

# Intoxication and Self-Induced Criminal Incapacity in Norwegian Law

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## 1. Introduction

A high number of crimes are committed under the influence of alcohol and drugs. The link between alcohol and drugs, and crime is complex, but generally alcohol and drugs affect people's thought processes and behaviour.<sup>1</sup> Alcohol and drugs also increase the risk of violent and criminal behaviour. In some instances, alcohol and drugs may result in poisonous effects that lead to severe impairment of consciousness or substance-induced psychosis – conditions that may normally provide an excuse from criminal responsibility. A central question in criminal law is therefore that of how to regulate *intoxication and criminal incapacity*, and how to construct criminal responsibility in these specific instances. This question relates in particular to the general problem of the responsibility of a defendant who has created the conditions of his/her own excuse, a problem which is part of an extensive philosophical debate about imputation of responsibility for actions.<sup>2</sup>

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<sup>1</sup> See further, especially for a discussion of how different drugs have different effects, Hoaken and Stewart, Drugs of abuse and the elicitation of human aggressive behavior, 28 *Addictive Behaviors* (2003) pp. 1533–1554 and Anderson and Bokor, Forensic Aspects of Drug-Induced Violence, 25 *Journal of Pharmacy Practice* 2012 pp. 41–49, at 41–46.

<sup>2</sup> See, inter alia, Hruschka, Imputation, 1986 *Brigham Young University Law Review* (1986) pp. 669–710, Robinson, Imputed Criminal Liability, 93 *The Yale Law Journal* (1984) pp. 609–676 and Moore, *Act and Crime. The Philosophy of Action and Its Implications for Criminal Law* (Oxford 1993).

As a starting point, it is a well established doctrine of criminal law that a defendant cannot rely on excuses arising from his or her own prior fault. The closely related doctrine of *actio libera in causa* also implies that a defendant who has caused a loss of control of his or her actions (for instance by substance abuse) can be held responsible for the consequences of these actions.<sup>3</sup> What these doctrines more specifically imply for the limits of the criminal incapacity excuse is, however, a more disputed matter. As we will see, a contested question is to what extent a defendant who creates his/her own incapacity must be culpable – and for what. There are also other, potentially conflicting, considerations that impact criminal rules, such as evidential considerations and arguments about the public sense of justice.

In this article, we will discuss the regulation of criminal incapacity and intoxication in Norwegian criminal law. The rule about self-induced intoxication and criminal incapacity is currently found in the second paragraph of section 20 of the Norwegian Penal Code<sup>4</sup> and states that impairment of consciousness caused by self-induced intoxication provides no exemption from punishment.<sup>5</sup> According to a judgment from the Supreme Court, this exception is also applicable to substance-induced psychosis.<sup>6</sup> The main rule is otherwise that a defendant who was suffering from a severe impairment of consciousness or who was psychotic at the time of the act is criminally incapable, and should be exonerated from criminal responsibility.<sup>7</sup>

This rule about criminal incapacity and intoxication is strict. It does not require that the defendant was culpable in creating his or her incapacity (or for committing the crime in this condition). Criminal responsibility is engaged as soon as the *intoxication* was self-induced and the defendant can be blamed for having intoxicated him or herself. As we will elaborate further below, this rule has been debated for many years and has been subject to different kinds of critique. It has also recently been the object of two different proposals for revision. In *NOU 2014:10*, a law committee proposed to introduce a new rule that moves the focus from self-induced intoxication to self-induced (and culpable)

<sup>3</sup> This doctrine is emphasised in Norwegian and Continental law. See Gröning, Husabø and Jacobsen, *Frihet, forbrytelse og straff. En systematisk fremstilling av norsk strafferett* (Fagbokforlaget 2016) p. 254 and Andenæs, *Alminnelig strafferett*, 6th ed. by Rieber-Mohn and Sæther (Universitetsforlaget 2016) pp. 294–295. For different accounts of this principle, see Susan Dimock, *Actio Libera in Causa*, 7 *Criminal Law and Philosophy* (2013) pp. 549–569.

<sup>4</sup> Law 20 May 2005 nr. 28. An unofficial English translation is available at [https://lovdata.no/dokument/NLE/lov/2005-05-20-28/\\*#\\*](https://lovdata.no/dokument/NLE/lov/2005-05-20-28/*#*) (last accessed 15.02.2018).

<sup>5</sup> See section 20, second paragraph of the Norwegian Penal Code of 2005: '*Bevissthetsforstyrrelse som er en følge av selvforskyldt rus, fritar ikke for straff*'. See also below in 3.2.

<sup>6</sup> See Rt. 2008 p. 549. See further below in section 2.1 about the meaning of this rule.

<sup>7</sup> Other grounds for criminal incapacity in Norwegian law are infancy (below 15 years of age) and severe mental disablement. See further section 2.1 and Gröning and Rieber-Mohn, *NOU 2014:10 – Proposal for New Rules Regarding Criminal Insanity and Related Issues*, Norway post 22-July, 3 *Bergen Journal of Criminal Law and Criminal Justice* (2015) pp. 109–131, at 111–112.

criminal incapacity.<sup>8</sup> This proposal was, however, not followed by the Norwegian Ministry of Justice and Public Security, who delivered *Prop. 154 L (2016–2017)* in June 2017 with its own recommendation of new rules. To what extent and in what way there will be a legal change is to date therefore an open question. The Parliament will most probably conclude in the matter in 2018. Against this background, we will in the following explain and discuss the current rule on intoxication and criminal incapacity in Norwegian law, as well as the prevailing law proposals. Hopefully this discussion will also contribute to a debate on criminal incapacity and intoxication.

## 2. Intoxication and Criminal Incapacity in Current Law

### 2.1 *The General Rule Regarding Criminal Capacity*

In order to understand the Norwegian regulation on criminal incapacity and intoxication, it is necessary first to understand the general rule regarding criminal incapacity. Criminal capacity at the time of the offence is in Norwegian law, as in many countries, a basic condition for criminal responsibility.<sup>9</sup> That individuals generally have the capacity to act responsibly is most accurately described as a core assumption of the criminal law. Individuals do not always make use of this capacity, but normally they are *expected* to do so. Only certain conditions that are currently specified in the Penal Code section 20, first paragraph a–d entail criminal incapacity and lead to exoneration from criminal responsibility. This rule determines that the perpetrator is absolved from criminal responsibility if he or she was a) below 15 years of age, b) ‘psychotic’, c) ‘severely mentally disabled’ or d) had a ‘severe impairment of consciousness’ at the time of the offence.

The more concrete meaning of these different grounds for criminal incapacity can briefly be summarised as follows: The age limit of 15 years is absolute. The criterion ‘psychotic’ refers to the equivalent medical term, but the provision requires that the psychosis be discernible at the time of the offence through obvious symptoms. A person who suffers from psychosis, but is not (actively) psychotic for example due to medication at the time of the offence is therefore not absolved from criminal responsibility.<sup>10</sup> The criterion ‘severely mentally disabled’ refers to offenders with seriously impaired

<sup>8</sup> One of the authors, Linda Gröning, was a member of this committee.

<sup>9</sup> See Andenæs 2016 p. 288, Mæland, *Norsk alminnelig strafferett* (Justian 2012) p. 203 and NOU 1990:5 *Strafferettslige utilregnelighetsregler og særreaksjoner – Straffelovkommisjonens delutredning IV* pp. 45–46.

