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

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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.

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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.

are (most of the times) considered to have had acted with intent, which is a prerequisite for being sentenced to forensic psychiatric care. This means, it is further argued, that in Sweden, even the most severely disordered and confused persons are on a regular basis held criminally responsible for their acts despite the fact that they had no idea of what they were doing. The Swedish National Courts Administration, as well as many of the district courts and the courts of appeal stated that the proposed legislation is more in line with the basic legal principles underlying the Swedish system; humanity, justice, legal security, predictability and proportionality. On a more critical note: the Swedish association for forensic psychiatric collaboration expressed concerns that the legally insane in the new system will not be given the opportunity to take responsibility for their actions afterwards, which, in turn, may affect their psychiatric treatment negatively.[8]

2.2. A proposal for a Swedish standard of legal insanity

In the proposal from 2002 the following standard was put forward:

> "An unlawful act should not entail responsibility for someone who due to a severe mental disorder, temporary mental confusion, a severe mental retardation, or severe dementia, lacked the ability to appreciate the meaning of their actions, or the ability to adjust their actions according to such understanding." (SOU (Swedish Government Official Reports), 2002:3, p. 37, translation; the authors)

Many of the consultation commentators to the report conveyed a concern that the formulation of the proposed standard was too inclusive and would hence result in too large a number of people being acquitted due to legal insanity. One of the courts of appeal, as well as the Prosecutor General, argue that the estimation made by the committee, that approximately 50–70 persons each year would be acquitted due to legal insanity, is too low.[9] The majority of the commentators stress the importance of a precise and narrow standard that would only fit a very small group of the most severely mentally disordered offenders.

The Faculty of Law at Uppsala University commented that the meaning of "the ability to understand the meaning of the act" is not completely clear. However, they added that it was hard to find a different wording that would be significantly better. The need for precision was also stressed with regard to the so called "ground conditions" (severe mental disorder, temporary mental confusion, a severe mental retardation, or severe dementia). The National Board of Forensic Medicine, e.g., asked whether "temporary mental confusion" is intended to only include organic mental dysfunctions or if it also denotes psychotic reactions. Several commentators also requested more detailed definitions of the states *severe mental retardation* and *severe dementia*.

How the standard should be re-designed to accomplish these goals is less clear. The National Board of Forensic Medicine suggests that the proposed standard should be further worked on and refined by a group consisting primarily of medical experts (forensic psychiatrists), but also including psychological, social and legal experts. The National Board of Forensic Medicine and The Faculty of Law at Uppsala University, among others, suggest that the lack of understanding and control should explicitly be connected to the criminal act as such. This would hopefully evade the problem of introducing a view that some individuals are held unaccountable per se, which is stressed as a concern by some commentators. This criterion could also narrow the definition, excluding individuals where the connection between the unaccountable state and the criminal act were less evident. Other commentators also request a standard that clearly emphasises the causal relationship between the mental disorder, the lack of accountability and the criminal act.

In the committee that delivered the proposal from 2012, psychiatric experts participated as requested, but the new version of the standard is quite similar to that from 2002:

> "An unlawful act is not a crime if it is committed by someone who due to a severe mental disorder, temporary mental confusion, a severe mental retardation, or severe dementia, lacked the ability to appreciate the meaning of their actions *in the situation in which they found themselves*, or the ability to adjust their actions according to such understanding." (SOU (Swedish Government Official Reports), 2012:17, p. 51, emphasis added, translation; the authors).

In the report, it is pointed out that the prerequisites for an act being excused in these circumstances should be subdivided into two parts; the so called "ground conditions" and the "effects of these conditions" (p. 542). It is not sufficient that the defendant lacked the above described abilities, it is also required that the defendant suffers from a condition that forms the sufficient ground for the absence of these abilities and that the disability is due to the ground condition. The ground conditions are the same as in SOU (Swedish Government Official Reports), 2002:3: a) a severe mental disorder, b) temporary mental confusion, c) a severe mental retardation, or d) severe dementia. A severe mental disorder is, as described above, a legal concept denoting a mental state that severely diminishes the ability for reality testing. A severe mental disorder may be permanent or temporary. A temporary severe mental disorder is e.g., a short psychotic episode following alcohol intoxication. Temporary mental confusion in this context refers to conditions of confusion that are not defined as psychiatric, e.g., confusion due to low blood sugar level in diabetes.

