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An Outline of the New Norwegian Criminal Code

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1 Introduction

On the 1st of October this year the New Norwegian criminal code – *Lov om straff* – entered into force.[1] In fact, the code was already enacted in 2005. But as we will return to, it had been put on hold until now.

A new criminal code is a major event in a legal system. This is particularly so for legal orders such as the Nordic one, belonging to the Continental family of legal orders, where the principle of legality – *nulla poena sine lege parlamentaria* – makes legislation the only legitimate basis for penal power.[2] In Norway, this is the third 'modern' criminal code since the Norwegian legal system received its constitutional basis in 1814. Also, the new code reflects the continental background of Norwegian criminal law. Many of the basic ideas, concepts and principles bear similarities to those found in other Nordic countries as well as in for instance German criminal law. At the same time, the Norwegian legal system has its particularities, which are also reflected in the new criminal code.

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1 Act 2005-05-20-28 on punishment (Lov om Straff).

2 On the principle of legality from a Nordic point of view, see e.g. Frände, Den straffrättsliga legalitetsprincipen - Der Strafrechtliche Gesetzlichkeitsgrundsatz: mit deutscher Zusammenfassung (Juridiska föreningens i Finland publikationsserie 1989) and Strandbakken, Grunnloven § 96, 39 (3/4) *Jussens Venner* (2004) pp. 166–215. For discussions on the character of Nordic criminal law in general, see e.g. Nuotio, The Rationale of the Nordic Penal Policy compared with the European Approach, in Nuotio (red.): *Festschrift in Honour of Raimo Lahti* (University of Helsinki, Faculty of Law 2007) pp. 157–174.

In this article, we will give an overview of the new criminal code, its background and content.[3] The code alone covers over 400 sections, so it goes without saying that a more comprehensive outline is not possible within the frame of this article. We will concentrate on outlining on the basic structure and system of the code and the most important changes from the previous code of 1902. Some nuances and exceptions to the rules described are left out. To some degree we will reflect on the strengths and weaknesses of the new code.

2. Background

2.1 The criminal code of 1842

As mentioned, the Norwegian legal order has its background in Continental legal culture. This background is especially evident when the modern evolution of Norwegian criminal law is addressed.[4] The formative period of modern Norwegian legal culture begun with the enactment of the Constitution of 1814.[5] According to section 84 of the Constitution of 1814, a new criminal code was to be enacted.[6] This initiated a long and difficult process with the criminal code of 1842 as the outcome.

[3] Concerning literature on the code, see Gröning, Husabø & Jacobsen, Frihet, forbrytelse og straff – En systematisk framstilling av norsk strafferett (Fagbokforlaget 2015); Eskeland, Strafferett, 6th ed. (Cappelen Damm 2015); and the commentary on the general provisions by Matningsdal, Straffeloven. Alminnelige bestemmelser, kommentarutgave (Universitetsforlaget 2015). See also Matningsdal, Nytt i ny straffelov (Universitetsforlaget 2015b) on the changes from the code of 1902 to the code of 2005. There is an official English translation of the previous code of 1902, see www.app.uio.no/ub/ujur/oversatte-lover/data/lov-19020522-010-eng.pdf, but not (yet) of the code of 2005. For a German translation of and outline of the code of 2005, see Husabø and Cornils, Das norwegische Strafgesetz: vom 20. Mai 2005 nach dem Stand vom 1. Juni 2014 / deutsche Übersetzung und Einführung (Duncker & Humblot 2014).

[4] For historical outlines of the Norwegian criminal law, see in particular Skeie, Den norske strafferett. Første bind. Den alminnelige del I (Olaf Norlis Forlag 1937) pp. 39-190. For a short, more recent outline, see Gröning, Husabø and Jacobsen (2015) pp. 15-18. A general outline of the history of Norwegian law, with emphasis on criminal law, is found in Sunde, Speculum legale – Rettsspegelen: Ein introduksjon til den norske rettskulturen si historie i eit europeisk perspektiv (Fagbokforlaget 2005).

[5] The Constitution of 1814 was revised at its 200th anniversary in 2014. Among the changes done was the inclusion of a number of individual rights at many points comparable to the ones found in the European Convention of Human Rights. Several of these rights included are of relevance to the criminal law. The Constitutional code is found at https://lovdata.no/dokument/NL/lov/1814-05-17-nn?q=grunnloven. On the Constitutional basis for Norwegian criminal law, see further Gröning, Husabø and Jacobsen (2015) chapter 2 and 3.

[6] This refers to the original constitution of 17th of May 1814. When the Constitution was revised in 2014, this section was omitted - for given reasons.

The criminal code of 1842 was a 'classical' criminal code.[7] It was mainly influenced by contemporary criminal codes on the continent, among which the French Code Pénal of 1810 and, in particular the criminal code of Hannover of 1840. The latter was in turn highly influenced by Feuerbach's Bavarian criminal code of 1813. Herein lays also the link to the classical ideas on criminal law. Feuerbach, with his Kantian background, is traditionally considered to be the portal figure of classical European criminal law. The code of 1814 was therefore limited to traditional crimes, and sought to describe these in a very precise manner.

2.2 The criminal code of 1902

Later on, the code of 1842 was substituted by the criminal code of 1902.[8] The latter was part of a larger modernisation project in the Norwegian criminal justice system.[9] A new code of criminal procedure was enacted in 1887, which also introduced the jury system in Norway.[10] Professor Bernhard Getz was later to become the first Director General of Public Prosecution, and was a key figure in this project. Getz, who was closely aligned with professor and Prime Minister Francis Hagerup, played a key role in the drafting of a series of legislation that were enacted as part of this project. In addition to the criminal code of 1902, laws concerning for instance vagrants were enacted.[11] In short, this project aimed to deal with the problem of criminality, or at least the fear of such a problem, which followed the modernisation process at the turn of the 20th century.

This code of 1902 stayed in force until the code of 2005 replaced it this year. During the last century the code of 1902 has, however, been subject to a number of amendments. The amendments have concerned the code's *general part*, for instance in regard to intoxication's relevance to intent[12]; the *special part*, for instance by revisions to the offences

7 Act 1842-08-20 on criminals (Kriminalloven).

8 Act 1902-05-22-10 (Almindelig borgerlig Straffelov). Strictly translated, this code is titled 'the General Civil Penal code', which has also become the expression traditionally applied in Norwegian legislation on criminal law. For the sake of simplicity, we apply the term 'criminal' throughout this article.