<sup>10</sup> See further Ot.prp. nr. 87 (1993–1994) *Om lov om endringer i straffeloven m.v (strafferettslige utilregnelighetsregler og særreaksjoner)* pp. 22–23, Ot.prp. nr. 90 (2003–2004) *Om lov om straff (straffeloven)* p. 217, Gröning, Husabø and Jacobsen 2016 pp. 494–495 and Andenæs 2016 p. 304.

intellectual capacity. Whether this criterion is fulfilled depends on an overall evaluation of the functioning and intellectual capacities of the offender, where an intelligence quotient below 55 normally entails incapacity.<sup>11</sup> ‘[S]evere impairment of consciousness’ finally refers to cases where the perpetrator has acted without perceiving their surroundings whatsoever, often with a subsequent loss of memory. Thus, the person can act, but is to a large extent without ability to control or critically evaluate how he or she acts.<sup>12</sup> Such cases can for example occur during sleepwalking or an epileptic seizure. It should be noted that the condition of severe impairment of consciousness in this regard has an obvious relation to the *actus reus* requirement, and raises questions whether the person has acted (voluntarily) at all. The concept of action has, however, been subject to little attention within Norwegian law, and the condition of severe impairment of consciousness is generally treated as a regular excuse (that presupposes a wrongful act).<sup>13</sup>

The various grounds for criminal incapacity are thus all defined by specifying a particular condition – young age, psychosis, severe mental disablement and severe impairment of consciousness – which, when established to have occurred at the time of the offence, lead to unconditional exoneration from criminal responsibility. These conditions are as such understood as full *excuses* from an otherwise criminalised and wrongful act. In contrast to many other countries, it is not necessary to establish that the relevant condition, disorder, or dysfunction has impacted the commission of the offence.<sup>14</sup> The primary justification for the Norwegian regulation is, however, as in most countries, anchored in the guilt principle, which demands that criminal responsibility should only obtain for those who *could and should* have acted differently, and therefore can be *blamed* for their actions.<sup>15</sup> The conditions that are equated with criminal incapacity are all understood to affect the person in such a way that it seems unreasonable to blame him/her and hold him/her responsible for having acted wrongly. Compared to other Nordic countries, Norway also has a high threshold for allowing a criminal incapacity excuse.<sup>16</sup>

Systematically, criminal incapacity is as an excuse from an otherwise criminalised and wrongful act assessed *independently* from *mens rea*. The *mens rea* requirement is in Norwegian law understood by some authors as closely related to the requirement of a criminalised act and thus *prior* to the excuse of incapacity, and by others as a separate

<sup>11</sup> See further Ot.prp. nr. 90 (2003–2004) p. 218 and Gröning, Husabø and Jacobsen 2016 p. 500.

<sup>12</sup> See Rt. 2008 p. 549 (34), Ot.prp. nr. 90 (2003–2004) pp. 218–220, Gröning, Husabø and Jacobsen 2016 pp. 498–499 and Andenæs 2016 pp. 307–308.

<sup>13</sup> See further Gröning, Husabø and Jacobsen 2016 pp. 112–116 and 497–499.

<sup>14</sup> On this rule construction in Norwegian law, see further Andenæs 2016 pp. 288–289 and Gröning, Husabø and Jacobsen 2016 pp. 487–488.

<sup>15</sup> See further Gröning, Tilregnelighet og utilregnelighet: begrep og regler, 102 *Nordisk Tidsskrift for Kriminalvidenskap* (2015) pp. 112–148 at 113–116.

<sup>16</sup> See NOU 2014:10 *Skylddevne, sakkyndighet og samfunnsvern* pp. 60–84 for a comparative analysis of the threshold for criminal insanity.

category of individual guilt.<sup>17</sup> However, both models share a doctrinal separation of criminal incapacity from *mens rea*, which has also resulted in a need for different, but related, rules about intoxication. An intoxication that places a person in a condition of criminal incapacity may also affect this person's ability to form intent, although this does not have to be the case. A substance-induced psychosis that leads to criminal incapacity may for instance, although unusual, involve bizarre hallucinations and delusions that negate also the person's ability to form intent. A person who in such a psychotic state wrongfully believes that a person is a demon, and kills this person, will lack the required intent for murder (of another human being). In order to avoid unreasonable acquittals, an exception for self-induced intoxication is thus found both in the rules regarding criminal incapacity and the rules regarding intent. The latter is found in the third paragraph of section 25 of the Penal Code. It states that ignorance resulting from self-induced intoxication shall be disregarded, and that the defendant in such cases shall be judged as if he or she were sober. This rule raises somewhat different considerations and different kinds of doctrinal problems than the rule regarding criminal incapacity, and will not be discussed further in this article.<sup>18</sup>

## 2.2 *The Exception for Intoxication and Criminal Incapacity*

The exception for self-induced intoxication is currently found in the second paragraph of section 20 of the Penal Code. It states that '[i]mpairment of consciousness as a result of self-induced intoxication provides no exemption from punishment'.<sup>19</sup> In order to be applicable, this exception requires as a starting point that the defendant was in a condition equated with criminal incapacity at the time of the offence. According to its wording, the rule is only applicable to criminal incapacity due to *impairment of consciousness* (alternative d mentioned above). The Supreme Court has, however, made it clear that the provision is also applicable to cases of *psychosis* (alternative b) triggered by substance abuse.<sup>20</sup> Naturally the exception for intoxication is not applicable on the conditions of low age and severe mental disablement, as these conditions cannot be substance-induced.

<sup>17</sup> On the structure of the general part of Norwegian criminal law, see further Gröning, Husabø and Jacobsen 2016 pp. 26–27.

<sup>18</sup> For a discussion of intoxication and intent, see further Boucht, Betydelsen av självförvållat rus vid uppsåtsbedömningen enligt norska strl. § 40 – särskilt i ljuset av svenska HD:s avgörande NJA, 2011 s. 563, 124 *Tidsskrift för Rettsvitenskap* (2011) pp. 612–657 and Høgberg and Tøssebro, Begrensninger i adgangen til å fingere skyld, 38 *Kritisk Juss* (2012) pp. 223–243.

<sup>19</sup> The wording of the law is: '*Bevissthetsforstyrrelse som er en følge av selvforskyldt rus, fritar ikke for straff*'.

<sup>20</sup> Rt. 2008 p. 549. The conditions are that the psychosis is short and temporary, and resolves with sobriety.

Given that the defendant was psychotic or in a condition of severe impairment of consciousness at the time of the act, three specific conditions must furthermore be fulfilled for the exception in section 20 second paragraph to apply. The first condition is that the *defendant was intoxicated*, which is often shown by a change in consciousness, mood and perception of reality.<sup>21</sup> This requirement is fulfilled when the person has lost full control over him or herself because of the use of alcohol or other substances.<sup>22</sup> The threshold is thus low. The kind of substance, or whether this substance is legal or not, is not relevant. The only thing that matters is whether the substance can cause intoxication and actually has done so in the specific case.<sup>23</sup>

The second condition is that *the intoxication was self-induced*. The intoxication is self-induced when, for instance, the intake of alcohol was voluntary and the defendant is to blame for consuming such an amount that he/she had to expect to lose control over him or herself.<sup>24</sup> The intake does not have to be significant before this condition is fulfilled,<sup>25</sup> and it is not required that the person foresaw, or should have foreseen, that the intoxication could lead to a state of incapacity.<sup>26</sup> There is basically no distinction between typical and atypical intoxication.<sup>27</sup> (At typical intoxication, the consciousness will be reduced gradually as the intake increases, while the atypical intoxication is characterised by a sudden impairment of consciousness after a small intake of alcohol).<sup>28</sup> However, atypical intoxication will more readily be considered not to have been self-induced since it obtains after a small amount of alcohol.<sup>29</sup> Whether the intoxication was self-induced or not must in the end be subject to an overall assessment of the situation. Court practise shows, however, that if the defendant's intake of alcohol is such that it will normally lead to intoxication, there must be special circumstances, such as ignorance about the drink being alcoholic, before the court finds the intoxication not to be self-induced.<sup>30</sup>

<sup>21</sup> Eskeland, *Strafferett*, 5th ed. by Høgberg (Cappelen Damm Akademisk 2017) p. 346.

<sup>22</sup> Rt. 1983 p. 202 at 204 with reference to Andenæs, *Alminnelig strafferett*, 1st ed. (Akademisk forlag 1956) pp. 274–275, Ot.prp. nr. 90 (2003–2004) pp. 220–221 and Gröning, Husabø and Jacobsen 2016 p. 252.

<sup>23</sup> Gröning, Husabø and Jacobsen 2016 p. 252.

<sup>24</sup> Rt. 2008 p. 1393 (15) and Gröning, Husabø and Jacobsen 2016 p. 252. The amount must be seen in relation to other known factors that can strengthen the intoxication, for example the use of medication, see in this regard for example Rt. 1984 p. 773.

