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Philosophical Motives For the Swedish Criminal Code of 1965

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Abstract

This article discusses the Swedish legal regulations from about 1700 to 1965 on how to deal with mentally disordered criminals. The emphasis is on the Criminal Code of 1965 and what preceded it from about 1900 and onwards. The code is generally considered to be exceptional, due not least to its principle that even mentally disordered persons who commit criminal deeds shall be subject to legal sanctions imposed by courts of law. A keyword of the ideology allegedly permeating the entire code is “treatment”. The code is the result of influences exerted by some of the members of the Swedish political and psychiatric leading circles during the first half of the twentieth century. On the political side the foremost promoter was Karl Schlyter, among other things minister for justice 1932-1936; after that he was chairman of one of the commissions preparing for the Criminal Code of 1965. On the psychiatric side the main figure was Olof Kinberg; the first in Sweden to hold a professorship in forensic psychiatry.

One conclusion drawn here is that the often made claim, that individual prevention takes precedence over general prevention in the new Criminal Code, is inaccurate. From the actual regulations made as well as from the preparatory works, it is evident that it is in fact the other way round. This suggests that the view actually expressed in the regulations is not that of a pure treatment ideology.

1. Introduction

On January 1st 1965, the Swedish Criminal Code¹ became law. With its leading principle that all criminals shall be subjected to correctional treatment, it is considered to be without parallel among the national codes.² Even persons sentenced to imprisonment are depicted as being subjected to treatment instead of punishment. Also severely mentally disordered persons who commit crimes are sentenced by courts of law. The sanctions that can be imposed on them are restricted though; the most significant has been that imprisonment is ruled out.³ With the

¹ The English equivalent of the Swedish denomination is “Criminal Code” — not “Penal Code”.

² The territorial codes of Greenland, Idaho, Montana and Utah are somewhat similar to the Swedish code.

³ From 1st July 2008 the prohibition against imprisonment of severely mentally disordered criminals is changed to a presumption for a sanction other than imprisonment.

exception of children, in principle everyone is punishable. To be consequent, “punishable” should, of course, be deciphered as having the meaning of “treatable”.

Some of the alleged motives for the new code will be dealt with here. Fragments of the Swedish legal history will be accounted for as well as aspects of the preparatory works made for the code. The parts of the preceding code of 1864 that are focused on here, i.e. its regulations regarding the insane and the mentally deficient, were very much criticized from about 1900 and onwards. The overall claim of one influential group of adversaries — consisting of psychiatrists and jurists as well as politicians — was that its theoretical foundation was nothing more than superstitious conceptions; such as *free will*, *moral guilt*, *retribution*, etc.

In the end, the wording of a law that has actually passed must be the main source as regards the motives of the legislator. The wording of the proposed bill is likewise the primary source as to what were the motives of the government at the time. Hopefully, the following will reveal that the code of 1965 gives expression to several rather different principles, some of which belong to opposite traditions of legal philosophy.

2. How the Penal Code of 1864 came to be

In 1866, Sweden obtained a new constitution.⁴ At about the same time its penal code was also changed. The preceding code was from 1734. To us, the content of the latter appears unreasonably cruel. Capital punishment was prescribed for what are nowadays considered to be minor offences. Imprisonment and even torture were legally approved as means to bring about confessions.⁵ There may have been a conviction, or at least a strong expectation, that the threat of being punished according to the letter of the law would deter from criminal acts. Support for this can be found in the writings of David Nehrman Ehrenstråhle (1756),⁶ according to whom the purpose of punishment is purely practical. As regards the punished, after he has served the sentence either he cannot or dare not harm others or break the law in any other way, and as regards the rest of society, the executed punishment is a warning. It is difficult to say, though, whether this was the view of the majority or just that of Nehrman Ehrenstråhle.

The legal status of the insane was touched upon in one single proposition. If an insane person killed someone, his custodian should pay damages. According to one interpretation, this meant that the insane were exempted from punishment (cf. Sondén, 1930, p. 41).

⁴ Until then the members of parliament represented the four estates: the nobility, the clergy, the burgers, and the peasants. Democracy, comprising more or less universal suffrage, etc., was not achieved until 1921. Parliamentarism was a fact a decade earlier.

⁵ Although torture was explicitly prohibited, there was one exception: careful use of more severe imprisonment to bring about confessions in cases of heinous crimes. This rule was frequently applied during the middle of the 18th century. Although not formally abolished until 1868, it came to an end in 1772, when King Gustaf III had all instruments for torture destroyed.

⁶ David Nehrman Ehrenstråhle (1695-1769), professor of Swedish and Roman law at the University of Lund from 1721, has written excellent commentaries on the Swedish legal system of his time.