9 For perspectives on this code, see in particular *Straff, lov, historie: historiske perspektiver på straffeloven av 1902,* eds. Flaatten & Heivoll (Akademisk publisering 2014).

10 Act 1887-07-01-5 on the procedure in criminal cases (Lov om Rettergangsmaaden i Straffesager).

11 See also for instance in this number of the journal, Ulvund, Penal reforms, penal ideology, and vagrants in Norway c. 1900 - Prevention through treatment or Incapacitation? 3(2) *BJCLCJ* (2015) pp. 178-201.

12 Act 1997-01-17-11 on amendments in the criminal code etc. (rules for insanity in criminal proceedings and special reactions) (Lov om endringer i straffeloven m.v. (strafferettslige utilregnelighetsregler og særreaksjoner)). In Norwegian law, intent can be 'constructed' when it is absent due to intoxication. See for a critical discussion, Boucht, Betydelsen av självförvållat rus vid uppsåtsbedömning enligt norska strl. § 40 –– särskilt i ljuset av svenska HD:s avgörande NJA 2011 s. 563, 124 (05) *Tidsskrift for rettsvitenskap* (2011) pp. 612-657.

concerning property[13]; and the *sanctioning system,* such as the inclusion of community sentence (*samfunnsstraff*).[14] The result was a combination of an old text with several fragments of amendments from different epochs during the last century. This left a need for modernising the code, which was also the background for the work that resulted in the code of 2005.

2.3 Preparing the Criminal Code of 2005

The legislative history of the Norwegian criminal code of 2005 started in September 1980, when the Legislative Commission of the criminal code, led by Professor Anders Bratholm, was appointed to perform a full revision of Norwegian Criminal Law, as well as to draft a completely new criminal code. First Public Prosecutor Einar Høgetveit, later head of Økokrim,[15] took over as leader of the Commission in 1994.

The Commission wrote eight separate reviews, published as 'NOU's (Norwegian Public Reviews) between 1983 and 2003, starting with NOU 1983:57 'Criminal Legislation under Transformation: The Commission of the Criminal Code's Report Part I'. Part I contained the main viewpoints of the Commission on the general aspects of a criminal law reform. Part II, 'The Geographical Scope of the Criminal Code' (NOU 1984: 31) was handed to The Ministry of Justice the next year by a subcommittee to the Commission. This was followed by Part III, NOU 1989: 11 'Criminal Liability of Corporations', Part IV, NOU 1990: 5 'Rules for Insanity in Criminal Proceedings and Special Reactions'[16], Part V, NOU 1992: 23 'New Criminal Code: General Provisions', Part VI, NOU 1997: 23 'Sexual Offences', Part VII, NOU 2002: 4 'New Criminal Code', and Part VIII, NOU 2003: 18 'National Security'. Part IV, VI and VIII were written by subcommittees to the Commission. Parts of the rules suggested in this process were already added by amendment to the criminal code 1902, and as such have been applicable law prior to the enactment of the new criminal code.

The Commission's reviews led to the proposal for a new criminal code, suggested by the Ministry of Justice in Ot.prp. nr. 90 (2003-2004). This was further reviewed by the Norwegian parliament's Standing Committee on Justice in Innst. O. nr. 72 (2004-2005).

13 Act 1951-05-11-2 on amendments to the criminal code of 1902 (Lov om endringer i straffeloven 1902) .

14 Act 2001-05-18-21 on the execution of punishment. (Straffegjennomføringsloven)

15 The National Authority for Investigation and Prosecution of Economic and Environmental Crime.

16 The rules for insanity in criminal proceedings and special reactions are currently going through yet another revision, see NOU 2014: 10 'Criminal Capacity, Court-Appointed Expert Witnesses and the Protection of Society'. See a detailed review of this work in the previous issue of this journal: Gröning & Rieber-Mohn, NOU 2014: 10 - Proposal for New Rules Regarding Criminal Insanity and Related Issue, Norway post-22 July, in 3(1) *BJCLCJ* (2015), pp. 109-131.

The resolution was adopted by the Norwegian parliament in April 2004.[17] The work continued and the *special part* of the code was crafted. A central addition was made with the act on 'Aggravating and Mitigating Circumstances, Genocide, National Independence, Acts of Terrorism, Peace, Order and Security, and Public Authorities'.[18] This was largely based on the Commission's review Part VII and VIII, and the relevant preparatory works are Ot.prp. nr. 8 (2007-2008) and Innst. O nr. 29 (2007-2008). Furthermore, central elements of the *special part* were added by endrl. 74/2009. The relevant preparatory works of this act are Ot.prp. nr. 22 (2008-2009) and Innst. O. nr. 73 (2008-2009). These were in part based on the Commission's review Part VII and NOU 2007: 2 'Legislative Measures against Cybercrime', written by The Committee of Cybercrime.

However, the act that was to enter the new criminal code into force was not adopted until 19 June 2015.[19] This act led to the criminal code entering into force on the 1st October 2015. The unusually long time span between the enactment of the code and its entry into force was due to pragmatic reasons. It was claimed that the computer systems applied by the police authorities were not capable of handling the new code. A need for solving the technical challenges arose. This required a suspension of the new criminal code's entry into force. A new government in 2013 put the code's entry into force high on the political agenda, which the results outlined above.

As the new criminal code is already ten years old, several changes and additions have already been made since the code's enactment in 2005. The code is still being developed. Most recently, certain changes were suggested in Innst. 87 L (2015-2016), which might lead to an expansion of criminal responsibility for child abduction.

