

## **Sentencing offenders with disabilities**

Jane Dullum\*

*Department of Criminology and Sociology of Law, University of Oslo, Oslo, Norway*

*(Received 19 November 2014; accepted 10 December 2014)*

Offenders with disabilities have a vulnerable status in prison. Due to inadequate facilities and a lack of care available to address their special needs in prison, their health may even deteriorate from imprisonment. The prisons carry out the sentences decided by the courts. It is therefore of interest to examine how the courts mete out punishment when the defendant has a disability. How are offenders with disabilities ‘seen’ and perceived by the penal law and the penal courts? Does the disability matter when the court metes out the sentence, and if so, in what way? Should disability matter as a mitigating circumstance? How should offenders with disabilities be dealt with in the criminal justice system? These questions are addressed in this article.

**Keywords:** offenders with disabilities; sentencing; imprisonment; principle of equality

### **Introduction**

Punishment is the harshest measure that the state can inflict on its citizens. The purpose of punishment is, in the words of Nils Christie, to inflict pain, and punishment is also meant to be experienced as pain by the offender (Christie 1982). In Norway, however, the punishment is in the confinement as such, and the conditions under which it is experienced are supposed to be as similar as possible to life outside the prison. People are not supposed to be subjected to measures that are felt as an additional penalty.

When it comes to offenders with disabilities, these ideals are not fulfilled (Haualand 2011, Søndena 2009). Prisons themselves are harmful to the physical and mental well-being of prisoners: prisoners are isolated from the community, prisons may be in a poor physical state, they offer inadequate activities, and inadequate access to health care. Thus, all prisoners are, to a certain degree, vulnerable. Offenders with disabilities, however, have a particularly vulnerable status in prison. Due to inadequate facilities and a lack of care available to address their special needs in prison, their health may even deteriorate by imprisonment. Discriminatory notions entrenched in society in general can also be more pronounced in the closed environment of prisons.

Prisons carry out the punishments decided by the courts, and the sentencing by courts is the outcome of penal policies and sentencing principles of a society. It is therefore of interest to study how the courts mete out punishment when the defendant has a disability. How are offenders with disabilities ‘seen’ and perceived by the penal courts? Does the disability matter when the court metes out the sentence, and if so, in what way? To what

---

\*Email: [Jane.Dullum@jus.uio.no](mailto:Jane.Dullum@jus.uio.no)

This article is based on the report ‘Domfelte med funksjonsnedsettelse. En analyse av straffutmålingspraksis’. The report was funded by Fritz Moens forskningsfond.

extent do the courts reflect upon the prison conditions for offenders with disabilities? What kinds of punishments are they sentenced to? To what extent do discriminatory practices exist in the court system? Are these offenders considered to be like everybody else, or do they receive special treatment by the courts? These are the questions addressed in this article.

In Norway today, as in many countries in the Western world, there is a trend towards 'going tough on crime' and more punitive sentencing policies (see e.g. Andenæs 1994; Hauge 1996; Mathiesen 2007). This implies more severe punishments, longer prison terms, reduced mechanisms for early release, and, in some jurisdictions such as the USA, a preference for sentencing policies that do not take individual circumstances into consideration. It is solely the criminal act itself that informs the punishment. It is claimed that a 'new penology' is emerging 'markedly less concerned with responsibility, fault, moral sensibility, diagnosis, or intervention and treatment of the individual offender. Rather it is concerned with techniques to identify, classify, and manage groupings sorted by dangerousness' (Feeley and Simon 1992, 452). Incapacitation of the offender and protection of society against the risk the individual offender might represent to society are the aims behind this development, not the treatment or rehabilitation of the individual offender.

The 'new penology' can be seen as a rather harsh interpretation of the equality principle. Penal and prison policies that are practiced in Norway and the Scandinavian countries, however, differ from practices in the USA. The penal policies of the Scandinavian countries have been called 'Scandinavian exceptionalism', a term referring to consistently low rates of imprisonment and comparatively humane prison conditions (Pratt 2008a, 2008b). This Nordic culture of control is embedded in a strong welfare state. Thus, one would expect that the Norwegian sentencing tradition would differ from the 'new penology', and that it would be more concerned with the individual offender.<sup>1</sup>

### **Relevance to disability studies**

The manner in which disabilities and people with disabilities are seen and categorized in a society is not self-evident. The categorizations are in themselves social constructions, being part of discursive processes in a society (cf. Foucault 1995).