According to another, it is more likely that damages and punishment were treated as separate matters, and that also the insane could be subjected to a punishment (cf. Munktell, 1943, p. 118). Nehrman Ehrenstråhle informs us that since they do not know what they are doing, the harm caused by insane persons should not be ascribed to them. To inflict a penalty on an insane person would not serve the purpose of punishment. Judging from this, the first interpretation seems to be the correct one.⁷

It was not legally regulated how to prove insanity. As time went on, the district mental officers came to be consulted in difficult cases (cf. Sondén, 1930, pp. 48 ff.). It should be pointed out here that capital punishment did not play an important role in the earlier Swedish laws, i.e. in the law-rolls of the Swedish Provinces, the most important sanctions of which were various forms of fines. The fines varied depending on whether the culprit was sane or insane. With capital punishment becoming more prevalent during the seventeenth century the relevance of the mental state of the accused increased. The demand for medical reports increased as well (cf. Sondén, 1930, pp. 48-9).⁸

In 1809, constitutional monarchy replaced royal absolutism.⁹ During the session of the Riksdag 1809-1810, a reformation of the legal system was requested. A penal law commission was set up. Its instruction was that the penalties should be adjusted to reflect enlightenment, humanity, and the aim to improve the criminal. Disagreement immediately arose on how this instruction should be interpreted. Some members of the commission claimed that their mandate was confined to redrafting and codifying what was already existing law. Other members claimed that it was to prepare a new code influenced by modern ideas from abroad. The view of the latter group won (cf. Sondén, 1930, p. 72). However, it took about fifty years until the new code gained legal force in 1864.

The reform work affected also the legal status of the insane. A new view, known as that of the classic school on penal law, had grown strong among leading jurists: a person is punishable only if he breaks the law knowingly and willingly. A version of this view was advocated by a Swedish legal philosopher Nils Fredrik Biberg (1776-1827). He had the ear of a whole generation of Swedish jurists who followed his lectures on criminal law during the first two decades of the nineteenth century.¹⁰ According to Biberg, temporarily mental derangement may exempt from punishment. It must not be self-inflicted though — for instance by intoxication (Biberg, 1830, pp. 94 f.). Incidentally, a royal ordinance in 1841 stipulated that being under the influence of alcohol should not excuse any crime. Of old there was the rule that the insane should be exempted from punishment. The result of this combined

⁷ Reports of court proceedings from the 18th century show that also insane persons were punished (cf. Qvarsell, 1993, p. 84). In itself, this does not exclude that insane persons were in principle exempted from punishment.

⁸ Cf. Sondén 1931, p. 59. When a substantial part of the Mosaic Law was incorporated into the Swedish law in 1608, it meant a brutalisation of it without precedent. To some extent, the code of 1734 reduced the effects of that unfortunate legislation. The last remnants of it disappeared in 1864.

⁹ Sweden had been a royal absolutism from 1772. The constitution of 1809 was in force until 1975.

¹⁰ His lectures are published in Biberg 1830. Cf. Qvarsell, 1993, p. 85.

with the view of the classic school was that the insane must lack either reason or free will. The same applied to children.

Parallel to this the medical sciences were advancing. A sign of that is the foundation of Karolinska Institutet in 1810. An organised mental health service began to take shape as well. From 1823, lunatic asylums were set up in various places of the country. While the psychiatrists were interested in treating mental illness, the jurists speculated on unaccountability.¹¹ A point of contact between the two professions was the supposed insight that certain types of mental states were or could be causally related to crime.

In 1826, the influence of the medical profession in legal matters formally increased. A regulation stipulated that an examination, establishing whether the accused had been insane or not when committing the crime, should be instituted when insanity was suspected to have been present. The report of the examining physician should in its turn be examined by the second highest medical authority of the country (“Sundhetskollegiet”). The court was not obliged to follow the opinion of the medical expertise. However, if it declared the criminal insane, it could not impose any punishment on him. Nor could it impose treatment. Instead, the criminal was to be handed over to the proper authority, which in the end often meant that his municipality made the actual decision. Since very few municipalities had any treatment to offer, one can presume that he was set free (cf. Sondén, 1930, pp. 51, 62 ff.).

3. The Penal Code of 1864

The code of 1864 reflected some of the changes that had occurred in the legal mind since the enactment of the preceding code. Psychiatrists had discussed the possibility of mental disorders affecting the volitional and emotional life without affecting the intellect. The actual wording of the law did not reflect this. It was limited to an “intellectualistic” view centring on the ability to understand the content of the law and the consequences of one’s action. This may have become the entrenched doctrine among Swedish jurists a long time before 1864. The formulations used regarding mentally deranged criminals were presented as early as during the 1840’s (cf. Sondén, 1930, p. 84). Despite the intellectualistic wording of the law, its legal usage soon became more in line with the broader psychiatric view.

Of particular interest here are two paragraphs of the fifth chapter of the code. Its fifth paragraph¹² stipulates that (complete) deprivation of the use of the intellect is a reason for exemption from punishment.¹³

¹¹ Although the English word “unaccountability” is not a perfect equivalent of the Swedish “otillräknelighet”, it seems to be the best one available.

¹² The expression “five-five”, which is still heard among aged Swedish persons, originates from this paragraph.

¹³ It is hazardous to translate the wordings of laws. Even more so if it was archaic already when the law was enacted; in this case 150 years ago. Nevertheless, my translation here — as well as those to follow — gives a hint of the content.

§ 5.

A deed, committed by someone who is insane, or deprived of the use of his intellect, owing to disease or weakness due to old age, shall be exempted from punishment.

Has someone, through no fault of his own, got into such a state of mental aberration that he was beside himself; the deed, which he commits in this unconscious state, shall be exempted from punishment.¹⁴

The term “unconscious” caused much criticism. It is an echo of the German “unbewusst”. German jurists of the time thought of mental derangement as cancelling *das Bewusstsein* — in the sense of the awareness that the action is an offence (cf. Sondén, 1930, pp. 75-6).