17 See *Referat fra Odelstinget* 11.04.05, and *Referat fra Lagtinget* 26.04.05.

18 Act 2008-03-07-4 on Amendments to the Criminal Code of 2005 (Aggravating and Mitigating Circumstances, Genocide, National Independence, Acts of Terrorism, Peace, Order and Security, and Public Authorities, etc.) (lov om endringer i straffeloven 20. mai 2005 nr. 28 mv. (skjerpende og formildende omstendigheter, folkemord, rikets selvstendighet, terrorhandlinger, ro, orden og sikkerhet, og offentlig myndighet))

19 Act 2015-06-19-65 on the Entry into Force of the Criminal Code of 2005 (Lov om ikraftsetting av straffeloven 2005).

3. The General Ideas

3.1. Basic Ideas Concerning Crime and Punishment

Even if firmly embedded in continental criminal law culture, the Nordic and in particular the Danish-Norwegian legal orders have their distinct traits. In particular, the legal culture has been characterised by a strongly pragmatic style of thinking.[20] Retributive ideas have been downplayed, and utilitarian considerations have been brought to the forefront. Such viewpoints are also found in the preparatory works of the new criminal code. In particular arguments concerning general deterrence are taken to be the central idea of criminal law. It has in this relation even been claimed that retributive ideas cannot at a conceptual level be the purpose of criminal law, a viewpoint that clearly is misguided.[21]

However, as mentioned the classical ideas of crime and punishment have been a central part of the Norwegian criminal law culture. Ideas of guilt and proportionality have, in accordance with the continental background of Norwegian criminal law, been fundamental for all the Norwegian criminal codes.[22] This is also the case for the criminal code of 2005. To some extent the code bears signs of a stronger influence of retributive ideas, even if these are addressed in terms of utility arguments. There is, according to the legislator, a social need for responses to crime, a need that must be met in order to avoid social unrest.[23] Retributive ideas also seem to influence the level of repression. Particularly in regard to violence and sexual crimes, the legislator has required an increase of punishment in order for these to be met with a proportional reaction (see further below).

3.2. The Harm Principle as Guidance for Criminalisation

In light of this pragmatic tradition, a strongly principled statement on criminalisation was somewhat surprisingly given in NOU 2002: 4. Here, the harm principle (*skadefølgeprinsippet*) was adopted and applied as a principal starting point for the criminal code. The code of 2005 is based on the idea that punishment should solely be used as a reaction towards actions that lead to, or could lead to, harm being inflicted on someone.[24] The idea

20 See further e.g. Jacobsen, The Methodology of the Norwegian Criminal Law Doctrine, in *Liber amicarum et amicorum Karin Cornils - Glimt af nordisk straffrätt og straffeprosessrett*, eds. Elholm, Greve, Asp, Bragadóttir, Frände, Strandbakken (Jurist- og Økonomforbundets Forlag 2010) pp. 243-265.

21 See Ot.prp. nr. 90 (2003-2004) p. 77, cf. Gröning, Husabø and Jacobsen (2015) p. 61.

22 See for an interpretation that puts this at the apex, Gröning, Husabø and Jacobsen 2015 ch. 2.

23 See Ot.prp. nr. 90 (2003-2004) pp. 80-81. In the literature, Morten Kinander has recently argued for a clear «retributive turn» in Norwegian criminal law, see Kinander, Straffens begrep og begrunnelse i norsk rett – en kritikk 48 (3) *Jussens Venner* (2013) pp. 155-192.

24 This was set out in NOU 2002: 4, see in particular pp. 79-81.

is that a specific behaviour should not be criminalised only because the majority dislikes it. The use of punishment must be rational and humane.[25] Punishment should only be used in cases where compelling reasons justify it, and actions that lead to the harm of people or assets will typically constitute such compelling reasons. The harm principle was the fundamental starting point for the work of the Legislative Commission of the Criminal Code.[26]

In the preparatory work for the criminal code, The Commission discussed whether one should take a general moral perception into account, when establishing what is meant by the expression 'harm'.[27] They concluded that while society needs a certain amount of shared values and common moral ground to work without too many conflicts, the objections towards basing what should be considered as 'harm' on moral aspects are of great import. The main objection is for example the question of whether such a thing as a common general moral perception even exists. The Ministry of Justice agreed with the Commission's view and pointed out that neither the individual's religious sense, nor a minor physical or mental discomfort should be enough to lead to punishment.[28]

Another side of the harm principle that is discussed by The Commission in the NOU is whether the provisions should exclude harm that one causes to oneself.[29] The Commission points out that while many acts of self-harm must largely be accepted, there may be compelling reasons for having some provisions that prevent people from causing harm to themselves. Such provisions are called paternalistic provisions.

An example of a paternalistic provision is the prohibition of the use of drugs.[30] Although one can argue that the drug-related problems of the individual drug addict are better dealt with using health measures than with punishment, a general prohibition against such use is supposed to *also* protect society and the people close to the drug addict. This argument applies to many paternalistic provisions; we can for example point to the burden it brings to the social security system when people cause damage to themselves. The same can be said in cases where the victim has consented to the act. Criminalisation is in such cases based on the need to protect individuals from themselves and their own decisions.[31]

25 Ot.prp. nr. 90 (2003-2004) p. 89.

26 NOU 2002: 4 p. 79.

27 NOU 2002: 4 pp. 80-81.

28 Ot.prp. nr. 90 (2003-2004), pp. 20 and 89-91.

29 NOU 2002: 4 pp. 80-81.

30 NOU 2002: 4 p. 81 and Ot.prp. nr. 90 (2003-2004) p. 91.

31 NOU 2002: 4 p. 81.

The Commission stated that there could be exceptions from the harm principle.[32] This is primarily the case when considerations of control and effectiveness form the basis of a provision. An example is a practical provision that prohibits the intake of alcohol or other mind-altering substances up to six hours after having, as a car driver, witnessed or been involved in an accident or other event, which the driver should have understood may lead to a police investigation. [33]

Prohibition against acts of preparation is another example of provisions concerning actions that don't necessarily lead to harm, but that are still criminalised. A consequence of the harm principle in this context is however assumed to be that one must have committed an act that shows the intent of committing a criminal offence: Thinking about committing a criminal offence is not enough to lead to punishment.[34]

Not all actions that lead to harm were in the Ministry's view unwanted and worth fighting. Sometimes the positive consequences outweigh the harmful effects of a certain action, as for example the exercise of high risk sport and the production of useful means of transportation that sometimes lead to human casualties, like cars and airplanes. The Ministry referred to this allowed risk as 'the general freedom of action'.[35]

Even where the harm principle is satisfied, the Ministry of Justice has declared that criminalisation should be the last resort in cases of minor violations. An action should in the Ministry's view only be criminalised if the utility of such a provision is clearly greater than its damaging effects,[36] and if other reactions and sanctions are non-existing or obviously inadequate.[37]

As we will return to, these principles have clearly made their impact on the drafting of the code. On a number of points, however, it is debatable whether the code in all regards conforms with these general principles. It is also debatable whether the Commission and the Ministry's option for and interpretation of the harm principle are theoretically viable.[38] Still, this principled approach should in itself be welcomed as a step in the right direction for Norwegian criminal law.