<sup>25</sup> Ot.prp. nr. 90 (2003–2004) pp. 220–221 and Gröning, Husabø and Jacobsen 2016 pp. 252–253.

<sup>26</sup> Rt. 1967 p. 688 at 689–690 and Eskeland 2017 pp. 348–350 and 352.

<sup>27</sup> Rt. 1983 p. 202, Andenæs 2016 pp. 316–317 and Eskeland 2017 pp. 352–353.

<sup>28</sup> See Andenæs 2016 pp. 314–315.

<sup>29</sup> See *ibid.* p. 317 and Eskeland 2017 pp. 352–353.

<sup>30</sup> Rt. 2008 p. 1393 (15) and Rt. 1977 p. 644. See further Andenæs 2016 p. 323 and Gröning, Husabø and Jacobsen 2016 pp. 252–253.

The third and last condition is that *the severe impairment of consciousness or psychosis must be caused by intoxication*. This is the case when the intoxication is the outstanding causal factor in a co-operative causal relationship of the severe impairment of consciousness or psychosis.<sup>31</sup> The relationship between intoxication and the impairment of consciousness or psychosis might be difficult to assess, since the person can have an underlying mental disorder, or maybe a history of substance abuse. Thus, there will be a need for further assessment of the defendant. In case of psychosis, the persistence of psychotic symptoms after the end of the intoxication is an important factor. If the psychosis resolves with sobriety, it will often be considered to have been triggered by the intoxication. Different kinds of substances have, however, different intoxicating effects. It is therefore generally difficult to determine exact time-limits for how long a psychosis should last after intoxication, before it should entail an excuse. Previous cases also provide for significant variation in this regard.<sup>32</sup> The medico-legal commission and the Director General of Public Prosecutions have indicated that if the psychosis lasts more than a month after the intoxication, it should not be considered to have been caused by the intoxication.<sup>33</sup>

The legal assessment of the applicability of the exception for self-induced intoxication is made on the basis of expert evidence. Forensic experts provide for a clinical evaluation and psychiatric diagnosis of the defendant's condition at the time of the offence. The experts do, however, not evaluate whether the intoxication was self-induced, but only whether the impairment of consciousness/psychosis was substance-induced.<sup>34</sup> There are no statistics as regards how often the exception for self-induced intoxication is used, and clear data are difficult to access. The impression from published judgements is, however, that the exception for intoxication relatively often is evaluated in insanity cases, but that this evaluation seldom results in acquittals.<sup>35</sup>

<sup>31</sup> Rt. 1983 p. 9 at 10, Rt. 1978 p. 1046 and Gröning, Husabø and Jacobsen 2016 p. 503.

<sup>32</sup> See inter alia Rt. 2011 p. 774 and Rt. 2010 p. 346.

<sup>33</sup> Rt. 2008 p. 549, Rt. 2010 p. 346, Rt. 2011 p. 774 and Rt. 2014 p. 92. See further Gröning, Husabø and Jacobsen 2016 pp. 503–504.

<sup>34</sup> See further *Nyhetsbrev fra Den rettsmedisinske kommisjon for psykiatrisk gruppe, nr. 3* 2000. See also Holum, Rusutløst psykose in *Rettspsykiatriske beretninger. Om sakkyndighet og menneskeskjebner*, eds. Grøndahl and Stridbeck (Gyldendal akademisk 2015) pp. 184–185.

<sup>35</sup> Among the judgements that are publically accessible there seems to be very few cases each year where the court concludes that a substance induced criminal insanity shall lead to an acquittal. For 2016 the exception seems, for instance, to have been considered in almost half of about 50 published cases, but only in one case we have found that the intoxication was not understood as self-induced and blameworthy. The same seems to be the situation for other years. From 2017 we have not found that any of the published cases resulted in an acquittal under the intoxication exception. See [www.lovdato.no](http://www.lovdato.no) for published judgements (last accessed 12.04.2018). See also the annual reports from the Forensic board of medicine on [www.sivilrett.no](http://www.sivilrett.no) (last accessed 12.04.2018).

In sum, the exception in section 20, second paragraph is strict, as it only requires that the *intoxication* was self-induced. Culpability with regard to causing the condition of criminal incapacity or committing the crime in this condition is thus not required. Criminal responsibility can be ascribed also to persons who could not at all foresee how their intoxication would affect them. This compromise with guilt considerations has been justified by reference to alcohol policy considerations, considerations of general and individual deterrence, and evidential considerations, in addition to the general sense of justice. Norwegian criminal law policy involves, in this regard, generally a harsh view upon alcohol and drugs which is also reflected in the criminal law.<sup>36</sup>

As we shall come back to, there are some evident problems with the contemporary Norwegian solution to our problem, in particular because it compromises the principle of guilt. Interestingly enough, however, Norwegian criminal law, when looked at in a broader perspective, also offers a number of alternative solutions. One finds a different solution in the Penal Code of 1902,<sup>37</sup> as it originally was drafted. Furthermore, the recent law proposals NOU 2014:10 and Prop. 154 L provide for different solutions as responses to the problems identified in current law. In the following section, we will survey the evolution of Norwegian criminal law and the related critical discourse from 1902 up until the contemporary proposals, as basis for our final analysis.

### 3. From Past to Present: Leaving the Guilt Principle Behind

#### 3.1 *The Development from the 1902-Solution Until Today*

When the former Penal Code was adopted in 1902, the exception for intoxication and criminal incapacity was not as strict as it is today. On the contrary, also criminal incapacity caused by intoxication could in many cases exempt someone from criminal responsibility. The former rule, in this regard, distinguished between intentional and negligent crime. If the penal provision claimed intent, a defendant who had been in a state of incapacity due to self-induced intoxication would be criminally responsible (only) if he had intoxicated himself *deliberately to commit the crime*.<sup>38</sup> In regard to negligent crimes, a person could be

<sup>36</sup> See in particular chap. 23 of the Penal Code.

<sup>37</sup> Law 22 May 1902 nr. 10. An unofficial English translation is available at <http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19020522-010-eng.pdf> (last accessed 15.02.2018).

<sup>38</sup> Section 45 of the Penal Code of 1902, which regulated criminal incapacity after intoxication, initially had this wording: '*Har nogen i den Hensigt at forøve en strafbar Handling hensat sig i en forbigaaende Tilstand af nogen i § 44 omhandlet Art, bliver denne Tilstand uden Indflydelse paa Strafbarheden. ... Er han ellers ved egen Skyld kommen i en saadan Tilstand, og foretager han paa Grund af denne nogen Handling, der er strafbar, ogsaa naar den forøves af Uagtsomhed, anvendes den for Uagtsomhed bestemte Straf.*'



held responsible if he/she was in a state of incapacity because of self-induced intoxication and because of this committed a crime, even though he/she did not intoxicate him or herself with the intent of committing a crime.<sup>39</sup>

At the same time as this former rule was more consistent with guilt considerations, it was also coupled with practical problems. There were in particular difficulties tied to proving that the person had intoxicated him or herself with the intent of committing a crime. The fact that many penal provisions required intent, resulted in acquittal in (too) many cases. A strengthened responsibility for criminal offences committed under intoxication was desired.<sup>40</sup>

Against this background, the Penal Code was changed in 1929, and the rule with the strict exception that we have today was thereby introduced.<sup>41</sup> Instead of being related to considerations of the defendant's culpability in intoxicating him or herself to commit the crime, criminal responsibility was now tied directly to self-induced intoxication. This turn was justified with the arguments that the person who intoxicates him or herself often acts by negligence, that the principle of guilt would in many cases authorise liability, and that other solutions would cause evidentiary problems.<sup>42</sup> In our view, however, the choice to introduce today's strict exception represented a choice to derogate the established principle of guilt, in favour of a practicable rule. To compensate for the effect of the change, a new rule about reduction of the penalty below the minimum prescribed for the act if it was committed in a state of unconsciousness that was a result of self-induced intoxication was introduced. This rule, however, requires that 'especially extenuating

<sup>39</sup> Indst. O. VII (1899–1900) *Indstilling fra justiskomiteen angaaende den kgl. proposition til en almindelig borgerlig straffelov, en lov om den almindelige borgerlige straffelovs ikrafttræden samt en lov, indeholdende forandringer i lov om rettergangsmaaden i straffesager af 1ste juli 1887* p. 37 (available at <https://www.stortinget.no/no/Saker-og-publikasjoner/Stortingsforhandlinger/Lesevisning/?p=1899-00&paid=6&wid=b&psid=DIVL783>, last accessed 15.02.2018).