Something should be said regarding the term “accountable”. Its Swedish counterpart and its cognates have for a long time been used somewhat peculiarly. Apparently under the influence of German jurists from about 1800 and onwards, it supposedly signified a property¹⁵ that a person either has or has not and which is a prerequisite for rightfully subjecting someone to punishment. Evidently, having reason is intimately related to being accountable. The same holds for being volitionally free¹⁶ but, as mentioned above, being volitionally free did not make any explicit imprint in the actual wording of the code.

The need for a mitigation rule had repeatedly made itself evident. When the culprit was found legally sane but nonetheless medically insane, the royal prerogative of reprieve was the only possible means to reduce the legal outcome (cf. Sondén, 1930, pp. 58-64). The sixth paragraph (see below) was intended to meet this need. Despite that, the only commentary made in the preparatory work on how it should be interpreted is found in the context of a discussion of deaf mutes. What holds for deaf mutes should hold also for persons who are deprived of the full use of their intellect by other causes. Deaf mutes were explicitly referred to in an earlier draft of the law, but not in what became the actual law (cf. Sondén, 1930, p. 85).

The sixth paragraph stipulates reduction of punishment on the grounds of some deprivation of the full use of the intellect. From the preparatory works, it is evident that the ideas of reduced accountability and mitigation were connected. Supposedly, there is a continuum between being fully accountable and not being accountable at all. This was supported by the view that there is no sharp line of demarcation between insanity and normality (Sondén, 1930, p. 81).

§ 6.

If someone is put on trial who has committed a criminal deed, and who from physical or mental disease, weakness due to old age or some other confusion induced through no fault of

¹⁴ This is from the 1890 version, when two paragraphs were merged into one.

¹⁵ It could alternatively be described as a state, which a person either is in or not.

¹⁶ Although it is not completely in line with how the jurists of the 19th century saw things, it could be said that having reason and being volitionally free are accountability characteristics.

his own was deprived the full use of his intellect, although he cannot be exempted from punishment according to § 5; then may, [...] according to the facts of the case, the punishment be reduced below what should usually have been the case for such a deed.¹⁷

The key phrase here is “deprived the full use of his intellect”. The parallel phrase in the fifth paragraph is “deprived the use of his intellect”. The difference between a person exempted from punishment and a person who may be subject to a reduced punishment is summed up in the word “full”. Due to the subtlety of this distinction, the two paragraphs were constantly mixed up in the public debate. And even so by the jurists.¹⁸

4. Psychopaths

The sixth paragraph was assumed to be applicable to so-called psychopaths. They were *per definitionem* psychologically abnormal. Therefore most, if not all, of them had diminished accountability. The irony of the situation was that some of the most dangerous criminals were thereby given reduced punishments. Quite a number of psychiatrists protested against what they considered to be a dangerous travesty of justice. A law introducing preventive detention of psychopaths was enacted in 1927.¹⁹ Whether a detainee should remain detained or be released was decided by an internment board. A parallel law applied to not mentally deranged recidivists. In 1946, the two laws were merged. Its conditions for detention were less strict. The number of detainees increased considerably.²⁰

5. Changes in the repertory of sanctions

As a rule, novelties in the repertory of sanctions were introduced through partial reforms and incorporated as regulations beside the code. In 1864, the available measures were fines, imprisonment, and imprisonment with hard labour. There were also sanctions like damages and forfeiture.

The year 1902 marks an important change. The principle that a punishment shall follow on a crime was then deviated from: juvenile criminals (15-17 years of age) could from now on be kept in a reformatory. In 1935, the idea of compulsory education was applied to older

¹⁷ The translation is of the wording from 1921, when capital punishment (in time of peace) was abolished.

¹⁸ There is reason to believe that few of the legislators had a clear view of the content of the sixth paragraph. A commentary, written in 1866 by a judge who was also a member of the parliamentary committee preparing the proposed bill, ended up in a recommendation to consult the medical expertise concerning its interpretation (cf. Sondén 1931, p. 86).

¹⁹ The law was preceded by a much debated murder of a psychiatrist (cf. Qvarsell, 1993, pp. 215-7).

²⁰ A part of the law of 1946 was called “Lex Nordlund”: a person serving imprisonment with hard labour or imprisonment for a sexual offence could be sentenced to preventive detention if considered dangerous to others. This marks that the interest of society was considered to be stronger than that of certain categories of criminals. The nickname was after a mass murderer, Filip Nordlund, whose memory haunted the Swedish debate for several decades (cf. Qvarsell, 1993, p. 328).

juvenile criminals (18-21 years of age).²¹ This sanction was time indeterminate. Karl Schlyter,²² the minister for justice at the time, regarded this as a historical divide. He saw it as a deliberate emancipation from the aim of general prevention, which, according to his view, demanded punishment according to desert (cf. Sundell, 1998, p. 253). However, the idea of general prevention does not in itself involve that of proportionality. Schlyter's thought may have been that since the view of the general public is retributive, sentences must appear proportionate to the offences in order to have a general preventive effect.

