RAIMO LAHTI

TOWARDS AN EFFICIENT, JUST AND HUMANE CRIMINAL JUSTICE

Nordic Essays on Criminal Law, Criminology and Criminal Policy 1972–2020

Professor Raimo Lahti (born 1946), received his LL.M. (1966), LL.Lic. (1967) and LL.D. (1974) from the University of Helsinki. He also holds a M.Soc.Sc. (1971) from the same University. He was Professor of Criminal Law at the Faculty of Law, University of Helsinki, Finland, in 1979–2014, Professor emeritus since 2014. He was Professor of Criminal Law, University of Turku, in 1974–79.

Professor Lahti has so far supervised 31 finalized doctoral theses. He has directed twelve research projects financed by extra-budgetary funding in 1982–2019. His recent scientific production includes – except this anthology – the compilation of his articles *Zur Kriminal- und Strafrechts-politik des 21. Jahrhunderts. Der Blickwinkel eines nordischen Wohlfahrtsstaates und dessen Strafgesetzreformen: Finnland* (De Gruyter, Berlin 2019) and about 450 other publications and writings. His recent research interests and publications have focused on comparative, Europeanized and internationalized criminal justice and criminal policy as well as on medical law and biolaw.

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Dedicated to my beloved wife, Senior Judge Varpu Lahti,
with my deepest gratitude for over fifty years of marriage,
friendship and judicial discussions

Preface

This collection of essays on criminal law, criminology and criminal policy includes a selection of my articles from the year of 1972 to the year of 2020, *i.e*. from a period of 49 years. The writings – in all 32 – chosen for the compilation are written in English and 30 of them have been published earlier. This anthology complements another recent collection of my articles, namely Raimo Lahti, *Zur Kriminal- und Strafrechtspolitik des 21. Jahrhunderts. Der Blickwinkel eines nordischen Wohlfahrtsstaates und dessen Strafgesetzreformen: Finnland* (De Gruyter, Berlin 2019), where 18 articles are published in German.

The main aim with this anthology is to crucially widen the access of my writings for comparative purposes. In addition to a printed book in the series of Publications of the Finnish Lawyers' Association (*Suomalainen Lakimiesyhdistys*), Series D (Ius Finlandiae), as No. 8, the contents of the anthology will be freely accessible from the digital publication platform of 'Open Monograph Press' (Edition.fi) of the Federation of Finnish Learned Societies (*Tieteellisten Seurain Valtuuskunta*). Both of these associations are scientific, non-commercial and non-governmental organizations in Finland.

When preparing this compilation, I had as models the similar anthologies of two influential Finnish criminal scientists and policy-makers: Inkeri Anttila's *Ad ius criminale humanius* (Finnish Lawyers' Association, Series D, No. 7, Helsinki 2001) and Patrik Törnudd's *Facts, Values and Visions* (National Research Institute of Legal Policy, Publication no. 138, Helsinki 1996). Professor Inkeri Anttila (1916–2013) was my teacher and predecessor as a chair holder. I worked together with both of them in the Task Force on the Finnish Criminal Code Reform in 1980–1999. I learned from them the basics of penal thinking – how important it is to further solutions towards a rational and humane criminal policy.

The essays are divided into seven chapters. Chapters I–VI cover a large spectrum of criminal sciences, and they are – in particular, in Chapters IV–VI – written rather from a Nordic (Scandinavian) than from a narrower Finnish perspective. The title of the anthology expresses its main message: towards an efficient, just and humane criminal justice.

Chapter VII includes five articles related to bioethics and (criminal) law. The reason for that chapter's attachment is to present some of my contributions to the new discipline entitled 'Medical law and biolaw', in which I was the pioneer and the responsible teacher in 1997–2011 at the Faculty of Law, University of Helsinki.

The first three Chapters (I–III) are closely interrelated but their main emphases differ to certain extent. In Chapter I there is an emphasis on the interdependence of the various disciplines of criminal sciences: criminal law, criminology and criminal policy. This approach reflects the enthusiasm I had at the beginning of my academic career for the position of criminology and rational decision-making.

When having been invited to the Task Force on the Finnish Criminal Code Reform I could in that preparatory work strive towards the objectives of criminal policy I had spoken in my scientific articles about: the penal system should be both rational concerning its goals (utility) and rational concerning its values and principles (justice, humaneness).

As the articles in Chapters II–III indicate, I as a scholar consulting criminal law drafting was expected to consider, *inter alia*, what kind of criteria – principles (values) and policies (interests) – should be taken into account and how those criteria should be weighed and balanced with each other. The ratification of the European Convention of Human Rights and the reform of constitutional rights in the 1990s changed essentially the Finnish criminal justice and legal culture in general. That development also led to the direct applicability of the individual fundamental rights in courts and the weighing and balancing of divergent principles embodied in these rights.

As to the principles of criminalization, one special feature of the Finnish criminal law reform was its regulation of new types of wrong-doing, especially in the spheres of business and finance. The new Criminal Code shall handle various types of illegal activity in a more equal and fair way and thus increase its legitimacy among citizens.

As to the types and contents of criminal sanctions, alternatives to imprisonment were developed and the use of prison sentences was also otherwise decreased. The length of prison sentences imposed in Finland and the other Nordic countries is even traditionally quite short from an international perspective: the average sentence is imposed in months, not in years. Since the mid-1970s, the relative number of offenders sentenced to unconditional imprisonment was on the decrease for nearly 25 years, until 1999. During this period, the average size of the prison population decreased from over 100 per 100 000 population to 65 – *i.e.*, to the level of the other Nordic countries. At

the same time the development of registered criminality signed a similar trend in all of the Nordic countries.

In Chapters IV–VI, the perspective is explicitly wider than in the earlier chapters. The Nordic view is dominant in Chapter IV. The Nordic countries form a sub-regional area in Europe and the developments there seem to presage more general trends in Europe towards harmonization of criminal justice legislation. Essential similarities are discernible in the goals, values and principles governing the Nordic penal codes and the criminal justice systems in these countries, although they are far away from identical. At the same time as the Nordic countries have been social welfare states, their crime control policies and the systems of criminal sanctions are characterized by the emphasis on such values as liberalism, rationalism and humaneness.

The writings in Chapters V–VI illustrate the effects of the internationalization and Europeanization of criminal justice since the end of the 1990s in Finland. The increased internationalization and Europeanization of criminal policy and criminal justice legislation has been challenging for legal scientists, legislators and practitioners. The administration of criminal justice, which so far has been an essential element of state sovereignty, has partially moved, and is still moving, beyond the direct control of nation-states. The European Court of Human Rights and its case-law have had an important role in creating the European standards for criminal law and criminal procedure. The international criminal tribunals have had a similar role in furthering respect for fair trial rights. Domestic courts are still in key positions in strengthening human rights according to these standards as well as in applying European Union law as well as international humanitarian law.

The intensified internationalization and Europeanization of criminal law and justice have changed the role of comparative law and criminal sciences in general. There is much more need for comparison of legal orders due to the emergence of European criminal law and international criminal law and due to the increased interaction between European and global legal regulations and the national legal orders. We also need more evidence-based criminological research to be utilized in criminal-policy planning and as a foundation for rational policy decisions. I hope that my anthology could contribute to this exchange of comparative data and their analysis.

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The support of Finnish Lawyers' Association has been remarkable. The Faculty of Law, University of Helsinki, has provided outward circumstances for preparing this anthology. These organizations are also as due publishers the copyright holders of several republished articles. My colleagues in criminal sciences, especially professors Dan Frände, Tapio Lappi-Seppälä, Martti Majanen, Sakari Melander and Kimmo Nuotio, have created a stimulating community at the Faculty. Professor Gert Vermeulen, General Director of Publications of the International Association of Penal Law (AIDP), has been very helpful in providing due permissions for republishing the articles which originally appeared in AIDP's publications.

I heartily thank all those colleagues and others who have helped me in preparing this article collection during a long process. Among them is also Miikka Rainiala, my co-author of one enclosed article. For the editorial assistance I give my thanks to Amanda Blick, Tomer Deutch, Jesse Heikkilä, Rebecca Kadoch, Lauri Lahti, Pinja Lindvall, Kirsi Matikkala, Lea Purhonen, Anssi Sinnemäki and Inga Snäkin.

Helsinki, 12 January 2021
Raimo Lahti

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I.
For a Scientific Criminal Policy: Is a Research-Based and Rational Criminal Law Reform Possible?

1. On the Reduction and Distribution of the Cost of Crime.

Observations on the Objectives and the Means of Criminal Policy*

1. During the last few years, the debate on crime and criminality carried on in the *Nordic countries* has in many ways changed earlier established notions. An essential feature in this debate has been the forceful breakthrough of the sociological conception of crime and criminality. It has lately become possible to characterize criminology in the Nordic countries primarily as a sociology of crime / criminal justice, as part of the study of deviant behaviour and social control.

The following two are, to my mind, among the most important of the changed views concerning criminality; first of all, the new definition regarding the objectives of criminal policy: *a) a minimization of the suffering and other costs caused by crime and of the control of crime, and b) a just distribution of these costs*. On this same basic idea rests the definition specifying the objective of criminal policy as a regulation of the harmful effects of crime, not a minimization of crime. The other important notion that has undergone a transformation is, to my mind, a realization of *the relationship of interdependence and interaction among society, the victims of crime and the offenders*.

The above-mentioned conceptions can be understood against the background of the change that has taken place with regard to the emphasis among the objects of criminological study. In criminology, one does not any more ask simply why some people become criminals while others do not; one is not satisfied with searching for the causes of crime in the characteristics of criminals or their environment. One of the new manners of posing the question is, first of all, what it depends on that there is crime in different societies. Crime is studied as a social institution. The second question is why there are fundamental differences in the amount and nature of crime in different societies (collectivities generally). In the latter case, the main attention is directed at the factors affecting the determination of the level and structure of crime.

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* Original source: *Oikeustiede – Jurisprudentia*, Vol. II, 1972:1. Vammala 1972, pp. 298–313. Suomalainen Lakimiesyhdistys [The Finnish Lawyers' Association.] – The text is a Summary of the author's article "Rikollisuudesta johtuvien kustannusten vähentämisestä ja jakamisesta. Kriminaalipolitiikan tavoitteiden ja keinojen tarkastelua", ibid., pp. 221–297.

In whichever manner the question is posed, crime must be understood sociologically, that is, to denote behaviour deviant from the (official or unofficial) social norm. If a crime were defined legalistically, it would not be possible to compare societies with different scientific and technological stage of development; only in scientifically and technologically developed societies can actions harmful to society to any greater degree be declared punishable, in other words, be criminalized. Even for other reasons, when the means of criminal policy applicable in Finland are discussed, the word 'crime' in this paper should often be understood as an act controlled due to its officially defined harmfulness and not as an act expressly defined as a crime. As will be made clear below, it is increasingly a question of expediency whether an act is controlled within the system of criminal justice or within some other official system of control.

Why some people become criminals is a question not asked any more even at the level of individual explanation of crime and criminality. Rather, the question is why some people get singled out as criminals in a selective process. When the question is stated in this way, the stress is on the realization that, to a great extent, it is dependent on the reactions of the environment and its processes – especially on the official measures of control – who will commit crimes and, more particularly, who will be defined as criminals, who will be apprehended and how they will be treated during the various stages of the criminal procedure, and who will become recidivists. The study of the victims of crime, or victimology, having gained strength, the question of why some people, through a selective process, are singled out as victims has turned out to be an important parallel problem.

The new criminological ways of stating the problem have i.a. in the following manner had an effect on the rise of the above-mentioned notions of criminal policy. Since crime can be observed to exist in all societies about which studies are available and which may be different in their basic structure, it does not appear to be realistic to set as objective the elimination of crime. There are two opposing opinions regarding the acceptability or the rejectability of this assertion which limits potential objectives. According to one of these, crime is necessary (and/or useful) for society, and, according to the other, this is not the case.

But a reduction of crime as such cannot be accepted as the objective, either. A breakthrough of a cost and value consciousness into decision-making in criminal policy, influenced by advanced research in economics and social sciences, has given rise to the notion that the reduction of crime must be sought with as small costs as possible and taking into account the considerations for justice as well as possible.

Even if there is disagreement about the necessity of crime, unanimity reigns with regard to the existence of great variations in the amount and nature of crime in different societies. It is not possible to explain such variations by referring to the variables with primarily individual content. Among such variables are those concerning the criminals, the victims of crime, or the characteristics of their social environment, or the control measures directed at the criminals. When the factors of the determination of the level and structure of crime are explained and the measures of criminal policy are planned, it is fundamental to take notice of the (structural) properties of society.

2. I shall take the criminological notions dealt with above as my starting points below in such a way that *I shall attempt to analyze the roles of society, victims of crime and criminals in the realization* of the objectives of criminal policy: *a reduction and distribution of the costs of crime* (and of the control of crime). A basic problem in this analysis is, first of all, how the costs of crime can best be reduced taking into consideration the interests of all sides of this relationship of interdependence and interaction. Secondly, it must be asked how these costs could be distributed with as great justice as possible among all sides of this relationship and, on the other hand, among individuals of each side. It should be noted that not society and the actual victims of crime or the criminals alone are, strictly speaking, interested parties in this relationship but also the potential, "latent" victims and criminals through their proneness to risk. Furthermore, it must be noted that not all crimes have a victim, or plaintiff, that is distinguishable from society (from public interests).

If the objective of criminal policy is defined simply as a reduction of the costs of crime, it is purely *utilitarian*. The devices of the policy should be discussed with only this viewpoint in mind. When, however, a distribution as just as possible is included among the objectives in the manner that I have outlined above, the new manner of discussion has also become *justice-oriented*. In other words, the considerations for justice must be taken into account in making policy choices.

It is difficult to define the exact contents of such considerations for justice. The fact, however, that these considerations are rated high as normative arguments even if they could not be justified on utility grounds can be regarded as an essential characteristic. When the concept is defined in this way, its range of meaning is wide. Of the considerations for justice that satisfy the above-mentioned criterion I shall advance, often without any particularization, above all the principles of equality and predictability as arguments. Many other arguments for justice can, completely or in their essence, be reduced to these two.

As reducible arguments of this type can be mentioned the principle of relativity (concerning the crime and its sanction), the legality principle in criminal law ('nulla poena sine lege'), and the considerations for the legal rights of the individual (victim or offender).

Equality is the most important of the arguments for justice above all because accomplishing equality for all citizens in all walks of life ought to view as a central objective in general social policy. Equality must here be understood as relative and not arithmetical. It follows from this that it is not in conformity with justice to distribute the costs of crime arithmetically (uniform), for instance, among all citizens without any regard to their different resources or to other factors that may be significant with regard to their capability to pay the costs (or endure the suffering). To pay attention to factors like those above has been said to mean observation of the 'principle of merit'. Observing the principle of merit often means paying attention expressly to considerations of equity.

It can probably be accepted as one of the basic statements on justice in this paper that *society*, as owner of the largest resources, must carry the principal responsibility for the reduction of the costs of crime. It is just to distribute the costs to be paid in the main by the society. This position can be argued on the grounds of utility alone, because it is possible to regulate crime and its harmful effects effectively only through various measures of the society. Similarly, it is just that the interests of society, that is, the public interests, are most effectively taken into consideration while reducing the costs. A consequence of this basic principle is that the measures intended to reduce the costs of crime must not imperil the accomplishment of society's central objective in criminal policy, the reduction of crime and criminality.

3. While dealing with the measures intended to reduce or distribute the costs, one must keep in mind the abovementioned conception according to which different *societies differ from each other*, even to a large extent, *with regard to the amount and nature of crime* and that *(basic) factors of social structure* explain such differences in the rate and structure of crime. The structural factors are those connected with the economic, social, and political conditions and the changes that take place in them.

The social structural factors mentioned above exert influence, among other things, on the number and nature of social norms, on the learning of norms (socialization generally), and on social control, and, furthermore, on the amount of opportunities for the commission of acts regulated by the norms. By means of these interventionary mechanisms, structural factors determine the amount and nature of crime in each society. To illustrate the matter, I shall in the fol-

lowing, in broad outline, characterize the effect of industrialization, urbanization and other such rapid social changes, due to scientific and technological development. On the other hand, I shall also deal with the determination of the amount and structure of crime that is influenced by those profound changes in the social and political structure that take place when a society turns socialist.

In a society predominantly agricultural and scientifically and technologically undeveloped, there are relatively few social norms and those that do exist are uniform. The learning and social control of norms (and values) take place in childhood and within primary (small) groups. It follows from this that the norms are effectively internalized. Official control mechanisms are not needed or their significance is relatively slight. The opportunities for the occurrence of those acts that the norms regulate are limited. Overall, the total amount of crime is low and the number of different types of crime is small. As a society becomes more *industrialized* and develops scientifically and technologically, there is an increase in the total amount of crime and in the number of different types of crime. A mechanism that affects the increase is, first of all, that the amount of social norms increases and that the norms differentiate particularly in keeping with the growth of (criminal) legislation. An ever-increasing number of acts are considered harmful to society and punishable. The complexity of the social system and the constant birth of new relationships of interdependence and interaction require ever more official control, with consequences prescribed in detail, for the prevention of acts considered harmful.

Secondly, people do not internalize social norms in the same way as before when they are transformed from persons 'directed by tradition or from within' to persons 'directed from without'. The new social, primarily criminal-law norms have very little connection with the other systems of norms (those of religion, or morality). The development can be accounted for by the fact that criminal sanctions, or, official measures of control, in general, can have but little effect through internalization, or, in other words, on the matter of how bad, in a moral sense, the acts are experienced. The socialization and the unofficial control which take place in childhood and in primary groups are of decisive import in the process of internalization of the norms. Their relative importance, however, is decreasing all the time. And the poorer mechanisms the society has available for the internalization of norms, the more crime there will be. After all, the internalization of norms is probably the most effective mechanism influencing the motivation and, thus, behaviour of the human being. At any rate, it is more effective than a strengthening of the unofficial social (group) norms or a threat, through which mechanisms (especially threat) the official control measures primarily work.

Thirdly, the opportunities for acts regulated by social norms increase greatly. Somebody has forwarded the hypothesis that the total amount of crime rises on the one hand when the total amount of both legal and illegal opportunities goes up, and, on the other hand, when the relative amount of the illegal opportunities (for committing a crime) grows compared with the legal (social) opportunities. An observation that verifies the first part of the hypothesis is that, when the standard of living rises, there is an increase in offences against property. On the other hand, it is consistent with the second half of the hypothesis, among other things, that offences against property increase also during periods of scarcity.

There are at least two opinions with different weighting on the question of how a radical transformation in the economic, social, and political structure, accomplished through transformation of a society into a *socialist* one, will affect the rate and structure of crime. According to the Marxist-Leninist conception crime will decrease/disappear when a country turns socialist and ultimately communist. Not even industrialization or other scientific or technological development will necessarily bring about crime or cause an increase in it in a socialistic society. The decrease in crime is accounted for, using the above system of concepts, by the growth of the proportional amount of legal opportunities when compared to the illegal ones. The relative increase in legal opportunities on the other hand is a consequence of the decrease of social inequality which has been achieved primarily by the change in the system of production. The effectiveness of learning social norms and of the control contributes to the outcome.

The common western attitude toward the validity of the above-mentioned Marxist-Leninist conception of crime has been sceptical. According to an opinion that has gained support in the Nordic countries the rate of the so-called traditional crime, at least, is lower in the socialist countries (of Eastern Europe) than in comparable western countries. The reasons for the determination of the level and structure of crime are, however, explained in different ways. According to this opinion with western weighting, the changes in the economic and social structure (the system of production), at any rate, are not in themselves quite as important as they are in the Marxist-Leninist explanation. The low rate of traditional crime in the socialist countries is, according to that opinion, explained by pointing to the effectiveness of the learning of social norms and of control. The effectiveness depends on the centralization of economic and political power and on the ideological uniformity of the norms, made possible by the centralization and, thus, by the fact that the norm-learning process and the control are made official and holistic.

4. I set it as a precondition that the means intended for reducing or distributing the costs will be applicable in *present-day Finland*. In the light of what I said above about the significance of social structural factors (*cf*. especially sections b and c), this precondition sets certain restrictions on the available means. The means must in this case be applicable in a capitalist, pluralistic and scientifically and technologically developed society.

a) *The continuing expansion of the criminal and other controlling legislation can hardly be avoided*. Even if the working of the official control systems could not be effectivized or there would be no desire to do so for reasons of saving money in proportion to the constantly expanding controlling legislation, there are still, in spite of that, numerous devices available for their intensification. The concentration of the work of the police in a more deliberate manner than at present on the reduction of crimes of a certain type really harmful to society is, to my mind, one of the recommendable devices to that end. This concentration, made, to some extent, possible in Finland by a right given to the policemen and their superiors in 1966 to abandon further measures in certain cases concerning lesser offences, would make possible a redirecting of the police work to especially the modern, 'white-collar crimes' (such as tax-evasion, environmental pollution, and offences against occupational safety), and simultaneously would be of considerable importance in lessening the injustices manifest in the selective process of becoming a recorded criminal.

But, the most important thing is to note that official control measures are not the only means for reducing crime. In spite of this, especially the ex post-facto control measures (at their most typical, penalties), of which it is characteristic that they are directed at the criminals, are very easily seen as almost the sole means for regulating crime. This is so even though the official ex post-facto control measures, for reasons for which I will give arguments below, often are not very good to minimize the costs of crime nor just in distributing them. In most cases the corresponding *advance* control measures are probably more efficient and better in conformity with justice as means for reducing crime – often, however, in addition to the ex post-facto measures. As such advance measures I shall in the following discuss official advance control, socialization, and unofficial advance control, measures for preventing opportunities for crime commission, and reduction of social inequality.

Both the utility and justice arguments are in favour of more emphasis on the measures that can be used to reduce crime in advance. The costs of crime are reduced and distributed in conformity with justice, among other things, so that a bigger proportional share of the costs of reducing crime is apportioned

on the advance measures and, correspondingly, the proportional share of the ex post-facto measures is cut down. As for the ex post-facto measures, particularly the costs created by the criminal justice system itself can be reduced in other ways, too. To some extent, it may be possible to give up criminalization wholly (especially 'crimes without victims', like abortion and homosexuality) or to the extent that acts, instead of being made criminal offences, are brought under other corresponding official control systems (such as a control-fee system; for example, no fine for a parking offence, simply a control fee for the violation). To an extent, this has already taken place in Finland.

The costs can also be reduced by adopting various modifications in the criminal justice system. Modifications can take place in the procedure, or in the regulations concerning the criteria of crimes or their sanctions. A modification that could cut down the costs of the procedure is, for instance, a speeding-up and simplification of the trial in criminal cases. Most fines are in our country, in fact, already imposed in such a speeded-up and simplified process. As for the modifications in the descriptions of the criteria of crimes and in the sanctions, they can take place i.a. in such a manner that interpreting the criteria of crime and imposing the criminal sanctions will be, to a greater extent, made subject to judicial discretion and that the sanctions of crime are humanized (mitigated). Through the former measure, changed conditions can better be taken into consideration, which will lessen the need for changing laws. With the help of the second measure, the costs created by the sanctions will be cut down. Measures of both types have been carried out in Finnish legislation.

Various justice and utility arguments set limits to this kind of reduction of the costs created by the criminal justice system. The legal rights of the individual can easily be violated by bringing criminalized deeds under other control systems or by the speeding-up or simplification of the trials in criminal cases. To increase the possibility for individual discretion in criminal trials is against predictability and uniformity and, consequently, in many cases, against equality. A mitigation of the sanctions of a crime would seem to be against their general prevention (deterrence).

It is, however, in place here to note that there have been considerable changes in the evaluation of the justice and utility arguments that are restrictive by nature. Retribution is not any more considered the principal aim (justification) of punishment / the criminal justice system. Instead of the central position of the justice argument, which found expression in the idea of retribution, the prevailing starting point nowadays is the centrality of utility manifest in the idea of general prevention. Among the justice arguments on which the idea of retribution is based, the following are still emphasized in Finland: the

importance of the principle that the liability of the offender depends on his being at fault ('mens rea') and of the principle that the sanction must be in proportion to the crime (relativity). The importance of the considerations for the legal rights of the individual is emphasized, too. But in addition to those, the importance of achieving an equitable judgement is underlined as favouring the possibility of applying discretion in favour of the offender. It follows from this that the mitigation regulations and decisions are not experienced as violating the principle of equality, although they can be felt to be violating that of uniformity, if the offenders on whom they are applied can generally, with good reason, be considered as deserving mitigation (for instance, the young and, possibly, first offenders and those who have committed the crime under very exceptional circumstances).

That the above-mentioned ways of reducing the costs (primarily the mitigation of the sanctions of a crime) are not necessarily against the principle of general prevention is a result of at least the following factors. First of all, the penal value of criminal sanctions is changing. Although the sanctions are mitigated, their value as penalties can stay the same or even increase, because, for instance, a term of imprisonment of equal length is now, in the differentiating society, experienced as more severe. Secondly, in the modern society, there are now more measures available than before to prevent opportunities for crime commission, even if it is true that the teaching of the fact of crimes being prohibited and of their unofficial control are even more difficult to achieve than before (in more detail below under b and c). Thirdly, the general prevention viewpoint is not influenced only by the severity of the sanction but also, and maybe above all, by the degree of the risk of being apprehended. General prevention is increased essentially also through a more effective dissemination of both the abstract and individual risk of sanction, the risk of apprehension, and of the suffering caused by the sanction. Fourthly, there are crimes in connection with which general prevention is less important compared to other social utility considerations (lesser offences) or to considerations for justice (the above-mentioned young, first offenders, and those who committed their crime under exceptional circumstances).

It will be necessary to deal in more detail with the third device above of advance crime reduction, the *official advance control*. Making a control of this type more effective is better in conformity with justice to all than retaining a severe sanction, but with a low risk of apprehension, and poorly known as regards the threat of sanction or the risk of apprehension, or even to make such a sanction more severe. The costs created by official advance control will fall on society in the first place (for instance, when the work of the police is

made more effective) and/or on potential criminals (for instance, when they are bothered by traffic control measures). On the other hand, the official ex post-facto control measures, such as the criminal sanctions, create costs that are distributed among victims, society, and offenders. The costs falling on the victims of crime are, in the first place, those caused by the crimes to them, and those falling on the society are the ones engendered by the control of crime; the criminals themselves suffer from the ex post-facto control measures. Under the circumstances, the costs created by the advance control measures are distributed more evenly, among more people, than those created by the ex post-facto control measures. In addition to that, the costs/sufferings created by the former strain, on the average, less the individual person than those caused by the latter group.

b) *It will probably be difficult to make the internalization of the criminal-law norms more effective* by making the learning of them (*socialization*) or *unofficial advance control* more intense. To some extent, however, it may be possible to have some effect on how effectively and how strongly emphasized the norms that prohibit crimes are learned at home and at school throughout the education process. To mention a further example, it is probably possible indirectly to develop the attitudes of the young people more favourable toward society and to sustain an unofficial crime prevention control by creating conditions for an enlargement of interaction within small groups favourably disposed towards society (i.a. through the devices of subsidizing voluntary youth or similar organizations and of providing opportunities for the young to spend their spare time).

On the other hand, in our western society which has a differentiated division of labour and emphasizes the rights of individuals to their varying beliefs and ways of life, many such arrangements as are typical of the socialist countries will probably not be possible, especially such as to charge members of work communities or persons responsible for organizing leisure activities with strict tasks of (re)socialization and advance control. Even a slight deviation from the established division of labour of the kind that would enable policemen to participate in the sparetime activities of the young, with the aim of promoting socialization and control, has given rise to suspicions as to the suitability of that kind of activity in our value system. There are, however, reasons for taking solutions like this increasingly under serious consideration.

Above I have already dealt with the utility arguments that favour the effectivization of the learning of norms and of the unofficial advance control. Arguments of the same kind as for developing advance control measures can

be presented to support the effectivization from the viewpoint of justice. The costs of the kind of effectivization, as mentioned above, are distributed among a greater number of people than those created by the effectivization of the official ex post-facto control measures and they are, on the average, a smaller burden on the individual. It can be noted that the unofficial ex post-facto control measures (such as the publication of the names and the loss of job) ought to be abolished in increasing measure, because they cause accumulation of consequences.

c) *There are, to an increasing degree, measures available to prevent crimes from taking place*, in other words, for regulating the opportunities for their occurrence. The importance of advance prevention measures is growing constantly. It is not always easy to distinguish the measures intended to prevent crime from occurring from the official advance controls. I consider as typical of the latter group that they are effectivized by a threat of the ex post-facto control measures, which are directed at the criminals and, when needed, by the fact that they are carried out. The measures intended to prevent opportunities for crime commission I define as not requiring control measures to be effective. It is another matter, however, that such control measures will probably increasingly be enacted (primarily to be focused on the potential victims of crime).

In the social decision-making process concerning crime a value and cost conscious school of thinking will probably gain ground. This means that when several alternative solutions are available for the society, the costs of these solutions and their applicability will be compared with different values and the decision will be made on the basis of this comparison. In accordance with this line of thinking, the costs of preventing opportunities for crime on the one hand and those of the official advance or ex post-facto control measures (or those of developing prevention and control) will be compared with each other and the solution that is the most advantageous, with regard to costs and benefits, will be accepted. It can be anticipated that, from the utility viewpoint, it will often be more expedient to develop measures to prevent opportunities for crime, or the official advance control, than the official ex post-facto control. This is the case also as regards the principle of justice. Above I have already given an account of those considerations of justice that favour the development of the advance control. The costs caused by preventing opportunities for crime commission are, in the first place, borne by the potential victims of crime (for instance, when they are required to take precautions) and/or by the society (for instance, when safe roads and vehicles are constructed). Thus the costs are distributed among a greater number of people than compared with the official ex post-facto control and, on the average, they are a smaller burden on the individual.

On the other hand, justice considerations (the principle of equality, and of relativity) can militate against abandoning criminalization of single acts or refraining from it with regard to acts equally harmful (or from some other ex post-facto control measure or against mitigating control measures) in order to develop the prevention of opportunities for crime commission or official advance control. This might mean, for instance, that some new act that has proved harmful to society would not be criminalized, but, instead, the measures taken to prevent opportunities for committing that act would be declared adequate. At the same time, however, a traditionally criminalized act with corresponding harmfulness might still carry a severe penalty. Therefore, the prevention of opportunities for committing crime, or the official advance control, ought to be manifest *throughout* in the official ex post-facto control measures, for instance, as a continuing mitigation of the criminal sanctions.

d) *The measures intended to reduce social inequality*, in other words, measures of general social policy, those intended to improve social opportunities and, in this way, to increase equality have also, in a wider sense, the objective of preventing opportunities for committing crimes. Such measures must be considered among the primary means for reducing crime particularly for the following reasons of justice: The principle of a just distribution of the costs of crime will be best carried out through a reduction of social inequality, because, in this way, not only are the costs of crime shared but social justice is advanced, too. This is connected with the fact that society will be changed through measures of general social policy; it is not any more individuals who have to adjust themselves to society, which is characteristic of socialization and of official or unofficial control among the means of crime reduction dealt with above. Adjustment measures will place individuals in unequal positions with regard to their right for self-determination; the failure to become adjusted can be found to have been caused by the society, not always by the individual.

From the point of view of utility, it ought to be noted that, according to the theories of control, subculture, and social reactions which have lately gained wide support in criminology, the environmental factors that regulate social opportunities do not exert a direct influence on the social singling-out process of becoming a criminal. This happens through various socio-psychological processes: for instance, unsuccessful socialization and unofficial control in childhood and in primary groups (control theories), "successful" socialization and unofficial control in delinquent groups (subcultural theories), and the labelling processes of (near) environment's reactions (social reactions theories).

A state of things which is based on this notion will have a limiting effect on

the short-range efficiency of the above-mentioned measures that are intended to change society. On the other hand, it is probably so that the more extended the observed period is the better results the said measures will, relatively speaking, bring. It must also be pointed out that social opportunities as well as the official control can easily be influenced through measures by the society when so desired; the case is different with regard to socialization in childhood and in primary groups and to unofficial control (*cf.* under section b above) and also with regard to the reactions of the social environment.

5. In the foregoing section (4), I have kept under consideration the role of the society in the reduction and distribution of the costs of crime. Regarding the *victims of crime* and the *offenders* one must note that the most advantageous way of reducing the costs – even more unquestionably as was the case with society – is to prevent, in advance, crimes from taking place, in other words, the advance measures for reducing crime. The costs of the reduction of social inequality, of (other) prevention of opportunities for crime commission, of socialization, and of advance control will not at all fall on them. Instead, the costs created by these measures will be distributed, as mentioned above, among the potential victims and/or potential offenders (and/or society).

If the advance prevention of crime fails, the most important thing from the point of view of the victims is to receive compensation for the injury and loss wrought by the offenders. Making sure that the victims of crime will receive their *compensatory damages* will, to my mind, be one of the most important means in the near future of distributing the costs of crime among the various parties in as just a way as possible. The most urgent thing is to make sure that the compensatory damages awarded to the victims of crimes of violence are paid. With every right, one should expect a vigorous participation by the society in arranging the matter of speedy compensation. In Finland this matter is being studied by a state committee.

In corresponding cases it is in the interests of the offenders that the criminal sanction causes them as little suffering as possible and that it reduces as much as possible their risk of reverting back to crime, that it advances their resocialization in society, and, in the best possible way, takes into consideration their legal protection. Of these elements *the minimization of suffering* is the one most purely in the interests of the offender alone; the remaining ones – in the order in which I have listed them – are more clearly also in the interests of society. The importance of the above-mentioned element is underlined by the fact that it is not undisputed in the light of present research what type of criminal consequence is the most advantageous in reducing the risks for recidivism.

And lastly, it must be also noted that, in the debate concerning Finnish criminal policy in the last few years, the principle of relativity and the accomplishment of the offender's legal rights have been found central among the considerations for justice. There has been increasing criticism lately of the so-called protective measures (such as isolation of a recidivist prisoner in a special institution for an indeterminate term) and of the coercive measures based on rehabilitative considerations (such as extending the prescribed sentence of a youthful prisoner).

That the consequences of crime are changed in such a way as to cause as little suffering to the offender as possible – for instance, by reducing their prisonization, the accumulation of the consequences, and other effects which cause stigmatization – is limited by the utility and justice considerations of the society (and the victims of crime). I have, however, above, (section 4; a) attempted to demonstrate that the system of criminal justice particularly can be modified in this sense rather extensively without violating considerations of the said type.

2. The Role of Criminology in the Development of Criminal Policy*

1. Criminology has traditionally a close connection with criminal policy. In this context, I define criminology as a discipline where, primarily, the following crime-related phenomena are subjected to empirical study: causes and manifestation of criminality; measures to be taken in regard to an offender and their effects; the relationship between an offender and his victim. By criminal policy, on the other hand, I mean the activity aimed at the settling of crime problems, particularly the activity carried on by the public authorities.

In the course of this seminar, several references have been made to *Franz von Liszt*, the German scholar in penal law, and the sociological school of penal law originating from him. In their day, the thoughts represented by this school had an impact on the shaping of penal legislation in Finland as well as in Hungary. It has been said[1] that von Liszt and other scholars affiliated with this school were able to fruitfully combine the results of the main trends in criminology of that time. Those criminological trends consisted of the Italian orientation towards biology (whose best-known representative was *Cesare Lombroso*) and the French orientation towards sociology (i.a. *A. Lacassagne*).

Dr. *Miklós Vermes*, however, aptly points out in his paper[2] that other factors of development too exert an influence on the adoption of a criminal policy – not only to a minor extent. The socio-economic factors mentioned by Vermes may have been neglected, as a rule, in Western criminology. For example, it is usual to be satisfied with explaining the cognitive and ideological factors that form a background for certain reforms in penal law.

The said cognitive factors are not to be limited to systematic knowledge based on empirical research. They also cover the experience derived from social and judicial praxis, i.e. the so-called everyday experience. Since it is

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* Original source: In E. Backman, P. Koskinen, R. Lahti, L. Lehtimaja: *Finnish Criminal Policy in Transition*. Publications of the Department of Criminal Law, University of Helsinki, No. 4. Helsinki 1979, pp. 33–44.

[1] See Stephan Hurwitz and Karl O. Christiansen, *Kriminologi I*, 3rd ed. Copenhagen 1968, p. 51.

[2] Vermes, *Die Rolle der Kriminologie bei der Gestaltung der Kriminalpolitik*.

a rule for the time being and probably for long in the future as well that our criminological knowledge pertaining to the invariant features of criminality is limited and fairly general by nature, it is often necessary to resort to knowledge based on everyday experience. Let us take general prevention as an example. *Johannes Andenaes*, the Norwegian scholar internationally known as a student of this problem, points out that although the study of general prevention has been, in the course of the last ten years, considerably more intensive than earlier, there has occurred no breakthrough of knowledge similar to that in regard to the research findings concerning the individual preventive effects of penal sanctions. "Research has given scraps of knowledge that can be used for testing as well as supplementing those common sense -marked arguments that we are still willing to be referred to".[3]

A variety of factors, of course, determine the extent to which criminological research knowledge is applied to decision-making. The utilization of research can be hampered by organizational, cognitive and attitudinal barriers. In Finland, for example, matters pertaining to criminality are divided among several branches of state administration, in the absence of an adequate co-ordination of the activities carried on within the various branches of administration. Owing to a continuous increase in the amount of criminological knowledge, it is more often possible than before to base a plan of criminal policy on systematic scientific knowledge. Nevertheless, it must be borne in mind that criminal policy will be dependent on value judgments in the future as well. Professor Andenaes points out that a presumable increase in the utilization of research knowledge does not on any account mean a decrease in the significance of value judgments, but rather brings these questions out into the open more clearly than before.[4]

One who does not believe in the basic rationality of human behaviour will assume a reserved attitude in regard to the "scientificization" of decision-making. In an appraisal of the relationship between Finnish alcohol research and decision-making, Professor *Erik Allardt* referred to *Vilfredo Pareto*, a classic of sociology. According to Pareto's view, the intellectual life of society is characterized by fluctuations similar to those in economic life. Along the same lines with Pareto, Allardt regards the liberalization of the Finnish alcohol legislation at the end of the 1960's as a manifestation of a more general intellectual trend rather than as an application of research knowledge. The climate of opinions

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[3] Andenæs, Nyere forskning om almenprevensjonen – status og kommentar, *Nordisk Tidsskrift for Kriminalvidenskab* 1977 (Copenhagen), p. 95.

