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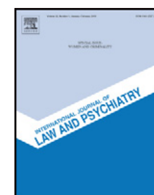

Mentally disordered criminal offenders in the Swedish criminal system

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ABSTRACT

Historically, the Swedish criminal justice system conformed to other Western penal law systems, exempting severely mentally disordered offenders considered to be unaccountable. However, in 1965 Sweden enforced a radical penal law abolishing exceptions based on unaccountability. Mentally disordered offenders have since then been subjected to various forms of sanctions motivated by the offender's need for care and aimed at general prevention. Until 2008, a prison sentence was not allowed for offenders found to have committed a crime under the influence of a severe mental disorder, leaving forensic psychiatric care the most common sanction in this group. Such offenders are nevertheless held criminally responsible, liable for damages, and encumbered with a criminal record. In most cases, such offenders must not be discharged without the approval of an administrative court. Two essentially modern principles may be discerned behind the "Swedish model": first, an attempted abolishment of moral responsibility, omitting concepts such as guilt, accountability, atonement, and retribution, and, second, the integration of psychiatric care into the societal reaction and control systems. The model has been much criticized, and several governmental committees have suggested a re-introduction of a system involving the concept of accountability. This review describes the Swedish special criminal justice provisions on mentally disordered offenders including the legislative changes in 1965 along with current proposals to return to a pre-1965 system, presents current Swedish forensic psychiatric practice and research, and discusses some of the ethical, political, and metaphysical presumptions that underlie the current system.

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1. Introduction

In accordance with the Swedish Criminal[1] Code (SFS (Swedish Code of Statutes) 1962:700), the Swedish public courts may pass sentence on all offenders who are at the age of criminal responsibility — i.e. fifteen years of age. Even offenders who are *non compos mentis* (unaccountable), when committing a crime can be held legally responsible. Offenders with severe mental disorders are thus presumed to be capable of having criminal intent and shall be prosecuted and sentenced. In this reasoning, the Swedish penal law system differs from most others in the world. To explain the reasoning behind this system and its forensic psychiatric implications, this review begins with a brief summary of the legal history of the Swedish regulations concerning mentally disordered offenders. In the next sections we step down from the ideological and legislative level to present details about the Swedish forensic psychiatric investigation process, the forensic psychiatric care system, and recent Swedish research in forensic psychiatry. In the last sections, some recent legal changes that indicate an imminent return to a regulation based on accountability are described together with important current suggestions in the same direction.

2. From the Penal Code of 1864 to the Criminal Code of 1965

A condition for legal responsibility in the The Swedish Penal Code of 1864 was that the offender was accountable at the time of the crime. Unaccountability or reduced legal responsibility was "intellectualistically" defined, focusing on the ability to understand the content of the law. However, the legal usage was soon adjusted to a broader psychiatric view, taking also volitional and emotional aspects into account. The application of these rules in practice was mainly determined by the highest medical authority of the country (Medicinalstyrelsen) (Sondén, 1930, pp. 86 ff).

In the 1946 revised formulation of the law, unaccountability was instead explained in terms of "mental disease", "mental deficiency", "mental abnormity", and "mental abnormity of such a deep-going

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[1] Since the Swedish name of the code is "Brottsbalken" and the word "brott" has the meaning of "crime", "Criminal Code" is more appropriate than the more commonly used "Penal Code".

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nature that it must be considered on a par with mental disease". Having committed a criminal act under the influence of such a mental state exempted the perpetrator from punishment. The explicit insistence on a causal connection between the perpetrator's mental state and his/her criminal act was also novel.

From as early as around 1900, fierce debate surrounded the key concept *accountability*. The foremost adversary of this concept was Olof Kinberg, who in 1922 became the first Swedish professor of forensic psychiatry and was an international authority on criminology during the first part of the 20th century. Kinberg based his work on the Positive School of Criminology, particularly the views of Enrico Ferri, but was not uncritical towards this school. In several works (e.g. Kinberg, 1914, 1930, 1935) he argued that the concept of accountability should be discarded from criminological use because of its close connection with concepts such as *freedom of will*, *guilt*, and *retribution*, all of which he claimed to be theological–metaphysical remnants in a modern society. Since determinism as the principle for science and thereby for a rational society excludes the freedom of will, the concepts of guilt and retribution have no real application. Judicial reactions against crime should be motivated by what is necessary for the continued existence of society, not by metaphysically based principles (Kinberg, 1935, pp. 71–72).

Unlike the earlier Penal Code, the Criminal Code does not recognise a causal connection between a mental disease and a criminal act as exempting the offender from penal law sanctions. The court may now commit an offender to forensic psychiatric care, even when the criminal act could not be ascribed to the influence of a mental disease; the prerequisite for such a sentence is instead that he or she has a need of psychiatric care at the time of the trial. Even if imprisonment is not allowed, other sanctions than forensic psychiatric care may be imposed, such as commitment to special care, fines, or probation. Regardless of sanction type, the convicted offender was encumbered with a criminal record.