The following years form a sad chapter in Swedish history. From 1935, insane and mentally deficient persons could be sterilized, either by consent or, if the highest medical authority of the country ("Medicinalstyrelsen") so decided, without consent.²³ The law of 1935 was complementary to one from 1915, which deprived insane and deficient persons the right to marriage. From 1941, also persons with an asocial way of living could be sterilized. The total number of sterilizations amounted to approximately 62 000. The law was in force until 1975 (cf. Qvarsell, 1993, pp. 310 ff.).

Olof Kinberg²⁴ was an ardent advocate of sterilization. As the self-appointed voice of science and reason, he was updated on the latest findings of eugenics. So was the professor of racial biology, Herman Lundborg.²⁵

²¹ Other reforms: in 1906, probational sentence as well as conditional release from longer terms of imprisonment; in 1943, a new version of the latter law. According to the laws of 1927, on preventive detention, also persons sentenced to detention could be conditionally released. Further: in 1931, fine proportional to one's daily income; in 1945, solitary confinement abolished, the law in question declared that internees were to be treated with firmness and respect for their human dignity, the purpose of the penalty should be to promote rehabilitation; in 1947, compulsory education replaced by corrective training under the management of child welfare; in 1945, revision of the fifth and sixth paragraphs of the fifth chapter of the Penal Code — the new formulations aimed at a reduction of the number of criminals exempted from punishment.

²² Karl Schlyter (1879-1959) was a member of parliament (the first chamber) 1919-1920 and 1926-1948; minister without portfolio in the social-democratic cabinets 1921-1923 and 1925-1926; minister for justice 1932-1936; chairman of the Standing Committee on Law-Procedure 1937-1947 as well as chairman of the Penal Code Commission 1938-1956 — the work of the latter resulted in the Criminal Code of 1965; member of the Procedural Code Commission 1912-1927 — its work resulted in the new Code of Procedure 1948. He was also president of the court of appeal for Skåne and Blekinge 1929-1946.

²³ Another stated reason was the eugenic one. In 1922, Alfred Petré — inter alia, social democratic Member of Parliament, 1909-1924 chief inspector of the Swedish mental health services, from 1924 honorary professor and 1929-1932 professor of psychiatry — submitted a motion on the subject. Gently insane as well as mentally retarded persons should be sterilized when leaving institutions. The stated reason was their alleged incapability of bringing up children. In 1933, Petré submitted a new motion, which led to the law of 1935. What seems to be the first Swedish eugenic law, prohibiting persons with epilepsy to marry, was enacted in 1686 (cf. Lindquist, 1991, p. 32).

²⁴ Olof Kinberg (1873-1960) became doctor of medicine in 1908; served as chief physician of various mental hospitals; from 1922 professor in forensic psychiatry; 1932-1939 head of the forensic psychiatric clinic at Långholmen central prison in Stockholm; from 1920 and onwards expert member of several governmental committees.

²⁵ Herman Lundborg (1868-1943) started out as a psychiatrist and neurologist. He was professor of racial biology 1921-1935. Lundborg's successor on the professorial chair, Gunnar Dahlberg (1893-1956), questioned *race* as a biological concept. As regards sterilization of various "deficient" human beings, however, Lundborg and Dahlberg did not disagree appreciably.

6. More about the accountability rules of the code of 1864

From about 1900, the accountability rules²⁶ were at the centre of dispute. In Kinberg (1914) the very notion of accountability is fiercely attacked. In the summary of the book it is stated:

1) The term accountability [...] contains, according to its use from time immemorial, quite a few conceptions of theological-metaphysical nature (such as »freedom of will», »guilt», »retribution»). An analysis of its conceptual content evinces that it presupposes an autonomous mental state, the absence of which [...] would exclude the use of the social reactive measures against criminality, called punishments.

From a deterministic point of view, the existence of such a mental state must be questioned. If the existence of such a state is accepted, in accordance with indeterminism, it will, in a concrete case, not let itself be established. Thus, to recognise the mental state of accountability is impossible.

The content of the term accountability, fixed by its use, will not let itself be removed by means of new definitions. Instead, it will supply rich opportunities for maintaining dangerous conceptual confusions.

Therefore the term accountability is useless, both for theoretical and for practical purposes.

2) Owing to its theological-metaphysical content, the term accountability supports the dangerous mistake that there are certain exceptional mental states (mental diseases, toxic states, psychic abnormalities and defects), which exclude social responsibility. That is not the case though. All human beings, living in societies, healthy as well as sick, normal as well as abnormal, are equally responsible for their actions, to the extent that these actions affect the social interest. Exceptional mental states are of importance, with regard to social responsibility, only to the extent they ought to be taken into consideration when selecting the most effective protective action.

3) For these reasons, the term accountability, together with those derived from it, ought to be discarded from criminological use (Kinberg, 1914, pp. 103-4).

This criticism combined theoretical and practical aspects. Kinberg referred to the French psychiatrist Eugène Dally, according to whom the healthy as well as the insane individual is completely responsible for all his actions. This for the higher interest: the welfare of the society (cf. Dally, 1863, p. 263). Kinberg claimed that a better justification for the legal reaction was unthinkable (cf. Kinberg, 1930, p. 68). This is obviously a normative thesis. He was here siding with the opinion of many a utilitarian; i.e., that this was what rationality demanded.

Also Schlyter considered accountability to be a useless notion. During his time as minister of justice (1932-1936), he set up a committee²⁷ with instructions to work out a proposal for

²⁶ The Swedish counterpart of "accountability" did not occur frequently in the actual wordings of Swedish laws. One exception was the law from 1927 concerning preventive detention of psychopaths.

