she must be acquitted in accordance with the general principle regarding the onus of proof, unless the prosecutor demonstrates that this person's actions of this nature are unaffected by the disorder.»[557]

However, in the Ministry's deliberation of the recommendations from the Committee, the object of proof is soundness of mind:

> «[… In] criminal cases, the onus of proof is squarely on the prosecuting authority. It will need to be proved that he or she was not in a state of automatism at the time of committing the act.»[558]

It was also in legal theory argued that the perpetrator shall be considered of unsound mind if there is doubt about the matter of criminal insanity.[559]

The Supreme Court addressed the matter in the ruling published on p. 143 onwards of the 1979 volume of the Norsk Retstidende court reporter. The *object of proof* was, in the opinion of the Supreme Court, whether the perpetrator was of sound mind:

> «And even if the conclusion shows that the experts have not considered the accused to be of unsound mind at the time of committing the act, the accused must nonetheless be acquitted if the court – because of the assumptions made in the forensic psychiatric opinion or for other reasons – finds it doubtful whether the accused was of sound mind at the time of committing the criminal act.»[560]

[556] Johnsen (1987), p. 205.

[557] Recommendation of the Penal Code Committee, 1925, p. 65.

[558] Proposition No. 11 (1928) to the Odelsting, p. 5.

[559] Andenæs (1965), p. 301.

[560] Ruling published on p. 143 onwards of the 1979 volume of the Norsk Retstidende court reporter for the Supreme Court, on p. 147.

The Court took the view that the *standard of proof* was somewhat less strict for the criminal insanity assessment than would be implied by the general criminal standard of proof:

> «I agree with the presiding Court of Appeal judge that one cannot apply the same requirement with regard to the strength of the evidence as in relation to the matter of evidence that the accused has committed the action specified in the indictment. However, I am not necessarily in agreement with the presiding Court of Appeal judge that a preponderance of probability is sufficient. If the forensic psychiatric experts were to reach differing conclusions, the accused must in my opinion be acquitted unless the court – i.e. the jury in cases heard by the Court of Appeal – were to find that there can be no reasonable doubt as to whether the accused was of sound mind at the time of committing the act. However, the forensic psychiatric opinion simply having mentioned the possibility of insanity at the time of committing the act does not suffice for a conclusion that the accused must be deemed of unsound mind and thus acquitted.»[561]

These pronouncements have in legal theory been taken to mean that the principle that the accused shall be given the benefit of any reasonable doubt shall apply to the matter of criminal insanity, although there may be more uncertainty before such doubt is considered reasonable.[562]

It may also appear to be a fairly widespread view that the standard of proof is also somewhat lower for other subjective factors on the part of the perpetrator. The Council on Criminal Law was, for example, of the view that the standard of proof «[should] probably not be as strict with regard to culpability […] as with regard to objective factors.»[563] However, the Supreme Court has concluded that this is a matter of «nuances», and that the principle that the accused shall be given the benefit of any reasonable doubt shall be strictly applied.[564]

There has been little discussion as to why, and if applicable what it means that, the standard of proof with regard to soundness of mind or other subjective factors on the part of the accused shall be lower than with regard to whether he or she has committed the action. This is neither explained or discussing in any further detail in the Supreme Court ruling from 1979, nor in any key sources of law from the subsequent period.[565] It is nonetheless reasonable to assume that the reason is that the pieces of evidence to be weighed in determining whether the accused has committed the offence are more readily available and easier to handle than the processes taking place within the mind of the indictee during the commitment of the act.

10.2.2.3 The criminal standard of proof and the Constitution

The presumption of innocence was this year incorporated into Article 96, second paragraph, of the Constitution, which is worded as follows:

> «Everyone has the right to be presumed innocent until proved guilty according to law.»

[561] Ruling published on p. 143 onwards of the 1979 volume of the Norsk Retstidende court reporter for the Supreme Court, on p. 147. See also the ruling published on p. 586 onwards of the 1990 volume of the Norsk Retstidende court reporter for the Supreme Court 1990, on p. 587, and the ruling published on p. 23 onwards of the 2003 volume of the Norsk Retstidende court reporter for the Supreme Court 2003, p. 23, paragraph 13.

[562] Strandbakken (2003), p. 407. See also Official Norwegian Report NOU 1990: 5, p. 53.

[563] Official Norwegian Report NOU 1974: 17, p. 69.

[564] Ruling published on p. 1945 onwards of the 1998 volume of the Norsk Retstidende court reporter for the Supreme Court, on p. 1947. See also the ruling published on p. 1217 onwards of the 2007 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraph 64 (the majority opinion).

[565] See for example Official Norwegian Report NOU 1990: 5, p. 53.

It is not necessarily the case that this provision can in itself be taken to imply a standard of proof of constitutional rank, inasmuch as the wording may suggest that the specific meaning of the presumption of innocence is supposed to be established in the form of statute. However, it would appear that the Human Rights Committee assumed that the provision also represented the incorporation of a substantive standard of proof into the Constitution:

> «The proposed wording for the new Article 96, second paragraph, will not go beyond that already implied by current law. The wording will instead summarise in one sentence the various aspects of the presumption of innocence, including, in particular, that the accused shall be given the benefit of any reasonable doubt.»[566]

What is here referred to by the term «current law», and what is thereby sought to be preserved through incorporation into the Constitution is not entirely clear. It is conceivable that it refers to a continuation of the substantive protection formerly implied by Article 96. In legal theory, Strandbakken has argued that the aspect of the presumption of innocence that concerns the standard of proof was embedded in Article 96 of the Constitution also prior to the amendment in May 2014.[567] The argument rests, in particular, on the reasoning that the requirement for «judgment» implies certain requirements with regard to the legal proceedings, including also a requirement for adversarial proceedings.[568] Strandbakken understands the constitutional protection of the presumption of innocence as a principle that may be deviated from if thus merited by weighty considerations. However, the existence and, if applicable, contents of the presumption of innocence at the constitutional level prior to the amendment in May 2014 is not discussed in the report of the Human Rights Committee.

Another reading of the reference to «current law» in the report of the Human Rights Committee is that it refers to the standard of proof as applicable in general criminal law; cf. 10.2.2.1 and 10.2.2.2. Such an interpretation is supported by the fact that the Committee discusses relevant case law from the Supreme Court within this field before the proposal for an amendment to the Constitution.[569] In addition, there are the requirements that the Supreme Court has inferred from Article 6(2) of the ECHR in the ruling published on p. 1409 onwards of the 2008 volume of the Norsk Retstidende court reporter and other rulings; cf. 10.2.2.4.

Without taking a final view on what standard of proof is presumed to be implied by Article 96 of the Constitution, the Committee finds it difficult to conclude that the new constitutional provision will prevent a lowering of the requirement if deemed to be well justified. Any such lowering should preferably be anchored in the legislation, thus preventing the courts of law from deciding the matter at their own discretion.

10.2.2.4 The criminal standard of proof and the ECHR

The presumption of innocence is a general criminal law and due process principle, which is also reflected in miscellaneous international human rights conventions; cf. Article 11(1) of the Universal Declaration of Human Rights, Article 14 of the International Covenant on Civil and Political Rights and Article 6(2) of the European Convention on Human Rights (ECHR). The latter provision is worded as follows:

> «Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.»

[566] Document 16 (2011–2012), pp. 129–130.

[567] Strandbakken (2003), pp. 131–152.

[568] Strandbakken (2003), pp. 151–152.

[569] Document 16 (2011–2012), p. 130.

The purpose of the provision is to prevent the punishment of innocent persons, and to preserve the reputation of those who are or have been under investigation or prosecution.

The European Court of Human Rights (ECtHR) has in a series of rulings referred to the general criminal standard of proof when making observations on the meaning of Article 6(2) of the ECHR.[570] The fundamental pronouncement is found in the plenary decision *Barberà, Messegué and Jabardo v. Spain*:

> «Paragraph 2 (art. 6-2) embodies the principle of the presumption of innocence. It requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused.»[571]

However, there is no case law involving review or re-examination of the actual standard of proof by the ECtHR.[572] The Supreme Court has nonetheless concluded that an operational standard of proof can be derived from the provision. In the Grand Chamber ruling published on p. 1409 onwards of the 2008 volume of the Norsk Retstidende court reporter for the Supreme Court, which concerned the standard of proof for the imposition of ordinary penalty tax, the majority of six justices applied a standard of proof that it held to be relative. The contents of the standard would have to depend on the nature of the case and the significance of the object of proof, including how intrusive the relevant administrative sanction is, the need for effective law enforcement and the prospects of the accused for presenting contrary evidence. A clear preponderance of the evidence might suffice, depending on the circumstances.[573] This legal interpretation has also been applied in subsequent rulings.[574] The minority of five justices did not find any basis for deriving such a standard from Article 6(2) of the ECHR, but stated that there must within key areas of criminal law be inferred, as a basic premise, a criminal law standard of proof from the fair trial requirement in Article 6(1) of the ECHR.[575]

The very sharp dissent and the diverging reasons and interpretations of ECtHR case law invoked by the factions, give cause for pursuing the issue of how any standard of proof under the ECHR is to be interpreted.[576] The subsequent discussion will first address the general significance of the ruling published on p. 1409 onwards of the 2008 volume of the Norsk Retstidende court reporter for the Supreme Court, and subsequently what implications it has for the issue of criminal insanity.

[570] Ruling published on p. 1217 onwards of the 2007 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraph 55.

[571] *Barberà, Messegué and Jabardo v. Spain*, Application 10590/83, Judgment of 6 December 1988, paragraph 77 (plenary).

[572] Strandbakken (2003), pp. 340–344, and the ruling published on p. 1409 onwards of the 2008 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraph 232.

[573] Ruling published on p. 1409 onwards of the 2008 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraphs 77 and 103–104, and the ruling published on p. 1217 onwards of the 2007 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraphs 64–65. Note, however, the dissident vote of Justice Tjomsland in the former ruling, paragraph 232, which unlike the other members of the majority factions seems somewhat more reluctant to infer a specific standard of proof from Article 6(2) of the ECHR.

[574] Ruling published on p. 1556 onwards of the 2011 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraph 47, and the ruling published on p. 1556 onwards of the 2012 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraph 50.

[575] Ruling published on p. 1409 onwards of the 2008 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraph 217. See also the minority the ruling published on p. 1556 onwards of the 2012 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraphs 94–96 and 110.

[576] It may here be added that one justice who joined the majority (Tjomsland) found cause to express his surprise that the legal situation was not more clarified and, moreover, that the ECHR interpretation was not obvious.

If a court is to perform a real review of the application of a standard of proof, other than simply checking the mere phrasing of such standard by other courts, it will need to take a view on the extent to which the evidence substantiates the invoked fact and whether or not it meets such standard of proof. The absence of any trace of such review or re-examination of the criminal standard of proof in ECtHR case law is presumably a reflection of the Court's function. Its general role is to hear applications alleging violation of the legal rules that can be derived from the ECHR and its protocols; cf. Article 19, 33 and 34.

It is correct that it follows from Article 29 of the ECHR that the Court shall rule on the «merits of individual applications», which shows that the assessment of facts on the part of the national courts is not binding, in formal terms, on the Court. However, the Court regularly states that it considers its role to be secondary, and that it is not prepared to assume the role of a court of first instance unless necessary.[577] Such reluctance is also based on the reasoning that the national courts are better placed to assess evidence.[578] Resource considerations may also be an argument in favour of the Court restricting its re-examination, to some extent, to legal issues.

In its practice, the Court only rules on matters of fact if there are convincing reasons to believe that the facts have been assessed incorrectly or established arbitrarily.[579] The threshold for review is generally high, but relative based on the nature of the violation.[580] In certain areas, especially the right to life pursuant to Article 2 and the prohibition of torture and inhumane treatment pursuant to Article 3, the Court examines factual circumstances intensively on the basis of the principle of free assessment of evidence.[581] This is done to ensure practical and effective protection for these fundamental rights.[582]

The Court has also made a number of pronouncements suggesting that a criminal law standard of proof can be derived from the Convention, although it has in practice not enforced such a standard by taking a view on its specific contents in individual cases. The reason why the Court has not reviewed standard of proof formulations is presumably that the standard, at least within traditional criminal law, is enforced by all state parties to the Convention.