<sup>40</sup> *Innstilling fra den av Justisdepartementet 11. mai 1922 opnevnte komité til revisjon av Straffeloven. Del 1* (1925) pp. 86–88 (available at [https://urn.nb.no/URN:NBN:no-nb\\_digibok\\_2016091248095](https://urn.nb.no/URN:NBN:no-nb_digibok_2016091248095), last accessed 15.02.2018).

<sup>41</sup> See amending act 22 February 1929 no. 5. This regulation is continued without substantive change in the Penal Code of 2005. The Penal Code's entry into force in 2015 did thus not change the state of law regarding criminal incapacity and voluntary intoxication, see the Penal Code of 2005 section 20 and Ot.prp. nr. 90 (2003–2004) pp. 423–424.

<sup>42</sup> *Innstilling fra den av Justisdepartementet 11. mai 1922 opnevnte komité til revisjon av Straffeloven. Del 1* (1925) pp. 88–89 and Ot.prp. nr. 11 (1928) *Om forandringer i straffeloven* pp. 3–5 (available at <https://www.stortinget.no/no/Saker-og-publikasjoner/Stortingsforhandlinger/Lesevisning/?p=1928&paid=3&wid=a&psid=DIVL235>, last accessed 15.02.2018).

circumstances' warrant that the penalty shall be reduced and that the defendant had not intoxicated him or herself with the intent of committing the crime.<sup>43</sup>

The discussion over the regulation, however, continued, and throughout the years several committees have recommended that the strict exception for criminal incapacity and intoxication should be substituted with a facultative rule of criminal responsibility, where incapacity caused by self-induced intoxication could only excuse when 'special reasons' require it.<sup>44</sup> This would make the responsibility for offences committed in a state of self-induced intoxication a little less strict. The proposals were, however, rejected. Amongst the reasons for rejecting the different proposals was that the current rule had not been unreasonably strict, that it could seem offensive against the general sense of justice if incapacity caused by self-induced intoxication could lead to full exemption from punishment, considerations of general and individual deterrence, judicial costs and the risk of incorrect acquittals if the rule was amended.<sup>45</sup>

### *3.2 Recent Criticism and New Proposals for Change*

The current regulation of intoxication and incapacity remains debated and criticised. To recapture the critique: The core of the criticism is that the exception for intoxication is too strict and that it compromises the principle of guilt. It is viewed as problematic that it is not required that the defendant should have understood that he/she by substance abuse could become criminally incapacitated or commit crimes.<sup>46</sup> This critique is adequate. The rule is applicable also in cases where the person cannot be blamed for causing the condition of incapacity or for causing the crime. Thereby, there is a clear disproportionality between what the defendant is to blame for (the prior intoxication) and the ascribed criminal responsibility for the committed crime in the state of incapacity (that was caused by the intoxication).<sup>47</sup> On the basis of considerations of guilt and blameworthiness, it has furthermore been argued that it is inadequate that the current rule is limited to

<sup>43</sup> See The Penal Code of 1902 section 56, letter d after the amendment by law 22 February 1929 nr. 5. See also Innst. O. II (1929) *Innstilling fra justiskomiteen om forandringer i den almindelige borgerlige straffelov* pp. 6–7 (available at [https://www.stortinget.no/no/Saker-og-publikasjoner/Stortingsforhandlinger/Lesevisning/?p=1929&paid=6&wid=b&psid=DIVL798&pgid=b\\_0267](https://www.stortinget.no/no/Saker-og-publikasjoner/Stortingsforhandlinger/Lesevisning/?p=1929&paid=6&wid=b&psid=DIVL798&pgid=b_0267), last accessed 15.03.2018).

<sup>44</sup> See the proposals NOU 1974:17 *Strafferettslig utilregnelighet og strafferettslige særreaksjoner* p. 149, see further at pp. 55–64, NOU 1990:5 p. 9, see further pp. 58–60 and NOU 2002:4 *Ny straffelov – Straffelovkommisjonens delutredning VII* p. 476, see further at pp. 230–231.

<sup>45</sup> See Ot.prp. nr. 87 (1993–1994) p. 38 and Ot.prp. nr. 90 (2003–2004) p. 221.

<sup>46</sup> Cf. Gröning, Husabø and Jacobsen 2016 p. 505.

<sup>47</sup> See for example Prop. 154 L (2016–2017) *Endringer i straffeloven og straffeprosessloven mv. (skyldevne, samfunnsvern og sakkyndighet)* p. 106, Eskeland 2017 pp. 360–361, Andenæs 2016 p. 316 and Gröning, Husabø and Jacobsen 2016 p. 505.

intoxication through alcohol and drugs – which was the only known cause for self-induced incapacity when the rule was first adopted.<sup>48</sup> Since incapacity can be self-induced by other means than intoxication, for example through discontinuation of medication, it has been suggested that the rule should have a wider applicability.<sup>49</sup> A more specific critique has been that the current rule has a far too strict application when it comes to the question of when alcohol-induced incapacity leads to criminal responsibility. Since the rule does not distinguish between typical and atypical intoxication, and since the rule is applicable also in case of a relatively low intake of alcohol, this can lead to unreasonable results in some cases.<sup>50</sup> Finally, the current rule has been criticised for compromising legality demands. As the exception is applicable also to substance-induced psychosis, although its wording only includes impairment of consciousness, it has been suggested that the wording should be changed.<sup>51</sup>

The current rule has on the background of this critical discourse also recently been subject to proposals for revision. In October 2014, the report NOU 2014:10 was delivered by a committee appointed in the aftermath of the 22 July case.<sup>52</sup> This report was followed by the law proposal from the Ministry of Justice and Public Procedure, Prop. 154 L (2016–2017), that was delivered in June 2017.<sup>53</sup> Both of these proposals concerned the rules about criminal capacity more generally and criminal insanity and psychosis in particular. In this context, however, they also recommended changing the current rule regarding criminal incapacity and intoxication, which we will now turn our attention to.

## 4. NOU 2014:10: Taking the Guilt Principle More Seriously

### 4.1 *The Content of the Committee's Proposal*

The committee behind NOU 2014:10 did not only propose changes in the rule about intoxication. It also proposed a change in the general rule for criminal incapacity, which

<sup>48</sup> NOU 2014:10 *Skyldevne, sakkyndighet og samfunnsvern* pp. 163–164.

<sup>49</sup> See Gröning, Husabø and Jacobsen 2016 p. 505 and the proposed changes in NOU 2014:10, see further section 4.2 below.

<sup>50</sup> See from court law for example Rt. 1967 p. 688 and Rt. 1978 p. 1046.

<sup>51</sup> See Gröning, Husabø and Jacobsen 2016 pp. 504–505.

<sup>52</sup> NOU 2014:10 *Skyldevne, sakkyndighet og samfunnsvern [Criminal capacity, expert knowledge and protection of society]* (available at <https://www.regjeringen.no/no/dokumenter/NOU-2014-10/id2008986/>, last accessed 15.02.2018).

