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# **Autism and (Norwegian) Criminal Law: discussing the relevance of autism to criminal accountability, sentencing, and risk assessment**

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# Outline

- Why and how autism might be relevant to the questions of criminal accountability, sentencing and risk assessment?
- How does the Norwegian legal framework address these issues?
- What about neurodiversity and disability rights?

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# Norwegian legal framework

## ❖ Criminal accountability

Before 2020: unaccountable if under 15-year-old; and/or psychotic; and/or mentally retarded to a high degree; and/or had severely impaired consciousness.

### Since 2020:

A person who at the time of the act is under 15 years old, is not criminally liable.

The same applies to a person who at the time of the act is **unaccountable due to a:**

- a. **severely deviant state of mind**
- b. severely impaired consciousness or
- c. **severe mental disability**

When assessing unaccountability pursuant to the second paragraph, **emphasis shall be given to the degree of failure in the person's perception of reality and functional capacity.**



(Section 20, Penal Code, emphasis added)

## ❖ Sentencing

**Mitigating circumstances** (§78d, Penal Code, emphasis added):

In connection with sentencing, **mitigating factors** to be given particular consideration are that:

d the offender had, at the time of the . act, an **impaired perception of reality** because of a **deviant state of mind, a mild mental disability, impaired consciousness or severe mental agitation**

**Milder penalty** (§80f, emphasis added):

The penalty may be set **below the minimum penalty** of the penal provision or to a **less severe penalty type** when the offender:

f. at the time of the act had a **significantly impaired perception of reality** because of a **severely deviant state of mind, mental disability or impaired consciousness, but is not unaccountable** pursuant to section 20 second paragraph

## ❖ Risk assessment

- Preventive detention (§40, Penal Code):
  - Renewable prison sentence
  - **Serious (or repeated) crime**
  - **Obvious risk or reoffending** (emphasis given to the committed offence by reference particularly to the **offender's conduct and social and personal functional capacity**)



- Committal to (psychiatric) care (§62 and §63 Penal Code):
  - **Unaccountable offenders**
  - **Serious (or repeated) crime**
  - **Particularly likely risk of reoffending (emphasis given to the offence committed in the context particularly of the offender's general conduct, illness history, current mental state and relationship with alcohol and drugs)**



# Autism and Criminal Unaccountability – Scenario 1

- **‘Severe autism’ impacting the mental state and functioning of the individual**
- **Example:** autistic individual causing bodily harm to a caretaker or a health worker during a meltdown
- **Potential ground for unaccountability in Norwegian law (as severely deviant mental state and/or severe mental disability) if enough failure in functional capacity or perception of reality**



# Autism and Criminal Unaccountability – Scenario 2

- **‘Milder autism’ contributing to worsening the overall mental state and functioning of the individual**
- **Co-occurrence of other ‘mild’ disorders (i.e., mild mental disability)**
- **Potential ground for unaccountability in Norwegian law if the combined effect of the ‘mild’ disorders is retained and severe enough**



## Example 1 (Borgarting lagmannsrett, 18. December 2018):

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

Ducarre et al., 2025, p.20



## Example 2 (Norges Høyesterett, 10. April 2025; §43):

It is not a question of taking into account the autism diagnosis itself, but of **placing emphasis on the offender's low level of functioning**. Whether the low level of functioning is due to the causal factors underlying the autism diagnosis, the diagnosis of mental retardation or both, can be difficult to determine and is in any case **not decisive in the criminal law assessment**.

As I have mentioned, the purpose is to identify mentally retarded offenders whom it is **not reasonable and fair to punish**. In addition to intellectual abilities, **emphasis should then be placed on the degree of failure in understanding reality and functional capacity**. The key point is whether the person can be blamed based on his or her circumstances. **Impaired adaptive function that is related to an autism spectrum disorder may therefore have an impact** on whether the basic condition in Section 20, second paragraph, letter c, of the Penal Code is met.

(author's translation, emphasis added)

### Example 3 (Borgarting lagmannsrett - Dom - LB-2025-186671, 15. April 2026):

(author's translation, emphasis added)

The majority **has taken into account that the diagnosis of unspecified pervasive developmental disorder (autism spectrum disorder), in combination with the diagnosis of mild mental retardation, can further reduce the overall level of functioning.**

However, the majority finds that in this case **there is no evidence that the defendant's level of functioning is so low that it approaches or falls below the guideline limit of IQ 60**, which the Supreme Court points to in HR-2025-662-A as a starting point for the assessment of the basic condition.

The **minority** [...] has doubts whether the condition in Section 20, second paragraph, letter c of the Criminal Code has been met. She points out that **the defendant has appeared immature and childish through his statement**, with an expression and appearance that is **close to that of a boy aged 10-12**. Although he can function satisfactorily in structured situations with support, the minority is unsure whether he **is sufficiently capable of processing experiences and understanding the consequences of his own actions** over time [...]