It may be said, on this basis, that the factions in the Supreme Court would appear to reflect a methodological divergence in the interpretation of the protection under the ECHR: The majority opinion is premised on loyal compliance with legal postulates as expressed by the Court, whilst the minority appears to adopt more of a legal realism perspective, under which the decisive factor is what is actually reviewed by the ECtHR. Which of these approaches should be chosen depends, fundamentally speaking, on how one interprets Norway's obligations concerning compliance with the ECHR. As far as the issue of standard of proof is concerned, which approach shall be adopted has been determined by the majority opinion in the ruling published on p. 1409 onwards of the 2008 volume of the Norsk Retstidende court reporter for the Supreme Court.

However, the Supreme Court ruling did not pertain to the issue of criminal insanity, and there may be reason to indicate how the Supreme Court, based on case law from the ECtHR, or the ECtHR itself, might conceivably deal with such issue. The ECtHR has not made any pronouncements on whether the general criminal standard of proof shall be applied to the issue of criminal insanity. The question must therefore be answered on the basis of an interpretation of case law from the Court.

577 *Matyar v. Turkey*, Application 23423/94, Judgment 21 February 2002, paragraph 108.

578 *Murray v. United Kingdom*, Application 14310/88, Judgment 28 October 1994 (Grand Chamber), paragraph 66. See also *Hugh Jordan v. United Kingdom*, Application 24746/94, Judgment 4 January 2001, paragraph 111.

579 *Matyar v. Turkey*, Application 23423/94, Judgment 21 February 2002, paragraph 108, and *Zdanoka v. Latvia*, Application 58278/00, Judgment 16 March 2006 (Grand Chamber), paragraph 96.

580 Kjølbro (2010), pp. 59–60.

581 *Nachova et al. v. Bulgaria*, Application 43577/98; 43579/98, Judgment of 6 July 2005, paragraph 147. See the subsequent Grand Chamber rulings in *Creangă v. Romania*, Application 29226/03, Judgment 23 February 2012, paragraph 88, and *El-Masri v. Former Yugoslav Republic of Macedonia*, Application 39630/09, Judgment 13 December 2012, paragraph 151

582 See for example *McCann et al. v. United Kingdom*, Application 18984/91, Judgment 27 September 1995, paragraph 146, *Tanli v. Turkey*, Application 26129/95, Judgment 10 April 2001, paragraph 111, *Ribitsch v. Austria*, Application 18896/91, Judgment 4 December 1995, paragraph 32, *Mathew v. Netherlands*, Application 24919/03, Judgment 29 September 2005, paragraphs 160–165, and *Salman v. Turkey*, Application 21986/93, Judgment 27 June 2000, paragraph 100.

The fact that soundness of mind is a condition for criminal liability, and hence a core criminal law issue, may suggest that the general criminal law rule on the standard of proof will need to be applied – which is also in conformity with the Supreme Court's previous observation that the domestic law principle that the accused shall be given the benefit of any reasonable doubt shall apply to all conditions for criminal liability; cf. 10.2.2.1.

The interpretation of the ECHR applied by the majority in the ruling published on p. 1409 onwards of the 2008 volume of the Norsk Retstidende court reporter for the Supreme Court, allows for different standard of proof thresholds, including that a clear preponderance of the evidence may suffice, depending on the circumstances, at least in relation to punishment in the form of ordinary penalty tax. If it is concluded that the general criminal standard of proof applies to the issue of criminal sanity, there is reason to expect that the standard under the ECHR will be interpreted strictly. Partly because the issue of soundness of mind is at the core of the doctrine of criminal liability, and partly because there are weighty substantive arguments against lowering the standard; cf. 10.4.2 for further details.

However, there are other indications that such a standard will not be applied as a general rule by the ECtHR. The Court has in other contexts noted that the ECHR allows states considerable freedom in formulating their own criminal law:

> «It is not the Court's role under Article 6 (1) or (2) to dictate the content of domestic criminal law, including whether or not a blameworthy state of mind should be one of the elements of the offence or whether there should be any particular defence available to the accused.»[583]

If it is correct that Article 6 (2) imposes an international law obligation on Norway with regard to the standard of proof in administrative and judicial proceedings, and such standard of proof also applies to subjective conditions for criminal liability, it is unlikely that the rule in question will prevent such nuancing or relativity of the standard of proof threshold, depending on whether the evidence relates to objective or subjective conditions for criminal liability, as has been stipulated in Norwegian legal theory, and partly also in case law. The same can probably also be assumed if a similar standard with regard to the strength of the evidence can be inferred from Article 6 (1), as indicated by the minority opinion in the ruling published on p. 1409 onwards of the 2008 volume of the Norsk Retstidende court reporter for the Supreme Court, in paragraph 217.

Regulation of the issue of criminal insanity varies widely between the state parties to the Convention. Such differences are also reflected in the question of which standard of proof shall be applied. English law is based, for example, on a principle of preponderance. How state parties weigh the various crossing interests against each other in this regard is something the Court is unlikely to interfere with, in view of its practice.

This position would also appear to be supported by an older Commission ruling. The English evidence rules under the M'Naghten rules, which require a preponderance of the evidence that the perpetrator was in a state of unsound mind and which put the onus of proof on the accused if criminal insanity is invoked by defence counsel; cf. 10.3.3, were in *H v. United Kingdom* deemed to be in harmony with Article 6(2) of the ECHR. The Commission did not take a direct view on the lower standard of proof under English law, but denied that a regime placing the onus of proof for criminal insanity on defence counsel is problematic in terms of the presumption of innocence.[584]

[583] *G v. United Kingdom*, Application 37334/08, Inadmissibility decision 30 August 2011, paragraph 27.

[584] See *H v. United Kingdom*, Application 15023/89, Inadmissibility decision 4 April 1990.

There is reason to believe that the ECtHR would, if called upon to review the matter, be somewhat reluctant to overrule the balancing of interests by the national courts if these take the relevant interests into consideration in a proportional manner, i.e. that these go no further than necessary in facilitating those considerations that favour a lowering of the standard of proof, and that the national rules do not violate the right of the indictee to a fair trial; see for further details the observations of the first justice to deliver an opinion in the ruling published on p. 1409 onwards of the 2008 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraphs 103–104.

In practice, this means that the ECtHR would be reluctant about objecting to a Norwegian ruling if it is evident from such ruling that all relevant considerations have been taken into account and weighted against each other in a reasonable manner. This is reflected, inter alia, in the Court allowing the national courts considerable latitude in the use of presumption rules, provided that such presumptions can be refuted.[585] Another example is that the Court is reluctant to conclude that any application of the evidence rules represents a violation, unless such application appears to have been indiscriminate.

The Committee is of the view that Article 6(2) of the ECHR and other international law obligations do not restrict which standard of proof rules may be applied under Norwegian law in relation to the issue of criminal insanity, provided that a deviating standard of proof serves a justifiable purpose and meets the proportionality test. If there are sound reasons for deviating from the ordinary criminal standard of proof rule in relation to the issue of criminal insanity, this will also be in conformity with the ECHR. Whether such reasons exist will be discussed by the Committee in 10.4.2.

10.3 Object of proof and standard of proof in foreign law

10.3.1 Denmark

What standard of proof applies to the issue of soundness of mind is not codified in Danish law, and there exists no authoritative judicial ruling making any direct pronouncement on such standard. However, Danish legal theory has noted that it may in many cases be difficult to determine whether the evidence suggests that the perpetrator was of unsound mind at the time of the offence, and that there is a need for rules to handle such uncertainty.[586]

Legal theory appears to start out from the position that any reasonable doubt as to whether the accused was in a state of sound mind shall result in acquittal.[587] This reflects the underlying premise, as also expressed in Norwegian legal theory, that the absence of unsoundness of mind is a condition for criminal liability that must be proved in the same way as the other conditions for such liability. At the same time, it is assumed in legal theory that case law reflects a somewhat lower standard of proof, in the sense that «very low levels of doubt» do not result in punishment exemption. It is assumed that the standard of proof is likely to be influenced by the choice of sanction at the time of the judgment.[588]

[585] See, inter alia, *Salabiaku v. France*, Application 10519/83, Judgment 7 October 1988.

[586] Greve et al. (2013), p. 231.

[587] Waaben (1965), p. 248, and Waaben (1968), p. 21.

[588] Waaben (1968), p. 21.

10.3.2 Sweden

What standard of proof shall be applied by the courts of law in determining whether the perpetrator suffered a «serious mental aberration» was addressed in the criminal case in the wake of the assassination of the Swedish Minister for Foreign Affairs; Anna Lindh. The Supreme Court of Sweden stated that the object of proof – what was to be proved – was «mental aberration», and it was concluded that a principle of preponderance applied:

> «What is required of the court is to review the report and to conclude as to whether it finds, on a preponderance of the evidence, that one is faced with a mental aberration that is serious. In other words, it is a matter of applying a principle of preponderance.»[589]

Various reasons were cited in support of such principle. It was noted that the legislative preparatory works stipulated that the courts of law should be cautious about imposing imprisonment in cases involving a suspicion of «serious mental aberration», which was invoked as an argument against requiring that it was obvious that the perpetrator suffered such an aberration. It should also be noted in this context that the object of proof under Swedish law is «serious mental aberration», and not the absence of such aberration.

The Court emphasised, in connection with the establishment of the standard of proof, that the question of whether the accused suffered a «serious mental aberration» belonged, in procedural terms, under the matter of sentencing, and not under the matter of guilt or innocence. This was considered an independent argument against applying the general standard of proof pertaining to the matter of guilt or innocence, and demonstrates that the abolition of soundness of mind as a condition for criminal liability has not been without substantive legal implications.

The Supreme Court of Sweden concluded, under reference to the Latin phrases «in dubio pro reo» («[when] in doubt, for the accused» or the presumption of innocence) and «in dubio mitius» («[when] in doubt, more leniently»), that it was neither appropriate, nor possible, to adopt a presumption of innocence or the most lenient punishment for the accused, as it is not possible to establish what will favour the accused in each individual case. It was in this context also emphasised that the standard should be the same irrespective of the seriousness of the case.

A subsequent ruling from the Supreme Court of Sweden gives the standard of proof a somewhat stricter formulation, i.e. as a matter of whether it can be «considered out of the question» that the perpetrator suffered a «serious mental aberration».[590] However, two factors weaken the status of the said pronouncement as a source of law. No reasons were given for such formulation of the standard of proof, and this legal interpretation was not decisive for the outcome of the case since the Court concluded that there was in any case no causal link between the relevant aberration and the conduct.

In other words, the *object of proof* under Swedish law differs from that under Norwegian law. The theme is in Norway formulated as a question of whether the perpetrator is of sound mind, whilst Swedish law seeks to determine whether the accused suffered a «serious mental aberration». Under Swedish law, the principle of preponderance will be decisive in determining whether the standard of proof can be deemed to have been met. However, it should be noted that the reason for this is caution about imposing imprisonment on seriously ill persons –

[589] Ruling of the Supreme Court of Sweden published on p. 702 onwards of the 2004 volume of the Nytt juridiskt arkiv court reporter.

[590] Ruling of the Supreme Court of Sweden published on p. 180 onwards of the 2007 volume of the Nytt juridiskt arkiv court reporter.

given the object of proof, a stricter standard would make it more difficult to prove a «serious mental aberration». This consideration is also reflected in the formulations in case law after the Anna Lindh case.

10.3.3 England

The main rule under English law is that only the accused or counsel to the accused can raise the issue of criminal insanity. This is because the issue of insanity only arises when invoked by the accused as a defence.

If such defence is invoked, defence counsel will be called upon to prove the state of insanity in accordance with the principle of preponderance, i.e. that it must be considered most likely that the accused was in such a state at the time of committing the act.[591] If such proof is deemed to have been furnished, the accused shall be declared «not guilty by reason of insanity». If, on the other hand, it is the prosecuting authority that moves for the accused to be declared «insane», the general criminal standard of proof, i.e. «proof beyond reasonable doubt», shall apply.[592] The prosecuting authority must in such case prove beyond reasonable doubt that the offender was in a state of insanity.

However, the standard of proof is a different one for the defence of «automatism». Whilst the issue of «insanity» concerns the mental state of the perpetrator at the time of the offence, «automatism» concerns the issue of whether the perpetrator did not have control over his or her behaviour at the time of the offence; cf. for further details 7.6.2.2. The latter issue is subject to the general criminal standard of proof. The accused shall be acquitted if the defence has been invoked, and reasonable doubt has been established.[593]

In other words, when the defence of «insanity» is invoked by the accused, he or she will need to prove his or her insanity in accordance with a principle of preponderance. It is considered problematic that the outcome will be conviction when the court is no more certain than it is uncertain that he or she is «insane».