Grue (2004) points out that throughout history, as well as today, there exists notions, often stereotypic notions, of people with disabilities. He refers to cultural expressions wherein people with disabilities are portrayed as a particular kind of people, with morals and ethics lower than that of other people. These cultural expressions contribute to maintaining certain ideas and negative notions, prejudices and stereotypes of people with disabilities. Grue also maintains that professionals – medical and others – are often prejudiced in the sense that their practices towards people with disabilities are built on a medical model of disability. In this model, disability is understood as an illness or individual injury. The medical model makes the removal of disadvantage contingent upon the removal or 'overcoming' of impairment – full participation in society is to be found through curing the individual. This is in contrast to the so-called social model of disability, a model that sees disability mainly as a problem of society. That is to say, the barriers that people with disabilities meet with respect to their inclusion in society is a disabling environment, not deficiencies of people with disabilities as individuals. Social change – the removal of disabling barriers – is the solution to the disadvantages people with disabilities experience.

In disability research, the social model has for the most part replaced the medical model of disability. The medical model is seen as discriminatory, and as a hindrance for the integration into society of people with disabilities. By studying the sentencing practices of the courts, we may gain insight into the way disability is seen and understood by the courts and whether we can trace discriminatory practices in the Norwegian judiciary. Before turning to the question of where Norwegian sentencing practices actually stand in this respect, I will give a short overview of the empirical material which this study is based on.

### **Methods and data**

This study is based on an analysis of 76 sentences imposed on defendants with disabilities. Twenty-seven of the defendants had a physical disability: 17 were deaf or hearing-impaired, and 10 were mobility-impaired and dependent on wheelchairs. In 49 of the sentences, the defendant had a minor intellectual disability.

The sentences are retrieved from Lovdata.<sup>2</sup> The data covers the period 1990–2010 for Supreme Court decisions, and the period 1995–2010 for appellate court decisions. Due to the use of this database, the data mainly cover sentences that were appealed, either to the Supreme Court or to the appellate court.

Sentences are a specific genre, with a distinct structure and rules for content. The sentences provide information about the nature of the case, the type of crime committed, the punishment imposed by the court of first instance, who appealed (the defence or the prosecutor) and for what reasons. The sentences also provide information on such personal characteristics of the defendant as age and gender. They also include information on whether the defendant is in some kind of vulnerable situation, such as having a disability, and some sentences give information about the life situation of the defendant. Sentences also indicate what the (appeals) court emphasized when sentencing, and what the court considered as aggravating or mitigating circumstances. Finally, the sentence records the punishment that the Supreme or appellate court imposed.

Thus, sentences provide information about the circumstances that form the basis of the court's judgement, and whether disability matters when the courts decide on the punishment. In addition, the sentences can be used as a source for investigating how the defendants are 'seen' by the courts and the legal system. Do the courts associate any specific notions or attitudes with offenders with disabilities? If so, what characterizes these attitudes?

Based on this, sentences can be seen as a valuable source of knowledge about the situation of people with disabilities in the penal system. However, the study does not pretend to give a representative picture of how offenders with disabilities are seen and treated by the penal courts. In order to do that it would have been necessary to consider a larger number of sentences, including a number of sentences from the District Courts. However, this does not mean that this study is not of relevance. As pointed out by Fastvold and Hellum (1988), the frequency of problems and conflicts is not necessarily crucial in a legal context. If it turns out that fundamental rights have been violated in an individual case, this can in itself be an important finding. Individual cases can contribute to highlight legal issues of general interest.

In the following, I will describe the legal framework that regulates sentencing in Norway.

### **‘The law in books’**

The Norwegian courts enjoy considerable freedom when deciding punishment. The various penal provisions in the penal code prescribe the maximum penalty that can be imposed for a given crime. In some penal provisions, a minimum penalty is also prescribed. Within the prescribed penalty scale, the court can select any penalty. Thus, the courts are relatively free. The courts can consider each particular case and decide the sentence on its merits.

This, of course, does not mean that the judge is completely free when deciding a sentence. First, the typical level of punishment for different crimes constitutes an important factor. This level is established through the practice of the Supreme Court. Second, several factors the judge can take into consideration when deciding on the punishment have been consolidated through legal practice. The seriousness of the crime will be an important element, but this can be balanced against individual circumstances such as the offender’s physical or mental health, intelligence, childhood experiences or the fact that serving a prison sentence would be particularly onerous for the defendant. The courts can also suspend a prison sentence (the Penal Code § 52). In addition, the courts can sentence an offender to a more lenient punishment if he or she was suffering from a serious mental disorder or had a minor intellectual disability at the time of the commission of the act (the Penal Code § 56c). The purpose behind this provision is to ensure that an offender who was not fully responsible when committing the crime does not receive a punishment that is ‘undue and unintelligible’ (Syse 1995, 623).<sup>3</sup>

Finally, the purpose of punishment is also a concern that contributes to the frame of sentencing. In Norway, punishment is based on utilitarian perspectives. Until the 1970s, individual prevention was the predominant aim of punishment. Since then general deterrence has become the predominant aim. During recent decades, however, punishment has to a greater extent become grounded in arguments relating to just deserts, this being particularly evident when it comes to violent and sexual crimes. The harm these crimes inflict on the victim is emphasized, and legislators have been of the opinion that punishment to a greater extent should reflect the harm caused, by means of more severe penalties.