32 NOU 2002: 4 p. 81.

33 Act 1965-06-18-4 on road traffic (Vegtrafikkloven) section 31, cf. section 22, second paragraph.

34 Ot.pr. nr. 90 (2003-2004) p. 90.

35 Ot.prp. nr. 90 (2003-2004) p. 89.

36 Ot.prp. nr. 90 (2003-2004) pp. 20-21.

37 Ot.prp. nr. 90 (2003-2004) p. 88.

38 For critical perspectives, see for instance Frøberg, Prinsippstyring av strafferettspolitikken, 36 (1) *Kritisk Juss* (2010) pp. 38-63 and Kinander (2013) pp. 165-166. Gröning, Husabø and Jacobsen (2015) pp. 68-82 suggest a somewhat different approach to the question on criminalisation. According to these authors, the harm principle is one-sided and does not acknowledge that there are at least two spheres of freedom to be taken into account in the forming of criminal law.

4. An Outline of the Code

4.1. Introduction

The structure of the criminal code of 1902 is to a great extent retained in the code of 2005: It is separated in part I, where we find the general provisions of the code, and part II, where the criminal offences are listed. The code of 1902 however addressed serious crimes (*forbrytelser*) and less serious crimes (misdemeanours or *foreseelser*) in different sections of the code.[39] As such, for instance theft and gross theft were addressed in part II of the code (section 257 and 258), whereas petty theft was addressed in section three on misdemeanours (section 391a). A function of this separation was to signal differences in the degree of blame that was attached to the different acts, but it also had procedural implications. The code of 2005 does not have separate parts for crimes and misdemeanours, which we will return to below.[40]

In the following, we will first describe the general criteria for criminal responsibility, then the offences and finally the forms of punishment applicable and the principles for sentencing.

4.2. General Provisions Concerning Criminal Responsibility

There are more general provisions in the code of 2005 than in the code of 1902, and they are more detailed than those of its predecessor. In the preparation of the code of 2005, one generally strived for a more complete and pedagogically accessible outline of the code. To a large degree, however, the general provisions do not imply changes to, but rather a codification of how these general provisions are understood according to the criminal code of 1902. As such, they are also presented in a manner that is largely compatible with how these criteria for criminal responsibility have been presented in literature concerning the *general part* of criminal law.[41]

Pursuant to section 1, the general provisions contained in Part I apply to all criminal offences, regardless of whether these are described in part II of the criminal code, or in separate legislation.

39 In the official translation the terms 'felonies' and 'misdemeanour' are used. Strictly translated, the word 'forbrytelser' which was applied for the serious crimes are most adequately translated 'crimes'. The conceptual system does not hinge on a division between the federal system and the states such as in US criminal law. The Norwegian criminal code is general to the entire country.

40 Ot.prp. nr. 90 (2003-2004) pp. 55-57.

41 See for instance Andenæs, Matningsdal and Rieber-Mohn, Alminnelig strafferett, 5th ed. (Universitetsforlaget 2004), which was the dominant textbook on the *general part* of the criminal code of 1902. A different conceptual system is applied in Gröning, Husabø and Jacobsen (2015).

In chapter 1, the scope of Norwegian criminal law is determined. The main rule is that the criminal provisions in force at the time of the commission of an act shall be applicable, unless the criminal provisions in force at the time of the trial lead to a more favourable decision for the accused. In such a case, the legislative change must in addition reflect a changed outlook from the legislator on which actions should be punished, or the use of criminal penalties at all for this specific crime (section 3). This section supplements and clarifies section 97 in the Constitution, according to which no law can have a retroactive effect.

Sections 4 to 8 in chapter 1 concern jurisdiction. It is here clarified what is legally considered to be Norwegian territory. Among others things, the application of Norwegian criminal law on offences committed abroad is determined.

The fundamental conditions for criminal liability are found in chapter 3. The principle of no punishment without law is stated in section 14. This principle was already expressed by section 96 of the Constitution, and also by article 7 ECHR. However, there are recent signs of a greater respect for the principle of legality than used to be the case in judgements from the Norwegian Supreme Court, and similarly the legislator found it useful to express this fundamental principle also in the criminal code.

Participation in crime is prohibited by section 15, which represents a change from the code of 1902. In the older code there was no general provision on participation, something which required that the legislator included a provision on responsibility for participation in the specific section regulating the offence. Attempt is prohibited by section 16. In sections 17 to 19 we find the provisions on necessity, self-defence and self-help, the latter being a new addition compared to the code of 1902.

In section 20 it is stated that the offender has to have a sound mind at the time of the criminal act. The offender is excused from criminal responsibility if he or she is below the age of 15, psychotic, mentally disabled or unconscious at the time of the act. In particular the psychosis alternative has been recently debated in the aftermath of the Breivik case. This discussion resulted in a recent white paper, NOU 2014: 10, but it does not suggest major changes in the current rules.[42]

Pursuant to section 21, criminal law is applicable only to criminal offences committed with intent, unless negligence or gross negligence is explicitly included in the specific provision. Intent includes cases where the offender has either strived for (for instance) killing someone, taken it to be probable that the victim would die, or acted with so-called *'dolus eventualis,'* where the offender understood that death was a possible result of the act and hypothetically accepted to carry out the act, given that it was certain that the victim would die. These different alternatives are now defined in the three different letters (a-c) of section 22. The latter alternative, '*dolus eventualis,*' has been subject to debate due *inter*

42 See further Gröning & Rieber-Mohn 2015 *op.cit*.

alia to difficulties in applying this kind of rule of intent in the courts. The Commission considered excluding this form of intent, but it was taken to be practical in particular in drug cases.[43] It remains as such a part of the Norwegian doctrine of intent.[44]

The Ministry found that it would be most compatible with the harm principle if criminalisation was reserved for intended or at least grossly negligent (to some degree comparable to the notion of recklessness found in Anglo-American criminal law) acts.[45] This implies that certain acts are no longer punishable when carried out in negligence.

There are many exceptions from this main rule that offences require intent. Exceptions are found both in the criminal code and in other criminal provisions, as negligence is often explicitly made adequate to lead to punishment. Negligence thereby remains an important part of Norwegian criminal law in regard to offences such as traffic offences. Negligence and gross negligence are defined in section 23.

In section 24 we find the provision on unintended consequences, while mistake of fact is addressed by section 25.

Mistake of law is regulated in sections 26. Similar to participation in crime, this section is one of the new additions to the criteria of criminal responsibility in the code of 2005 compared to the code of 1902. Previously, mistake of law was solved by reference to section 57 which concerned sentencing, but which wording also opened for acquittal on this basis. Now, there is a general provision for acquittal on this basis, provided that the offender did not act negligently in this regard.

