

Legal Science and Criminal Policy

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De lege ferenda - about the law that ought to be made. Under this sentence, which is the common thread in the centennial edition of the Faculty's publication series, I will discuss the lawyer's role in legislation - particularly that of a lawyer specializing in jurisprudence. With examples from my own field, criminal law, I will show what, in my opinion, the lawyer's role should not be. The less successful input on the part of some lawyers may be explained in many cases by the profession's traditional unwillingness to express values. This may seem paradoxical, since what the general public can be assumed to demand and expect from lawyers is not values but rather facts. However, in recent years lawyers have on several occasions stood out as cold, unfeeling and disinterested in a way that has had a negative effect on the general view of both lawyers and the legal system. Writer and journalist Maciej Zaremba has in two, attention-getting articles published in *Dagens Nyheter* (21 Nov. 1995) and *Moderna Tider* (Dec.-Jan. 1995/96) respectively, developed a very critical view of the Swedish legal culture. He claims that it is characterized by an indifference towards the law's roots in morality which is unique in Europe.

Against the background of this critique I intend to formulate my understanding of how a lawyer active in the field of jurisprudence can assist in a positive way in the work of legislation and therewith also in the development of society.

The lawyers' input into legislative work is well known if one considers such assignments as those of committee secretaries and chairpersons, investigators or experts in official reports, and above all serving on the standing committees of the Riksdag and in the government departments. Another task performed to a large extent by lawyers is to work out consultation replies to legislative questions put forward to different authorities, organizations, etc.

But the work of legislation does not begin with formal initiative being taken: problems are discovered and focused on out in society. The societal debate leads then to the formulation of demands for a new law or amendments to the existing one. It has been maintained for a long time now that lawyers' participation in the societal debate is far from sufficient. Perhaps as a reaction to this criticism an increasing number of lawyers have stepped forward in recent years, submitting their

comments and participating in media debates. Lawyers have doubtlessly an important task to perform in their role of mediators between the general public and the political decision makers, because no matter how powerful a claim concerning a given problem to be remedied, it is difficult to put it on the political agenda without the assistance of lawyers.

For lawyers doing research or teaching at the law faculties of universities participation in the formation of opinion is not a problem from the point of view of loyalty. We are free to criticize both legislation and court judgements. As teachers we are actually accustomed to doing this in our lectures which are designed not only to teach about the regulatory system, but also to place that system in a broader perspective. "Ein Professor ist ein Mann" (today occasionally a woman) "anderer Meinung". Our independent position - and in the case of professors the special security of employment - gives us unique opportunities to play an active part in social issues. This position carries also with it a responsibility - both to actually use these opportunities, and to use them the right way. I will discuss this issue below.

Whether the representatives of jurisprudence should concern themselves in their research with criticism of the law in force is actually not a completely indisputable question. There are those who advocate a very restrictive approach in this respect, claiming that *de lege ferenda* reasoning is seldom justified in, for example, monographs. The common understanding today is, nonetheless, that arguing about and proposing solutions for the ways in which the law can and should be changed constitute important elements in legal scientific research.

We know little about the way in which the contribution of legal science to the legislative debate is perceived by society. No discussion worth mentioning concerning the place of *de lege ferenda* reasoning in jurisprudential research has taken place outside the closed circles of examining committees, appointment boards and faculty boards. It was therefore gratifying when Justice Johan Lind in a debate article appearing in the law journal *Juridisk Tidskrift* at Stockholm University (1995-96, p. 232 ff.) took up the journal's case analysis section for a critical discussion. Lind writes that the analysis of new judgements often contains interesting insights and comparisons, but that most often these are also "reviews in which the critic does not approve of the results attained by the Supreme Court for one reason or another". How does it help to come up with a claim that the Supreme Court's judgement is wrong, asks Lind. The legal scientist must have greater possibilities of influencing reality if he or she devotes time to set the case in a larger context, and is able to point out that it constitutes an aberration not to be followed in the future. In this way the practitioner is given an argument to be raised in future cases.

