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# Punishment, treatment and fair retribution

OPINIONS

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## I have been asked to write a commentary on society's reactions to criminal acts committed by (in)sane individuals and on how the criminal prosecution system can – if possible – balance the various concerns for treatment, protection of society and fair retribution.

The bombing of the government buildings followed by the mass murder of young people at Utøya 22 July last year, perpetrated by Anders Behring Breivik, forms the contextual background for this commentary.. As of today, it is common knowledge that the two forensic psychiatrists who were appointed initially to examine Breivik concluded that he fulfils the criteria for a diagnosis of paranoid schizophrenia and that he was psychotic at the time of the crime, and thereby unaccountable for his deeds. Other experts have doubted on this conclusion. At present (12 March 2012), Breivik is under compulsory judicial observation by two other court-appointed experts. The observation started 29 February in a custom-built 60-square-metre cell in Ila Prison. This is the first time in Norway that such an observation has taken place within a prison, and not in a psychiatric hospital.

I have not read the initial expert report, and must therefore assess the facts of the matter on the basis of media reports. These do not provide any opportunities for assessing whether Breivik is of sound mind or whether he is unfit to stand trial. My contribution will thus be to clarify what each of these options will imply in terms of criminal prosecution and relevant sanctions.

Since the general issues of «not guilty on reasons of insanity» are most often associated with reported assassinations of prominent politicians and subsequent trials, I wish to extend the perspective on the Breivik case by going almost 170 years back in time (1).

## A murder and a basis for innocence

A Scottish carpenter and Protestant, Daniel M'Naghten (1813 – 65), had developed a strong persecution mania. First, these ideas centred on the police, but later they developed to appear in the form of a perceived international conspiracy against him. Both the papacy and Prime Minister Robert Peel (1788 – 1850) were allegedly involved in this conspiracy.

On 20 January 1843 he fired a targeted shot at a person he believed to be Robert Peel. He had tailed Peel for several days, and shot him from behind as he was approaching Downing Street. However, the man he shot was private secretary Edward Drummond (1792 – 1843), who died in hospital shortly thereafter.

There were no doubts concerning M'Naghten's intention to commit murder – the court based its deliberation on the fact that the pistol had been loaded and the shot fired «feloniously, wilfully, and of his malice aforethought». In court, M'Naghten said that «he was driven to desperation by persecution». Because of his obvious paranoid disorder, the court concluded that he was «not guilty by reason of insanity». Queen Victoria (1819 – 1901) would not acquiesce in letting the assassin go unpunished. A total of nine experts were appointed, but they were all unanimous in their reports.

The verdict gave rise to strong reactions among scholars and laymen alike. On 19 June 1843 the judges in the House of Lords established a standard that became the concluding point of the proceedings, the M'Naghten Rules:

[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused as 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.

During the 1870s, Queen Victoria, who ruled for a long period of time (1837 – 1901), was exposed to further assassination attempts by deranged persons. She found it remarkable that persons who accosted the Queen could be found «not guilty». In 1883, she therefore forced through a legal amendment, to the effect that if the court found that the criteria in the M'Naghten Rules were fulfilled, the verdict should be «guilty, but insane».

At that time, like today, there was an exaggerated fear that deranged people who endanger society should be released too quickly. M'Naghten was to be held in custody indefinitely, at first in Bedlam asylum, where he spent nearly 20 years before he became one of the first to be transferred to the newly erected Broadmoor Criminal Lunatic Asylum, where he died from tuberculosis in 1865.

## Justifications for punishment or exoneration and conditions for criminal liability

It is partly a matter for moral philosophy whether all humans – irrespective of their personal capacity for understanding the criminal nature and/or unfortunate consequences of their actions – can be held criminally accountable. Issues concerning responsibility, choice, free will and punishment have been occupying people for as long as delinquency has been met with social sanctions.

Penal sanctions are based on the fundamental axiom that human beings have a free will. A person's «will» develops through childhood, and is regarded as sufficiently developed at the age of legal responsibility. Without the existence of «free will», it would seem unfair to sentence people to certain «onera» that society has defined. A lack of free will could justify exempting some from criminal liability. In such cases, issues are raised concerning the protection of society.

Society's «right» to punish is based on the idea of fair retribution. It removes the need for private acts of revenge, such as the blood vengeance of the Viking Age or modern-day lynchings and honour killings. In earlier times, and still in some cultures today, this just retribution is regarded as a necessary exercise of God's just will. In light of such theories, the punishment should reflect the severity of the crime. This leads to a detailed, action-specific penal legislation, which characterised European penal systems until the last half of the 19$^{th}$ century. At that time, the penal utility theories («relative justifications») became prominent, usually aiming at general or special prevention.

It is possible to theorise the underlying rationale for punishment, but this would go beyond the framework of this article. However, the justifications referred to above will mainly fail if the perpetrator is *non compos mentis* and cannot be held accountable for the crime.

The Breivik case nevertheless demonstrates that retribution still remains as a justification for a penal verdict. An underlying element in many of the reports is that Breivik should be found fit to stand trial, so that society can give him «the punishment he deserves».

## Conditions for criminal capacity

Western criminal law outlines four cumulative conditions for establishing an individual's criminal capacity. The first condition is the existence of an act of law, since nobody can be sentenced unless a legal basis exists. This applies unabridgedly and is stipulated by Section 91 of the Norwegian Constitution. Nor can the penal instruction be imposed retroactively (Section 97 of the Norwegian Constitution). In addition, there must be no reasons for exemption from punishment, such as necessity, self-defence, consent, etc.