The rules on criminal liability for corporations (*foretaksstraff*) are found in chapter 4. The general rules on criminal liability for corporations were developed in particular in a white paper in 1989, which was part of the preparation of the new criminal code, and added to the code of 1902 in 1991.[46] They are as such quite a new addition to Norwegian criminal law. The code of 2005 was built upon the basis of the 1902-code. But a significant change has been made with regard to the requirement of intent or negligence in regard to the person who has acted on behalf of the corporation. This previously existing requirement has now been abandoned, at least according to the wording in the first part of sec-

43 An overview of this discussion and the Ministry's view upon it is found in Ot.prp. nr. 90 (2003-2004) pp. 117-118.

44 The discussion has however not ended, see for instance Stigen, Forsettets nedre grense – dolus eventualis eller hva?, 123 (4/5) *Tidsskrift for Rettsvitenskap* (2010) pp. 573-636.

45 Cf. Ot.prp. nr. 90 (2003-2004) pp. 88-92.

46 See NOU 1989: 11 and Ot.prp. nr. 27 (1990-1991). The inclusion of this general rule on corporate criminal responsibility was made by Act 1991-07-20-66 on amendments to the Criminal Code of 1902 (criminal liability for corporations) (Lov om endringer i straffeloven m.m. (straffansvar for foretak)).

tion 27.[47] This change disconnects this institute further from the traditional requirements of criminal responsibility.

4.3 The Offences

The code of 1842 was to a large degree restrained to the most serious offences. During the period when the code of 1902 was applicable, a number of minor crimes were also included – in addition to the fact that a number of regulatory offences were included in other (primarily administrative) codes concerning traffic, pollution, etc.

The classical crimes also form the backbone of the code of 2005. Among the crimes at the apex of the code are the provisions on the protection of Norwegian independence and other fundamental national interests in chapter 17. However, certain new serious crimes are also added compared to the code of 1902.

This first and foremost concerns the offences found in chapter 16, which include genocide, crimes against humanity and war crimes. This chapter came into force already on 7 March 2008 and implemented the Rome Statute of the International Criminal Court in Norwegian law.[48] In section 110 of the criminal code of 2005 it is provided that crimes that fall under chapter 16 cannot lead to a lighter sentence than the minimum sentence following the provision which the criminal act would fall under, had chapter 16 not existed. Most of the crimes listed in chapter 16 have at least for gross violations a maximum penalty of 30 years detention. Traditionally 21 years of imprisonment has been the maximum under Norwegian criminal law.

Likewise, a series of new acts of terrorism have been added to the code. Chapter 18 on acts of terror and terror-related actions was added in 2008.[49] This chapter has since been developed, especially by act 2013-06-21-85. Under this law, several new acts of preparation of terrorism were criminalised. This was done partly by adding specific preparatory actions to the chapter (such as in section 136a, participation in a terrorism organisation). Criminalisation of *preparatory* actions was also partly achieved by an otherwise atypical connection made in section 131 to the general rules of criminal liability for *attempt*.[50] Gross acts of terror, similarly to the acts regulated in chapter 16, carry a maximum sentence of 30 years of imprisonment, cf. section 132.

In chapter 19, the protection of and confidence to public authorities are regulated. The provisions here span from the prohibition on buying or selling votes (sections 151 to 152) to the prohibition of torture (sections 174 to 175). Chapter 20 protects public peace, pub-

47 See for instance the critical viewpoints in Matningsdal (2015) pp. 237-240.

48 See in this regard e.g. Cornils, Om kriminalisering av folkmord, brott mot mänskligheten och krigsförbrytelser, 3 *Lov og rett* (2005) pp. 131-146.

49 Act 2008-03-07-4 *op.cit., supra* note 18.

50 See further Prop. 131 L (2012-2013) chapter 8.

lic order and public security. The protection of information and information exchange is regulated in chapter 21. Chapter 22 prohibits false statements and false accusations of crime.

The provisions on the protection of public health and the environment are listed in chapter 23. Sections 231 to 235 prohibit the interaction with illegal drugs, and environmental crime is regulated in sections 240 to 241. At several points these offences are supplemented by offences found in other legislation. This is for instance the case with drugs. The Pharmaceutical Act contains offences regarding the use and possession of drugs for personal use.[51]

In section 24 we find the provisions on the protection of peace and liberty of the person. This chapter includes, among others, acts against the use of force, human trafficking, slavery, violations of the Marriage Act,[52] and threats and violations of privacy. The offence of human trafficking illustrates a more general trend in criminal law. The code contains specific offences that were previously comprised by more general ones. These specific offences, meant to address specific situations or violations that the legislator wants to put particular emphasis on, often have their background in international conventions or other documents which require criminalisation. In the case of trafficking, the basis for the offence is found in the *United Nations Convention against Transnational Organized Crime* and the Protocols Thereto (the Palermo Convention).

Violence and sexual offences are regulated in chapters 25 and 26. Domestic violence and abuse is prohibited by sections 282 to 283, and in cases of gross violations, the maximum penalty is 15 years of imprisonment. Domestic violence and abuse have received increased attention in recent years in Norwegian criminal law – something which is reflected in the increased maximum penalty from 6 to 15 years.

Acquisitive crime is regulated in chapter 27, and so now all crimes for the purpose of gain are collected in one extensive chapter. The code of 2005 does not, as mentioned, contain a specific part on misdemeanours. To some extent, such misdemeanours are now addressed in relation to the general offences. Theft, for instance, is primarily addressed in section 321 of the code. The two following sections, section 322 and 323, concern gross theft and petty theft. Application of one of these additional sections regarding theft results in the normal maximum punishment for theft under § 321 of 2 years imprisonment being either increased to 6 years imprisonment (§ 322), or reduced to a fine only (§ 323). This system of a general offence with additional sections concerning more severe and/or milder offences is also found in some other offences in this chapter. In addition to theft, this chapter also contains offences of robbery (sections 327 to 329), extortion (sections 330 and 331), the handling of stolen goods (sections 332 to 336) and similar. In chapter

51 Act 1994-12-04-132 on pharmaceuticals (Legemiddelloven).

52 Act 1991-07-04-47 on marriage (Ekteskapsloven).

28 we find the provisions on the wilful destruction of property and offences that cause danger to the public.

The provisions on forgery are located in chapter 29, while criminal fraud, tax evasion and similar economic crimes are regulated in chapter 30. The provisions on creditor protection are in chapter 31.