[4] Andenaes, *Punishment and Deterrence*, Ann Arbor 1974, p. 170.

is conditioned by a wavelike motion incapable of being calculated in advance. To a large extent, research orients itself in accordance with this motion and, in a manner of speaking, legitimates it.[5] On the other hand, another Finnish sociologist, *Klaus Mäkelä*, has stressed that the swings of opinion in alcohol policy must be viewed as part of a cultural change in the Finnish society; at bottom this ideological process is regulated by a structural change of society.[6]

It must not be forgotten that the interaction between criminology and criminal policy is reciprocal. Not only does criminology affect criminal policy, but also vice versa.

2. The orientation of Scandinavian criminology has been notably influenced by the Scandinavian Research Council for Criminology, which was established in 1961. This council operates under the supervision of the Ministries of Justice in the Nordic countries. It finances criminological research and organizes research seminars each year. It was the need to take care of the contacts with this council that served as a chief impulse for us in 1963 to establish the Institute of Criminology in Finland (since 1974 The Research Institute of Legal Policy). The Research Institute of Legal Policy operates subject to the supervision of the Ministry of Justice, even though the institute can be regarded as semi-independent (it is led by a Governing Board appointed by the Council of State). In the beginning of the 1960's, there were aspirations to establish the institute in connection with the university, but this endeavour failed. At present, there are no professorial chairs in criminology in the Finnish universities. To a great extent, criminological research has been carried on in this institute or with its co-operation.

The above-related organization of research work – the fact of where research has been pursued – has exerted an influence on the selection of research topics as well as on the goal of the research. As law-drafting in the field of penal law was being speeded up, the institute began, to a considerable degree, to direct the course of its research activity towards studies ancillary to law-drafting. At the same time, many of the researchers employed by the institute were recruited to take part in the law-drafting. Professor *Inkeri Anttila*, the director of the institute since its beginning, emphasizes that in a small country like Finland, the impact

[5] Allardt, Alkoholitutkimussäätiön yhteiskuntatieteellisen tutkimuksen heijastusvaikutukset, *Alkoholipolitiikka* 1976 (Helsinki), p. 17 f.

[6] Mäkelä, Alkoholipoliittisen mielipideilmaston vaihtelut Suomessa 1960- ja 70-luvulla, *Alkoholipoliittisen tutkimuslaitoksen tutkimusseloste* n:o 98, Helsinki 1976 (mimeographed), p. 18.

of research cannot be evaluated independently of the impact of the researchers.[7]

In the beginning of the 1970's, the Institute of Criminology was engaged in a study concerning the interaction of criminological research on one hand and decision-making in criminal policy on the other hand. The study made up a part of a Dutch–Finnish research project launched by the United Nations Social Defence Research Institute in Rome.[8] The Finns studied, among other things, the relationship between individual research projects and decision-making processes. It appeared to be difficult to demonstrate a clear-cut causal relation between a certain individual study and a legislative measure. In several instances, it is obvious that research has exercised an influence on the shaping of a pattern of thinking, an ideology, thus being able to break ground for certain reforms.

The decriminalization of drunkenness in 1968 can he mentioned as an example of a law reform that was essentially based on the findings of a criminological study. In the government bill, an explicit reference was made to the results of a study by *Patrik Törnudd*.[9] According to these results, penalties inflicted for drunkenness are likely to have no individual preventive effect or else this effect is insignificant. Furthermore, the punishability of drunkenness as such, apart from apprehension by the police, does not seem to have a general deterrent effect – at any rate not one worth mentioning.

It is to be noted that investigations most directly ancillary to everyday decision-making are carried on in the various divisions of the Ministry of Justice. In the 1970's, the Ministry has recruited researchers with education in social sciences and some of the divisions even include research units.

During the last few decades, criminology has been to a great extent sociologically oriented not only in Finland but also elsewhere in the Scandinavian countries. Accordingly, the proximity of criminology to the study of deviant behaviour and social control has been emphasized. Since the 1960's, Scandinavian criminology has focused, among other things, on hidden criminality, the administration of justice and the victims of crimes as well as the damages caused by crimes. Scandinavian Studies in Criminology, a periodical published by the Scandinavian Research Council for Criminology, provides a good gen-

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[7] Anttila, The Relationship between Research and Criminal Justice Policy, in Anttila, *Papers on Crime Control 1977–1978*, Research Institute of Legal Policy no. 26, Helsinki 1978 (mimeographed), p. 89.

[8] *Criminological Research and Decision Making*, United Nations Social Defence Research Institute, Publication no. 10, Rome 1974 (mimeographed).

[9] The English version of this study: Törnudd, The Preventive Effects of Fines for Drunkenness, *Scandinavian Studies in Criminology* II, Oslo 1968, p. 109 ff.

eral view on Nordic criminology. By the end of the year 1978, six volumes of this publication had come out.[10]

3. I shall scrutinize, more closely, two features that are especially characteristic of Finnish criminology oriented towards criminal policy. In the first place, a variety of attempts have been made to differentiate the scope of criminological study. It is understood that criminality involves a relationship of interaction among the offender, his victim, the official controlling machinery and the surrounding society in general. Furthermore, various levels of explanation in regard to crime are distinguished and several factors are assumed to affect criminality in different ways depending on the particular groups of offenders or offences.

In criminology, we are not to confine ourselves to the question why some individuals become offenders and others do not; it is not enough to search for the causes of crime among the characteristics of the offenders or their close environment. Furthermore, there is interest in the mechanism by which the level of criminality is determined, i.e. in the differences in the volume and structure of criminality that exist among diverse societies or collectivities. As far as the first-mentioned type of crime analysis is concerned, we no longer content ourselves with the question why some individuals become offenders, but often like to pose the problem in terms of why some people get singled out as criminals in a selective process. As studies in victimology have grown in importance, we have been confronted by a parallel question of great significance: why are certain individuals singled out as victims of crime?[11]

In its report, the Finnish Penal Law Committee (1977) made such a distinction among the levels of crime explanation, most significant in view of the consequences in criminal policy. As a rule, the Committee regarded observations pertaining to the characteristics of collectivities as more important, from the viewpoint of criminal policy, than those dealing with the characteristics of human individuals. It has been stated as an observation of the first-mentioned category that the modernization of society (i.a. urbanization and a transition in the employment structure) coupled with simultaneous changes in the systems of social control explains the major part of the fluctuations in the volume and structure of Finnish criminality. According to an observation of the latter kind, individuals who are, for example, handicapped in regard to their linguistic

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[10] See also *Some Developments in Nordic Criminal Policy and Criminology*, Scandinavian Research Council for Criminology, Stockholm 1975.

[11] See Raimo Lahti, On the Reduction and Distribution of the Costs of Crime, *Jurisprudentia* II, Helsinki 1972, p. 298 ff. See also Törnudd, The Futility of Searching for Causes of Crime, *Scandinavian Studies in Criminology* III, Oslo 1971, p. 23 ff.

capacity, disturbed in their human relations or short-spanned in their behaviour, are somewhat more often singled out as offenders than the rest of the population, no matter if they live in a society with high or low criminality. The Committee considers it important that the resources of criminal policy as well as these of other social-development policy are more decisively than before allocated to factors influencing the general level of criminality; accordingly, measures centered on individuals will diminish in importance.

In the second place, I wish to point out that criminology has been more and more influenced by the research methods employed in economics and in social development planning. "The economics of criminology" is an expression recently coined in international discourse. In Finland, this development is displayed in the fact that we have started applying the general methods of social development planning (like cost–benefit analysis and system analysis) or – maybe more precisely – the pattern of thinking manifested by these methods, to planning in the sphere of criminal policy as well. For example, this pattern of thought can be traced in the report of the Penal Law Committee as I shall demonstrate below.

It is pointed out in the report of the Penal Law Committee that while the number of penal provisions has been growing, the societal resources available for the regulation of criminality have also been on the increase. Moreover and at the same time, the general knowledge of the direct and indirect effects of diverse societal measures has advanced and grown more versatile. As a result of this, when we consider the social functions and general steering of our criminal justice system, we seem to encounter more numerous alternatives than before and we have to weigh those alternatives in regard to more viewpoints than before. While doing so, we can realize the alternative nature of the means of penal law in relation to other measures in social-development policy. Furthermore, we begin to achieve more fixity of purpose in considering the ways – how justly – the criminal justice system is distributing obligations and burdens to the various groups of society. This viewpoint is especially significant in the process of reforming penal provisions – while resolving the problem: what behaviour is to be punished and how severely?

As the Penal Law Committee was discussing the need of penal provisions in various spheres of social life, it endeavoured to apply a method of scrutiny based on the above standpoints. Above all, heed was given to housing, labour relations, traffic, environment and consumer protection. This scrutiny involves the following stages. In the first instance, we attempt to locate those forms of behaviour that appear to be the most harmful as judged in the light of the specific goals of each sphere of life. Does a certain behavioural phenomenon

harm or endanger the interests of an individual or society and, if so, to what extent? Secondly, we must evaluate the blameworthiness of those harmful acts. Then we are to discuss for example the actual freedom of choice on the part of the human agent, the circumstance whether it is reasonable to pronounce a reproach on the agent. Thirdly, we must embark on a systematic weighing of the pros and cons entailed by a criminalization, whether they occur in the fields of legal or social development policy. Any means of penal control must adapt its purpose with a view to the other possible methods of regulation (supervision, technological or administrative arrangements etc.). Furthermore, we are obliged to pay attention to the fact that it is only to a limited extent that the means of penal law can be resorted to. In addition, a penal regulation is subject to special restrictions (e.g. a penal provision must never leave too much room for interpretation).

There has occurred a wish to emphasize the importance of cost-benefit thinking of a related kind in defining the specific objectives of criminal policy as they are derived from the general goals of social development policy. The minimization of the harmful effects of criminality as well as those entailed by the measures of its control is regarded as better worth striving for than the minimization of criminality as such. Even if we adopt this view, the minimization of criminality as a rule remains the best way of minimizing the harmful effects of criminality as well. But the latter goal can also be pursued for example by ensuring the compensation for the damages inflicted on the victims of crimes and by relieving any unnecessary suffering caused by controlling measures to their subjects. In order to stress the importance of diverse viewpoints of justness, we speak not only about the minimization of the harmful effects of criminality but also about their just distribution to the various parties (primarily among the offenders, the victims of crimes and society at large).

It was originally a Finnish sociologist, Patrik Törnudd, who, at the turn of the 1970's, launched a definition of the goals of criminal policy pertaining to the reduction and distribution of the costs of crime.[12] This definition was adopted by the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1975, in a report prepared by its section dealing with the economic and social consequences of crime and endorsed by the Congress.[13] It is recommended in the same report that cost-benefit thinking be

[12] See Törnudd, *Scandinavian Studies in Criminology* III, p. 29 ff. See also Lahti, *Jurisprudentia* II, p. 298 ff., and Anttila, *Papers on Crime Control 1977–1978*, p. 85.

[13] See *Economic and Social Consequences of Crime: New Challenges for Research and Planning*, A/Conf. 56/7 (1975), p. 64 ff., and *Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, A/Conf. 56/10, New York 1976, p. 46 ff.

encouraged. A discussion on the attitude-related barriers to such thinking is included in the report. It is stressed that "economic costs are only a part of the measurable costs along the whole social cost continuum".

It remains a problem that the various viewpoints to be taken into account in criminal policy are seldom commensurable. This fact is apt to stress the significance of value judgments in the resolutions of the decision-makers: at bottom, the latter must rest on value judgments in their task of resolving which viewpoints, on the whole, will be taken into account in criminal policy and how great a weight will be afforded to them.

3. The Utilization of Criminological Research in Finnish Criminal Law*

1 THE RELATIONSHIP BETWEEN CRIMINOLOGY AND PUBLIC POLICY IN FINLAND – SOME GENERAL REMARKS

Finnish criminology and Finland's crime control policy correspond in many respects to those followed by her Scandinavian neighbours. In order to explain this similarity, two background factors ought to be mentioned. First, all of Scandinavia shares a common cultural and legal heritage. Second, there has long been intensive cooperation in legal matters between the Scandinavian countries.

The orientation of Scandinavian criminology has been notably influenced by the Scandinavian Research Council for Criminology, which was established in 1962 and operates under the supervision of the Ministries of Justice. The need to take care of this council's contacts served as a primary motivation to establish the Institute of Criminology in Finland in 1963, known as the Research Institute of Legal Policy since 1974. This institute operates under the supervision of the Ministry of Justice, even though it can be regarded as semi-independent.

During the last few decades, criminology has been to a great extent sociologically oriented not only in Finland but also elsewhere in the Scandinavian countries. Accordingly, the proximity of criminology to the study of deviant behaviour and social control has been emphasized. Since the 1960's, Scandinavian criminology has focused, among other things, on hidden criminality, the administration of justice and the victims of crimes as well as the damages caused by crimes.

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* Original source: A Paper presented at the Ninth International Congress on Criminology, Vienna, 25–30 September 1983. International Society of Criminology. – Published in: *Towards a Total Reform of Finnish Criminal Law*. Edited by Raimo Lahti and Kimmo Nuotio. Publications of the Department of Criminal Law and Juridical Procedure, B:2. University of Helsinki 1990, pp. 39–54.

Another characteristic of Scandinavian criminology has been its orientation towards applied research. This holds true especially in Finland, where there is no university chair in criminology (i.e., no one who specializes only in this field). To a great extent, criminological research is carried out in the Research Institute of Legal Policy or with its cooperation. The organization of the research has an influence on the selection of research topics as well as on the goals of the research.

With the current emphasis on applied research there is a primary interest in the probable effects of certain crime prevention measures. Theories concerning these effects generally differ from the theories about the causes of crime. Nevertheless, the increased consideration given to situational factors explaining crime has brought theoretical criminology closer to the research oriented toward criminal policy.

As criminal law reform was accelerated in Finland in the 1970's, the abovementioned institute began, to a considerable degree, to direct the course of its research activity toward studies ancillary to law reform. At the same time, many of the researchers employed by the institute were recruited to take part in the law-drafting. Professor *Inkeri Anttila*, the director of the institute from 1963 to 1979, has stated that in a small country like Finland the impact of the research cannot be evaluated independently from the activity of the researchers.

At the beginning of the 1970's, the institute was engaged in a study concerning the interaction of criminological research on one hand and decision-making in criminal policy on the other. Among other things, the relationship between individual research projects and decision-making process was studied. It appeared to be difficult to demonstrate a clear-cut causal relation between a certain individual study and a legislative measure. In several instances, it is obvious that research has exercised an influence on the shaping of a pattern of thinking, an ideology, thus being able to break ground for certain reforms.

The decriminalization of drunkenness in 1968 is a clear example of a law reform that was essentially based on the findings of a criminological study. The bill itself contains a reference to the results of a study done by *Patrik Törnudd*, a researcher of the Institute of Criminology. According to these results, penalties inflicted for drunkenness are likely to have no individual preventive effect or else this effect is insignificant. Furthermore, the punishability of drunkenness as such, apart from apprehension by police, does not seem to have a general deterrent effect – at any rate not one worth mentioning.

It must be noted that penal or control measures are not the only means for reducing crime. For example, the Research Institute of Legal Policy acted as scientific advisor to a commission appointed by the city of Lahti from 1978 to

1982. The commission was instituting crime prevention measures in the city. On the basis of eight research reports, the commission proposed that several measures be taken in order to improve social conditions, to develop safer residential areas, to reduce opportunities for crime, to heighten community awareness, and to take care of prisoners returning to the community.

Investigations directly ancillary to everyday decision-making are best left to those organizations where public policy decisions are made. In Finland the branches of public administration in the field of criminal policy, primarily the Ministries of Justice and of the Interior, have recruited researchers with education in social sciences, and some of their divisions even include special research units. – In 1982, the Ministry of the Interior planned a large campaign against violence and vandalism. With the campaign's conclusion the effects will be evaluated.

2 PROBLEMS OF RESEARCH UTILIZATION

A variety of factors determine the extent to which criminological research knowledge is applied to decisionmaking. The utilization of research can be hampered by organizational, cognitive and attitudinal barriers. In Finland, for example, matters pertaining to criminality are divided among several branches of state administration. Nevertheless, there is not an adequate coordination of the activities carried out within the various branches.

The cognitive factors are not limited to systematic knowledge based on empirical research. They also cover the experience derived from social and judicial praxis, i.e., the so-called everyday experience. Because our criminological knowledge pertaining to the invariant features of criminality is limited and fairly general by nature, it is often necessary to resort to knowledge based on everyday experience. Let us take general prevention (deterrence) as an example. Although the study of general prevention has been, in the course of the last fifteen years, considerably more intensive than earlier, no breakthrough of knowledge has occurred similar to the research findings concerning the individual preventive effects of penal sanctions.

Owing to a continuous increase in the amount of knowledge gained by criminological research, it is often more possible than before to base a plan of criminal policy on systematic scientific knowledge. Nevertheless, it must be kept in mind that criminal policy will be dependent on value judgments in the future as well. Professor *Johannes Andenaes*, a Norwegian legal scholar, points out that a presumable increase in the utilization of research knowledge does

not on any account mean a decrease in the significance of value judgments, but rather brings these questions out into the open more clearly than before.

One who does not believe in the basic rationality of human behaviour will assume a reserved attitude in regard to the "scientificization" of decision-making. In an appraisal of the relationship between Finnish alcohol research and decision-making, Professor *Erik Allardt* from the University of Helsinki referred to a renowned sociologist, *Vilfredo Pareto*. According to Pareto's view, the intellectual life of society is characterized by fluctuations similar to those in economic life. Along the same lines with Pareto, Allardt regards the liberalization of the Finnish alcohol legislation at the end of the 1960's as a manifestation of a more general intellectual trend rather than as an application of research knowledge. The fluctuation of opinions is characterized by a wavelike motion incapable of being calculated in advance. To a large extent, research orients itself in accordance with this motion and, in a manner of speaking, legitimates it. (On the other hand, another Finnish sociologist, *Klaus Mäkelä*, has stressed that the changes of opinion in alcohol policy must be viewed as part of a cultural change in Finnish society; basically, this ideological process is regulated by a structural change of society.)

3 CRIMINOLOGICAL PATTERNS AFFECTING FINNISH CRIMINAL POLICY

The patterns of Finnish criminology can be observed in the report of the Criminal Law Committee (1977) which was assigned the preparation of an integrated basis for reform of criminal law. In this section, I shall comment on two features that are especially characteristic of Finnish criminology and its orientation towards criminal policy. In the following sections 4–5, I will describe in greater detail how these factors can be examined in the reform of criminal law.

First, a variety of attempts have been made to differentiate the scope of criminological study. It is understood that criminality involves a relationship of interaction among the offender, his victim, the agencies of crime control, and the surrounding society in general. Furthermore, several explanations regarding crime stand out and several factors seem to affect criminality in different ways, depending on the particular groups of offenders or offences.

In criminology, we cannot confine ourselves to the question of why some individuals become offenders and others do not. It is not enough to search for the causes of crime among the character traits of the offenders or their immediate environment. Furthermore, there is interest in the process in which

the level of criminality is determined, i.e., the differences in the amount and nature of crimes that exist among different societies (known as a macro-level of explanation).

As far as the micro-level crime analysis first mentioned is concerned, we no longer content ourselves with simply questioning why some individuals become offenders, but often like to pose the problem as to why some people get singled out as criminals through a selective process. As studies in victimology have grown in importance, we have been confronted by a parallel question of great significance: why are certain individuals singled out as victims of crime?

Secondly, I wish to point out that criminology has been influenced more and more by the research methods employed in economics and in social development planning. "The economics of criminology" is an expression recently coined in international discourse. In Finland, this development is observed by the fact that we have started applying the general methods of social development planning, like cost-benefit analysis and system analysis, to criminal policy (or perhaps more precisely, the pattern of modern thinking manifested by these methods).

The cost-benefit approach is revealed through defining the specific objectives of criminal policy as they are derived from the general goals of social development policy. The minimization of the harmful effects of criminality and effects caused by the measures of its control are regarded as more worth striving for than the minimization of criminality as such.

Even if we adopt this view, minimizing criminality as a rule remains the best way of reducing its harmful effects. More examples of how this can be attained are by ensuring there is compensation for the damages inflicted on the victims of crimes and by relieving any unnecessary suffering caused by penal sanctions and other control measures on the offenders. In order to stress the importance of diverse viewpoints of justice, one speaks not only about the reduction of the harmful effects of crime, but also about the distribution of these effects to the various parties (primarily among the offenders, the victims and society at large.)

It was originally a Finnish sociologist, Patrik Törnudd, who, at the end of the 1960's, defined the goals of criminal policy pertaining to the reduction and distribution of the costs of crime. This definition was adopted by the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1975, in a report dealing with the economic and social consequences of crime, which was endorsed by the Congress. It is recommended in the same report that the cost–benefit approach be encouraged. A discussion on the attitude-related barriers to such an approach is included in the report. It is

emphasized that "economic costs are only a part of the measurable costs along the whole social cost continuum."

It remains a problem that the various costs to be taken into account in criminal policy are seldom commensurable. This fact is apt to stress the role value judgments play in the resolutions of the decision-makers: they use these value judgments in their task of resolving which viewpoints, on the whole, will be taken into account in criminal policy and how heavily they will be stressed.

4 THE UTILIZATION OF CRIMINOLOGICAL RESEARCH IN THE FINNISH CRIMINAL LAW COMMITTEE REPORT

In its report, the Finnish Criminal Law Committee made a distinction among the different levels of explanation of crime described above. This distinction is quite significant in view of the consequences of criminal policy. The committee regarded observations pertaining to the characteristics of society as more important, from the viewpoint of decision-making, than those dealing with the characteristics of individuals.

It has been observed in the first-mentioned category that the modernization of society (i.e., urbanization and a transition in employment structure), coupled with simultaneous changes in the systems of social control, explain the major fluctuations in the amount and nature of Finnish criminality. One observation concerns the characteristics of individuals, who are, for example, handicapped in regard to their linguistic capacity, disturbed in their human relations or unpredictable in their behaviour. They are more often singled out as offenders than the rest of the population, no matter if they live in a society with high or low criminality.

The committee considers it important that the resources of criminal policy as well as those of other social-development policies are more decisively allocated to factors influencing the general level of criminality. Accordingly, measures centered on individuals will diminish in importance.

It is pointed out in the report of the Criminal Law Committee that while the number of penal provisions has been growing, the societal resources available for the regulation of criminality have also been on the increase. At the same time, the general knowledge of the direct and indirect effects of diverse societal measures has advanced and grown more versatile. As a result, when we consider the social functions and general direction of our criminal justice system, we seem to encounter more numerous alternatives than before and we

have to weigh those alternatives with more viewpoints as well. While doing so, we can realize the alternative nature of penal measures in relation to other measures in social-development policy.

Furthermore, we begin to achieve a fixed purpose in considering the ways the criminal justice system is dispensing obligations to various groups in society. This viewpoint is especially significant in the process of reforming penal provisions while resolving the problem of what behaviour is to be punished and how severely.

The report of the committee supports proposals based on considerations of appropriateness with arguments of justice; the committee sees a degree of parallelism between utilitarian and justice-based legal thinking. The primary justification for the criminal justice system is a utilitarian one, even though the means of criminal law are not generally an effective regulator of the amount or nature of criminality. The threat of punishment (and on a more general level, the criminal justice system) has significance primarily in teaching basic social norms (prohibitions) from the point of view of social order; it demonstrates the limits of norms in this sense. Punishment has a considerable indirect effect, since the authoritative reproach expressed in punishment shapes the legal and moral concepts of citizens.

The idea of general prevention is associated with the working of the penal system rather than with the severity of sentences. The committee believes that general prevention has often been one-sidedly tied in with the question of the harshness of the sentence. It considers, however, that the harshness of punishment has relatively little effect on the total level of criminality. It is true that by regulating the severity of the threat of punishment one can influence those offenders who act deliberately, and changes in the severity of the punishment have significance in their attempt to indicate the relative harm of various offences. The committee especially emphasizes the importance of quality police detection, a quick reaction by society, and the proper function of the penal system in regard to its citizens. Also, attention should be paid to the actual process of pronouncing the sentence, as well as to the social significance of related measures, e.g., upholding official disapproval even in mild measures.

In opposing individualized and indeterminate criminal sanctions, the committee points out the negative research results. Even though research has been increasingly carried out on the individual deterrent effect of different methods of treating offenders, no methods have been found which would generally have a clear and positive effect on the rate of recidivism for an individual (i.e., rehabilitation does not work).

On the other hand, the report of the Criminal Law Committee emphasizes the demands for justice and the value of humanity, which are placed on the criminal justice system as a whole and on the punishment in particular. Only a criminal justice system which fulfills these demands can effectively develop proper attitudes and behavioural norms. The most important question concerning justice has to do with the structure of criminalization, in other words what is punishable and how severe the threat of punishment should be. The most important function of the criminal justice system lies here. Based on the principle of justice, it is also important that the concepts of equality and predictability are realized as much as possible in the application of criminal law. For this reason, the significance of the principles of legality and proportionality must be emphasized, and a coherent law application and punishment praxis must be sought.

5 USING A COST-BENEFIT APPROACH IN DISCUSSING CRIMINALIZATIONS IN FINNISH CRIMINAL LAW REFORM

As the Criminal Law Committee discussed the need for penal provisions in various spheres of social life, it endeavoured to apply a cost-benefit approach. More importantly, the committee paid heed to housing, labour relations, traffic, environment and consumer protection. This scrutiny involves the following stages.

In the first stage, we attempt to locate those forms of behaviour that appear to be the most *harmful*. Does a certain behavioural phenomenon harm or endanger the interests of an individual or society, and, if so, to what extent?

Secondly, we must evaluate the *blameworthiness* (condemnability) of the harmful acts. We can then discuss, for example, the actual freedom of choice on the part of the individual and the circumstances under which it is reasonable to reproach an individual.

Thirdly, we must *systematically weigh the pros and cons involved in a criminalization*, to see whether they occur in the fields of legal or social development policy. Any means of penal control must adapt its purpose with a view to the other possible methods of regulation (supervision, technological or administrative arrangements, etc.). Furthermore, we are obliged to pay attention to the fact that it is only to a limited extent that the means of penal law can be resorted to. In addition, a penal regulation is subject to special restrictions (e.g., a penal provision must never leave too much room for interpretation).

Let us take an example of the argumentation of the Criminal Law Committee. The condemnable nature of offences against economic legislation was

according to the committee apparent by the fact that these offences jeopardize the national economy and, in more general terms, jeopardize the economic viability of society. Therefore, the committee proposed that offences against monetary and economic regulations (such as those on foreign exchange, price controls, and commercial and industrial activity), as well as currency offences, be placed in separate chapters in the new Criminal Code. The committee adhered to the philosophy that a penal code could not be fair unless it placed higher demands on more qualified persons and on those people who command more "social power" than the average citizen. For this reason, those who are guilty of aggravated economic offences or especially flagrant abuses of public power, and who display a considerable amount of intention and deliberation, deserve severer threats of punishment than what has been previously the case.

In March 1980, the Ministry of Justice appointed a special project commission (the so-called Criminal Code Project) to continue preparations for criminal law reform. In working on the reform, problems have arisen in the application of the principles established by the Criminal Law Committee. The following observations are based primarily on the experiences of the project's working group on economic offences.

Firstly, there are difficulties in evaluating the harmfulness of the acts to be criminalized. In particular, when the harmfulness of such an act is manifested as violations of collective interests, there is a need for national economic analysis which can adequately consider the social ramifications of the act. The harmfulness of such acts cannot be measured against the same yardstick used for traditional property offences. This makes it more difficult to place the punishment levels of various offences in proportion to each other.

Offences in economic life are often associated with activity which by itself is acceptable, and which in itself has positive external effects. The offences themselves are negative peripheral phenomena, or negative external effects. Therefore, in considering criminalizing certain acts, a primary question would be how appropriately to regulate conflict in interests.

In the penal regulation of economic relations it is often difficult to draw a line between acceptable and prohibited behaviour, both when formulating the definition of offences, and when applying the appropriate penal provisions. An example of this would be the difficulty in distinguishing between the acceptable minimization of taxes and illegal tax fraud.

The factors discussed above enable us to understand that it is easy to disagree over the harmfulness and blameworthiness of acts. It is possible that sufficient unanimity can be reached only by observing that acts causing negative external effects cannot be criminalized directly. Instead, the threat of punishment should

be directed at the related acts, which in themselves are of lesser significance. For example, certain forms of activity may be allowed under prescribed conditions, while we make punishable the failure to give reports, obtain a license or undertake certain security measures. In this, the severity of the punishment would be very small, even if it is a question of people who act with great deliberation and who have a strong position in society; the threat of punishment should be directed to an increasing degree at these people.

In applying cost-benefit approach when considering criminalizations, economic activity is an area where it is often possible to point out means that are an alternative to the criminal justice system. There may be the possibility of civil and/or administrative regulation of the activity. For example, current Finnish legislation on consumer protection as well as on unfair competition is based on the idea that punishment should only be used as a final step, when other legislated measures have proven to be insufficient. Penal provisions signify a supplement to the system of Market Court injunctions, especially in the area of unfair business activity. The existence of such effective alternative (and competing) means raises the question of whether the severity of the punishment should be lessened or whether it might be possible to remove the threat of punishment entirely. Also, penal provision may be formulated so that the punishability of an offence would first require that a supervisory authority has unsuccessfully attempted some measure to prevent harmful acts (for example, if an injunction has proven to be ineffective). One should also consider whether pressing charges in general would require that a special supervisory authority first reports the offence and calls for prosecution.

We come to the core of the balance between utilitarian and justice arguments, particularly when considering the level of punishment in such cases. What significance should we give to the symbolic value of the threat of punishment, or in other words, what significance should we give to the argument that acts which are considered equally harmful and condemnable should be punished with equal severity? For example, due to the lack of criteria for commensurability, we cannot often reach unanimity on even the degree of harmfulness or on the degree of condemnability of these acts.

According to the mandates given to the project commission in the continued preparation of criminal law reform, one must try to offer solutions on criminalization which will receive broad unanimity among different societal groups. These mandates modify the possibilities of rational argumentation and recognize the importance of value judgments. However, the significance of the mandates is somewhat open to speculation, as the appointment of the members of the project commission has been based primarily on their theoretical or practical expertise.

4. Recodifying the Finnish Criminal Code of 1889: Towards a More Efficient, Just and Humane Criminal Law*

1 INTRODUCTION

Finland, along with the other Nordic or Scandinavian countries, belongs to the so-called civil law tradition. Countries following this tradition include Denmark, Finland, Iceland, Norway and Sweden. All of these nations are advanced, industrialized welfare states. The Nordic countries have pursued economic, social and cultural development along similar lines, and have cooperated intensively in legal and political matters.

Various means of Nordic cooperation have been developed since the Second World War, and these interstate activities have become even more diversified since the 1960s. The objectives and organs of cooperation between the States were laid down in a special treaty signed in 1962. The treaty covers cooperation in the legal, cultural, social and economic spheres as well as in traffic and environmental matters. Efficient cooperation in criminal law is based on a variety of sources, consisting primarily of the treaties between the Nordic countries, multilateral European conventions, common basic approaches in crime control and human rights policies, uniform legislation in relevant areas, and established practice between state authorities.[1]

Strong similarities are discernible in the goals, values and principles governing the reform of Nordic penal codes and criminal justice systems. Efforts to harmonize criminal legislation have led to a number of positive results,

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* Original source: Recodifying the Finnish Criminal Code of 1889: Towards a More Efficient, Just and Humane Criminal Law. *Israel Law Review*, Vol. 27, Nos. 1–2, Winter–Spring 1993, pp. 100–117. The Israel Law Review Association (Jerusalem). – An earlier version of the article was published in: Towards a Total Reform of Finnish Criminal Law. Edited by Raimo Lahti and Kimmo Nuotio. Helsinki 1990, pp. 55–85.

[1] See R. Lahti, "Sub-Regional Cooperation in Criminal Matters: The Experience of the Nordic Countries", in A. Eser, O. Lagodny, eds., *Principles and Procedures for a New Transnational Criminal Law* (Freiburg i.Br., 1992) 305.

particularly in the reform of penal sanctions.[2] Nevertheless, there also have been divergent ideological trends in Scandinavia and efforts to reform criminal legislation are not always similar in the different Nordic states. One example of divergent crime policy concerns drugs.[3] Although the differences may seem striking at first glance,[4] on the whole, crime control policies in Scandinavia are essentially similar compared with most other regions.

2 TOWARDS AN EFFICIENT, JUST AND HUMANE CRIMINAL JUSTICE

Finnish criminal policy has witnessed the following tendencies toward change since the 1960s:

a) criticism of so-called treatment ideology (c. the 1960s);
b) emphasis on cost-benefit analysis (c. the beginning of the 1970s);
c) so-called neo-classicism in criminal law (c. the end of the 1970s and the beginning of the 1980s);
d) pragmatic reform work by utilizing modified ideas of the above-mentioned movements (since the 1980s).

Without characterizing each of these movements individually,[5] I shall present my version of the current tendency. At the very outset, it is important to emphasize that these trends cannot always be clearly distinguished from each other and that the earlier modifications have influenced those that have followed.

The existence of the criminal justice system is justified on utilitarian grounds. The structure and operation of the penal system cannot, however, be determined solely on the basis of its utility. The penal system must be both goal-rational (efficient) and value-rational (just, humane). I would express the focus of current thinking as a demand for a more rational criminal justice system: towards an efficient, just and humane criminal justice.[6] The following points clarify the content of these various criteria.

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[2] See, e.g., R. Lahti, "Current Trends in Criminal Policy in the Scandinavian Countries", in N. Bishop, ed., *Scandinavian Criminal Policy and Criminology 198085* (Copenhagen, 1985) 59.

[3] See generally, P. Stangeland, ed., *Drugs and Drug Control*, *Scandinavian Studies in Criminology* (Oslo, 1987) vol. 8.

[4] See, e.g., K. Sveri, "Criminal Law and Penal Sanctions", in A. Snare, ed., *Scandinavian Studies in Criminology* (Oslo, 1990) vol. 11, p. 11.

[5] For a fuller account, see R. Lahti, "On Finnish and Scandinavian Criminal Policy", (1989) *Cahiers de Défense Sociale* 64.

[6] See also R. Lahti, "Zur Entwicklung der Kriminalpolitik in Finnland", *in Festschrift für Hans-Heinrich Jescheck* (Berlin, 1985) vol. II, p. 871, at 884.

2.1 Utility (efficiency, expediency):

- A criminal justice system shall be used for the prevention of unacceptable behaviour only to the extent proven necessary in a cost-benefit comparison of the various means of criminal policy.
- The expediency of criminal justice is measured first and foremost through its general preventive effect.
- The structures of a penal system are defined such that the system causes as little suffering and other human, social or fiscal costs as possible without significantly reducing general prevention.
- Although the efficiency of a criminal justice system is evaluated primarily on the basis of general prevention, other utilitarian grounds are also important when individual criminal sanctions are imposed and sentences executed. These goals include rehabilitation and incapacitation.

2.2 Justice

- A criminal justice system shall be used only to the extent that is reasonable, given a just distribution of the harmful effects caused by crime and its control.
- The demand of justice is evaluated first and foremost by asking whether or not the penal system accords with the principles of equality, fairness and predictability.
- The definitions of criminal acts and penal sanctions are legally bound this proposition is known as the legality principle in criminal law (*nulla poena sine lege*).
- The determination of threats of punishments as well as actual penal sanctions should take into account the principles of culpability and proportionality.
- Required legal safeguards, primarily due process and a fair trial shall be maintained.
- Criminal procedure shall take into consideration to a reasonable extent the interest of the possible victim.

2.3 Humaneness (including postulates in the area lying between the principles of justice and humaneness):

- The fundamental human rights and freedoms of the individual in criminal proceedings shall be properly protected.
- When imposing a penal sanction and executing a sentence, the principles of equity and mercy shall be taken into account.

It is largely possible to apply the main criteria for rationality in the criminal justice system – utility, justice and humaneness – without creating conflict over the development of the penal system. In order for it to be possible to regard these criteria complementary to one another, they must be defined in a particular way.[7]

Thus, the primary mechanism for achieving the general preventive (i.e. utilitarian) effect cannot be the deterrent effect of punishment. In Scandinavia, the criminal justice system has long used an alternative mechanism for general prevention: punishment not as a deterrent but as a demonstration of socio-ethical reproach and as a method of influencing the people's sense of morals and justice.[8] Similarly, the criteria of justice and humaneness cannot only refer to formal legal safeguards or internationally protected human rights but also must encompass postulates that are determined on the basis of material criteria (for example, reasonableness *in casu*).