Accountability (which denotes the effects) should according to the report target the defendants' "ability to, in a rational manner, understand the situation they find themselves in" (SOU (Swedish Government Official Reports), 2012:17, p. 542, translation; the authors). It is stated that it primarily should represent situations where the defendant had an impaired ability to assess reality due to delusions or hallucinations. This is also described in terms of the defendant "lacking the ability to relate his or her actions to its factual circumstances". This, the committee continues, also entails that the defendant has lacked the ability to distinguish between right and wrong, since he has appreciated the context of the act, in an "unreal manner".

A difference between this standard and the one from 2002 is that the accountability requirement clearly states that it should concern the understanding of the action in a *given situation*, i.e., the context of the criminal act. The intention behind changing the wording of the standard was, according to the committee, to make a clear distinction between the concept of *accountability* and the concept of *intent*. This would be accomplished by emphasising that the appreciation of the meaning of the act relates to the act in a wider context, and not to the specific requirements of the criminal act that is relevant for the assessment of intent. The assessment of intent should instead weigh in the understanding of the punishable act in itself and its consequences. For example, a person who delusionally thinks that he is serving in a war and kills an enemy, has the intent to kill a person and understands what the consequences of shooting at another person might be, but fails to recognise the real situation (that it is not a war). In this case, it seems right to assess that the person acted with intent, but was not accountable, it is argued. At the same time, it is clearly stated that the change of wording is not intended to alter the meaning of the standard, it is the same as the one suggested in 2002 (p. 543f).

The proposal from 2012 was also circulated for formal consultation and the overall response was quite similar to that of the proposal from 2002. The vast majority of commentators once again endorsed a reintroduction of the concept of accountability, but many of them point to problems of both practical and principal nature that such a change of law would entail. The Faculty of Law at Lund University states that the standard constitutes a "negative definition" of accountability, which

[8] Ibid.

[9] In the proposal from 2012 SOU (Swedish Government Official Reports), 2012:17 the number of acquittals due to legal insanity is estimated to between 75 and 100. In today's system app 300 defendants per year are sentenced to compulsory psychiatric care.

leaves the central concepts involved unexplained. This means, among other things, it is argued, that the courts will become heavily dependent on psychiatric expertise, which is unfortunate considering "the fragmentation that characterizes forensic psychiatric and psychological research".[10] The Swedish Bar Association boldly suggests that any of the ground conditions alone should be enough to constitute legal insanity, a suggestion that seems much in line with the Norvegian standard of legal insanity, where it is sufficient that the defendant was psychotic at the time of the criminal act to be held legally insane.[11] Several responses came to concern the question of whether insanity or accountability should lead to exemption from criminal responsibility or whether the unlawful act should not be considered a crime in the first place.

Reaching consensus about the criteria for accountability—i.e., developing a standard for insanity—turns out to be difficult in Sweden. The option not to introduce a standard for legal insanity in the Swedish context has however not been considered. On the contrary, the shared view among the commentators seems to be that the standard needs to be as precise and well defined as possible. Still, a legal system in which evaluations are, just like in Sweden, 'court ordered' (see above), uses no legal standard defining the specific criteria for legal insanity: The Netherlands. Could that be a solution to the current Swedish debate: to introduce legal insanity, but not to introduce a legal standard?

3. Do we need a standard for legal insanity?—The Netherlands as a comparison

The Dutch Penal Code contains insanity as statutory ground for excuse (Article 39), see also above:

> "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."

