International Journal of Law and Psychiatry 37 (2014) 82–90

Contents lists available at ScienceDirect

International Journal of Law and Psychiatry

The irresponsible criminal in Norwegian medico-legal discourse

Svein Atle Skålevåg [1]

Department of Archaeology, History, Cultural studies and Religion, University of Bergen, Postboks 7805, NO-5020 Bergen, Norway

ARTICLE INFO

Available online 18 October 2013

Keywords:
Forensic psychiatry
Norway
Criminal responsibility
Criminal law
History

ABSTRACT

This article discusses discourses on criminal responsibility in Norway in the 19th and 20th centuries, in light of Michel Foucault's regimes of power and knowledge: the apparatuses of law, discipline and security. The passing of two criminal codes, in 1842 and 1902 marks a development from neo-classical law to a law influenced by positivist criminology. In these consecutive ways of thinking law, the figure of the irresponsible criminal constituted a contentious issue. From being a figure marking the limits of the law, the irresponsible criminal became an object to be disciplined and a security threat. This redefinition of criminal responsibility created or was created by new groups of experts speaking from positions increasingly close to the criminals. The most important professional group was of course the psychiatrists, that emerged in Norway as a distinct professional group in the second half of the 19th century, and whose influence in the legislative process culminated in the 1920s.

1. Introduction

The history of forensic psychiatry in Norway is framed by two criminal codes: The criminal code of 1842 was the first code passed after the dissolution of the Norwegian–Danish union in 1814. It was a neo-classical code, giving prime importance to the classification and systematization of criminal acts. The second code was the criminal code of 1902, a code that was marked by the "scientific approach" to crime in continental Europe. It established a penal regime that was much more reformative in its spirit, and in which medicine and psychiatry had a more prominent role. This criminal code is only in the early 21st century about to be replaced by a new, third, code.

This article examines the relationship between psychiatric and legal discourse in 19th and 20th century criminal law reforms in Norway. At the heart of the analysis lies the question of criminal responsibility, but a proper historical understanding of this problem should take into account the manner in which it is embedded in a discourse that is simultaneously medical and legal. Some guidelines for this history can be found in Michel Foucault's writings on power. Foucault's notions of "sovereign power", "disciplinary power", and "biopower", that were so crucial to his thinking in the 1970s, were rooted in a reflection on the historical development of criminal law and relied on 19th and early 20th century analysis of this history. In the early 19th century the reformed prison was propagated as incorporating a new approach to crime, where redemption should be replaced with rehabilitation. The lack of success of this prison triggered a new analysis that was primarily social. Scholars such as the Belgian Adolphe Prins and the Italian Raffaele Garofalo criticized the criminal law of their time for being blind to the individuality of the criminal, the effects of punishment, and the social reality of crime (Garofalo, 1914; Prins, 1910). They wanted to replace the "classical law" of Beccaria and other former reformers with a "new criminal law". For Prins and for Garofalo the purpose of law was to establish a defense of society.

The history of analysis of power as seen through criminal law (and other discourses) constitutes a persistent theme in Foucault's writings in the 1970s. In *Discipline and punish* the prison reform movement is central for an elaboration of the distinction between law and discipline. The title of "*Society must be defended*" refers directly to the positivist criminology of Prins and Garofalo, and *Security, territory, population* expands the analysis to a tripartite scheme of law, discipline and the "security dispositive" (Foucault, 1975, 1997, 2004).

For 19th century positivist criminalists, the distinction between classical and new criminal law signaled a real progress in the relation between society and crime. For Foucault, this very analysis is the starting point for developing a historicized approach to power. For me, this conceptual apparatus offers useful tools for guiding our analysis of psychiatry, law and responsibility in 19th and 20th century Norway. It indicates a periodization: from law, to discipline, to security. This discussion on the law–medicine relationship and the question of criminal responsibility is based on policy documents, legal drafts, minutes from debates, court rulings and forensic medical reports from the 19th century up until the 1980s.