Lind's critique has a lot to do with the choice of phraseology and the distribution of emphasis. But it is undeniably an interesting reaction to the more and more common phenomenon of lawyers challenging judicial sentences. There exists a strong opposition to such activities among the judiciary. For a Swedish judge especially it is an almost blasphemous thought to come out publicly and criticize a court decision, and with it one or more colleagues. No distinction is made in this connection between questions of law and questions of evidence. Privately, one can be quite determined that a certain judgement is crazy, not least with respect to the way in which a given legal question has been decided, but one does not say so

publicly. Lind's view is the judge's - and he applies it as well to lawyers active in the field of jurisprudence.

Today, demands of contribution to public discussions about legal decisions are directed even towards judges, however. It was therefore perceived as a remarkable, and somewhat reactionary, expression of opinion when the former Chief Judge in the Stockholm City Court, Carl-Anton Spak, at a conference for court presidents in September 1995 said that he:

with great satisfaction - discerned that the Government's view ought to be that it isn't the court presidents' task to go out in the mass media in this context; not even when the company is running out of resources and employees are about to be given notice. (Domstolsverket informerar, Oct. 1995, p. 13)

It had to do with the drastic cutbacks taking place within the Judiciary, considered by many people to threaten the rule of law, not least by endangering the judge's independent role. Even if the opposition to Spak's conception at the conference was lame (it was only the president of the Court of Appeal, Bo Broomè, who expressed a reaction, namely that he found it a little difficult to accept the point that court presidents should "keep their opinions about their superiors to themselves"; p. 21), it was that much stronger once it reached other lawyers.

The important issue that lawyers themselves assert the demands for the application of the rule of law in their work and in the legal system as such attracts little attention of either the general public or the mass media. On the other hand, lawyers' performance is closely watched in other, more spectacular contexts.

One piece of legislation where lawyers have come to be regarded by the general public as remarkably passive and unfeeling is the question concerning criminalization of possession of child pornography. Already early on, lawyers, then in the Swedish Government Office, adopted a defensive approach to this question. It developed later into a battle of positions in which, against the collective opinion of various advisory bodies and coordinating organs focused on the protection of children, the lawyers claimed that, unfortunately, due to the special character of Swedish legislation it was impossible to prohibit the possession of films and pictures depicting sexual abuse of children.

The Law Faculty Board at Stockholm University, together with the Chief State Prosecutor and the National Police Board among others, took another standpoint. The Faculty Board's point of departure was that a prohibition was well justified, not only because Sweden, as a party to the UN Convention on the Rights of Children, has an international duty to counteract the use of children in pornographic contexts. The Faculty asserted also a legal political point of view: possession of pictures and films depicting sexual assault on children should be forbidden. This evaluation was founded on arguments of proven injurious effects and it was supplemented by proposals of suitable legislative techniques. The battle of positions made it impossible to make constitutional changes within the normal time frame before the parliamentary elections. The question is being investigated once again, this time by a parliamentary committee, and it is only to be hoped that necessary action is taken, also on the part of the legal profession, in order to give Sweden legislation that will make Sweden a part of Europe as regards this particular issue: practically all other

European countries have a prohibition against possession.¹

Lawyers have also been perceived as indifferent and unfeeling in the question on measures against racism. In this context I am naturally not taking into account the fact that, unfortunately, among Swedes, and even among Swedish lawyers, there exists a certain amount of racism and dislike of foreigners. The lawyers' indecision to institute laws restricting racialistic manifestations is hard for the general public to understand. Here, like in the question of child pornography, the constitution is referred to where freedom of speech and freedom of association are presented as obstacles to issuing a prohibition.

What this is all about is the unavoidable, and not at all new, question about the borders that must be drawn for constitutional rights. This is not the place for a study of arguments against the intervention of law in the fight against racism. What is interesting here is the fact that lawyers do not often give expression to any legal political perceptions regarding the question. They can express abhorrence of racism, or child pornography, but they are often unwilling to take a stand on the question of whether prohibition would be desirable. It is this that can make people wonder whether empathy is a scarce commodity not only among today's young, violent, criminal offenders, but also among lawyers.

Traditionally, lawyers have been unwilling to make value judgements, i.e. to let their emotions play a part in the formation of their opinions. It would be difficult to reconcile such behaviour with the professional role of a lawyer, which is to give objective opinions about what actually applies in different legal situations. When lawyers have been employed in legislative work they have clearly been inclined to formulate their views in objective terms. In some cases, when the lawyer in question was also a researcher, her or his views were presented as scientific theses.