The Law Commission has recently published a thorough discussion paper om insanity rules under English law, which also includes a presentation of arguments invoked for and against requiring the accused to prove his or her own insanity, i.e. placing the onus of proof on him or her.[594]

The main argument in favour of requiring the prosecuting authority to prove the sanity of the accused – placing the onus of proof on the prosecuting authority – is said to be that «insanity» should be considered part of the matter of guilt or innocence. This is based on the thinking that a lack of criminal capacity shall not only be considered a defence, but a mandatory condition for imposing punishment, and that it should therefore fall to the prosecuting authority to prove that such condition is met. Moreover, the Law Commission emphasises that requiring the accused to prove his or her own state of unsound mind is in conflict with the presumption of innocence.

The main argument in favour of requiring the accused to prove his or her insanity is that there would otherwise be too many acquittals. The perspective is that if the onus of proof is placed on the prosecuting authority, it will not be able to demonstrate the sanity of the accused. It is

[591] Law Commission (2013), pp. 13–14 and 171 onwards.

[592] Law Commission (2013), p. 172.

[593] Law Commission (2013), p. 5 and 171.

[594] Law Commission (2013), pp. 174–182.

often emphasised, as an extension of this, that the accused will typically be better placed, in terms of evidence, to clarify his or her own mental state than is the prosecuting authority. Another argument in favour of the accused demonstrating his or her own insanity is that such rule best safeguards individual dignity, inasmuch as everyone is enabled to take responsibility for his or her choices of action.

The Law Commission's own recommendation is a regime in conformity with the regulation of evidential issues in relation to the defence of «automatism», as discussed above.[595] This is considered sufficient to ensure effectiveness in the administration of criminal justice and is in harmony with the presumption of innocence.

English law primarily differs from Norwegian law in the issue of criminal insanity only becoming relevant, in formal terms, when invoked as a defence. This difference reflects that our procedural system charges the courts of law with properly establishing the facts of the case, whilst the English procedural system generally leaves the investigative element with the parties. In addition, the standard of proof with regard to whether the accused was «insane» differs from that under Norwegian law. Norwegian law requires soundness of mind to be demonstrated with a high degree of certainty, whilst under English law it is insanity that shall be demonstrated by a preponderance of probabilities.

There is nothing about the English regime to suggest a lowering of the standard of proof or a reverse onus of proof under Norwegian law, other than those arguments that are already well known; see the discussion below for further details.

10.4 The assessment of the Committee

10.4.1 Object of proof

The object of proof is what shall be proved. The standard of proof concerns with what degree of certainty this (the object of proof) needs to be demonstrated. Consequently, the issues of the formulation of the object of proof and the formulation of the standard of proof cannot readily be examined independently of each other. If the object of proof is the soundness of mind of the accused, a strict standard of proof will require more evidence to conclude that the accused is of sound mind than a less strict standard of proof. If the object of proof is the unsoundness of mind of the accused, a strict standard of proof will require more evidence to conclude that the accused is of unsound mind than a less strict standard.

The formulation of the object of proof – what needs to be proved in order for a legal effect to materialise – may in other words influence the implications of the standard of proof. However, as long as the standard of proof is tailored to the object of proof, the issue of which object of proof is applied will not necessarily make much of a difference.

The question of what should be the object of proof under criminal law can hardly be answered other than under reference to criminal law and criminal procedure systems considerations. In principle, what is to be proved will depend on an interpretation of the wording of the statutory conditions for criminal liability, but legislative wording does not always contribute to the clarification of this issue.

Section 44 of the Penal Code, which stipulates that a person who was psychotic or in a state of automatism at the time of committing the act shall not be liable to punishment, does not in itself provide much guidance on the object of proof. However, the assumption made by the

[595] Law Commission (2013), pp. 181–184.

Supreme Court in the ruling published on p. 143 onwards of the 1979 volume of the Norsk Retstidende court reporter, was that the object of proof was whether the perpetrator was of sound mind; cf. 10.2.2.2.

Stipulating the soundness of mind, and not the unsoundness of mind, of the accused as the object of proof is appropriate under the current penal system. Punishment is the most obvious form of authoritative condemnation and the most significant intervention the State may use against its citizens. It is therefore also reasonable that it is for the State – represented by the prosecuting authority – to prove that the conditions for criminal liability, including the requirement for soundness of mind, are met. The position that the encroachment on individual autonomy is what needs to be justified and explained is, from a criminal law perspective, closely related with the onus of proof being on the prosecuting authority.

It has been argued in the debate on the criminal insanity regime that the object of proof should be unsoundness of mind and not soundness of mind. The perspective would appear to be that each person is entitled to be considered an independent and responsible individual, and that people shall as a main rule be held to account for their actions. The majority in the Standing Committee on Justice formulated this as follows in giving its reasons for not introducing a discretionary punishment exemption rule:

> «The majority believes, as a matter of principle, that it is appropriate for individuals to be held to account for their actions to the maximum possible extent, and thereby to be convicted for any offence committed by them […].»[596]

It may be argued that this idea of the maximum possible accountability must also influence the formulation of the object of proof, thus implying that what should be proved is not that the perpetrator was of sound mind, but that he was of unsound mind. This argument often also appears to be based on the assumption that the standard of proof shall remain the same, whilst the object of proof is «reversed», with the result that the threshold for proving that the perpetrator is of unsound mind is made higher. This, incidentally, is in line with the perspective of the psychiatric experts, which is that the aberration, if any, is what needs to be demonstrated.

However, it is difficult for the Committee to accept that the argument is viable in relation to the formulation of the object of proof. The general presumption that most people are compos mentis and can be held liable for their actions is no longer applicable when there is doubt as to whether the accused is of sound mind. The issue is then precisely whether it is in this specific case viable to rely on such presumption. Another matter is that there will in many cases be no reason to specifically address the soundness of mind of the perpetrator, because it will generally be evident that he or she was of sound mind.

The use of punishment, both as a social policy tool and as retribution, is premised on underlying assumptions concerning the benefits of punishment and concerning how citizens will be motivated by threats of punishment on the part of the State, and that it is reasonable and just to impose criminal liability on citizens. In line with the principle that the need for intervention against citizens is what has to be justified and demonstrated, and that the onus of proof is on the prosecuting authority, the Committee believes that it is appropriate for the object of proof to be whether the conditions for such intervention have been met, also as expressed in the requirement that the perpetrator must have been of sound mind at the time of committing the act.

Besides, this is also in harmony with the general system under criminal law, where the objects of proof are typically to do with whether the conditions for criminal liability have been met,

[596] Recommendation No. 34 (1996–97) to the Odelsting, p. 7.

and not whether these have not been met. It is therefore also most reasonable and pedagogically appropriate for the object of proof to be soundness of mind.

However, the choice of the object of proof does not say anything about how one should deal with the problem of uncertainty with regard to the existence of the object of proof, including what standard should be applied in determining whether there is sufficient evidence to the effect that the perpetrator was of sound mind. This is addressed in the following.

10.4.2 Standard of proof

10.4.2.1 Theme and structure

The chosen standard of proof must be considered from the perspective of the adopted evidential regime, including the object of proof. The following discussion will address the formulation of the standard of proof for soundness of mind. A distinction will be made between *value-based* and *evidence-based* arguments relating to the formulation of the standard of proof.

An example of a value-based argument is the general criminal law objective of preventing incorrect convictions. In 10.4.2.2, the Committee discusses whether this objective should be different in respect of soundness of mind than in respect of the other conditions for criminal liability. One example of an evidence-based argument is that a standard worded as «proved beyond any reasonable doubt» is the best way of realising the objective of preventing incorrect convictions. In 10.4.2.3, the Committee discusses whether this approach also applies to the issue of criminal insanity.

In 10.4.2.2.2, the Committee makes some observations in relation to those arguments in favour of lowering the standard of proof that were outlined in the judgment of the Oslo District Court in the 22 July Case. Although this is only an obiter dictum (a pronouncement in a judicial ruling without any impact on the specific conclusion of such ruling) in a District Court judgment without any authority as a judicial precedent, it is worthy of some attention. The 22 July Case led directly to the appointment of the Committee, and the case put the standard of proof for soundness of mind on the agenda. It occasioned extensive discussion of this issue both amongst the general public and in relevant professional circles, and few other sources discuss or seek to outline reasons for the standard of proof for soundness of mind as thoroughly as did the District Court judgment in the 22 July Case.[597]

10.4.2.2 Value-based arguments

10.4.2.2.1 General remarks

The issue addressed in the following is whether the basic criminal law and procedural law principle referred to as the presumption of innocence («in dubio pro reo») should also apply in full to any doubt as to whether the perpetrator was of sound mind. In other words, whether the principle that anyone shall be considered innocent until the opposite is proved beyond any *reasonable doubt* shall also apply unconditionally when the courts are called upon to rule on the issue of criminal insanity.

If it will not be to the advantage of the accused to be declared of unsound mind, this may constitute an argument in favour of lowering the standard of proof, based on the reasoning that the need to prevent incorrect convictions does not apply to the same extent in respect of criminal insanity as in respect of the other conditions for criminal liability.[598] The question is

[597] The last time a case occasioned a debate on a similar scale was in the 1960s; cf. Andenæs (1965).

[598] Official Norwegian Report NOU 1974: 17, p. 47.

therefore, more precisely formulated, whether the generally accepted view that an incorrect conviction is so very much worse than an incorrect acquittal is also fully viable in relation to the issue of criminal insanity.

The fact that it may not necessarily be advantageous to be declared of unsound mind in a criminal case has previously been highlighted by the Council on Criminal Law as an argument in favour of lowering the standard of proof. This was based on an opinion authored by Professor Johs. Andenæs.[599] His position was that the disadvantages on the part of the accused suggested that it would be more reasonable to resort to a preponderance of probabilities in one direction or the other, than to apply the criminal standard of proof.[600]

Professor Andenæs was of the view that three disadvantages, in particular, suggested that the standard of proof should not be equally strict in respect of the soundness of mind requirement. Firstly, the perpetrator would risk compulsory treatment in a psychiatric institution, which might entail a longer period of deprivation of liberty than if he or she had been sentenced to punishment. Secondly, by being declared of unsound mind, the accused might also risk being deprived of other rights, for example the right to drive a motor vehicle. Thirdly, Professor Andenæs emphasised that being labelled of unsound mind and exempted from punishment might be more detrimental in terms of self-esteem and reputation than being declared of sound mind and sentenced to punishment.

The Committee is of the view that it will depend on the circumstances whether it is favourable or unfavourable for the accused to be declared of unsound mind. If no special sanction would be relevant, for example because there is no risk of recidivism or because the offence is not of a sufficiently serious nature, the possibility that the perpetrator was of unsound mind at the time of committing the act will easily lead to prosecution of the case being discontinued or to the accused being acquitted. The accused will in such case not be subjected to any sanction, which outcome will generally be in favour of the accused. If the offender is already, at the time of the judgment, enrolled in a well-functioning treatment programme, it is also to his or her advantage to be exempted from sanctions and allowed to continue uninterrupted in such programme.

If the potential punishment is modest, for example a fine, it may on the other hand be much more burdensome to be subjected to a psychiatric evaluation concluding that he or she was and possibly remains psychotic, than simply to pay the fine.[601] However, this situation is probably not particularly representative. The prosecuting authority will rarely initiate a comprehensive psychiatric evaluation in less serious cases and will more likely discontinue prosecution on the basis of doubt as to whether the soundness of mind requirement is met. The situation may also be that the aberration in question is not identified, with the result that the fine gets paid.

It may also, depending on the circumstances, be more burdensome for the accused if long-term commitment in a psychiatric institution is a relevant alternative. Even if being declared of sound mind would result in a lengthy and immediate custodial sentence for the accused, this would not necessarily be the least favourable outcome for the accused. In comparison with a time-definite custodial sentence, the special sanction may represent much more of a burden for the convicted person, primarily because it is of indefinite duration. The difference from preventive detention, which may readily become relevant in such cases and which is also

[599] Johs. Andenæs, *The Foundation of the Insanity Rules*, Appendix 1 to Official Norwegian Report NOU 1974: 17, on pp. 165–166. See also Andenæs (1965), on pp. 301–302.