Several offences found in other codes, such as offences in traffic, remain in place. To gather all offences in one criminal code was at no point of the process regarded as a viable option. However to some degree one has sought to find an adequate division between serious offences, which are to be addressed by the criminal code, and less serious offences, which are dealt with in other settings. An example is section 233 of the criminal code, which targets gross violations (intentional or negligent) of the Alcohol act.[53] Less serious breaches of the alcohol act are covered by section 10-1 of the Alcohol act.

4.4 Forms of punishment and sentencing

4.4.1 General remarks

According to the principle of legality, it is the task of the legislator to point out in the statute which kind and amount of punishment that is applicable in reaction to breaches of the offence described. The system of the Norwegian Criminal Code is that the legislator in the section regulating the offence indicates whether the crime can be sanctioned with a fine or with imprisonment or both. If imprisonment is an alternative, the offence states the maximum sentence (and in a few cases also the mandatory minimum) that can be imposed in years. However, a number of other sanctions are also available according to general provisions.

4.4.2 Forms of punishment and other reactions

The main forms of punishment in the criminal code are prison sentence, secure custodial supervision, community sentence, juvenile punishment, fines and loss of civil liberties, cf. section 29. Other reactions to crimes are deferment of sentence, suspension of sentence, committal to compulsory psychiatric treatment, committal to compulsory care, confiscation of proceeds of criminal acts and more, dismissal of criminal proceedings, cf. section 30 a)-f). In addition we also find committal to conciliation in the conflict resolution board, ordering follow-up by the conflict resolution board, juvenile supervision in the conflict resolution board, loss of the right to drive, and loss of the right to drive passengers for compensation, cf. section 30 g)-h).

[53] Act-1989-06-02-27 on the trade of alcoholic drinks etc. (Lov om omsetning av alkoholholdig drikk m.v.).

Chapter 6 regulates *prison sentencing*. A prison sentence can be imposed when the relevant criminal provision provides for it. The prison sentence shall be pronounced for a specific amount of time, cf. section 31. The minimum penalty is 14 days, unless otherwise is specified. A prison sentence can only be imposed on offenders who were less than 18 years old at the time of the offence if imprisonment is particularly required, cf. section 33. In such cases the imprisonment's timeframe cannot exceed 15 years. Community sentencing, fine and loss of civil liberties can be imposed together with a prison sentence, see section 32. The sentence can be suspended for a time of probation, which is usually two years, cf. section 34. Suspension of execution is only given on the basic condition that the offender does not commit new offences in the probation period. Also other conditions can be applied.

The provisions on secure *custodial supervision* (*forvaring*) are found in chapter 7. This form of punishment diverges from a prison sentence mainly by its purpose. Where imprisonment is a classical, backwards-looking, and proportional punishment for an offence, secure custodial supervision aims to protect society from the risk of further offences, and is thus future-oriented. Previously, this safekeeping followed as an addition to the prison sentence. A reform in 2001 however made secure custodial supervision a separate kind of punishment, thereby also blurring the distinction between correctional punishment and other, non-correctional criminal sanctions (*andre strafferettslige reaksjoner*). The code of 2005 has however prolonged this unfortunate solution.

The timeframe for the secure custodial supervision should generally not exceed 15 years, and cannot exceed 21 years, unless the maximum penalty for the offence is 30 years of imprisonment, cf. section 43. In case the maximum penalty is 30 years, the maximum time of the sentence to secure custodial supervision is also 30 years. As a general rule, the enforceable sentence for secure custodial supervision should not be more than 10 years, cf. section 43. In some cases, however, the minimum sentence may be passed for up to 14 or even 20 years. In the period between the minimum and maximum sentence, the sanction shall be upheld as long as there is a sufficient need for it (see below). And even when the maximum sentence is served, the sanction can for the same reason be successively prolonged, potentially for life.

Secure custodial supervision is applicable when prison sentence is not considered sufficient to protect the lives, health and freedoms of others, and where the committed criminal offence is a violation of one or several of these legal values, cf. section 40. The provision requires that the offence was of a serious nature, and that there is a real possibility of a new and serious offence. If the offence was of a less serious nature, the offender must have committed or tried to commit a serious offence at a previous occasion. Furthermore, the previous and current offence must be closely connected, and the risk of a new, serious criminal offence being committed must be judged particularly likely. Before someone is sentenced to secure custodial supervision, a personal examination or a psy-

chiatric examination must be conducted. If the offender is less than 18 years old, secure custodial supervision can only be imposed in exceptional cases.

In chapter 8 we find the provisions on *community sentencing*. This form of punishment replaced community service in May 2002.[54] Community sentencing can only be imposed when replacing a prison sentence of no more than 1 year. It can also be imposed in some other situations, such as when the offender is below 18 years of age or where there are compelling reasons for sentencing the offender to community sentence. Community sentencing can also only be imposed when due regard for the purposes of criminal law does not require imprisonment. If the committed crime is too serious, both retributive and deterrence considerations may hinder the use of community sentence. Another condition is the offender's consent and Norwegian residency, cf. section 48. A community sentence shall last from 30 to 420 hours, and a subsidiary prison sentence must be set. The time of completion shall usually correspond to the subsidiary prison sentence. Further conditions, like prohibition of contact with certain people, can be imposed on the offender as part of the community sentence, cf. section 50.

Juvenile punishment (*ungdomsstraff*) is regulated in chapter 8a. Juvenile punishment is a 'new invention' in Norwegian criminal law. It is the outcome of a greater emphasis on the care for children and the damaging effects that may follow from imprisonment.[55] One has sought to implement ideas of restorative justice to a much greater extent than previously, for instance through the abovementioned community sentence.

Juvenile punishment can be imposed on offenders who were less than 18 years old at the time of the commission of the offence, and who have committed repeated or serious crime, cf. section 52a. The offender must consent thereto and reside in Norway. Here, due regard for the purposes of criminal law must not *forcefully* demand imprisonment. The time of completion shall be set to between six months and two years, cf. section 52b. If the alternative prison sentence clearly would have been longer than two years, the time of completion can be up to three years. A subsidiary prison sentence to the juvenile punishment shall be set. The content of juvenile punishment is further elaborated in The Conflict Resolution Board Act of 2014, chapter 4.[56]

Chapter 9 regulates *fines*. As the main rule a fine can be imposed as a sole punishment when this is stated in the criminal provision. When determining the size of the fine, the offender's income, fortune, family responsibilities, burden of debt, and other circumstances that may impact his or her financial capacity are to be considered cf. section

54 Act 2001-05-18-21 on the execution of punishment (straffegjennomføringsloven)

55 See further e.g. Holmboe, Ungdomsstraff og ungdomsoppfølging: En oversikt og noen kritiske merknader, 14 (4) *Tidsskrift for strafferett* (2014) pp. 397-414.