Against this background, the minority has **doubts whether his overall level of functioning is as high** as the experts have indicated, and whether at the time of the acts **he had the prerequisites to distinguish reliably between right and wrong.**

# Autism and Criminal Unaccountability – Scenario 3

- Impact of **specific autistic features** on crime commission by an individual with ‘mild’ or ‘high functioning’ autism.
- E.g., **lack of social or inter-personal skills; social naivety; cognitive rigidity**
- **Possible situations:**
  - Attempt at social interactions constitutive of **harassment/stalking** due to obsessive and repetitive functioning and lack of social and inter-relational skills
  - **Sexual assaults** due to lack of social and inter-relational skills and inability to perceive subtle cues and/or due to cognitive rigidity and inability to adapt to changing situations in due time



❖ Examples from international case-law:

- *Parish v. DPP*, 2007 (Victoria, Australia)
  - *R v Marinovich*, 2020 (New Zealand)
  - *R v Sokaluk*, 2012 (Victoria, Australia)
- Even high-functioning autism must at least **be properly considered when assessing a defendant's guilt/accountability** (*STATE v. BOYD*, 2004, Missouri Court of Appeals; *Sultan v. The Queen*, 2008; *US v. Cottrell*, 2009, 9th Cir.)

❖ Norwegian legal framework:

- **Would most likely not qualify for criminal unaccountability under Norwegian law because no severely deviant state of mind or severe mental retardation causing failure in overall functional capacity and reality perception**



# Autism and Sentencing

Norges Høyesterett (Dom - HR-2026-713-S; 27. March 2026; §85)

The defendant in this case has **problems taking the perspective of others and understanding other people's intentions and emotional expressions**. This has made him **less well equipped than others in the same situation** to understand how the victim experienced the abuse, and what psychological harm they could have on her. In my view, **this failure to understand reality** provides grounds for **reduced blame** that should be given weight in a **mitigating manner**.

(author's translation, emphasis added)

## Frostating lagmannsrett (Dom - LF-2021-98863, 17. November 2021)

Based on the information provided about the defendant's medical diagnosis at the time of the act, **F84.9 unspecified pervasive developmental disorder**, and what has emerged from the evidence, the Court of Appeal assumes that **he had a reduced understanding of reality in relation to his mother due to his condition** [cf. §78d]. Although the defendant has no history of mental illness, his fixation and negative development in his relationship with his mother from 2018/2019 until the incident are consistent with such a conclusion.

(author's translation, emphasis added)

## Eidsivating lagmannsrett (Dom - LE-2024-1900, 17. June 2024)

After an overall assessment of A's functional level, the Court of Appeal unanimously concluded that A has a **"significantly impaired understanding of reality"**, cf. **Section 80 letter f** of the Penal Code. His cognitive abilities and general functional level mean that his condition is closer to the limit of insanity in Section 20 than what falls under mitigating circumstances in Section 78 letter d of the Penal Code. This makes it **possible to impose a lower sentence or a milder type of sentence** than that resulting from the penalty framework in the sentence.

**[...] His functional impairment is so pervasive that the criminal act must be understood in light of this. [...] It is the specific and special circumstances related to A that justify making the sentence conditional.**

(author's translation, emphasis added)

## Frostating lagmannsrett (Dom - LF-2024-167329, 20. February 2025)

**Experts A and B:** “even if they did not find clear, unrealistic ideas/obvious positive psychotic symptoms in [the defendant] – such as people with serious psychotic disorders have – they consider that **he nevertheless appears in such a deviant state and functioning that can be equated with a serious psychotic disorder.**”

**Expert C:** “It is not found that he has either a psychotic disorder, a substance abuse disorder, a disorder of consciousness, a mental retardation or any other relevant diagnosis beyond the two mentioned [F84.9 Pervasive Developmental Disorder and F60.2] – which, however, **he has major handicaps because of.**”

**The Court:** “believes that it is clear that **A's diagnoses have not resulted in a similar severity of symptoms as the active psychoses, and that his condition therefore cannot be considered a "severely deviant state of mind" within the meaning of the law [...]** The Court of Appeal cannot see that there are mitigating circumstances in the case [nor] basis for the application of Sections 80 letter f or 78 letter d of the Criminal Code.”