[600] Andenæs (1965), p. 302.

[601] Official Norwegian Report NOU 1983: 57, pp. 161–162.

of indefinite duration, will be less, but it will typically be the case that a person who is declared of unsound mind as the result of a serious mental disorder, possibly of a chronic nature, will find it more difficult than a person of sound mind to convince the relevant authorities that there is no risk of relapse into new outbreaks of the disorder and new crimes. It may, at the same time, be to the advantage of such a person that he or she, given his or her disorder, is subjected to a treatment-oriented, and not a penal, sanction regime.

However, the reasoning that the standard of proof must be determined on the basis of what is the most favourable for the accused is hard to square with the justifications for having criminal insanity rules. The justification for the punishment exemption for persons of unsound mind is that such persons cannot be blamed for their conduct at the time of the offence. The justification for the punishment exemption has nothing to do with whether societal protection considerations or treatment considerations are of relevance at the time of the judgment. If lowering the standard of proof is justified by what deprivation of liberty is risked at the time of the judgment, one will the same time disregard the justifications for having criminal insanity rules as outlined by the Committee, which justifications also form the basis for current law; cf. 6.2.

The same would apply if the lowered standard of proof is justified by such other legal effects as the legal order might define under reference to the mental state of the perpetrator, for example whether the perpetrator is suited for driving a car or for concluding binding agreements.

It may be argued, not without justification, that to be declared of unsound mind is to be deprived of one fundamental aspect of the dignity of being a human being. Society does not recognise one's ability to make reasoned choices, and one is not held accountable for one's own conduct. However, this perspective is primarily of relevance when determining the extent to which one shall consider offenders to be of unsound mind within the meaning of criminal law, and not when determining what evidence shall be required to prove that the perpetrator belongs to the group that should be without criminal capacity. In formulating and defining the scope of the criminal insanity rules, the Committee has taken into account that it is a serious intervention to deprive a person of his or her right to be held to account for his or her actions. And this also means that the said consideration has been accorded such weight as should be accorded thereto. By according it weight also in the formulation of the standard of proof, by lowering such standard, one runs the risk that persons who were supposed to be without criminal capacity are instead subjected to criminal liability on an incorrect basis.

Value-based arguments do not give sufficient reason to deviate from the general criminal standard of proof and its ethical foundation when it is uncertain whether the offender was of sound mind at the time of committing the act. As indicated above, the implication of a lower standard of proof in ruling on the issue of criminal insanity might be that more innocent people are punished. This would also have obvious and undesirable social implications – mentally ill persons will be incarcerated in prisons, where the outlook for treatment and rehabilitation will not be as tailored and comprehensive as in a treatment facility under the mental health care service. This is undesirable.

It is noted above that the implications for an individual accused person of being declared of sound or unsound mind, respectively, may vary significantly. For some persons it will undoubtedly be favourable to be declared of unsound mind, whilst this may be more doubtful as far as others are concerned. One might argue that this suggests that the standard of proof

should very, depending on the circumstances of each individual case and the situation of each individual person.[602]

However, the Committee believes that such a relative standard of proof would hardly be appropriate in this case. The Committee has, in reaching this conclusion, taken into account that it is a rule of law ideal to have general rules in this area in order to, inter alia, ensure a predictable and practicable penal regime.[603] In addition, equal treatment considerations suggest that identical evidence situations should be treated identically. Nor has it, as far as can be established, previously been argued in favour of a relative standard of proof threshold, depending on which outcome might be in the best interest of each accused person. And no such relativity has been proposed in respect of other conditions for criminal liability either.

10.4.2.2.2 The comments of the Committee on the judgment of the Oslo District Court in the 22 July Case

It is, as mentioned in 10.4.2.1, appropriate to make some observations in relation to the reasoning in favour of a lower standard of proof outlined in the judgment of the Oslo District Court in the 22 July Case. It should be reiterated, before the Committee addresses the reasoning of the District Court in the following, that the discussion of the Court had no impact on the outcome of the case, since the Court concluded that the accused was undoubtedly of sound mind. Consequently, the comments made by the Committee in the following will in no way challenge the conclusion of the District Court that the accused was of sound mind or any other aspect of the judgment.

The District Court presented four value-based arguments in favour of applying a lowered standard of proof. The first argument was presented as follows:

> «The District Court finds that there are good reasons for such a lower standard of proof for criminal sanity. Although it is true that punishment is an intended evil expressing society's strong reproach of a crime, such a reproach would presuppose the offender to have criminal capacity. The sentence however also implicates an element of atonement, giving the convicted the opportunity to «settle his debts». In this perspective, the punishment is not exclusively an evil, but also a road back to society. If the standard of proof for criminal sanity is placed too high, this route would be shut off to many offenders with true criminal capacity.»[604]

The Committee is of the view that this argument is problematic. One would be equally «justified» in invoking such argument in respect of other conditions for criminal liability, including the issue of whether the perpetrator has acted intentionally. There is no doubt, whether under current law or based on the rationale behind the criminal standard of proof, that any reasonable doubt shall be for the benefit of the accused when determining whether the accused acted with intent. The argument invoked by the District Court is, in other words, completely general and will, if applied, undermine the rationale behind the criminal standard of proof as such. It is not immediately obvious that the element of atonement in punishment is more prominent in determining the issue of criminal insanity than in determining, for example, whether the accused acted with intent.

The second argument of the District Court is worded as follows:

602 Andenæs (1965), pp. 301–302, and Bratholm (1980), p. 96.

603 Andenæs (2005), p. 310.

604 Judgment published on p. 1153 onwards of the 2012 volume of the Rettens Gang court reporter, on p. 1196.

> «Besides, it is doubtful, as a matter of principle, whether it is wise to deprive offenders of criminal capacity, and hence also moral and legal autonomy, by an unwarranted pathologization of their minds.»[605]

The issue of who should be deemed to have criminal capacity is, as already noted in 10.4.2.2.1, a matter of which mental aberrations shall fall within the scope of the insanity rule – and not a matter of the standard of proof. Which standard of proof should apply depends on how one should reduce and apportion the risk of an incorrect judgment – what degree of certainty is required for the court to be entitled to render a conviction? The answer to this question cannot be anticipated by adopting the premise that a strict standard of proof will imply an *unwarranted* pathologization.

Besides, it is unclear what the District Court means by the term «unwarranted pathologization of [offenders'] minds». Irrespective of how doubtful cases concerning criminal insanity are resolved, these will almost invariably relate to persons who were, at the time of committing the act, mentally very ill or aberrant, and who are often also equally ill or aberrant at the time of the judgment. One may therefore ask whether a criminal insanity conclusion in a doubtful case does at all involve any particular «patholog*ization*» of the offender's mind, and whether this can be «unwarranted». The Committee is, under any circumstance, unable to see that this argument in the District Court judgment makes any specific contribution towards deciding how the issue of the standard of proof should be resolved. There are of course reasons not to declare persons who are in fact of sound mind to be of unsound mind. However, there are conflicting and even more weighty reasons against holding liable those who are in fact of unsound mind, and hence innocent.

The third argument of the District Court is as follows:

> «Furthermore, with respect to society and those directly affected by a crime, consideration for a fair retribution indicates that criminals with an actual criminal capacity must be punished. Certainly, the preparatory works of the new Penal Code of 2005 state that retribution cannot be the purpose of punishment, cf. Proposition No. 90 (2003–2004) to the Odelsting, page 77. Notwithstanding, the Court finds that the subjective conditions for punishment, linking liability to guilt and criminal capacity, show that penal law does not exclusively build upon utilitarian considerations like prevention and renovation. The starting point of the legislators that «anybody must be held responsible for their acts», cf. Recommendation No. 34 (1996–1997) to the Odelsting, Item 5.4, appears to be based upon a wider approach to the purpose of punishment.»[606]

It would appear that the District Court is arguing in favour of deviating from the basic principle that an incorrect conviction is significantly worse than an incorrect acquittal, under reference to the justifications for punishment. And the conclusion it draws from this reasoning is, as noted, that the criminal standard of proof in respect of soundness of mind should be lowered. As with the first argument of the District Court, its third line of reasoning is also general and valid for other conditions for criminal liability; this reasoning is also valid in relation to the requirement for intent. To deviate from the principle that an incorrect conviction is significantly worse than an incorrect acquittal by lowering the criminal standard of proof on the basis of retribution considerations is justified neither by available sources of law, nor by relevant values.

[605] Judgment published on p. 1153 onwards of the 2012 volume of the Rettens Gang court reporter, on p. 1196.

[606] Judgment published on p. 1153 onwards of the 2012 volume of the Rettens Gang court reporter, on pp. 1196–1197.

Although ideas of retribution can be said to be reflected in Norwegian criminal law; cf. 6.2.1, allowing retribution, as a justification for punishment, to influence the formulation of a rule on the standard of proof in such a way that it deviates from that applicable to the other conditions for criminal liability, would represent a major departure from how specific standards of proof are justified in other contexts. Ideas of fair retribution primarily serve to curtail the use of punishment.

And it is under any circumstance difficult to find any basis for the District Court's differentiation between absolute and relative theories of punishment when it comes to the potential relevance of such theories to the standard of proof. Deterrence considerations are no less weighty, and probably weightier, arguments for a lowered standard of proof, than are the retribution considerations invoked by the District Court – the more persons with «actual criminal capacity» we punish, the more reason to expect the general deterrent purpose of punishment to be realised. Besides, it is not easy to understand why there should be any link between retribution considerations and a lowered standard of proof. Retribution considerations cannot in themselves justify an acceptance by the legal order of a lower level of certainty as to whether the perpetrator was of sound mind, and thus a higher level of uncertainty as to whether such retribution is fair and legitimate, than as to whether other conditions for criminal liability are met.

The fourth argument of the District Court is outlined as follows:

> «The Court further finds it unfortunate to transfer offenders who most likely no longer have a genuine need for treatment, to compulsory mental health care. It is true that a dangerous person who is not (or no longer) psychotic may be transferred to an institution under the correctional service «when particular reasons speak in favour thereof», cf. Section 5–6 of Act No. 62 of 2 July 1999 on Mental Health Care,. This possibility of transfer is nevertheless restricted, cf. the ruling published on p. 1043 onwards of the 2011 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraph 27, and may only take place with the consent of the Court. Dangerous persons may thus be kept in the mental health care service for years, irrespective of their state of mind. On the other hand, as long as Section 39 of the Penal Code does not have any requirements as to the state of mind at the time of the judgment, it is not possible to safeguard against this.»[607]

The Committee is not able to endorse this either. The above reasoning is based on the premise that the potential sanctions risked by the perpetrator and what benefits he or she might derive from such sanctions should have an impact of the formulation of the standard of proof. The Committee is of the view that such a premise cannot be adopted, as it is not in harmony with the justifications for making it a condition for criminal liability that the accused was of sound mind at the time of committing the act; cf. 10.2.2.1.

Moreover, lowering the standard of proof for soundness of mind because of a possibility that the offender does not have a «genuine need for treatment» may result in many persons with and without such a need for treatment being punished, although they do in fact not have criminal capacity. Hence, one would also run the risk of offering many persons treatment opportunities that are much inferior to those available under the special sanction regime. The Committee believes that it is important, as is the case under current law, to avoid this. See, inter alia, 21.2, 22.1.5.3 and 24.3.3 on the scope for transfer between the mental health care service and the correctional service.

[607] Judgment published on p. 1153 onwards of the 2012 volume of the Rettens Gang court reporter, on p. 1197.

In other words, the judgment of the Oslo District Court in the 22 July Case does not present any value-based arguments suggesting that the general criminal standard of proof should be deviated from in relation to the issue of whether the perpetrator was of sound mind.

10.4.2.3 Evidence-based arguments

The issue in the following is whether arguments of an evidential nature suggest that the ordinary and strict standard of proof should be deviated from in relation to whether the perpetrator was of sound mind at the time of committing the act. The standard of proof should not be stricter than to enable the phenomena to which legal effects are linked to be proved. If states of sound mind are generally difficult to prove, that may constitute an argument for lowering the standard of proof such as to make criminal liability a reality.