56 Act 2014-06-20-49 on the Board of Conflict Resolution (konfliktrådsloven).

53. Fines can always be imposed on the offender alongside prison sentence, community sentence or loss of civil liberties, cf. section 54.

Loss of civil liberties is regulated in chapter 10. Such loss can be imposed when the criminal offence shows that the offender is unfit for a specific position, business or activity, or is likely to misuse it, cf. section 56. In such cases, the offender can lose the position, or the right to hold such a position or exercise such an activity in the future. The legal authority can also impose a non-molestation order on someone cf. section 57. The duration of the loss of civil liberties is regulated in section 58. For some liberties, such an order can in exceptional cases be imposed indefinitely.

In addition, the code opens for applying a number of criminal sanctions that are not regarded as punishment but rather aims at fulfilling other purposes than blame and punishment for an offence.

Deferment of sentence (straffutmålingsutsettelse) and *suspension of sentence (straffutmålingsfrafall*) are regulated in chapter 11. *Deferment* of sentence can be imposed when the offender is considered guilty, and can lead to a probation period wherein the final sentence is not yet set, cf. section 60. It is considered a milder reaction than suspension of execution.[57] *Suspension* of sentence can, like deferment of sentence, be imposed when the offender is considered guilty, but only when there are quite special reasons for doing so. In the decision of whether such special reasons are present, particular consideration must be taken as to whether pronouncing the sentence will be unreasonably burdensome for the offender and for the purposes of criminal law, cf. section 61.

Committal to *compulsory psychiatric treatment* and to *compulsory care* is regulated in chapter 12. Committal to *compulsory psychiatric treatment* is possible when the offender cannot be punished because he or she at the time of the commission of the offence was psychotic or had a strong disorder of consciousness (§ 62). Committal to *compulsory care* can take place when the offender was intellectually disabled to a high degree (section 63). The treatment or care must be deemed necessary to protect the lives, health and freedoms of others, and it is a condition that the committed criminal offence did (or could have) represent a violation of these rights. Compulsory psychiatric treatment and compulsory care can only be maintained as long as there still is a likelihood of recidivism, cf. section 65.

Confiscation can be imposed as the sole sanction, or in addition to other forms of punishment, cf. section 66. The main form is confiscation of proceeds of crime, cf. section 67. Extended confiscation according to section 68 can be imposed when for instance the offender is found guilty of a criminal act of such a nature that the proceeds thereof can be considerable, and the act is (or acts are) of a certain severity. All assets belonging to the offender can be confiscated in such cases, unless the offender can substantiate

[57] Ot.prp. nr. 90 (2003-2004) p. 457.

that the said assets have been lawfully acquired.[58] Further provisions on confiscation are found in chapter 13.

Waivers of prosecution (påtaleunnlatelse) are regulated in the Code of Criminal Procedure, sections 69 and 70.[59] It can be used when there are special reasons for doing so. It can be made conditional upon the offender not committing new offences in the probation period.

Committal to conciliation in the conflict resolution board, being followed up by the conflict resolution board, and *juvenile supervision in the conflict resolution board,* are regulated in section 71a in the Code of Criminal Procedure. These reactions can only be imposed if such treatment is deemed suitable in the case, and the offended, the offender, and his or her prospective legal guardians agree to it. Juvenile supervision can be imposed when the offender was between 15 and 18 years old at the time of the criminal offence, and the duration period of such supervision is up to one year.

Loss of the right to drive is regulated in the Road Traffic Act,[60] section 24a subpart 2, section 33 subparts 1 and 2, cf. subpart 6, and section 35 subpart 1. These provisions establish the duration time for the loss of the right to drive as a punishment, which, depending on the criminal offence, can in some cases be perpetual.

Loss of the right to drive passengers for compensation according to the Professional Transport Act[61] section 37f subpart 2 can be imposed on the offender in addition to other forms of punishment if such loss is considered to be in the public's interest.

4.4.3 Sentencing

The time frame applied by the legislator is first and foremost found in the specific provision regulating the offence. For instance, the offence of causing death by negligence in section 281 entails a maximum sentence 6 years imprisonment. This is supplemented by general rules in the first part of the Code. According to section 31, a prison sentence must be at least of 14 days. Thus, the timeframe for a violation of section 281 is imprisonment between 14 days and 6 years. The time frame imposed by the legislator is thus quite wide, here as for most other offences.

Additionally, in chapter 14, which contains common rules on the length and choice of punishment, there are provisions that make it possible to derogate from the sentenc-

58 See e.g. Boucht, Utvidgat förverkande enligt strl. § 34a - ny modell för ökad funktionalitet eller obefogat avsteg från hävdvunna rättssäkerhetskrav?, 12 (4) *Tidsskrift for Strafferett* (2012) pp. 382-423, who also questions whether this solution is compatible with the prohibition of full confiscation of the offender's wealth in what is now section 96 (third part) of the Constitution.

59 Act 1981-05-22-25 on Criminal Procedure (straffeprosessloven)

60 Act 1965-06-18-4 on Road Traffic (veitrafikkloven).

61 Act 2002-06-21-45 on Professional Transport (yrkestransportloven).

ing rules that follow from the offence itself. Pursuant to section 79, the court can under further conditions sentence the accused to a punishment longer than the maximum sentence set out in the specific criminal provision. Section 79 allows for the maximum sentence to be doubled. Under certain conditions, this may apply where the sentence concerns more than one offence, in cases of recidivism, and when the offence is carried out as part of organised crime. In section 80 we find the opposite rule, which in some cases opens up to sentencing the accused to a punishment below the minimum sentence or a lighter penalty.