As Henum (2002) points out, when general deterrence is the predominant grounds for punishment, there is reason to expect that sentencing will turn away from considering circumstances relating to the individual perpetrator and focus instead on the criminal offence as such. One can go on to say that, when the purpose of punishment is retribution, there is reason to expect that sentencing will place more weight on redressing the damages caused by the crime.

In Norway, then, the judge must balance various considerations when passing sentence in each particular case. Courts are often left to consider the appropriate balance between deterrence, societal protection, and the most appropriate and humane method of dealing with the offender. The prominent Norwegian professor of penal law, Johs. Andenæs, formulated this search for balance thus: ‘The court must undertake the at times painful choice between general deterrence and opposing humanitarian considerations’ (1994, 177).

In the following, I will describe how the Norwegian courts seek a balance between these considerations. First I will give an overview of the kinds of crimes the defendants in this study have been convicted of, the punishments they have been sentenced to, and the length of the unconditional sentence.

### The features of the sentences

Table 1 shows the kinds of crimes involved.

As shown in the table, various crimes are represented. However, the majority involves sexual offences and violence. These crimes are particularly represented among the defendants who have an intellectual disability. It is important to emphasize that this does not tell anything about the crimes most often committed by people with intellectual disabilities. The strong representation of sexual/violent crimes in the table can be explained in a number of different ways. One is that these crimes would normally result in a severe penal sanction (unconditional prison), and would therefore more often be appealed. But one can also assume that these crimes will be more often detected and reported when the perpetrator has an intellectual disability. People with intellectual disabilities may be less capable of hiding their crimes, and will thus more often be known to the police.

Table 2 shows the kinds of sanctions that are imposed.

The table shows that the defendants are sentenced to a wide range of sanctions, ranging from non-custodial measures, like community service and suspended sentences, to the sanction that may be characterized as the strictest punishment in Norway: preventive detention.<sup>4</sup> However, in most cases the courts sentenced the offender to unconditional imprisonment, with this applying to more than two out of three cases (53 out of 76 sentences).

Table 3 shows the length of the unconditional imprisonment.

The table illustrates the wide range in the length of the unconditional sentences imposed by the courts, which can be anything from very short to a long unconditional sentence. The longest unconditional sentence is 13 years. The offender was a man with a minor intellectual disability who had committed a murder.<sup>5</sup>

Thus, the courts impose prison sentences of a certain length, even if the defendant has a disability. The question is then: what is the courts' reasoning for this? Did the disability matter when the courts imposed the sentence? In what way? I will now present the courts' justification for their sentencing.

Table 1. Crimes: total numbers and per cent.

Crime	Physical disability	Intellectual disability	Total	Total %
Sexual intercourse with children	5	14	19	25
Violence/threats	4	12	16	21
Rape	3	9	12	16
Murder	3 <sup>a</sup>	5	8	11
Traffic misdemeanour	5	–	5	7
Use/possession of narcotics	2	1	3	4
Fraud	2	1	3	4
Assaulting police	2	–	2	3
Economic crime	1	–	1	1
Arson	–	1	1	1
Other	–	6	6	8
Total	27	49	76	101 <sup>b</sup>

<sup>a</sup>This category comprises one murder, one manslaughter and one attempted murder.

<sup>b</sup>Totals do not add up due to rounding.

Table 2. Sanctions: total numbers and per cent.

Sanction	Physical disability	Intellectual disability	Total	Total %
Community service	2	6	8	11
Suspended prison	3	7	10	13
Suspended prison and fine	1	–	1	1
Unconditional prison	12	14	26	34
Suspended and unconditional prison	4	17	21	28
Preventive detention	1	2	3	4
Prison and preventive supervision <sup>a</sup>	–	3	3	4
Compulsory mental health care	2	–	2	3
Other	2	–	2	3
Sum	27	49	76	101

<sup>a</sup>Previously, certain categories of offenders could be sentenced to preventive supervision. In 2002, this sanction was replaced by preventive detention for criminally responsible offenders and two special measures for the criminally irresponsible; forced mental care for psychotic defendants, and forced care for the mentally retarded.

Table 3. The length of the prison sentence: total numbers.