It is often stated in case law and in legal theory that no «direct evidence» can be presented in respect of subjective factors on the part of the perpetrator.[608] Some have argued that any assertion relating to such matters will always be subject to uncertainty, and that the standard of proof should therefore be lowered, in contrast to what is the case with objective, external circumstances that lend themselves to more direct observation.[609]

It is not immediately obvious that demonstrating subjective factors on the part of the perpetrator is generally subject to uncertainty. Such factors, like for example the degree of culpability, are realities that we relate to in both daily life and the judicial system. This is reflected in statements like you «did it on purpose» and in the legal system through statements like this: «The planning and the purposeful actions behind the attempt demonstrate an entrenched criminal intent».[610]

This may be explored in more detail. Legal theory identifies *two sources of knowledge about the mind of the perpetrator.*[611] One of these is notions as these appear in the consciousness of the perpetrator him- or herself and are communicated to other persons. The other is the interpretation of human activity. It follows, for example, from the ruling published on p. 104 onwards of the 2005 volume of the Norsk Retstidende court reporter for the Supreme Court that the Court of Appeal had drawn on both sources to determine the intent of the perpetrator, without expressing any form of scepticism or doubt, despite this being a matter of evidence in respect of a subjective factor:

> «He has in two police interrogations, the last of which took place almost a month after the event, and in connection with investigative custody*, testified that he intended to kill* someone and was aware of what he did […] The court refers, moreover, to *the act itself*, which involved the accused stabbing A twice in the neck and face with a large knife, as well as pursuing A with the knife when he tried to get to safety.»[612]

The offender's own introspection and communication thereof is not a necessary condition for concluding that a certain subjective state existed. It will, on the contrary, in many criminal cases be concluded that the accused acted intentionally despite this being strenuously denied

608 Strandbakken (2003), p. 388.

609 Waaben (1973), pp. 56–57 and 65.

610 Ruling published on p. 95 onwards of the 1991 volume of the Norsk Retstidende court reporter for the Supreme Court, on p. 96. See also the ruling published on p. 1634 onwards of the 2005 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraph 7 (from the judgment of the Court of Appeal).

611 Andenæs (2005), p. 240.

612 Ruling published on p. 104 onwards of the 2005 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraph 45, emphasis added.

by him- or herself. This is because the judge will be able to rely on the external/objective aspects of the case and on his or her general life experience in determining such matters.

Although the quote concerned the issue of intent, and not the issue of soundness of mind, it illustrates that it is generally assumed that states of mind can be determined with near certainty. The same applies to the issue of soundness of mind. It will in many cases be evidentially obvious that the perpetrator was in a state of automatism or a state of psychosis, or that he or she was not in a state of psychosis, as was the conclusion in the judgment of the Oslo District Court in the 22 July Case.

It is difficult to see, against this background, that evidential considerations can justify a lower standard of proof in respect of the issue of soundness of mind.

10.4.2.4 Summary

The discussion has demonstrated that the rationale behind the general criminal standard of proof is also valid in relation to the issue of whether the perpetrator was of sound mind at the time of committing the act. The consequences of an incorrect conviction will generally be much greater than those of an incorrect acquittal, also in relation to the issue of soundness of mind.

Society cannot run the risk of conviction and punishment of persons who are without criminal capacity because of severe mental aberrations at the time of committing the act, and who therefore cannot be blamed either. It is both deeply unfair and an inappropriate investment in punishment to impose criminal liability on such seriously mentally ill persons. A suitable way of reducing the risk of incorrect convictions in this area is to apply the general requirements as to the strength of evidence to this condition for criminal liability as well.

10.4.3 Various types of uncertainty under the criminal insanity rule proposed by the Committee

10.4.3.1 Theme, delineation and approach

There is reason to discuss in somewhat more detail how the courts of law should deal with uncertainty as to whether the perpetrator was of sound mind. The uncertainty may relate to various factors, which should probably not be dealt with in the same way. Nonetheless, different uncertainties have previously all been addressed uniformly. However, it is imprecise to talk of the standard of proof for soundness of mind as a set standard. When the rationale behind the standard of proof is to reduce and distribute the risk of incorrect judgments, there is reason to clarify more precisely what types of risk may be incurred in practice.

Factual uncertainty is the theme addressed in the following. Factual uncertainty is uncertainty about phenomena to which legal effects are linked, for example matters such as what the perpetrator did or thought at the time of the offence. Factual uncertainty should be distinguished from *legal* uncertainty, which relates to how phenomena should be assessed, for example matters such as the legal implications of an act having been committed or having been committed intentionally.

First, in 10.4.3.2, it is emphasised that there are two dimensions to the standard of proof – *probability* and *robustness*. When a level of certainty is required in relation to a factual circumstance before it can form the basis for a conviction, it is required that the invoked fact exists with a specific degree of probability, in the sense that there are reasons to believe that such is the case (*probability*), and that the assessment of probability is based on a solid evidential foundation (*robustness*).

How the rule on punishment exemption on grounds of criminal insanity is formulated will decide which types of uncertainty may arise. It is of key importance whether the rule is premised on medical diagnoses or more general legal terminology pertaining to mental aberrations. The theme addressed in 10.4.3.4 is a specific form of uncertainty associated with the establishment of a diagnosis, and how to deal with this. The theme in 10.4.3.5 is uncertainty associated with the use of more general terminology pertaining to states of mind, and how such uncertainty should be dealt with.

10.4.3.2 Uncertainty – probability and robustness

Whether something is certain can be expressed in two ways. One way is to express the certainty on the basis of a defined set of information. Another way is to take into consideration, at the same time, that there may exist more information in addition to that already available.[613]

This is a distinction that has until recently received little attention in Norwegian legal thinking. Legal evidence theory tends to refer to such distinction as a distinction between the *probability dimension* and the *robustness dimension* of an invoked fact. Probability typically refers to a more or less well-founded belief. Robustness refers to the extent to which an invoked fact is vulnerable to new information in the form of additional evidence. This implies that it is possible to consider an assertion to be correct even if its evidential foundation is weak. If more evidence is added, one gets a firmer foundation on which to base the ruling. One example of this is that it is generally considered more certain to have two experts rather than one. Another example is that one will in case of a guilty plea generally be more certain if all evidence from the crime scene is presented to the court.

It should be emphasised that a robustness requirement is distinct from the requirement for the court of law to shed light on the facts of the case under Section 294 of the Criminal Procedure Act. The court of law may find that sufficient light has been shed on the facts of the case to enable it to render judgment and at the same time acquit because the invoked fact is not sufficiently robust, for example because the police has failed to take a blood sample or to interview a witness. This is because these requirements serve different purposes – the rationale behind the robustness requirement is the need to prevent incorrect convictions, whilst the rationale behind the general obligation of the courts of law to seek to uncover the facts is the need to establish the truth.

As will be noted from the above, the general criminal standard of proof can be considered a requirement for an evidence-based belief and specifies how well-founded an argument will need to be before it can form the basis for a judgment. However, it is rarely clarified which of the said two types of certainty – probability or robustness – are addressed. In any case, the rationale behind the criminal standard of proof, which is to prevent incorrect convictions, suggests that a strict standard must be applied with regard to both the probability and the robustness of the assertion.

10.4.3.3 Uncertainty with regard to symptoms

The Committee proposes to continue the regime under which psychotic persons shall be considered of unsound mind. In addition, the Committee also proposes that aberrations that must be deemed equivalent to a state of psychosis shall result in a punishment exemption. Both criteria presuppose the demonstration of specific pathological (morbid) symptoms in the psyche of the offender. Such demonstration may be based on external factors, like bizarre behaviour, etc., as well as on ideas and notions expressed by the offender him- or herself.

[613] See also Bjerke, Keiserud and Sæther (2011), p. 422.

There may be uncertainty along two dimensions. Firstly, there may be uncertainty with regard to the existence of individual symptoms. Secondly, there may be uncertainty as to whether the overall symptoms are sufficient to merit the conclusion of psychosis or an equivalent aberration. Uncertainty as to symptoms is addressed in the following. 10.4.3.4 and 10.4.3.5 address uncertainty as to the establishment of a diagnosis and uncertainty as to whether there is an equivalent aberration.

External symptoms relating to actual conduct are established on the basis of observations and experience-based conclusions. Uncertainty arises where the observations are uncertain, or where the available experience is incomplete. This type of uncertainty can, for legal purposes, be handled by applying the general criminal standard of proof.

It is more difficult to establish those symptoms that take the form of thoughts and feelings. The standard working methodology here is interpretation of the conduct of the offender and his or her communication of his or her own perception of his or her experiences (introspective experience). In the following will be made some observations on the nature of the uncertainty that may arise, and whether it can be regulated by way of the standard of proof.

Uncertainty in the *interpretation of human behaviour* may have two causes. Firstly, it may be uncertain whether the external behaviour being interpreted has in actual fact taken place, or how it manifested itself. Did for example the person in question behave in such manner as would be expected in case of ignorance or hallucination? Such uncertainty is also regulated by the general criminal standard of proof.

Secondly, there may, once the actual behaviour has been established, be uncertainty as to how such behaviour should be interpreted. Such uncertainty does not relate to factual circumstances, but to the interpretation of human relations that vary between theories, persons, situations and cultures. This is ultimately a matter of interpreting human beings as presumably rational agents.

The courts of law may here be faced with uncertainty in determining how best to interpret behaviour with its origin in other cultures. One example illustrating that such interpretations may be of relevance under criminal law is provided by the ruling published on p. 1146 onwards of the 1984 volume of the Norsk Retstidende court reporter for the Supreme Court, which concerned the sentencing of three Turkish immigrants; a father and two sons, who had killed a 31-year old, married compatriot, who had engaged in sexual conduct with the 18-year old daughter and sister of those who committed the homicide. The Supreme Court stated the following:

> çI agree with the prosecuting authority that people from foreign countries and cultures who settle in this country cannot generally expect that moral views or traditions found in their countries of origin will be taken into account in evaluating their actions from the perspective of criminal law or in sentencing them, if such views or traditions are not recognised in this country. Immigrants must as a general rule adapt to the circumstances and views prevailing in this country.
>
> However, in the present case the actions of the convicted persons are thus influenced and motivated by the expectations imposed on them by their culture of origin and by their compatriots in this country in the situation in which they found themselves, that I find that this needs to be taken into account in the sentencing. The conflict that gave rise to the homicide

> had its background in the culture to which both the convicted persons and the victim belonged. I am of the view that the tradition in their country of origin, with its attitudes and stipulations, places the culpability of the convicted persons in a special perspective.è[614]

The reason for quoting the above is not to express any view on whether it was appropriate or not appropriate to let cultural factors influence sentencing in this case, but to illustrate that the interpretation of actions depends on cultural factors.[615] This is also the case when establishing intent and other states of mind on the part of the offender, and not least in relation to the matter of criminal insanity. When evaluating symptoms, it may be of importance to assess these in their appropriate cultural or religious context. And cultural factors may be of relevance, not least to the matter of criminal insanity; cf. 19.7.4.1.

Uncertainty relating to the perpetratorôs perception of own experiences (introspective experience) may also have two explanations. Firstly, it may be uncertain whether the perpetrator has had the ability or willingness to engage in introspection. Secondly, it may be uncertain whether such introspection has been correctly communicated.

Whether what the offender communicates concerning his or her own thoughts is viable is a matter of interpretation. Whether such communication is truthful will in practice be determined by interpreting the testimony from the perspective of his or her behaviour: A person who after prolonged reconnoitring behaviour breaks into a warehouse and is caught whilst leaving it carrying goods, will in a normal situation not be believed if arguing that the act was unplanned.

Whether the offender has had, or currently has, insight into his or her own mental life, will need to be determined by the court on the basis of experience from corresponding or similar situations, with the assistance of experts if need be. In other words, such uncertainty also comes down to a matter of interpreting the situation.

To the extent that one is unable to eliminate uncertainty as outlined above through interpretation, it is common practice to deal with it by applying the criminal standard of proof; cf. 10.2.2.1. However, it is worth noting that this is regulation of a different type of uncertainty than that associated with external factual circumstances.

10.4.3.4 Uncertainty with regard to a psychosis diagnosis

The Committee is of the view that the issue of whether the offender shall be deemed to be of unsound mind should be approached on the basis of medical diagnoses. One may say that such diagnoses serve as tools to identify those who do not have the maturity, mental capacity or awareness necessary to be accorded criminal liability.

A diagnosis of psychosis is, like other medical diagnoses, established on the basis of an international diagnosis system, ICD-10. The diagnosis system functions as a guideline-based checklist. The system does not specify criteria with a definite meaning, but requires specified symptoms to be subjected to a discretionary clinical medical assessment before establishing a diagnosis.