²⁷ Kinberg was a member of it.

new wordings of the fifth and sixth paragraphs of the fifth chapter of the penal code. The committee presented a proposal in 1936 according to which a person who at the undertaking of a deed was insane, or suffered from a mental disorder that was on a par with insanity, should be exempted from punishment. The intention was to steer clear of the problems of the wording “deprived the use of his intellect”. If it had become law, the courts would have become even more dependent on the psychiatrists.

The matter was submitted to another committee: the Penal Code Commission²⁸ (Strafflagberedningen). It worked on the sanctions, while another commission worked on the catalogue of offences. Together, they had the task of making a complete overhaul of the entire penal code. In 1942,²⁹ the Penal Code Commission presented a proposal for new formulations of the accountability rules. However, what became law in 1946 was not in accordance with its proposal.³⁰ What became the new fifth paragraph stated:

§ 5.

No one shall be held responsible for a deed, which he commits under the influence of insanity, mental deficiency or other mental abnormality of such a profound nature, that it must be considered to be on a par with insanity.

The word “unconscious” in the old paragraph five is removed. The phrase “other mental abnormality of such a profound nature that it must be considered to be on a par with insanity”, which is added, was intended to decrease the number of psychopaths exempted from punishment. And it did indeed decrease the number.

The old sixth paragraph was meant to be replaced by an enumeration of the states of mind exempting from punishment. This was not accepted, however. Instead, the following became law.

§ 6.

If someone commits a criminal deed under the influence of some mental abnormality other than those referred to in § 5, the punishment should, when special reasons give cause for it, be reduced below the lowest punishment prescribed for the deed.

The same law shall hold with reference to a criminal deed committed by someone whose mental state has been disturbed through no fault of his own, although he is not exempted from punishment according to § 5.

²⁸ Schlyter was its chairman. Kinberg was among its member.

²⁹ By then Kinberg had been given the sack by Karl Gustaf Westman, the minister of justice at the time. The remaining psychiatric expert member was Torsten Sondén, whose views differed in many ways from those of Kinberg.

³⁰ Its proposal was simply that no one should be held responsible for a deed committed under the influence of a mental disease or mental deficiency.

Here was an explicit demand for a causal connection between the abnormal mental state and the deed. Arguably there had previously been no (legislated) demand for that. The interpretation had been that what primarily mattered was whether insanity had existed at the time of the crime. From the temporal connection, a causal connection was presumed. That presumption rule had had exceptions. A person could be held accountable for one crime and not accountable for another committed at more or less the same time.³¹ According to the commission, a causal connection should always be required.³² By stipulating a presumption that there always is such a connection when the accused is insane or seriously mentally deficient at the time of the crime the commission took the sting out of its own reasoning. However, in line with its earlier reasoning, it opposed what was Danish law at the time: if insanity first manifests itself between the crime and the trial, insanity is presumed to have existed at the time of the crime. According to the commission, such cases should instead be dealt with in the same way as when insanity is developed by an inmate; i.e. he is transferred to a mental hospital. Pardon is also mentioned as a serious alternative (cf. Swedish Government Official Reports, 1942, pp. 59, 82 ff.).

Kinberg had approved of another proposed wording of the fifth paragraph worked out by the Ministry of Justice:

§ 5.

A deed, which is committed by someone who is insane or mentally deficient or otherwise differs with regard to his character from what is normal so that he therefore should be taken care of for special care, shall be exempted from punishment. Nor shall punishment be imposed for a deed that someone commits during a temporary mental derangement.

What Kinberg appreciated here was both the lack of any explicit demand for a causal connection between state of mind and deed³³ and the lack of any reference to accountability. Since a key phrase of what actually became law was “under the influence of”, it represented no progress, according to Kinberg’s standards. Particularly irritating was the remark made by Lagrådet (the permanent committee of high judges of the two Supreme Courts), that it was improper to conclude from the need of psychiatric treatment that the defendant was or was not accountable. Kinberg interpreted that as implying that the need for treatment should depend on accountability. He saw accountability as a nonentity.³⁴ Two opposite views clashed here.

³¹ In an actual case, although a crime caused by a morbid sexual drive was exempted from punishment, another crime committed at approximately the same time incurred the person a punishment (cf. Swedish Government Official Reports, 1942:59, p. 83).

³² Cf. Swedish Government Official Reports 1956:55, p. 270. This harmonizes with a civil law from 1924, which is still part of the Swedish law of contract, stipulating that mental abnormality can quash a contract if it contributed to its content.

³³ I would say that he exaggerated the innovative aspect of the proposed wording. The demand for a temporal connection would have continued to suggest a demand for causal connection as well.