<sup>53</sup> Prop. 154 L (2016–2017) *Endringer i straffeloven og straffeprosessloven mv. (skyldevne, samfunnsvern og sakkyndighet) [Changes in the Penal Code and the Act on Criminal Procedure (criminal capacity, protection of society and expert knowledge)]* (available at <https://www.regjeringen.no/no/dokumenter/prop.-154-l-20162017/id2557006/>, last accessed 15.02.2018).

had implications for the formulation of the exception for intoxication, and therefore first must be commented. The current structure, where certain conditions (low age, psychosis, severe mental disablement, and severe impairment of consciousness) lead to unconditional exoneration from criminal responsibility, was proposed to be kept, but the criterion of 'psychosis' was proposed to be changed:<sup>54</sup>

*A person whom at the time of committing the act ... the court deems to have been ...  
a) psychotic or in a condition which, due to reduced functioning, disordered thinking,  
or otherwise inability to comprehend his relationship with his surroundings, must be  
equated with psychosis.*<sup>55</sup>

The proposal thus clarified that psychosis only grants exemption from criminal responsibility when the psychotic symptoms are established to have had a pronounced intensity at the time of the offence. In addition, conditions *equated* with psychosis, *i.e.* conditions that are equally serious, were proposed to lead to exoneration from criminal responsibility. According to the committee's view, the justification to exempt from responsibility those offenders who cannot reasonably be blamed for their actions, reaches further than the current legal definition of psychosis. Certain individuals who cannot be understood as psychotic, can still have disordered thinking, reduced functioning, or a lack of ability to understand his/her relation to his/her surroundings in a way similar to the people suffering from psychosis.<sup>56</sup> These changes in the general rule about criminal incapacity were also reflected in the committee's proposal to change the rule with the exception about intoxication. The committee responded to much of the criticism of the current formulation of this rule and proposed an entirely new formulation:

*The person who has self-induced a condition such as those provided in letters a and b [psychosis and equivalent conditions, severe impairment of consciousness], can be liable to a penalty. Conditions that are an effect of self-induced intoxication do not exclude punishment.*<sup>57</sup>

<sup>54</sup> As regards the criteria of severe mental disablement, a minor extension was proposed. See further NOU 2014:10 p. 376 and Gröning and Rieber-Mohn 2015 p. 115.

<sup>55</sup> See the proposed wording in NOU 2014:10 p. 380: '*Den som på handlingstidspunktet ... av retten anses for å ha vært ... a) psykotisk eller i en tilstand som med hensyn til sviktende funksjonsevne, forstyrret tenkning og for øvrig manglende evne til å forstå sitt forhold til omverdenen, må likestilles med å være psykotisk.*'

<sup>56</sup> *Ibid.* pp. 24 and 127–128.

<sup>57</sup> See the proposed wording *ibid.* p. 380: '*Den som selvforskyldt fremkaller en tilstand som nevnt i bokstav a og b [psykotisk eller i likestilt tilstand, og sterk bevissthetsforstyrrelse], kan straffes. Slike tilstander som er en følge av selvforskyldt rus, utelukker ikke straff.*'

A first thing to note is that this rule in its wording clarifies all relevant conditions that may be subject to the exception. In contrast to the current rule, the rule thus takes into account the demands of legality. The most radical change, however, is that the proposed rule in its first sentence shifts the focus from *self-induced intoxication* to *self-induced criminal incapacity*. By the formulation ‘[t]he person who has self-induced a condition’, the rule expands the possible application of criminal liability for criminally incapable persons to other cases than those related to intoxication. For instance, defendants who become criminally incapable due to the discontinuation of medication, and who suffer from psychotic disorders, can be held responsible if they can be blamed for having placed themselves in the condition of incapacity.

The committee further proposed that a condition should be understood as self-induced when it is brought about *wilfully* or *by negligence*, as an objective-subjective standard of prior fault. At its core, the culpability assessment should be objective, and the question is whether the defendant should have understood that his/her actions would cause the condition. This assessment shall, however, be adjusted to the personal circumstances and abilities of the defendant.<sup>58</sup> Responsibility could for instance be ascribed to a person who, even though he/she by experience knows that he/she reacts in an atypical way to alcohol or hallucinogenic substances, runs the risk of severe impairment of consciousness by drinking alcohol or consuming hallucinogenic substances.<sup>59</sup> Responsibility could also be ascribed to a patient who ceases to take prescribed medication, which he or she knows is necessary to hold a mental illness in check, and therefore relapses into psychosis and commits a crime in this condition.<sup>60</sup>

The main justification for the shift of focus to self-induced incapacity consisted in considerations of guilt. Emphasising a guilt perspective, the committee criticised the current strict focus on self-induced intoxication. The committee also argued that guilt considerations can justify responsibility for mentally ill persons who bring a condition of criminal incapacity on themselves, well aware that it involves a risk of unacceptable, and perhaps aggressive and violent behaviour. To impose criminal responsibility for such risk-taking was, in addition, presumed to have clear preventive effects and to reduce the extent of risky behaviour.<sup>61</sup>

At the same time, the committee emphasised that not all instances of self-induced incapacity can be viewed as blameworthy. In order to avoid unreasonable results, the rule was therefore constructed as conditional, asserting that persons who induce their own incapacity ‘can be liable to a penalty’. Criminal responsibility should not be ascribed

<sup>58</sup> *Ibid.* section 9.5.4.4.

<sup>59</sup> *Ibid.* pp. 169–170.

<sup>60</sup> See *ibid.* p. 170.

<sup>61</sup> See *ibid.* pp. 153–155 and 163–164.

in situations where there are no moral reasons to punish.<sup>62</sup> An example given by the committee was that of a person suffering from malaria who becomes psychotic when taking medication against the disease. Equally, a doctor and patient must have some leeway in establishing the correct dose of antipsychotics.<sup>63</sup>

The committee also discussed the intake of alcohol in relation to the rule about self-induced incapacity. It proposed that an intake of alcohol that is within generally accepted limits should not lead to criminal responsibility according to this rule.<sup>64</sup> Furthermore, a greater amount of alcohol must be consumed before the state of incapacity will be found to be self-inflicted than before the intoxication will be found to be self-induced.<sup>65</sup> At the same time as the proposal expands the exception beyond intoxication cases, the requirement that the criminal incapacity has to be self-induced thus expands the room for excuse in intoxication cases.

As we can see, the first sentence about self-induced incapacity covers self-induced incapacity caused by intoxication. The committee intended this to be the sole regulation of incapacity linked to intoxication, but nevertheless proposed a second sentence for the rule, stating that states of incapacity that are an 'effect of self-induced intoxication do not exclude punishment'.<sup>66</sup> This continuation of the current regulation's focus on self-induced intoxication seems somewhat inconsistent with the focus on self-induced incapacity in the first part of the rule. As arguments for having this rule in addition to the rule about self-induced incapacity, the committee indicated uncertainty about whether the first sentence would lead to large evidentiary problems in cases of self-induced incapacity related to intoxication, and whether the rule would be effective enough in such cases.<sup>67</sup> The committee nevertheless suggested using the rule in the first sentence also in intoxication cases, and that the rule in the second sentence should be phased out over time.<sup>68</sup> The committee also recommended that the wording 'do not exclude punishment' should be interpreted with a reservation for unlawfulness to alleviate any unfair results the rule may lead to in current law.<sup>69</sup> As with the first sentence, unexpected and atypical reactions to an ordinary and socially acceptable intake of alcohol will not lead to criminal responsibility,<sup>70</sup> and the intake must be greater than the generally accepted amount before

<sup>62</sup> *Ibid.* p. 170.

<sup>63</sup> *Ibid.* p. 170.

<sup>64</sup> See *ibid.* pp. 170–172 and 376.

<sup>65</sup> See *ibid.* pp. 174–175.

<sup>66</sup> See the proposed wording in *ibid.* p. 380: '*Slike tilstander som er en følge av selvforskyldt rus, utelukker ikke straff.*'

<sup>67</sup> See *ibid.* p. 173.

<sup>68</sup> *Ibid.* pp. 376–377.

<sup>69</sup> *Ibid.* p. 173.

<sup>70</sup> *Ibid.* p. 377.

criminal responsibility will obtain.<sup>71</sup> The proposed rule thus also allows for a larger room for excuse in regard to intoxication than what follows from current law.