As noted in 8.4.3, the delineation of various diagnoses in the system is partly based on the nature of the symptoms, partly on their seriousness and intensity and partly on their duration.

[614] Ruling published on p. 1146 onwards of the 1984 volume of the Norsk Retstidende court reporter for the Supreme Court, on p. 1150.

[615] The ruling would appear to have been deviated from in case law and has been criticised in legal theory; cf. ruling published on p. 445 onwards of the 1989 volume of the Norsk Retstidende court reporter for the Supreme Court, on p. 446, ruling published on p. 750 onwards of the 2004 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraph 17, and Garde (2001), pp. 576ï 577.

There are varying degrees of psychoses, and the system allows for a person to have a psychotic disorder without clear psychotic symptoms, for example if the disorder is managed through antipsychotic medicine.

In addition to potential uncertainty as to the existence of symptoms, as discussed in 10.4.3.3, there may be uncertainty as to what significance the diagnosis system accords the symptoms. It is reasonable to expect such uncertainty to arise, precisely since the diagnosis system takes the form of guidelines. It is a generally held view that the term psychosis is not unambiguous and that there are no sharp distinctions between disorders that fall within and outside the scope of the term psychosis.[616]

There are two aspects to the vagueness of the term psychosis. Firstly, there exists no definite specification of symptoms that may indicate psychotic disorder. The diagnosis of çparanoid psychosisè may serve to illustrate this, as its symptom description includes, inter alia, the terms çparanoiaè and çgrandiosityè, which indicate a rather vague meaning. Secondly, the criteria that form the basis for the discretionary clinical assessment used in determining whether the symptoms are sufficient to qualify for a diagnosis of psychosis are, reasonably enough, themselves also discretionary in nature.

Whether uncertainty relating to symptoms and discretionary clinical assessments prevents a diagnosis of psychosis, depends on an interpretation of the diagnosis system. If this type of uncertainty cannot be clarified or eliminated through interpretation based on the criteria of the diagnosis systems itself, the implications of such uncertainty for the matter of punishment exemption must depend on an interpretation of the term psychosis as used in the legislative wording.[617]

The point is this: The legal psychosis concept in Section 44 of the Penal Code is directly linked to the medical psychosis criteria under the diagnosis system. Uncertainty concerning the meaning of the medical diagnostic criteria therefore implies, at the same time, uncertainty concerning the meaning of the legal psychosis concept. Such uncertainty is of a *legal nature*. Consequently, uncertainty relating to the establishment of a diagnosis of psychosis must be handled as an *issue of legal interpretation* of the insanity rule, and *not* as an evidential issue. Such interpretational issue must be resolved with reference to the legislative basis of the insanity rule. This is ultimately a matter of whether the rationale behind the criminal insanity rule suggests that the aberration in question should fall within the scope of the rule.

The Committee also wants to include aberrations that are equivalent to psychosis under the punishment exemption because of, inter alia, the type of interpretational issue outlined here; cf. 8.9.4. Including equivalent aberrations means that one is not restricted to letting only medical diagnoses developed for other purposes determine who should be exempted from punishment. A further tool is placed at the disposal of the court for purposes of determining whether the accused has sufficient maturity, mental capacity or awareness to be accorded criminal liability. This means that the legal element to the insanity evaluation is clearly expressed in the legislative wording.

This is already to some extent reflected in the çmedical modelè under current law. This is because it is required that the person in question is çpsychoticè ï in some contexts expressed by stating that the psychosis needs to be çactiveè ï a concept or classification that is not included

[616] Lßvlie (2012), pp. 163ï 164.

[617] Lßvlie (2012), p. 177.

in the ICD-10 system; cf. also 6.4.3.[618] What characterises such aberrations is a manifest deficiency in the perception of reality, and this conceptual clarification thereby allows for the performance of a discretionary legal assessment regarding which aberrations are sufficiently symptom-intensive and therefore shall not result in punishment.

10.4.3.5 Uncertainty with regard to equivalent aberrations

The Committeeôs proposal for a punishment exemption in respect of aberrations that are equivalent to psychosis implies the use of criteria that are formally detached from medical diagnoses. The courts shall, based on the legal concept of equivalent aberrations, determine whether the state of mind of the accused is such that criminal liability should not be imposed, irrespective of whether the aberration falls within the scope of the diagnosis system in ICD-10.

One of the key reasons why the Committee proposes that equivalent aberrations shall also fall within the scope of the punishment exemption rule, apart from the fact that it specifies as precisely as possible who should be encompassed by the rule, is to clarify the division of responsibilities between the experts and the courts. Danish legal theory has also held up such a clear division of responsibilities between medicine and law as an ideal, and considered it part of the rationale behind a rule on equivalent aberrations:

> çPhysicians should to the extent possible be enabled to express their sincere opinion on the basis of their professional terminology and be led away from the temptation to use the label çinsaneè with excessive opportunism.è[619]

The legislative proposal of the Committee specifies certain symptoms of particular relevance in identifying equivalent aberrations, but other symptoms may also be of relevance; cf. 8.4. As with the question of whether the perpetrator was in a state of psychosis, it will depend on an interpretation of the criterion of equivalent aberrations whether the identified symptoms, and the uncertainty associated therewith, are sufficient to merit a punishment exemption.

The reason why this type of uncertainty should be approached from the perspective of legal interpretation, and not from that of the standard of proof, is that such uncertainty does not concern the existence of factual phenomena, but the interpretation of these. One example of the Supreme Court having engaged in such interpretation pursuant to Section 44 of the current Penal Code is provided by the following statement from the first justice to deliver an opinion in the ruling published on p. 634 onwards of the 1960 volume of the Norsk Retstidende court reporter:

> çI am of the opinion that the mental or psychopathological factors that have been invoked and asserted to merit the exclusion of criminal capacity in the present case are, by their nature, such as must be assumed to have been contemplated at the time of the adoption of the statute and, moreover, that such factors would have fallen within one of the two alternatives mentioned in Section 44 of the Penal Code if these had been of sufficient intensity.è[620]

Such an approach is also supported by other case law. One example is that the Supreme Court has concluded that so-called çblurred intentè falls within the scope of the intent categories of

[618] This will presumably be largely overlapping with the so-called active untreated phase (between the prodromal phase and the remission phase); cf. 8.4.4.1.

[619] Waaben (1968), pp. 43ï 44. See more of the quoted text above in the small-font paragraph in 7.2.2, which addresses the specification of the ambit of the criminal insanity rule in Danish law.

[620] Ruling published on p. 634 onwards of the 1960 volume of the Norsk Retstidende court reporter for the Supreme Court, p. 635. The ruling was rendered with dissenting votes (3ï 2), but none of the minority votes related to this issue.

dolus indirectus (indirect intent) and dolus eventualis (legal intent).[621] This implies that the courts may conclude that the accused has acted intentionally also in situations in which the subject matter of the ruling has not been entirely clear in the mind of the perpetrator. Such interpretation may be understood to mean that the requirement for intent is çmodifiedè or çexpandedè to allow intent to be inferred also in situations in which it is uncertain how the conduct of the offender should be interpreted or understood.

Uncertainty as to the existence or intensity of the symptoms that may merit inclusion under the çequivalentè alternative is, on the other hand, factual uncertainty that will need to be addressed from the perspective of the standard of proof; cf. 10.4.3.3.

10.4.3.6 Summary

The discussion has demonstrated that one has not by specifying a standard of proof exhausted the matter of uncertainty in relation to the issue of criminal insanity. What shall be the implications of uncertainty about the meaning of diagnostic criteria and equivalent aberrations as addressed in 10.4.3.4 and 10.4.3.5, respectively, will depend on an interpretation of the punishment exemption rule.

Instead of approaching uncertainty with regard to matters of legal interpretation from the perspective of the standard of proof, the judge should interpret the rule on the basis of its justification and the considerations it reflects. Irrespective of whether this pertains to the punishment exemption ruleôs medical diagnostic criteria or more general variables, it is of decisive importance that the court-appointed experts communicate professional uncertainty, thus enabling the court to determine the implications of such uncertainty for criminal liability and how it shall be dealt with.

10.4.4 Legal uniformity

Applying the general criminal standard of proof serves to clarify and distinguish the legal and factual aspects of the criminal insanity assessment from each other.

Any doubt as to whether an aberration falls within the scope of the criminal insanity rule, including any doubt with regard to the establishment of a diagnosis, will under the Committeeôs proposal initially be a matter of interpreting the rule with regard to medical diagnosis systems for determining whether the aberration shall be classified as psychosis, or of interpreting the insanity rule to determine whether it shall be classified as an equivalent aberration. The court must thereafter determine whether the symptom intensity in question is sufficient to be encompassed by the statutory criterion.

The clarification of the scope of the standard of proof serves, in combination with the supplementary element of equivalent aberrations, to turn such uncertainty as may arise under the insanity rule into a legal matter. This is because these two aspects make it clear what are legal issues that will need to be resolved on the basis of an interpretation of the criminal insanity rule. Such clarification reflects the Committeeôs fundamental view that psychiatrists shall keep to psychiatry and lawyers to law; cf. 14.2 and 14.3.

Turning the criminal insanity assessment into a legal matter will also provide the courts of law, with the Supreme Court at the forefront, with a tool for enforcing the scope of the insanity rule, thus enabling them to manage any evolvement of the rule as the result of expanded knowledge concerning mental aberrations. This will contribute to a high degree of legal uniformity, and serve as the best guarantee against unintended liberalisation and heterogeneous

[621] Ruling published on p. 1104 onwards of the 2011 volume of the Norsk Retstidende court reporter for the Supreme Court, paragraphs 17ï 20.

practice. The Committee recommends that such issues be clarified on the basis of thorough proceedings in individual cases.

10.4.5 Sentencing

The Committee is of the view that the general criminal standard of proof should also be applied to circumstances as mentioned in Section 56 of the Criminal Procedure Act on punishment reduction. This is in conformity with long-standing case law. The Supreme Court stated, in the ruling published on p. 634 onwards of the 1960 volume of the Norsk Retstidende court reporter, that any doubt as to whether the perpetrator had suffered «a severe transient disturbance of consciousness» would have to be for his benefit.[622] This standard of proof would also appear to have been applied in subsequent rulings.[623]

10.4.6 Codification

A substantive standard of proof is implied by the wording «Everyone has the right to be presumed innocent until proved guilty according to law» in Article 96, second paragraph, of the Constitution; cf. 10.2.2.3.

The Committee sees no reason for further codification of the general criminal standard of proof. There is no tradition for such codification, and the lawmaker saw no reason for codifying this when enacting the Penal Code of 2005 either. The criminal standard of proof is generally known and adequately entrenched in Norwegian law as it is; cf. 10.2.2.1.

A separate question is whether it is nonetheless necessary to take the step of codification to ensure implementation of the views expressed by the Committee. The issue arises because the current practice of a lowered standard of proof is based on the ruling published on p. 173 onwards of the 1979 volume of the Norsk Retstidende court reporter for the Supreme Court and must be considered established case law. However, the Committee is of the view that the source of law situation does not necessitate codification.

It may be asked whether the general standard of proof – which as mentioned will in the view of the Committee apply the same threshold in respect of all conditions for criminal liability – is not already implied by Article 96 of the Constitution after the presumption of innocence was incorporated into the said Article. As emphasised by the Committee above, the standard of proof will only apply to uncertainty concerning facts. As far as legal uncertainty is concerned, the court shall choose the alternative best supported by the available sources of law.

We have a long tradition of applying the general standard of proof in case of factual uncertainty, primarily in case of doubt as to facts of relevance to the matter of guilt or innocence. This important distinction between factual and legal uncertainty, which may also give rise to delineation challenges as far as the issue of criminal insanity is concerned, is addressed neither in the Supreme Court ruling from 1979, nor in those theoretical contributions that have briefly touched on the matter. This significantly reduces the weight of these sources of law.

In other words, it is only in case of doubt as to the facts that the accused shall be given the benefit of any reasonable doubt, and it must be appropriate to apply this identically in respect of all conditions for criminal liability in accordance with general principles of criminal law.

[622] Ruling published on p. 634 onwards of the 1960 volume of the Norsk Retstidende court reporter for the Supreme Court, on p. 637.

