International Journal of Law and Psychiatry 40 (2015) 43–49

Contents lists available at ScienceDirect

International Journal of Law and Psychiatry

Introducing a standard of legal insanity: The case of Sweden compared to The Netherlands

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ARTICLE INFO

Available online 21 May 2015

Keywords:
Insanity defence
The Netherlands
Sweden
Legal insanity
Accountability

ABSTRACT

A recent governmental report has suggested that the notion of insanity, which has not been a relevant concept in Swedish criminal law for the last 50 years, should be reintroduced into the criminal justice system. This move has generated a debate over the most appropriate criteria to be included in a legal standard for insanity. We consider the fundamental question of whether a legal standard is required when introducing insanity, by looking at a legal system in which legal insanity is available but where no standard is used: The Netherlands. Overall, a review of advantages and disadvantages leads to the conclusion that such a standard is necessary. What exactly should that standard be? Is the development of different "grades" of insanity desirable? Legal considerations concerning what is essentially a legal notion should predominate in making these determinations—informed by psychiatric and other relevant scientific findings.

1. Introduction

Sweden and the Netherlands are rather unusual in the respect that neither country has a standard for legal insanity like, e.g., the M'Naghten rules, defining the specific criteria for legal insanity. The M'Naghten rules, used in many common law systems, state that in order to be legally responsible for a criminal act, the defendant must have (i) known what he was doing, and (ii) known that what he did was wrong.[1] A defendant who does not know what he was doing and/or that it is wrong might then be found not guilty by reason of insanity. But there are other legal insanity standards as well: for instance, the Model Penal Code standard which consists of both a cognitive prong—appreciation of the criminality of the act—and a control prong—the ability to conform one's conduct to the requirements of the law.[2] Again, both Sweden and the Netherlands lack such a standard.

The legal systems of Sweden and the Netherlands share a further significant characteristic, this time when it comes to the evaluation of mentally disordered criminal defendants: in both legal systems, psychiatric evaluations are 'court ordered', in the sense that insanity is, in principle, not raised by the defendant as an affirmative defence.[3] There are also differences between Sweden and The Netherlands, the most important being that in the Netherlands a defendant can be acquitted due to legal insanity (even though there is no standard specifying the criteria), a legal outcome that is not possible in the current Swedish system. A further difference is that forensic psychiatric evaluations in the Netherlands are performed by individual psychiatrists and psychologists, while in Sweden forensic psychiatric evaluations are conducted by a governmental authority; The National Board of Forensic Medicine.

The (re-) introduction of a possibility for acquittals due to legal insanity in Sweden has repeatedly been argued for since the concept of accountability (tillräknelighet) was abolished in Swedish law in 1965. During the last four decades, no less than four governmental reports have proposed a new legislation when it comes to handling mentally disordered criminal offenders, the latest issued in 2012 (SOU (Swedish Government Official Reports), 2012:17). In the Netherlands, acquittal due to legal insanity is possible due to Article 39 of the Dutch

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[1] McNaghten rules. House of Lords (1843).

[2] Model Penal Code. Official draft and explanatory notes: complete text as adopted May 24, 1962. Philadelphia: American Law Institute, 1985. The English Law Commission recently recommended that the insanity defence should be replaced by a new statutory defence of not being criminally responsible by reason of a recognised medical condition. The defence would apply in cases when the defendant "wholly lacked the capacity: (i) rationally to form a judgment about the relevant conduct or circumstances; (ii) to understand the wrongfulness of what he or she is charged with having done; or (iii) to control his or her physical acts in relation to the relevant conduct or circumstances as a result of a qualifying recognised medical condition". (Law Commission (2013) Criminal Liability: Insanity and Automatism: A Discussion Paper) [http://lawcommission.justice.gov.uk/areas/insanity.htm]. p. 193.

[3] In The Netherlands, a country with a moderately inquisitorial system, most psychiatric and psychological evaluations used to be ordered by a judge, but nowadays most of them are ordered by the prosecution. Meanwhile, the defendant him or herself may also raise the defence or ask for a 'second opinion' by another behavioural expert if he or she disagrees with findings of the expert appointed by the court.

http://dx.doi.org/10.1016/j.ijlp.2015.04.009
0160-2527/

Penal Code (originally established 1886), which states that "A person who commits an offence for which he cannot be held responsible by reason of mental defect or mental disease is not criminally liable."[4] But also here a change of practice regarding insanity is afoot. A recently published *Guideline* for forensic psychiatric evaluations in criminal cases proposes that the current—and as far as we know unique—five grade scale of accountability be abandoned and replaced with one of three grades (Nederlandse Vereniging voor Psychiatrie, 2012). The five grades of responsibility are: being responsible, slightly diminished responsibility, diminished responsibility, severely diminished responsibility, and (complete) legal insanity. These grades cannot be found in the law itself but have evolved in practice.

In this paper we discuss a possible re-introduction of legal insanity in Sweden and make comparisons between Sweden and The Netherlands. This comparison is of interest because both are European civil law systems, while much of the discussion about legal insanity concerns Anglo-American common law systems. Furthermore, in both Sweden and The Netherlands the question of legal insanity is (usually) not raised by the defence. We begin by describing the current situation regarding legal insanity in Sweden as well as in The Netherlands, before discussing the criteria for insanity, and also the possibility of introducing grades of insanity in the Swedish legal system. Finally we consider the desirability of a standard for legal insanity as such. The exact form of such a standard, we argue, is likely to depend largely on legal considerations, because it is basically a legal matter. Nevertheless, these considerations should be informed by psychiatric and other relevant scientific findings.