3. Post-1965 revisions of the legislation

3.1. The concept of severe mental disorder

As mentioned above, the "equivalency" criterion of "a mental abnormality of such a deep-going nature that it must be considered on a par with mental disease" was among the grounds for penal exemption from 1946 on. In the Criminal Code of 1965, it remained as a ground for prohibition of imprisonment. By the 1970s, this criterion had become applicable to a very heterogeneous group of offenders because of a lack of consensus among psychiatrists regarding the content of the equivalency criterion. In reaction to criticism of the criterion, the proportion of offenders committed to forensic psychiatric care decreased, as did the number subjected to forensic psychiatric examination (Lidberg, 1983).

In 1992, the medicolegal concept of *severe mental disorder* replaced the previous disease-related concepts in both the penal legislation and the legislation regarding involuntary psychiatric care. The use of "severe" in "severe mental disorder" indicates that what is intended is not just any mental disorder. However, the concept is nowhere explicitly defined, but only explained by a list of example diagnoses that may constitute severe mental disorder (Prop. (Government Legislative Bill) 1990/91:58, p. 86).[2] A distinction is made between the *kind* and the *degree* of a mental disorder, both of which have to be weighted into the assessment of a disorder as severe. Schizophrenia, for instance, is always severe with regard to kind but need not be severe with regard to degree, whereas depression is not severe with regard to kind but may be severe with regard to degree. It has been suggested that the lack of a clear definition of the concept of a severe mental disorder has made it possible to interpret it as a mental disorder causing inaccountability (Malmgren, Radovic, Thorén, & Haglund, 2010).

The new legislation was also ambiguous (not to say contradictory) regarding severe personality disorders. They were included as examples of the severe mental disorders linked to prohibition of imprisonment, but it was also implied that subjects with these disorders should be given prison sentences rather than psychiatric care (Prop. 1990/91:58, p. 86). It is tempting to speculate that this shows an influence of remaining retributivist intuitions. When the revised legislation had gained legal force in 1992, the number of offenders with personality disorders sentenced to forensic psychiatric care did indeed decrease considerably (Kullgren, Grann, & Holmberg, 1996). However, the number of offenders with psychotic disorders sentenced to psychiatric care increased to the same extent or more (Grann & Holmberg, 1999; Lund & Forsman, 2005). Thus, it cannot be excluded that the revision of the legislation changed the diagnostic rather than the judicial praxis. Another possible explanation of the increase in sentences to care among subjects with psychotic disorders is the de-institutionalisation of psychiatry during the 1990s (Belfrage, 1998).

3.2. Special court supervision

With the need for protecting the public as the explicit motivation, the revisions of the Criminal Code in 1992 introduced "special court supervision" (Prop. 1990/91:58, p. 5). The public court can stipulate such special court supervision in sentences to psychiatric care, particularly in cases where there is a risk of relapse into serious criminality due to severe mental disorder. In these cases, any changes in safety measures such as ground privileges, outpatient treatment, conditional leaves, as well as absolute discharge must be approved by an administrative court after consultations with the prosecutor from the initial public trial and an independent psychiatric expert.

In 2008, changes to the Criminal Code were made that point towards a radical reform of the "Swedish model". However, before we go into these, we will describe the workings of the Swedish forensic psychiatric process in more detail and give an overview of Swedish forensic psychiatric research under the present system.

4. Forensic psychiatric investigations today

In the current Swedish system, a person under prosecution may be subjected to three types of investigations in connection with the court proceedings: a pre-sentence personal case study, a section-seven investigation (or minor forensic psychiatric investigation), and a complete (or major) forensic psychiatric investigation. All forensic psychiatric investigations are conducted at any of three investigation units in the country and under the auspices of the National Board of Forensic Medicine, an authority under the Ministry of Justice.

4.1. Pre-sentence personal case study

The most commonly performed investigation is described in the Personal Examination in Criminal Cases Act (SFS, 1991d:2041). The local probation authority, a branch of the Swedish Prison and Probation Services, is responsible for the investigation by order of the court. The investigator collects information about the subject's lifestyle and social circumstances, and may stress the need for further forensic psychiatric investigation.

4.2. Section-seven investigation

In accordance with the seventh section of the Personal Examination in Criminal Cases Act, the court may appoint a psychiatrist to issue a so-called "section-seven certificate". Although the court makes the decision, both the prosecutor and the offender, or his lawyer, may

[2] Since it serves as guidance for the courts when interpreting the statute, the government Bill is in itself a source of law.

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