#### 4.2 Critical Remarks

The shift in focus to self-induced incapacity clearly makes the proposed rule more consistent with considerations of guilt than the current regulation. The proposal has also responded to the legality criticism by clarifying in the wording which conditions can be subject to the exception. The proposed new formulation of the rule has, however, been the object of several critical remarks.<sup>72</sup> A main point has been that the rule may result in unfair convictions of mentally ill persons, especially in cases of discontinuation of medication. Whether the discontinuation of medication is a choice unaffected by the illness or not is a complex question, among many reasons because mentally ill persons can have limited insight into their own illness.<sup>73</sup> It is also possible that the person had already, at the point of discontinuation, become criminally incapable.<sup>74</sup> The rule therefore calls for quite individual and complex considerations, maybe with large evidentiary problems, in order to distinguish those who should be blamed for having caused their own incapacity from those who should not.<sup>75</sup> The risk is also that persons with serious chronic mental illness who are sceptical to mental health care end up in prison, even though they are in need of treatment.<sup>76</sup> Another risk that has been emphasised in this context is that the rule could lead to pressure, or informal coercion on taking medication.<sup>77</sup>

In relation to the intoxication cases, the proposed rule has been criticised for not properly clarifying the threshold for the required amount of alcohol.<sup>78</sup> In this regard, it

<sup>71</sup> See *ibid.* pp. 171–172 and 173.

<sup>72</sup> See Prop. 154 L (2016–2017) pp. 95–104 for excerpts from comments to the consultation paper.

<sup>73</sup> See *ibid.* pp. 96–101, comments to the consultation paper from *Nasjonalt folkehelseinstitutt* (pp. 96 and 99), *Oslo politidistrikt* (p. 97), *Helse Bergen Haukeland universitetssykehus ved Divisjon psykisk helsevern* (p. 100), *Helsedirektoratet* (pp. 100–101) and *Sykehuset i Vestfold HF ved Klinikk Psykisk Helse og Rusbehandling*.

<sup>74</sup> See *ibid.* p. 101, comment to the consultation paper from *Oslo universitetssykehus ved Regional sikkerhetsavdeling Helse Sør-Øst*.

<sup>75</sup> See *ibid.* pp. 96–104, comments to the consultation paper from *Ila Fengsel og forvaringsanstalt* (p. 96), *Oslo politidistrikt* (pp. 96–97), *Randi Rosenqvist* (pp. 97–98), *Den rettsmedisinske kommisjon* (pp. 99–100), *Oslo universitetssykehus ved Kompetansesenter for sikkerhets-, fengsels- og rettspsykiatri ved Narud* (p. 100), *Helsedirektoratet* (pp. 100–101 and 104) and *Mental helse* (p. 101).

<sup>76</sup> See *ibid.* pp. 96 and 98, comments to the consultation paper from *Ila Fengsel og forvaringsanstalt* and *Randi Rosenqvist*.

<sup>77</sup> See *ibid.* pp. 98–99, comments to the consultation paper from *Helsedirektoratet* and *Sykehuset i Vestfold HF ved Klinikk Psykisk Helse og Rusbehandling*.

<sup>78</sup> See *ibid.* pp. 102–103, comment to the consultation paper from *Kristiansand tingrett*.

has also been questioned whether the rule would create new evidentiary problems, for example if defendants argue that they have not experienced impaired consciousness when drinking large amounts of alcohol in the past.<sup>79</sup> Several institutions have also expressed the need for further study of the rules regarding psychosis caused by intoxication.<sup>80</sup> Some comments emphasised that addiction can influence the ability to control one's actions, including refraining from drug use. The proposed rule has in this context also been criticised for not properly clarifying the implications of the complex interplay between mental illness and addiction.<sup>81</sup>

These various critical remarks illustrate the difficulty of formulating an exception that takes into account principled arguments and at the same time represents a practically acceptable solution. It also raises some doubts about whether, and to what extent, the rule should emphasise self-induced incapacity instead of self-induced intoxication. As we shall now see, Prop. 154 L (2016–2017) proposes a somewhat different rule construction in this regard.

## 5. Prop. 154 L (2016–2017): Taking the Guilt Principle Somewhat Seriously

### 5.1 *The Content of the Ministry's Proposal*

The main changes in the general rule about criminal incapacity in Prop. 154 L (2016–2017) also concerned the psychosis criterion. In contrast to NOU 2014:10, however, Prop. 154 L (2016–2017) proposed to abolish the psychosis criterion and replace it with a criterion of 'severe mental disorder'. The intention was in this regard to introduce a criterion that makes it possible to include other conditions than psychosis, provided that they are serious enough, while psychosis is still the central condition for excuse.<sup>82</sup> In addition to this particular change, a new rule structure that provides a larger room of judicial discretion was proposed. Prop. 154 L (2016–2017) suggested that a person who at the time of committing the offence was below 15 years of age or criminally incapable

<sup>79</sup> See *ibid.* pp. 102–103, comment to the consultation paper from *Kristiansand tingrett*.

<sup>80</sup> Among these institutions are *DRK, Den norske legeforening, Helse Bergen Haukeland universitetssykehus ved Divisjon psykisk helsevern, Institutt for psykoterapi, Lovisenberg Diakonale Sykehus* and *Oslo universitetssykehus ved Senter for rus og avhengighetsforskning (SERAF)* see *ibid.* p. 103. It was also emphasised that the relation between psychosis and intoxication is complex, see *ibid.* pp. 103–104 on the comments to the consultation paper from *Helse Bergen Haukeland universitetssykehus ved Divisjon psykisk helsevern, Helsedirektoratet* and *SERAF*.

<sup>81</sup> See *ibid.* p. 101, comments to the consultation paper from *Oslo universitetssykehus ved Seksjon psykosebehandling* and *Institutt for psykoterapi*.

<sup>82</sup> See about this *ibid.* pp. 64–70.



due to a severe mental illness, severe impairment of consciousness or was severely mentally disabled, cannot be held criminally responsible.<sup>83</sup> In contrast to current law, it would not be sufficient for incapacity that the defendant was in a condition of severe mental illness, severe impairment of consciousness or was severely mentally disabled. In addition, the proposed rule requires that the defendant due to such a condition was also 'criminally incapable' at the time of the offence. By introducing such an open and vague additional criterion, the proposed rule thus allows for a wide room of judicial discretion.<sup>84</sup> The judge is, however, obliged to take into account certain dysfunctions when considering who concretely should be understood to be criminally incapable. It follows from a third paragraph of the proposed rule that the judge must take into account the degree of dysfunction in *reality understanding* and *functional ability*. The defendant's ability to understand his/her relation to the world around him or herself represents this person's reality understanding, while functional ability covers mundane, social and cognitive functions.<sup>85</sup> In the end, the judge must conclude on the defendant's criminal accountability on the basis of an overall assessment of the case's circumstances.

This provides for a more flexible main rule, and similarly for a more flexible exception for self-induced incapacity and intoxication. The formulation of the exception proposed in Prop. 154 L (2016–2017) differs, in this regard, from the rule proposed in NOU 2014:10. The advised rule is as follows:

*The person who is temporarily criminally incapacitated as a result of self-induced intoxication shall not be exempted from punishment unless special reasons require it. The person who has a persistent, severe mental illness and who provokes a state of criminal incapacity in him or herself, can be punished if special reasons require it.*<sup>86</sup>

Thus, compared to the proposed rule in NOU 2014:10, this rule reverses the structure. Prop. 154 L (2016–2017) proposed keeping a rule about self-induced intoxication as a starting point, and supplementing it with a rule about self-induced incapacity. The

<sup>83</sup> See the proposed wording in *ibid.* p. 236: 'Den som på handlingstidspunktet er under 15 år, er ikke strafferettslig ansvarlig. ... Det samme gjelder den som på handlingstidspunktet er utilregnelig på grunn av ... a) alvorlig sinnslidelse, ... b) sterk bevisstetsforstyrrelse eller ... c) høygradig psykisk utviklingshemming. ... Ved utilregnelighetsvurderingen etter annet ledd skal det legges vekt på graden av svikt i virkelighetsforståelse og funksjonsevne.'

<sup>84</sup> For a critical assessment of this part of the rule, see further Gröning, Hvordan skal vi avgjøre om alvorlig sinnslidelse innebærer utilregnelighet? Refleksjoner om lovforslaget i Prop. 154 L (2016–2017), 5 *Bergen Journal of Criminal Law and Criminal Justice* (2017) pp. 77–85.

<sup>85</sup> Prop. 154 L (2016–2017) pp. 229–230.