³⁴ Cf. Kinberg, 1945, p. 17. Kinberg compared jurisprudential orthodoxy to theological orthodoxy. Both have their holy scriptures: the statute book and the Bible respectively. Whereas the theological dogmas have cracked,

According to that of the high judges, accountability was the sole law issue, and the confirmation of it was supposed to be independent of the confirmation of the need for (psychiatric or other) treatment. Regarding psychopaths, the high judges interpreted the governmental bill as implying that the need for treatment should determine whether they were accountable or not.³⁵ This they found inappropriate since it meant that insane or mentally deficient persons should be treated differently from psychopaths despite the fact that they all essentially belong to the same group.³⁶

One of the stated reasons for the proposal was that it would involve a reduction of the range of unaccountability. According to the presumed interpretation of the fifth paragraph, psychopaths should not be included in the group of persons exempted from punishment by it. As reported earlier, the commission proposed that the sixth paragraph should be replaced by an enumeration of states of mind exempting from punishment, and the psychopaths would not be included on that list either. The stated reason for all this was that it would strengthen the general preventive effect of the penal system. According to the commission, the legal practice regarding the psychopaths had made the public bewildered. The cause was the combination of looking on them as holding an exceptional position regarding the regulations of the penal law and at the same time adjudging them normal capacity regarding every other regulation of the legal system. To this was added that the public conceived the application of the two paragraphs as arbitrary. Summing up, practice undermined the general preventive effect of the whole penal system (cf. Swedish Government Official Reports, 1942:59, p. 73). Therefore, the commission proposed that psychopaths should be dealt with by means of new legislation. What it primarily had in mind was the possibility of imposing detention *sine die* combined with individualized treatment. This could be done without disregarding any individually preventive considerations (cf. Swedish Government Official Reports, 1942:59, p. 76).

7. The final report of the Penal Code Commission

“Protective Law” (“Skyddslag”) was the name of the final report of the Penal Code Commission, submitted in 1956.³⁷ It was intended to signal a new approach.³⁸ Its chairman,

due to the confrontation with science, those of jurisprudence are intact. Jurisprudence has its own trinity: freedom of will, moral responsibility and accountability. These are supposed to be prerequisites of being punishable. There is also its subordinate dogma that general prevention should be given a dominant significance. These articles of faith prevent useful legal reforms (cf. Kinberg, 1945. p. 19). However, the idea of general prevention does not belong to the same family as the other three. Anyhow, in Kinberg (1953) it is claimed that general prevention does not exist.

³⁵ It is the phrase “or otherwise differ with regard to his character from what is normal so that he therefore should be taken care of for special care” which is interpreted accordingly. As regards the two other categories of criminals — the insane and the mentally deficient — the high judges saw them as automatically unaccountable, according to the proposal. The role of Lagrådet is to examine how new legislation tallies with what already is valid law. It may have considered the proposed regulation regarding psychopaths incompatible with valid law — in a non-trivial way. This could of course be questioned (cf. Belfrage, 1989, pp. 26-7).

³⁶ Cf. *Första lagutskottets utlåtande*, p. 19.

³⁷ The final report of the parallel committee was submitted in 1953, as Swedish Government Official Reports, 1953:17.

Schlyter, had worked his will to have it used. He, in fact, wanted to completely discard the term “punishment”, which he considered to be obsolete and misleading. He preferred “protective measure” and its cognates. This terminology gave rise to much debate (cf. Sundell, 1998, p. 146).

The final report contained a complete proposal for a new wording of the entire criminal code. A court of law could choose between various sanctions — ordered from the less to the most severe:³⁹ waiver of prosecution,⁴⁰ conditional sentence, probation, fine, protective education (juveniles, 18-20 years of age), imprisonment, and internment. Of these, protective education and internment were time indeterminate. Various types of time indeterminate care could also be imposed (cf. Swedish Government Official Reports, 1956:55, pp. 58-9). However, imprisonment and fines were still the normal penalties. The obvious objection was that “protective measure” was a misleading label for these penalties (cf. Waaben, 1957, p. 153).

The following paragraphs deal with insane criminals, but are not what finally gained legal force.⁴¹

Chapter 10

Reduction and exclusion of certain sanctions, etc.

3 §.

Except as provided below, no sanction other than transfer for special care in conformity with Ch. 7 may be imposed for crime committed by a person under the influence of mental illness or feeble-mindedness.

Probation may be imposed if for particular reasons this sanction is deemed more appropriate than care in conformity with Ch. 7.

A fine may be imposed or a conditional sentence given, if this is found to answer the purpose of restraining the defendant from further criminality. Such fine may not be converted.

4 §.

If a person who has committed a crime under the influence of mental illness or feeble-mindedness is not in need of special care and it is found that neither probation nor a fine should be imposed nor a conditional sentence given, he shall be free from sanction.

³⁸ Schlyter knew and admired the French comparative jurist Marc Ancel (1902-1990), whose idea of *dé-juridification* of criminal politics influenced him. The term “societal protection” (“samhällsskydd”) may have been inspired by Ancel’s “défense social” (cf. Ancel, 1954, and Sundell, 1998, pp. 210, 238).

³⁹ Cf. Sundell, 1998, p. 146.

⁴⁰ This is of course not much of a sanction.

⁴¹ The English translations of the proposals, used here, are made by the Swedish-born criminologist Thorsten Sellin. They are found in an appendix of the final report of the Penal Code Commission. In Sellin’s translations there are no paragraph signs; instead, he uses “sec.” — short for “section”.

The same rule shall apply if a person without any fault of his own has temporarily been in such a state that he is bereft of his senses and, being in that state, has committed a crime (cf. Swedish Government Official Reports, 1956:55, p. 167).