3 ON THE PREPARATION OF THE RECODIFICATION OF FINNISH CRIMINAL LAW

Since 1972, the total reform of the 1889 Finnish Penal Code has been under preparation. That year, a committee was appointed to prepare a comprehensive basic reform of criminal law. The reform has continued on the basis of the report of the Criminal Law Committee (Committee Report 1976:72) and the statements given thereon, in the form of a special Task Force appointed by the Ministry of Justice in 1980 (the so-called *Criminal Code Project*). The following proposals are the main results of the work of the Criminal Code Project as of the middle of 1993:

- "Total reform of the Criminal Code I" and the supplementary proposal on regulatory offences and smuggling: Publications of the Department of Legislation of the Ministry of Justice (hereinafter PMJ) nos. 5/1984 and 8/1986;
- "Total reform of the Criminal Code II": PMJ no. 1/1989;
- "On the alternatives to imprisonment" and a related proposal on the waiving of measures under criminal law: PMJ nos. 4/1987 and 11/1988;

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[7] Cf., i.e., N. Lacey, "Justice and Efficiency in Criminal Justice", in W. E. Butler, ed., *Justice and Comparative Law* (Dordrecht, 1987) 91, at 98, and A. Ashworth, "Towards a Theory of Criminal Legislation", (1989) 1 *Criminal L. Forum* 41, at 43.

[8] See, e.g., T. Lappi-Seppälä, "Penal Policy and Sentencing Theory in Finland", in R. Lahti et al., eds., *Criminal Policy and Sentencing in Transition* (Helsinki, 1992) 3, at 7.

- "The criminal liability of corporate bodies": PMJ no. 13/1987;
- "Criminal Jurisdiction": PMJ no. 2/1991;
- "Drug crime": PMJ no. 4/1991;
- "Crimes against administration of justice, public authorities and public order": PMJ no. 6/1992; and
- "Stock market crime": PMJ no. 3/1993.

The first of these proposals (PMJ nos. 5/1984 and 8/1986), namely the first stage of the reform of criminal law, resulted in the delivery of Government Bill no. 66/1988. It consisted of provisions regarding one third of the special part of the Penal Code, primarily dealing with economic, exchange and property offences. This Bill was approved by Parliament in June 1990 in a somewhat amended form, and the new provisions came into force on 1 January 1991 (see nos. 769–834/1990 of the Statutes of Finland).[9]

Another Bill based on the work of the Criminal Code Project dealt with the reform of the provisions on the waiving of penal measures (Bill no. 79/1989), and these new provisions also came into force on 1 January 1991 (as Statutes nos. 300–303/1990). This reform is worthy of special consideration, in that Finland has traditionally been very wary of extending the discretionary powers of criminal justice agencies, particularly those of the police and the public prosecutor.[10]

The proposal on alternatives to imprisonment examines seven different types of non-custodial sanctions. A separate commission was set up to prepare a legislative proposal regarding an experimental introduction of community service, and the sanction was later introduced by a statute (no. 1105/1990) and came into force on 1 January 1991.[11]

The proposal on drug crime, the report entitled "Total reform of the Criminal Code II" and the proposal on the adoption of criminal liability for corporations have lead to Government Bills (nos. 180/1992 and 94–95/1993), and these Bills are currently under the scrutiny of Parliament.

The second stage of total reform (Bill no. 94/1993) deals with the second third of the provisions of the special part of the new Criminal Code. Some of

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[9] See *Amendments to the Penal Code and to the Decree on the Enforcement of the Penal Code* (Department of Legislation, Ministry of Justice, Helsinki, 1991). The publication is a supplement to the *Penal Code of Finland and the Decree on the Enforcement of the Penal Code* (Research Institute of Legal Policy, Helsinki, 1983).

[10] See R. Lahti, "Diversion from Criminal Justice Some Experiences from Finland", in *Hungarian-Finnish Penal Law Seminary on Petty Offences* (Budapest, 1984) 119.

[11] For a follow-up study concerning this sanction, see J.-P. Takala, "Finland's Experiment with Community Service", in *Rapport fra kontaktseminar om samfunnstjeneste* (Scandinavian Research Council for Criminology, Oslo, 1993) 32.

the provisions in the report are connected with the first stage of the reform; the primary examples are the provisions on labour and environmental offences, on the violation of certain intangible rights, and on data and communications offences.[12] The other important groups of offences dealt with in the Bill are, on the one hand, offences against humanity, treason and high treason offences, and offences against democracy, and on the other hand, offences against life, health and liberty as well as offences involving a general danger (the objects of legal protection here primarily concern the individual).

It therefore can be seen that two thirds of the special part of criminal law have reached an advanced state of recodification. The remaining stage of the reform, which is now materializing, is focused on the total revision of the system of penal sanctions.[13] At the same time, however, the general doctrines on the preconditions of criminal liability shall be reconsidered,[14] and the reform of the remaining chapters of the special part is to be prepared.

A memorandum of the Criminal Code Project estimates that the total reform of criminal law shall be completed at the earliest in the mid-1990s. Thus, more than a century presumably shall pass since 1894, when the present Penal Code entered into force, and it appears that the total reform shall require approximately the same length of preparation – about 25 years – as the corresponding reform one hundred years ago.

4 THE PRIMARY GOALS AND VALUES IN THE RECODIFICATION OF CRIMINAL LAW[15]

Following the classification developed by the classic sociologist Max Weber,[16] a distinction can be made between goals and values. Value considerations have

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[12] Regarding the latter group of offences, see A. Pihlajamäki, "Computer Crimes and Other Crimes against Information Technology in Finland", (1993) 64 *Revue Internationale de Droit Pénal* 275.

[13] See generally, T. Pellinen, "The Finnish System of Penal Sanctions and Its Reform", in R. Lahti, K. Nuotio, eds., *Towards a Total Reform of Finnish Criminal Law* (Helsinki, 1990) 159, and Part 1 (the papers of T. Lappi-Seppälä, A. Hirvonen, H. Kiuru and T. Pellinen) in *Criminal Policy and Sentencing in Transition, supra* n. 8.

[14] See generally, R. Lahti, K. Nuotio, eds., *Criminal Law Theory in Transition* (Finnish Lawyers' Publishing Co., Helsinki, 1992) *passim*.

[15] For a more detailed analysis, see R. Lahti, "Die Gesamtreform des finnischen Strafgesetzes: Zielsetzung und Stand der Reformarbeit bis 1991: insbesondere im Blick auf die erste Phase der Gesamtreform", in *Criminal Law Theory in Transition, ibid*., at 27.

[16] M. Weber, *Wirtschaft und Gesellschaft* (Tübingen, 1985) 12.

traditionally been particularly important in criminal policy and in the reform of criminal law.[17] At the time the 1889 Finnish Penal Code was drafted absolute theories of punishment were prevalent. *Jaakko Forsman*, the intellectual father of the Penal Code, made the following poetic statement in 1898:

> If justice – to the extent that it can be reached in deficient human circumstances – ceases to be the leading principle guiding the legislative work and the application of criminal law, we shall drift to the open seas, where we will be swayed by every wind, dragged by every current.[18]

Forsman's statement may be reformulated to give it new meaning in a contemporary context. Firstly, we speak today of the legitimacy or general acceptability of the social and legal system. Secondly, we can see more clearly than before the connection between the value of justice and the goal of the protection of society (i.e. social defence). The public must feel that the system of criminal law is acceptable for it to be possible to use this system for the maintenance and strengthening of moral and social norms of behaviour. Thirdly, the general consciousness of the limits of criminal law has increased.[19]

The importance of justice arguments in the reform of criminal law is apparent in the following passage of the reasoning in support of Bill 66/1988 (p. 9):

> One central task is the weighing of the values to be protected and the reassessment of the liability for punishment. The contents of criminal legislation must be examined in the light of the changed sense of justice. Where needed, the demarcation line between punishable and non-punishable behaviour must be defined anew. The material content of penal provisions is part of the problem of social justice. An attempt should be made to ensure that criminal legislation takes into consideration the interests of different social groups and increases the certainty of law.

The emphasis on justice in decisions on criminalization, apparent in this citation, has also been seen clearly in the concrete proposals for reform. In establishing the Criminal Code Project, the Ministry of Justice stipulated that work be undertaken on the public economy provisions and economic legislation, i.e., regulations on economic offences.[20]

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[17] *Cf*. the distinction between policy and principle considerations, R. Dworkin, *Taking Rights Seriously* (London, 1977) 22.

[18] J. Forsman, "The New Proposal for a Swiss Criminal Code" (in Finnish), in: (1898) 34 *Tidskrift utgifven af Juridiska Föreningen i Finland* 177, at 180.

[19] See, e.g., M. Joutsen, "Legitimation and the Limits of the Criminal Justice System" (1992) 1 *European J. Criminal Policy and Research* 9.

[20] See also R. Lahti, "Finland: National Report" (Concept and Principles of Economic and Business Criminal Law), (1983) 54 *Revue Internationale de Droit Pénal* 249.

Of course the goal of social defence also grounds such reform. The prevailing view today is that the existence of the system of criminal law in general must be justified, at least primarily, on the basis of the resulting social benefits. Secondly, more emphasis than before is given to the fact that, when considering individual decisions on criminalization, we must not only assess the degree to which the form of behaviour in question is detrimental and reproachable, but we also must compare systematically the benefits of various means, and we must consider whether or not means under criminal law are appropriate.

However, the extent of the benefits of punishment is open to question. For example, the 1976 report of the Criminal Law Committee states, on the basis of present criminological knowledge, that the significance of the entire criminal justice system is quite marginal in increasing the uniformity of human behaviour, in dealing with conflict situations or in preventing phenomena that are undesirable from the point of view of the functioning of society. In accordance with this view, we should seek to decrease the relative role of the criminal justice system, in relation to other means of criminal policy.

Moreover, the present view is that the most important benefit (securing the general preventive effects of punishment) can be reached best by attending, on the one hand, to the efficiency of law enforcement machinery (primarily by aiming at a high detection rate) and, on the other hand, by ensuring that the overall operation of the penal system maintains its function and hence credibility in strengthening social morality. The values of justice and legal certainty are thus also promoted at the same time.[21]

To quote Bill 66/1988 (p. 23):

> Criminological research has demonstrated that the general preventive effect of punishment can not be connected, in a one-sided manner, to the length of the prison sentences. Entry into prison already has a considerable deterrent effect. Similarly, we have abandoned the view that the "rehabilitative" effect of prison would require a certain minimum period in prison. On the contrary, we know that sentences of imprisonment almost always hamper the possibilities of readjustment to a normal social life. In addition, the enforcement of prison sentences is expensive for society.

The thinking reflected in this quotation is concretized in the legislation based on this Bill in the mitigation of penal sanctions for theft and certain comparable offences. In light of the findings of criminology, there is no justification

[21] For a fuller account of the reasoning of the Criminal Law Committee, see R. Lahti, "The Utilization of Criminological Research in Finnish Criminal Law Reform", in *Towards a Total Reform of Finnish Criminal Law, supra* n. 13, at 39.

for expecting that a minor and gradual decrease in the level of punishments would alter the general preventive effect of the penal system. In addition, it is significant that the typical harm caused by property offences is now relatively less worthy of imprisonment than it was at the time the present Penal Code was drafted.

Furthermore, the new legislation determines that sentences of imprisonment up to three months be measured in days. The length of prison sentences imposed in Finland and the other Nordic countries is quite short from an international perspective: the average can be given in months, not in years. The relative number of offenders sentenced to unconditional imprisonment was on the decrease in Finland for nearly 15 years since the mid-1970s. During this period, the average size of the prison population decreased from over 100 per 100,000 population to 70 per 100,000, at the beginning of the 1990s.[22]

All in all, if we attempt a rough comparison of the criminal policy of criminalization and sanctions in the 1889 Penal Code, with that reflected in the total reform of criminal law, we can see a number of ideological similarities, in particular in the weight given to the principle of justice. Indeed, the 1976 report of the Criminal Code Committee reflects a "neo-classical" approach to criminal law, while the 1889 Penal Code was a product of the classical school of criminal law.

The International Union of Criminologists (IKV), established in 1889, sought justification in the then infant discipline of criminology in order to demand a strengthening of the utilitarian approach to criminal policy and a transfer of the focus of the penal system from the offence to the offender. This, as well as the general discussions among the international community, influenced criminal policy in Finland.[23] However, when we compare the current situation with that of the turn of the century, the belief that we can rely on criminology has changed: we are no longer as optimistic as before in believing in the general or special preventive effects of certain criminal sanctions and, in general, we no longer believe that the criminal justice system has the significance once ascribed to it.

At the same time, sanctions are justified more than before by arguments other than general or special prevention. For example, the use of a type of sanction may be rejected, or its use may be limited, on the grounds that the

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[22] For the explanation of this development, see P. Törnudd, "*Fifteen Years of Decreasing Prisoner Rates in Finland*" (National Research Institute of Legal Policy, unpublished paper, 29 June 1991).

[23] See, e.g., R. Lahti, "Criminal Sanctions in Finland: A System in Transition" (1977) 21 *Scandinavian Studies in Law* 119, at 128.

imposition of the sanction would be deemed unreasonable, or it would conflict with the appropriate use of the resources available to the control of crime.

The fact that too little weight seems to be given to considerations of utility in decisions on criminalization (i.e., the question whether the use of criminal law is productive or not), has been criticized in the present discussion. For example, the increased use of environmental and economic criminal law seems to have a purely symbolic effect. It is questionable to cease to require, in criminalizing forms of behaviour, that these punishable deeds manifestly violate clearly identifiable (and preferably individual) objects of legal protection.[24]

5 GENERAL PRINCIPLES OF CRIMINAL LAW IN THE RECODIFICATION

The reformulation of the general principles of criminal law has been left till last in the preparatory work. This is particularly true of the core principle of the general preconditions of criminal liability. It is true that, over several years, a working group appointed by the Criminal Code Project has intensively considered the general part of criminal law, and in 1990 prepared a preliminary proposal for provisions on criminal liability.[25]

This approach for the criminal law reform is problematic for a number of reasons. First, the primary objective of the reform is reassessing what is punishable and how severe the level of punishment should be. After all, the doctrines of criminal liability essentially define the line of demarcation between punishable and non-punishable behaviour. For example, the content given to the concept of "intention" or the extent to which a so-called futile attempt at an offence is punishable have a significant effect on the scope of punishability.

Second, the reform of provisions on various offences must anticipate how the general preconditions of criminal liability shall later be defined in law. As such, we already must require that the doctrines of criminal liability remain as unchanged as possible, for practical reasons. Thus, the approach adopted in drafting the law inhibits the dynamic development of the doctrines of liability.

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[24] See, in particular, the critique by W. Hassemer, "Symbolisches Strafrecht und Rechtsgüterschutz"(1989) *Neue Zeitschrift für Strafrecht* 553. *Cf*. also the "minimalistic approach" of the Israeli criminal law reform, M. Kremnitzer, "The Israeli Proposal for a New General Part of a Penal Code – An Introduction", in *Criminal Law Theory in Transition, supra* n. 14, at 63.

[25] See the appendices 1–2 in the work *Criminal Law Theory in Transition, supra* n. 14. The contributions to this book were devoted to the Finnish criminal law reform.

On the other hand, because the 1889 Finnish Penal Code contains very few general prerequisites for criminal liability, reformulating the legal systematics of these general prerequisites may not be too difficult, regardless of the support of the new statutory law. Moreover, in a sense, certain of the principles were set forth from the start. At the beginning of the Criminal Code Project, a decision was taken on various issues relating to the way in which the provisions on the special part (i.e., the definitional elements of individual offences) should be written. For example, one of the objectives of the work on reform is to write the new penal provisions in accordance with such values as certainty, consistency and comprehensibility.[26]

Similarly, a decision was taken at the beginning of the reform work that an act would be punishable under the new criminal law only if committed intentionally, unless the penal provision explicitly stipulated that the offence should be punishable if committed through negligence as well. It is assumed that the forms of culpability (intention and negligence) will be defined in the final stage of the preparations so that the definitions will be contained in the general part of the new criminal law.[27]

Third, the delay in the consideration of the general doctrines means that the first stages of the reform are not based on a thoroughly considered and consistent view of the basic concepts of the doctrine of liability and the contents to be given to legal principles. The Criminal Law Committee also dealt quite briefly with these issues in its report of 1976.

One resulting problem is that the penal provisions enacted at the first stage of the total reform of criminal law as well as the draft provisions of the second stage pay insufficient attention to the content and differences in meaning of the various expressions that refer to danger. The use of these concepts is not uniform and consistent enough. In accordance with the recommendations of the Criminal Law Committee, the new Criminal Code will contain a greater number of provisions criminalizing endangerment. In the formulation of the new definitional elements of the offences, more use has been made of the expression "is conducive toward causing danger" or similar expressions which refer to so-called abstract danger. However, the contents of this concept have not been clarified in full in legal science or in legal practice, and the use of such expressions has led to strong criticism.[28]

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[26] A. Ashworth, *supra* n. 7, at 41, regards these values as essentially formal virtues of codification.

[27] On the draft proposals in this respect, see T. Lappi-Seppälä, "The Doctrine of Criminal Liability and the Draft Criminal Code for Finland", in *Criminal Law Theory in Transition, supra* n. 14, at 228. For an Israeli reform plan, *cf.* M. Kremnitzer, *supra* n. 24, at 61.

[28] See, in particular, D. Frände, "Die Gefährdungsdelikte – Struktur and Begründung", *in Criminal Law Theory in Transition, supra* n. 14, at 349.

6 THE STRUCTURE AND SIGNIFICANCE OF THE GENERAL PRINCIPLES OF CRIMINAL LAW

During recent years in Finland, there has been a rather lively debate over the position of the general doctrines and, in particular, the so-called legal principles (as opposed to rules) of the legal system and legal science. Scholars representing different fields of law have taken part in this debate. Among the issues debated is the significance of the basic concepts and legal principles of the general doctrines in the formulation of the basic structure of a field of law, on the one hand, and in legal argumentation, on the other hand.[29]

The first question is of particular interest in the reform of criminal law. The issue is linked, for example, to a consideration of the extent to which the basic concepts and principles of the general doctrines should be defined in the new criminal law. It is even more important to consider what demands may be set for the formulation of concepts in criminal law and for the system itself. The 1976 report of the Criminal Law Committee provides us with some guidance in making this assessment.

The Committee is of the view that one should attempt to express the general principles of criminal law as fully and explicitly as possible in statutory law. This would promote predictability and legal certainty. Such an approach is desirable also from the point of view of the division of powers between Parliament and the courts. The Committee holds, therefore, that the legality principle in criminal law and the values behind it support increased regulation of the general doctrines of criminal law. The preliminary proposal of 1990 for provisions on criminal liability follows this line of reasoning.[30]

Moreover, the report of the Criminal Law Committee refers to the connections between penal theory and the general doctrines of criminal law. For example, the Committee report justifies two basic principles, the legality principle and the principle of culpability, primarily on the basis of their compatibility with the liberal values of legal certainty and predictability. At the same time those principles are defended with a reference to the utilitarian argument of general prevention. A necessary prerequisite for the persuasiveness of such a parallel or complementary justification is that general prevention means so-

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[29] On this discussion see, e.g., K. Sevón, "Legality, Efficiency and Legitimacy": Some Comments on the Legitimacy Problems of Modern Criminal Law", in *Towards a Total Reform of Finnish Criminal Law, supra* n. 13, at 181, and "The Concepts of 'Rechtsgut', 'Handlung' and 'Schuld'", in *Criminal Law Theory in Transition*, *supra* n. 14, at 126.

[30] See *Criminal Law Theory in Transition, supra* n. 14, at 587, and T. Lappi-Seppälä, *supra* n. 27, at 214.

called integration prevention, in other words the effect that criminal law has in maintaining or strengthening moral and social norms.[31]

The impetus that the report of the Criminal Law Committee provides for the development of Finnish criminal law must be supplemented with models of the dogma of criminal law. German criminal law theory has traditionally played a strong role in Finnish thinking on the prerequisites of criminal liability.

Features typical of the German-language Continental tradition are its constructiveness ("conceptualism") and its theoretical nature, while the Anglo-American approach is more practically oriented and places more emphasis on the significance of procedure. German constructiveness can be seen, for example, in the highly differentiated ("analytical") and hierarchical concept of an offence, as opposed to an Anglo-American "holistic" construct of an offence.[32]

The Nordic way of thinking in criminal law generally has been less constructive than the German criminal theory, and in this respect is closer to the tradition of the common law countries. The influence of the criminal law theory of the other Nordic countries has grown as part of the general development of legal cooperation and harmonization in Scandinavia. Information from three areas – Nordic, the German-speaking Continental countries, and the common law countries – has been collected on a relatively even footing in the comparisons for the reform of the general part of Finnish criminal law.

7 REQUIREMENTS OF SYSTEM FORMATION IN CRIMINAL LAW UNDER REFORM[33]

On the basis of the above, we can conclude that the new Criminal Code will increasingly include legal definitions and other provisions on the general doctrines. However, it is not possible to define the general prerequisites of criminal liability with very specific contents without an accompanying decrease in the level of generality of the provisions. In some cases, a certain generality could be maintained by limiting the scope of application of such provisions.

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[31] *Cf*. the detailed discussions on this topic in German, e.g., K.-L. Kunz, "Prevention und gerechte Zurechnung", (1986) 98 *Zeitschrift für die gesamte Strafrechtswissenschaft* 823.

[32] *Cf*. generally, A. Eser, George P. Fletcher, eds., *Rechtfertigung und Entschuldigung (Justification and Excuse)* (Freiburg i. Br., 1987–1988), vols. I–II, in particular the German-Anglo-American debate.

[33] See also R. Lahti, "Neues in der finnischen Strafrechtswissenschaft und in den allgemeinen Lehren des finnischen Strafrechts" (1991) 103 *Zeitschrift für die gesamte Strafrechtswissenschaft* 521, at 533. *Cf*. generally T. Lappi-Seppälä, *supra* n. 27, at 215.

One demand that must be placed on definitions of the preconditions of criminal liability is that as far as possible, these definitions should be system-neutral, in other words avoid being bound to a specific structure that, from the point of view of Finnish legal tradition and comparative law, is still under development or has been contested. In itself the fact that there may be disagreement in legal practice or theory is not a sufficient argument for opposing a legal definition; instead, this, actually, may be an argument in support of the definition. As a point of comparison it may be noted that the 1889 Penal Code contains very few legal definitions (which was not the case with the 1875 proposal for the Penal Code), and the principle reason for this reticence was the "raw nature" of many of the results of jurisprudence at the time.

Furthermore, I assume that the general doctrines of Finnish criminal law shall be influenced increasingly by the approaches of the other Nordic countries and also of the common law countries, which are more practically oriented than the civil law nations. System-building in criminal law theory should have a sufficient connection with practical reality.

An increasing focus on practicality implies that if the decision on a legal issue has little significance from the point of view of its consequences, and in particular punishability, such issues will be bypassed or dealt with in a cursory manner. In addition, concepts pertaining to the doctrines of criminal liability are defined so that they can be applied in practice without unreasonable difficulty.

Finally, it is my assessment that the formulation of concepts and the system of criminal law will be based increasingly on consideration of values and goals in criminal policy, or at least there will be greater awareness of the links between the structure and operation of the entire system of criminal law on the one hand, and criminal policy, on the other.

The first influential advocate of this approach was *Claus Roxin* of the Federal Republic of Germany,[34] while, for example, his compatriot, the classical scholar in criminal law, *Franz von Liszt*, viewed criminal law as a boundary that criminal policy cannot pass.[35] Criminal policy is significant not only in deciding on criminalization and penal sanctions, but also when dealing with dogmas of criminal law.

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[34] See, in particular, C. Roxin, *Kriminalpolitik und Strafrechtssystem* (München, 2nd ed., 1973) and Roxin, *Strafrecht. Allgemeiner Teil* (München, 1992). See also, e.g., B. Schünemann, ed., *Grundfragen des modernen Strafrechtssystems* (Berlin, 1984).

[35] F. von Liszt, "Über den Einfluss der soziologischen und anthropologischen Forschungen auf die Grundbegriffe des Strafrechts", in *Strafrechtliche Aufsätze und Vorträge* (Berlin, 1905), vol. II, p. 75.

8 ON THE THEORIES OF CRIMINAL LAW AND CRIMINAL POLICY[36]

How can we conceptualize a theory of criminal law that takes into account the goals and values of criminal policy? So far, there has been no unambiguous answer in Finnish criminal theory, and many are critical of the entire question. I shall begin by presenting briefly two approaches to the subject.

In a recent praiseworthy doctoral thesis on sentencing, the author sought to reduce the general or specific prerequisites of punishability to their preventive effect, in other words to their effect in controlling behaviour. In addition to effectiveness in prevention, one must consider when determining sanctions, the interest in prevention (the degree to which the type of act in question is detrimental) and the limits on the resources available for control (which forces us to make a strict assessment of the extent to which behaviour can be controlled).[37] Another scholar has taken a sceptical attitude towards the extent to which criminal policy can be utilized in the theory of criminal law. Already the expansion of the concept of criminal law beyond decisions made by the legislator on criminalization is problematic for this author.[38]

One source for the divergence of opinions lies in the different definitions of the criminal policy. I believe that the concept of criminal policy should be broadly applied. In determining the contents of the general doctrines of criminal law, we must take into consideration the legal consequences of their application as well as the goals and values that generally guide rational criminal policy. The use of the word "policy" should not be construed to mean that the points made in the foregoing relate only to policy types of arguments; they can also relate to principle (value) types of arguments.[39]

The distinction between the goals and values of criminal policy raises the tension that can be found throughout the history of criminal law, a tension between, on the one hand, utilitarian arguments of social defence and, on the other, arguments of justice and humanity. As is apparent from the above discussion, utility and justice can, to a certain extent, be justified as complementary to each other. One way of minimizing the conflict has been to emphasize that goal-principles are, above all, arguments that operate on the level of legislation,

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[36] For a more detailed analysis, see Raimo Lahti, *supra* n. 33, at 535.

[37] See T. Lappi-Seppälä, *On Sentencing* (in Finnish with an English Summary) (Vammala, 1987), at 120, 252, 262 and 598.

[38] See D. Frände, "The Dogmatics of Criminal Law and Criminal Policy" (in Swedish) (1985) 18 *Oikeustiede – Jurisprudentia* 5, at 29, 37, 46 and 48.

[39] In the sense used by R. Dworkin, *supra* n. 17.

while value-principles operate on the level of the application of the law.[40]

The function of the formation of concept and system in criminal law is easily understood as a technical means of transmitting information on the prerequisites of criminal liability and easing decision-making in concrete cases. It is my view that well-developed concepts and systematizations facilitate an assessment of punishability that avoids arbitrariness, and thus promotes equality and predictability in criminal law. Concept and system formation therefore promotes value-principles. Thus the practical orientation of theories in criminal law, which received separate treatment in the foregoing analysis, is in fact connected with value and goal arguments.

The substantive principles of criminal law quite clearly are connected to the values and/or goals of criminal policy. In the formulation of the system of criminal law, we can also adopt the argument that legal certainty and similar values are given *prima facie* priority, while in certain border-line cases in the definition of individual categories of liability, arguments of prevention are accorded priority.[41] In Finland, such an approach is illustrated by the attitude taken towards criminal acts undertaken while the actor is intoxicated. The principle of culpability carries less weight, and yields to considerations of prevention.[42]

All in all, it is my view that in the determination of the categories of criminal liability, as well as of the prerequisites of punishability in general, considerations of prevention are significant along with considerations of justice and humanity. A totality of the general prerequisites of criminal liability should be so constructed that holding a person liable can be justified on the basis of justice, prevention, and by the fact that holding this person liable would not be inhuman or unreasonable.

Because goals and values in criminal policy are recognized in criminal law theory, the determination of categories of criminal liability receptive to pressures for change are brought about by the development of society. For example, with the development of society and the commercial world, the adoption of criminal liability for corporate bodies is necessary, even though this would entail a restructuring of criminal liability with its traditional basis in individual culpability. Criminal law is dynamic, and the system of criminal law as a whole is open to its necessary differentiation and development.

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[40] See, e.g., G. P. Fletcher, "Utilitarismus und Prinzipiendenken im Strafrecht" (1989) 101 *Zeitschrift für die gesamte Strafrechtswissenschaft* 803, at 813.

[41] On this kind of reasoning in general, see Robert Alexy, "Rechtsregeln und Rechtsprinzipien" (1985) *Archiv für Rechts- und Sozialphilosophie* (Beiheft 25) 13.

[42] See chap. 3, sec. 4, para. 2 of the Penal Code.

II.
Theories and Principles of Criminal Justice and Criminalization

5. Concepts and Principles of Economic and Business Criminal Justice (Including Consumer Protection). Finland. National Report*

1 INTRODUCTION

Economic criminality became a source of worry for the authorities in Finland later than in Denmark, Norway and Sweden. During recent years, tax fraud cases in particular have received wide attention. The tax fraud investigation organization was made more effective during the 1970's, and this led to an increase in detection. At the beginning of the 1970's, a significant official estimate of the extent of economic crime was published (the only one of its kind up till now). At that time, it was estimated that tax fraud leads to a 5–10 % reduction in the collection of taxes.

In October of 1981, 79 of the 200 members of Parliament signed an interpellation asking the Government how large of a problem economic crime was in Finland, and whether or not the Government was considering giving a special report to the Parliament on economic crime. The answer given by the Minister of Justice in November was perfunctory. In referring to statements obtained from the National Board of Taxation and the Central Criminal Investigation Police, the Minister said that the increase in tax fraud and other economic crimes calls for more effective counter-measures by society.

The Minister of Justice referred to certain measures which were being planned to combat economic crime. First of all, on March 31, 1980, the Ministry of Justice had established a broadly based project organization to plan a total reform of the penal code. Provisions that would affect the core area of economic crime have been included among the measures that were given highest priority. Secondly, material reform of legislation on economic matters (for example bankruptcy law, commercial law and corporate law) was being planned in the Ministry of Justice. Thirdly, an increase in the personnel as-

* Original source: *Revue Internationale de Droit Pénal*, Vol. 54, Nos. 1–2, 1983, pp. 249–262. Association Internationale de Droit Pénal (France).

signed with the supervision and investigation of economic crime was being planned. The Minister did not consider the presentation of the report referred to in the interpellation as relevant at that stage.

The fact that the Minister of Justice referred in his answer first of all to the total reform of the penal code illustrates the official order of priority in the prevention and control of economic crime. To a higher degree than, e.g., in Sweden, planning in Finland has revolved around the reform of the penal code. With this in mind, this paper will concentrate on an analysis of the plans for reforming the penal code, even though we should note the limitations of the significance of criminal law in regulating economic relations.

2 THE INITIATION OF THE TOTAL REFORM OF THE PENAL CODE OF FINLAND AND THE PLANNING PRINCIPLES ESTABLISHED BY THE 1977 CRIMINAL LAW COMMITTEE

The planning of the total reform of the penal code of Finland was initiated at the beginning of the 1970's. The present penal code dates from 1889, although several amendments have been made since then. In 1972, three special commissions were appointed to inquire into the negative sanctions entailed by illegal tax avoidance, the pollution of the environment, and violations of labour legislation: the Tax Offence Commission, the Environmental Offence Commission and the Labour Offence Commission. The reports of these commissions were planned as contributions to the work of the Criminal Law Committee, which was appointed in 1972. The Criminal Law Committee was assigned with the task of preparing the ground for a comprehensive criminal law reform. Its report was published in 1977.

The above mentioned Commissions assessed the expediency of penalizing illegal tax avoidance, environmental pollution and misconduct in labour relations as compared to other means available for the control of such behaviour. The scope of criminal law was regarded as limited. In a similar manner, the Criminal Law Committee discussed the need for penal provisions in various spheres of social life. It subscribed to an application of a cost-benefit approach, as recommended by the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. The scrutiny involved the following stages:

First, the Committee attempted to locate those forms of behaviour that appear to be most harmful when judged in the light of the specific goals of

> each sphere of life. Does certain behaviour harm or endanger the interests of an individual or of society and, if so, to what extent? Secondly, the Committee evaluated the blameworthiness of these harmful acts. This involved a discussion of, for example, the actual freedom of the human agent and the circumstances in which it is reasonable to pronounce the blameworthiness of the agent. Thirdly, the Committee attempted a systematic weighing of the pros and cons of criminalization both in legal and in social development. Any means of penal control must have a purpose adapted to a view to the other possible methods of regulation such as supervision and technological or administrative arrangements. The Committee departed from the assumption that criminal law can be resorted only to a limited extent. In addition, penal regulation is subject to special restrictions; for example, a penal provision must never leave too much scope for interpretation.

The Criminal Law Committee argued that the condemnable nature of offences against economic legislation was manifested by the fact that these offences jeopardized the national economy and, in more general terms, the economic viability of society. Therefore, the Committee proposed that offences against monetary and economic regulations (for example, with regard to foreign exchange, price controls and commercial and industrial activity) as well as currency offences be placed in a separate chapter in the new Penal Code. The Committee adhered to the philosophy that a penal code cannot be fair unless it places higher demands on more capable persons and on those persons commanding more "social power" than the average citizens. Accordingly, those who are guilty of, for example, aggravated economic offences or especially flagrant abuses of public power and who display a high degree of intention and deliberation are more deserving of a severe threat of punishment than has been the case up to now.

This approach should be considered according to the background of the general planning principles of the Criminal Law Committee. The report of the Committee backs up proposals based on considerations of appropriateness with arguments of justice. The primary justification for the criminal justice system is a utilitarian one, even though the means of criminal law are in general not an effective regulator of the degree or structure of crime. The threat of punishment (the criminal justice system) has significance primarily as the teacher of the central prohibitions from the point of view of social order; it demonstrates the limits of norms in this sense. Punishment has a considerable intermediate effect, as the authoritative reproach expressed in punishment shapes the legal and moral concepts of citizens.

On the other hand, the report of the Criminal Law Committee emphasizes the demands for justice and humanity which are placed on the criminal jus-

tice system as a whole and on the inflicted punishments in particular. Only a criminal justice system which fulfills these demands can effectively develop attitudes and behaviourial norms. The most important question concerning justice has to do with the structure of criminalizations, in other words with what is punishable and how severe the threat of punishment is (the scope and level of punishment). The most important function of the criminal law reform pertains to this. From the point of view of justice, it is also important that the principles of equality and predictability are realized as far as possible in the application of criminal law. For this reason, the significance of the principles of legitimacy and proportionality must be emphasized, and a coherent application of the law and punishment practice must be sought.

> In the light of the above it is understandable that the Criminal Law Committee regarded the symbolic value of the final systematics and formulation of criminal law as important. The following proposals have been justified with this factor, although this was not the sole justification presented.
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> First of all, the Committee assumed that all the most important criminal provisions will be gathered together in the new penal code. A provision was regarded as important in this sense if it carried the threat of imprisonment. Secondly, by organizing the penal code into chapters and putting these chapters into a certain order the effect of these matters on the general sense of justice should be taken into consideration. Thirdly, there must be greater coherence in the classification concerning the seriousness of offences. The Committee believed that the most appropriate way of putting the offences in an order of priority was to base the classification on "typical punishments". The alternatives suggested by the Committee included 3, 4, 6 or 7 levels of seriousness. Each level would correspond to a penal scale which would be considerably more limited than the situation at the present. The offence categories would be labelled so that the name of the offence would denote both the offence and the level of seriousness (cf. such concepts as "theft" and "penal code offence"). This was not the first time that attention has been drawn in the drafting of legislation to the importance of the names of offences in demonstrating their degree of reproach in society.

3 PROBLEMS IN THE FURTHER PLANNING OF THE CRIMINAL LAW REFORM DURING THE 1980's, ESPECIALLY FROM THE POINT OF VIEW OF ECONOMIC AND BUSINESS CRIME

In March of 1980 the Ministry of Justice appointed a special task force to continue the preparation of the criminal law reform. The work will be continued

within an organization consisting of several levels and organs. The primary responsibility for the progress will be held by an executive group with a chairman and ten members.

It is expected that a draft bill for a new penal code will be completed by the end of 1984. The work will be carried out in three stages. The most urgent stage will deal with offences against property, economic legislation and the national economy, as well as with forgery and related offences. The proposals for the new penal provisions are being drafted by three working groups, focusing on property offences, economic offences, and offences involving fraudulent exchange, respectively. The drafting of penal provisions regarding offences against labour relations and the environment has also been initiated.

During the first stage of the further planning of the reform, primary attention is thus being focused on the regulation of economic relations through penal provisions. This will bring up a number of questions of principle in connection with criminalizations. Due to the change in the industrial structure and in production, the increased complexity of economic relations, the increase in importance of the public sector of the economy and the regulatory duties of public corporations, there is a need to re-evaluate penal provisions. The traditional provisions regarding property offences are primarily intended to protect ownership and possession rights (property offences proper) and the exchange in goods ("exchange offences"). From the point of view of the well-being of society and its members, it has become more and more important to safeguard such public interests as the smooth operation of economic life and the viability of the national economy. For this reason, acts directed against the public economy or against economic regulations are foremost when considering criminalizations.

In the continuation of the criminal law reform, problems have arisen within the application of the principles laid down by the Criminal Law Committee and referred to above. The following observations are based primarily on the work of the economic offences working group.

Firstly, there are difficulties in evaluating the harmfulness of acts to be criminalized. In particular when the harmfulness of an act is manifested in violations of the interests of collectives and corporations, there is a need for national economic analysis that can adequately consider the social ramifications of an act. It is not often that the harmfulness of such acts can be measured with the same yardstick as traditional property offences. This makes it more difficult to set the punishment levels of the various offences into proportion.

The reform work assumes that the new penal code will contain all provisions regarding economic offences where it has been regarded as necessary to use

imprisonment as a sanction. At the present, these provisions are to be found in a number of different pieces of legislation. In each legislative sector, three types of criminalizations are involved: 1) acts that directly violate or endanger the immediate goals of the sector in question ("goal offences"), 2) acts that only hamper the supervision exercised by the authorities without directly endangering the goals of the sector in question ("supervision infractions") and 3) acts that otherwise violate the decreed courses of action ("course of action infractions"). The classification of an act within a certain category has an essential effect on the punishment level. Goal offences carry a more severe punishment than do supervision infractions or course of action infractions.