[623] See the ruling published on p. 864 onwards of the 1985 volume of the Norsk Retstidende court reporter for the Supreme Court, on p. 867. From another field, see the ruling published on p. 1945 onwards of the 1998 volume of the Norsk Retstidende court reporter for the Supreme Court. See also Strandbakken (2003), pp. 471–472.

These perspectives suggest that it is not necessary to effect any legislative amendment in order for the assessment of the Committee to be implemented.

Although the Committee does not propose codification, it recommends an amendment to the wording of the innocence presumption in Article 96, second paragraph, of the Constitution. The current wording, which is quoted in 10.2.2.3, is heavily inspired by Article 6(2) of the ECHR:

> çEveryone charged with a criminal offence shall be presumed innocent until proved guilty according to law.è

However, the term çproved é according to lawè as used in Article 96, second paragraph, of the Constitution, Sub-section 2, may be read quite differently depending on whether it is used in a convention that imposes commitments on a state or in such stateôs own constitution. Whilst this term as used in the Convention puts the emphasis of how states must proceed in order to find a person guilty, the term çaccording to lawè as used in the Constitution is more likely to convey the impression that the constitutional protection of the accused will depend on the legislation as applicable at any given time. This has probably not been the intention, but is a plausible interpretation based on the actual wording.

Especially with regard to as important a provision as Article 96, and as important a rule of law guarantee as the presumption of innocence, it is the view of the Committee that it is important for the wording to exclusively point towards the protection intended to be conferred by such provision.

The Committee therefore proposes that the provision in Article 96, second paragraph, of the Constitution be amended as follows (amendments in italics):

> çAny person *shall be considered innocent until the opposite is proved.»*

This wording expresses more precisely the protection that should be conferred by the Constitution and is semantically more straightforward.

The Committee has also considered whether the current formulation that one shall be çconsideredè innocent until the opposite is proved may convey an inaccurate impression as to what is meant. The intention is, after all, that a person çisè innocent according to law until a final judgment has been rendered which concludes that there is sufficient evidence to the opposite effect. In addition to this definitional observation, there is the consideration that çisè highlights, to a greater extent than çconsideredè, how he or she shall be treated within the legal system. The Committee has nonetheless concluded, based on an overall assessment, that the word çconsideredè should be used, since one cannot necessarily know whether or not he or she is actually guilty or innocent, and that the said term therefore provides the most realistic description of what is the actual situation of the person who is to be treated as innocent.

10.4.7 Summary and observations concerning the implications of the Committee's proposal

The Committee is of the view that the object of proof ï i.e. what needs to be proved ï should be that the indictee is of sound mind; cf. 10.4.1. The Committee is of the view that the rationale behind the general criminal standard of proof is fully applicable also to the issue of soundness of mind. Also in case of an incorrect ruling on the issue of criminal insanity will the negative implications of an incorrect conviction generally outweigh the implications of an incorrect acquittal.

It is the opinion of the Committee that neither value-based, nor evidence-based, arguments merit any deviation from the criminal standard of proof. The justifications for punishment are no less relevant to soundness of mind as a condition for criminal liability than to the other conditions for criminal liability, and hence these cannot be invoked as an argument in favour of lowering the standard of proof. Nor has the examination of foreign law identified any argument suggesting that Norwegian law should deviate from the general criminal standard of proof.

A further argument for applying the criminal standard of proof is that it will represent a practicable rule. The standard of proof threshold will be clearly defined, which will have positive practical implications, not least in terms of prosecution practice, including the matter of discontinuation of prosecution. Besides, it is simplifying for the criminal standard of proof to be applied uniformly in respect of all conditions for criminal liability.

It is conceivable that the views expressed by the Committee may imply that a somewhat larger number of persons will be deemed to be of unsound mind within the meaning of criminal law than at present, since more evidential certainty will be required with regard to the soundness of mind of the accused than under the legal interpretation advanced in the ruling published on p. 173 onwards of the 1979 volume of the Norsk Retstidende court reporter for the Supreme Court. However, since few cases are resolved on the basis of evidential doubt in the interval between the current standard of proof and the proposed standard of proof, the increase in the number of persons declared to be of unsound mind will not be large.

Besides, the situation may well be that fewer persons than at present will be considered of unsound mind. This has to do with the proposal making, through its rationale, a clear distinction between factual and legal doubt. Any doubt as to how the aberration shall be defined, including whether it falls within the scope of Section 44 of the Penal Code, shall be deal with as a matter of legal interpretation. This implies that all legal uncertainty shall be resolved on the basis of the reasoning behind the punishment exemption rule and not, as would appear to be the case at present, by applying the criminal standard of proof outside its true ambit.

Irrespective of whether the rule will in practice result in a larger or smaller number of persons being deemed to be of unsound mind, there is reason to believe that this approach will result in greater accuracy than under current law. The standard of proof will provide assurance that those groups of offenders who should be exempted from punishment by reason of the legislative basis of the criminal insanity rule are in fact also being exempted from punishment. It may be added that the Committeeôs proposal to strengthen societal protection through the conditions for applying the special sanction is not affected by the standard of proof; cf. Part IV. In other words, there is in the view of the Committee no reason to fear unwanted consequences of the proposal for also applying the general criminal standard of proof to the issue of whether the perpetrator was of sound mind.

Part III
Expertise

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14 The Committee's insanity rule and the need for expertise

14.1 Need for expertise

The Committee proposes a continuation of the tradition of criminal insanity rules that require the involvement of the disciplines of medicine and psychology; cf. 8.3.4, 8.5 and 8.6. If these insanity rules are adopted, it will therefore in future be necessary for the prosecuting authority and the courts of law to make use of psychiatric and psychological expertise. Such would also have been the case for most conceivable alternatives to the rule recommended by the Committee.

Psychiatry and psychology have theoretical and experience-based knowledge of the group of offenders encompassed by the criminal insanity rule. This includes knowledge of the characteristics of the relevant states of mind, how these can be classified and how these can be identified methodologically. They also have knowledge of relevance to determining whether it is appropriate to adopt measures in relation to offenders who suffer mental aberrations that result in them being of unsound mind within the meaning of criminal law.

Such knowledge must be taken into consideration when applying the legal rules in this field to the specific factual circumstances. The legislative proposal implies that experts will, as under current law, assist the courts with regard to the issue of whether the accused was in a state of psychosis or severely impaired consciousness at the time of the offence or was intellectually disabled to a high degree. And they will assist the courts in clarifying the symptoms that form the basis for the assessment of the courts as to whether the accused was in a state that should be deemed equivalent to a state of «psychosis».

The Committee proposes that psychiatric experts and psychologists shall assist the courts in determining the sanctions as well. Partly in clarifying whether persons who are deemed to be of sound mind within the meaning of criminal law suffered a mental aberration that merits a punishment reduction. Partly in clarifying whether a special criminal sanction should be imposed.

Psychiatrists and psychologists who thereby serve as advisors to the courts may contribute significantly to establishing the facts of the case. Consequently, high standards with regard to presentation, professionalism and integrity must be required and expected on their part. High standards must also be required and expected on the part of the courts and other legal practitioners in their handling of expert opinions and statements. Since the legislative proposal is predicated on the involvement of special professional expertise not in the possession of lawyers and courts, such expectations and requirements need to be presented and formulated as clearly as possible; cf. 19.6.

14.2 The duties of the expert

It is the general impression of the Committee, as supported by various indications, that the implementation of Section 44 of the Penal Code has largely been left to court-appointed experts, in the sense that clear conclusions from the experts have been applied by the courts of law.[624] This means that the expert evidence can be characterised as «authoritative»; cf. 19.2. The importance of such evidence has therefore also given rise to criticism; cf. 13.4.

[624] Mæland et al. (2008), p. 217, and Official Norwegian Report NOU 1974: 17, p. 47.

The said practice is understandable in view of the fact that Section 44 starts out from the technical medical psychosis concept, which encompasses a group of more or less defined disorders, and that diagnosing such a disorder requires, in addition to the identification of symptoms in accordance with the diagnostic criteria in ICD-10, a *discretionary clinical medical assessment*. Clinical psychiatric or psychological experience is required to establish the aberrations characterised by the symptoms required under the criminal insanity rules.

The criteria for establishing a diagnosis are partly vague and discretionary in nature. Since criminal insanity is defined on the basis of medical criteria, and it is in practice determined by experts whether the perpetrator was in a state of psychosis or automatism at the time of committing the act, the implication is that the need for clarification and legal development resulting from the vagueness of the criteria has primarily been met by the court-appointed experts and the Norwegian Board of Forensic Medicine. This means that the specific delineation of criminal insanity has in actual fact been determined by the experts, often referred to as «forensic psychiatry».

This role has in practice been further strengthened by way of the mandate formulation and the conclusions of the experts having largely been phrased as a direct question and answer, respectively, as to whether the prerequisites under the Penal Code have been met. One example of such a phrasing of the question from the standard mandate is: «Was the accused at the time of committing the act psychotic, in a state of automatism or intellectually disabled to a high degree? (Section 44 of the Penal Code).»[625]

Such duties will be eliminated if the legislative proposal and recommendations of the Committee are implemented. The Committee is of the view that the role of experts shall only be to provide professional psychiatric and psychological assistance to the courts: The psychiatrist and the psychologist will be providers of professional expertise, the legal significance of which will need to be assessed by the courts.

The proposal and recommendations of the Committee will make the duties of experts clearer, and counteract the tendency of experts, as encouraged by the legal tradition, to encroach on the field of law. This is necessary because experts have at present too much influence over issues that they neither should solve, nor are particularly well placed to solve.

In other words, one main observation of the Committee is that a clearer distinction should be made between medical and legal issues than at present. This perspective supports the general premise that knowledge of the law is in the possession of the courts, and that the courts shall examine and apply the law of their own accord.

It is the considered opinion of the Committee that the experts shall *not* – as stated in a report on the involvement of forensic medicine – express any view with regard to legal concepts, such as for example the term «insane» in Section 44 of the Penal Code as worded prior to the amendment in 2002:

> «Where the medical model is practised, it becomes the duty of the experts to reply in the affirmative or in the negative to the question of whether there is, for example, mental disease on the part of the observee.»[626]

For the alternative «psychotic» in the proposed insanity rule, the evaluations and examinations conducted by psychiatrists and psychologists will continue to be of significant interest. This is because the rule refers to medical conditions – which are symptom-intensive – under

[625] Rosenqvist and Rasmussen (2004), p. 88.

[626] Official Norwegian Report NOU 2001: 12, p. 55.

ICD-10, which conditions psychiatrists and psychologists have specialist knowledge of. It is nonetheless for the court to ultimately determine, based on the symptom description, whether the perpetrator was at the time of committing the act suffering from sufficiently intensive symptoms to fall within the scope of the legislative wording «psychotic». This is occasionally formulated as a question of whether he or she was in a particularly symptom-intensive state of psychosis. This is in this context a legal, and not a medical, classification; cf. 6.4.3 and 8.9.2.

As far as concerns the alternative of «equivalent aberrations» under the criminal insanity rule, it is for the court to determine which disorders and symptoms fall within the scope thereof, which includes determining whether states bordering on a state of psychosis shall be encompassed by the punishment exemption rule. By including «equivalent aberrations» in the rule, it is clearly signalled what constitutes a medical assessment criterion and what constitutes a legal assessment criterion. If the nature and symptom intensity of the aberration has been established, but such aberration is not classified as a psychotic state under professional medical categorisations, thus falling outside the scope of the legislative term «psychotic», it is a matter of legal interpretation to determine whether the specific aberration shall be deemed «equivalent» and, if applicable, merit a conclusion of criminal insanity. The key issue is here, as also indicated in 8.9.3, how intensive the symptoms of the perpetrator were at the time of committing the act.

In case of uncertainty concerning factual aspects of the actual aberration, it will depend on the standard of proof and the assessment of the court of such factual aspects whether it shall be concluded that the accused was of sound mind at the time of the offence; cf. Chapter 10. It is also for the court to decide the implications of the aberration having been self-induced, if applicable; cf. Chapter 9.

14.3 «Forensic psychiatry»

«Forensic psychiatry» is a term denoting the services provided by psychiatrists and psychologists as experts before the courts of law. Since the criminal insanity rules have to some extent been based on psychiatric terminology, the role of «forensic psychiatry», and the interpretation of such role, has become somewhat different from that of other branches of «forensic medicine».