Length of prison sentence	Physical disability	Intellectual disability	Total
0–3 months	7	6	13
4–6 months	1	5	6
7–11 months	2	3	5
1–2 years	4	15	19
2–4 years	1	2	3
More than 5 years	2	5	7
Total	17	36	53

### The courts justification for sentencing

The dominant pattern in the court cases that are discussed here is that disability matters. It matters in the way that the disability is seen as a *mitigating* circumstance by the courts. This is typically practiced in the way that, when an unconditional prison sentence is imposed by the courts, the prison sentence is scaled down, or a relatively large part of the sentence is made conditional, because of the disability. This was the case in 20 of the 27 sentences in which the defendant had a physical disability, and in 39 of the 49 sentences in which the defendant had an intellectual disability.

The courts give various justifications for the more lenient punishment given to these offenders. Often the reasoning is that the defendant would find a prison sentence more than normally onerous. When it comes to defendants with intellectual disabilities, the mitigating factor may also be that they did not understand the seriousness of their actions. In the case of sexual crimes, it is seen as a mitigating circumstance if there was proximity in mental age between the defendant and the victim.

This is the main pattern of sentencing, but there are exceptions. There are defendants who did not have to go to prison at all. In these cases, the sentence would normally have been unconditional imprisonment, but the courts either suspended the prison sentence, or imposed a sentence of community service. In other cases, however, disability has no, or only minimal, importance for the court's sentencing. In these sentences, the courts solely

emphasized the severity of the crime, or the protection of society, when imposing the sentence.

Thus, disability is taken into account by the courts, but how much the disability counts in the punishment that is imposed depends on the particular circumstances of each case. This implies that disability is not an impediment to long, unconditional prison sentences, but also that the opposite can be true. Defendants with disabilities can also be diverted to alternative sanctions that do not involve unconditional imprisonment. In that sense, Norwegian sentencing practices are flexible, with the courts deciding on punishment in each individual case.

In the following paragraphs I will present some of the sentences and show how the courts reasoned in sentences with three different outcomes. The first example illustrates how the court reasoned in a case where individual circumstances are given primacy by the court, and the defendant is not imprisoned. The second example illustrates how the court reasoned in a case where the disability is seen as a mitigating circumstance, and the prison sentence is reduced. The last example shows how the court reasoned in a case where no mitigating circumstances are taken into account.

### **When individual circumstances are given primacy**

As mentioned above, there are sentences where the individual circumstances of the offender are given primacy by the courts. In these cases the crimes can be serious, and the defendant would normally have been given an unconditional prison sentence. However, the courts either suspended the prison sentence or diverted the defendant to a period of community service. I will now show how the court justified the sentence in such a case.

#### ***Inflicting bodily harm***

The sentence was passed by the appellate court in 2006. The appellate court commuted a sentence of unconditional imprisonment to community service. The defendant was a 27-year-old deaf man. He was sentenced in the District Court to 120 days of imprisonment for stabbing a woman in the neck. The defendant and the victim were fellow students, and the stabbing occurred without any prior provocation. According to the sentence, the woman was not seriously hurt, but the stabbing could have been serious. The defendant appealed the sentence to the appellate court.

During the appeals hearing it was revealed that the defendant, in addition to being deaf from birth, had dyslexia, and had been diagnosed with attention deficit hyperactivity disorder (ADHD). He had good intellectual resources. He was on a waiting list for medical treatment at a hospital.

The appellate court initially found that a sentence of unconditional imprisonment would be appropriate for the kind of crime he had committed. However, the court also made the point that a sentence of community service could be applied if there were extraordinary circumstances in the case. Based on an overall assessment, the appellate court found that the purpose of punishment did not hinder the imposition of a community service sentence in this case, and thus the court commuted the sentence to 120 hours of community service. For the court, it was of significance that the case had become old, without the defendant being to blame for this. In addition, the defendant was deaf and had been diagnosed as having ADHD. Due to these problems the serving of a prison sentence was considered by the court as particularly demanding for him. To quote from the sentence:



[The defendant struggles with] a number of dysfunctions, and due to these problems, he is already somewhat isolated, but he can not be described as friendless. A prison term would represent an additional burden for him, and would probably intensify his feelings of being isolated.

This court decision illustrates how the courts can divert an offender with a disability to community service, or suspend an unconditional prison sentence because of extraordinary circumstances in the particular case. The offender's disability is an important part of these extraordinary circumstances. But in addition, there are also other mitigating circumstances present in these cases, such as a time aspect, or that the defendant was heavily marginalized in several respects. This, concludes the courts, means that imprisonment would represent a particularly heavy burden on the defendant, and therefore the prison sentence is suspended. Other aspects of the purpose of punishment, such as general deterrence, are not given much weight by the court in these cases.

### **Disability as a mitigating circumstance**

In the cases under consideration, however, this is not the most common sentencing decision when it comes to offenders with disabilities. The typical pattern is that they are sentenced to unconditional imprisonment, but with the courts taking some account of the disability when deciding the punishment. Either the prison sentence is somewhat reduced or part of the unconditional prison sentence is suspended. So what is the court's reasoning behind these sentences? What characterizes these offenders and situations?

