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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 deficiences are required that makes it unreasonable to blame the defendant
- Deficiences 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 consequenses 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

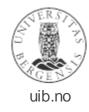




An Adequate Delimitation of Insanity

- The mixed model is often argued as being preferrable
- 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 critisised

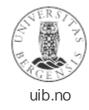




The Division between Experts and Judges

- 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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