The Committee is proposing, as mentioned, that the distinction between medicine and law be made clearer than at present. A key observation on the part of the Committee is precisely that the legal rules refer to, and derive legal effects from, mental aberrations that are to be assessed by experts on the basis of their general professional medical, psychiatric and psychological expertise. The rules do not refer to specific «forensic psychiatric» variables.

The role of the expert in resolving such issues is no different from the general role of experts – he or she shall draw on his or her professional knowledge to shed light on the facts presented to the court of law. This is purely a matter of professional psychiatric and psychological assessments. Under the Committee's proposal, the expert shall neither apply the criminal insanity rule to the facts of a case, nor engage in any assessment of the legal meaning of such rule. This is the exclusive domain of the court.

Those professionals who typically serve as experts in such cases often use terms like a «forensic psychiatric psychosis diagnosis» or similar. Such terms are also used in some legislative contexts.[627] These are strictly speaking terms without any legal or medical meaning. There exists a medical psychosis concept, and there exists a criminal insanity rule in Section 44 of

[627] See for example Chapter 13 of the Criminal Procedure Act.

the Penal Code that uses the term «psychotic». However, the meaning of the legislative psychosis concept, which is linked to the perpetrator's symptom intensity at the time of committing the act, is purely legal, although the application of the legal rule to the facts of the case requires a prior medical assessment. Consequently, there is neither any need, nor any scope, for operating with a hybrid in the form of a separate category of «forensic psychiatric psychosis diagnoses».

In the term «forensic psychiatry», the word «forensic» serves to indicate the purpose of psychiatry in this context – it refers to ordinary psychiatry applied for forensic purposes. Those psychiatrists and psychologists who are professionally involved in guiding legal practitioners, will also accumulate experience within medicine and law that it may be appropriate to structure and communicate. It may in such a context be appropriate and fitting to use the term «forensic psychiatry» to denote such activities of psychiatrists and psychologists. In addition, the classification under the ICD-10 system is largely based on actual behaviour; cf. 8.4.2. Hence, there will in some areas be a high degree of overlap between medical classifications and offence categories. An example of this pyromania.

However, those who use the term «forensic psychiatry» need to be aware that such term is indeed a hybrid and that a sharp distinction needs to be made between psychiatric and legal issues.

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Part IV
Societal protection

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Part V
Financial and administrative implications and proposed legislative amendments

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26 Proposed Act relating to amendments to the Penal Code, etc. (new insanity rule) – draft legislation and comments

26.1 […]

26.2 The Committee's legislative proposal with comments

26.2.1 The Penal Code

26.2.1.1 Legislative proposal

Act of 22 May 1902 No. 10, General Civil Penal Code, to be amended as follows:

[…]

In Chapter 3, Conditions governing criminal liability, Sections 44 and 45 to be amended.

Section 44 of the Penal Code to be worded as follows:

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

Nor shall a person who was intellectually disabled to a high degree, or correspondingly debilitated, incur criminal liability.

Section 45 of the Penal Code to be worded as follows:

Self-inducement of a state as mentioned in Section 44, Sub-section 1, may be punished. Such a state that is a consequence of self-induced intoxication*,* shall not exclude punishment.

The current Section 45, first sentence, to be become its second sentence.

[…]

26.2.1.2 Comments

[…]

Regarding Section 44 of the Penal Code:

The proposal for a new insanity rule in Section 44 of the Penal Code is based on the so-called medical model; cf. 8.3. The basic criterion is that the perpetrator must have been in «psychotic» state at the time of committing the act. The criterion is met if the offender at the time of committing the act had a psychotic disorder *and* the symptoms were of a certain intensity. That symptom intensity shall be decisive is also indicated by the symptom specification included in the wording. It is clearly reflected in the legislative wording that it is for the court to decide whether the statutory requirement of «psychotic state» has been met.

In other words, «psychotic» does not correspond directly to a medical diagnosis, and shall instead be understood as a legal term. It follows from this that court-appointed psychiatrists or psychologists do not have special qualifications for determining the scope of such term, or for applying it to specific facts. Consequently, the experts shall no longer express any opinion as to whether the statutory criterion has been met. The court shall only draw on – here as in other

areas requiring expertise – the special professional expertise and experience of psychiatrists and psychologists in establishing and describing the medical fact, i.e. the functional ability, cognition and perception of reality on the part of the accused, under assessment. This is specifically indicated in the legislative wording by the term «[a] person deemed by the court».

The term «must be deemed equivalent to a psychotic state» implies that aberrations that cannot be classified as psychoses in the medical sense may also result in a criminal insanity ruling. The disorders in question interfere with the psyche and motivations of the perpetrator in a similar and correspondingly fundamental manner as a psychosis. The legislative term «psychotic» will, as mentioned, not be identical to the medical psychosis concept. The term «equivalent aberrations» has even less of a foundation in medical terminology.

This applies to a narrow group of aberrations. The person needs to be as aberrant as a psychotic person, thus implying that the rationale behind the punishment exemption applies correspondingly. Such normative evaluation will form part of the assessment as to whether the relevant aberration «must be deemed equivalent» to a «psychotic» state. However, the courts of law shall not distinguish between the person of unsound mind and the person of sound mind solely on the basis of an evaluation as to whether the justifications for punishment suggest that the accused should be held liable. The decisive factor shall be a specific assessment of the symptoms of the perpetrator and the intensity of these. The role of the expert will here be the same as in relation to the psychosis criterion.

Since the wording specifies the symptoms that need to be present in order for the perpetrator to be deemed to have been in a psychotic state or in an equivalent state of aberration at the time of committing the act, it is clearly indicated what shall be emphasised in the criminal insanity assessment. It is clearly indicated, at the same time, that it is neither a medical diagnosis, nor the fact that the perpetrator has a mental disorder, which justifies his or her exemption from criminal liability, but the relevant disorder's impact on the key mental functions mentioned in the legislative wording. Which symptom intensity is therefore necessary to be deemed to be in a «psychotic» state or equivalent to a psychotic state depends, as mentioned, on the court's interpretation of the legislative wording. Uncertainty as to how intensive symptoms the perpetrator was suffering at the time of committing the act is a question of which fact shall be applied, and must be subject to the legal standard of proof; cf. 10.4.3.3.

The ruling pursuant to Section 44 belongs under the matter of guilt or innocence. Consequently, the assessment of evidence cannot be appealed to the Supreme Court; cf. Section 306, Sub-section 2, of the Criminal Procedure Act. It is a question of legislative interpretation to determine what constitutes the criminal insanity threshold. The specific application of the rule to a fact is a matter of application of law, which can be appealed to the Supreme Court. The same concerns the issue of whether the standard of proof has been applied and interpreted correctly. Hence, the Supreme Court will have considerable scope for defining the threshold and for providing guidelines on the application of the rule.

Sub-section 2 of the provision is a continuation of current law, although the wording also includes any person who at the time of committing the act was mentally debilitated to a high degree, i.e. persons with deviations contracted through for example brain injury or senile dementia, which for criminal law purposes are similar in nature to an intellectual disability of a high degree. The term «at the time of committing the act» in the current Section 44, Sub-section 2, will be omitted. The term is as a matter of fact superfluous in relation to persons with intellectual disabilities. As far as concerns those who are mentally debilitated to a high degree, it follows clearly from the provision that the impairment must exist at the time of com-

mitting the act; cf. the terms «was» and «or». The latter word establishes a link with Sub-section 1, from which is follows explicitly that the aberration must exist at the time of committing the act. See 6.5, 6.6 and 8.6.5.3 for further details in this regard.

Regarding Section 45 of the Penal Code:

The proposed *new first sentence* of Section 45 of the Penal Code stipulates an exception from the insanity rule in Section 44 with regard to psychotic states, equivalent aberrations and severely impaired consciousness. Application of the rule is conditional upon the aberration being self-induced. The rule thereby differs from the current Section 45 in two respects. The provision does not only apply when the state of unsound mind is triggered by intoxicants, but by any means, and it does not suffice that the intoxication is self-induced. Under the Committee's proposal, the *state of unsound mind* must be self-induced.

Consequently, the predominant rule is that a person who has culpably, through intent or negligence, induced a severe mental aberration – which entails a risk of serious crimes – cannot invoke such aberration as a basis for punishment exemption. The contents of the criterion *self-induced* represents, to some extent, a continuation of current law. The specifics with regard to what shall be considered self-induced are outlined in 9.5.4.4.

The rule makes an exception from the criminal insanity rule. Hence, it is also a prerequisite under this provision that *an offence has been committed*. However, the self-induced risk inducement is the reason for criminalisation, and not the fact that an offence has, in purely objective terms, been committed in the aberrant state. The commitment of an offence has been introduced as a prerequisite, instead of simply stipulating a rule that attaches criminal liability to behaviour that entails a risk of causing damage or injury, since such offence will normally be a good indicator that it was indeed dangerous to induce the aberration.

It is not a prerequisite that an offence committed in the state of unsound mind was committed intentionally. This aspect of the new rule needs to be considered in the context of the Committee's proposed amendments to Sections 40 and 42 of the Penal Code; cf. 26.3. The chairperson of the Committee, Rieber-Mohn, has submitted a dissenting opinion in this regard; cf. 9.5.4.3.3.

The general scope of the wording is too broad. A multitude of considerations may indicate that punishment should not be imposed in certain cases. These considerations cannot readily be listed exhaustively and precisely in the wording; cf. 9.5.4.5 for further details. Consequently, the provision is structured as a discretionary rule on the imposition of punishment, but the intention behind the rule is that a punishment exemption may *only* be granted if the risk inducement, based on a socio-ethical assessment, can be said to fall within the scope of the general freedom of action. In other words, the assessment is the same as the illegality assessment that would have been required if criminal liability had been mandatory. However, the application of the discretionary rule will, in procedural terms, belong to the matter of sentencing. This implies, inter alia, that specific reasons shall always be given in resolving any questions arising in the application of the rule proposed by the Committee. Consequently, the Supreme Court will also be able to clarify and evolve the ambit of the new rule and thus promote legal uniformity.

The *second sentence* of the provision is a continuation of the current Section 45 on criminal liability for offences committed in a state of self-induced intoxication, subject to certain minor amendments. The reason for keeping the said provision is that there is some uncertainty as to the effects of the new rule on self-induced unsoundness of mind, and that one needs to be certain about the effectiveness of this rule in the intoxication cases before abolishing the current provision. However, although the wording of the current Section 45 is largely retained, it is

the view of the Committee that the said rule can in certain situations result in altogether unreasonable outcomes. An example is a person who consumes a normal and socially accepted quantity of alcohol, which ordinarily causes an equally accepted and slight intoxication, but reacts in a manner that is completely unanticipated by him or her and by his or her surroundings, enters a state of severely impaired consciousness and commits a serious crime that is completely out of character and alien to his or her manner of being. It is not reasonable to accord full criminal liability to such a person. Hence, the current Section 45 should also allow for somewhat more freedom of action in future, in line with the assessment that may result in an exemption from liability pursuant to the new first sentence of the provision; cf. 9.5.4.5 on the so-called «illegality criterion». Nor is this contrary to the wording of the current Section 45; cf. the term «shall not exclude punishment». That punishment is not excluded does not imply that it must necessarily be imposed.

The continuation of the current Section 45, subject to the reservation just mentioned, will enable the courts to try out the new general rule in the first sentence in practice, whilst at the same time not risking that the scope of the punishment exemption is expanded excessively because of difficult evidential issues. However, the Committee will strongly encourage anyone involved in the administration of criminal justice to seek to resolve all matters of self-induced unsoundness of mind, also when such unsoundness of mind is induced by intoxication, through the application of the new rule in the first sentence, thus enabling the current Section 45 to be phased out over time and eventually to be abolished. This may also bring Norwegian law in this field more into line with the regulation of liability for offences committed in a state of intoxication in other countries.

The term «such a state», which points to the reference to Section 44, Sub-section 1, in the new Section 45, first sentence, expands the wording of the current intoxication provision to also encompass psychoses and equivalent aberrations that are substance-induced. This is a codification of current law as interpreted by the Supreme Court in the ruling published on p. 549 onwards of the 2008 volume of the Norsk Retstidende court reporter. Besides, the amendment implies that prevailing law will be more in harmony with the criminal law principle of legality. The bracketed wording, «caused by alcohol or other substances», in the current Section 45 is superfluous and therefore deleted; cf. also Proposition No. 90 (2003–2004) to the Odelsting, p. 423.

[…]

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Appendix 1.

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Appendix 2.

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