<sup>86</sup> For the proposed wording, see *ibid.* p. 236: 'Den som forbigående er utilregnelig som følge av selvforskyldt rus, fritas ikke for straff, med mindre særlige grunner tilsier det. Den som har en vedvarende, alvorlig sinnslidelse og som selvforskyldt fremkaller en utilregnelighetstilstand, kan straffes dersom særlige grunner tilsier det.'

ministry admitted that the proposal to continue the rule about self-induced intoxication represented a clear exception from principles of guilt and proportionality between blameworthiness and punishment. The justification for nevertheless keeping such a rule was based on arguments about the general sense of justice, considerations of general and individual deterrence and evidentiary matters.<sup>87</sup>

Following the first sentence, the main rule is that criminal incapacity caused by self-induced intoxication leads to criminal responsibility. With the wording ‘temporarily criminally incapacitated’, the recommended rule about self-inflicted intoxication covers both cases of serious mental illness (earlier psychosis) and the severe impairment of consciousness triggered by substance abuse. It is thus better aligned with the principle of legality than current law, though not as clear as NOU 2014:10, and also represents a widened applicability. The requirement of the state of criminal incapacity being ‘temporary’ shall furthermore distinguish between states caused by an underlying, persistent mental illness as opposed to those caused by intoxication.<sup>88</sup> Factors to consider in the assessment of whether the condition is temporary is the question of whether the person has an underlying psychosis disorder, how lasting the symptoms are, the kind of substance that is used, whether there is active treatment against the condition, the person’s medical history and whether he or she is on antipsychotics. The assessment shall thus be more comprehensive than under current law.<sup>89</sup>

At the same time as the ministry proposed to continue the general rule, that incapacity caused by self-induced intoxication shall not exempt from criminal responsibility, it emphasised that the current strict regulation can lead to unfair results. To alleviate such unfair results, the ministry proposed a narrow exception rule in cases of ‘special reasons’.<sup>90</sup> Examples of such ‘special reasons’ could be the case when a person lacking experience with intoxication unexpectedly becomes psychotic after consuming alcohol, or atypical reactions to quantities of alcohol that are greater than those accepted in current court practice (two to three units), but still within the generally accepted limits, for example by unusual and unexpected effects resulting from a combination of alcohol and medication.<sup>91</sup> Due to considerations of deterrence, the general sense of justice and consideration of the victim and the seriousness of the crime can be taken into consideration here, so that

<sup>87</sup> *Ibid.* p. 106.

<sup>88</sup> *Ibid.* pp. 106 and 230.

<sup>89</sup> *Ibid.* pp. 106–107 and 230. On p. 107, the ministry states that this assessment, more comprehensive than the rigid one month-rule, can result in more offenders being found criminally incapable, but that this can be counteracted by the proposed rule about self-induced incapacity. See also p. 220, where the ministry sees it possible that some offenders, who with the current law will be acquitted or sentenced to forced mental health care, can be sentenced to prison under the proposed regulation.

<sup>90</sup> *Ibid.* pp. 14, 106–107 and 230.

<sup>91</sup> *Ibid.* pp. 14, 108 and 230.

special reasons will be more difficult to find in cases of serious violations of integrity.<sup>92</sup> This relativisation of the exception according to the seriousness of the crime seems hard to reconcile with a genuine guilt based approach.

The second part of the rule states that a person with a persistent severe mental illness who induces a state of criminal incapacity in him or herself can be punished if special reasons so require. As in the proposal in NOU 2014:10, this part of the rule represents a clear change compared to current law, where a person with a mental disorder who induces psychosis by substance abuse is exempted from responsibility.

The criterion 'severe mental illness' clarifies that this part of the rule is only meant for cases where a defendant with an underlying mental disorder can be blamed for suffering a relapse because of intoxication or the discontinuation of medication.<sup>93</sup> This is in contrast with the proposed rule in NOU 2014:10, which is generally applicable to self-induced incapacity, and thus can apply for instance to disorders such as diabetes and epilepsy. In this regard, the ministry found the threshold for blameworthy behaviour proposed in NOU 2014:10 to be too low, and did not see the need for such a general rule.<sup>94</sup>

The requirement that the state of incapacity has to be self-induced implies that it at least is negligently induced, and that the defendant thus can be blamed for acting contrary to demands of responsible behaviour.<sup>95</sup> The subjective element is here emphasised more strongly than in NOU 2014:10. In regard to intoxication, it is emphasised that a person with an underlying mental disorder should be blamed only when there are subjective circumstances implying that the person should have understood that his substance abuse could cause criminal incapacity.<sup>96</sup>

The proposed extended criminal responsibility, to people with underlying severe mental disorder who induces incapacity, was mainly justified with arguments about blameworthiness. The ministry also referred to the public's need for restoration, the possibility of raising awareness in society and the need for serious mental disorder not to represent an 'exemption card'.<sup>97</sup> Nevertheless, 'special reasons' must require punishment. This criterion claims an individual assessment and narrows the room for ascribing responsibility for self-induced incapacity after the second part of the rule. Contrary to the first part of the rule, where 'special reasons' can provide for exemption from responsibility, 'special reasons' is here a criterion that justifies responsibility and punishment. The ministry indicated that, due to the known general risk of substance abuse, the rule will

<sup>92</sup> *Ibid.* pp. 109 and 230.

<sup>93</sup> *Ibid.* p. 231.

<sup>94</sup> *Ibid.* pp. 111–112.

<sup>95</sup> *Ibid.* p. 111.

<sup>96</sup> *Ibid.* p. 231.

<sup>97</sup> *Ibid.* pp. 105 and 109–110.

be more often applicable to mentally ill persons who abuse substances than to cases of the discontinuation of medication. The issue of addiction as an excuse was specifically discussed. The ministry found that the known general risk linked to lasting drug abuse should not in itself be enough for responsibility, but that subjective factors related to the drug addict and his drug abuse, for example earlier incidents of incapacity after use of drugs, could constitute a ‘special reason’.<sup>98</sup> The ministry further emphasised that it will rarely be justifiable to blame someone for the discontinuation of medication, and also that there are several counterarguments to such responsibility. The possibility of instances of the discontinuation of medication, which could justify criminal responsibility could nevertheless not be disregarded. For example, the ministry pointed at a hypothetical scenario where a person has previously become psychotic after the discontinuation of medication, is under forced medication, his/her doctor has clearly communicated the risk connected to discontinuation, and the defendant was sane and had his/her judgment intact at the time he/she decided to discontinue his/her medication.<sup>99</sup>

## 5.2 Critical Remarks

In relation to current law, Prop. 154 L (2016–2017) represents an improvement by taking into account legality demands and by opening up for a less harsh application to cases of intoxication, as it states that ‘special reasons’ can lead to exemption from responsibility. Still, with its focus on self-induced intoxication, the proposed rule remains in tension with guilt considerations. If temporary criminal incapacity caused by self-induced intoxication does not lead to exemption from punishment, the blame is still mainly tied to the fact that the person intoxicated him or herself, while the criminal liability is tied to the offence committed. The justification behind the rule – especially the reference to considerations of deterrence, alcohol-related political considerations, and the general sense of justice – consists of vague and uncertain arguments. In particular the argument of the general sense of justice has an unclear meaning.<sup>100</sup> It is thereby reasonable to raise questions about how well justified the proposed rule is. The proposed rule also reflects

<sup>98</sup> *Ibid.* p. 111.

<sup>99</sup> *Ibid.* pp. 110–111 and 231.