With greater or lesser reason it is perceived as risky for a lawyer to publicly assert an opinion. One risks a loss of credibility as a lawyer, and in some cases, as a legal scientist too. Instead, one formulates one's position in objective terms. This implies another kind of danger though: the credibility of lawyers in general is shaken when the supposed objectivity is shown to contain a value judgement. And when lawyers stand out as a special kind of cold and unfeeling people, they risk being 'marginalized', as it is called in today's parlance.

Actually, the lawyers' fear of making value judgements is quite irrational and out of place. Today we have namely an excellent, constitutionally guaranteed ruler to give measure to such value judgements, i.e. various human rights conventions and other international conventions, such as, for example, the Convention on the Rights of Children signed by Sweden. The ratification of the conventions has made it possible to give views with the pretention of objective truth in one respect, namely how well or how badly Swedish law conforms with these superior, international norms. But even here it is not common for Swedish lawyers to express an opinion.

After these observations and reflections on the lawyer's input into the debate on legal policy I shall look more closely at criminal law's jurisprudential relationship to that part of legal politics that has to do with criminal law, namely the legal

1 Legislation along the lines proposed by the Faculty was eventually enacted in 1999, after another general election.

politics on crime and punishment. For the general public the most interesting area of criminal law is the penal system itself, i.e. the rules on different forms of punishment. The design and application of the penal system arouses strong feelings. In the ongoing debate between political parties this area is therefore especially prominent.

A short synopsis is needed of the background to my critical reflections concerning the character given by a certain kind of juridical input to the legislation on the penal system.

Today's Swedish politics on crime is characterized by the so called neoclassicism. This 'school of thought' has developed as a reaction to what was afterwards called an 'ideology of treatment'. By the middle of this century the idea that the penal system's primary function should be resocialization became very strong in Sweden - stronger than similar tendencies in the neighbouring states. This culminated in the appearance of the Criminal Code in the 1960s.

Since then one has been changing ideologies in stages. A decisive step in the direction away from the ideology of treatment was made by the introduction of two new chapters to the Code in 1989, containing detailed rules regarding the form of punishment and its length. Underlying this legislation was the Report of the Committee for Prison Sentences 'Påföljd för brott'.² The subsequent larger investigation of our penalty system was made by the Committee for the Penal System, whose ambition it was to make a final break with the ideology of treatment. Pre-legislative treatment of the Committee's proposal 'Ett reformerat straffsystem'³ is being processed by the Ministry of Justice.

Criticism directed towards the ideology of treatment was from the beginning characterized by a strong empathy for the socially weak defendants who were subjected to prognostication so characteristic of the penal system. The same attitude can be traced to the unwillingness of the Committee for the Penal System to apply a more stringent intervention system right from the start of someone's criminal career, by tightening up probation within the frame of suspended sentences. The label 'prisoner' should be avoided for as long as possible; an overriding goal should be to minimize the use of prison sentences.

When the criticism of the ideology of treatment was later equipped with a theoretical superstructure, a completely different picture has emerged. What is seen as the cornerstone of the new structure of thought is that it is the criminal act itself, not its perpetrator, that should determine the punishment. This new school of thought on the penal system's functions and foundations has a profoundly theoretical character. It offers a completely new motivation for society's institution of punishment, which is to mete out the 'right' punishment for a given criminal act, and not to give the criminal a sentence that will best contribute to the process of her or his resocialization. The 'right' punishment shall be decided following a system of detailed sentencing rules for the court.

Behind this neoclassical reform of Swedish criminal law, there stands one legal scientist, professor of criminal law at Uppsala University, Nils Jareborg. He has

² SOU 1986:13-15; (SOU = the Swedish Government Official Reports); the English title: *Sanctions for Crime*.

³ SOU 1995:91; the English title: *A Reformed System of Punishment*.

derived inspiration and support from an American law professor, Andrew von Hirsch, who has been active during some periods of time in Sweden. the latter is the proponent of the USA-based theory of 'Just Desert' (Theory of Fair Retribution). Jareborg acted as an expert for the Committee for Prison Sentences, being involved in this work full-time for a period of time. That it is his spirit that permeates this report is well known. Due to strong personal ties it has also affected the work of the Committee for the Penal System.