(author's translation, emphasis added)

## ❖ Protection against disproportionate effect or a cruel and unusual punishment

- *Glover v. Police*, 2009 (New Zealand)
- *Love v. The Government of the United States*, 2018 – see *Attorney-General v. Davis*, 2016 for a counter-example

**Eidsivating lagmannsrett** (Dom - LE-2024-623, 22. April 2024) – §78d or §80f not retained but: “a prison sentence will be significantly more difficult and burdensome for him than [the usual]’ and ‘there is considerable uncertainty as to whether [he] will be able to endure a prison sentence’ and a ‘not insignificant risk that he may take his own life’ => fully conditional sentence

**Frostating lagmannsrett** (Dom - LF-2024-187871, 14. January 2025) – §78d retained (due to being under 18) but refusal of fully conditional sentence: “people with [Apserger syndrome] tend to be rigid, are interested in structure and have good conditions for adapting to an organized life.”



# Autism and Risk assessment

- ❖ **Autism** sometimes retained as a **mitigating circumstances/ground** for **milder penalty AND** as a **justification** for **preventive detention**
- **Gulating lagmannsrett** (Dom - LG-2024-174793; 18. february 2025):
  - **Mitigating circumstance (§78d)** retained due to the defendant's **Asperger syndrome** and his related **reduced ability to realistically evaluate his relationship with the outside world**
  - **Preventive detention applied** (partly) due to the impact of his **Asperger syndrome**



- ❖ Presence of **debatable and unnuanced (mis)conceptions of autism** in forensic and/or judicial risk assessments

### **Examples:**

- Eidsivating lagmannsrett - Dom - LE-2019-122942
- Norges Høyesterett - HR-2019-832-A
- **Gulating lagmannsrett - Dom - LG-2024-174793**
- Frostating lagmannsrett - Dom - LF-2024-167329



## **Gulating lagmannsrett (Dom - LG-2024-174793; 18. february 2025):**

(author's translation, emphasis added)

**'Although many with the diagnosis F84.5 Asperger's syndrome are well-functioning, the experts would point out that the subject's case appears to be a more serious variant of this diagnosis with symptoms that affect both thinking, behavior and functioning to a much greater extent than is common in most people with this diagnosis. It has been described that a subgroup (approximately 20%) with Asperger's syndrome may have significant aggression problems, not infrequently in the form of aggressive or violent fantasies.**

[...]

**People with ASD are described in this article [Helverschou, 2017] as being characterized by deviations in social interaction, communication and imagination. Risk factors for criminal acts are described as: Social naivety, limited empathy, lack of understanding of social situations, limited ability for moral reasoning, emotional dysregulation, intense special interests, behavioral deviations related to routine violations and limitations in assessing the implications of one's own actions.'** [expert's assessment]

[...]

**As the experts assess it, we would like to state that the subject has a variant of the diagnosis F84.5 Asperger's syndrome which indicates that he belongs to such a subgroup with violent acts and fantasies, and that he is characterized by a number of the above-mentioned risk factors for criminal acts.** [the Court]

## ❖ Literature and research on autism and violence

- **Empathy:** double empathy theory; cognitive v. emotional empathy
  - Role of (violence-related) **special interests** in crime commission still poorly understood
  - **Sub-group** of particularly violent autistic subjects: not established (moving towards co-morbidities and other risk factors as alternative explanations)
  
  - *Helverschou et al. (2015)*: highly selected and **not representative sample; impossible to identify ASD-specific patterns of offending; ca. 1/3 with background in child protection and 83% with at least one psychiatric comorbidity.**
  - *Heeramun et al. (2017)* – Conclusion: ‘An initially observed association between autism and violent crimes at a population level was explained by comorbidity with ADHD and conduct disorder. Better understanding and management of comorbid psychopathology in autism may potentially help preventive action against offending behavior in people with autism.’
- Persistence of **oversimplifications and misconceptions** sometimes contaminating forensic and judicial risk assessments even though the **research into the relationship between criminality/risk and autism does not allow to establish any conclusion yet.**



# Neurodiversity and Disability Rights

- **Neurodiversity** conceiving autism as a **non-pathological neurodevelopmental difference**
- **Disability rights and CRPD (UN, 2009):** Legal capacity; Access to justice; Equality before the law; Liberty and Security
- At first sight might contradict the relevance of autism (and other conditions) to accountability, sentencing and risk assessment
- Can also support a **better-informed and rights-based approach to autism and to its relevance to accountability, sentencing and risk**



# Summary

- ❖ Potential relevance of autism to criminal accountability and sentencing through its impact (with or without other conditions) on the overall perception of reality and functional capacity or on the crime commission
- Unequal treatment across cases?
- ❖ Potential relevance of autism for risk assessment but presence of debatable and unnuanced (mis)conceptions of autism
- **Need for more neurodiversity and rights-based research**
  - ❖ **COMPLEX project sub-study:** exploring the relevance of autism to the criminal unaccountability doctrine through a cross-country study.

## COMPLEX

COMPLEX explores the connection between mental illness and criminal responsibility. The project is funded by an ERC Consolidator Grant, and led by professor Linda Gröning.



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