The severity of the crime and the aim of general deterrence are important justifications for these sentences. Typical crimes here are drug felonies and sexual crimes: crimes that have been increasingly penalized in Norway in recent decades. When it comes to serious forms of sexual crimes, like aggravated rapes, legislators have stated that personal considerations regarding the offender can only be given limited weight by the courts. It is the damage inflicted on the victim that is the most important. In addition, the courts have emphasized other factors involved in these cases. Several of the defendants had prior criminal records, and this is seen as an aggravating circumstance by the courts. In some of these cases the victims were severely injured, this being particularly true in the cases of sexual crimes. The harm inflicted on the victim is considered an aggravating circumstance by the courts, and this is an important justification for the unconditional part of the prison sentence.

I will now give an example that illustrates these sentences. The following case is that of a deaf man who was convicted of rape.

#### ***A rape***

The defendant was a 24-year-old man. In the District Court he was sentenced to three years and three months unconditional imprisonment for raping his former girlfriend. At the time of the incident, they were still friends. Both of them were deaf. He raped her at a party, using both physical and psychological violence. The defendant appealed the sentence. The appeals court reduced the sentence to three years imprisonment. The court's reasoning was as follows:

The court attached particular importance to the:



seriousness of the assault, and the psychologically detrimental effects on the victim. He used threats and physical violence, and the violence must be considered gross. The defendant's method of achieving intercourse was frightening for the victim. The rape was committed by someone she regarded as a friend, they knew each other well, and the rape was committed in an environment where she felt safe ... In such a situation, and with her hearing impairment, she was particularly vulnerable. Therefore the rape constitutes a particular violation of trust and confidence, and has the nature of an attack.

In the sentence the court elaborates on the psychological damage the rape caused to the woman. The court was of the opinion that it was necessary to impose an unconditional prison sentence of a certain length. The court continued:

What is of most significance is the violation itself and the circumstances surrounding it in relation to the victim. Another important consideration when deciding the sentence is the aim of general deterrence. Violence and rape are growing societal problems. These crimes not only hurt the victim, they have a general impact on women's claims to safety and respect.

The appeals court stated that the defendant's personal characteristics and situation had to take second place in the assessment of the sentence. However, the court acknowledged that:

the defendant's severe hearing handicap, and his dependence on communication by means of sign language, will make him very vulnerable and isolated in prison. This burden is likely to be so heavy that there is room to take some account of it. In addition, the question of adjustments of the serving conditions because of the defendant's special needs, including the possibility of release on probation, and the question of whether he is unfit to serve the sentence, is the responsibility of the prison authorities, according to the provisions of the Execution of Sentences Act.

The appeals court accordingly sentenced the man to three years imprisonment.

Finally, I will consider the characteristics of sentences where disability was of minor importance for the assessment of the sentence.

### **When disability is of minor importance**

In these sentences the disability is mentioned by the courts, but only to the extent of stating that it is up to the prison authorities to consider the question of the defendant's fitness to serve a sentence. It is the severity of the crime that is given primacy by the court in these sentences, together with the aim of general deterrence and the principle of proportionality.

What characterizes these cases is that the courts consider the crime as particularly troubling, severe or horrifying. The courts also find that the crimes have been planned and systematically carried out, and thus, when it comes to offenders with intellectual disabilities, that the offenders understood the seriousness of the crime. Often the defendants have prior convictions, and in a few instances the defendant is considered dangerous by the court: that is, the court considers that there is a risk that the offender will reoffend. When the court considers that there is such an imminent risk of reoffending, the court has given the protection of society primacy in the assessment of the sentence, and the offender is sentenced to preventive detention. Preventive detention is a sanction that came into force in Norway in 2002. Offenders that have committed a

serious crime, and who are considered accountable for their crimes, can be sentenced to this sanction instead of a prison sentence. The risk of reoffending and the aim of protecting society are the central preconditions for sentencing an offender to preventive detention. The sanction is unlimited with respect to time; it continues as long as the person is considered dangerous. It can in theory last for life, and is therefore considered to be the most severe punishment in Norway today.

A certain number of offenders with learning disabilities have been sentenced to preventive detention. I will here give an example of how the court reasoned in such a case.

### ***A murder***

The defendant was a 27-year-old woman. She had been sentenced for several other crimes, and now she was sentenced for killing a six-year-old boy. In the District Court she was sentenced to 10 years imprisonment and five years preventive supervision.<sup>6</sup> She appealed on the question of guilt and the sentencing, and the appeals court sentenced the woman to preventive detention for 11 years.

