

U N I V E R S I T E T E T I B E R G E N

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The Rules on Legal Insanity: A Debate

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Current Regulation in the General Civil Penal Code

Section 44:

A person who was **psychotic** or unconscious at the time of committing the act should not be liable to a penalty.

The same applies to a person who at the time of committing the act was mentally retarded to a high degree.



Legal Sanity

- Sanity is a condition for criminal responsibility
- The rules of the criminal law does not define sanity – but only those conditions that negate sanity
- In the legal discourse, sanity is explained as 'skyldevne' – ability of guilt/capacity to criminal responsibility/criminal capacity



The Sane and Responsible Person: Basic Premises

- The concept of criminal responsibility is constructed for moral and legal purposes
- It is based upon certain metaphysical premises:
 - **Freedom**: the responsible agent acts voluntary
 - **Rationality**: the responsible agent is capable to understand and reason about his actions in a given context



Towards Concretisation

- Overall biological/psychological aspects required for criminal capacity:
 - Ability of correct sensation and perception of the world
 - Ability of correct conceptualisation and interpretation of the world
 - Ability of practical judgment on how to act



Legal Insanity

- Mental disorder should not be equated with legal insanity
- Serious deficiencies are required that makes it unreasonable to blame the defendant
 - Deficiencies that affect the defendants' ability to understand the world correctly
- Problematic issues?:
 - Mental disorder and control deficits
 - Mental disorder and empathy deficits



From Concepts to Rules: Some Basic Premises

- Different legitimate demands on a legal insanity rule:
 - Adequate delimitation of insanity
 - Practical for the system agents
 - Its consequences should be justifiable
- The specific character of law makes it difficult to perfectly fulfil all these demands



Central Legislative Considerations

- A legal insanity rule may be constructed in many different ways
- Two ideal type models:
 - The medical model
 - The mixed model
- The dichotomy between the models should not be exaggerated



An Adequate Delimitation of Insanity

- The mixed model is often argued as being preferable
 - By connecting the mental disorder to the act, it reflects the meaning of criminal responsibility
- Arguments concerning the medical model:
 - Some medical conditions might correspond to insanity
 - The problem of flexibility?
- Also the mixed model might be criticised



The Division between Experts and Judges

- Criticism towards the medical model:
 - The current rule on legal insanity largely moves the decision into the diagnostic sphere
 - The experts involvement in legal assessments
- Criticism towards the mixed model:
 - Difficulties in detecting the effects of a disorder in relation to an action
 - Objections regarding legal certainty and predictability



Consequences in the Reaction System

- The problem with mental illness and suffering
- The legal starting point: seriously mental ill people shall not be in prison
- In any case, it shall be taken special regard to their health condition and needs
- The possible mental suffering from detained people cannot justify a wider room for excuse
- The access to adequate care must be realized as a right for the individual - across the distinctions in the reaction system



The Matter of Resources...



The Rules from a Society Perspective

- A legal insanity rule must be considered in relation to the social function of the criminal law
 - The criminal justice system communicates, consolidates and creates certain societal attitudes
 - A legal insanity should not communicate messages that could create or support negative attitudes
- The criminal justice system must, in order to secure trust, be responsive to the citizens' attitudes



Thank you for your attention!



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