The Breivik case clearly does not represent such a situation, and his actions are subject to penal provisions. Breivik is charged according to the terrorist clause, Section 147a of the Criminal Code, carrying a maximum sentence of 21 years of incarceration, with an opportunity to impose preventive custody. So far, it is foreseen that Breivik will be sentenced to compulsory mental health care, in accordance with the initial assessment made by the forensic psychiatrists. This will be in accordance with the charge by the chief prosecution officer.

Neither is there any doubt that he has demonstrated a sufficient degree of guilt. He has undoubtedly acted in a premeditated manner, from the early planning stage through the implementation. The only doubt concerns whether he was of unsound mind at the time of the act. Guilt and accountability are often confused, as an insane person is often said to «have no criminal capacity». Breivik acted just as intentionally as M'Naghten. But is Breivik insane, like M'Naghten? The court needs to decide this issue upon presentation of the evidence, including the assessment of the four court-appointed forensic experts.

In assessments of insanity according to Anglo-American jurisprudence a «mixed principle» is used, demanding that a strongly deviant state of mind must have been present at the time of the action and that this must have had a strong influence on the perpetration of the crime. Norwegian courts use the biological principle, i.e. that the state of mind alone, if sufficiently deviant at the time of the action, will exonerate from guilt.

## Utility and social control

In the 1890s, during the preparation of the Criminal Code of 1902, new impulses with origins in European criminal-law philosophy had an effect on Norwegian thinking within the field of criminal law. The Criminal Code Commission of 1885, with Professor, later Prosecutor General Bernhard Getz (1850 – 1901) as its chairman and driving force, wished to place greater emphasis on an individual assessment of the delinquent when choosing an appropriate form of reaction. The differentiated criminal prosecution system should serve several purposes:

- Assist the treatable person
- Deter those who do not need any treatment
- Neutralise the incorrigible

On the basis of such considerations of utility, exoneration on the grounds of insanity would give rise to particular problems. Lacunae would occur in the system if the «lunatics» or the «semi-lunatic and wicked» went scot-free. The character of delinquents ought thus to be studied, and the concept of «mental capacity», taken from Russian criminal law, was introduced. The psychiatrists thus had to be instructed to assess whether the delinquent had «insufficiently developed» and/or «permanently impaired» mental capacity. This would entail longer sentences and infer an increased protection of society.

Police Surgeon Paul Winge (1857 – 1920) was adamantly opposed to being presented with such questions, since he was convinced that they belonged to the realm of metaphysics, and not of the natural sciences. «If one wants to have psychiatrists as experts, then they must be presented with psychiatric issues. If one does not seek a solution to such questions, but on the contrary, to metaphysical ones, then one should consider summoning philosophers, or, as they rather should be called, metaphysicians. (...) Of the abovementioned legal-metaphysical problems concerning the properties of mental capacity, a psychiatrist has no better understanding than other people.»

The rules for criminal prosecution followed today stem from the 1990s and originate in the public study *Rules for insanity in criminal proceedings and special reactions* (2). With our present rules, we are back to the statute of 1902. Today too, proposals have been put forward to allow the «semi-lunatic and wicked» – often referred to as the «bothersome» – to be placed under compulsory mental health care. This leads us back to the practice of preventive detention of the late 1920s. I have therefore commented on these regulatory amendments on a previous occasion, under the heading «Nothing new under the sun» (3).

Even though the debate in the early 1990s was similar to the corresponding debate in the years 1885 – 1902 in terms of the content and arguments used, it was not as analytical. Neither was it conducted with the same depth of knowledge, nor with the same view to issues of principle, such as the justification of punishment, the basis for assessing sanity and the quality of assessments as the debate that took place a hundred years ago.

Neither moral philosophy nor jurisprudence – and one could add forensic psychiatry – are prepared to provide generally valid and permanently sound answers. This has not improved over the last hundred years. During the intervening century we have witnessed the emergence of modern evidence-based medicine, including neurology and biologically based psychiatry, psychoanalysis, behavioural sciences and other medical and psychological theories that explain human behaviour. Furthermore, throughout this century the social sciences, such as sociology, criminology and sociology of law, have studied correlations between delinquency, penal reactions and social conditions.

Apparently, we have much more knowledge of the body, the mind and the relationship between individuals and society today, compared to what we had only hundred years ago. This knowledge does not, however, seem very useful for providing valid and lasting answers to the wide and complex issues of moral philosophy that are raised by the Breivik case.

Breivik can be held to be criminally insane and sentenced to compulsory mental health care as a special reaction. In principle, this is a reaction without a pre-specified time limit, and the sentence may be constantly renewed. If he is held to be sane, it is reasonable to believe that he will be sentenced to preventive custody, which is another special reaction without a particular time limit. He is thus likely to remain in Ila Prison, either as a prisoner or as a patient. This is comparable to the M'Naghten case, where being «exonerated» made no difference. There is reason to believe, however, that in the aftermath

of the Breivik verdict – irrespective of the outcome – new demands will be put forward regarding the assessment of the relationship between punishment and treatment of (in)sane criminals. Such a review is, in my opinion, most welcome.

## LITERATURE


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