However, interestingly, there is no standard—like, e.g., M'Naghten—for determining insanity. (Meynen, 2013a; Tak, 2008) Tak writes: "but in practice a person is not held responsible for his criminal conduct if at the time of such conduct, as a result of a mental defect, disorder or disease, he lacks substantial capacity either to appreciate the wrongfulness of his conduct, or to bring his conduct into conformity with the requirements of law." However, it is not clear that insanity in Dutch criminal law has this specific meaning. In fact, forensic psychiatrists[12] use different concepts and notions in their arguments why a particular defendant should not be considered sane. For instance, sometimes the notion of free will is used when the court or psychiatrist explains why a defendant is (partially) legally insane.[13] van Marle (2000), explaining insanity in the Dutch context also uses the term "free will":

> "Undiminished responsibility means that the person concerned had complete access to his or her *free will* at the time of the crime with which he or she is charged and could therefore have chosen not to do it. Irresponsibility means that the person concerned had no *free will* at all with which to choose at the time of the crime with which he or she is charged. Important here is determining the moment when aspects of the disorder become manifest in the situation ("the scene of the crime") that will eventually lead to the perpetration. The earlier they play a role, the more inevitable will be the (disastrous) sequence of events, and the stronger will be the eventual limitation of *free will*." (van Marle, 2000, p. 527, emphasis added)

Also Antoine Mooij puts 'free will' at the centre of the concept of legal insanity in the Dutch context (Mooij, 2004). Alternatively, the behavioural expert may state, e.g., that the defendant "most probably due to a manic episode lost control of his behaviour and was not able to see the consequences of his behaviour".[14] Apparently, different concepts or criteria are used by Dutch behavioural experts in criminal cases.[15] This should not come as a surprise, since, as already noted, no legal standard or criterion has been formulated in The Netherlands. In a way, the psychiatrist and psychologist—and eventually the judge—are free to formulate a relevant criterion for legal responsibility in every particular legal case (Meynen, 2013a). Note that while the judge will eventually decide about legal insanity, in most cases, the psychiatrists' argument is accepted by the court.

There is another interesting feature of insanity in The Netherlands, which we will also briefly consider. In the Netherlands, a scale of 5 grades of responsibility is used (van Marle, 2000). These 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. Although these five grades have been used for decades, the recently published *Guideline* for forensic psychiatric evaluations in criminal cases proposes to reduce the five grades to three grades. The guideline reads: "scientific research does not show that clear relations exist between specific psychopathology and the advice about criminal responsibility" (Nederlandse Vereniging voor Psychiatrie, 2012, p. 64, translation: the authors). The guideline also states: "there is no evidence for any scale whatsoever, neither for a five-point scale nor for a three-point scale." (p. 64) Meanwhile, according to the guideline, the absence of psychopathology[16] as well as (complete) insanity can be reliably determined. So, according to the guideline, the two extremes are clear. Between these extremes, there is a middle-area and the defendants who do not fall in these two extremes, fall in the middle: diminished responsibility, or partial responsibility (Nederlandse Vereniging voor Psychiatrie, 2012 p. 65).[17]

Not everybody favours this approach in which, effectively, three grades are used. For instance, Mooij strongly urges us not to abandon the five-point scale. He emphasises the helpfulness of these degrees of responsibility when determining sanctions (Mooij, 2012). For instance, based on the forensic psychiatric conclusion that a defendant's responsibility is *slightly* diminished, the sentence may be reduced (in principle even proportionately).

4. Returning to legal insanity in Sweden—discussion

In what follows we will address some important questions that need to be considered when deciding about (re-)introducing legal insanity, as currently happens in Sweden.

First and foremost, we must consider the issue of if and when it is fair to exempt someone from legal responsibility.[18] The availability of an insanity defence in most legal systems strongly suggests that the moral

[10] The formal consultation report regarding SOU, 2012:17. Dnr LUR 2012/47.

[11] The formal consultation report regarding SOU, 2012:17 R-2012/0934. For an account of the Norvegian standard see e.g., Melle, 2013.

[12] Jaarbericht 12/13 NIFP: https://www.nifpnet.nl/jaarbericht/cijfers.htm. Total evaluations of adult defendants for the court in criminal cases: 4.526. Only psychologist: 46.55%, only psychiatrist: 18.12%; and double report (usually both psychiatrist and psychologist): 29.81%.

[13] For reference to the term 'free will' in a verdict see for example: http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBHAA:2006:AV0882.