> In the case of goal offences, an attempt has been made to define the essential elements of the offences as precisely as possible, even though it is permitted to refer to special legislation when necessary. In the case of supervision infractions, the Criminal Law Committee proposed a synthesized set of essential elements – termed "supervision avoidance" – which would replace the numerous special provisions on obligatory registering and reporting that exist at the present. Minor course of action infractions would remain outside of the penal code, in the proper material legislation.

It has turned out that there are many problems involved in distinguishing between these types of criminalizations and the formulation of the appropriate penal provisions. It is not often possible to distinguish between acts regulated by the law on economic crime to the extent that the above categorization would require. In general, such a categorization is practical only when the material legislation in the economic sector in question is sufficiently developed. Proper attention must be paid to the goals, contents and terminology of this material legislation in the formulation of penal provisions. For example, the fact that Finland lacks coherent material legislation on the protection of the environment (just as it lacks a centralized system of supervision), prevents the formulation of precise essential elements of environmental offences and the differentiation of environmental offences.

A characteristic feature of offences in economic life is that they are negative peripheral phenomena (negative external effects) of activity which in itself is acceptable and which thus has positive external effects. In considering the criminalization of a type of act, therefore, a primary question might be the appropriate regulation of the conflict of interests. It is also a characteristic feature of the penal regulation of economic relations that it is often difficult to draw a line between acceptable and prohibited behaviour both when formulating the essential elements of offences and when applying the proper penal provisions. An example of this would be the difficulty in distinguishing between the ac-

ceptable minimization of taxes and illegal tax fraud.

The factors related above enable us to understand that it is easy to disagree upon the harmfulness and the extent of reproach of acts. It may be that sufficient unanimity can only be reached on the argument that acts causing negative external effects cannot be criminalized directly; instead, the threat of punishment should be attached to the related acts, which are of lesser significance. For example, certain activity may be allowed under certain conditions, while the criminalization is directed at a failure to give reports, obtain a license or undertake certain measures. Thus, the punishment level is very low, even if it is a question of persons who act with great deliberation and who have a socially strong position, persons to whom the threat of punishment should, to an increasing degree, be directed.

In the cost-benefit analysis that is involved in criminalization, economic activity is an area in which it is often possible to point out means that form an alternative to the criminal justice system: there is the possibility of civil and/or administrative law regulation. For example, the present Finnish legislation on consumer protection and unfair competition is based on the idea that punishment should only be used as a final means when other legislated measures prove to be insufficient. Especially in the area of unfair business activities, penal provisions signify in fact a supplement to the system of Market Court injunctions. The existence of such effective competing means raises the question of whether or not the punishment level should then be lower or whether or not it might be possible to leave out entirely the threat of punishment. Also, should the penal provision be formulated so that the punishability of the offence requires a supervisory authority to have unsuccessfully tried some other measure (for example, an injunction has proven to be ineffective)? Should the raising of charges in general require that a special supervisory authority has reported the offence?

It is specifically in considering the punishment level in such cases that we come to the core of balancing of utilitarian vis-à-vis justice-oriented arguments: what significance should we give to the symbolic value of the threat of punishment as such or, in other words, to the fact that acts which are considered equally harmful and reproachable must also be punished with equal severity? Due, for example, to the lack of the criteria of commensurability, we often cannot reach unanimity on the degree of harmfulness and reproach of acts.

According to the terms of reference given in the continued preparation of the criminal law reform, in directing punishability attention must be paid to formulations which can lead to a broad unanimity among different groups in society. These terms of reference modify the possibilities of rational argumen-

tation and recognize the differences in value judgments. The significance of the terms of reference, however, is somewhat open to speculation in the work, as the appointment of the members of the task force has been based primarily on their theoretical or practical expertise.

In the reform work it has proven to be difficult, even impossible, to fulfill all of the demands placed on the systematics and formulation of penal legislation. After all, in the writing of the new penal code, the following goals must be balanced out with one another: 1) provisions on acts which can lead to imprisonment are to be included in the penal code; 2) casuistic penal provisions are to be avoided; 3) the essential elements of the offences are to be described in an appropriate manner without reference to blanco provisions; and 4) the definitions of the offences are to be as clear and unambiguous as possible so that they would be in harmony with the legality principle in criminal law ("*nullum crimen sine lege*").

The above goals are problematic specifically in the penal regulation of economic relations, as a large share of the relevant penal provisions is at present to be found outside of the penal code. Also in the future, the corresponding penal provisions will be tied to the material legislation involved, no matter whether these penal provisions are contained in the penal code or not. The significance of this connection has been discussed on the part of marketing offences. Is there reason to include in the new penal code synthesized penal provisions that would attempt to protect not only the interests of consumers and competitors, but also those of purchasing entrepreneurs? In the present material legislation on the protection of consumers and competitors, different pieces of legislation are involved (the Consumer Protection Act and the Unfair Business Activities Act). There is no direct protection of the interests of purchasing entrepreneurs at the present although the legislation cited does have an indirect protective effect.

4 PRELIMINARY PROPOSALS FOR THE PENAL REGULATION OF ECONOMIC RELATIONS

The working groups on offences against property, economic offences and offences involving fraudulent exchange are expected to have completed their proposals by the summer of 1982. The following information is based on the data available on April 1, 1982. In this connection, the proposals of the latter two working groups are of primary interest.

Economic offences have tentatively been divided into three groups, 1) tax

and subsidy offences, 2) customs and regulation offences, and 3) marketing and industrial offences. The present penal code already contains provisions on tax fraud and smuggling. Separate legislation has been passed on regulation offences. The penal provisions on the other offences mentioned are to be found together with the material legislation in question.

It is proposed that the new penal code will contain penal provisions on subsidy fraud and subsidy misuse, regulation offences, marketing fraud, unfair competition offences, the giving or accepting of bribes in business, misuse of professional secrets, book-keeping offences, illegal engaging in business and copyright offences.

Most of these offences would be so-called "penal law offences" which would carry, according to the proposed penal scale, a fine or at most one year's imprisonment. For more serious versions of these offences, there would be a category called "serious penal law offences", for which the proposed penal scale would be imprisonment for at least eight months and at most three years. The intention is that these more serious offences would be listed in full in the penal code. The respective material legislation would contain provisions on the "privileged" forms of these acts, for which the category of "infractions" is involved and for which the maximum punishment would be a fine. In a considerable number of cases the existence of the threat of punishment would only be noted in special legislation. This would be the case, for example, with penal provisions supporting the supervision of unfair business activities.

At the present, Finnish law does not contain anything similar to the proposed legislation on subsidy offences. In the re-evaluation of subsidy crime, it has been considered a mirror image of tax offences. Subsidy fraud would involve the supplying of false or misleading information within the application for subsidies from public funds, while the misuse of subsidies would involve the use of subsidies granted for a specific purpose in violation of the conditions of the subsidy.

In respect of the fact that there will be a considerable reduction of the penal scales of various offences in general, the relative punishment level of, for example, book-keeping offences, the illegal engaging in business and copyright offences will increase. For this reason, various formulations and ways of limiting the scope of crime definitions have been considered. For example, in the definition of book-keeping offences it is not enough to describe the possible ways of violating book-keeping obligations, what is also required is the definition of how the act renders the evaluation of the economic status of the enterprise more difficult.

According to the tentative proposal, there will be four penal code chapters

on offences involving fraudulent exchange: 1) fraud, dishonesty and extortion offences, 2) payment offences, 3) forgery offences and 4) offences by a debtor. The basic offences in each chapter would be "penal law offences". The essential elements of the corresponding serious penal law offences and the infractions would be drafted in the normal manner.

The inclusion of a separate chapter on payment offences has been justified on the grounds that a large portion of property offences involve the misuse of the flow of payments and the means of payment in one way or another. Thus, it would be possible to take the characteristic features of these abuses into consideration to a greater extent than what had been possible when following the penal systematics based on a traditional approach to protected interests. The chapter would include provisions not only on monetary offences but also on means of payment offences as a "normal" penal law offence, as a serious penal law offence and as an infraction. Means of payment fraud would cover not only the unauthorized use of means of payment, which as an offence is related to theft, but it would also cover the misuse of a client-agent relation, which as an offence is related to a breach of trust.

The proposals do not foresee the regulation of the use of computers as a separate sector. Instead, the present provisions will be expanded so that the old basic systematics can be used to deal with the new phenomena brought about by computer technology and with the resulting new ways of committing offences. Thus, both the provisions on fraud and forgery will include a separate sub-section on the misuse of computers.

One feature which is characteristic of the proposals of the working groups in question is that, with a very few exceptions, it will be assumed that the penal law offences can lead to punishment only when committed intentionally. However, the degree to which it is possible to be consistent in this respect will be dealt with separately later on. The working groups have adopted a negative attitude towards crime definitions with very vague expressions covering various abuses of economic power, although such solutions have been put forth in Scandinavian discussions during the 1970's. It has also not been suggested that the crime definitions would be expanded so that it would be easier to come to grips with those persons who finance illegal economic activity or who otherwise are to be found in the background.

5 SANCTIONS SUPPLEMENTING OR REPLACING PUNISHMENTS. DECRIMINALIZATION AND DEPENALIZATION

As is the case in other Scandinavian countries, Finland has not clearly distinguished between criminalized acts and infractions which can only be sanctioned administratively (an example of the latter is the "*Ordnungswidrigkeitensystem*"). Such a distinction has been made in many Continental European legal systems. It is true, however, that an administrative system of punitive payments is in use in some special sectors in Finland.

Parking infractions, a very typical feature of traffic, have been decriminalized since 1970, and are sanctioned only through administratively set parking fines (called "fee" in the Act). An Act on fines in mass transport came into force in 1979. This Act has a very limited scope, as it applies to those who have used rail transport operated by public corporations without paying the fare. In practice, this limits the scope of the Act to the Helsinki area. An Act concerning excess lorry loads was passed at the beginning of 1982, following a very extensive discussion in principle, as the Act signified a departure from the basic tendencies outlined in the report of the Criminal Law Committee.

The Act provides for an excess load fine (called "fee" in the Act). The fine is set administratively on a very straightforward basis, and it is generally directed at the owner of the vehicle. In practice, the fine replaces the confiscation of the economic benefit derived from transporting excess loads. From the point of view of the criminal law reform work, the problematic feature is specifically the amount of the fine. The Criminal Law Committee had stated that punitive sanctions which, due to their severity, could be compared to punishment, should whenever possible be applied through criminal procedure. This would ensure sufficient due process. Furthermore, they should also be termed punishment, in order to demonstrate the extent of reproach of the behaviour. In order to deal with minor infractions carrying light penalties, one can and – according to the position adopted in the continued planning of the criminal law reform – one should develop a system of administrative fines (punitive fees) with a general scope of application.

Behind the adoption of a sanction with a deliberately severe effect, the excess load fine, there is an attempt to make the prevention and supervision of the transporting of excess loads more effective. The application of the new sanction does not depend on the evaluation of guilt, something which is typical of punishment in penal law. This considerably lessens problems related to the demonstration of proof. The method of application itself, which would

follow administrative procedure in regards to appeals, was not considered to lead to any essential difference in legal safeguards, as recently there has been a considerable improvement in the procedure in administrative courts. During the Parliamentary stage of the drafting of the legislation, the excess load fine was brought closer to sanctions in criminal law by providing for the possibility of lessening the size of the fine when equitable, or waiving the fine entirely in forgivable cases.

In practice the most important administrative fee with a penal nature is the punitive tax increase which is set in connection with the assessment of taxes in cases of tax deceit. The major share of all violations of tax legislation has been dealt with solely with punitive tax increases. It should be observed that in many cases a penal sanction would not even enter the question, due to the lack of the necessary imputability; for example, the main tax offence, tax fraud, is punishable only when committed intentionally. In 1978, the National Board of Taxation reminded its district authorities that they should, within the limits of their discretion, report tax offences within their supervisory sector to the police. This led to a considerable increase in the number of tax offences entered into the statistics. When the court passes sentence for a tax offence, it takes the punitive tax increase set by the tax authorities into consideration on the basis of the general provision in the criminal law on the moderation of sanctions. It would not be realistic to consider a considerable limiting of the scope of the administrative sanctions for tax deceit.

In connection with the criminal law reform, the use of confiscation as a sanction for economic offences has been discussed primarily in respect to the extent to which it is justified to retain the possibility of the confiscation of the objects involved in an offence (the *corpus delicti*). For example, at the present when passing sentence for the smuggling of currency, the entire amount of the currency that was illegally taken out of the country must be declared forfeited. It is clear that in any case, provisions for moderating the sanction or forgiving the offence must be set up, but it has also been suggested that this form of confiscation as a sanction could be abandoned entirely.

6 CERTAIN SPECIAL PROBLEMS IN CONNECTION WITH CORPORATE CRIME AND REGULATORY POSSIBILITIES

In Finland, the discussion of the problems related to corporate crime has primarily revolved around the justification for adopting provisions on the criminal

responsibility of corporations. The Environmental Offence Commission, the Labour Offence Commission, and the Criminal Law Committee all concluded that such provisions should be adopted. The reasons stated by the Criminal Law Committee can be summarized as follows:

> First of all, the Committee noted that during the 1800's, the system of criminal law could operate in a very satisfactory manner without provisions on the criminal responsibility of corporate bodies. Since then, however, the circumstances have changed: industrialization, the increasing difficulties in separating the directors of a corporate body from the corporate body itself, the increase in corporate forms, the development in means of production, the focusing of individual responsibility to an increasing degree on salaried directors and functionaries instead of decision-making bodies, and so on. Reference was also made to the development of tort liability as a more appropriate way of regulating corporate behaviour than criminal responsibility. The Committee emphasized in particular the social significance of corporate activity, the cumulation of actions and default, the lack of proportionality between offences and punishment, the difficulties in apportioning individual responsibility, the transfer of responsibility in hierarchical relationships, and the need for directing an effective sanction in an equitable manner. The nature of corporate identity does not prevent the criminal responsibility of corporate bodies; after all, they are already the subject of various rights and obligations. The Committee also dealt with the objection based on the concept of guilt by saying that the reproach can also be directed at the corporate body, and not just at those individuals acting on its behalf.

The Criminal Law Committee also assumed that individual criminal responsibility should be made more effective even if corporate responsibility was adopted. This would mean, however, that there would be more exact provisions than before which would define which directors in a corporate organization are (primarily) criminally responsible for each type of offence committed within the corporate body's area of operations. At this time there is considerable doubt concerning the point at which a corporate director or functionary should be regarded as having neglected a special obligation to act and when he would thus (in part) be responsible for economic offences committed in the corporate body. The realization of individual responsibility is made more difficult in part by the fact that the reproachable activity in an organization is often the result of the simultaneous or subsequent acts or neglect of several individuals; in these cases, the guilt of any one individual can be slight or remain anonymous. In practice, despite the lack of justifying provisions, it is often a question of assumed guilt, and the burden of proof is thus turned around. According to some interpretations, also the demand for subjective guilt, for the extent of reproach, has only slight independent significance.

By the summer of 1982 no final position will be taken in the work on the criminal law reform on the question of corporate liability. Parallel data has been obtained especially from Sweden and Norway. In Sweden, thorough study has led to the rejection of the idea of corporate responsibility, and there is a tendency towards the development of the system of sanctions, for example by expanding the scope of punitive confiscation and, when necessary, by the adoption of new administrative sanctions. Norway has cautiously expanded the scope of corporate responsibility. In Finland, there is a considerable divergence of opinion; for example the most important employers' organizations are emphatically against the idea. In order to formulate the final position, drafts for the necessary provisions are being drawn up in the case that corporate responsibility is adopted. The clarity and unambiguity with which this regulation can be realized will in part affect the final position.

6. Punishment and Justice – a Finnish Approach*

1 INTRODUCTION

In 1977, an anthology of articles called *Justice and Punishment*[1] was published in the United States. Three years later, a similar book, *Punishment and Justice*[2], came out as a result of Scandinavian co-operation. This could be considered a symptom of corresponding trains of thought on both sides of the Atlantic. Closer scrutiny shows, however, that there is on neither side a question of any uniform pattern of thought, although the American ideas have been called "the justice movement" and the Scandinavian ones "neoclassicism". Moreover, these two movements differ considerably from each other. These differences should be seen in the context of dissimilarities in the respective criminal justice systems and legal traditions, for example concerning the severeness of penal sanctions and the amount of discretion allowed to courts.

This paper is not an attempt towards systematic comparison. The starting point is my interpretation of current Finnish thinking about penal policy and the philosophical problems connected with this thinking. The comparative point of view will not be forgotten, however.

Both in Scandinavia and in the United States, philosophers, lawyers as well as penologists have participated in a debate on the justifications or goals of (criminal) punishment. The anthologies mentioned above give the impression that the contribution of philosophers has been greater in the United States than in Scandinavia. It seems that in the United States more attention has been paid

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* Original source: *ARSP* (*Archiv für Rechts- und Sozialphilosophie*), Beiheft Nr. 24. Franz Steiner Verlag. Stuttgart 1985, pp. 257–261. – The text was originally presented as a Paper at the Eleventh World Congress on Philosophy of Law and Social Philosophy, Helsinki, 14–20 August 1983. IVR (International Association for Philosophy of Law and Social Philosophy).

[1] *Justice and Punishment*. Edited by J. B. Cederblom and William L. Blizek. Ballinger Publishing Company, Cambridge, Mass., 1977.

[2] *Straff och rättfärdighet – ny nordisk debatt*. (Translated in the body text.) Edited by Sten Heckscher, Annika Snare, Hannu Takala and Jørn Vestergaard. Norstedt & Söners Förlag, Stockholm, 1980.

to analysis of terminology as well as to the philosophical background and theoretical analysis of changes or proposed changes in penal policy. A pragmatic approach has been especially dominant in Denmark. These differences in approach give rise to divergent terminology and make communication between philosophers and penologists difficult. I myself represent the latter group, but I hope to be understood in this conference of philosophers.

2 UTILITY V. JUSTICE

Both of the above-mentioned movements are united in their critical attitude towards utilitarian or teleological theories of punishment. These moral theories are concerned with the consequences of an act, a rule or a principle. The justification of an act etc. lies in the value of the consequences. Thus, according to utilitarian theories, the justification of a punishment is dependent on how efficient the deterrent (generally preventive), rehabilitating or incapacitating effects of the punishment are.

This criticism has coincided with the rise of deontological theories of morality. The consequences of an act, a rule or a principle are not the only thing to be considered when evaluating justifications of an act etc. A particular punishment must not be seen merely as a means of attaining certain positive results; e.g. the value of the principles applied in dealing with a criminal case and imposing the penal sanction is not determined solely by utility grounds. It is a question of a revival of retributivism, the justice approach or a human rights perspective. The conceptions *retribution* and *justice* have been defined in numerous ways, which shows how heterogeneous the movement is. The critical attitude towards utilitarian theories does not mean that the critics would share an attitude of unreserved enthusiasm toward retributivism or justice approach.

> Rather few of those who have participated in Scandinavian debate on penal philosophy have admitted that they are supporters of retributivism. However, retributivism has traditionally had a strong position in Finnish thinking. Already at the beginning of the 20th century, the Finnish philosopher *Edvard Westermarck* wrote that the retributive element in punishment is uneliminable, and cannot be wholly replaced by such principles as deterrence and reformation. Westermarck's works contain the paradoxical idea that, on one hand, the principle of retributive punishment cannot be satisfactorily developed within a logical system of moral thought, but, on the other hand, it is not possible to eliminate the principle from our moral thinking[3].

[3] See, e.g., Edvard Westermarck, *Ethical Relativity*, Kegan Paul, Trench, Trubner & Col, London, 1932.

Also the author of the general review in the American anthology *Justice as Fairness* follows such an ambivalent line of thought: "However attractive a strict justice approach may appear to be, few of the critics have become true believers in this approach and will abandon and modify their positions when the consequences become less attractive, either by way of external constraints or by reason of unwelcome logical extensions of principle"[4].

3 HIERARCHIES OF OBJECTIVES: THE GOALS OF CRIMINAL POLICY, THE PENAL JUSTICE SYSTEM AND THE SINGLE PENAL SANCTION

At the beginning of the 1970s, criminal policy was much debated in Finland. The main theme of this debate were the overall goals that were to be set for criminal justice policy. As a total reform of criminal legislation became actual towards the end of the decade, the goals of the penal justice system and a single penal sanction became a central topic of discussion. Before scrutinizing these objectives, it is necessary first to examine the goals of criminal policy. Criminal policy was considered a part of social development policy. Thus, decisions concerning crime prevention and control were to further the welfare and safety of entire society. It was determined a special objective of criminal policy to minimize the harmful effects (suffering and other costs) caused by crime and the control of crime. The goals of social and criminal policy were not defined only by using aggregative but also distributive concepts: the benefits of welfare as well as the costs of crime were to be shared in a just way.

> The most efficient way to minimize the costs of crime is to prevent it. However, the influence of the penal system on the motivation of potential offenders is limited. It is better to prevent environments and situations that instigate and further criminality from being created. The harmful effects of criminality are distributed between various parties, including, primarily, society as a whole, the actual and potential victims and the actual and potential offenders. While considering what is a just distribution, a question arises whether it is meet that the state should reimburse the victim the actual costs suffered by him because of crime. Another example of questions to be solved is whether the potential victim can be ordered by law to himself take preventive action against crime.

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[4] Patrick D. McAnany, "Justice in Search of Fairness," *in Justice and Fairness – Perspectives on the Justice Model*. Edited by David Fogel and Joe Hudson. Anderson Publishing Co., 1981, p. 40.

4 AN EFFICIENT, JUST AND HUMANE PENAL JUSTICE SYSTEM

The distributive objectives set for a penal justice system in Scandinavian debate are usually expressed with two concepts: justice and humaneness. The most important postulates to be derived from each of these concepts as well as from the utilitarian goal of efficiency are the following:

4.1 Efficiency

A criminal justice system shall be used for the prevention of unacceptable behavior only to the extent proved necessary in a cost–efficiency comparison of criminal policy measures.

The expediency of a criminal justice system is measured first and foremost through its general prevention (deterrence).

The contents of a penal justice system are defined in such a way that the system causes as little suffering and other social costs as possible without allowing any essential reduction of general prevention.

Although the efficiency of a criminal justice system is evaluated primarily on the basis of general prevention, even other utilitarian grounds have influence when single penal sanctions are imposed and sentences executed. These goals include rehabilitation and incapacitation (n.b. also the above-mentioned minimization of costs).

4.2 Justice

A penal justice system shall be used only to the extent that is reasonable when just distribution of harmful effects caused by crime and its control is realized.

The justice of a criminal justice system is evaluated first and foremost by asking whether or not it furthers the principles of equality, fairness and predictability.

The definitions of criminal acts and penal sanctions are legally bound (the legality principle in criminal law; *nulla poena sine lege*).

The threats of punishment as well as actual penal sanctions are, in accordance to the guilt and proportionality principles, in reasonable relation to harmfulness and blameworthiness of the acts.

The criminal procedure shall be organized so that the interests of the victim are reasonably taken into consideration.

4.3 Humaneness

The content of the criminal justice system is determined so that it is in harmony with the principles of human dignity, integrity, freedom of the individual and other human rights.

4.4 Postulates in the border area between the principles of justice and humaneness

A criminal justice system shall fulfil the requirements of legal safety.

When imposing a penal sanction and executing a sentence, the principles of equity and mercy shall be taken into consideration.

5 THE INTER-COMPLEMENTARY NATURE OF THE OBJECTIVES

The above-listed objectives, efficiency, justice and humaneness, and the postulates derived from each of them, are intended to complement each other. The idea of juxtaposing these manners of argumentation includes the presumption – which, in principle, can be verified empirically – that justice and humaneness as requirements for a criminal justice system are to a great extent in harmony with efficiency. In a possible conflict, the two first-mentioned principles should set limits to efficiency. However, the utilitarian arguments are primary insofar as the justification of the existence of the criminal justice system lies in its utility.

The justice approach which many American debaters have preferred concentrates on emphasizing the importance of the principle of proportionality and analyzing its contents. This has given rise to coinage of the term *just desert movement* – according to the thesis that a punishment must correspond to desert. In Scandinavia, a similar debate has brought about the term *penal value*. When attempting to evaluate the penal value of an act on an abstract level, it is considered, what acts are to be punished and how severely. When the same evaluation happens on a concrete level, consideration is given to what factors influence on imposing penal sanctions.

Unlike in the United States, in Scandinavia the principle of proportionality has a close connection with the principle of equity. According to a Finnish committee report[5], for example, it is in accordance with the principle of

[5] Rikosoikeuskomitean mietintö (Report of the Penal Law Committee). Committee Report 1976:72. Helsinki 1977.

proportionality, when interpreted widely, for the court to refrain from passing a sentence when this would, all its consequences considered, evidently be inequitable. The principle of proportionality is, thus, of importance not only when ranking the penal scales as to different crimes, but also when determining upper limits for penal sanctions.

6 THE EXPRESSIVE FUNCTION OF PUNISHMENT

There has been controversy in Scandinavia on the plausibility of the following postulate: "the objective of a criminal justice system (punishment) is to show authoritative disapproval and, thus, to change attitudes towards acceptance of legal order and, moreover, to symbolize the dominant system of (moral) values in society". This postulate is connected with both the principle of efficiency and that of justice. According to the postulate, a punishment would create and uphold social morals, i.e. it would have generally preventive effects. It is, however, stated in the postulate that despite this utilitarian point of view a penal sanction must have an expressive or symbolic function.

It is of important consequence to argumentation in penal philosophy and penal policy, which interpretation is considered correct for the above-quoted postulate. Firstly, the symbolic function of a punishment can be used as a weighty additional argument for the principle of proportionality: equally harmful and disapprovable acts should be penalized in an equal manner, although the cost-efficiency arguments would not support such a solution.

Secondly, the fact that it is the penal sanction which is believed to show authoritative disapproval and that this denunciation is considered important, has an effect on the debate on the relation between the criminal justice system and other punitive (control) systems. In Finnish criminal policy, the actual controversy has been on to what extent minor offences should be sanctioned in criminal legislation and whether it should be possible to punish corporate bodies.

Thirdly, it is problematic in a pluralistic society to require that criminalization should coincide with moral denunciation. *Mala prohibita* are more and more often equally or even more harmful for society as *mala per se*. In the above-mentioned Finnish committee report, it is true, denunciation as a ground for criminalization is given a modern interpretation: a criminal code cannot be fair unless it calls on the capable persons and those commanding more "social power" with higher demands than those applied to the average citizens.

7. Redefining the Area of Criminal Behavior: Offences Against the Person*

1 INTRODUCTION

A total reform of the Finnish Penal Code of 1889 is in operation, and its first stage was concluded by amendments to the Penal Code in 1990.[1] The second stage of this reform is expected to be implemented in 1995 on the basis of the Government Bill of 1993 (no. 94), and the revision as a whole should be completed by enacting a new Criminal Code before the year 2000.[2]

Redefining the area of criminal behavior is one of the primary objectives of a total reform of criminal law. In the following sections, the issues of criminalization will be examined by utilizing Finnish experience. The examples concerning criminalization will be taken from the definition of the criminal offences against the person (primarily then, offences against life and personal integrity).[3]

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* Original source: A Paper presented at a Colloquium during the Fifteenth International Congress on Penal Law. Rio de Janeiro (Brazil), 4–10 September 1994. AIDP (Association Internationale de Droit Pénal). The revised (valid) Chapter 21 (578/1995) and Chapter 22 (373/2009) of the Finnish Penal Code have been added to the Appendices, as no. 3.

[1] Concerning the English translation of the Code, see *The Penal Code of Finland and the Decree on the Enforcement of the Penal Code*. Research Institute of Legal Policy, Helsinki 1983 and *Amendments to the Penal Code and to the Decree on the Enforcement of the Penal Code*. Ministry of Justice, Helsinki 1991.

[2] Regarding the Finnish criminal law reform, see R. Lahti – K. Nuotio (eds): *Towards a Total Reform of Finnish Criminal Law*. Helsinki 1990, R. Lahti – K. Nuotio (eds): *Criminal Law Theory in Transition; Strafrechtstheorie im Umbruch*. Finnish Lawyers' Publishing Company, Helsinki 1992, R. Lahti – K. Nuotio – P. Minkkinen (eds): *Criminal Policy and Sentencing in Transition; Kriminalpolitik und Strafzumessung im Umbruch*. Helsinki 1992, and R. Lahti: Recodifying the Finnish Criminal Code of 1889: Towards a More Efficient, Just and Humane Criminal Law. *Israel Law Review*, Vol. 27, Nos. 1–2, 1993, pp. 100–117.

[3] The proposal for the revised Chapter 21 of the Finnish Penal Code on the Offences against life and health (Government Bill 94:1993) and the draft proposal for the revised Chapter 22 of the Code on the Offences against the corporal integrity of human embryo and foetus and against genetic integrity (prepared by a working party of the so-called Criminal Code Project, Ministry of Justice, 1989) are included as appendices nos. 1–2 at the end of this paper.

2 POLICIES AND PRINCIPLES OF CRIMINALIZATION

In the Finnish reform, an attempt has been made to assess on a uniform and systematic basis the goals, interests and values that the Criminal Code can promote and protect – while trying to resolve the basic problem of criminal legislation: what behavior is to be punished and how severely.

According to a traditional thinking, the Criminal Code shall be built on existing criminalizations, whereupon the nature of the protected interest (*Rechtsgut*) and the means for committing the offence usually determine the classification of offences and the assessment of their seriousness. In the Finnish preparatory work, another approach has also been used, and it reflects cost-benefit thinking as applied to criminal policy in general and to criminalizations in particular. This latter scrutiny involves several stages for discussing the need of penal provisions in various spheres of social life.

> In the first instance, we aim at locating those forms of criminal behavior that appear to be the most harmful as judged in the light of the specific goals of each sphere of social life. Does a certain behavioral phenomen harm or endanger the interests of an individual or society and, if so, to what extent? Secondly, we must evaluate the blameworthiness of those harmful or dangerous acts. So we are to discuss for example the actual freedom of choice on the part of the human agent, the circumstance whether it is reasonable to pronounce a reproach on the agent. Thirdly, we must embark on a systematic weighing of the pros and cons entailed by a criminalization, whether the benefits and costs are discernible in the fields of legal or social development policy. Any means of penal control must adapt its purpose with a view to the other possible methods of regulation (supervision, technological or administrative arrangements etc.). Furthermore, we are obliged to pay attention to the fact that it is only to a limited extent that the means of penal law can be resorted to. In addition, a penal regulation is subject of special restrictions due to legal safeguards (e.g., the legality principle requires that the penal provisions shall never leave too much room for interpretation).

The just-described approach signifies the limitations of the use of criminal law. Traditionally it has been emphasized that a criminalization has to remain a means of last resort (*ultima ratio*). Several preconditions for the employment of criminal law as a control mechanism must be fulfilled as listed in the Finnish legislative work (similar prerequisites in German terms: *Strafwürdigkeit*, *Strafbedürftigkeit* and *Straftauglichkeit*).

As for the offences against the person, it may at the first glance seem to be rather obvious what criminalizations are needed. After closer consideration many legislative problems appear, and some of the debatable questions

are of general nature and others specific to this category of offences. In the Finnish reform work, in particular the following issues have called forth deliberations:

a) how should the basic principles governing criminal law be reflected in the shape and form of criminal legislation;
b) how should we assess the seriousness of crime and, accordingly, for instance differentiate the offences against the person into various chapters of the Criminal Code and into subcategories in each chapter;
c) what part should be given to the criminalization of dangerous behavior (*Gefährdungsdelikte*); and
d) how should we decide the emerging problems concerning the legal protection of life, primarily caused by the development of modern biomedical techniques (life's beginnings) and the advances in medical technology and pharmacology (life's end).

3 ON THE SIGNIFICANCE OF THE BASIC PRINCIPLES CONCERNING THE SHAPE AND FORM OF CRIMINAL LEGISLATION

There are two basic principles governing Finnish criminal law reform: the legality principle (*nullum crimen sine lege, nulla poena sine lege poenali*) and the principle of culpability (*Schuldprinzip*). These principles are justified primarily on the basis of their compatibility with the justice values of legal certainty and predictability. At the same time those principles are defended with a reference to the utilitarian argument of general prevention. A necessary prerequisite for the persuasiveness of such a parallel or complementary justification is that general prevention means so-called integration prevention, in other words the effect that criminal law has in maintaining and strengthening moral and social norms. – It must be kept in mind that those basic principles are significant, not only when reforming criminal law but also in its actual application.

The legality principle includes, *inter alia*, the requirement of certainty of criminal law. The aim to limit judicial discretion is predominant in the reform work. While the Swedish Criminal Code of 1965 had been criticized for using overly vague crime definitions, the Finnish law drafters have striven for describing the offences as clearly as possible, for example by reducing the use of value-laden or otherwise ambiguous terms in the definition of the crime. On the other hand, the objective of more precise crime definitions collides with another aim of the Finnish reform work, namely the effort to synthesize crime definitions, in other words to write them in a more abstract form (as in

the definition on 'Causing of danger'). A reasonable balance between these conflicting aims is to be sought.

Other means to limit judicial discretion have also been used. Thus, the existing offences have in many cases been split into subcategories (e.g., basic assault, aggravated assault and petty assault), and the definition of an aggravated offence is based on an exhaustive list of criteria (however, a milder evaluation is always discretionary). In addition, the amount and wideness of penal scales (punishment latitudes) have been generally reduced.

In accordance with the legality principle and the values behind it, the basic concepts and principles governing the general preconditions of criminal liability will be defined in the general part of the Criminal Code to a greater extent than is the case now. It is obvious that, *inter alia*, the concepts of intention and negligence as well as the preconditions of the liability for omissions will be defined in the new Code (unlike the valid Code). These legal definitions are of particular importance in relation to the offences against the person, for following reasons: the punishability of intentional and negligent offences against the person is profoundly different; and the major area of criminal liability for omissions consists of the offences against the person (although the scope of this kind of liability is in Continental legal tradition much wider than that).[4]

One method to strengthen the legality principle will be the effort to reduce and specify the use of so-called blanket provision technique. Blanket provisions are often added to the special legislation for criminalizing in general violations of the Act in question or of enactments given on the basis of that Act.

As for *the principle of culpability* (guilt), the definition of fault terms (intention and negligence) in law will probably as such strengthen the significance of this principle. The idea that the fault element of intention apparently indicates a higher degree of blameworthiness than negligence (basic or gross negligence) is reflected in the draft provision according to which the liability for negligent behavior depends upon express specification. Accordingly, the main emphasis of the offences regulated in the Criminal Code lies on intentional behavior.

In its original form, the Finnish Penal Code of 1889 prescribed it as an aggravation of a crime if a person, guilty of intentional and dangerous conduct (which was punishable as assault, robbery or similar intentional offence), caused death or serious injury by that act to the victim, although his intention or even negligence with respect to that result was not proven. This kind of liability not covered by the guilt (so-called *'Erfolgsqualifizierte Delikte'*) did

[4] *Cf.* the resolution XIIIth Congress of the AIDP on the crimes of omission, *Revue Internationale de Droit Pénal* (RIDP), Vol. 56, 1985, pp. 489–492.

not accord with the principle of culpability, and the crime definitions reflecting it were abolished in 1969 when the chapters (= Chs. 21–22) on the offences against the life and personal integrity were revised. One such provision dealing with collective brawls still remained but, according to the Government bill of 1993, it will also be repealed. In Finnish criminal law the doctrine of fair opportunity has been adopted in a strict form; thus, no individual shall be blamed for consequences over which he had no control.

4 CRIME-SERIOUSNESS AND THE DIFFERENTIATION OF THE OFFENCES AGAINST THE PERSON

One important function of the criminal justice system is to demonstrate socio-ethical reproach and, in this way, influence the sense of morals and justice. This aim of *denunciation*, which has long been emphasized in Finnish and Scandinavian criminal policy, implies that the Criminal Code is a notable instrument for communication; furthermore, the Criminal Code distinctively represents symbolic legislation expressing in an authoritative way the values and interests prevailing in society.

The value(s) of *justice* is then particularly significant, and the aspect of social justice is one of its connotations. The legality principle and the principle of culpability (*supra*, 3) can also be seen as subcriteria of justice, and the same is true of the proportionality principle which governs the assessment of crime-seriousness. It is, however, worth noticing that it is largely possible to apply the main criteria for rationality in the criminal justice system – justice, efficiency and humaneness without creating conflict over the development of the penal system.

When the aim of denunciation and the value of justice are seen essential, the systematic assessment of crime-seriousness and the solutions concerning the classification of offences and other structure of penal provisions are of vital importance in the reform of criminal law.

The aims of accessibility and comprehensibility have in the Finnish reform work affected so that all important information – both general principles of criminal law and crime definitions – will be concentrated on the Criminal Code. From a comparative perspective it is noteworthy that, in addition to traditional crime definitions, all offences with a punishment latitude containing imprisonment are intended to be listed in the Criminal Code. On the other hand, the concept of offence is broad and the Finnish law does not contain a clear and uniform system of administrative penal law for minor infractions.

The classification and structure of offences are very much determined by the legal tradition. Regarding the offences against the person, the Finnish Penal Code of 1889 dealt with these offences in several chapters which followed chapters governing the offences against basic collective or institutional interests (or values): one chapter contained the provisions on 'murder, manslaughter and other assault', another chapter the provisions on 'infanticide' (including the offences against foetus) and the third chapter the offences against the person in duel. These chapters were followed by chapters dealing with the protection of other basic individual interests (or rights): offences against peace, liberty, honour and property.

In 1969 a remarkable reform of the provisions on the offences against life and personal integrity was implemented. The classification of these offences was revised and many structural and substantive changes in crime definitions were made. The chapters of the Penal Code in question (= Chs. 21–22) deal now with the 'offences against life and health' and 'foetus destruction' (abortion). The penal provisions were generally modernized in the way which was guiding for the future reform of criminal law. Accordingly, an attempt was made to write the crime definitions more precise and synthesized, certain offences were split into several subcategories and the penal provisions based on the liability not covered by the guilt were repealed (see *supra*, 3). In all, the Government Bill of 1993 does not differ crucially from the existing law as amended in 1969.