The principal rule of paragraph three is expressed in its first part. It assumes that the crime was committed under the influence of a mental abnormality, and the defendant should normally be handed over to psychiatric care. The exceptions are enumerated in the second and third parts. The latter stipulates yet another prohibition; one against converting a fine to a more severe sanction. A relevant causal connection rules out imprisonment. Merely invoking the third paragraph did not completely exempt from sanction. Only the fourth paragraph could deliver that outcome. In that paragraph the principal rule is that the defendant should be free from sanction. Exceptions to this were: he might be in need of special care *or* probation, fine or conditional sentence might be a better alternative.

The two quoted paragraphs only regulated what sanctions may be imposed when the crime was committed under the influence of an abnormal mental state. What about the case where a relevant causal connection is lacking combined with a need of psychiatric treatment at the time of the trial? This was regulated in another chapter:

Chapter 7

Special care

3 §.

If a person who has committed a criminal act has been declared, in a report made in accord with the Mental Health Act, to be in need of care in a mental hospital, the court may order him turned over for care in accord with the Mental Health Act.

In the case of a person not mentally ill or feeble-minded, the order referred to in the first paragraph [i.e. the first part of this paragraph] may be made only after hearing the Medical Board.

4 §.

If a person who has committed a criminal act is in need of psychiatric care or attention and no order is made in accord with § 3, the court may order him turned over for open psychiatric care.

In the case of a person not mentally ill or feeble-minded, the order referred to in the first paragraph may be made only if recommended by a welfare physician or the Medical Board, unless psychiatric care has been recommended in a report made in accord with the Mental Health Act (Swedish Government Official Reports, 1956:55, p. 164).

These paragraphs might seem rather lenient. Assume that someone commits a heinous crime when in a completely normal state of mind. The day of the trial is approaching and the defendant has taken the opportunity to develop what appears to be a severe mental illness. In

accordance with the third paragraph, the court orders that he shall be turned over for care in accordance with the Mental Health Act. Now, what will happen if this person, when arriving to the mental hospital, all of a sudden recovers and is found to be as sound as a bell? The requirement of a causal connection was inserted in §§ 3-4 of Chapter 10 because one could not ignore the risk that hope of being exempted from imprisonment could give rise to mental illness (cf. Proposition 1962:10, C354). In our hypothetical case this precaution is sidestepped by §§ 3-4 of Chapter 7.

Note also “bereft of his senses” in the fourth paragraph of Chapter 10. Phrases like that used to refer to unaccountability. And here it is found in a proposal made by Schlyter, a sworn adversary of that very notion.

The importance that seems to have been attached to general prevention is not completely compatible with the alleged treatment ideology behind the proposals.⁴²

Within legislation the principal rule must be — so that the general law-abidingness is not jeopardised — that a social reaction shall be the consequence of a crime, even if it could not be shown in the specific case that there is a need to take measures to prevent the criminal from relapsing into criminality. The administration of the criminal law must for this reason [...] have at its disposal sanctions which to a considerable extent do not have any other purpose than to make an example to others than the criminal, to serve as sanction. As it seems such a sanction must like the present sanctions with regard to measure be determined above all by the offence against the law itself (Swedish Government Official Reports, 1956:55, p. 274).

This is a desertion of individual prevention as *the* guiding principle, if it ever was that. That a sanction must be proportional to the offence could even be interpreted as expressing a retributive principle.

In the partial report on the accountability rules it is evident that general prevention as a rule takes precedence over individual prevention.

The purpose must therefore be to see to it, within the scope of what is justifiable from the point of view of general prevention, that the demands of individual prevention are satisfied (Swedish Government Official Reports, 1942:59, p. 68).

As it turns out, full consideration with regard to individual prevention can only be entertained in exceptional cases, the latter being the ones where the criminal is insane or mentally deranged. This since general prevention is not affected in these cases (cf. Swedish

⁴² Terminology may have contributed to the confusion. In the final report, the principal rule is that a *social reaction* (samhällsreaktion) shall be the consequence of a crime. If “social reaction” does not mean punishment, this rule is rather non-committal. Furthermore, it is admitted that sanctions will often involve serious disadvantages from the point of view of individual prevention (cf. Swedish Government Official Reports, 1956:55, p. 33. This reveals that not just *any* reaction is assumed in the principal rule.

Government Official Reports, 1942:59, pp. 68 ff.). Even here, however, general prevention stipulates the framework within which the individual prevention is given play.

Allegedly, there is no difference in principle between the varying societal reactions imposed on criminals. The distinction still made between the sanctions labelled “punishments” and those labelled “protective measures” is characterised as purely legal-technical (Swedish Government Official Reports, 1956:55, p. 274). However, one should not allow oneself to be fooled by this terminological trick. A penalty does not become something else just by having its name changed.

8. The content of the Criminal Code of 1965

The code which gained legal force on January 1st 1965 has been changed several times since coming into being. None of these changes will be dealt with here; the discussion is restricted to the original version. One of its central paragraphs regarding mentally abnormal criminals was the following.

Chapter 33

On reduction and exclusion of sanction

2 §.

For a crime that someone has committed under the influence of mental disease, mental deficiency or other mental abnormality of such a profound nature, that it must be considered to be on a par with mental disease, no other sanction should be applied than being turned over to special care or, in cases specified in the second part [of this paragraph], fine or probation.

A fine should be imposed, if it is found suitable for preventing the defendant from committing further crimes. Probation should be imposed, in case such a sanction in view of the circumstances is found to be more suitable than special care; [...].⁴³

If a sanction mentioned here ought not to be imposed, the defendant shall be exempted from sanction.