[14] Translated from Rechtbank Utrecht, 19-10-2011, ECLI:NL:RBUTR:2011:BT8735.

[15] In other legal systems, free will has also been considered an important notion with respect to legal insanity, even though lack of free will is not a *legal criterion* for insanity. But here we use the quotation to show that not just the concepts mentioned by Tak—which are very similar to the model penal code—are used, but that also other notions may be used. On free will, mental disorder, and legal insanity see e.g., Meynen (2010).

[16] The Guideline also uses the phrase: "there is no mental disorder that has influenced the criminal act" (Nederlandse Vereniging voor Psychiatrie, 2012).

[17] See also van Marle, 2012: "Until now, as it turns out, it is hard to distinguish between the three grades in the middle…" (p. 127).

[18] For further critical points regarding legal insanity, see Morse & Bonnie (2013) and Morse (1985).

intuition that it is not fair to blame or punish someone who does not know what he does, does not appreciate that what he does is wrong, and/or is not able to exert control over his actions, is upheld.[19] At the same time, there seems to be a widely spread idea that successful insanity defences in a given legal system should be rare. In the Swedish debate it has explicitly been stated on several occasions. This underlying objective can also be found in discussions in other countries/jurisdictions, both in legislative documents and case law; a standard of legal insanity should exempt a small number of defendants, it should not be "too easy" to be found legally insane. People tend to fear that if the criteria are not strict, some who deserve punishment will 'get away' with their crimes (Morse & Bonnie, 2013, see also Penney, 2012). According to Morse and Bonnie (2013), the real reason we excuse so few people on the grounds of legal insanity is that only a few defendants truly lack the abilities for understanding and controlling one's actions in the way intended by the law. Still, one might e.g., note that the mental incapacity defence in Article 31 of the International Criminal Court Statute states that a person shall not be criminally responsible if, at the time of that person's conduct: "The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law."[20] During the preparatory discussions the formulation "lacking substantial capacity" was suggested, but instead the more restrictive "destroy" was decided upon.[21] When it comes to the most horrendous crimes like crimes against humanity, the possibility to be acquitted due to legal insanity is thus slim, which in turn suggests that the threshold for legal insanity is not just set with regard to our intuitions about the requirements for rationality, but also with respect to the severity of the crime committed.

Another worry that was raised by the Swedish association for forensic psychiatric collaboration (see above) regarding excusing those who commit crimes, is that defendants considered legally insane and thus not responsible for their actions cannot reasonably be given psychological treatment with the aim to restore their action control by encouraging them to take responsibility for their actions afterwards. We would respond that this does not necessarily mean that they cannot take responsibility for their future actions—for instance by committing oneself to treatment.

Secondly, but very much related to the first point, the presence of a mental condition of some kind is, apparently, of paramount importance here.[22] Since the defence is called 'insanity defence', it is in a way self-evident that a requirement of a mental disorder is a criterion for this defence. The moral intuition that, at least in some cases, mental disorders may undermine a person's/defendant's responsibility dates back to ancient times (see Robinson, 1996 on the history of the defence). Usually, legal insanity should be due to *severe* psychopathology. One of the reasons is probably that legal insanity and mistake of law must be kept apart. Not to be aware of the law and that your actions could violate it, is usually not considered sufficient grounds for exculpation. However, the concept of mental impairment that is used differs from jurisdiction to jurisdiction, examples being "disease of the mind" (Model Penal Code), "mental impairment" (Australia), "mental defect or mental disease" (the Netherlands). Courts in the USA have pondered over a list of diseases that would satisfy the insanity criteria and the range of conditions considered has come to vary from hyperglycaemia to severe organic brain damage (Marchuk, 2014; Scaliotti, 2002). However, it is primarily the presence of psychotic disorders that actually leads to successful insanity defences (Lymburner & Roesch, 1999). It is worth noting that the insanity standard in Norway only entails the presence of a psychotic disorder at the time of the crime.[23] A version of this standard was put forward by The Swedish Bar Association that suggested that the presence of either; severe mental disorder, temporary mental confusion, a severe mental retardation, or severe dementia alone should be enough to constitute legal insanity.