As regards the question of lawyers and empathy it may be interesting to have a closer look at the arguments propounding the paradigm shift.

The purpose of this new school of thought is said to be - and evidently is - to achieve a more fair system of punishment, as well as better conformity with the principle of the rule of law. The theory is not presented in the form of evaluation, or as a legal political viewpoint, but rather as a function of research, or as a truth arrived at through jurisprudential and criminological research. A higher form of wisdom, thus, than the kind of wisdom possessed by the former generation of politicians of crime, with representatives such as Karl Schlyter and Ivar Strahl.

It is, naturally, not unusual for a new theory to make demands on being seen as a step towards a higher degree of objective truth, and later on being shown that its demands were premature. But when, as here, the formation of a country's penal system is at stake, this course of action seems to be rather remarkable. It should be quite clear that what is appropriate or inappropriate in a given penal system, or in the use of a given penalty form, can only be the object of valuation, even though it should be done on the grounds of good, factual argumentation. In our part of the world where we are trying to improve our penalty systems all the time, there is no doubt that this is all about values. Here I may refer to an article appearing in *Süddeutsche Zeitung* on 28 December 1995 on 'Verrechnung von Untaten nach justitiellem Marktwert' entitled 'Die Utopie der gerechten Strafe'.

This is, nonetheless, not the kind of argumentation that is used when the neoclassical changes in the law are presented to the Swedish public. Jareborg and von Hirsch distance themselves from the idea of prevention as a basis for imposing punishment in concrete cases. In its place they introduce 'a legal doctrine on how the gravity of harm can be compared' which shall act as an objective measure for the individual crime's degree of gravity and therefore also represent the 'correct' sentence.⁴

One can believe that a penal system is more fair if it has been formed in accordance with a certain scale of values, without considering the person behind the crime, other than in exceptional situations. But if one wants to be treated as a serious lawyer and scientist, one cannot claim that, quite objectively, this *is* the way things are.

In fact, such a viewpoint can be questioned. What is an act if we disregard the person behind the act? It is exactly by consistently and programmatically disregarding the perpetrator's situation that Swedish penal law probably risks losing the humanitarian character that has gained it so much attention and praise around the world. This fame has not been based on the fact that Sweden has had fewer

⁴ *Gauging Criminal Harm: A Living-Standard Analysis*. Oxford Journal of Legal Studies, 1991, p. 1 ff.

people in prison for shorter periods of time than comparable countries, for this has not been the case. Instead, it has been the emphasis on the person behind the crime that has been noticed.

The change of wind that we are now experiencing would have perhaps taken place anyway, due to the focus on the position of the victim of a crime that has developed simultaneously. But there a totally different kind of argumentation is used. Against the background of research results substantiating the injuries' extent, length and character it has been suggested that victims of crime should be treated in a different way, and have their interests advanced more effectively than has previously been the case. The most recent example of this kind of argumentation is the Report of the Commission for Violence Against Women, 'Kvinnofrid'.⁵ It has not been claimed that it should be an objectively and scientifically provable truth that the crime victim should have a stronger position.

Why is it then so important to distinguish between scientifically supported conditions and values? Eventually, time will show what the whole issue was about - old 'truths' are relegated to the annals of (legal) history. The danger is that behind the façade of objectivity, subjectivity may run rampant. Values of completely or partly different kind cannot be brought forth. Intellectual honesty will have to give in to some kind of misuse of science.

When I tried to understand the forces behind this method of arguing the politics of crime, I went back to the question of lawyers and feeling. The explanation lies most likely precisely in the lawyer's unwillingness to express values, and the legal scientist's desire to act as the interpreter of the truth.

As a legal expert in a certain area one is in a unique position of being able to affect the development of society. One can contribute with knowledge on the state of the law, and give advice on how changes in the law ought to be made so that they achieve the desired effects, fit into the system and create the minimum of application problems. When one has researched a particular question or a particular problem area one acquires a special ability to see and judge alternative solutions. One has normally formed an opinion as to what the best solution is, not only from the purely technical legal point of view, but also from the factual one with regard to legal policy. I think that this opinion should be advanced and one's argument supported with all the weight accorded to it by one's own research. But the opinion must not be presented as some kind of objective scientific truth. It must be made clear that it is *de lege ferenda* reasoning that should be judged on the basis of the argument's validity, and nothing else.

