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Psychiatric care or social defense? The origins of a controversy over the responsibility of the mentally ill in French forensic psychiatry

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ABSTRACT

While some countries like Belgium chose a penal system clearly inspired by social-defense theories for mentally disturbed criminals, the French law hasn't been consistent and varies from the enlightened classical law and social-defense law. Indeed paragraph 1 of article 122-1 states that people whose discernment or control is abolished by a psychiatric disorder are non-responsible respecting the classical logic of law. On the other hand, Paragraph 2 of Article 122-1 allows the mentally ill to be judged responsible whereas no institution exists to take care about them. Then the system of psychiatric care in prisons present as a solution for professionals wishing to promote a system where people are punished and socially rehabilitated. Thus these forensic psychiatrists don't refer to paragraph 1 of article 122-1 and even people presenting serious mental disorders are considered responsible. Moreover, if a controversy has always existed between psychiatrists who argue a large conception of mental irresponsibility and professionals who defend the right to punish and to conclude that responsibility even for mentally disturbed criminals, the controversy becomes more important in French forensic psychiatry after the Second World War. If until the 1970s the practice of imposing responsibility for mentally ill individuals shows itself as a humanism, it occurs more within a security perspective today.

1. Introduction

What is special in the relationship between psychiatry and justice in France? How has this interaction built up over time? The French penal system is particularly characterized by an ambivalence and the impossibility of choosing between on the one hand, the classical system of law that affirms the strict separation of the penal and psychiatric strands of logic and the social-defense logic[1] that promotes their combination. But French law has never implemented consistent legislation for mentally disturbed criminals inspired by social-defense theories as in Belgium for example. This ambiguity of the law has advanced a controversy between French forensic psychiatrists over the responsibility of the mentally ill. If during the nineteenth century this controversy already existed and opposed first alienists to judges, now this opposition is internal to the psychiatric profession, and characterizes the evolution of forensic psychiatry in the twentieth century. Indeed, if some forensic psychiatrists consider that psychotic people have to be judged non-responsible, others restrict the universe of disorders that count as non-responsibility. This last trend is increasing significantly nowadays. In this context, the mobilization by psychiatrics of social-defense theory is not so obvious because happening in a psychiatric context. While some of these experts clearly refer to this theory, others use arguments which are getting close without referring to it directly. Then are also arguments of another kind which are developed. After presenting the French legislation concerning the criminally insane and showing that the social-defense logic influence French law without reaching a consistent law for mentally ill criminals, we will make an inventory of this controversy in the nineteenth and in the twentieth century. Our intention is first to present theories that have influenced the criminal law, and then to study the mobilization of these theories into practice in the nineteenth and twentieth centuries.

2. Classical law as the model of French penal law, or the strict separation of the penal and psychiatric logics

Since the French Revolution, French criminal law has been based on the classic concept of criminal responsibility, which proposes that it is right to punish someone free to act [re-word]. This situation where people are free to act is in opposition to situations in which questions exist regarding the suspect's freedom, psychological involvement and responsibility. These cases, which include insanity, are at loggerheads with the traditional criminal law and lead to a dead-end in its discursive logic. Then if the judge suspects the criminal's madness, he asks a forensic psychiatrist to apprehend this question.

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[1] The concept of social defense comes from the Italian criminological school founded by Cesare Lombroso. This penal theory considers a system of punishment based on the dangerousness of the offender. Its goal is the rehabilitation of the defendant to limit his risk of recidivism. In this type of system, Forensics, and specifically psychiatry and criminology would have a privileged status.

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"Its internal criteria preclude both acquittal and conviction. The use of (psychiatric) expertise, based on a different specific capital, provides external legitimacy and is what removes, if I may say, the monkey from the judiciary system's back" (Castel, 1985, p.85).

From a legal perspective, French classical-law theorists have usually distinguished the commission of an offense referred-to as such in the penal code, from its author's responsibility. The classification of an offense is divided into three distinct elements: first, the legal element refers to the fact that it is referred-to in the law. Secondly, the material element designates the objective relationship that can be established between the action of an actor and the offense. Finally, it remains necessary that "the punishable act was willed in itself" (Merle & Vitu, 1978, p. 833) by its perpetrator regardless of the consequences to which it led: this is the moral element of the offense.

But an offense can be attributed to an actor only if the actor's responsibility can be demonstrated. Specifically, for an individual to be considered responsible, two elements must be demonstrated: guilt and accountability. *Culpa* on the one hand, is not only the fact of an offense having been committed against the law, but also the actor's willful involvement in the offense, i.e. his involvement in an act that could potentially lead to the result prohibited by law. Therefore the definition of guilt refers to both the material element and the moral element of the offense. About accountability on the other hand, even though some lawyers do not distinguish it from the notion of guilt, it is clearly defined as "the ability to understand and to will, the capacity to deserve the penalty" (Merle & Vitu, 1978, p. 715) by authors such as Jean-Marc Aussel (1956), Joseph Ortolan (1886), or Gaston Stefani et Georges Levasseur (1975) (famous French legal theorists of the twentieth century). The principle of accountability therefore necessitates the assumption of personal liberty and refers to the psychological state of the actor at the time of his crime. Thus anyone is considered accountable if he can be shown to have acted freely and in full possession of his faculties.