The woman had killed the boy, and she was soon under suspicion for the murder. A large search operation was launched. The woman participated in the search, but led the rescue team astray. The boy was not found for three days, until the woman admitted what had happened and where the boy was. The appeals court described the murder as 'entirely pointless. The incident is seemingly inexplicable, and it was committed for no known reason'.

The appeals court describes the woman in the following manner:

She is heavily burdened by a difficult childhood and adolescence, and in adulthood too she has had many traumatic experiences. She is considered to have some learning difficulties, together with extensive psychosocial problems. She has attracted attention, and been feared in the local community because of aggressive and impulsive behavior. She has fallen out of the adult world. Apart from her pets, those she associates with are children, mostly young boys.

The Correctional Services had conducted a social inquiry report (prior to the killing). In this report, the woman was described as a person with major needs for help. However, no one had addressed her needs for help and care. Her mother died when she was 15, and she had been in the care of the social services until she was 18. After that she had lived with her father, but he too died after a few years. His death meant that she lost a person representing an important sense of belonging to her. Her behaviour thereafter became dangerous to herself and the people around her.

The court appointed psychiatric expert witnesses in the case who concluded that there was a high risk of future aggressive and impulsive behaviour. They diagnosed her as accountable, but as having a minor intellectual disability. She was also diagnosed as having an impulsive personality disorder. The psychiatric experts concluded that only comprehensive and lengthy psychological treatment could improve the woman's capacity for risk management.

The appeals court based the sentence on the severity of the crime, the woman's intent and the damage caused by the crime. In addition, the court found that there was an imminent risk that the woman would reoffend and that she would commit other serious crimes. Thus the pre-conditions for sentencing the woman to preventive detention were

satisfied. The appeals court considered that her personality traits could help explain the murder. The defendant's personal characteristics, however, could not be a major factor in the sentencing decision. The particular nature of the crime and the character of the intent had to be the decisive factors. The injury and trauma the crime had inflicted on the boy's parents and the local community also had to be emphasized.

The woman appealed the sentence to the Supreme Court, and the Prosecuting Authority also appealed. The Supreme Court upheld the sentence of preventive detention, and increased the term from 11 to 13 years. In the assessment, the Supreme Court emphasized that the case was about a murder of a defenceless child. The Court also considered it an aggravating circumstance that the woman had concealed the crime.

I will now summarize the main findings of the study, and discuss possible ways to improve the situation of offenders with disabilities in the penal system.

### **Concluding remarks**

The overall pattern in this study is that a person's disability does have an impact on the sentencing by the courts. Usually the disability is considered a mitigating circumstance by the courts, and the length of time the offender has to serve in prison is reduced. The courts' reasoning behind this reduction is that the offender, because of his or her disability, will serve their time under tougher condition than other prisoners. But the courts also emphasize that it is the responsibility of the Correctional Services to decide whether the defendant is fit to serve a prison sentence.

When it comes to offenders with a mental disability, the courts consider it a mitigating circumstance if it is assumed that there is a causal relationship between the crime and the mental state of the offender. When it is assumed that the offender did not understand the seriousness of the act, or the likely consequences of the act, this is considered to be a mitigating circumstance and the sentence is reduced. The courts thus question the defendant's culpability.

There are exceptions to this overall pattern. There are examples in court decisions where the disability is given precedence in determining the sentencing. In these cases the courts suspend a sentence for an offender who would otherwise have been sentenced to an unconditional prison sentence, or they divert the offender to an alternative sanction. The reason for this is that the court thinks the personal and social circumstances are so exceptional that it is justifiable to suspend the prison sentence. Conversely, we find examples where disability has no impact on the court's sentencing. In these cases it is the seriousness of the crime, or the fact that the court considers that society needs protection from the offender, that determines the sentence imposed.

How, then, can we interpret this pattern?

The pattern of the cases reflects the fact that the courts take different circumstances into consideration when meting out punishment, not just the defendant's disability. When sentencing, the courts attach great importance to the severity of the crime, but they also take into consideration the personal and social characteristics of the defendant as well as the circumstances surrounding the crime. Such considerations include whether the defendant was under rehabilitation, how planned or calculated the offence was, whether the offender was a 'newcomer' or had a prior criminal record, the time elapsed since the crime was committed, the aim of general deterrence, and the protection of society. This implies that it is not the disability as such that forms the basis of the courts' judgement. The courts make an overall assessment, and the disability is only one of a number of aspects that is taken into consideration when the courts decide on the punishment.

This is in accordance with how Rasmus Wandall describes Danish sentencing practices. He points out that the courts combine offence-, offender- and process-related considerations when sentencing, and ‘that the choice of imprisonment is constructed not only as a response to the severity of crime and prior criminal record, but also as a response to the less stable social profiles of the defendants’ (2008, 150). He also points out that ‘sentencing to imprisonment is constructed as a response, not only to the defendant’s adult age, but also to his or her moral maturity and lack of susceptibility to reform’ (2008, 150).