2. Sweden—50 years without an insanity defence

In Sweden today, criminal defendants cannot plead or be judged not guilty on the grounds of legal insanity. Those found guilty of serious crimes while suffering from a serious mental disorder can instead be sentenced to involuntary psychiatric treatment, which is a legal sanction among others. Whether an offender is sentenced to psychiatric treatment depends on the type and severity of the mental disorder, its relation to the crime and the need for treatment.

The requirement for intent (*mens rea*) is the same for all defendants in Sweden. The assessment of intent in cases where the defendant suffered from e.g., psychotic delusions can entail some difficulties, but the Swedish Supreme Court has emphasised that the assessment of intent is as important here as in other cases and should be performed as rigorously.[5] If the defendant fulfils the requirements for mens rea (which partly constitutes a requirement for *sufficient awareness*) he or she will be convicted, regardless of whether the defendant is severely mentally disordered. A differentiation is then made at the choice of sanction, where the Criminal Code prohibits the courts from sentencing an offender to prison if the crime was committed under the influence of a *severe mental disorder*. The available sanction in that case is involuntary psychiatric care.

In order for the prison prohibition to be applicable it must first be shown that the act was committed *under the influence of a severe mental disorder* and in order for forensic psychiatric care to become an available sanction, it is also required that the severe mental disorder *persists* during the examination and that the examined person is considered to be in *medical need of psychiatric inpatient care* at the time of the trial.

The concept of *severe mental disorder* plays a crucial role here and it should be noted that it is a legal and not a medical concept. In the preliminary work for the current law, it is stated that a severe mental disorder should primarily entail states of "psychotic character, e.g., states of disturbed reality evaluation with symptoms such as delusions, hallucinations and confusion. Furthermore, a mental disability caused by organic brain damage (dementia) with disturbed reality evaluation and impaired ability of orientation in the world may also count as a severe mental disorder" (Prop. (Government Legislative Bill) 1990, p. 86, translation; the authors). The assessment whether a mental disorder is severe or not is based both on degree as well as kind of the (medical) mental disorder. Schizophrenia is e.g., considered severe by kind, but not always by degree. Depressions, on the other hand, are not severe by kind, but can be severe by degree.

2.1. A proposal for a new law

Before 1965, the Swedish law allowed acquittals due to legal insanity or unaccountability. A defendant who has committed an act "under the influence of insanity, mental deficiency or some other mental abnormality of such a profound nature, that it must be considered on par with insanity" was not considered accountable (tillräknelig) and could not be held criminally responsible for the act.[6] The political decision of changing the law was preceded by a 50 year (at least) long scientific and political debate where the basic arguments can be found in the old school of positive criminology (Ferri, 1895; Lombroso, 1911). According to this view, a crime is always an effect of something abnormal, either in the individual or in society. Human actions are the result of sufficient causes, genetic, neurophysiological, psychological, and social and there are no grounds for differentiating between those who acted freely and those who committed their crimes unwillingly and unknowingly (see also Juth & Lorentzon, 2010). The function of the criminal system should therefore only be to protect society and rehabilitate the individuals that have committed criminal actions. However, after the change in 1965, numerous voices have argued that Sweden should re-introduce the concept of accountability and start allowing acquittals due to legal insanity. Four governmental reports have suggested such a change, the most recent was issued in 2012, but Sweden has yet not come to change the law. The fact that Swedish law does not include an insanity defence has in legal doctrine been described as "highly questionable from a principle point of view" (Asp, Ulväng, & Jareborg, 2013 p. 65). It is further argued that this "flaw" is merely to a very limited extent compensated by the considerations made concerning the sanctions and that a change of the law is expected within a near future.

The 2002 Swedish governmental report *Mental disorder, crime and responsibility* (SOU (Swedish Government Official Reports), 2002:3) was the first report to not only suggest a re-introduction of the concept of accountability, but also to develop a Swedish model for a revision of the attribution of criminal responsibility. In this model (which basically remains the same in the most recent proposal from 2012) the courts will, if they find that an unlawful act (representing the actus reus) has been committed, evaluate whether the defendant was accountable according to the standard presented below. If not, the defendant will be acquitted. If the defendant is considered to be dangerous, he or she can be subjected to societal protective measures, including incarceration. The suggested legislation was circulated for formal consultation to a number of government agencies, universities, interest groups, and associations and 98 consultation responses were received. The majority of the responses were positive to re-introducing legal insanity in Sweden, but some concerns about the proposal were also raised.[7] The responses give some insight into the political and scientific issues debated in Sweden since the concept of accountability was abolished in 1965. For example; The Faculty of Law at Stockholm University points out—in favour of a reform—that a penal system should not only function as a health care facility, it also conveys values of guilt and blame. The forensic psychiatric division in South Sweden brings up the problematic dealing with criminal intent in the current system. Since legal insanity is not an option, even severely mentally disordered criminal defendants in the Swedish system

[4] *The American series of foreign penal codes: The Dutch Penal Code*. Littleton, Colo.: F.B. Rothman, 1997. See for an alternative translation: Tak (2008).

[5] NJA 2012 p. 45.

[6] Strafflagen 1946 chap 5 § 5.

[7] A summary of the consultations commentators to the governmental report *Mental disorder, crime and responsibility* (SOU, 2002:3) can be found in The Swedish Justice Department, Document Ju2002/481/L5.