2. Before the criminal code of 1842: criminal insanity as a legal concept

In medieval Norway law was a regional law. Conflicts were dealt with at the 'ting', the gatherings of free men. Only at a relatively late stage in

E-mail address: Svein.skalevag@ahkr.uib.no.
[1] Tel.: +47 55 58 97 77.

0160-2527/$ – see front matter © 2013 Elsevier Ltd. All rights reserved.
http://dx.doi.org/10.1016/j.ijlp.2013.09.008

history were the legal rules written down (Sunde, 2005). In 1274 the first royal codex was issued by the king Magnus Lagabøte (*Magnus the Lawmender*), based on substantive rules in the former regional laws. In the 15th and 16th centuries, the kingdom of Norway gradually ceased to exist as an independent state. It came under dominance of the kings of Denmark, and came to constitute a defined region with significant legal autonomy. In the 17th century, the kings of Denmark issued separate legal codes for the Norwegian part of their realms. To a large extent these codes were Danish translations of the older Norwegian codes. Hence there was a significant continuity in the legal culture of Norway in the centuries leading up 1814 when it, in the wake of the Napoleonic wars, was transferred from the Danish to the Swedish kings. The scholarly culture in these centuries of Danish rule, law as well as medicine, had its center in the University of Copenhagen. This remained the only university in the dual kingdom until 1811, when a second university was established in Christiania (present day Oslo).

Already the medieval regional law had rules addressing the question of legal responsibility, in particular regarding ostensibly mad murderers. The codes issued by the Danish kings perpetuated these rules. But a general rule on criminal responsibility was first formulated by the legal scholars in Copenhagen who adopted natural law in the late 18th century. Norwegian born scholar and playwright Ludvig Holberg (1684–1754), a professor of metaphysics, Latin and history, first published his "Natural law" in 1716, a work that was republished in several editions over the next fifty years (Holberg, 2013). Another significant scholar in this tradition was Lauritz Nørregaard (1745–1814) who taught at the university in the 1780s. Holberg addressed the question of legal responsibility, but Nørregaard extended the argument, making it a general principle of legal responsibility. Both of them held the existence of a "free will" as a necessary precondition for crime; the will was the real object that the law aimed at. A person lacking free will was not a fit subject to stand for the law. Even though not formulated in the legal code, this general principle regulated legal practice and legal discourse in the late 18th century. (Holberg 2013, Nørregaard 1788)

This first articulation of a principle of accountability in a Danish–Norwegian context was formulated quite independently of medical thinking. Illness was relevant in this context to the degree that it interfered with the free will. Yet these legal scholars admitted the existence of a broader range of mental disturbances than the one recognized by the clear cut distinction of the law. Holberg mentions the existence of a "madness that only is expressed in relation to certain matters", hence seemingly anticipating the later medical category of monomania (Ludvig Holberg, *Epistel* 353, quoted from Waaben, 1997, p. 19).[2] And Nørregaard points to the many "transitional" mental states, incomplete or intermittent mania, that are known from daily experience, but unrecognized by the legal code. The professor left to the judge's discretion to decide the legal consequences of these mental states on a case to case basis (Nørregaard 1788, p. 10).

Nørregaard's observation hints at the existence of this kind of case being known from legal practice. Little research has been done on legal practice in the area, so we have little knowledge about medical participation in these local negotiations. Indeed until the 19th century very few physicians were at hand for the Norwegian courts to consult if they should wish to do so.[3] But it seems that from the early 19th century participation of medical experts in negotiations on the states of mind in criminal courts were slowly increasing. One early example is a case from 1823 which made it to the relatively newly established Supreme court. The case regarded a military surgeon who in Trondheim had brutally stabbed a woman to death (Brandt, 1855). The mental state of the defendant was an important issue in the trial, and several physicians testified that he suffered from fits of "hypochondria", that occasionally "deprived him of his wits".[4] The man's derangement saved him from the axe; he was sentenced to detention for as long as would prove necessary, which in his case proved to be until the end of his days.