The old-fashioned provisions concerning offences in duel were finally repealed in 1969 (they were, as far as is known, never applied). The legislation on permitted *abortion* was radically liberalized in 1970 and, in accordance with that reform, the provisions on illegal abortion in the Penal Code were essentially mitigated in 1969. For instance, if a woman illegally kills her foetus and the circumstances are very mitigating punishment may be withheld. On the other hand, since a woman can in fact always get a permission for an early abortion on the basis of the Abortion Act of 1970 illegal abortions are nearly non-existent.

When drafting the criminal law reform of 1969 one controversy concerned the punishability of abetment in suicide and of passive euthanasia. The abetment in suicide was not criminalized but the offence 'killing on request' was maintained as a privileged form of manslaughter. The standpoint of the legislator in relation to the justification of passive euthanasia remained vague (cf. *infra*, 6).

The offences of *assault* were in 1969 defined in a more abstract method than before. The crime definition on basic assault includes that somebody intentionally causes another bodily injury or an illness; according to the definition of petty assault, intentional causing of pain or other 'assault' is also punish-

able. After this synthesization of crime definitions, special provisions on the spreading of venereal disease and of poison to another person were repealed as unnecessary. So the provisions on assault and other offences against life and health are applicable when, for example, a person transmits HI-virus (AIDS) to another, and some cases from recent judicial practice confirm this opinion.

In the Government Bill of 1993 a proposal is made that the definitions of assault were partly clarified and partly extended. The basic form of assault (and, consequently, the aggravated and petty assault) would contain the following ways of committing intentionally the crime against another: using corporal violence or (without using corporal violence) injuring the health, causing pain or causing to pass into a state of unconsciousness or into another similar state of mind.

It is worth noticing that a special crime definition on *torture* was not regarded as necessary although Finland has ratified the conventions in question (those of United Nations and of Council of Europe). The reasoning for this view is that the Finnish Penal Code as a whole criminalizes the ways to commit torture which must be punishable according to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984). In order to fulfil the requirement of the Convention, an attempt of basic assault was made punishable (an attempt of aggravated assault was already earlier punishable). Torture was also added to those (international) crimes to which criminal jurisdiction is based on the universality principle.

5 CRIMINALIZATION OF DANGEROUS BEHAVIOR AGAINST THE PERSON

In the total reform of the Finnish Penal Code, the significance of the principle of culpability has been strongly emphasized (see *supra*, 3). An important implication of this principle concerns the liability for dangerous behavior. The following reasoning was strongly supported in the basic report on criminal law reform (1977): In order to ensure that the society's reaction were proportional to the degree of blameworthiness of the offender's mind at the time of the offence, less emphasis should be placed on crimes of negligence in favor of criminalization of dangerous behavior. The justification for this view is that causing danger deliberately or otherwise intentionally indicates a higher degree of blameworthiness than causing certain consequence through negligence.

This reasoning was sharply criticized by many experts, who were concerned about the vision that the increased criminalization of dangerous behavior

would lead to an unacceptable enlargement of the area of punishable conduct. Nevertheless, it is a fact that the criminalizations of dangerous behavior have remarkably increased since the 1970's in Finnish criminal law. The total reform of criminal law will accelerate this development although the emphasis on the liability for endangerment is not so drastic as the basic report recommended. In any case there is need for further theoretical research on the concepts and principles governing the liability for dangerous behavior.[5]

The crime definitions on the basic and aggravated form of 'endangering traffic', which are included in the Road Traffic Act of 1981 (but are planned to be removed to the Criminal Code), are the mostly applied provisions in this area. These offences contain the breaking of road traffic rules in such a way that the behavior is conducive towards causing danger to the life, health or property of another. The expression 'conducive towards causing danger' implies so-called abstract danger, in which case it is not necessary to prove the actual dangerous situation occurred, in contrast to the formulation 'causing danger', which refers to a concrete, actual danger.

In the revision of the provisions on the offences against life and personal integrity (1969), a very synthesized crime definition on 'causing of danger' was created. According to it, it is punishable if somebody intentionally or through gross negligence causes a serious danger to the life or health of another. This provision is prescribed to be secondary in relation to any other penal provision covering an endangerment to the life or health of another.

In the Government Bill of 1993 the synthesization of endangerment offences is gone still further in the sense that a traditional crime definition on 'abandonment', in which case somebody leads another into a helpless state or leaves a person for whom he is responsible in such a state, will be repealed because the definition of 'causing of danger' is thought to be applicable in most of those cases.

It is important to notice that, according to Finnish legal tradition, the offences involving *general* (i.e., not individually specified) danger to life, health or property are regulated in a separate chapter of the Penal Code. In the Government Bill of 1993 these offences are defined in a very abstract way and many of them are divided into subcategories. The basic crime definitions include, *inter alia*, the following: 'sabotage', 'endangerment of health', 'nuclear explosive offence', 'negligent causing of general danger' and 'capture of a vessel'.

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[5] *Cf.* the proceedings of the AIDP Preparatory Colloquium on the offences of endangerment, *RIDP*, 1969, Nos. 1–2.

6 NEW LEGAL DILEMMAS AFFECTING LIFE AND DEATH[6]

As already indicated (see *supra*, 4), the issue of *euthanasia* was discussed when the provisions on the offences against life and health were reformed in 1969. Due to the advances in medical technology and pharmacology, this issue is more and more topical. In order to make it clear that passive euthanasia shall be regarded as justified (in contrast to the forbidden active euthanasia), a special provision was included in the draft proposal for the revision of the chapter on the offences against life and health (1989). This provision would have expressed that the discontinuance of treatment maintaining the vital functions of a mortally ill patient in accordance with acceptable medical practice shall not be deemed an offence against life.

In the Government Bill of 1993 this provision was not regarded as necessary and it was deleted; the attitude towards passive euthanasia was still permissive. When the Bill is now (1994) under consideration in Parliament some debaters have even demanded a legalization of active euthanasia (in line with the model of the Netherlands).

The rapid progress in modern bio-medical techniques – particularly in human artificial procreation and gene technology – has created new challenges to moral reasoning and legal regulation. In many countries the most obvious need for legal regulation and protection concerns viable (living) human *embryos*. The inviolability of genetic inheritance is another new subject of legal protection.[7]

It is a generally accepted point of departure in the Finnish reform work that legal regulation in these areas is needed but it should primarily provide a regulatory framework, in connection with a licence authority controlling the activity of the medical and research personnel in the field. The use of criminal law should remain as the last resort. The Penal Code would include only such penal provisions in which the punishment latitude contains imprisonment, in other words when the violation of the law is not a minor infraction. (See the Finnish draft proposal in the appendix no. 2.)

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[6] See generally, *Law and moral dilemmas affecting life and death*. Proceedings of the 20th Colloquy on European Law, Glasgow, 10–12 September 1990. Council of Europe, Strasbourg 1992.

[7] See generally, the proceedings of the AIDP Preparatory Colloquium on the Criminal law and modern bio-medical techniques, *RIDP*, Vol. 59, Nos. 3–4, 1988, and the resolution of the following XIVth Congress of the AIDP on the same subject, *RIDP*, Vol. 61, 1990, pp. 115–126.

7 RECOMMENDATIONS

a) The questions on criminalizations – what behavior is to be punished and how severely – should be discussed by following the rules of rational argumentation, even when dealing with morally laden issues of life and death.
b) Such basic principles of criminal law as the legality principle and the principle of culpability should be reflected thoroughly in the shape and form of criminal legislation.
c) A systematic assessment of crime-seriousness is an important task for the reformer of criminal law. The law drafters should consider how this assessment will affect the classification of offences and their subdivision.
d) When redefining criminal behavior consideration should be given to what extent the causing of danger to specified individual or collective interests should be criminalized.
e) The scope and methods for the legal protection of individual interests (such as human life, personal integrity and genetic integrity) should be continuously scrutinized taken into account, *inter alia*, the development of bio-medical techniques and medical technology.

APPENDICES[8]

1. Proposal for the Revised Chapter 21 of Finnish Penal Code: Offences against Life and Health (Government Bill 94:1993)

Section 1 Homicide

Who kills another shall be sentenced for homicide to imprisonment for a determinate period, at least eight years. An attempt shall be punished.

Section 2 Murder

If homicide is committed
1) with firm deliberation,
2) in a particular brutal or cruel manner,
3) in a way that causes serious general danger, or
4) by killing an official in order to prevent maintaining of public order and safety, and the offence, also when assessed as a whole, is to be deemed serious, the offender shall be sentenced for murder to imprisonment for twelve years or to imprisonment for life.

An attempt shall be punished.

[8] When looking at the provisions the following principle should be taken into account: Unless stipulated otherwise, an act described in the penal provision is punishable only when committed with intent.

Section 3 Manslaughter

If the homicide, taking into consideration the exceptional circumstances of the offence, the motives of the offender or the other factors that led to and are connected with the offence, is deemed as a whole to have been committed under mitigating circumstances, the offender shall be sentenced for manslaughter to imprisonment for at least four years and at most ten years.

An attempt shall be punished.

Section 4 Infanticide

A woman who, when still in a state of fatigue or anguish brought upon by childbirth, kills her child, shall be sentenced for infanticide to imprisonment for at least four months and at most four years.

An attempt shall be punished.

Section 5 Assault

Who uses corporal violence against another or, without using corporal violence, injures the health of another, causes pain to another or causes another to pass into a state of unconsciousness or into another similar state of mind shall be sentenced for assault to a fine or to imprisonment for at most two years.

An attempt shall be punished.

Section 6 Aggravated assault

If in assault

1) another person is caused a serious bodily injury, a serious illness or mortal danger,
2) the offence is committed in a particular brutal or cruel manner, or
3) a firearm or edged weapon or another comparable mortally dangerous implement is used,

and the offence, also when assessed as a whole, is aggravated, the offender shall be sentenced for aggravated assault to imprisonment for at least six months and at most ten years.

An attempt shall be punished.

Section 7 Petty assault

If the assault, taking into consideration the pettiness of the violence, of the violation of corporal integrity or of the injury to health or the other factors connected with the offence, is to be deemed petty as a whole, the offender shall be sentenced for petty assault to a fine.

Section 8 Negligent manslaughter

Who causes the death of another through negligence shall be sentenced for negligent manslaughter to a fine or to imprisonment for at most two years.

Section 9 Aggravated negligent manslaughter

If, in negligent manslaughter, death is caused through gross negligence and the offence, also when assessed as a whole, is aggravated, the offender shall be sentenced for aggravated negligent manslaughter to imprisonment for at least four months and at most four years.

Section 10 Negligent causing of injury

Who causes injury or illness to another through negligence shall be sentenced for negligent causing of injury to a fine or to imprisonment for at most six months.

Section 11 Aggravated negligent causing of injury

If, in negligent causing of injury, the injury or illness is caused through gross negligence and the offence, also when assessed as a whole, is aggravated, the offender shall be sentenced for aggravated negligent causing of injury to a fine or to imprisonment for at most two years.

Section 12 Causing of danger

Who intentionally or through gross negligence causes a serious danger to the life or health of another shall, unless an equally severe or more severe sentence is provided for the act elsewhere in law, be sentenced for causing of danger to a fine or to imprisonment for at most two years.

Section 13 Omission of an act of rescue

Who, knowing that another is in mortal danger, refrains from providing or obtaining help to such person which he could reasonably be expected to provide, taking into consideration his possibilities and the nature of the situation, shall be sentenced for omission of an act of rescue to a fine or to imprisonment for at most six months.

Section 14 Right to bring charges

The public prosecutor may not bring charges for petty assault or causing of injury unless the injured party reports the offence for prosecution. However, a report for prosecution is not necessary for petty assault directed against a child below the age of fifteen years.

2. Draft proposal for the Revised Chapter 22 of the Finnish Penal Code: Offences against the Corporal Integrity of Human Embryo and Foetus and against Genetic Integrity (Working party, Ministry of Justice, 1989)

Section 1 Offence against the corporal integrity of human embryo or foetus

Who, without the licence required by law, carries out an experimental investigation with and on a viable (living) human embryo or foetus or otherwise, without authorization, violates the corporal integrity of such an embryo or foetus shall be sentenced for offence against the corporal integrity of human embryo or foetus to a fine or to imprisonment for at most one year.

An attempt shall be punished.

An investigation for the treatment or diagnosis of the human embryo or foetus in question shall not be deemed an offence referred to in the paragraphs 1 through 2 of this section.

Section 2 Illegal abortion

Who, without the licence required by law or otherwise without authorization, causes an abortion to another shall be sentenced for illegal abortion to a fine or to imprisonment for at most two years.

Section 3 Offence against genetic integrity

Who carries out experiments with and on human gametes or embryos aimed at

1) facilitating the production of genetically identical human beings,
2) facilitating the production of human beings by mixing genetically different embryos, or
3) facilitating the production of living human individuals being hybrids with a genetic mass in which elements of other races are incorporated,

shall be sentenced for offence against genetic integrity to a fine or to imprisonment for at most two years.

3. The revised (valid) Chapter 21 (578/1995) and Chapter 22 (373/2009) of the Finnish Penal Code[9]

Chapter 21 Homicide and bodily injury (578/1995)

Section 1 Manslaughter (578/1995)

(1) A person who kills another shall be sentenced for manslaughter to imprisonment for a fixed period of at least eight years.
(2) An attempt is punishable.

Section 2 Murder (578/1995)

(1) If the manslaughter is (1) premeditated, (2) committed in a particularly brutal or cruel manner, (3) committed by causing serious danger to the public, or (4) committed by killing a public official on duty maintaining public order or public security, or because of an official action, and the offence is aggravated also when assessed as a whole, the offender shall be sentenced for murder to life imprisonment.
(2) An attempt is punishable.

Section 3 Killing (578/1995)

(1) If the manslaughter, in view of the exceptional circumstances of the offence, the motives of the offender or other related circumstances, when assessed as a whole, is to be deemed committed under mitigating circumstances, the offender shall be sentenced for killing to imprisonment for at least four and at most ten years.
(2) An attempt is punishable.

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[9] The unofficial translation of the Finnish Penal Code in force (up to the Statute No. 766/2015) is available from the website of the Ministry of Justice: https://www.finlex.fi/fi/laki/kaannokset/1889/en18890039_20150766.pdf.

Section 4 Infanticide (578/1995)

(1) A woman who in a state of exhaustion or distress caused by childbirth kills her baby shall be sentenced for infanticide to imprisonment for at least four months and at most four years.
(2) An attempt is punishable.

Section 5 Assault (578/1995)

(1) A person who employs physical violence on another or, without such violence, injures the health of another, causes pain to another or renders another unconscious or into a comparable condition, shall be sentenced for assault to a fine or to imprisonment for at most two years.
(2) An attempt is punishable.

Section 6 Aggravated assault (654/2001)

(1) If in the assault (1) grievous bodily injury or serious illness is caused to another or another is placed in mortal danger,(2) the offence is committed in a particularly brutal or cruel manner, or (3) a firearm, edged weapon or other comparable lethal instrument is used and the offence is aggravated also when assessed as a whole, the offender shall be sentenced for aggravated assault to imprisonment for at least one year and at most ten years.
(2) An attempt is punishable.

Section 6(a) Preparation of an aggravated offence against life or health (435/2013)

(1) A person who, for the commission of an offence referred to in sections 1-3 or 6,(1)has in his or her possession a firearm or edged weapon or a comparable lethal implement or instrument that is particularly suitable to be used as an instrument in the offence,(2) agrees with another person on or prepares a detailed plan for the com-mission of one of said offences, or (3)employs, orders or otherwise exhorts another to commit said offence or promises or offers to do so, shall be sentenced for preparation of an aggravated offence against life or health to imprisonment for at most four years.
(2) If, however, the danger of the commission of the offence has, for other than random reasons, been slight or if the person voluntarily has abandoned the preparation of the offence, prevented its continuation or otherwise negated the significance of his or her activity in the preparation of the offence, subsection 1 does not apply.

Section 7 Petty assault (578/1995)

If the assault, when assessed as a whole and with due consideration to the minor significance of the violence, the violation of physical integrity, the damage to health or other circumstances connected to the offence, is of minor character, the offender shall be sentenced for petty assault to a fine.

Section 8 Negligent homicide (578/1995)

A person who through negligence causes the death of another shall be sentenced for negligent homicide to a fine or to imprisonment for at most two years.

Section 9 Grossly negligent homicide (578/1995)
If in the negligent homicide the death of another is caused through gross negligence, and the offence is aggravated also when assessed as a whole, the offender shall be sentenced for grossly negligent homicide to imprisonment for at least four months and at most six years.

Section 10 Negligent bodily injury (578/1995)
A person who through negligence inflicts not insignificant bodily injury or illness on another shall be sentenced for negligent bodily injury to a fine or to imprisonment for at most six months.

Section 11 Grossly negligent bodily injury (578/1995)
If in the negligent bodily injury or illness is inflicted through gross negligence, and the offence is aggravated also when assessed as a whole, the offender shall be sentenced for grossly negligent bodily injury to a fine or to imprisonment for at most two years.

Section 12 Brawling (578/1995)
A person who by employing physical violence or otherwise takes part in a brawl or attack which has several participants and where someone is killed or suffers a serious bodily injury or illness, if he or she had reason to believe that the brawl or attack would have the said consequence, shall be sentenced for brawling to a fine or to imprisonment for at most two years.

Section 13 Imperilment (578/1995)
A person who intentionally or through gross negligence places another in serious danger of losing his or her life or health, shall be sentenced, unless the same or a more severe penalty for the act is provided elsewhere in the law, for imperilment to a fine or to imprisonment for at most two years.

Section 14 Abandonment (578/1995)
A person who renders another helpless or abandons a helpless person in respect of whom he or she has an obligation of care, and thereby endangers the life or health of said person, shall be sentenced for abandonment to a fine or to imprisonment for at most two years.

Section 15 Neglect of rescue (578/1995)
A person who knows that another is in mortal danger or serious danger to his or her health, and does not give or procure such assistance that in view of his or her options and the nature of the situation can reasonably be expected, shall be sentenced for neglect of rescue to a fine or to imprisonment for at most six months.

Section 16 Right to bring charges (441/2011)
The public prosecutor may bring charges for petty assault only if the injured par-ty reports the offence for the bringing of charges or the offence was directed at (1) a person below the age of eighteen years;(2) the offender's spouse or former spouse, sibling or direct ascending or descending relative or a person who lives or has lived in a joint house-hold with the offender or otherwise is or

has been in a corresponding personal relationship with the offender or is close to him or her; or(3) a person due to his or her employment and the offender is not part of the personnel at the place of employment. The public prosecutor may bring charges for the negligent bodily injury only if the injured party reports the offence for the bringing of charges.

[Section 17 has been repealed; 712/2004]

Section 18 Provision on the scope of application (302/2014)

In applying section 2, paragraph 4 of this Chapter, a person elected to a public official as referred to in Chapter40, section 11, a foreign public official acting in the service of the International Criminal Court or in Finnish territory on the basis of an international agreement or other international obligation in inspection, surveillance, pursuit or criminal investigation duties, or who acts in Finnish territory in accordance with the Act on Mutual Assistance in Criminal Matters and on the basis of a request for mutual assistance issued or approved by a Finnish authority in criminal investigation or other duties, and a person referred to in Chapter16, section 20(5), is equated with a civil servant as the object of the criminal act.

Chapter22 Violation of a foetus, embryo and genetic inheritance (373/2009)

Section 1 Unlawful abortion (373/2009)

(1) A person who aborts the pregnancy of another person without the permission referred to in the Abortion Act (239/1970) or otherwise without authorization shall be sentenced for unlawful abortion to a fine or to imprisonment for at most two years.
(2) An attempt is punishable.
(3) The woman whose pregnancy is interrupted in the act referred to in subsection 1 or 2 shall not be sentenced as an offender or participant in unlawful abortion or in its attempt. However, the woman may be sentenced for the offence re-ferred to in section 13 of the Abortion Act.

Section 2 Aggravated unlawful abortion (373/2009)

(1) If in the unlawful abortion (1) serious danger is caused to the life or health of the woman, or (2) the offence is committed in violation of the will of the woman .and the offence is aggravated also when assessed as a whole, the offender shall be sentenced for aggravated unlawful abortion to imprisonment for at least four months and at most four years.
(2) An attempt is punishable.

Section 3 Unlawful manipulation of an embryo (373/2009)

A person who undertakes
(1) embryo research without the permission of the Social Welfare and Health Sector Licence and Supervision Office as provided in section 11, subsection

1 of the Medical Research Act (488/1999), referred to in the following as the Research Act, or without the written consent of the donor of the germ cells or of the woman referred to in section 12 of the Re-search Act, or undertakes foetus research without the written consent of the pregnant woman referred to in section 14 of the Research Act,

(2) embryo research in violation of the restriction provided in section 11, subsection2 or section 13, subsection 3 of the Research Act or other measures directed at an embryo in violation of the ban referred to in section 13, subsection 1 or 2 of the Research Act, or

(3) embryo or germ cell research in violation of the ban referred to in section 15 of the Research Act, shall be sentenced for unlawful manipulation of an embryo to a fine or to imprisonment for at most one year.

Section 4 Unlawful manipulation of genetic inheritance (373/2009)

A person who undertakes research involving the manipulation of the integrity of a human or a human embryo or a human foetus and that is intended to make possible (1) the cloning of a human,(2) the generation of a human by combining embryos or (3) the generation of a human by combining human germ cells and animal genetic material, shall be sentenced for unlawful manipulation of genetic inheritance to a fine or to imprisonment for at most two years.

Section 5 Unlawful use of germ cells (373/2009)

A person who

(1) in fertility treatment uses germ cells or foetuses in violation of the general restrictions on their use as provided in section 4, subsection 1 of the Fertility Treatment Act (1237/2006), referred to in the following as the Fertility Treatment Act,

(2) influences or attempts to influence the traits of a child by selecting germ cells or foetuses or otherwise in violation of section 5 of the Fertility Treatment Act,

(3) accepts, stores or uses germ cells or foetuses in fertility treatment without the consent of the donor referred to in section 16 or 20 of the Fertility Treatment Act,

(4) stores germ cells or foetuses or provides fertility treatment without the permission of the Social Welfare and Health Sector Licence and Supervision Office referred to in section 24 of the Fertility Treatment Act or in violation of the time limit provided in section 6, subsection 3 of the Fertility Treatment Act or

(5) provides fertility treatment without the written consent of the person receiving the treatment as referred to in section 8, paragraph 1 of the Fertility Treatment Act or in violation of paragraph 4 of said section after the person providing the consent has withdrawn this consent or has deceased, shall be sentenced for unlawful use of germ cells to a fine or to imprisonment for at most one year.

Section 6 Violation of the identity of a child (28/2012)

A person who neglects to follow

(1) the provisions of section 12, subsections 2 and 3 or section 14 of the Fertility Treatment Act regarding the use, content, marking or reporting of the identification mark of a donor,

(2) the provisions of section 18 of the Fertility Treatment Act on the reporting of information to the donor register,

(3) the provisions of section 10, subsection 2 or sections 28 or 30 of the Fertility Treatment Act on the provision, transfer, recording or maintaining of information and documents or

(4) the provisions of sections 92 or 93 of the Adoption Act (22/2012) on the keeping or transfer of documents or on the provision of information so that the act is conducive to endangering the right of a child to ascertain his or her birth, shall be sentenced for violation of the identity of a child to a fine or to imprisonment for at most one year.

8. Constitutional Rights and Finnish Criminal Law and Criminal Procedure*

1 INTRODUCTION

The constitutional aspects of criminal law and criminal procedure only began to receive serious attention in Finland in the 1990s. The remarkable change in legal thinking and practice in this respect was connected to two major legislative reforms: firstly, Finland ratified the European Convention on Human Rights and Fundamental Freedoms (ECHR) in 1990 and, secondly, new provisions on fundamental (basic) rights were incorporated in the Finnish Constitution in 1995. A fully revised new Constitution of Finland was enacted in 1999 (to be entered into force on 1 March 2000), but the substance of fundamental rights and freedoms was confirmed already in the constitutional reform of 1995.

Those aspects had not, however, been completely overlooked before. Most of the relevant human rights treaties were eventually ratified in Finland (e.g., the International Covenant on Civil and Political Rights, CCPR) and, when ratified, they were incorporated into the domestic legal order. Nevertheless, courts or administrative authorities very seldom referred to human rights treaties or constitutional rights before the late 1980s; a tradition of invoking constitutional rights in the courts was lacking. Instead, human rights treaties and constitutional rights were primarily regarded as binding the legislator. The first references to human and constitutional rights were made in decisions of the Parliamentary Ombudsman and the Supreme Administrative Court.

Theoretical discussion was necessary for creating a sound basis for an alternative understanding of the role of human and constitutional rights and, accordingly, for a change in legal thinking and practice. An emphasis on general doctrines and principles was typical for Finnish legal literature in the 1980s and early 1990s. Two authors were often cited: *Ronald Dworkin* and *Robert Alexy,*[1]

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* Original source: *Israel Law Review*, Vol. 33, No. 3, Summer 1999, pp. 592–606.

[1] See Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977/1987) and Robert Alexy, *Theorie der Grundrechte* (Baden-Baden, 1985).

whose distinction between rules and principles as two categories of legal norms was frequently analyzed and utilized in Finnish legal theory. Concepts and theories of human rights law were developed; an influential theoretical conception was based on the distinction between the rule effect, the principle effect and the standard effect of human rights norms; it was further based on an analysis of how human rights provisions operate in concrete decisions.[2] The political decisions of the Finnish government in the late 1980s to apply for the membership of the Council of Europe (and join the ECHR) and to begin the revision of the Constitution affected also the theoretical discussion about the status of human and constitutional rights. Basic human values, principles and rights were increasingly seen not only as requirements of justice, humaneness, or other dimensions of morality but also as judicially relevant phenomena.

The Finnish legal system has, since the enactment of the Constitutional laws of 1919, followed a model of democratic *Rechtsstaat* where democracy and fundamental rights are regarded as complementary principles in a strong sense: there is no judicial review, nor is there a constitutional court for the review of the constitutionality of laws. Instead, the conformity of a bill to the Constitution is only assessed during the legislative process.[3] Therefore, the ratification of the ECHR and the reform of constitutional rights in the 1990s were remarkable in that they implied the direct applicability of individuals' fundamental rights in the courts. It may be mentioned here that there is a strong legalistic tradition in Finland. The steadfast reliance on the rule of law goes back to the "Russification period" before Finland's independence (1917), when its autonomous status as the Grand Duchy under the Russian regime and the special constitutional position once secured for it, were threatened.[4]

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[2] See especially Martin Scheinin, *Human Rights in Finnish Law*, summary of a doctoral dissertation (Jyväskylä, 1991).

[3] See, e.g., Antero Jyränki, "Taking Democracy Seriously. The Problem of the Control of the Constitutionality of Legislation", in M. Sakslin, ed., *The Finnish Constitution in Transition* (Helsinki, 1991) 6–30.

[4] See, e.g., Yrjö Blomstedt, "A Historical Background of the Finnish Legal System", in J. Uotila, ed., *The Finnish Legal System* (Helsinki, 1966) 7–23, at 19. Finland was annexed by the Russian Empire during the Napoleonic wars, but the Russian Emperor promised to uphold its own Constitution and laws (inherited from Sweden, to which Finland belonged as an integral part until 1809).

2 FINLAND AND THE RATIFICATION OF THE ECHR IN 1990

In May 1990, Finland ratified the European Convention on Human Rights and Fundamental Freedoms (ECHR), accepted the jurisdiction of the European Court of Human Rights and recognized the right of individual petition. Before that, an in-depth study on the compliance of Finnish legislation with the ECHR and Strasbourg case law was carried out. Several Acts of Parliament were amended, for example, with respect to criminal investigations and the rights of aliens.[5]

The ECHR and other important human rights treaties have been incorporated through Acts of Parliament *in blanco*. Because of the predominance of this incorporation method, Finland can be said to represent dualism in form but monism in practice, when implementing international law into the domestic legal order. The implementation method affects the application of human rights treaties. The Parliamentary Select Committee for Constitutional Law has confirmed the following principles: the hierarchical status of the domestic incorporation act of a treaty determines the formal rank of the treaty provisions in domestic law (i.e., their rank is normally that of an Act of Parliament); incorporated treaty provisions are in force in domestic law according to their content in international law; and the courts and authorities should resort to "human rights-friendly" interpretations in domestic cases, in order to avoid conflicts between domestic law and human rights law.[6]

Before the Finnish ratification of the ECHR there were no references to international human rights conventions in the case law of the Finnish Supreme Court, although the Parliamentary Ombudsman had applied international human rights law in his decision-making in the years before ratification. The first cases where the Supreme Court expressed its willingness to apply international human rights norms were decided in 1990 and dealt with the extradition of persons accused of hijacking an aeroplane in the former Soviet Union. In all four cases, the Supreme Court informed the Ministry of Justice that, in its opinion, there were no legal obstacles to extradition in the concrete cases, while stating

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[5] See Matti Pellonpää, "The Implementation of the European Convention on Human Rights in Finland", in A. Rosas, ed., *International Human Rights Norms in Domestic Law* (Helsinki, 1990) 44–67.

[6] See in more detail Martin Scheinin, "Incorporation and Implementation of Human Rights in Finland", in M. Scheinin, ed., *International Human Rights Norms in the Nordic and Baltic Countries* (Martinus Nijhoff Publishers, The Hague, 1996) 257–294.

that a rule of *non-refoulement*, directly binding on Finnish authorities, could be inferred *inter alia* from Art. 3 of the ECHR and Art. 7 of the CCPR.[7]

Since these extradition cases, the Supreme Court has most often applied human rights norms, e.g., Art. 6 of the ECHR and Art. 14 of the CCPR, in issues concerning criminal procedure. These treaty provisions have been directly applied in order to fill certain gaps in Finnish legislation on criminal procedure or, at least, references to them have been made when interpreting domestic provisions.

Two examples of the reasoning from the first years may be mentioned. In the leading case *1991:84* the Supreme Court stated that, according to the principles laid down in Art. 14(3)(e) of the CCPR and in Art. 6(3)(d) of the ECHR, anyone charged with a criminal offence has the right to examine or to have examined witnesses whose testimony has been used against them. As a person had been convicted on the basis of statements given in earlier trials, the Supreme Court remitted the case for retrial at the District Court.

In the case *1992:73* the Supreme Court referred to Art. 6(1) of the ECHR and to Art. 14(1) of the CCPR guaranteeing the right to a fair trial, and to Art. 6(3) of the ECHR and Art. 14(3) of the CCPR, the right to be informed, in detail, of the nature and cause of the accusation or charge against the person, and to have adequate time and facilities for the preparation of a defence. As the defendant had not been informed of the possibility that he could be found guilty of a more serious offence than the one mentioned in the charge, he had not been informed, in detail, of the charge against him and had not had adequate facilities for the preparation of his defence. Therefore, he could not be convicted of aggravated assault but only of assault. The Supreme Court reduced the sentence accordingly.

The approach of the Supreme Court described above is in line with the "human rights-friendly" interpretation emphasized by the Parliamentary Select Committee for Constitutional Law. The human rights treaties have also had an influence on the development of the legislation on criminal procedure since the end of the 1980s, as will be explained below (section 5).

[7] See Lauri Hannikainen, "How to Interpret, and What to Do to, the Treaty on Aircraft Seizures with the Soviet Union", in *Finnish Yearbook of International Law* (vol. II, 1991) 538–558.

3 CONSTITUTIONAL REFORM IN FINLAND IN 1995

New provisions on fundamental rights in the Finnish Constitution were enacted in 1995.[8] The new provisions on basic rights, much more detailed than the earlier ones, for instance, in that they concern not only fundamental freedoms but also social rights, have been essentially inspired by the international human rights treaties. From the point of view of criminal law, important new provisions relate to the legality principle in criminal law (corresponding to Art. 7 of the ECHR and Art. 15 of the CCPR) and the principle according to which a punishment entailing the deprivation of liberty can only be imposed by a court of law.

Several of the enacted constitutional provisions make reference both to basic and to human rights, thus giving semi-constitutional status to human rights treaties.[9] The *travaux préparatoires* of this reform emphasize the point that the constitutional provisions are also directly applicable in the administration of justice by judges and authorities; thus, their binding effect is not restricted to law-making only. In addition to the "human rights-friendly" interpretation of the law, a similar "basic rights-friendly" interpretation was recommended, although the prohibition of the courts to examine the constitutionality of Acts of Parliament was maintained.

As a result of these comprehensive legislative reforms, the significance of individuals' fundamental rights has been strengthened. A certain change in the relationship between democracy and fundamental rights, as well as between the different branches of government, has taken place. For instance, some critics of this development have been concerned about the weakening of the position of the Parliament in the hands of an emerging *"Richterstaat"* (judiciary state).[10] On the other hand, proposals were made for a constitutional amendment which would expressly authorize the domestic courts to review the conformity of laws with the human rights treaty provisions and the Constitution, at least in certain respects.[11] Such an amendment was also made when enacting the new Finnish Constitution of 1999: its Sec. 106 empowers and obligates the courts to give priority to the provisions of the Constitution over an ordinary Act of

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[8] As for a compilation of the provisions on the basic rights, *Constitutional Laws of Finland*, The Parliament of Finland, et al. (Helsinki 1996).

[9] So Scheinin, in *International Human Rights Norms in the Nordic and Baltic Countries, supra* n. 6, at 276.

[10] See, e.g., Jyränki, in *The Finnish Constitution in Transition, supra* n. 3, at 14.

[11] See especially Curt Olsson, "Om lagprövning" [Judicial review], vol. 130 (1994) Tidsskrift utgiven af Juridiska Föreningen i Finland 443–503.

Parliament in the case of an "obvious conflict". Every court shall then *in casu* give precedence to the Constitution but the Act of Parliament itself remains in force (until its possible repeal by the Parliament).

4 FINNISH CRIMINAL LAW REFORM AND CONSTITUTIONAL RIGHTS

The ideological change, with its greater emphasis on human and basic rights, has also had an effect on the criminal law reform in Finland. It is obvious that the rise of human and basic rights in legal thinking and practice will increasingly have an influence not only on the Finnish criminal law but also on its theoretical basis.

The preparatory work for the recodification of the Finnish Penal Code of 1889 started already in the 1970s, before the emergence of the new human and basic rights thinking.[12] Nevertheless, two basic legal principles have governed the Finnish criminal law reform: the legality principle and the principle of culpability (*Schuldprinzip*).[13] These principles are justified primarily on the basis of their compatibility with the judicial values of legal certainty and predictability. At the same time, the principles can be defended with reference to the utilitarian argument of general prevention. A necessary prerequisite for the persuasiveness of such a parallel or complementary justification is that general prevention means "positive" or "integration" prevention, in other words, the effect that criminal law has in maintaining and strengthening moral and social norms. It must be kept in mind that those basic principles are significant not only when reforming criminal law but also in its actual application.

The legality principle in criminal law can be divided into four subrules: the rule that only the law can define a criminal offence and prescribe a penalty (*nullum crimen sine lege scripta*); the rule that criminal law must not be applied by analogy to the disadvantage of the accused; the prohibition of retroactive application of the criminal law to the disadvantage of the accused (*nullum crimen sine lege praevia*); and the rule that a criminal offence must be clearly

[12] See generally Raimo Lahti, "Recodifying the Finnish Criminal Code of 1889: Towards a More Efficient, Just and Humane Criminal Law", (1993) 27 Is. L.R. 101–117. See also Raimo Lahti and Kimmo Nuotio, eds., *Criminal Law Theory in Transition – Strafrechtstheorie im Umbruch* (Finnish Lawyers' Publishing Company, Helsinki, 1992) *passim*.

[13] Regarding this discussion in general, see Raimo Lahti, "The Rule of Law and Finnish Criminal Law Reform", (1995–1996) 37 *Acta Juridica Hungarica* 251–258, at 255.

defined in the law (nullum *crimen sine lege certa*). This kind of classification of the main contents of the legality principle is generally accepted e.g., in the case law on Art. 7(1) of the ECHR (see, for instance, the recent case *C.R.* v. *The United Kingdom* 22 November 1995).[14]

The legality principle has been included among the new basic rights (Section 6a of the Constitution Act); it is equivalent to Art. 7(1) of the ECHR and Art. 15(1) of the CCPR:

> No one may be found guilty of a criminal offence or sentenced to a penalty on account of some act for which no penalty had been prescribed by Act of Parliament at the time of its commission. No greater penalty shall be imposed for a crime than that which was prescribed by Act of Parliament at the time of its commission.

The provision in the Constitution Act has strengthened the significance of the legality principle as the most important fundamental right of an individual. As can be seen from the citation, this provision is intended to be applied more strictly than the corresponding provisions in the ECHR and CCPR, in so far as the definition of a crime and the prescription of a penalty must be based on an Act of Parliament.

The legality principle includes *inter alia* the requirement of certainty of criminal law. The aim of limiting judicial discretion is predominant in the reform work. While, for instance, the Swedish Criminal Code of 1965 has been criticized for using overly vague definitions of criminal offences, those responsible for recodifying the Finnish Criminal Code (FCC) have striven to describe the offences as clearly as possible, for example by reducing the use of value-laden or otherwise ambiguous terms in the definition of the offences. On the other hand, the objective of more precise definitions collides with another aim of the Finnish reform work, namely the effort to synthesize the definitions, in other words, to write them in a more abstract form (as in the definition on "Imperilment")[15] and to facilitate a progressive development of the criminal law through judicial law-making. A reasonable balance between these conflicting aims needs to be sought.