Thirdly, we may ask: do we need to specify the criteria for legal insanity in a standard? What arguments could possibly be provided for *not* introducing a standard for insanity, as is the case in the Netherlands? Clearly, if one would no longer want to introduce a standard, the discussions about the specific criteria as they currently take place in Sweden would come to an end. This would give scholars the time to devote their energy to other matters, which would be an advantage. Furthermore, if no standard is available, what insanity entails will be determined in each particular case, given a particular defendant. The forensic psychiatrist and psychologist may then provide the reasons why, *in that particular* case, a defendant should (not) be considered insane. In this way, the judgement could be 'tailored' to the case at hand. So, it might be that in cases like this, it is better to let praxis decide upon the standards. The meaning of criminal intent in Swedish criminal law, to take an example, is defined neither in the law text nor in the preliminary works. One major argument for this line of reasoning is that it is very difficult—if not impossible—to give a precise definition of many of our (legal) concepts, but that does not necessarily mean that we do not know what they mean. Following e.g., the suggestion by Ludwig Wittgenstein (1953), if one wants to understand the meaning of a word, one should pay attention to the practical use of the term in human communication. However, while it might be a good idea to let the concept of criminal intent be defined by the courts, the situation is more complex when it comes to the concepts of severe mental disorder and legal insanity, given the fact that the court's judgement partly relies on psychiatric and psychological testimony. In order to reach its judgement, the court will have to communicate with other disciplines and there are grounds for concern that courts and psychiatrists do not mean exactly the same thing by the concepts discussed. One important aspect of the Wittgensteinian view is that conceptual ambiguity may be the result of conflicts about the communicative goals of a certain discussion. In this specific context the goals and practices of psychiatrists and lawyers respectively may be diverging; for instance, as Malmgren, Radovic, Thorén, and Haglund (2010) argue, the psychiatrists could be partly concerned about the outcome of the verdict in terms of psychiatric treatment, while the question of legal responsibility is the judges' focus (this depends on the jurisdiction, and, more precisely, on the specific tasks of both the psychiatrist and the judge in a criminal case). In fact, to reach a decision about a defendant's sanity a translation has to take place from the psychiatric findings (medical domain) to the notion of insanity (legal domain). A standard enables or facilitates such a translation of psychiatric symptoms to the legal domain; by articulating what kind of psychopathological effects are legally relevant regarding insanity (see also Meynen, 2013a; 2013b).

Furthermore, at least in principle, in the Dutch context the criteria that are used may differ between behavioural experts and between cases. So, in one legal case, the psychiatrist may use another criterion than another psychiatrist in another case. This can be considered problematic from the perspective of equality before the law (Meynen, 2013a). These considerations show that defining criteria for insanity is still the better option compared to not having a standard—even if reaching consensus about the criteria may take time and a lot of efforts (see Meynen, 2013a).

Fourthly, therefore, we must then consider the question: which should be the criteria for insanity? The first issue here is whether knowledge of right and wrong should be included in the standard (which is unclear in the Swedish proposal[24]) and whether *wrong* here

[19] To mention some criteria that can be found in legal insanity standards.

[20] Article 31 (1) (a) ICC Statute 1998.

[21] See Krug (2000). The emerging mental incapacity defence in international criminal law: some initial questions of implementation. *The American Journal of International Law*, ***94***(2), 317–335.

[22] On this topic, see also Meynen (2012).

[23] See, e.g., Melle (2013).