This indicates that Scandinavian sentencing practices seem to be quite a way from the ‘new penology’ mentioned previously. The Scandinavian penal culture is more diversified; the courts make their decision on the basis of the circumstances present in each individual case. Normally the courts take disability into account in the sentence. One could argue that this is in accordance with the principle of equality: the courts provide differentiated treatment to situations and offenders that are different. But how much the disability is taken into account by the courts in the sentence depends on the particulars of each case. This also has the consequence that the more severe the case is considered to be, the less weight the court puts on the disability in the sentencing.

So what does this study tell us about the way defendants with disabilities are seen and understood by the Norwegian courts? Has the study revealed discriminatory practices in the Norwegian judiciary?

The study gives little grounds for claiming that there exists discriminatory notions or practices against offenders with disabilities in the Norwegian courts. In the sentences, there are no expressions or formulations which makes it reasonable to conclude that offenders with disabilities are seen and perceived differently from other offenders. The fact that the courts often take disability into account in the sentencing can be interpreted as if the courts rely on a medical model of disability – disability understood as a sickness or individual injury. Because the disability is perceived this way, the courts are showing mercy and they reduce the sentence. But to interpret this as a discriminatory practice is questionable. Instead it can be argued that the social model of disability has its shortcomings. Susan Wendell (1996), among others, has argued that the social model has idealized the body as never weak, free of pain, without torments, as never tired, etc.

If such an understanding of disability is accepted, the courts’ sentencing practices can hardly be seen as discriminatory. The courts acknowledge the subjective reality of many offenders’ lives, and reduce the sentence according to this.

### ***Some dilemmas***

I will now discuss some dilemmas involved in the way offenders with disabilities are seen and treated in the penal apparatus.

As shown in this study, disability does not represent a hindrance to offenders with a disability being sentenced to long, unconditional prison sentences. This raises a paradox. Studies have shown that the more serious the criminal career of an offender, the more poorly he or she scores on important social indicators such as living conditions in childhood and adolescence, exposure to abuse, or physical and mental health problems (Friestad and Skog Hansen 2004; Skardhamar 2002). This implies that offenders who have been seriously affected by poor living conditions are sentenced to the most stringent penalties. This also applies to offenders with disabilities.

Long prison sentences might perhaps be justifiable if imprisonment contributed to rehabilitating offenders. We know, however, that punishment rehabilitates prisoners only to a limited extent. On the contrary, imprisonment may seem to *dehabilitate* (Mathiesen 2007). Partly because of the stigmatizing effects of a prison sentence, it contributes to the exclusion and marginalization of the offender. This is further exacerbated when the physical and mental health of the defendant deteriorates due to a lack of health and rehabilitative facilities in prisons.

This raises the questions of how offenders with disabilities should be dealt with in the criminal justice system and how their situation may be improved.

### ***Remedial actions in the Correctional Services***

In order to address the needs of prisoners with special needs, in particular offenders with intellectual disabilities and mental illnesses, establishing separate units within prisons has been suggested (Justisdepartementet 2009). There may, however, be grounds for warning against this. Past experience has shown that these kinds of units easily become ‘prisons within the prison’, and that they represent an impoverished regime as to both resources and staffing.

Therefore the best solution is perhaps to adjust prison conditions and to equip prisons so that serving a prison sentence works equally for everyone. This would mean strengthening the health and rehabilitative services in prisons. It would also mean taking the words of the courts seriously: that is, that it is up to the Correctional Services to consider the question of whether it is appropriate for an offender to serve the prison sentence. In Norway there is little knowledge about how the Correctional Services apply the rules relating to the offender’s fitness to serve a prison sentence. There are indications, though, that these rules only exist on paper. Prison doctors (e.g. Rafter 2008) report that the situation for sick prisoners has worsened in recent years. Doctors report that it is more difficult than in the past to transfer prisoners to medical treatment or rehabilitative measures. This is due to more punitive sentencing policies, and to the fact that security considerations have become relatively more important than rehabilitative considerations.

In this respect, the question of prison conditions for offenders with disabilities is closely connected to the prevailing political climate in a society. Thus, to improve the situation of offenders with disabilities in the criminal justice system, it is important to hold on to a humane criminal policy at all stages of the criminal process.