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[14] See also Raimo Lahti, "Article 11", in A. Alfredsson and A. Eide, eds., *The Universal Declaration of Human Rights* (Kluwer Law International, 1999) 239–249, at 245.

[15] See FCC 21:13: "A person who intentionally or through gross negligence places another in serious danger of losing his/her life or health, shall be sentenced, unless the same or a more severe penalty for the act is provided elsewhere in the law, for imperilment to a fine or to imprisonment for at most two years".

An accommodation may also be required between the principles of comprehensibility and certainty. Although clarity is a function of both comprehensibility and certainty of language, the maximization of the one may be detrimental to the other.[16]

Other means of curbing judicial discretion have also been used. Thus, in many cases, existing categories of criminal offences have been split into subcategories (e.g., assault, aggravated assault and petty assault), with the definition of an aggravated offence being based on an exhaustive list of criteria (of course, a more lenient evaluation is always discretionary). In addition, the numbers and ranges of penal scales (punishment latitudes) have been generally reduced.

In accordance with the legality principle and the values underlying it, the basic concepts and principles governing the general preconditions of criminal liability will be defined in the general part of the Criminal Code to a greater extent than is the case now. It is obvious that *inter alia*, the concepts of intention and negligence, as well as the preconditions for criminal liability for omissions will be defined in the new Code (unlike in the Code in its current form).

One way to strengthen the legality principle is the effort to reduce and specify the use of the so-called blanket (reference) provision technique. Blanket provisions are often added to legislation for the general criminalization of violations of the act in question or of enactments given on the basis of that act. The new provision on the legality principle in the revised Constitution should oblige the legislator and the courts to take a strict course of action in this respect, because such acts must have been punishable under an Act of Parliament at the time when they were committed. A new challenge is created by Finland's membership in the European Union (EU) since 1995, because "integration by reference", for the purpose of incorporating the European Community (EC) norms, is extensively used by the Member States of the EU.[17] The obligation to enforce EC-norms into the national legal orders of the Member States affects their criminal legislation, too. While the EC regulations shall be enforced as such, without any national transformation, the blanket technique must still be used in corresponding criminal provisions.

The new constitutional provision on the legality principle, taking account of its *travaux préparatoires* and the tradition to transform the international treaties

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[16] See E. Colvin, "Criminal Law and The Rule of Law", in P. Fitzgerald, ed., *Crime, Justice and Codification* (Carswell, Toronto, 1986) 125–152, at 135.

[17] See especially Mireille Delmas-Marty, "The European Union and Penal Law", (1998) 4 *Eur. L.J.* 87–115, at 100.

requiring the penalizing of certain acts, appears to lead to the conclusion that the Finnish courts are not allowed to pass sentence for an act which constitutes a criminal offence under international law alone.[18] The legality principle is, of course, not the only fundamental – although it is the most important right which is relevant for the Finnish criminal law and its reform. Many of the basic principles which were behind the reform work can, after the amendment of the Constitution Act (1995), be classified as fundamental rights. For instance, the moral and political arguments of justice and humanity, which have played an important role in Finnish criminal policy and criminal law theory, now have a strong institutional support as legal principles as well, as they are firmly attached to human rights and constitutional law.[19]

For instance, the principle of culpability and, accordingly, the prohibition of strict liability, can, from a legal point of view, be based on express human rights norms and constitutional provisions which guarantee the inviolability of human dignity. As for the principles of criminalization, various human and basic rights must be taken into account. In the argumentation, constitutional (and human rights) aspects may collide so that a certain aspect supports the expansion of criminalizations and another aspect restricts their scope or the methods for using criminal law; there is often a tension between contrary arguments. When dealing with some of the recent government bills concerning criminal law, the Parliamentary Select Committee for Constitutional Law has deliberated generally upon the question: there must be a considerable social need and acceptable reasons, also from the basic rights point of view, for a criminalization, in order that it restrict fundamental freedoms in an acceptable way; the pros of criminalization and the threat of punishment and coercive measures must also be in proportion to the cons of the restriction of fundamental freedoms. As pros for criminalization, particularly the following argument may be mentioned: the penal provisions provide legal protection of basic rights (*Rechtsgüter*), such as the right to life and personal liberty, physical integrity and security of person.[20]

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[18] Compare Decision 53/1993 (X.13) of the Hungarian Constitutional Court, where individual responsibility for war crimes and crimes against humanity was established irrespective of their punishability under domestic law, but was based on the general cogency of the relevant international law.

[19] See especially Ari-Matti Nuutila, "The Reform of Fundamental Rights and the Criminal Justice System in Finland", (1995–1996) 37 *Acta Juridica Hungarica* 303–314, and Kimmo Nuotio, "The Difficult Task of Drafting Law on Principles", 287–301.

[20] See, e.g., Statement No. 23 of the Parliamentary Select Committee, 1997 Parliament Session, when dealing with the Government Bill (No. 6/1997) on the offences against the judiciary, public authority and public order as well as on sexual offences.

As for criminal sanctions, explicit human rights norms and constitutional provisions forbid capital punishment, torture and other degrading treatment. In traditional penal theory, the debaters rely primarily on the utilitarian arguments of social defence and/or the arguments of justice and humaneness.

In recent Finnish literature much attention has been paid to the role of constitutional rights (and human rights) in legal theory in general and in criminal law theory in particular.[21] For instance, there have been demands that the aims and functions of Finnish criminal law be profoundly re-evaluated following the Constitution Act reform (1995). The discussion so far indicates that constitutional rights (and human rights) must be taken seriously in criminal law. It is still quite unclear what the relative importance of these arguments of constitutional and human rights law is or should be. On the other hand, the forum should continuously be open for balancing different types of not only legal, but also political, and moral arguments.[22]

5 FINNISH CRIMINAL PROCEDURAL LAW AND CONSTITUTIONAL RIGHTS

The requirements of *Rechtsstaatlichkeit* (the constitutionally governed State) include several criteria which shall be applied in constitutionally governed states, among them in Finland:[23] first, anticipatory guarantees such as the general principles limiting the use of (substantive) criminal law and the principles concerning the organization of the judiciary; second, the procedural rules regarding the different phases of criminal proceedings; and, third, the methods of appeal in criminal proceedings and the supervision of the administration of justice. Such basic elements of due process as the right of access to court, an independent and impartial tribunal, the presumption of innocence and other guarantees of fair trial have traditionally been recognized in Finnish procedural law. The ratification of the ECHR and the reform of fundamental rights in the Finnish Constitution have

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[21] See especially the doctoral theses of Ari-Matti Nuutila, *Rikosoikeudellinen huolimattomuus* (Helsinki, 1996) (German Summary: Fahrlässigkeit als Verhaltensform und als Schuldform), and Kimmo Nuotio, *Teko, vaara, seuraus* (Helsinki, 1998) (German Summary: Handlung, Gefahr, Erfolg).

[22] See, e.g., Ståle Eskeland, "Criminal Law and the International Human Rights", in A. Snare, ed., Beware of Punishment, *Scandinavian Studies in Criminology* (vol. 14, 1995) 204–221. According to Eskeland (at 220), international human rights permit an offensive and not only a defensive criminal policy.

[23] See, e.g., Eero Backman, "Rechtsstaat und Strafrecht", in R. Lahti and K. Nuotio. eds., *Towards a Total Reform of Finnish Criminal Law* (Helsinki, 1990) 7–20.

strengthened the importance of those principles (see sections 2 and 3 above).

Major reforms of criminal procedural law have been prepared and carried out during the past 15 years.[24] The provisions on criminal investigations and on coercive measures in criminal proceedings were reformed in 1989; the lower court system was restructured in 1993; the public prosecution authorities were reorganized in 1996; a comprehensive reform of criminal procedure in the lower courts was carried out in 1997; and the provisions on the Court of Appeal procedure as well as on legal aid and public defence were revised in 1998.

Originally, these reforms were planned in order to modernize the civil and criminal procedure especially according to the Swedish legislative model. The purpose of the major reform of 1997 was to realize legal proceedings which are oral and immediate and in which the litigation is concentrated. The possibilities of parties (including those of the prosecutor) to present their case in writing to the court at the trial are restricted; respectively, the evidential material should be presented at the trial directly to the court. As a whole the new Finnish criminal procedure can be characterized as a mixed system, incorporating elements both from the Anglo-American adversial and the Continental inquisitorial procedures.

In the late 1980s and in the 1990s, the increasing awareness among the decision-makers of the importance of human rights and, later, of the constitutional rights, affected the aims and content of those reforms. Already the first remarkable reform, that concerning the provisions on coercive measures in criminal proceedings, raised a politically difficult question about the longest period of arrest and the role of the court in deciding on the possible continuation of the detention. The question was determined by adopting a regulation which was in conformity with the case law of the ECHR.

The most important of the Supreme Court decisions since the beginning of the 1990s, when they include references to human rights norms, concern criminal procedural law in general and the requirements of a fair trial in particular (see also section 2 above). The ECHR and its case law have *inter alia* clarified and strengthened the significance of fair trial principles, such as presumption of innocence and "equality of arms" (the parties of the criminal trial shall be equal).[25] The constitutional reform in 1995 produced a lot of new provisions

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[24] See especially P. O. Träskman, "Reform Movements in Criminal Procedure and the Protection of Human Rights in Finland", (1993) 64 *Revue Internationale de Droit Pénal* (RIDP) 1063–1087, and Johanna Niemi-Kiesiläinen, "Perusoikeudet rikosprosessissa" [Basic rights in criminal procedure] in L. Nieminen, ed., *Perusoikeudet Suomessa* [Basic rights in Finland] (Helsinki, 1999) 149–175.

[25] See also Träskman, *supra* n. 24, at 1080–1083.

on basic rights, mostly equivalent to the corresponding articles in international human rights treaties but in some respects divergent from them. The scope of applications of these new provisions may be more extensive, and their formulation follows the Finnish style of law drafting:

> Sec. 6(3) of the Constitution Act:
> There shall be no interference in personal integrity, nor shall anyone be deprived of his liberty in an arbitrary manner and without grounds prescribed by Act of Parliament. All penalties entailing deprivation of liberty shall be imposed by a court of law. The lawfulness of other forms of deprivation of liberty may be submitted to judicial review. The rights of persons who have been deprived of their liberty shall be secured by Act of Parliament.
>
> Sec. 16 of the Constitution Act:
> Everyone shall have the right to have his affairs considered appropriately and without undue delay by a lawfully competent court of law or other public authority, as well as the right to have a decision concerning his rights and obligations reviewed by a court of law or other independent judicial organ.
> The publicity of proceedings and the right to be heard, to receive a decision with stated grounds and to appeal against the decision, as well as the other guarantees of a fair trial and of good public administration shall be secured by Act of Parliament.

These basic rights provisions, as the constitutional provisions in general, exert influence both on legislation and judicial practice. For instance, the provision that all custodial penalties must be handed down by courts of law soon led to a legislative amendment, making military arrest a penalty that can be imposed by a court alone. The national courts and public authorities are obviously prone to prefer domestic basic law provisions compared with treaty provisions when resorting to fundamental rights. Nevertheless, the new provisions on basic rights should if possible be interpreted in harmony with corresponding human rights provisions.

There is a peculiarity in the Finnish constitutional tradition that makes it possible to enact Acts of Parliament inconsistent with the Constitution, if they are enacted in the same way as amendments to the Constitution. According to the new Finnish Constitution of 1999, the scope of this system of exceptive enactments is more limited. In case of the absolute fundamental rights in human rights treaties those international provisions have in fact a similar limiting influence on the corresponding domestic basic law provisions and on the use of exceptive enactments.

The Finnish Constitution directs the public authorities to secure the implementation of fundamental rights and of international human rights. This duty is a new task for all public officials and obliges them to actively promote

the observance of those rights. The Chancellor of Justice and Parliamentary Ombudsman, as the traditional supreme guardians of legality in the exercise of public functions, have also been mandated with the special task of supervising the implementation of fundamental and human rights. Their important role is to investigate whether these rights are being implemented in everyday practice.

6 CONCLUSIONS

Finnish experience indicates that a legalistic legal tradition may prevail as strong while its contents vary. The concept of legality and the rule of law ideology, with their emphasis on legal certainty, have been transformed to cover aspects of material legitimation or legitimacy.[26] This transformation has been strengthened by the effective implementation of human and fundamental rights of individuals in the 1990s. The ever-increasing significance of these principles of human and fundamental rights has also had a profound influence on legal theory: as the normative deep structure of law which extends its unifying or harmonizing effect between various domestic legal orders as well as, within a certain legal order, between various fields of law.[27]

In a Member State of the EU (like in Finland), it is increasingly important to take into account the ongoing harmonization of legislation, which does concern penal law and the criminal justice system as well. For instance, there are in practice examples of EC-prompted neutralization of domestic penal law,[28] and the Treaty of Amsterdam (1998, entered into force on 1 May 1999) has adopted the objective of developing the EU as an "area of freedom, security and justice". This objective shall be achieved *inter alia* through a closer cooperation between judicial and other competent authorities of the Member States and an approximation of rules on criminal matters in these states.[29]

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[26] See, e.g., Nuotio, *Acta Juridica Hungarica* (1995–1996), *supra* n. 19, at 291 and 301, and, from the point of view of legal philosophy, Aulis Aarnio, *The Rational as Reasonable* (D. Reidel Publishing Company, Dordrecht, 1987) *passim*. See also Ari Hirvonen, "The Rule of Justice and the Ethical Limits of Criminal Law", *Acta Juridica Hungarica* (1995–1996) 221–229, who prefers to speak about the rule of justice (instead of 'rule of law').

[27] See Kaarlo Tuori, "Oikeustiede 2000" (Summary: Legal Science in the Year 2000), (1998) 96 *Lakimies* [Journal of Finnish Lawyers' Association] 1002–1013, 1213.

[28] See Delmas-Marty, (1998) *European L. J. supra* n. 17, at 96–97.

[29] See more e.g., Raimo Lahti, "Towards an International and European Criminal Policy?", in M. Tupamäki, ed., *Liber Amicorum Bengt Broms* (Helsinki, 1999) 222–240, at 235–239, and Peter-Alexis Albrecht and Stefan Braum, "Deficiencies in the Development of European Criminal Law", (1999) 5 *Eur. L. J.* 293–310.

When considering the relationship between the constitutional rights and criminal law and criminal procedure, the trend towards internationalization and regional judicial space should respectively be noticed. For instance, the case law of the European Court of Justice has gradually recognized that the Member States are bound to respect human and fundamental rights as general principles of Community law. The EC has since the early 1990s also included so-called human rights clauses in its trade and cooperation agreements with third countries. Recently, the EU has decided to initiate work on an EU Charter of Fundamental Rights.[30] As for the international and regional cooperation in penal matters, it still remains the question to be solved: how can the human and fundamental rights of the individuals be properly guaranteed when the existing human rights treaties and national constitutions do not offer enough protection?[31] In international criminal law generally, and in extradition law specifically, the interest of the individual's human rights should be better balanced with that of law enforcement.[32] Similarly, the policy-decisions of the European Union so far have been criticized for their over-emphasis on crime-suppression and the lack of attention to human rights protection.[33]

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[30] See in more detail, N. Neuwahl and A. Rosas, eds., *The European Union and Human Rights* (Dordrecht, Martinus Nijhoff, 1995) *passim*.

[31] See generally Christine Van den Wyngaert, "*The Transformations of International Criminal Law in Response to the Challenge of Organized Crime, General Report*", (1999) 70 133–221. See also the corresponding Resolution IV of the XVIth International Congress on Penal Law, adopted on 11 September 1999 in Budapest; *RIDP*, vol. 70, 1999, 907–913.

[32] See, e.g., John Dugard and Christine Van den Wyngaert, "Reconciling Extradition with Human Rights", (1998) 92 *Am. J. Int'l L.* 187–212.

[33] See Van den Wyngaert, *supra* n. 31, at 149.

9. Alternative Investigation and Sanctioning Systems for Corporate and Corporate-Related Crime in Finland

RAIMO LAHTI AND MIIKKA RAINIALA

I. INTRODUCTION: ECONOMIC CRIME AND ITS CONTROL IN FINLAND

A. Penal Code reforms in the 1980s and 1990s[1]

Economic criminality became a source of concern for the authorities for the first time in the late 1970s. At that time, tax fraud was regarded as the most common economic crime. It was estimated that tax fraud led to a 5–10 per cent reduction in collected taxes. In 1980, the Ministry of Justice established a broadly-based project organization to prepare a proposal for a total reform of the Penal Code of 1889 (39/1889). The goal was to give the highest priority to the reassessment of the provisions on economic crime. Two years later, the Ministry of Justice established a separate working party to examine the factual phenomena of economic crime as well as the material legislation on and control mechanism for economic crime; the work group was also entitled to make proposals for improving the prevention, supervision, and investigation of economic crime.

These preparations led to various government measures to tighten control over economic crime. At the legislative level, the most important action was the revision of provisions on economic crime in gradual parts of the total reform of the Penal Code (PC) in the 1990s (1990, 1995, and 1999).[2] For instance, completely new provisions on subsidy offences and business offences

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∗ Original source: *Revue Internationale de Droit Pénal*, 90:1, 2019, pp. 131–161. – Raimo Lahti wrote Chapters I and II and Miikka Rainiala (LL. M., doctoral candidate) wrote Chapter III. They collaborated on Chapter IV.

[1] As to the aims and early stages of the total reform of the Finnish Penal Code (PC), see R Lahti and P O Träskman, 'Conception et principes du droit penal economique et des affaires y compris la protection du consommateur. Finland. National Report' (1983) 54 *Revue Internationale de Droit Pénal* 249.

[2] An unofficial English translation of the Penal (Criminal) Code, as it was in force in 2015 (766/2015), is available on the website of the Ministry of Justice: https://www.finlex.fi/fi/laki/kaannokset/1889/en18890039_20150766.pdf.

were incorporated into chapters 29 and 30 of the revised Penal Code in 1990 (769/1990). A major legislative reform dealt with the introduction of corporate criminal liability in 1995 (in chapter 9 PC; 743/1995). New clarifying provisions were also enacted on the individual criminal responsibility of directors in a corporate body.

According to the Finnish Penal Code, a corporation may be sentenced to a corporate fine for certain enumerated, mostly economic, offences. The main reasons for introducing this type of corporate liability, as expressed in the legislative drafts, can be summarized as follows: the social significance of corporate activity, the cumulation of actions and omissions, the lack of proportionality between offences and punishment, the difficulties in allocating individual criminal responsibility, the transfer of responsibility in hierarchical relationships, the need for imposing an effective sanction in an equitable manner, and the idea that it is fair to direct the reproach at a corporate body when the offence was committed in the operations of the corporation.[3]

B. Action Plans against economic crime and the grey economy

In 1996, the Finnish government initiated an Action Plan aimed at a more effective control of economic crime and the grey economy. The Action Plan was later renewed by the government with similar new decisions of principle, and, ultimately, a permanent body for investigating the grey economy was established in the tax administration. These measures consolidated and launched a series of reforms in material legislation, regulatory agencies, law enforcement and prosecution, and strengthened the applied research on economic crime. As to material legislation, for example laws regulating bankruptcies or the registering of companies and debt recovery procedures were revised. In the field of law enforcement and prosecution, new positions for investigators and prosecutors were created, and the organization of economic crime investigation within the police was reformed.

Many empirical studies have been conducted on the nature and interaction of the processes and forces which characterize economic crime control in Finland. One of these studies cautions against the dangers of advocating criminalization as a response to social problems, but at the same time it points out how parts of the practices of criminal justice can be positive and productive in certain

[3] For a more detailed review, see M Tolvanen, 'Trust, Business Ethics and Crime Prevention – Corporate Criminal Liability in Finland' (2009) *Fudan Law Journal* 99.

aspects, especially when compared with traditional crime control mechanisms. So the results of the study indicate that (a) the theoretical paradigm of rational choice theory and the criminal justice strategy of general prevention (deterrence) are useful with respect to economic crime, and (b) stronger emphasis on economic crime control can be perceived as bringing about greater equality (justness) in criminal policy.[4]

C. Types of punitive sanctions with respect to economic and corporate crime

Traditionally, the applicable punitive sanctions in Finland and elsewhere in Scandinavia are primarily punishments and other criminal sanctions (see chapter II, below). However, punitive administrative sanctions (typically punitive fees) have been introduced in various sectors of business and financial activity, and the implementation of EU legislative instruments has increased the use of administrative criminal law in combating economic and financial offences. In practice, the most important administrative fee with a penal nature is the punitive tax increase, which is set concurrently with the assessment of taxes in cases of tax deceit. Another early example of the adoption of a noticeable punitive fee involves competition law: since 1992, a new Competition Act has been enacted, replacing the earlier Act on Competition Restrictions, and the competition restriction offence decriminalized and replaced by provisions on a competition restriction fee. A similar type of punitive administrative fee was adopted in 2016 by the legislative acts for the protection against market abuse as prescribed by Regulation (EU) 596/2014.[5] In chapter III below the development and current contents of Finnish administrative criminal law will be examined in detail.

Forfeiture, especially forfeiture of the proceeds of crime, is a criminal sanction commonly imposed in connection with economic and corporate crime. The forfeiture shall be ordered on the perpetrator, a participant, or a person on whose behalf or to whose benefit the offence has been committed, where these have benefited from the offence. A prerequisite for a forfeiture order is that the relevant act is criminalized by law; thus, forfeitures are imposed in criminal

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[4] For the research results of A Alvesalo, see *The Dynamics of Economic Control* (The Police College of Finland 2003), 41-74.

[5] See Securities Markets Act /258/2013), as amended by the Act of 519/2016. See also the amendment of chapter 51 (Security markets offences) of the Penal Code by the Act of 521/2016.

proceedings. In Finnish doctrine forfeiture is classified as a security measure instead of a punishment. Therefore, Article 6, paragraphs 2–3 (fair trial) of the European Convention on Human Rights are not considered applicable as such to the forfeiture proceedings.[6]

Chapter 10 PC includes the general provisions on forfeiture. They were revised by Act of 875/2001 as part of the total reform of the Code. By Act of 356/2016 these provisions were reshaped in order to implement Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the EU. The provisions were retained as general provisions, and so their application is not only restricted to the crimes listed in Article 3 of the Directive 2014/42/EU. Forfeiture will not be discussed separately in this report.

II. CRIMINAL LAW AND PROCEDURE[7]

A. General characteristics of criminal policy[8]

A total reform of the Finnish Penal Code of 1889 was in its essence finalized after 30 years' drafting process. The four most comprehensive partial reforms were concluded by amendments to the Penal Code in 1990, 1995, 1998, and 2003. The last partial reform (Act of 515/2003) dealt with the general part of the Code. The development over the recent decades has been marked by similar approaches to criminal policy in the Nordic countries, by an efficient Nordic cooperation in penal matters and, to a lesser degree, by harmonized legislation in the fields of criminal law and criminal procedure of these countries.

It is possible to treat the Nordic countries as a sub-regional area in terms of their culture and the law, although the different positions of these countries in relation to the European Union have changed the role of cooperation between them and of their organs (among them, the Nordic Council and Nordic Minister Council). The common legal traditions and crucial similarities in cultural, economic, and social development engender strong mutual confidence between the

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[6] J Rautio, 'Uudet menettämisseuraamuksiin liittyvät menettelysäännökset' in J Riekkinen (ed), *Oikeutta oikeudenkäynnistä täytäntöönpanoon, juhlajulkaisu Tuula Linna* (Alma Talent 2017), 269–279, 271.

[7] See generally M Joutsen, R Lahti and P Pölönen, *Finland. Criminal Justice Systems in Europe and North America* (HEUNI 2001).

[8] See generally R Lahti,Towards a Rational and Humane Criminal Policy – Trends in Scandinavian Penal Thinking' (2000) 1 *Journal of Scandinavian Studies in Criminology and Crime Prevention* 141.

Nordic countries, and this confidence promotes efficient cooperation. Nordic cooperation in legal matters is based on a variety of sources: multilateral (European) conventions, treaties between the Nordic countries, a partly uniform legislation, and an established practice between the public officials of these countries.

The legal culture and legal thinking in the Nordic countries reveal some specific features. Although these countries belong to the so-called civil (statutory) law tradition, the approaches in legislative reforms and legal doctrines are often less strict in 'system-building' (in constructing theories and concepts) and more pragmatically oriented than is typical of the continental civil law countries. This is also true in relation to the general system for analysing criminal acts (*Straftatlehre*), although Finland is in this respect closer to German penal thinking than the other Nordic countries. The models offered by common law countries and the theories developed by scholars from these countries are now more seriously considered than in earlier times.

Essential similarities are discernible in the goals, values, and principles governing the Nordic penal codes and the criminal justice systems in these countries, even though they are far from identical. At the same time as the Nordic countries have been social welfare states, their crime control policies and the systems of criminal sanctions are characterized by an emphasis on values such as liberalism, rationalism, and humaneness. The Nordic countries have also been active in promoting efforts to elaborate internationally accepted standards for criminal policy and criminal justice and to implement them. Human rights aspects and humanitarian considerations are of special importance in this context.

The penal thinking adopted in the *travaux préparatoires* to the total reform of criminal law is characterized by the demand for a more rational criminal justice system, i.e. for a more efficient, just, and humane criminal justice. The existence of the criminal justice system is justified on utilitarian grounds. The structure and operation of the penal system, however, cannot be determined solely based on its utility. The criteria of justice and humaneness must also be applied. The penal system must be both rational as to its goals (utility) and rational as to its values (justice, humaneness).[9] This kind of penal thinking has

[9] R Lahti, 'Towards Internationalization and Europeanization of Criminal Policy and Criminal Justice – Challenges to Comparative Research' in E W Pływaczewski (ed), Current Problems of the Penal Law and Criminology; Aktuelle Probleme des Strafrechts und der Kriminologie (Lex, Wolters Kluwer Polska 2012), 365–379, 369. See also generally I Anttila, *Ad ius criminale humanius. Essays in Criminology, Criminal Justice and Criminal Policy* (Finnish Lawyers' Association 2001).

had clear effects on the reasoning about the punitive level of the penal system, the types and contents of the criminal sanctions, and the sentencing. To quote Government Bill 66/1988:

> Criminological research has demonstrated that the general preventive effect of punishment cannot be connected, in a one-sided manner, to the length of the prison sentences. Entry into prison already has a considerable deterrent effect. Similarly, we have abandoned the view that the rehabilitative effect of prison would require a certain minimum period in prison. On the contrary, we know that sentences of imprisonment always hamper the possibilities of readjustment to a normal social life. In addition, the enforcement of prison sentences is expensive for society. (Detailed reasons, chapter 1.2.1.1.)

As to the punitive level of the penal system, the assessment of the harmfulness and blameworthiness of the acts to be criminalized was also intended to lead to a reassessment of the sentencing scales and of the seriousness of the various types of offences. For instance, the typical harm caused by property offences – their 'penal value' – should be regarded as lesser than that of violent crimes, and modern crimes such as economic and business offences, work safety offences, and the impairment of the environment should be regulated in the criminal code and their seriousness should be comparable to that of property offences.

As to the aims of the policy on criminal sanctions, alternatives to imprisonment were developed and the use of prison sentences was also decreased in general. The length of prison sentences imposed in Finland and the other Nordic countries was even traditionally quite short from an international and comparative perspective: the average could be stated in months, not in years. The relative number of offenders sentenced to unconditional imprisonment since the mid-1970s was on the decrease for nearly 25 years, until 1999. During this period, the average size of the prison population decreased from above 100 per 100,000 population to 65, i.e. to the level of the other Nordic countries.[10] From 2000–2005, the size increased again, to 90 in 2005 – in line with similar developments in the other Nordic countries. The main individual factor explaining this increase in the prison rate in Finland was a shift towards a more repressive reaction against violent crime. In the last decade the number of prisoners seems to have normalized at 60–70 per 100,000 population.[11]

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[10] See especially P Törnudd, *Fifteen Years of Decreasing Prisoner Rates in Finland* (National Research Institute of Legal Policy 1993); T Lappi-Seppälä, *Regulating the Prison Population* (National Research Institute of Legal Policy 1998).

[11] R Lahti, 'Towards a more efficient, fair and humane criminal justice system: Developments of criminal policy and criminal sanctions during the last 50 years in Finland' (2017) *Law,*

Since the 1990s there has been a shift in legal ideology, with a still greater emphasis on human and basic rights, and this trend is increasingly affecting both Finnish criminal law theory and criminal policy. Since the end of the 1990s, the internationalization and Europeanization of criminal justice has had a noticeable influence on Finnish criminal policy.[12]

B. Policies and principles of criminalization

In the beginning of the total reform of criminal law, an ambitious attempt was made to assess in a uniform and systematic way the goals, interests, and values that the Penal Code can promote and protect – while trying to resolve the basic problem of criminal legislation: what behaviour is to be punished and how severely? Although this theoretical model was not effectively realized in the reform work, it illustrates the discrepancy between theory and practice in legislative work. Since the 1990s, the theory on criminalization has been influenced by the fundamental rights approach, according to which the constitutional limits should govern the use of criminal law, too.

According to traditional European thinking, the punishability and the seriousness (penal value) of various acts should be based on the assessment of the protected interest (*Rechtsgut*) and the means for committing the offence. In the Finnish preparatory work, another approach was also used, and it reflects cost-benefit thinking as applied to criminal policy in general and to individual criminalizations in particular. This latter scrutiny should involve several stages for discussing the need for penal provisions in various spheres of social life.

Our first aim is to locate the forms of criminal behaviour that appear to be the most harmful as judged in the light of the specific goals of each sphere of social life. Does a certain behavioural phenomenon harm or endanger the interests of an individual or society and, if so, to what extent? Second, we must evaluate the blameworthiness of these harmful or dangerous acts. For example, we need to discuss the actual freedom of choice on the part of the human agent, the circumstance whether it is reasonable to reproach the agent. Third, we must embark on a systematic weighing of the pros and cons entailed by a criminalization, whether the benefits and costs are discernible in the fields of

Criminology & Criminal Justice. *Cogent Social Sciences*, 3 (http://dx.doi.org/10.1080/23311886.2017.1303910).

[12] As to the following text in more detail, see R Lahti, in *Current Problems of the Penal Law and Criminology* (n 9), 370–375.

legal or social development policy. Any means of penal control must adapt its purpose with a view to the other possible methods of regulation (supervision, technological or administrative arrangements, etc.). Furthermore, we need to pay attention to the fact that the extent to which the means of penal law can be resorted to is limited. In addition, a penal regulation is subject to special restrictions due to legal safeguards (e.g. the legality principle requires that the penal provisions shall never leave too much room for interpretation).

The above-described approach should strongly signify the (moral) limitations in the use of criminal law. Traditionally, it has been emphasized that a criminalization has to remain a means of last resort (*ultima ratio*).[13] Several preconditions for using criminal law as a control mechanism must be fulfilled as listed in the Finnish legislative work (similar prerequisites as in the German terms *Strafwürdigkeit*, *Strafbedürftigkeit*, and *Straftauglichkeit*). As mentioned above, the latest theoretical discussion emphasizes the constitutional limits of using criminal law.

Accordingly, the following issues have triggered deliberations in the Finnish reform work:

(i) how should the criminalization principles governing criminal law be reflected in the shape and form of criminal legislation;
(ii) how should we assess the seriousness of a crime and, accordingly, assign, say, the offences against the person to various chapters of the Criminal Code and to subcategories in each chapter;
(iii) what part should be given to the criminalization of dangerous behaviour (*Gefährdungsdelikte*);
(iv) how to ensure that criminal legislation takes into consideration the interests of different social groups (criminalization as an issue of social justice);
(v) how to solve the emerging problems concerning the legal protection of new interests and values in economic and business life, environment, labour protection etc. (dynamic evolution of criminal law);
(vi) how should we implement at the national level criminalizations based on international obligations, i.e. crimes with an international or transnational nature.

The practical results as manifested in the enacted penal provisions imply colliding interests and values in the legislative discretion, in particular the tension between developing criminal law in the spirit of social justice, dynamic

[13] See in more detail R Lahti, 'Towards a principled European criminal policy: some lessons from the Nordic countries' in J B Banach-Gutierrez and C Harding (eds), *EU Criminal Law and Policy. Values, Principles and Methods* (Routledge 2016), 56–69, 60–63.

social needs, and international solidarity and, at the same time, taking into consideration the constitutional and moral limitations in the use of criminal law. A balance between these divergent aims should be sought. In the course of argumentation constitutional and human rights aspects may collide so that certain aspects support the enlargement of criminalizations whereas others restrict their scope or the methods for using criminal law; tensions between contrary arguments are frequent. When dealing with some of the recent government bills concerning criminal law, the Parliamentary Constitutional Law Committee deliberated generally on the issue that there must be a considerable social need and also, from the basic rights point of view, acceptable reasons for a criminalization to restrict fundamental freedoms in an acceptable way; the arguments for criminalization must also be proportionate to the extent to which fundamental freedoms are restricted.

The original objective of enacting a unified, coherent, and systematic criminal law (consisting of a general and a special part, as well as of the system of criminal sanctions) has been challenged by the increased tendency towards diversification of various areas of criminal law (in particular, the emergence of European economic criminal law and international criminal law). This diversification is reflected in the pluralism of general legal doctrines and in the need to develop a more dynamic conceptual and systematic approach in order to control many parallel legal regulations and the diversity of the regulated phenomena.

C. Fundamental principles of criminal law

According to the preparatory work, there are two basic principles governing Finnish criminal law reform: the legality principle (*nullum crimen sine lege, nulla poena sine lege poenali*) and the principle of culpability (*Schuldprinzip*). These principles are justified primarily on the basis of their compatibility with the judicial values of legal certainty and predictability. At the same time these principles are defended by referring to the utilitarian argument of general prevention. A necessary prerequisite for the persuasiveness of such a parallel or complementary justification is that general prevention means so-called integration prevention, in other words the effect that criminal law has in maintaining and strengthening moral and social norms. It must be kept in mind that these basic principles are significant not only when reforming criminal law but also in its actual application.

The *legality principle* includes, *inter alia*, the requirement of certainty of criminal law. The aim to limit judicial discretion is predominant in the reform

work. While the Swedish Criminal Code of 1965 had been criticized for using overly vague crime definitions, the Finnish law drafters sought to describe the offences as clearly as possible, for example by reducing the use of value-laden or otherwise ambiguous terms in the definition of the crime. On the other hand, the objective of more precise crime definitions collides with another aim of the Finnish reform work, namely the effort to synthetize crime definitions, in other words to cast them in a more abstract form (as in the crime definition on 'Causing of danger' or the definitional elements of 'Debtor's offences'; PC 21:13 and chapter 39). A reasonable balance between these conflicting aims needs to be sought. An accommodation may also be required between the principles of comprehensibility and certainty. Although clarity is a function of both comprehensibility and certainty of language, the maximization of one may be detrimental to the other.

Other means to limit judicial discretion have also been used. Thus, in many cases the existing offences have been split into subcategories (e.g. basic assault, aggravated assault, and petty assault), and the definition of an aggravated offence is based on an exhaustive list of criteria (however, a milder evaluation is always discretionary). In addition, the number and scope of sentencing scales (punishment latitudes) have been generally reduced.

In accordance with the legality principle and the values behind it, the basic concepts and principles governing the general preconditions for criminal liability are defined in the general part of the Penal Code to a greater extent than in the Penal Code's original form. For instance, the preconditions for liability for omissions as well as the concepts of intent, negligence, and mistake are defined in the new Code (chapters 3–4; 515/2003), unlike in the original Penal Code of 1889.[14] The significance of the legality principle was reinforced during the preparatory work by the constitutional reform (chapter 2, section 8, Constitution[15]).

As for *the principle of culpability* (guilt), the definition of fault terms (intent and negligence) in law as such is likely to strengthen the significance of the guilt principle. The idea that the fault element of intent apparently indicates a higher degree of blameworthiness than negligence (basic or aggravated negligence) is reflected in the provision according to which negligence liability depends upon explicit specification (PC 3:5). Accordingly, the main emphasis

[14] See the following provisions in the revised PC 3:3; 3:6–7; 4:1–3.

[15] An unofficial English translation of the Constitution of Finland (731/1999), as it was in force in 2011 (1112/2011), is available on the website of the Ministry of Justice: https://www.finlex.fi/fi/laki/kaannokset/1999/en19990731_20111112.pdf.

of the offences regulated in the Penal Code is on intentional behaviour. In Finnish criminal law the doctrine of fair opportunity has been adopted in a strict form; thus, no individual shall be blamed for consequences over which he or she had no control.

It should be noted that the strengthening of the culpability principle did not exclude the adoption of corporate criminal liability in 1995 (chapter 9 PC). This indicates a tendency towards diversification of general doctrines of criminal liability and, at the same time, a tendency towards harmonized principles of the criminal liability of legal persons and the heads of business within the EU.

An important function of the criminal justice system is to express a socio-ethical reproach and, in this way, to influence the sense of justice and morality. This aim of *denunciation*, which has long been emphasized in Finnish and Scandinavian criminal policy, implies that the Penal Code is a notable instrument for communication. Furthermore, the Penal Code distinctively represents symbolic legislation expressing in an authoritative way the values and interests prevalent in society.

Thus, the value(s) of *justice* is particularly significant, and the aspect of social justice is one of its connotations. The legality principle and the principle of culpability can also been seen as sub-criteria of justice, and the same is true of the *proportionality* principle, which governs the assessment of the seriousness of crime and sentencing. However, it is worth pointing out that it is largely possible to apply the main criteria for rationality in the criminal justice system – justice, efficiency, and humaneness – without creating conflict over the development of the penal system.

When the aim of denunciation and the value of justice are seen as essential, the systematic assessment of the seriousness of crime and the solutions regarding the classification of offences and other structures of penal provisions are of vital importance in reforming the criminal law.