The paradigm shift within criminal law has passed unnoticed to the majority of people in our country, among them to many lawyers and politicians. It has not been presented in such a way that it could be understood and critically examined outside the small community of initiates. In my opinion the fact that value statements have been asserted as scientific truths has greatly contributed to this situation.

In an anthology entitled 'Varning för straff'⁶ Jareborg summarizes his views on the penal system. His standpoint is presented here in a completely different manner, as a legal political point of view. With his love for the formation of new definitions

⁵ SOU 1995:60; the English title: *Peace for Women*.

⁶ Victor, Dag, ed. *Varning för straff*, Norstedts Juridik, 1995.

he calls the neoclassical school 'defensive criminal law politics'.

Jareborg is uncertain as to whether we should have any criminal law at all (p. 35). For the most part it is the less serious crimes that one can get at, whereas, for example, economic and environmental crimes are so difficult to handle from the criminal law perspective that Jareborg is quite simply willing to give up.

The British professor of criminal law Andrew Ashworth, who declares in the introduction to the above-mentioned anthology that he shares the defensive attitude of Jareborg and the other contributors, is nonetheless much more willing to put up a fight. He asks why a pick-pocket who has stolen 1000 crowns should be tried in court, while a company that has enriched itself with a million crowns by committing other law offenses can get away with administrative sanctions only (p.18). On the other hand, Jareborg points to the introduction of administrative fees as a (if only too infrequent) step away from the extravagant use of criminal law as a means of altering people's behaviour. He says (p. 36) that there are so many other methods than criminalization and punishment to choose from if one really wants to achieve results. Only a few pages before he was forced to admit though that "for some people the fact that an act is punishable by law is always enough reason to refrain from committing it" (p. 21).

The neoclassical, defensive theory is an expression of values. In some cases these values are irreconcilable with the core of the criticism that has been aimed at the idea of treatment. Drunken drivers are in most cases alcoholics; alcoholics cannot be cured by staying in prison; they should therefore not be sent to prison. This is often the attitude expressed by the neoclassical criminal law theoreticians. Paedophiliacs shall not be punished for their sexual inclinations, they say. With this we can only, naturally, agree. Such grave disturbances as alcoholism or paedophilia cannot be probably 'cured' at all. What is so contradictory in neoclassicism is that neoclassicists use this line of reasoning as an argument for the choice of punishment in cases of drunken driving and sex crimes. This means that they abandon their own theory on the institution of punishment, which is to administer punishment for a given criminal act, disregarding the perpetrator of the crime. In the spirit of the good old treatment ideology they focus on the perpetrator after all.

The explanation of this fundamental logical blunder is constituted, paradoxically, in the fact that we are all actually ruled by values. We have a certain understanding of the perpetrator and his crimes which are valued with this understanding kept in mind. This can undeniably be seen as a sign of empathy. But when the values are not shown openly, but are hidden behind theoretical smoke screens, there can be no debate of the kind that is necessary to a democratic society. The lawyers fail in their important duty to the development of society, and, because of the kind of argument they present, appear as lacking in empathy and as divorced from reality.

The question is whether the supposedly objective argumentation has not made that the proponents of the theory have fallen into their own trap. Defensive politics of criminal law is recommended by the argument that punishment does not 'help'; those who are sentenced return to crime. But does this reasoning have any relevance for the neoclassical theory according to which a certain punishment is meted out because a particular criminal act 'deserves' this punishment? Must not one who supports the defensive politics of criminal law, claiming that more severe

repressive measures do not reduce criminality, assert the fact that resocialization is the goal of the administration of justice in criminal law?

It is important to work against populism and any tendencies towards lynching. I have seen how difficult it can be when, on assignment from the Ministry of Justice, I investigated the 'Lindome' problem, named so after a much criticized court case.⁷ But there must be better methods than supposedly scientific smoke screens. I suggest a *de lege ferenda* type of reasoning where a legal political standpoint can be taken for what it is - a value judgement formed on the basis of a reported, factual argument.

⁷ See, DS 1993:15, *Efter Lindome* (DS = Departamentets stencil).