[24] There is no distinction made in the proposal between a criterion of understanding and a criterion of wrongfulness. The proposal explicitly states that the standard targets a person's ability to appreciate the meaning of the act, which indicates a criterion of understanding (p. 542). However, the ability to distinguish right from wrong is also discussed. Mainly it is described to be a symptom of a lack of understanding, but it is also, on occasions used synonymous to a lack of understanding (p. 563).

should denote legally or morally wrong. Some standards explicitly state that it is knowledge of the law that should be the issue, while others remain silent on the subject. Carl Elliot (1996) refers to the Committee of Abnormal Offenders who noted that "wrong" could not refer to legally wrong since ignorance of the law is not a defence that is available to sane offenders. He suggests that "knowledge of right and wrong" in the M'Naghten rules should refer to knowledge of the moral beliefs generally held in society.[25]

Next, we need to decide whether a control requisite should be included or not. The proposed Swedish standard as well as e.g., the Model Penal Code, includes a volitional criterion or 'control prong'. In order to be fully responsible for one's actions a person must exercise some conscious control of her actions, the actions must have been conducted in accordance with the person's will. The volitional prong of insanity standards has been contested and thoroughly discussed (see, e.g., Penney, 2012). In the United States, "irresistible impulses" was used as a possible basis for exemption due to legal insanity, but was abolished in many states after John Hinckley was found not guilty by reason of insanity for the attempted assassination of Ronald Reagan.[26] One of the problems regarding the control prong is that people doubt that it can be reliably assessed by psychiatrists (Meynen, 2013c; Penney, 2012). Clearly, this argument relies, at least in part, on the actual tools psychiatrists have to determine lack of control. So, knowledge about such tools is highly important to reach a conclusion about the desirability of a control prong in a legal standard.

Fifthly, there is the question of grades of responsibility or accountability. In the Swedish proposal for a new law including legal insanity, there are only the two possibilities of finding a defendant accountable or unaccountable. The option of introducing grades of accountability, as they are used in The Netherlands, is not considered in the report. However, when it comes to the sentence, the Swedish proposal from 2002 includes a possibility of mitigating the sentence if the defendant "due to a mental disorder have had a *severely diminished capacity* to understand the nature of his act or to adjust his behaviour according to such an understanding" (p. 39, emphasis added). In the proposal from 2012 "severely diminished capacity" due to a mental disorder is substituted for "diminished capacity due to a mental disorder, temporary mental confusion, or some other cause", without any further arguments (p. 54).

In the recently published Dutch Guideline (2012) for psychiatrists concerning the evaluations of defendants, it is stated that there is no scientific research showing clear relations between different types of psychopathology and the five levels of criminal responsibility.[27] And, of course, the question of how and where to draw the line between being a responsible, a slightly responsible, or a non-responsible agent is not a medical scientific issue, but a matter of ethics, legal principles, and perhaps even of policy and politics. So, from a medical perspective, the difference between severe mental disorder and complete health may seem pretty clear; still, in what way severe psychopathology may influence criminal responsibility is not a question that can be answered with the methods of psychiatry (see also Sinnott-Armstrong & Levy, 2011). Consequently, any scale for criminal responsibility cannot possibly be based on 'scientific medical evidence'. At the same time, scientific knowledge is likely to thoroughly inform the *debate* about legal insanity (see also Meynen, 2013a). For instance, neuroscientific and neuropsychological findings on how certain mental disorders may compromise behavioural control may inform the discussion about including a control prong in a legal standard (Penney, 2012). The reason is that some feel that although the control prong is morally justified (a lack of control is a valid excuse) it is hard to determine whether a defendant could not control or just did not control his behaviour. Scientific knowledge and assessment techniques may help to clarify this matter and thus affect the decision on including a control element in an insanity standard.

In Sweden, the possibility of taking diminished responsibility into account when mitigating a sentence has been strongly criticised by, e.g., the Faculty of Law at Stockholm University in the consultation response to the Swedish suggestion from 2002. [28] The Faculty questions the possibility of an intermediate state between accountability and unaccountability, and state that either you have the ability to understand and control or you don't. They also question the purpose of mitigating the sentence based on diminished accountability, and stress the concern that this kind of reasoning would entail that mental disorders will be seen as excuses even in situations where the mental disorder, in fact, could rather be considered an aggravating factor, e.g., in cases where the diagnosis to a large extent is based on the persons repeated antisocial/criminal behaviour.