In the Finnish reform work, the aims of accessibility and comprehensibility caused all important information – both general principles of criminal law and crime definitions – to be concentrated in the Penal Code. From a comparative perspective it is noteworthy that it is intended to list in the Penal Code, in addition to the traditional crime definitions, all the offences with a punishment latitude that includes imprisonment. On the other hand, the concept of offence is broad, and the Finnish law does not contain a clear and uniform system of administrative penal law for minor infractions (see chapter III below).

D. System of criminal sanctions – for individuals and corporations[16]

As mentioned above, the mechanism used to achieve the general preventive effect of punishment is not primarily deterrence but the socio-ethical disapproval which affects the sense of justice and morality – general prevention instead of general deterrence, without calling for a severe penal system. The legitimacy of the entire criminal justice system is an important aim and, therefore, principles of justice such as equality and proportionality are central. The emphasis on the non-utilitarian goals of the criminal justice system – fairness and humaneness – must be coupled with a decrease in the repressive features (punitiveness) of the system, for example through the introduction of alternatives to imprisonment. The significance of individual prevention or incapacitation is regarded as very limited.

The first changes in the system of criminal sanctions prepared since the 1970s pertained to the alternatives to custodial sentences. Accordingly, legislation enacted in 1996 incorporated community service as a regular part of the sanction system. Legislation enacted in 2005 incorporated conciliation – both in criminal and civil cases – as a regular part of social welfare and a restorative justice system. Electronic monitoring was introduced as a new type of criminal sanction in 2011; it shall be imposed subject to certain material prerequisites as an alternative to a maximum custodial sentence of six months.

The general punishments in force are as follows: fine, conditional imprisonment, community service, electronic monitoring, and unconditional imprisonment (chapter 6 PC). A special criminal sanction for those who in the course of their business as entrepreneur or manager of an enterprise committed an economic crime or otherwise crucially failed in their legal duties was introduced in 1985, namely the prohibition to engage in business activities. Although it is not a necessary precondition that the suspected person fulfil all definitional elements of an economic crime, this sanction can be characterized as a criminal sanction, because the investigation and prosecution follow the rules of a criminal process.

The legislative changes are not restricted to substantive law. The competence to impose monetary criminal sanctions has increasingly been transferred from the courts to summary proceedings outside the court or to law enforcement authorities.

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[16] See in more detail R Lahti, in *Law, Criminology & Criminal Justice* (n 11).

As mentioned above, a corporation may be sentenced to a corporate fine for certain enumerated, mostly economic offences (chapter 9 PC, as amended in 1995). The corporate fine – which is the only criminal sanction available – ranges from a minimum of EUR 850 to a maximum of EUR 850,000.

The Finnish doctrine behind corporate criminal liability is not clear.[17] The acts or omissions of the individual offender, under certain conditions, are attributed to the legal person not as acts of the legal person but as acts of the individual for the company (PC 9:3). A crucial precondition is that a person who is part of the corporation's statutory organ or other management or who exercises actual decision-making authority therein was an accomplice in the offence or allowed the commission of the offence, or alternatively that the care and diligence necessary for the prevention of the offence was not observed in the operations of the corporation (PC 9:2). This precondition refers to the blameworthy organizational conduct (fault) of the corporation. In case of the last-mentioned alternative it is possible to impose a corporate fine based on anonymous culpa.

The Penal Code has provisions on determining the sentence. The general principle governing the assessment of punishment to an individual offender reads as follows: the sentence shall be determined so that it is in just proportion to the harmfulness and dangerousness of the offence, the motives for the act, and the other culpability of the offender manifest in the offence (PC 6:4). The basis for calculating the corporate fine is worded as follows: the amount of the corporate fine shall be determined in accordance with the nature and extent of the omission or the participation of the management and the financial standing of the corporation (PC 9:6.1).

Corporate criminal liability does not replace individual criminal responsibility, but both are parallel forms of imputability. Normally, both the individual manager and the company are prosecuted if the formal conditions are met. There are clarifying penal law provisions on the allocation of individual liability for an offence committed in the operations of a legal person: the person is liable to whose sphere of responsibility the act or omission belongs when taking into consideration his or her (formal or factual) position, the nature and extent of his or her duties and competence, and also otherwise his or her participation in the origin and continuation of the situation that is contrary to the law (PC 5:8, 47:7, 48:7).[18]

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[17] See also M Tolvanen, in *Fudan Law Journal* (n 3), chapter 2.

[18] R Lahti, 'Individual Liability for Business Involvement in International Crimes' (2017) 88 *Revue Internationale de Droit Pénal*, 257.

E. Criminal procedure and its safeguards – general characteristics

In Finnish procedural law, the traditionally recognized basic elements of due process or fair trial are the right to access to court, an independent and impartial tribunal, the presumption of innocence, and guarantees of procedural rights. It is noteworthy that these procedural principles and rules are applicable to all kinds of offences (including corporate and corporate-related crime), except that summary (simplified) penal proceedings and fixed fine penal proceedings for minor offences have some specific features which make the proceedings more expeditious and cost-effective.

A fundamental principle that reflects the presumption of innocence is *favor defensionis* (in favour of the defence). This 'meta' principle implies specifying principles, most importantly the principle of *nemo tenetur se ipsum accusare* or privilege against self-incrimination (an individual may not be compelled to testify against him-/herself and has the right to silence) and the principle of *in dubio pro reo* (in case of doubts about the guilt the accusation shall be dismissed). The burden of proof is on the prosecutor.

The Finnish legal system has long represented a model of a democratic *Rechtsstaat* where democracy and fundamental rights are regarded as complementary principles in a strong sense: there is neither judicial review nor a constitutional court for reviewing the constitutionality of laws; rather, the conformity of a bill to the constitution is reviewed only during the legislative process.[19] Therefore, the ratification of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and the reform of constitutional rights in the 1990s were remarkable because they implied the direct applicability of the fundamental rights of individuals in the courts.

In May 1990 Finland ratified the ECHR, accepted the jurisdiction of the European Court of Human Rights (ECtHR), and recognized the right of individual petition. The ECHR and other important human rights treaties have been incorporated through an Act of Parliament *in blanco*. Because of the predominance of the incorporation method, Finland can be said to represent dualism in form but monism in practice when implementing international law into the domestic legal order. This implementation method affects the application of human rights treaties. The Parliamentary Constitutional Law Committee

[19] See, e.g. A Jyränki, 'Taking Democracy Seriously. The problem of the control of the constitutionality of legislation' in M Sakslin (ed), *The Finnish Constitution in Transition* (Helsinki 1991), 6–30.

has confirmed the following principles: the hierarchal status of the domestic incorporation act of a treaty determines the formal rank of the treaty provisions in domestic law (i.e. their rank is normally that of an Act of Parliament), incorporated treaty provisions are in force in domestic law according to their contents in international law, and the courts and authorities should resort to 'human-rights-friendly' interpretations of cases having domestic status in order to avoid conflicts between domestic law and human rights law.[20]

New provisions on the fundamental rights in the Finnish Constitution were enacted in 1995, and they were included into the new Constitution of 1999. The new provisions on these basic rights, which are much more detailed than the earlier ones, for instance those concerning not only fundamental freedoms but also social rights, have been essentially inspired by the international human rights treaties. From the point of view of criminal law, there are important new provisions, for example on the legality principle in criminal law (corresponding to Article 7 ECHR) and the provision stating that a punishment entailing deprivation of liberty can only be imposed by a court.

Several of the enacted constitutional provisions reference both basic and human rights, thus giving semi-constitutional status to human rights treaties.[21] The *travaux préparatoires* for this reform emphasize the fact that the constitutional provisions are also directly applicable in the administration of law by judges and authorities, and so their binding effect is not restricted to law-making only. In addition to the 'human-rights-friendly' interpretation of the law, a similar 'basic-rights-friendly' interpretation is recommended, although the prohibition of courts to examine the constitutionality of Acts of Parliament was maintained.

The requirements of *Rechtsstaatlichkeit* (the constitutionally governed state) include several criteria which should be applied in constitutionally governed states (like Finland): first, anticipatory guarantees such as the general principles limiting the use of (substantive) criminal law and the principles concerning the organization of the judiciary; second, the procedural rules regarding the different phases of criminal proceedings; and, third, the methods of appeal in criminal proceedings and the supervision of the administration of justice. Major reforms of criminal procedural law have been carried out during the last thirty years.

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[20] See in more detail M Scheinin, 'Incorporation and Implementation of Human Rights in Finland' in M Scheinin (ed), *International Human Rights Norms in the Nordic and Baltic Countries* (Martinus Nijhoff Publishers 1996), 257–294.

[21] So Scheinin, in *International Human Rights Norms in the Nordic and Baltic Countries* (n 20), 276.

Legislation on the pre-trial investigation and coercive measures in criminal proceedings was reformed in 1989 (and replaced by new Acts of 2011[22]), the lower court system was restructured in 1993, the public prosecution authorities were reorganized in 1996, a comprehensive reform of criminal procedure in the lower courts was carried out in 1997,[23] and the provisions on the Court of Appeal procedure in 1998. The Code of Judicial Procedure, which dates back to the year 1734 under Swedish rule, has been revised innumerable times; in 2015 (732/2015), a crucial reform targeted its chapter 17 on evidence.[24]

There are two special features in the institutions and actors of Finnish procedural law: first, the pre-trial investigations are led by senior police officers and not by prosecutors or judges. The decision as to whether an apprehended suspect is to be arrested must be made within 24 hours by a senior police officer or the prosecutor. A request that a person under arrest be remanded for trial shall be made to a court without delay and not later than noon on the third day following the day of apprehension. The court has also an important role in deciding on the use of covert coercive measures. The prerequisites for these measures are regulated in detail by the legal Act; covert coercive measures include telecommunications interception, the obtaining of data other than through telecommunications interception, traffic data monitoring, obtaining base station data, extended surveillance, covert collection of intelligence, technical surveillance (on-site interception, technical observation, technical monitoring and technical surveillance of a device), obtaining data for the identification of a network address or a terminal end device, covert activity, pseudo-purchase, the use of covert human intelligence sources, and controlled delivery.

Second, the office of the prosecutor general is an independent authority outside the judicial administration of the Ministries of Justice and Interior. When the legislation on criminal proceedings was modernized in the 1990s, the main model was Sweden's accusatorial type of trial. The accusatorial principle

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[22] Unofficial English translations of these Acts are available on the website of the Ministry of Justice: Criminal Investigation Act (805/2011), as it was in force in 2015 (736/2015), and Coercive Measures Act (806/2011), as it was amended up to 1146/2013: https://www.finlex.fi/fi/laki/kaannokset/2011/en20110805_20150736.pdf; and https://www.finlex.fi/fi/laki/kaannokset/2011/en20110806.

[23] See Criminal Procedure Act of 689/1997, whose unofficial translation is available on the website of the Ministry of Justice, with amendments up to 733/2015: https://www.finlex.fi/fi/laki/kaannokset/1997/en19970689_20150733.pdf.

[24] See Code of Judicial Procedure, whose unofficial translation is available on the website of the Ministry of Justice, with amendments up to 732/2015: https://www.finlex.fi/fi/laki/kaannokset/1734/en17340004_20150732.pdf.

requires that the judge be an impartial third party, so that all the activities of bringing the criminal charge forward are handled by a separate official, the prosecutor, and his or her role is significant.

In addition to the accusatorial principle, the other leading principles governing the main hearing in the proceedings are the requirements of orality and immediacy. Therefore, all pleadings shall, as a rule, be oral, and the opposing party has the right to cross-examine all evidence presented against him/her. The acceptability of evidence other than oral evidence in open court is very restricted.

The increased awareness among decision-makers of the importance of human rights and, later, of the constitutional rights affected the contents of the procedural reforms and still affects the application of procedural law. The most important Supreme Court decisions since the beginning of the 1990s, whenever human rights norms were directly applied, address criminal procedural law and particularly the fair trial requirements. The constitutional reform produced some new provisions on basic rights, mostly equivalent to the corresponding articles in international human rights treaties but more extensive in some respects.

F. Most recent developments regarding criminal procedure in case law and legislation

In the most recent years, ECtHR case law has influenced especially the fair trial guarantees of evidentiary procedure (such as the privilege against self-incrimination and the exclusion of unlawfully obtained evidence) and the significance and contents of the '*ne bis in idem*' principle. In these respects Finnish procedural law has been reformed and applied in line with the practice of the ECtHR and, when necessary, in line with the judgments of the Court of Justice of the EU (CJEU). For instance, explicit provisions have been included in the revised Code of Judicial Procedure (chapter 17, sections 18 and 25; 732/2015) on the privilege against self-incrimination and on the exclusion of unlawfully obtained evidence.

A separate legal Act (781/2013) on the prohibition of double jeopardy (*i.e.* a prohibition against the cumulative use of criminal punishment and administrative penal fee) was introduced for tax fraud cases. Accordingly, as a rule, no charges may be brought nor court judgments passed if the same person in the same case has already incurred a punitive tax or customs increase (PC 29:11).

The reformed evidence law regulated in chapter 17 of the Code of Judicial Procedure contains – in addition to clarifying general provisions and provisions

on the obligation or right to refuse to testify – innovative provisions, such as the above-mentioned provisions on the privilege against self-incrimination and on the exclusion of unlawfully obtained evidence. There are also new provisions on secret evidence and anonymous witness. If, in very serious criminal cases, the protection of the identity of an anonymous witness is required (to protect against a threat against life or health), he or she can be heard in the main hearing behind a screen or without the presence of the defendant or, without being present in person, by telephone, video contact, or other suitable means of communication. In the hearing, the voice of the witness may also be altered to protect the anonymous witness against recognition by voice. (See chapter 17, sections 51–53, of the Code of Juridical Procedure; and chapter 5, sections 11a–b, of the Criminal Procedure Act.)

A new legislation on consensual proceedings was enacted in 2014 (670/2014) as part of the revision of the Criminal Procedure Act. The new legislation maintains the legality principle in prosecution as a main rule, but the exceptions – grounds for waiving prosecution – have become more extensive. One of the grounds for waiving prosecution is that criminal proceedings and punishment are deemed to be unreasonable or inappropriate in view of a settlement reached by the suspect in the offence and the injured party, the other action of the suspect in the offence to prevent or remove the effects of the offence (chapter 1, section 8).

One innovation concerns the introduction of plea bargaining, which is intended to be applied particularly in complicated cases of economic and corporate crime. Accordingly, the prosecutor may, on his or her own motion or on the initiative of the injured party, take measures for the submission and hearing of a proposal for judgment in confession proceedings. The prosecutor must use his or her discretion in considering the nature of the case and the claims to be presented, the expenses apparently resulting from, and the time required for, a hearing in confession proceedings on one hand and in the normal procedure on the other. Preconditions for confession proceedings are that the suspect in the offence in question admits having committed the suspected offence and consents to confession proceedings as well as that the injured party has no claims in the case or consents to confession proceedings. The prosecutor must commit to requesting punishment on a scale mitigated by one-third. The proposal for judgment will be handled and confirmed by the court. (chapter 1, sections 10–11 and chapter 5b Criminal Procedure Act.) It should be noted that the mitigation of punishment applies only to the actor's own guilty plea and not to testimony on the guilt of accomplices.

III. ADMINISTRATIVE CRIMINAL LAW

A. Introduction

It is still relevant and possible to commence a text about differences between criminal law and administrative penal law in Finland with the same words as professors Pekka Koskinen and Terttu Utriainen did in 1988. They wrote an article entitled 'The legal and practical problems posed by the difference between criminal law and administrative law' and started off by remarking that it is not easy to prepare a clear and informative Finnish national report on the subject in question. It is probably easier to write such an article from the point of view of a legal system with a clearly defined and uniform system of administrative penal law. This is not the case in Finland.[25]

Finnish law does not contain a clear and uniform system or definition of administrative sanctions or administrative penal law. The field of administrative sanctions is quite heterogeneous, and sector-specific rules are laid down in laws governing the use of public authority.[26] There are, however, several types of such sanctions already in use, but a comprehensive systematic review and rethink of them is still under investigation.

All these sanctions share in common that they are imposed by an administrative decision, in accordance with the provisions of the Administrative Procedure Act (434/2003) on administrative matters, unless otherwise specified elsewhere. However, the regulatory model for administrative sanctions is not entirely strange to Finland. The administrative sanction model got its early forms in the early 1970s when the control of parking violations was transferred outside of the criminal law system (decriminalized). Parking violations may now lead to an administrative fee, a 'parking fee'. Examples for long-established administrative sanctions include the public transport inspection fee also called 'penalty fare' (1979), the excess load fee (1983), and the

[25] P Koskinen and T Utriainen, 'The Legal and practical problems posed by the difference between criminal law and administrative law' (1988) 59 *Revue Internationale de Droit Pénal* 173, 188.

[26] K Kiiski, *Hallinnollinen sanktiointi* (Turun yliopisto 2011), 55. R Lahti, 'Rikosoikeuden ultima ratio -periaatteesta ja hallintosanktioiden asemasta' in T Hyttinen, A Jokela, J Tapani, and M Vuorenpää (eds), *Rikoksesta rangaistukseen, juhlajulkaisu Pekka Viljanen 1952 – 26/8 – 2012* (Turun yliopisto, oikeustieteellinen tiedekunta 2012), 105. See also R Lahti: 'Towards a principled European criminal policy: some lessons from the Nordic countries' in J B Banach-Gutierrez and C Harding, *EU Criminal Law and Policy* (Routledge 2016), 56–69. See also L Halila and V Lankinen, 'Administrativa sanktionsavgifter i nordisk kontext' (2014) *JFT* 305, 325.

tax increase, which has even longer historical roots.[27]

Already the Penal Law Committee, which prepared the total reform of the Penal Code in Finland during the late 1970s, expressed the idea that sanctions for petty violations of the law may be replaced by fiscal sanctions, which can be imposed in simplified proceedings.[28]

The Legal Affairs Committee of the Parliament of Finland[29] stated in 2005 that the government should examine the possibilities of introducing a more comprehensive and uniform system of administrative sanctions. The Constitutional Law Committee also paid attention to the same issue.[30] On 21 March 2017, the Ministry of Justice set up a working group to prepare the general regulation of administrative sanctions (Ministry of Justice 7/41/2017).[31] The working group is tasked to assess the necessity for a general regulation on administrative sanctions and to prepare the necessary legislative proposals for implementing the relevant legislation. The term of the working group is 1 June 2017–31 August 2018.

In Finland, administrative sanctions have been increasingly introduced, especially in the attempt to eliminate criminal penalties for minor and/or negligent offences (decriminalizations). It has also been suggested that their introduction, to some extent, may be explained by the flexibility in administrative decision-making. In addition, administrative sanctions are used in EU law, particularly in order to safeguard the financial interests of the Union, and this development is also reflected in national legislation.[32]

Administrative sanctions are closely related to the specific legislative objectives of a particular sector of administration and its regulatory objectives enforced by specialized administrative authorities.[33] The legislative differences

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[27] L Halila and V Lankinen, 'Administrativa sanktionsavgifter i nordisk kontext' (2014) *JFT* 305, 319.

[28] *Penal Law Committee* 1976:72, 88–90.

[29] *Legal Affairs Committee* 21/2005, 2–3.

[30] *Constitutional Law Committee* 9/2012, 4. The Finnish Supreme Court (SC) has also stated that the consideration and coordination of different sanction systems in accordance with the case law of the European Court of Human Rights should most naturally take place in the legislature and the government, not in the courts. SC 2010:45, para 43.

[31] See also P Koskinen and S Repo, *Hallinnolliset maksuseuraamukset vähäistä lainrikkomusten seuraamuksena. Arviomuistio oikeusministeriölle 29.1.2001* and *Oikeudenhoidon uudistamisohjelma vuosille 2013–2025* (Oikeusministeriön mietintöjä ja lausuntoja 16/2013). The evaluation and enhancement of regulation of administrative sanctions has also been included in the development programme of the Ministry of Justice for years 2013–2015.

[32] O Mäenpää, *Yleinen hallinto-oikeus* (Alma Talent 2017), 76.

[33] These authorities, in principle, deal with cases of administrative sanctions independently. However, individual public officers are subject to the orders of their superiors according to the

in sanctioning are largely due to the sectoral nature of administrative sanctions. Administrative sanctions are closely linked to enforcement and supervision procedures and methods of a specific public authority. The aforementioned sectoral nature of administrative sanctions and the priority of specific regulation (*lex specialis*) emphasizes the fact that administrative sanctions are part of the sectoral sanction scheme.[34]

B. Administrative sanctions in Finland

In the legal literature, administrative sanctions have been deemed to include both sanctioned administrative penalties and other administrative sanctions and to be criminal in nature or to share certain features with criminal law sanctions. This has been taken to mean that some of the principles that need to be followed in criminal proceedings must also be taken into account when imposing administrative sanctions. At least two different things can be said when discussing administrative sanctions. On the one hand, the question is whether the sanctions or penalties for minor offences should be replaced by administrative sanctions. On the other, there may be severe financial penalties, such as penalty payments imposed for restraints on competition in competition legislation.

The most distinct subgroup of administrative sanctions are administrative penalties ('sanction fee', 'penalty payment'). The legislation uses different terminology for them, such as default payment, penalty charge, and penalty fare. The penalty is usually imposed in the administrative procedure by the administrative public authority in the role of a supervising authority. However, some penalties are imposed by the court on proposal by the public administrative authority (supervisory authority). In some cases, Finnish legislation includes the possibility of imposing increases in payments (tax or duty surcharges).

Administrative sanctions (penalties), on the other hand, are not charges for services or other actions of public authorities (service charge) or fees charged by the public authority (supervision fee). Nor has the recovery of an advantage

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laws, rules of procedure, etc. considering certain public authority. Administrative authorities do not have legislative powers but may have the right to issue regulations and guidelines. Generally, the decision making process and jurisdiction in the public authority considering decisions such as to impose an administrative sanction are regulated by laws, government decrees, and rules of procedure.

[34] *Rangaistusluonteisia hallinnollisia seuraamuksia koskevan sääntelyn kehittäminen* [Developing the regulation of punitive administrative sanctions] (Oikeusministeriön työryhmän muistioluonnos 8.11.2017), 12–13 [Draft Memorandum of the Ministry of Justice working group].

or aid previously granted, the withdrawal or restriction of an administrative authorization, or the restriction or removal of the right to pursue a trade or to have access to a certain professional activity been considered an administrative sanction.

The conditional fine procedure is not considered an administrative sanction either. In the case of the conditional fine procedure, the authority imposes a ban or operating obligations, and the authority may impose a conditional fine to enforce this ban, operating obligation, or prohibition. A penalty payment or fine is not imposed if the person acts according to the terms set by the authority.

In addition to the administrative penalties, the legislation includes some other administrative penalties which can be considered punitive, such as a public warning. Documents relating to the imposition of administrative sanctions are, in principle, public in accordance with and due to the Act on the Openness of Government Activities (621/1999), but the public authorities are not always required to publish sanctions or maintain a separate register of sanctioned persons or entities.

One special feature of administrative sanctions is that most of them can be imposed on legal persons as well (corporate bodies etc.). However, the legislation is not coherent in this case either. Provisions do not always explicitly indicate whether it is possible to impose sanctions on both legal and natural persons.

The administrative penalties may be divided and classified in two groups: flat-rate or non-fixed penalties. Typically, flat-rate payments are imposed on natural persons due to minor regulatory violations (e.g. public transport penalty fare and parking fee). Non-fixed administrative penalties are imposed on the basis of an assessment by the supervisory authority. Still, the maximum and sometimes the minimum levels of the penalty are provided in relevant legislation.[35]

Further, it is possible, to some degree, to classify administrative penalties as minor transgressions that might have been criminal offences in the past but were later replaced by administrative sanctions. Criminal law sanctions might have been considered too harsh in relation to the blameworthiness of the conduct in question. In such cases, the legislator may also have considered that administrative sanctions are more effective in addressing specific problems than criminal law sanctions and compliance with criminal procedure. Examples include the public transport penalty fare and the parking fee. In addition,

[35] *Rangaistusluonteisia hallinnollisia seuraamuksia koskevan sääntelyn kehittäminen* (n 34), 13–15.

there are administrative penalties in amounts up to several million euros, whose introduction emphasizes procedural efficiency aspects. The penalty payment imposed on a company responsible for a restraint on competition can be mentioned as one example. Further, the latter kinds of penalties are often imposed on legal persons, the former to natural persons.[36]

C. Legal constraints of criminal legislation in Finland

Criminalizing a certain act or conduct depends on political values and decisions. Nevertheless, criminalization must meet certain legal requirements. The Constitutional Law Committee has stated that fundamental and human rights have a major role in determining the limits to criminalization. The baseline is that the law cannot disallow actions explicitly justified or allowed by the Constitution. Even so, certain criminal law provisions can genuinely restrict the scope of a person's fundamental rights. Also, criminal law sanctions *de facto* result in a restriction of certain rights. Consequently, the Constitutional Law Committee concluded that a criminalization should be assessed in the same way as the restrictions on fundamental rights in general. Criminal law provisions must therefore fulfil the general conditions for limiting fundamental rights and possibly certain special conditions depending on the fundamental right in question.

The general conditions for limiting fundamental rights set by the Constitutional Law Committee can be summarized as follows:

- Principle of legality (*nullum crimen sine lege scripta et certa, nulla poena sine lege*): the restrictions must be based on the law laid down by Parliament. The restrictions must be sufficiently precise. A criminal law provision must define the punishable conduct and the penalty with sufficient definiteness.
- Eligibility requirement: the restriction must be acceptable and there must be a substantial social necessity for the restriction.

[36] See also R Lahti, 'Towards a principled European criminal policy: some lessons from the Nordic countries' in J B Banach-Gutierrez and C Harding (eds), *EU Criminal Law and Policy* (Routledge 2016) 56, 63–66. It is also about the question of application of the principle of proportionality. The principle of proportionality has in the field of criminal law not only the dimension of prospective proportionality. It has also the dimension of retrospective proportionality. The legislator needs to analyse whether measures other than those of formal criminal law could address the problems more effectively and to what extent various types of sanctions should be introduced in parallel. *Ibid* 69.

- Requirement of immunity of the core area: it is not possible to limit the core of a fundamental right by an act enacted in ordinary legislative procedure.
- Proportionality requirement: the restrictions must be indispensable to achieve an acceptable objective and in proportion to the weight of the legal interest protected by fundamental rights and the social interest behind the restriction.
- Due process: there must be adequate legal safeguards in limiting fundamental rights, and legal rights must be properly taken into account.
- Demand for compliance with human rights obligations: restrictions must not conflict with Finland's international human rights obligations.[37]

In legal literature, the legal constraints on the use of criminal sanctions have been structured in the form of so-called criminalization principles (principle of protection of legitimate interests, *ultima ratio* principle (criminal law must be used only as a last resort), social cost evaluation (rational evaluation of the social costs and benefits of criminalization), inviolability of human dignity and legality. The principles of criminalization are very similar to those of limiting fundamental rights described earlier. A criminalization which respects the limitations of fundamental rights should also be considered to meet the requirements of the criminalization principles and vice versa.[38] Although the principles of criminalization do not quite have the same support of and confirmation from the Constitutional Law Committee and the Legal Committee as the constraints on fundamental rights, they do increasingly receive support from recent government proposals, for example.

While the Constitutional Law Committee has, to some degree, equated administrative penalties and criminal law sanctions, it has not made a corresponding assessment of the fulfilment of the limitations of fundamental rights as in the criminalization process. Further, the national legal literature has so far failed to make a comprehensive correlation between criminal sanctions and administrative sanctions from the point of view of the legal conditions and limitations of their adoption. To date, national legal literature has focused primarily on the procedural questions regarding these forms of sanctions (in particular the *ne bis in idem* principle and questions related to the privilege against self-incrimination).

As said, the Constitutional Law Committee in Finland did equate criminal law sanctions and administrative sanctions to some degree. The general cri-

[37] *Constitutional Law Committee* 25/1994.

[38] See the pioneering work of S Melander, *Kriminalisointiteoria – rangaistavaksi säätämisen oikeudelliset perusteet* [A Theory of criminalization – legal constraints to criminal legislation] (Suomalainen Lakimiesyhdistys 2008).

teria and grounds for administrative sanctions must be laid down by an Act of Parliament as required by section 2, subsection 3 of the Constitution, as it implies a significant use of public authority and powers. The law must clearly and explicitly lay down the grounds for the payment obligation (administrative penalty), the amount of the penalty, and the due process of the person liable for payment, as well as the grounds for enforcing the law.

Although the principle of legality in criminal cases, as described in article 8 of the Constitution, does not, as such, apply to the regulation of administrative sanctions, the general requirement of precision cannot be ignored in the context of such regulation either. This means that especially the amount of the penalty and the scope of the sanctioned conduct must be subject to a clearly defined scope of application.[39]

D. The nature of administrative sanctions in relation to criminal sanctions

In Finland, legislative compliance with constitutional law is supervised by the Finnish Constitutional Law Committee of the Parliament. But while the Committee has to some degree equated administrative penalties and criminal sanctions, the exact and accurate meaning and the impact of that statement are not always clear.

As discussed above, the national debate on the differences and similarities between administrative and criminal law sanctions has so far focused on defining and analysing procedural legal safeguards. This can be considered a natural consequence of the case law of the ECtHR and of national Supreme Courts, which explicitly emphasize procedural issues. As far as administrative cases are concerned, there is little debate at national level on the 'theories of punishment' or the legal constraints on administrative sanctions in terms of their legal conditions of use or restrictions in relation to criminal law sanctions.

It is generally assumed that 'the administrative sanctions system' is more effective when the criminal justice system operates slowly and the strictly enforced safeguards of criminal procedure restrict its use. However, criminal law and criminal law sanctions are considered to be the strongest manifestation of moral condemnation and blame in society. An increased need to create alternative sanction penalty payment systems, especially for minor offences, has been recognized. Likewise, from the point of view of cost-efficiency,

[39] See, *e.g.* *Constitutional Law Committee* 2/2017 and its referral to relevant case law.

similar pressure is applied to systems of severe administrative sanctions, for example under competition law. However, it should be ensured that the procedural legal safeguards characteristic of the criminal justice system are duly taken into account.

On the other hand, it has also been argued that the criminalization structure of criminal law, in keeping with justice and equality principles, should reflect the relative harmfulness and blameworthiness of the different types of conduct. Particularly as regards economic crimes and violations, it should be considered whether it is better to differentiate the prerequisites for sanctioning conduct within the criminal law system in order to improve prevention and procedural efficiency or to distinguish them by coexisting and developing different sanction systems.[40]

The administrative sanctions, however, contain features which are inherent in criminal sanctions. These are related to the fact that administrative sanctions have been viewed as both punitive and preventive. In addition, the prerequisites of administrative sanctions and liability, grounds for exempting liability, and the factors affecting the assessment of the amount of sanctions resemble the rules and general doctrines inherent in criminal law and criminal law sanctions. Administrative sanctions are principally not considered to carry a stigmatizing effect as strong as criminal sanctions, despite the fact that administrative sanctions can be monetarily very significant.

In the case of administrative sanctions, the 'blameworthiness' of an act must be established when assessing whether the act falls within the scope of sanctioned conduct, i.e. whether the conduct is prohibited by law at all. In addition, blameworthiness may also be taken into account when determining the size of the sanction; the sanction can often be moderated or, subject to certain conditions, may not be imposed at all. Further, sometimes prescribed mitigating or aggravating circumstances can affect the size of the sanction, in particular where the sanction amount is to be assessed by the relevant public authority. However, the factors involved in regulating the mitigating and aggravating circumstances vary (matters to be taken into account include, for example, the nature of the violation, the extent, duration, frequency, methodical nature of the activity, the blameworthiness of the conduct, the acquired benefit/financial advantage, the financial position of the perpetrator, and the damage caused by the unlawful conduct). Some sanctions can be reduced due to considerations of reasonableness, such as a mistake by the perpetrator, financial status, illness, or other circumstances; others due to the low level of financial gain achieved.

[40] R Lahti in *Rikoksesta rangaistukseen* (n 26), 109, 114.

The regulation also includes differences in whether the authority has the *right* or the *obligation* to impose an administrative sanction.

Administrative sanctions are often governed by the administrative sector and frequently implemented by estimating the functionality of a certain public authority and sector of the administration. Criminal law sanctions are principally more general in scope. The supervising administrative authority may have considered it easier to examine the conditions for imposing an administrative sanction than always to make a notification to the police to determine the conditions for initiating the preliminary investigation of possible offences. The sanctions may have been set in such a way that the supervisory authority can adjust the degree of administrative sanctions to the blameworthiness of the conduct in question (such as an administrative fine, a public warning, or an administrative penalty), but if it is established that the statutory definition under criminal law might be fulfilled, the supervisory authority should report to the investigating authority (police).[41]

The Constitutional Law Committee in its practice has emphasized proportionality in regulating administrative sanctions. Issues related to proportionality are, for example, the sanctioning of very minor misconduct and the scaling of sanctions based on the gravity of the conduct.[42] Although the principles of

[41] The Financial Supervisory Authority (FSA) may exercise supervisory powers in respect of financial markets. FSA imposes an administrative fine for a failure to comply with or violation of the provisions in section 38 of the Act on the Financial Supervisory Authority (878/2008). However, FSA may decide not to impose an administrative fine, subject to fulfilment of the conditions of section 42 of the Act. The administrative fine payable by a legal person is EUR 5,000–100,000, and by a natural person EUR 500–10,000. The size of an administrative fine is based on a comprehensive assessment, which takes into account the nature, scope, and duration of the failure or violation. If the act or omission is particularly reprehensible, FSA may impose a penalty payment instead of an administrative fine. An administrative fine may be imposed, provided that the matter, after comprehensive assessment, does not warrant more severe action. According to section 39 of the Act on the Financial Supervisory Authority, FSA issues a public warning to a supervised entity or other financial market participant for violations that are not subject to an administrative fine or a penalty payment. In addition, a public warning is issued if the supervised entity's conduct is in violation of the terms of its authorization or the rules governing its operations. FSA imposes a penalty payment for a failure to comply with or violation of the provisions of section 40 of the Act on the Financial Supervisory Authority, if the penalty payment does not exceed the sum of EUR 1 million. Penalty payments exceeding EUR 1 million are imposed by the Market Court on a proposal by FSA. FSA may decide not to impose a penalty payment or suspend the decision to impose a penalty payment on a legal person if it reports the matter to the police authorities or takes another supervisory measure as provided by law. A penalty payment may be imposed, in addition to or instead of the penalty payment imposed on a legal person, on such member of the management of the legal person whose obligations have been contravened by the act or omission, if such member has significantly contributed to the act or omission.

[42] *e.g. Constitutional Law Committee* 58/2010.

legality and legal certainty in criminal cases do not, as such, apply to administrative sanctions, the principle of *nulla poena sine lege* can generally not be ignored in such a regulation either. This means that sanction provisions must define the punishable conduct and the sanction with sufficient definiteness. The provisions must make it clear that a breach of the statutes may be sanctioned. In addition, the acts and the negligent conduct sanctioned must be described by law in order to identify them.[43]

E. Basic procedural aspects

When assessing the procedural legal safeguards for administrative sanctions, the case law of the European Court of Human Rights (ECtHR) is of crucial importance. Particularly the ECtHR's autonomous interpretation of the European Convention on Human Rights (ECHR) and the applicability of legal safeguards under the ECHR need to be taken into account in the context of administrative sanctions.[44] As is known, the proper application of the legal safeguards provided by the ECHR is not limited to the national definition of criminal law sanctions and other sanctions. The ECtHR's evolving case law and the Court's interpretations of the ECHR create certain difficulties for developing national legislation and for assuring that national legislations meet the requirements set by the ECHR. As regards administrative sanction matters, one of the key issues is the scope of application of the ECHR in the context of administrative sanctions.[45]

Administrative sanctions are to some extent, especially from a procedural point of view, equated to criminal sanctions. Thus, when a public authority imposes an administrative sanction, the administrative procedure must also pay special attention to the legal safeguards similar to and inherent in criminal sanctions and criminal procedure. In general, when an administrative sanction

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[43] *e.g. Constitutional Law Committee* 60/2010 and *Constitutional Law Committee* 74/2002.

[44] See especially the *Engel* criteria worked out by the ECtHR when interpreting autonomously the concept of a 'criminal charge' under Article 6 of the ECtHR (*Engel and others v The Netherlands* (App no 5100/71) ECtHR 8 June 1976). A similar assessment is now also applied in EU law (Case C-489/10 *Bonda* (ECJ 5 June 2012); Case C-617/10 *Fransson* (ECJ 26 February 2013).

[45] *Jussila v Finland* (App no 73053/01) ECtHR 23 November 2006 para 43: 'Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency.' See also *A and B v Norway* (App no 24130/11 and 29758/11) ECtHR 15 November 2016 para 133.

is imposed (*lex generalis*), the Administrative Procedure Act (434/2003)[46] is applied, but, where appropriate, the proceedings correspondingly must take into account criminal law principles such as the privilege against self-incrimination, the presumption of innocence, the *ne bis in idem* principle, and the principle of legality. The main rule is that an administrative sanction is imposed in an administrative procedure by an administrative decision, and an appeal to the administrative decision is appealed to the Administrative Court.[47] The use of administrative sanctions by administrative procedure and of appeals against such decisions has also been considered as constituting a special area of administrative law (administrative criminal proceedings).[48] The concept of administrative criminal proceedings and its content, however, is not fully established and clear.[49] The regulation also contains differences as to whether the sanctioning public authority is the same as the public authority which investigates the case.

F. Privilege against self-incrimination and *ne bis in idem* principle

The regulation also contains differences in explicit provisions on the privilege against self-incrimination. Further, different legislation reveal some variations on how the *ne bis in idem* principle has been taken into account. For some sanctions, there is a restriction imposing an administrative sanction on a person suspected of the same offence in a preliminary investigation, prosecution, or criminal proceedings pending before a court or a ban imposing a penalty on a person who has been the subject of a final judgment or punishment.[50] According

[46] An unofficial English translation of this Act, with the amendments up to 891/2015, is available on the website of the Ministry of Justice: https://www.finlex.fi/fi/laki/kaannokset/1996/en19960586_20150891.pdf.

