

Anders Breivik is guilty: the fine line between bad and mad

August 28 2012, by Dr Arlie Loughnan



A memorial message outside Oslo Cathedral for the Utoya victims. Image: Flickr/Rødt Nytt

One of the most high profile court decisions on "madness" and crime has concluded. In a unanimous decision, the Oslo District Court in Norway has convicted Anders Behring Breivik of the murder of 77 people in the streets of central Oslo and on the island of Utoya in July 2011.

As is well-known, Breivik faced trial for multiple counts of murder, following gun and bomb attacks resulting in mass killing of adults and

children. Since his [apprehension](#), Breivik has admitted planning and carrying out the killings, and is on record as saying that they were necessary to start a revolution aimed at preventing Norway from accepting further numbers of [immigrants](#).

Breivik's conviction was based on a finding that he was sane at the time of the killings. In a strange twist, the court's verdict is a victory for the defence; they had been instructed by their client Breivik to argue that he was sane. The [prosecution](#) had argued that Breivik was insane.

The finding that Breivik was sane and the conviction means that he can be punished and he has been sentenced to 21 years in prison. It is possible that Breivik will be detained beyond that period, under a regime of preventative detention. This means Breivik may never be released. The seriousness of Breivik's offences and the enormous harm they have caused seems to indicate that Breivik's conviction and sentence will be well-received in Norway.

The issue in Breivik's trial was whether he was criminally responsible for the killings. If he was insane at the time of killings, he was not criminally responsible. Criminal responsibility concerns the capacities of the accused. If an accused lacks the necessary capacities, he or she cannot be called to account for his or her actions in the context of a [criminal trial](#).

The question of criminal responsibility goes beyond the issue of liability for an offence: it addresses the issue of whether the accused is someone to whom the [criminal law](#) speaks. Criminal responsibility lies at the heart of our criminal justice system.

The Breivik trial brings the complex issues surrounding criminal responsibility into sharp relief. It prompts us to where the line between "madness" and "badness" lies and to think about how to respond to offenders whose criminal responsibility is at issue.

Media reports indicate that Breivik has been examined by a total of 18 medical experts. Some of these experts concluded that he met the legal test of insanity, which, in Norway, requires that he acted under the influence of psychosis at the time of the crime. But Breivik himself disputed this diagnosis, claiming it is part of an attempt to silence him and stymie his message about "saving" Norway. Other medical assessments concluded Breivik was sane at the time of the offences, his actions motivated by extremist ideology not mental illness. The judges reached the same conclusion.

This difference of opinion among experts should not surprise us. Not only is the process of diagnosing a mental disorder complex, determining whether a disorder had a relevant effect on an individual at a specific point in time, is notoriously difficult. At what point, if any, does ideologically-driven fanaticism become "madness"?

It is tempting to think that Breivik's crimes were so extreme that he had to be "mad". How could he think he was performing a "duty" to his country, that such violence was "necessary"? According to this logic, the criminal acts tell us everything we need to know. And [criminal responsibility](#) appears to be a trade off between the severity of someone's mental incapacity and the magnitude of harm resulting from their [offence](#).

But, as a matter of law, in our system, responsibility and harm are separate matters. If an individual is not criminally responsible, the issue of the harm that their actions have caused must be dealt with by means other than punishment. Indeed, treatment for the relevant mental condition may be the most appropriate response when an individual is not criminally responsible.

If this seems too lenient, we must recall that it represents the flipside of a criminal justice system that works on the assumption that everyone is

an independent agent, and, in a liberal democratic system, this assumption protects us from excessive paternalism on the part of the state. Our system requires that each individual accused of crime be respected as an autonomous subject of the law.

We must also recall that, even if an individual is not criminally responsible, legal options remain open. If Breivik had been found to be insane at the time of the killings, and not convicted of the offences with which he was charged, he could have been made the subject of a court order, which, in his case, would have seen him detained in a secure psychiatric unit inside a prison. This form of detention could have been just as long as any prison term.

If he had been tried here, and found not to be criminally responsible, Breivik could have been subject to detention—perhaps even indefinitely. But, in that case, our legal system's response is not so much a moral condemnation of blameworthy conduct, but more forward-looking action aimed at avoiding further harm—to the individual and others—in the future.

The crucial difference with this response is that it is not based on the responsible subject otherwise at the heart of criminal law and process.

Provided by University of Sydney

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