<sup>100</sup> See further for example Ryberg, Retsfølelse og kriminalpolitikk in *Rettsfølelsen i strafferettssystemet – perspektiver fra teori og praksis*, eds. Frøseth, Grønning and Wandall (Gyldendal Juridisk 2016) pp. 29–46 and Wandall, Det ‘almene’ i den almene rettsfølelse – og legitimitet under tiltagende kulturell diversitet in *Rettsfølelsen i strafferettssystemet – perspektiver fra teori og praksis*, eds. Frøseth, Grønning and Wandall (Gyldendal Juridisk 2016) pp. 74–98. For a discussion about the meaning of this argument in relation to the rules about criminal incapacity, see Grønning, Er de norske utilregnelighetsreglene i strid med rettsfølelsen? in *Rettsfølelsen i strafferettssystemet – perspektiver fra teori og praksis*, eds. Frøseth, Grønning and Wandall (Gyldendal Juridisk 2016) pp. 137–165. For a discussion about general deterrence, see Jacobsen, Diskusjonen om allmennprevensjonen sin faktiske verknad, 4 *Tidsskrift for strafferett* (2004) pp. 394–438.

a more general negative development in Norwegian criminal law, where the legislator leaves the determination of the limits of criminal responsibility to judicial discretion. In this regard, the criterion of 'special reasons' clearly serves the function of providing the judge with such a discretion.

At the same time, the proposed rule structure, and in particular the requirement that self-induced incapacity can only lead to responsibility when 'special reasons' require it, seem to avoid some of the problems that the rule proposed in NOU 2014:10 faced. Most notably, it communicates in a clearer fashion that far from all mentally ill persons who self-induce a condition of incapacity, for instance by the discontinuation of medication, are blameworthy.

## 6. Concluding Analysis

How should we then construct the rules about intoxication and self-induced criminal incapacity? As we have explained, this question is debated in Norway. Looking at previous, current and proposed rules, we are provided with different solutions to the matter. While the former, original rule in the 1902-code reflected an emphasis of the guilt principle and required that a responsible person had intoxicated himself deliberately to commit the crime, the current rule has more or less left the guilt principle behind. In order to escape evidentiary problems, and with a wish to implement a harsh alcohol and drug policy, the current rule only requires self-induced intoxication – which does not require much more than using a substance. Under this rule, a person who intended to get intoxicated can thus be held responsible and punished for a(ny) crime – disregarding whether he or she intended to cause the excusing condition and to commit the crime. The two law proposals, NOU 2014:10 and Prop. 154 L (2016–2017), placed themselves between the two extremes of former and current rules. Both proposed a certain shift towards self-induced incapacity, with a greater emphasis on the guilt principle, and NOU 2014:10 also emphasised the primacy of such a perspective. Full responsibility required as a minimum that the defendant could be blamed for being negligent with regard to bringing upon him or herself a state of incapacity. Both proposals also argued for a less strict application of responsibility in the intoxication cases, and NOU 2014:10 signalled that the current possibility of ascribing responsibility for self-induced intoxication should be removed. If the proposal from the ministry in Prop. 154 L (2016–2017) is enacted as legislation, the rule about self-induced intoxication will be preserved, although with a somewhat less strict meaning.

In evaluating these different rule-constructions, it is a noteworthy starting point that they all centred on considerations about the guilt principle. The guilt principle is obviously seen as the central point of reference in this context, at the same time as the legal development illustrates how it has been overridden by conflicting arguments.

From a guilt perspective, the former rule represented for instance a far more preferable alternative for intoxication cases than current law, but was abandoned in particular because it was understood as coupled with serious evidentiary problems. Such arguments are also provided in the two law proposals as justifications for compromising the guilt principle.

How the guilt principle more concretely should be operationalised into rules is a question that requires thorough consideration. In our view, the guilt perspective should be primary. It is obvious that it must be taken more seriously than it is the case with the current rule. The rules about criminal incapacity as an excuse only make sense within the framework of the 'act-based' and 'guilt-centred' model of the criminal law. Under these rules, we excuse those who cannot reasonably be blamed for their wrongful actions. Also, when justifying an exception for intoxication and/or self-induced incapacity, the guilt perspective should be the conclusive perspective. The core question is to what extent we could reasonably blame a person who commits a crime in a condition of incapacity *that normally excuses*, when he or she has caused this condition by intoxication or other means. As the core justification for ascribing responsibility, the guilt perspective cannot easily be overridden by practical (or other) arguments. The focus should rather be on seeking to solve the challenges that arise from the proper implementation of the guilt principle. There seems, in this regard, to have been a lack of proper investigation into solutions of evidentiary problems before the current rule was adopted.

The legislator will of course here, as many other times, face a tension in regard to what is consistent with philosophical and principled considerations and what is preferable from the perspective of a practicable and socially accepted rule, where considerations about evidence are central. But, looking at this matter in a comparative perspective, there must clearly be room for a more principled rule than the current rule in the Penal Code section 20, second paragraph. We therefore hope that this rule will soon be removed from Norwegian criminal law, and replaced with a rule that takes the demands of justice better into account.<sup>101</sup>

Which alternative should we opt for? Do guilt considerations favour a rule that ascribes responsibility to self-induced incapacity, instead of intoxication, such as has now been proposed most clearly in NOU 2014:10? We find such a shift to be adequate. In what way a person has caused his or her incapacity, be it through substance abuse, the discontinuation of medication or in other ways, should not be decisive. The central question is whether the person should be blamed for causing this condition. At the same time, a guilt perspective may require a differentiation between different ways of causing an incapacity condition, with regard to what risk the person entails for causing such a condition and violent and criminal behaviour. A differentiation between dangerous

<sup>101</sup> See NOU 2014:10 pp. 151–153 for the Norwegian regulation in a comparative perspective.

and non-dangerous substances may for instance be preferable, also in order to reduce evidentiary problems.<sup>102</sup> By focusing on whether the substance is commonly known to create states of unpredictability or aggression, or to present a danger of triggering states of incapacity, instead of the defendant's previous experience with the substance and amount used, one of the more difficult evidentiary questions may be alleviated.

Among the different proposals, we thus favour NOU 2014:10 with regard to the rule about self-induced incapacity. However, in light of the criticism of this proposal, it must be further considered how to construct a rule that targets the individuals, and only the individuals, that it is reasonable to blame. It must in particular be considered how to adequately delimit the responsibility for mentally ill persons. There must generally be a sufficient proportionality between what the person is to be blamed for as the prior fault, be it substance abuse or the discontinuation of medication and the associated risks, and the responsibility and punishment ascribed for the crime committed in the self-induced incapacity condition. With a construction that requires culpability only in relation to causing the excusing condition (and not in relation to committing the crime), there will always remain an asymmetry between blameworthiness and ascribed responsibility. The problem is that criminal capacity, as a core requirement for responsibility, will not concur in time with the committing of the criminal act. At the time the person is criminally capable, he or she does not commit the criminal act, but only the actions that cause his or her state of incapacity (with or without intention to commit the crime). At the time the crime is committed, the person is criminally incapable and thus not responsible. This asymmetry provides in our view at least arguments for a clearer subjective standard than what was proposed in NOU 2014:10, requiring the defendant to have foreseen a risk of loss of criminal capacity.<sup>103</sup> This asymmetry also provides arguments for the rule construction being related to considerations about sentencing rules regarding the reduction of penalty in these cases.<sup>104</sup> The existence of such rules will function to hinder that a person who commits a criminal act in a state of self-induced criminal incapacity is punished equally harsh as a criminal capable person who commits an equal act.

In the end, however, these problems seem to require deeper philosophical investigation. The many alternatives that are presented by this outline of Norwegian criminal law, past, present and future(?), share the fact that none of them are developed from or in light of a more profound elaboration of the guilt principle and the proper standards for imputation. We need a solid theoretical basis for constructing and choosing between

<sup>102</sup> For a discussion of such a distinction, see Law Commission, *Criminal Liability: Insanity and Automatism. A Discussion Paper*, 23 July 2013, section 6.9 ff. (available at [https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/insanity\\_discussion.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/insanity_discussion.pdf), last accessed 15.02.2018). The term 'dangerous' refers to substances commonly known to create states of unpredictability or aggression, see section 6.67.

<sup>103</sup> Such a solution is also proposed in *ibid.* p. 131.

<sup>104</sup> Prop. 154 L (2016–2017) p. 110.

possible alternatives. Taking the guilt principle seriously therefore brings us back to where we started: to the recognition that the regulation of intoxication and self-induced incapacity raises legal philosophical problems about imputation of responsibility for actions. In order to construct adequate rules, it seems we must engage in philosophical debate to a larger extent than it has been done in Norwegian criminal law so far. We hope that this article will contribute to this.