The rationale for the medical expertise in the early 19th century courts of law was, apparently, a way of thinking medically that assumed an intimate relation of the body and the mind. In another murder case, from 1818, a surgeon was consulted to establish whether the defendant showed any manifest signs of "mental weakness". The participation of the surgeon seems to presuppose that the body constituted a legible surface of the inner soul. The surgeon found none, but the murderer's employer, the factory owner Jacob Aall, who was a man with strong interest in contemporary politics and philosophy, threw himself into the case and managed to persuade the court that the man was out of his mind (Johannessen, 2009; Skålevåg, 2006).

This assumption of the intimate relation of the mind and the body was also evident in the first public debate around the insanity defense in Denmark, in the 1820s. The debate, known in Danish history as the "Howitz controversy", was the first public confrontation in the kingdom of law and medicine over issues pertaining to criminal law (Michelsen, 1989, p. 37ff). In 1824, Frantz Gotthard Howitz (1789–1826), a young professor of forensic medicine in Copenhagen, published a lengthy dissertation on "dementia and responsibility" (Howitz, 1824). Dementia or *afsindighed* was in the legal language of the time understood as a general term for the legally relevant aberrations of the mind, as in the French penal code. Howitz suggested a redefinition of this concept in materialist terms, and at the same time sought to demonstrate that medical and legal scholars thought differently about this issue. Legal scholars and jurists, on the one hand, presumed a strict demarcation between responsible and irresponsible. Medical scholars, on the other hand, were concerned with the plurality of intermediate states that they found "in nature" (what Nørregaard earlier had considered the realm of every day experience).

As to the concept of dementia, Howitz suggested a definition that was materialistic and unapologetically medical: "dementia consists of a constriction of reason due to an illness in the material organs of mental activity." (Howitz, 1824, p. 2) By insisting on the bodily aspect of dementia Howitz called for a bold medicalization of a term that had a long history in domestic legal discourse, without ignoring the professional consequences it would have for the working relations between law and medicine (Howitz, 1824, pp. 21–22). With Howitz, the body became the place of insanity, and medicine also laid claim to a place in the Danish courts of law.

The timing of the controversy is interesting, as it broke out short time before a controversy around homicidal monomania in Paris.[5] Howitz had travelled to France and England in the 1810s and may very well have acquired his taste for empiricism and medical localism there.

In Copenhagen Howitz' position met with little support. The publication of his thesis rapidly led to a general discussion about philosophical determinism and pitted the philosophy of Hume against that of Kant, the latter being dominant among Danish scholars. But Howitz' position on the nature of dementia was not ignored by physicians. In Copenhagen he was defended by his friend professor Carl Otto, whose treatise on phrenology was published in 1825 (Michelsen, 1989, p. 55). Across the sea, at the new university in Christiania, Howitz was quoted as an authority in the lectures by Professor Michael Skjelderup in the 1820s and 1830s (Skjelderup, 1838). Skjelderup's students were trained to

[2] "der ere visse galne Mennesker, men hvis Galskab yttrer sig alleene udi visse Ting."

[3] Per Holck has estimated the number of physicians in Norway at the time of the dissolution of the Norwegian–Danish union to be around 50, surgeons excluded. Per Holck "The very beginning, Folk Medicine, Doctors and medical Services" In (Larsen, 1996, pp. 27–38).

[4] "berøvet ham Fornuftens Brug". It is likely that "hypochondria" is mistaken for "melancholia" in the source, as the author also refers to "anfald af tungsind", which may be translated to "fits of melancholia".

[5] This controversy was triggered by the publication of Georget's *Examen medical des procès criminels* in 1825. Jan Goldstein has shown how this concept of monomania was shaped by the emergence of a profession of alienists (Goldstein, 2001 (1987), pp. 152–96).