The systematics of this paragraph might be that the principal rule assumes that the crime has been committed under the influence of a mental abnormality. As a rule, the defendant is to be handed over to special care. The modality is permission or recommendation. The court is not prohibited to ignore that the regulation is applicable. In the second part of the paragraph, some exceptions to the permission are specified. If either of them is found to be a better alternative than special care, a fine or probation should be imposed. Furthermore, if none of the enumerated sanctions should be imposed, the defendant shall be set free. This hypothesis of how the paragraph is to be interpreted assumes that the defendant is still in need of some kind of treatment at the time of the trial. If instead the opposite assumption is made, the principal rule is that the defendant shall be set free if he has committed the crime under the

⁴³ Left out here is a cross-reference to a paragraph of another chapter.

influence of a mental abnormality. Whether the paragraph is considered to be applicable or not in a certain case may very well depend on which one of these rules one chooses to view as being the principal one. Anyhow, this paragraph expressed the so-called “imprisonment prohibition” of the original version of the code of 1965.

Here are two other paragraphs of interest for the present study:

Chapter 31

On delivery to special care

3 §.

Has someone, who has committed a criminal deed, in a statement over a psychiatric examination been declared to be in need of care in a mental hospital, should the court, if it finds such a need to exist, prescribe that he shall be committed to care according to the law of psychiatric care. If the deed was *not* committed *under the influence of* mental disease, mental deficiency or other mental abnormality of such a profound nature, that it must be considered to be on a par with mental disease, such a prescription should be issued *only if there are special reasons* for it. [Italics added]

4 §.

Is someone, who has committed a criminal deed, in need of psychiatric care or supervision, and is prescription according to § 3 not issued, should the court, if a more far-reaching measure is not required for special reasons, prescribe that he shall be turned over to non-institutional psychiatric care.

In the this third paragraph a causal connection is, in principle, required for being exempted from imprisonment if one is in need of psychiatric care at the time of the trial. “In principle” is needed here because *special reasons* may exist. The court may then prescribe that the defendant shall be committed to psychiatric care. In the 1956 proposal of the Penal Law Commission special reasons had not been required. Furthermore, the insistence on a causal connection between mental abnormality and committed crime is not in line with a treatment ideology (cf. Belfrage, 1989, p. 37). Such an ideology entails that one should give considerations of the need for treatment priority over whether the crime is a consequence of insanity or not. Thus, the wording of the new law rather expresses an ideological kinship with the code of 1864.

Although the notion of accountability may very well have influenced the 1965 legislation, the idea of treatment as a sanction had gained ground as well. It has even been claimed that the need for psychiatric care at the time of the trial is the primary interest according to the ideology behind the criminal code. This claim is very difficult to corroborate, as should have been made clear by now. Maybe it is easier to show that the treatment interest is primary in the proposal made in 1956 by the Penal Law Commission. That the state of mind at the time of the crime is considered in the proposal is supposed to have nothing to do with accountability or moral responsibility. Allegedly, it is explained by practical motives (cf.

Belfrage, 1989, p. 35). But what does that mean? It might mean that the state of mind at the time of the crime should be taken into consideration if the need for psychiatric treatment is not conspicuous at the time of the trial (cf. Belfrage, 1989, p. 35). In other words, anyone who is insane or mentally deficient either at the time of the crime or at the time of the trial should be exempted from punishment. Thus, the difference between the situation during the era of the code of 1864 and that which would have existed if the proposal of the commission had become law is the following: In the former days the state of mind at the time of the crime was totally decisive; not so if the proposal of the commission had been accepted. This hypothesis is supported by what the commission asserted elsewhere when stating that it should be no imperative requirement for being turned over to psychiatric care that the psychological abnormality existed already at the time of the crime (Swedish Government Official Reports, 1956:55, p. 54). In the partial report, dealing with the accountability rules, from little more than ten years earlier, the reasoning followed another line. There, exemption from punishment required insanity or mental deficiency at the time of the crime. The commission rejected the presumption rule that the mental disease or mental deficiency should be presumed to have been present at the time of the crime if it was present at some time between that time and the time of the trial.⁴⁴ If this hypothesis is correct, the opinion of the commission changed between 1946 and 1956.⁴⁵

Finally, we would like to once more point out that general prevention is the most important principle of the new criminal code. It is stipulated that it shall guide all applications of its regulations. This is explicitly stated in the seventh paragraph of its first chapter:

When making a choice between sanctions the court shall, observing what is necessary for upholding general law-abidingness, take special care that the sanction is suitable for supporting the adaptation to society of the convicted.

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⁴⁴ As already mentioned, this presumption was adopted in the Danish penal code at the time.

⁴⁵ It is, of course, possible to maintain that the commission in the partial report strived to propose something which did not violate too many principles then in force. Circumstantial evidence is that Sondén is supposed to have written most of the partial report. His views on these issues were not the same as those of Kinberg, of whom Schlyter is supposed to have been an ally. As Sondén died in 1953, he did not take part in the final report, which was presented in 1956 (cf. Sundell, 1998, p. 203). Schlyter thought of Sondén as a psychiatrist among the jurists rather than as simply a psychiatrist (cf. Sundell, 1998, pp. 120-2).

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