The wide time frames leave the court a large degree of discretion in sentencing. In the code of 1902 there was no general provision concerning sentencing. Instead, in Norwegian criminal law the Supreme Court has played a key role.[62] It has established a general level of punishment both in choice of form and in length. This practice from the Supreme Court has been followed loyally both by the court itself and the lower courts. The dominating principle according to this practice is the principle of proportionality, which requires that the level of punishment be scaled relative to the severity of the criminal offence.[63]

This practice was also the basis for the provisions on aggravating and mitigating circumstances that were included in the code of 2005 (sections 77 and 78). The enumeration of aggravating and mitigating circumstances in the code is mostly a codification of practice from the Supreme Court, and is supposed to carry on the *lex lata*.[64] The Supreme Court is meant to keep their role as a developer of the level of punishment, although the codification means that the listed circumstances must be taken into account.[65]

To some extent however, the legislator has sought to adjust the level of punishment applied. For instance, with regard to certain acts of violence and sexual offences, the legislator has through the preparatory works required a more severe sentencing practice. One example is murder, which for a long time has carried a prison sentence of approximately 10 years when committed under neither aggravating nor mitigating circumstances. According to the preparatory works this should now be raised till 12 years imprisonment, something the Supreme Court already has accepted as the new standard.[66] Thus the discretion of the Supreme Court is not quite as wide as it was before.

62 For an overview, see Matningsdal, Høyesterett som straffedomstol – straffutmåling, in Gunnar Bergby *et. al., Lov, sannhet, rett - Norges Høyesterett 200 år* (Universitetsforlaget 2015), pp. 548-595.

63 See for instance Mæland, Norsk alminnelige strafferett (Justian 2012) p. 247.

64 See Ot.prp. nr. 8 (2007-2008) p. 268.

65 Ot.prp. nr. 8 (2007-2008) p. 268.

66 See Ot.prp. nr. 22 (2008-2009) pp. 185-186, see also for instance Rt. 2014 p. 12.

5. Changes (from 1902) and Challenges

Mainly, the code of 2005 is a continuation of the code of 1902. The general ideas, principles and core rules are the same. The new code does therefore not represent a dramatic shift in Norwegian criminal law. The code of 2005 is first and foremost a renewal, a modernisation and a simplification of the code of 1902. The legislator has simplified the structure, updated terminology, standardised different rules and abandoned some distinct solutions found in the old code.

However, on a number of points the code represents a change from the code of 1902. In this section we will point to some of the central changes and their implications.

Starting with the overarching, conceptual system it is notable that the legislator as mentioned now has abandoned the division between crimes and misdemeanours as opposed to the code of 1902. The *special part* was earlier divided into two parts (part two and part three of the code). The first of these concerned crimes. Here the significant criminal acts were dealt with. The second of these concerned misdemeanours. For instance, theft was a crime according to section 257. Petty theft was however only a misdemeanour, and therefore addressed in a different part of the code - more precisely in section 391a. The division between crimes and misdemeanour communicated the seriousness of the criminal act, and also had important procedural implications.

In the code of 2005 this division between crimes and misdemeanour is omitted. In fact, the legislator also sought to avoid applying the term 'crime'. Instead, one opted for the less useful expression 'punishable acts' *(straffbar handling*). The function of the conceptual division between crimes and misdemeanour are instead related to differences in the level of punishment applied in the offences.

As concerns the general criteria for criminal responsibility the code contains, similar to the code of 1902, a separate section for these criteria. However, in the new code, the legislator has sought to achieve a more complete codification of these general criteria. Compared to the code of 1902, this has in particular resulted in a new, general provision on participation in crime (section 15). Also, the legislator has sought to define what amounts to intent and negligence (sections 22 and 23). And new general provisions on both self-help (section 19) and mistake of law are included (section 26).

The strength of the code is this pedagogical improvement from the criminal code of 1902. The code is supposed to give a more accurate account of the criteria for criminal responsibility, the offences and the level of punishment. Also, to a large degree uniform solutions have replaced the more heterogenic ones in the code of 1902, which contained a number of distinct, specific solutions. This makes the code more accessible.

This pedagogical strive towards simplification and accessibility is however also the code's main weakness. To illustrate this, one finds a clear example in the regulation of mis-

take of law. The regulation under the code of 1902 was built upon an acknowledgement of the complex relation between facts and law. Consider for instance that one mistakenly believes that an agreement one has entered includes the transfer of a painting, that later proves not to be part of the agreement. This mistake concerns a legal phenomenon, i.e. the contents of the agreement. Still it can be claimed that the mistake is decisive for what kind of act that one has committed, whereas mistake of law typically concerns lack of knowledge of the illegality of one's actions. Therefore one previously considered this to be a mistake that was of relevance to whether the offender had intent of committing theft.

Now, one has sought to find a more simple solution to the division between mistakes of fact and mistake of law simply by referring to whether the mistake concerns facts or law. In case the mistake concerns a legal phenomenon, the preparatory works (which generally are of high relevance for the interpretation of laws in Norway) presuppose that such a mistake should be dealt with as a mistake of law and therefore (only) as an excuse for the offender. This also implies that negligence on this point is sufficient for criminal responsibility, even if the offence concerns acts of intent. The solution suggested by the preparatory works bypasses the complexity of the relation between facts and law and seems to leave us with a solution burdened by principled problems, which also fit badly with the nature of crimes such as theft.[67]

Another challenge concerns the principle of legality. The Norwegian Supreme Court in recent judgments has interpreted the principle of legality more strictly than before. In contrast, the code of 2005 is somewhat ambivalent with regard to the principle and the ideas it springs from. Certainly, the legislator has on some points sought to comply with the legality principle, for instance by creating a more comprehensive outline of the criteria for criminal responsibility. On other points, however, the legislator has opted for solutions delegating competence from the legislator to the courts. On several points in the grey zone between the criteria for criminal responsibility and the rules for sentencing, the legislator has included an element of discretion with regards to whether the accused is to be held criminally responsible or not. Examples of this sort of problem can be found both with regards to criminal responsibility for individuals (for instance in section 81), and for legal persons (section 27). This is an unfortunate feature already present in the criminal code of 1902, which is thus even more pertinent under the new code.

Generally, the weakness of the code seems to reflect the weakness of Norwegian criminal legal culture. The code of 1902 was characterised by a strong theoretical and comparative engagement in criminal law science. The code was hailed as a landmark, and its theoretical and comparative basis was an important factor as to why it proved durable for over a hundred years. During the last hundred years however, the relevance of theoretical perspectives fo understanding criminal law has been downplayed in Norway in favour of a more pragmatic approach – also with regards to the decision of whether to

[67] This solution has been subject to critique in the literature; see for instance Gröning, Husabø and Jacobsen (2015) pp. 318-324.

ascribe criminal responsibility. In our opinion this is now unfortunately reflected in our new criminal code, which on certain points would have strongly benefited from a greater theoretical influence.