Finally, we would like to mention the complexity of distinguishing between the assessment of intent and the assessment of legal insanity. In systems using legal insanity it is (at least theoretically) possible to have acted with intent, and being legally insane. However, this is a complicated affair, as e.g., pointed out by Stephen Morse and Morris Hoffman (Morse & Hoffman, 2008). In the Swedish context, criminal intent necessitates a state of *sufficient awareness* and a requirement for a basic understanding of the criminal act and its consequences, and it might be questioned whether it is possible to lack understanding of one's actions in the present situation and at the same time have sufficient awareness for *mens rea*. In the proposal from 2012 it is suggested that the distinction between criminal intent and accountability could be maintained by considering the defendant's understanding of the act in a given situation, while assessing accountability, and his understanding of the punishable act in itself while assessing intent. Whether this will work in reality remains to be seen, but for our purposes here, we would like to stress the importance of also keeping this issue—intent—in mind while formulating a standard of legal insanity.

In sum, even though arriving at a legal insanity standard may cost a lot of effort, legal systems should develop and use such a standard. It is needed for a clear translation of medical and psychological findings to the legal norm (insanity). Furthermore, equality before the law is better ensured using such a standard. The exact form it will take, however, will also depend on other aspects of an individual legal system (e.g., regarding criminal intent and the possibility of mitigation).

5. Summary and conclusion

Sweden is currently in the process of re-introducing insanity in its legal system. At present there is a discussion about the criteria for legal responsibility that should be defined in the standard for insanity. One might wonder: is a legal standard really required when introducing

[25] The meaning of wrong has been discussed both by scholars and in case law. E.g., the California Court of Appeals addressed the issue in 1988. The court of appeals concluded that in California the definition of wrong for purposes of the insanity defence was related to society's standards for morality. The court stated, "Again, while not entirely clear, it appears California follows the rule that moral obligation in the context of the insanity defense means generally accepted moral standards and not those standards peculiar to the accused" (People v. Stress, 1988, p. 1274).

[26] One of the witnesses for the defence—Dr. Carpenter—argued that Hinckley on an intellectual level understood that what he did was wrong, but that he was unable to attach any emotional importance to this because he was *overpowered by an inner urge* to end his own life as well as his romantic feelings for the actress Jodie Foster. The verdict became subject of strong criticism and sparked a heated debate among the public, politicians and lawyers. The American Bar Association and the American Psychiatric Association recommended that the control test for legal sanity competency should be removed from the law. As a consequence hereof, several states eliminated the volitional prong from the insanity standard, some transferred the burden of proof from the prosecution to the defence and the states of Montana, Kansas, Idaho and Utah abolished the possibility of being exempted due to insanity. (See e.g., Low, Jeffries, & Bonnie, 1986.)

[27] The *Guideline* states, the relationships "are strongly determined by individual factors and depend on the individual assessment" (p. 64, translated by the authors). "Possibilities for an objectifying classification within the realm of diminished impact on the crime are, therefore, impossible. This implies that the five grades, as they have developed in the Dutch criminal law practice (…), cannot be substantiated based on the current state of the science" (p. 64, translated by the authors).

[28] Document Ju2002/481/L5. The Swedish Justice Department.

insanity? Such a standard is, for instance, not used for criminal intent in the Swedish system. It would save us a lot of debate if this could be skipped. We looked at another Western European legal system in which legal insanity is available, but where no standard is used, The Netherlands. We formulated advantages and disadvantages of a legal standard, and concluded that, overall, a standard for insanity is required. We then considered some further issues, like the elements of the standard, and the desirability of grades of insanity, also referring to the Netherlands. The exact form the standard will take is likely to depend largely on legal considerations, because it is basically a legal matter, but it need nevertheless be informed by psychiatric and other scientific findings, e.g., regarding the issue of a control prong in a legal standard.

We feel that although legal insanity is a legal matter, there is a need for further interdisciplinary research on this kind of legislation. Psychiatric and (neuro-) psychological expertise is required regarding the ways in which mental disorder may affect behaviour—and whether these can be reliably assessed. Lawyers have to consider the threshold for exculpation and matters such as distinguishing insanity from lack of intent. When collaborating, these disciplines are in a better position to reach wise conclusions regarding legal insanity than when operating independently.

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