

COMPARATIVE CRIMINAL LAW, INTERNATIONAL CRIMINAL JUSTICE, THEORY OF  
CRIMINAL LAW, UNCATEGORIZED

# NORWAY: THREE CODES, THREE (SOMEWHAT) DIFFERENT SOLUTIONS

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James G. Stewart's argument for a unitary theory to replace the modes of liability in international criminal law is of particular interest from the point of view of Norwegian criminal law theory. Here, one of the most prominent contributors to the discipline, Bernhard Getz, made a similar claim in the latter half of the 19th century. Getz' famous work on a unitary theory from 1875 is often hailed as a masterpiece (published in 1876 as *Om den saakaldte Delagtighed i Forbrydelser – en strafferetlig Undersøkelse: Prøveforelæsning over selvvalgt Thema ved Concurrence om en Professorpost i Lovkyndighed*). For good reasons too: he wrote it at only 25 years of age, and it certainly demonstrated a theoretical maturity that was a great surprise to Norway's then fledgling criminal law discipline. After all, one counts Schweigaard's commentaries from the 1840's as the starting point for this discipline, and Getz's work was the first significant theoretical contribution to it.

Getz became a professor the year after he published his book, and went on to have a huge impact on the formation of modern Norwegian criminal law. Getz and his close companion, Francis Hagerup, exhibited their impressive ambitions for criminal law in other manners too. They had international ambitions, and were both active in the AIDP (Association International de Droit Penal –

International Association of Penal Law). Even more importantly from a Norwegian point of view, they filled key positions within the Norwegian political and legal order. Professor Hagerup served two separate terms as Prime Minister. Getz, for his part, held key positions in forming Norwegian legislation on criminal law and criminal procedure. He led both the commission preparing the Criminal Procedure Code of 1887 and the Criminal Code of 1902. He then became the first Director of Public Prosecutions in order to implement the Criminal Procedure Code of 1887. Certainly, this was the golden age for Norwegian criminal law – likely the first and only time when a criminal law professor held such prestigious positions in Norwegian society and with regard to the Norwegian criminal code, which was hailed as landmark legislation by central Continental criminal law scholars.

What then about Getz's unitary theory? In itself, it was a critique of the then existing criminal code, the Criminal code of 1842. Norway's first criminal code after independence was achieved in 1814. The code was itself a result of constitutionalization, as the Constitution of 1814 sect 94 required a criminal code to be enacted. This criminal code was imprinted by the Continental ideals at that time. The models used were the Code Penal (1810) and in particular the Code of Hannover (1840), which was itself inspired by Feuerbach's Bavarian criminal code of 1813. Not surprisingly, this code differentiated between contributors to crime. In the code, a separate chapter was dedicated to 'Participation' (chp. 5), which was understood as something different from the 'Perpetrator'. Here, the code had separate provisions for several different forms of participation, such as instigation of crime.

Starting from a concept of causation, Getz heavily criticized the 1842 Code. As there were no conceptual differences between the participator and the perpetrator, there was no reason to differentiate between them – thus the title 'On so-called Participation in Crime'. The unitary theory was also the starting point for Getz when he embarked on the task of drafting the new Penal Code of 1902, which was celebrated throughout Europe. Here, in line with Getz's program, there was no separate chapter on participation. In regard to sentencing, however, a section of the code in keeping with Stewart's approach, assigned differences between different contributors' importance. Getz clearly aimed at putting his theoretical enterprise into practice. However, the code of 1902 still included complicity as additional elements in a number of specific

offenses. The additions do not appear to be consistently included in the code. This also left it for court practice to decide in regard to a number of offences whether complicity gave rise to criminal responsibility. In regard to several offences, the Supreme Court concluded that it did. Complicity therefore remained a central concept in Norwegian criminal law theory and practice even after Getz's own code.

The lack of complete coherence between Getz theoretical project and his solution as a drafter of the code has often been emphasized in later literature. Unfortunately, Getz passed away at young age in 1901 – a year before his criminal code was enacted. As a consequence, we do not know how he would have responded to this criticism. Moreover, it is a point of intrigue for the current debate that later Norwegian scholars have not followed Getz's approach on these questions. In particular, G. Astrup Hoel (1941) and Erling Johannes Husabø (1999) have criticized it. Husabø's critique of Getz, in the most recent and extensive investigation into complicity in Norway, starts out from a different concept of causation and also offers conceptual arguments concerning the relation between 'Perpetrator' and 'Participator'.

In 2015, the Norwegian code of 1902 was replaced by the Penal Code of 2005. At least in part, this legislative shift can be described as return to the original code of 1842. In the code of 2005, there is a general section on participation (sect. 15), which makes participation in crime in general subject to criminal responsibility unless otherwise stated in the offense. This new code does thereby not adopt the opposite solution to Getz's code of 1902. In the preparatory works, there is no discussion of a unitary theory. Instead, treating complicity as a separate subject seems now to be taken for granted.

Lessons learned? There are two ways to see the rise and fall of the unitary theory in Norwegian criminal law. One way to see it is as an unfulfilled promise, one that was hindered by Getz's early death, legal culture and other obstacles. The other way to see the Norwegian story is that the theory was flawed in the first place. There is not room for a detailed discussion of the subject here, nor on the particularities of international criminal law and the distinct challenges to modes of liability that this field of law faces. It seems clear, however, that the history of Norwegian criminal law at least is

not a particularly strong argument for the potential of a unitary theory internationally.

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