In this context, several causes may impair accountability, including insanity. To summarize the main ideas of French legal theorists since the nineteenth century, accountability refers to four fundamental faculties: 1) intelligence (for Sir Edward Coke, 1979; Roger Merle and André Vitu, 1978), 2) discernment (Saint Augustine, 1864–1873; François Grimaudet, 1613; or, more recently, Jean Pradel, 1994), or ability to understand whether an action is moral, 3) freedom (Saint Augustine, 1864–1873; or Saint Thomas Aquinas, 1984–1985) and control over one's actions; 4) the will. Hence, the philosophy of classical law defines insanity as any mental disorder that impairs the discernment of the accused (which does not allow him to understand whether his behavior is moral) or his ability to control (where he may perceive right from wrong but is unable to control his actions). Gaston Stefani, Gerard Levasseur, Bernard Bouloc or Merle and Vitu attest to this, predicating that the will of a mentally disturbed individual cannot be considered free because the psychological and moral understanding of their actions does not find its source in their conscience, but in a pathological force external to it. However, where the jurist defines accountability as the existence of intelligence with possession of the faculties, [the actor's] responsibility can also be challenged, since in his ravings, the mentally ill person shows a misapprehension of reality.

Two articles of the law enshrine this theoretical basis: Article 64 of 1810 and Article 122-1 of the 1992 new Penal Code.[2]

Article 64 of the 1810 Penal Code states:

> There is neither crime nor offense if the defendant was insane at the time of the action or if he has been compelled by a force which he could not resist.
>
> [Code pénal (1810) quoted by Bouyssou (2003, p. 89).]

According to this article, madness – or rather "insanity" – is viewed as a state in which the criminal is entirely deprived of the freedom of will to transgress the legal prohibitions. The portrayal here of the irresponsible mentally ill person is that of a person without awareness of the prohibitions, who acted on impulse and with no awareness of his actions. This model of total lack of consciousness is at quite some remove from the more complex model of the abolition of accountability, discussed earlier, which allows room for conceiving someone to be aware of transgressing the prohibitions but unable to control himself because of his mental illness. The early alienists were quick to criticize this model on the grounds that a whole flock of people whom they termed "half-mad" blurred the boundary between this state of "total madness" and a state of so-called "psychic normality". The Chaumié[3] Circular was issued in 1905 with the aim of replying to this criticism:

> It is necessary for the expert to be formally instructed to indicate with the greatest possible clarity whether, at the time of the offense the accused was responsible for the action for which he is charged. To achieve this goal, I consider that the commissioning instrument must always and as a matter of course contain and put the two following questions:
>
> 1) State whether the accused was in a state of insanity at the time he committed the act, within the meaning of Article 64 of the Penal Code;
> 2) State whether the psychiatric and biological examination brings to light the existence of mental or psychic anomalies such as to mitigate to a certain extent the accused's responsibility.
>
> [Quoted by Bouyssou (2003, p. 90–91).]

However, the role given by this circular to a psychiatrist in the legal sphere stirred up much and varied controversy in the psychiatric community (to which we shall revert), resulting in its withdrawal shortly after being adopted. Gradually, the Penal Code of 1810 began to be reviewed. A series of ministerial committees revised Article 64 between 1975 and 1992, and produced a new one which is applied in 1994 (article 122-1). The first draft legislation was tabled in 1975:

> There is no punishable offense where, at the time of the act, the perpetrator was experiencing a psychic disorder abolishing his judgment or control over his actions.

The principles underpinning Article 122-1 are established here: this article confirms the status of madness as a state that precludes accountability but not guilt, because it fails to cancel the existence of the offense. The state of madness is seen as a cause that obstructs the individual's capacity for discernment and his freedom. Moreover, in contrast with article 64, the presence of a mental disorder at the time of the crime is not sufficient to demonstrate criminal irresponsibility. The legislator is apparently seeking greater forensic-medical rigor since now, the disorder is required to *preclude discernment* or the *control* of actions in order for the individual to escape punishment. The final wording of Article 122-1 is:

> A person who was experiencing psychic or neuro-psychic disorder that abolished discernment or control over his actions at the time of the offense cannot be held criminally responsible.A person who was experiencing psychic or neuro-psychic disorder that impaired discernment or obstructed control over his actions at the time of the offense can still be punished; however the jurisdiction shall take this circumstance into account when sentencing and setting the regime of the sentence.
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> [Code pénal (1994) quoted by Bouyssou (2003, p. 102).]

[2] For a longer and wider historical perspective, see D-N. Robinson (1996), wild beasts and idle humours: The insanity defense from antiquity to the present and A. Esmein (1978), Histoire De la procédure criminelle en France et spécialement de la procédure inquisitoire depuis le XIII^{e} siecle jusqu'à nos Jours.

[3] Pierre Chaumié (1880–1966) was a French politician, lawyer and resistance fighter during the second world war. From 1905 to 1906 he was Deputy Head of Staff to the Minister of Justice.