### **Notes**

1. For a more nuanced discussion of this thesis, see e.g. Ugelvik and Dullum (2012) and Barker (2013).
2. Lovdata is an online database which includes all Supreme court decisions from 1836 onward and all appellate court decisions from 1993 onward.
3. All translations are those of the author.
4. Preventive detention is unlimited with respect to time, and incarceration can in theory last for life.
5. To compare: In Norway, most prison sentences are relatively short. In 2010, of all those released from prison, 75% of prisoners were released within 90 days. 93% were released within one year.
6. In 2002 the sanction of preventive supervision was replaced by preventive detention. Preventive supervision could be applied in addition to a penal reaction for certain groups of offenders who could be held responsible for their crimes.

## References

- Andenæs, Johs. 1994. *Straffén som problem* [Punishment as a Problem]. Halden: Exil.
- Barker, Vanessa. 2013. "Nordic Exceptionalism Revisited: Explaining the Paradox of a Janus-faced Penal Regime." *Theoretical Criminology* 17 (1): 5–25.
- Christie, Nils. 1982. *Pinens begrensning* [Limits to Pain]. Oslo: Universitetsforlaget.
- Fastvold, Marianne, and Anne Hellum. 1988. *Money and Work in Marriage: Women's Perspectives on Family Law*. Oslo: Institutt for offentlig retts skriftserie.
- Feeley, Malcolm, and Jonathan Simon. 1992. "The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications." *Criminology* 30 (4): 449–473.
- Foucault, Michel. 1995. *Seksualitetens historie I. Viljen til viten* [The History of Sexuality]. Halden: Exil.
- Friestad, Christine, and Inger Lise Skog Hansen. 2004. *Levekår blant innsatte* [Inmates' Living Conditions]. Oslo: Fafo.
- Grue, Lars. 2004. *Funksjonshemmet er bare et ord. Forståelser, fremstillinger og erfaringer* [Disability is Only a Word. Understandings, Representations and Experiences]. Oslo: Abstrakt forlag AS.
- Haualand, Hilde. 2011. *Straffet og isolert. Innsatte med funksjonsnedsettelse i norske fengsler* [Punished and Isolated. Prisoners with Disabilities in Norwegian Prisons]. *Fafo-rapport* 2011:01. Oslo: Fafo.
- Hauge, Ragnar. 1996. *Straffens begrunnelse* [The Grounds for Punishment]. Oslo: Universitetsforlaget.
- Hennum, Ragnhild. 2002. *Domstolenes utmåling av straff – en undersøkelse av rettspraksis* [Sentencing in Norway – An Analysis of the Courts' Jurisprudence]. Rapport. Oslo: Justisdepartementet.
- Justisdepartementet. 2009. *Ressursavdelinger for innsatte med psykiske lidelser og store atferdsavvik – Forslag til tiltak* [Resource Departments for Prisoners with Mental Health Problems and Behavioral Disorders – Suggestions for Action]. Oslo: Ministry of Justice
- Mathiesen, Thomas. 2007. *Kan fengsel forsvares?* [Prison on Trial] Oslo: Pax.
- Pratt, John. 2008a. "Scandinavian Exceptionalism in an Era of Penal Excess: Part I: The Nature and Roots of Scandinavian Exceptionalism." *British Journal of Criminology* 48 (2): 119–137.
- Pratt, John. 2008b. "Scandinavian Exceptionalism in an Era of Penal Excess: Part II: Does Scandinavian Exceptionalism Have a Future?" *British Journal of Criminology* 48 (3): 275–292.
- Rafter, Bjørn. 2008. "Nordnorske legers vurderinger av soningsdyktighet [Northern-Norwegian doctors' Evaluations of Prisoners' Capacity to Endure a Prison Sentence]." Accessed February 22, 2011. <http://www.krom.no/artikler>.
- Skardhamar, Torbjørn. 2002. *Levekår og livssituasjon blant innsatte i norske fengsler* [Living Conditions for Prisoners in Norwegian Prisons]. K-serien nr. 1/2002. Oslo: Institutt for kriminologi og retts sosiologi, Avdeling for kriminologi, Universitetet i Oslo.
- Søndenaa, Erik. 2009. "Intellectual Disabilities in the Criminal Justice System." PhD diss., Norwegian University of Science and Technology, Faculty of Medicine, Department of Neuroscience.
- Syse, Aslak. 1995. *Rettsikkerhet og livskvalitet blant utviklingshemmete. Rettigheter, vern og kontroll som rettslige virkemidler* [Rule of Law and Quality of life for People with Disabilities. Rights, Protection and Control as Legal Instruments]. Oslo: Ad Notam Gyldendal.
- Ugelvik, Thomas, and Jane Dullum, eds. 2012. *Penal Exceptionalism? Nordic Prison Policy and Practice*. London: Routledge.
- Wandall, Rasmus H. 2008. *Decisions to imprison. Court Decision-making Inside and Outside the Law*. Aldershot: Ashgate.
- Wendell, Susan. 1996. *The Rejected Body. Feminist Philosophical Reflections on Disability*. New York: Routledge.