[47] O Mäenpää, *Yleinen hallinto-oikeus* (Alma Talent 2017), 77.

[48] O Mäenpää, *Yleinen hallinto-oikeus* (Alma Talent 2017), 9.

[49] See L Halila, 'Hallinnollisen rikosprosessin piirteitä' in T Ojanen, I Koivisto, O Suviranta and M Sakslin (eds), *Avoin, tehokas ja riippumaton. Olli Mäenpää 60 vuotta juhlakirja* (Edita 2010), 197, 215; K Kiiski and M Koillinen, 'Tieliikennevirhemaksu vähäisten tieliikenteen rikkomusten sanktiona' in A Keinänen, R Kukkonen and M Kilpeläinen (eds), *Oikeustieteiden moniottelija – Matti Tolvanen 60 vuotta* (Edita 2016), 86.

[50] However, there are explicit provisions concerning the privilege against self-incrimination and the *ne bis in idem* principle. *E.g.* Waste Act (646/2011): § 129 Any information that is based on an obligation to provide information imposed on a natural person by this Act or thereunder and that has been obtained by imposing the threat of a fine on the natural person may not be used to hold the person criminally liable in preliminary investigation, consideration of charges

to the Code of Judicial Procedure (4/1734 with amendments, chapter 17 section 25 subsection 2), the court may not, in criminal proceedings, use evidence obtained from a person in proceedings other than a criminal investigation or in criminal proceedings by threat of coercive measures or otherwise against his or her will, if at the time he or she was a suspect in an offence or a defendant, or if a criminal investigation or court proceedings were underway in respect of an offence for which he or she was charged. However, if a person in proceedings other than criminal or comparable proceedings, in connection with fulfilling his or her statutory obligation, has given a false statement or submitted a false or untruthful document or a false or forged object, this may be used as evidence in a criminal case concerning conduct in violation of his or her obligation.[51] According to the government proposal, therefore, the privilege against self-incrimination is respected in criminal procedure, even though certain other laws require the provision of information to the authorities that could otherwise incriminate the person giving the required information.[52]

It is also appropriate to note that, during the consideration of the legislative proposal to renew the Administrative Judicial Procedure Act, the Legal Affairs Committee of the Parliament proposed the withdrawal of a provision concerning the right against self-incrimination.[53] The Committee proposed that provisions regarding the right against self-incrimination should be evaluated together with questions concerning a prohibition against reference to certain evidence. As previously mentioned, a more comprehensive evaluation was not involved in the government proposal.

The regulation on administrative sanctions also includes differences in that there is a restriction on pressing charges or giving a sentence if an administrative sanction has already been imposed on the same person for the same conduct.[54] Much of the case law of ECtHR on the *ne bis in idem* principle involves the relationship between tax increases and criminal sanctions. In reaction to this case law, Finland changed the taxation legislation. In 2013, a law on a tax or duty increase was passed, decided by a separate decision (781/2013). The law

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or trial, or in matters related to a penalty payment for neglect; § 133 A penalty payment for negligence cannot be imposed on a party convicted of a violation regarding the same matter, or if the matter is under a pre-trial investigation or a consideration of charges, or before a court of law.

[51] The law applies to proceedings before the general courts, unless otherwise provided by the Criminal Procedure Act (689/1997) or other law. The general courts of law are the District Court as the court of first instance, the Court of Appeal as the appellate court, and the Supreme Court as the highest appellate court.

[52] *Government Proposal* 46/2014, 88.

[53] *Legal Affairs Committee* 23/2014; *Government Proposal* 245/2014, 4.

[54] *Rangaistusluonteisia hallinnollisia seuraamuksia koskevan sääntelyn kehittäminen* (n 34), 32.

contains, among other things, a regulation on the relation of a tax increase to reporting an offence and commencing a preliminary investigation. In its statement the Constitutional Law Committee was of the opinion that the regulatory solution goes beyond what current human rights obligations require.

G. Appeal and procedural regulation

Finnish legislation also includes some administrative sanctions which are imposed by a court. The administrative sanctions imposed by court decision are concentrated in the Market Court, which is a special Administrative Court. In these cases the court imposes the administrative sanctions on proposal by the public administrative authority (supervisory authority). For example, the Market Court imposes a penalty payment for restricting competition under the Competition Act (948/2011) and penalties under the Information Society Code (917/2009) on proposal by the public administrative authority, namely the Finnish Competition and Consumer Authority or the Finnish Communications Regulatory Authority, respectively.

A decision to impose an administrative sanction may always be appealed. The appeal is most commonly lodged with the administrative court of first instance. However, administrative court decisions are usually subject to appeal only if the Supreme Administrative Court grants leave of appeal. When appealing a decision to impose an administrative sanction, the appeal is usually subject to the provisions of the Administrative Judicial Procedure Act (586/1996). Exceptionally, an appeal may be lodged with the District Court (oil discharge fee[55]). In assessing the appropriateness of the legal safeguard arrangements, attention needs to be paid to whether an administrative sanction can be enforced before it has attained legal validity. It has been considered reasonable that particularly severe administrative sanctions can be enforced only after the decision has become legally valid.

The handling of and procedure for administrative matters by an authority

[55] The party liable for payment is entitled to appeal the decision regarding the oil discharge fee by submitting an appeal to the maritime court operating within the Helsinki District Court. For a violation of the prohibition laid down in Act on Environmental Protection in Maritime Transport (1672/2009) 3:1, 3:3, and 3:10, on the discharge of oil or oily mixtures in Finland's territorial waters or Finland's exclusive economic zone, a monetary penalty (oil discharge fee) shall be imposed, unless the discharge is deemed minor in amount and impact. The competent authority may waive the imposition of an oil discharge fee or reduce the amount of the fee if the party liable for payment shows that the imposition of the fee would be manifestly unfair due to an emergency or accident or due to some other comparable reason.

is generally in writing and based on documentary material. Upon request, an authority shall reserve the party to a case the opportunity to submit his/her demands or information orally if this is necessary for purposes of clarification of the matter and if the written procedure causes unreasonable inconvenience to the party. The other parties shall be summoned to be present at the same time if this is unavoidable in order to safeguard the rights or interests of the parties. Further, for special reasons, witnesses may be heard under oath and parties may be heard under affirmation of truth in an administrative matter. The parties immediately concerned shall be reserved an opportunity to be present when a witness or a party is being heard. They have the right to question the person being heard and to express their opinion on the testimony.

The administrative judicial procedure (appeal to the Administrative Court against an administrative decision taken by a public administrative authority[56]) is also based on written procedure. Oral proceedings or hearings are an exception and are at the discretion of the court. However, the discretion of the court does not mean that the court is entirely free to decide on holding the oral procedure or hearing. It is a matter for the court to provide for a fair trial. The oral hearing may be limited to cover only a part of the matter, to clarify the opinions of the parties, or to receive oral evidence, or in another comparable manner. However, the Administrative Court shall conduct an oral hearing if a private party so requests. The oral hearing requested by a party need not be conducted if the claim is dismissed without considering its merits or immediately rejected, or if an oral hearing is manifestly unnecessary in view of the nature of the matter or for another reason (e.g. minor cases or in matters that are clearly resolved by written material).[57]

The Court is responsible for reviewing the matter. Where necessary, it shall inform the party or the administrative authority of the additional evidence that needs to be presented. Further, the Court shall on its own initiative obtain evidence in so far as the impartiality and fairness of the procedure and the nature of the case so require.[58]

The Court and the administrative public authority shall include a statement of reasons in the decisions. The statement shall indicate which facts and evidence have affected the decision and on which legal grounds and provisions it is based.[59]

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[56] This means that in most cases, the public administrative authority has already imposed administrative sanction before actual court proceedings begin. The Administrative Judicial Procedure Act does not apply to procedures in the administrative public authority.

[57] M Paso and others, *Hallintolainkäyttö* (Alma Talent 2015), 164, 168–175.

[58] Administrative Judicial Procedure Act, § 33.

[59] Administrative Judicial Procedure Act, § 54, and Administrative Procedure Act, § 44.

In general, before the matter is decided, a party shall be reserved an opportunity to express an opinion on the matter, to comment on the demands of other parties, and to submit an explanation on the demands and information which may have an effect on decision. A deadline for the supplementation of a document, the submission of an explanation, and the provision of information is set by the administrative public authority or the Court and shall be 'reasonable in view of the nature of the matter'. A party is notified of the purpose of the hearing. When necessary, the notification on the hearing shall indicate the points on which clarification is being sought. The party shall be provided with the documents covered by the hearing in the original or as copies, or otherwise reserved an opportunity to peruse them.[60] However, there are certain restrictions to a party's access to official, non-public documents (but the party has a broader right to documents concerning the pending case than the general public).[61]

According to the Administrative Judicial Procedure Act, a private party who is party to a trial, or another person whose rights, interests, or obligations the matter subject to a trial directly involves, or their legal representative, cannot be heard as a witness in judicial procedure in general administrative courts (§ 39 a). Further, a party's current or former spouse or current cohabiting partner, sibling, relative in directly ascending or descending line, or anyone in a similar, close relationship with the party comparable to a partnership or a family connection, may refuse to give evidence in administrative judicial procedure.

As stated above, administrative sanctions are, in principle, governed by an administrative procedure. However, the administrative procedure differs in many instances from the criminal procedure. The comparison, e.g. of the presumption of innocence and the analysis of its more precise content, between the criminal procedure and the administrative procedure is challenging.

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[60] Administrative Judicial Procedure Act, §§ 34–35, and Administrative Procedure Act, §§ 32–36.

[61] e.g. the administrative court may refrain from providing information on trial document that is to be kept secret in accordance with section 11, subsection 2, paragraph 1 (a document, access to which would be contrary to a very important public interest, the interest of a minor or some other very important private interest) of the Act on the Openness of Government Activities, if it is necessary to refrain from providing the information in order to protect the interest referred to in the secrecy provision and if refraining from providing the information does not endanger due process. E.g. in FN am Anfang klein per Hart's Rules s. 182

H. Burden of proof and accountability in criminal and administrative procedures

Clarification responsibility means responsibility for obtaining adequate and appropriate information, evidence, and clarification for a decision on the matter. The burden of proof becomes applicable at the time the Court considers that there is no substantiated evidence to support a certain fact. The matter will be resolved to the detriment of the party who was obliged to introduce evidence or clarify a fact. The burden of proof is the duty of a party in a trial to produce the evidence and clarification that will prove the claims made. In a legal dispute, one party gets the benefit of the doubt, while the other side bears the burden of proof. On the other hand, the burden of proof relates to whether the evidence presented is so reliable and meets the standards of evidence that it can be seen as a basis for conviction (instead of acquittal).

Generally, the prosecutor bears the burden of proof and is required to prove his or her version of events in a criminal procedure. This means that the proposition being presented by the prosecution must be proven to the extent that there is no 'reasonable doubt'. In criminal matters, the burden of proof means the question of who must prove that the standards of evidence have been met. This is in criminal matters, without question, the responsibility of the prosecutor, and this also constitutes the core of the presumption of innocence. If the standard of evidence ('without reasonable doubt') is not met, the court must dismiss the charges.

Cases in the administrative judicial procedure are mainly processed in a written procedure. The appeal procedure is based on the administrative procedure of the public administrative authority, the factual material that has been accumulated, and the decision prepared and taken by a competent public servant with appropriate qualifications.[62] The burden of proof, the standard of proof, or the accountability system in administrative law is based on the special sectorial regulation and partly on the administrative practices governing this area. The general regulation is governed by sections 31 and 32 of the Administrative Procedure Act; there is also specific regulation for the administrative sector (e.g. sections 26.4 and 27–30 of the Act on Taxation Procedure, 1558/1995).

The Administrative Judicial Procedure Act does not contain clear provisions on the burden of proof or the standard of proof. It is not always clear which

[62] M Tolvanen, 'Näytön hankkiminen ja arviointi veroprosessissa ja rikosprosessissa – yhtäläisyyksiä ja eroja' in A Mieho (ed), *Vero ja finanssi – Juhlakirja Matti Myrsky 60 vuotta* (Edita 2013), 347, 349–350.

regulations and provisions apply to the burden of proof and the standard of proof in administrative matters. There are, however, many cases that require solving the issues of burden of proof and standard of proof in practice.[63] The key element in the presumption of innocence is that the prosecutor bears the burden of proof. The presumption of innocence can be considered to be met where, during the administrative procedure, the public administrative authority shows, above all, that the (objective) criteria giving rise to liability have been fulfilled. However, the standard of proof in the administrative procedure is principally lower than in criminal proceedings.[64]

The Constitutional Law Committee has allowed legislation and liability on administrative sanctions that do not expressly require intent or negligence of the perpetrator.[65] However, the Committee has consistently maintained that strict liability and the reverse burden of proof are in violation of the presumption of innocence contained in article 21 of the Constitution.[66] Some of the administrative sanctions are based on presumed guilt, which resembles objective liability. The imposition of sanctions does not usually require clarification of the perpetrator's intent or negligence. As noted before, as regards the presumption of innocence in the Finnish Constitution, the fact that the burden of proof in administrative proceedings might be based on strict liability and a reverse burden of proof has been considered problematic.

However, the Constitutional Law Committee found it essential for the functioning of the administrative sanctions system that procedure and grounds for liability be as simple and effective as possible within the limits of appropriate legal safeguard requirements.[67] However, the Committee always pays attention to the *ad hoc* elements of regulation and to the fact that the regulation as a whole is drafted subject to the requirements of proportionality and justice.[68]

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[63] M Paso and others, *Hallintolainkäyttö* (Alma Talent 2015), 226, 230; A-S Tarkka, 'Selvitysvelvollisuus ja todistustaakka – vertailevia näkökohtia hallinto- ja siviiliprosesseista' (2015) *Lakimies* 508, 532, *passim*. Tarkka considers that both the standard of proof and the burden of proof for investigation seem to operate flexibly in administrative judicial procedure.

[64] The question has also been raised how the presumption of innocence can be respected in the administrative judicial procedure considering that the imposition of the administrative sanction by the public administrative authority already precedes the procedure in the court. A-S Tarkka, 'Itsekriminointisuoja ja hyödyntämiskiellot – vertailevia näkökohtia hallinto- ja rikosprosesseista' (2016) *Lakimies* 488, 493. Hence, it is also not clear to what extent certain principles related to fair trial are to be applied in proceedings in the public administrative authority.

[65] *Constitutional Law Committee* 57/2010 and 32/2005.

[66] *Constitutional Law Committee* 2/2017, 5; 57/2010; 4/2004; 7. See also *Constitutional Law Committee* 15/2016.

[67] *Constitutional Law Committee* 57/2010.

[68] See, e.g. *Constitutional Law Committee* 39/2017.

I. Publicity and investigations

Proceedings in the public administrative authority are not open to the public as a matter of principle. Section 24 of the Administrative Procedure Act states that an administrative matter is only handled publicly if the law so provides or if it has been so decided based on a specific provision. The right of the public to monitor the handling of administrative matters and to obtain information about the authority's activities is based primarily on the disclosure of documents. In Administrative Courts, the main rule is that court proceedings and trial documents are public (Act on the Publicity of Administrative Court Proceedings 381/2007). The Act applies to proceedings in an administrative judicial case and to trial documents in administrative courts. Every person has the right to be present in oral proceedings unless otherwise provided in this or another Act.[69]

The investigative and intelligence mechanisms of the authorities vary by public administrative authorities and by administrative sanctions. The administrative sanctions regulation includes differences, for example regarding the right to obtain information necessary for investigation and supervision purposes from the other authorities. The methods of controlling and investigating administrative sanctions by public administrative authorities are often access to information, request for hearings, and conducting audits in businesses or other premises. The authority may also have the right to receive executive assistance from the police in supervising compliance with the regulations. In general, there are no restrictions to the information that can trigger investigations by the administrative public authority. In some cases people are actually encouraged to inform the authorities if they suspect misconduct.[70] The authorities are generally obliged to initiate an investigation when there is sufficient suspicion of a violation of the law, unless otherwise explicitly provided by law.[71] With the exception of the leniency procedure in competition law,[72] Finland's regula-

[69] O Mäenpää, *Yleinen hallinto-oikeus* (Alma Talent 2017), 377–380.

[70] See, e.g. https://www.vero.fi/en/About-us/contact-us/efil/reporting-suspected-tax-evasion/. By filing an electronic form citizens or other actors can inform the tax authorities about their suspicion of a tax non-compliance of some kind. The form facilitates the anonymous provision of information.

[71] e.g. the Finnish Competition Authority shall prioritize its tasks. It shall not investigate a case if 1) it cannot be deemed likely that there exists an infringement prohibited by sections 5 or 7, or Articles 101 or 102 of the Treaty on the Functioning of the European Union; 2) competition in the relevant market may be considered functional as a whole, irrespective of the suspected infringement; 3) the complaint in the matter is manifestly unjustified.

[72] Immunity from fines and the reduction of fines in cartel cases.

tion on administrative sanctions is not generally familiar with concepts such as 'non-prosecution agreement', 'plea bargaining', or similar procedures.

In accordance with the practice of the Constitutional Law Committee, the supervisory authority may also be empowered to conduct investigations in premises covered by the sanctity of the home, even without a procedure for a constitutional enactment, even if such conduct is punishable by an administrative sanction. One example of this may be the competition authority's right to extend an investigation also to the non-business premises of the enterprise. However, the Finnish Competition Authority shall seek an advance permission from the Market Court to conduct an inspection or audit. Still, access to premises covered by the sanctity of the home in administrative matters can be considered quite exceptional; more often the audit right extends to and is confined to other premises.[73]

IV. EVALUATION AND CONCLUSIONS

Finland's existing legislation does not include a general definition of a (punitive) administrative sanction.[74] The field of administrative sanctions is quite heterogeneous, and specific rules are laid down in public authority-specific and sector-specific laws. These sanctions share in common that they are imposed by administrative decision, in accordance with the provisions of the Administrative Procedure Act, unless otherwise provided elsewhere.

Generally speaking, the extent to which the legal safeguards of criminal procedure must be taken into account in matters concerning punitive administrative sanctions is somewhat unclear. However, the identification of this question must be considered significant in light of the objectives and justifications for the introduction of administrative sanctions (especially procedural effectiveness). The ECtHR's case law is of key importance for identifying this question and considering the limits of and preconditions for a system of administrative sanctions.[75]

In Finland, administrative sanctions are based on diverse regulatory instruments that vary in existing legislation. The prerequisites for the imposition and enforcement of sanctions and the legal safeguards for the subject of sanctions

[73] See Competition Act (948/2011), §§ 35–37, and *Constitutional Law Committee* 7/2004.

[74] However, see the definition of 2013 on the scope of application of the Act on Compensation for the Excessive Length of Judicial Proceedings (362/2009), § 2a (81/2013).

[75] See the case of *A and B v Norway* (App no 24130/11 and 29758/11) ECtHR 15 November 2016, separate opinion paras 29–32.

may differ in the same type of cases, depending on the special laws concerned. Regulatory arrangements also vary in terms of taking into account the *ne bis in idem* principle and the privilege against self-incrimination. But it is clear that these principles must be taken into account when imposing administrative sanctions. It is not entirely clear what they mean in this context and how they relate to the dichotomy of legal and natural persons.

The regulation of administrative sanctions has been introduced at different times and in different areas, and its nature is also specific to certain administrative sectors. Regulatory instruments may be the result of some special features of a certain administrative sector. Further, the rights and obligations imposed by EU regulation have had an effect on the formation of national administrative sanction instruments. Consequently, the Finnish set of administrative sanctions does not include a coherent system for which very holistic and comprehensive features of the sanction system could be presented with regard to the legal safeguards for imposing penalties and conditions for liability.

Although the need for a more extensive review of administrative sanctions has been widely identified and recognized, Finland has so far not undertaken such a comprehensive examination. Still, it can be assumed that due to the efforts of the aforementioned Ministry of Justice working group, the need for a general regulation (*lex generalis*) and other measures to promote regulatory consistency will be considered and the legal policy in the field of administrative sanctions enhanced. Nonetheless, given the necessity to take into account the specific characteristics of the various sectors of the administration, the development of a general regulation could be challenging. However, in order to take certain legal safeguards into account, a general regulation might include provisions such as the *ne bis in idem* principle and the privilege against self-incrimination.

In the prevention of economic and corporate crime, the significance and impact of various kinds of preventive tools and reactive control systems on the achievement of the goals and value aims to be set shall be assessed from a comprehensive criminal policy and control policy perspective. The examination of control systems shall not be limited only to criminal justice policy or criminalization principles; instead, the approach to be adopted should be one of extensive control policy and sanction policy assessment wherein the various forms of sanctions, such as punishments under criminal law and economic administrative sanctions of a punitive nature, are subjected to a cost/benefit analysis.

A systematic comparison between administrative sanctions on the one hand and criminalization and criminal law sanctions on the other enhances

the potential for differentiating control systems for economic and corporate crime and the prerequisites for the imposition of sanctions. Underlying this need for differentiation is the fact that the effects of goals and values in the various sectors of control policy and criminal policy pull in different directions and with different forces. Questions for deliberation include, for example, whether it is better to differentiate the prerequisites for imposing sanctions and the procedural rules to be observed in the imposing of sanctions within the criminal justice system in order to increase the efficiency of crime prevention (while at the same time somewhat weakening the due process guarantees), or whether such differentiation should be accomplished through the introduction of a parallel system of administrative sanctions.

Systems thinking and the pursuit of coherence are required in the development of a system of punitive sanctions (including criminal law sanctions and administrative sanctions). There is a need for a Nordic and pan-European sanction policy debate not limited to criminalization and criminal law sanctions but instead comprising a comprehensive examination of the prerequisites for and restrictions on the use of all kinds of punitive sanctions.[76]

[76] See also R Lahti in *EU Criminal Law and Policy* (n 26), 66–69.

III.
Criminal Sanctions in Transition

10. Criminal Sanctions in Finland: A System in Transition*

1 INTRODUCTION

The purpose of this paper is to describe the development of the Finnish system of criminal (penal) sanctions from the latter part of the 19th century up to 1976, a period of about one hundred years. The focus will be on those changes in the system of sanctions which, in retrospect, seem to have been the most important. The approach chosen for the task of description is restrictive, inasmuch as the background and effects of the changes are surveyed largely on the basis of the arguments to be found in the legislative history of the reforms in question. At least to some extent, however, these arguments throw light on the general living conditions (such as the prevailing economic, political and social conditions) and especially on the ideological and intellectual (cultural) circumstances which have influenced the development of the system of sanctions.[1]

The inspiration for preparing this chronological survey has been the reform of Finland's criminal-policy legislation, a reform which of late has been gathering speed. Thus, in 1976 important legislative reforms dealing with the choice of the type of punishment and with the meting out of punishment were enacted, and at the end of the same year the committee which had been preparing a total reform of penal law for almost five years finished its report. It is interesting to try to examine how far the official arguments for reform of the system of penal sanctions, and the criminal-policy ideology which has influenced these arguments, have changed from one time to another. In addi-

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* Original source: *Scandinavian Studies in Law* 1977. Edited by Folke Schmidt. Vol. 21. Published under the auspices of The Faculty of Law, University of Stockholm. Almqvist & Wiksell International. Stockholm, pp. 119–157.

[1] Regarding factors affecting the development of the system of sanctions, see, e.g., Johs. Andenæs, "Strafferett, kriminologi og kriminalpolitikk", *N.T.f.K.* 1959, pp. 107 ff., and Raimo Lahti, *Toimenpiteistä luopumisesta rikosten seuraamusjärjestelmässä*, Helsinki 1974, (German summary), pp. 89 ff.

tion, an outline of the sanction system will help to place the recent reforms in a proper perspective.[2]

The survey will begin with the late 1850s and the early 1860s, when work was begun on a total reform of penal law in connection with the convening of the Estates, the Lantdag.[3] The second section of this review will end with the enactment of this reform, the penal legislation of 1889. Section 3 will deal with the half century between the enactment of the Penal Code and the end of the second world war (or, to be more specific, the end in 1945 of Finland's "Continuation War" with U.S.S.R. and Germany). It is not considered necessary to take the politically significant event which occurred halfway through this period, namely Finland's declaration of independence in 1917, as a separate turning point in describing changes in the system of sanctions. Of the two sections, 4 and 5, which deal with the period after the second world war, the former deals with the general development up to the 1970s, while the latter examines in particular the criminal-policy ideology dominant at the end of the 1960s and during the 1970s, and the reforms and proposals for reform of the system of sanctions which manifest this ideology. The examination ends with the summary and conclusions given in section 6.

2 THE DEVELOPMENT LEADING UP TO THE 1889 PENAL LEGISLATION (C. 1860–94)

(*a*) When work began on a total reform of the Finnish penal law around the 1860s, particular attention was given to the defects in the punishment system based on the Code of 1734. The committee which was set up to prepare arguments for what was to become an *Imperial Bill to the 1863–64 Lantdag on the general grounds for a new penal law* conceived its main purpose to be the preparation of detailed proposals on the types of punishment to be included in the new legislation or to be abandoned.

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[2] The entire section dealing with the development of penal legislation in Finland is included in the report of the Penal Law Committee. See *Komiteanmietintö* ("Committee Report") 1976:72, Helsinki 1977, pp. 9 ff. See also Brynolf Honkasalo, "Das finnische Strafrecht", in Edmund Mezger *et al*. (eds.), *Das ausländische Strafrecht der Gegenwart*, vol. 11, Berlin 1957, pp. 13 ff.; Inkeri Anttila, "The Trend of Criminal Policy", in Jaakko Uotila (ed.), *The Finnish Legal System*, Helsinki 1966, pp. 237 ff., and Olavi Heinonen, "Suomen kriminaalipoliittisen päätöksenteon kehitys", in Anttila *et al*., *Rikollisuus ongelmana*, Helsinki 1974, pp. 93 ff.

[3] Regarding previous phases in penal-law reform, see Yrjö Blomstedt, "Rikoslakireformin ensimmäiset vaiheet vuoden 1866 osittaisuudistuksiin saakka", *Historiallinen Arkisto* 1964, (German summary), pp. 421 ff.

> The committee adopted as its point of departure the belief that "the penal law should not be used solely to support general legal security and the maintenance of the authority of the law and to provide for the possibility of meting out punishment in a just proportion to the seriousness of the offence; instead, in a truly Christian spirit it should also attempt to further the reform of the fallen offender and his achieving a new start through the use of measures which can be connected with the force of punishment without the punishment losing its severity and repressiveness".[4]

On this basis it was proposed by the committee, and also in the Imperial Bill, among other things, that capital punishment be abolished in all its forms, and that the use of corporal punishment, punishment involving public disgrace, and exile be done away with. The main elements of the system of punishments would consist of imprisonment with hard labour (consignment to a "penitentiary"), imprisonment, confinement to special short-term custody ("arrest"), and fines. Enforcement of prison sentences would take place in accordance with the principles of progression; release on parole ("conditional release") would be part of the progression system. In general, the penalties for various offences were to be proportionate and meted out within the limits set by given scales of punishment.[5]

In their reply to the Imperial Bill, the Lantdag stated that in general they approved of the proposed punishment system. According to the Lantdag, this punishment system

> "not only is sufficiently graduated to fulfil the demands of justice but also, through the severity of its punishments, will have a deterrent effect and by providing the opportunity of religious education will bring about repentance and an intention to reform; even more, by providing vocational instruction for [the offender] and instilling into him the habit of work, it will make it easier for him to realize this intention".[6]

The Lantdag voted on the question of release on parole, and the final decision of the Lantdag was opposed to this proposal. In dealing with the proposal, the majority of the Committee on Legislation held that adoption of parole could become dangerous to society, and would in addition be in conflict with the prevailing legislation, according to which only the sovereign was empowered to break a legally binding decision of a court.[7]

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[4] See Hans Kejserliga Majestäts Nådiga Proposition till Finlands Ständer ("His Imperial Majesty's Gracious Bill to the Estates of Finland") no. 12, *Hans Kejserliga Majestäts Nådiga Propositioner till Finlands Ständer å Landtdagen* 1863–1864, vol. I, Wiborg 1864, pp. 227 f.

[5] *Ibid*., pp. 228 ff.

[6] Finlands Ständers underdåniga svar (the Lantdag's reply), *ibid*., p. 270.

[7] Lagutskottets betänkande, no. 14, (Committee Report), *ibid*., p. 258.

On the basis of the above quotations, it can be deduced that the envisaged new punishment system was intended not only to fulfil the demands for justice in accordance with the philosophy of retribution (atonement) but also to be deterrent (a reference to general prevention) and reformative (involving elements of individual prevention). The prevailing punishment system was seen as being based almost entirely on the belief that the purpose of punishment was to deter through fear both the offender himself (assuming his life was spared) and anyone else who was disposed towards acts against the penal law. Accordingly, the punishment system was composed primarily of methods of physical and mental torture.[8]

(*b*) The grounds for the new penal law, accepted by the 1863–64 Lantdag, signified only what amounted to a draft programme, and this gave considerable freedom of action to *the Penal Law Committee set up in 1865*. The same Diet also dealt with other bills concerning the reform of penal legislation. The bill dealing with a punishment system for the period of transition did not lead to any results, as the Lantdag, contrary to the Imperial Bill, accepted complete abandonment of capital punishment already during this period.[9] On the other hand, in consequence of the decisions reached by the same Lantdag, five statutes were enacted in 1866. Four of these dealt with various offences, the fifth with the execution of prison sentences. In general, the punishments prescribed in the first four statutes were proportionate. Already the Code of 1734 recognized latitudinal punishments to some extent, but only a few of these (those with a fixed minimum and maximum) were of the type that have occupied a dominant position in our penal legislation ever since the 1860s.[10]

The Penal Law Committee, which finished its work in 1875, proposed a punishment system based primarily on the principles which, as we have seen, were accepted by the Estates in 1864. The committee deviated from these principles in the direction of greater severity by proposing that capital punishment be retained, though only as a sanction for violence directed against the sovereign.[11] The committee's proposal supporting the use of parole constituted a deviation in the contrary direction. According to the committee's argumenta-

[8] Lagutskottets betänkande, no. 14, *ibid*., pp. 253 f.

[9] See Blomstedt, *op.cit*., pp. 490 f.

[10] Regarding the significance and application of the partial reforms of 1866, see Blomstedt, *op. cit*., pp. 493 ff.

[11] See *Underdåniga förslag till Strafflag för Storfurstendömet Finland* …, Helsinki 1875 (1875 Committee Report), p. 148.

tion, such a reform would be a logical extension of the progression system. It is characteristic of this system that it attempts to reform the prisoner by using a system of graduated progression in connection with the treatment of the prisoner: the execution of the sentence is severe at the beginning but is eased as the prisoner "progresses".[12]

> The committee's position on the principle of the punishment system is contained in the section of its report which presents arguments why, again in opposition to the opinion expressed by the Estates, forfeiture of civil rights is not included among the proposed punishments. The central idea behind the proposed punishment system is regarded as being that the punishment for each offence should not only be proportionate to the seriousness of the offence but should also, with a higher or lesser degree of purposefulness, aim at the reforming of the offender. Since the principal punishment must be meted out within the limits of the punishment scale applicable to the offence, taking into consideration the need for coercion and reform in the offender that is demonstrated by his offence, the offence is in any case to be considered as having been atoned for as soon as the offender has served the principal sentence.[13]

(*c*) In the official opinions requested on the basis of the 1875 Committee Report, criticism was directed at, among other things, the fact that the proposal gave too prominent a position to scientific doctrines and that the provisions were drafted in too much detail ("kasuistisch").[14] The proposed punishment system was especially criticized on the grounds of the wide punishment scales.[15]

> *K. G. Ehrström* (1822–86), professor of criminal law and the history of law, who seems to have been the most influential member of the committee in question, as well as having been an expert member of the committee which had prepared the general principles of the new Penal Code in 1862–63, took part in the discussion on penal scales. According to him, concrete offences to be evaluated on the basis of abstract penal provisions appeared in so many different forms that for this reason alone the scales had to be sufficiently wide in order to realize the aims of justice. Furthermore, when a penal code based on such a system of latitude was in force, there would be no need to fall back on pardons or to increase arbitrarily the length of the sentence in exceptional cases.[16]

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[12] 1875 Committee Report, pp. 313 ff.

[13] 1875 Committee Report, pp. 146 f.

[14] This opinion was expressed concerning the contents of the official opinions by, e.g., Bill no. 36, *Handlingar vid Landtdagen* 1885, vol. III, Helsinki 1886, p. 3.

[15] See, e.g., Jaakko Forsman, "Om latitudsystemet i Finfands strafflagstiftning", *F.J.F.T.* 1878–79, pp. 228 ff.; *idem, Sananen tekeillä olevasta Rikoslaista, etenkin rangaistuksen punnitsemiseen nähden*, Helsinki 1884, pp. 13 ff., and the discussion on the above, *F.J.F.T.* 1880, pp. 76 ff.

[16] *F.J.F.T.* 1880, p. 88.

> Ehrström had already emphasized in his earlier writings that not only the external extent of the delict but also the degree of guilt of the offender should be taken into account when choosing the type of punishment and when meting out the sentence. It was necessary to uncover the degree of guilt of the offender so that the punishment could be set in a way that would further his reform. Reform and repentance were the only ways that the criminal will of the offender could be destroyed, while the sentence with its repressiveness was used to offset the delict.[17]

A new committee was appointed to examine the 1875 proposals.[18] After this Review Committee had completed its report in 1884, an Imperial Bill for a new Penal Code and Bills for statutes on the enforcement of sentences and on the promulgation of the Penal Code were constructed on its basis and then submitted to the 1885 Lantdag.[19] There was no time to deal fully with the propositions during the 1885 Lantdag, and so they were laid before the 1888 Lantdag in an almost unchanged form.[20] The Estates passed the measures with minor amendments, and the code and the statutes were duly enacted in 1889.[21] Owing to certain difficulties connected with constitutional law, the measures did not come into force until 1894.

(*d*) *The Report of the Review Committee and the provisions drawn up on the basis of the report* differed in many respects from the 1875 Committee Report. Changes in the direction of greater severity were made in the punishment system. The applicable range of capital punishment was extended. Forfeiture of civil rights was retained in the system, while confinement to special short-term custody was left out. In the draft presented by the Review Committee as well as in the subsequent Penal Code, the penal scales were generally narrower than those in the 1875 proposals. The former did not contain as broad provisions justifying digressions from the normal penal scales or types of punishment as did the 1875 proposals. Another difference was that according to the 1875 proposals, some offences, also other than those committed in public office, could in some cases be dealt with by administering an admonition instead of a punishment.[22]

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[17] See Ehrström's doctoral dissertation *Om principen för fängelsestraffets ordnande*, Helsinki 1859, especially pp. 66 ff.

[18] See *Underdåniga förslag till Strafflag för Storfurstendömet Finland …*, Helsinki 1884 (Committee Report).

[19] Bill no. 36, *op.cit*.

[20] See Bill no. 1, *Handlingar vid Landtdagen 1888*, vol. I, Helsinki 1889.

[21] Statutes of Finland no. 39, Dec. 19, 1889.

[22] For a comparison of the proposals in the 1875 committee report with later proposals and the accepted legislation, see Pertti Myhrberg, "Nykyajan ratkaisuja 1875 rikoslakiehdotuksessa", *Oikeus* 1976, pp. 17 ff.

The 1875 committee's proposals towards which, as we have seen, the Review Committee was opposed, and which were not included in the later drafting of legislation, had been regarded as furthering the construction of a punishment system based on the principle of the reform of the offender. A partial explanation of these changes may be the important influence exercised by Ehrström's successor in the chair, Professor *Jaakko Forsman* (1839–99), on the final formation of the Penal Code and legislation related to it.

Forsman was a member of the review committee and the chairman of the Penal Law Committee at the time when the legislative proposals were being dealt with by the 1888 Lantdag. In his writings Forsman did not present the idea of reform so strongly as Ehrström had done, although he did not neglect it entirely. According to Forsman, justice, and consequently retribution, should be the guiding principles when meting out a punishment. But, being just, the punishment also fulfils the demands for utility, from the point of view of both society and the offender: a just punishment does not corrupt the offender morally; instead, it reforms him, wherever this is possible.[23]

(*e*) Forsman characterized the *1889 Penal Code as being* thoroughly *permeated by the spirit and principles of* the so-called *classical penal-law school*: a punishment must primarily be retribution for the offence; the principal ground for punishment is "quod peccatum est", while "ne peccetur" is only secondary; the basis for the right to punish is free human will; and so on.[24] There is general agreement in Finnish legal writing that the Finnish Penal Code, as one of the last European penal codes to be drafted, was based to a large extent on this ideology, according to the patterns provided by Sweden's 1864 and Germany's 1871 penal codes.[25]

However, Forsman also pointed out that in the 1889 penal legislation particular emphasis had been laid on the principle of reform, even though it was recognized that the primary basis for the evaluation of punishment is justice.[26] In accordance with this, it appears that more weight had been given to the idea of reform at the beginning of the work on the legislation than was given in the

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[23] See, e.g., Forsman, *Nyky-ajan erisuuntaiset käsitykset rangaistuksen tarkoituksesta*, Helsinki 1883, especially pp. 26 and 42, and *Anteckningar enligt Professor Jaakko Forsmans föreläsningar öfver straffrättens allmänna läror* …, 3rd ed. Helsinki 1914 (=Forsman, *Straffrätten*), pp. 16 ff., especially pp. 35 f.

[24] "Sveitsin uusi rikoslainehdotus", F.J.F.T. 1898, pp. 177 f.

[25] See, e.g., Eero Backman, *Rikoslaki ja yhteiskunta* I, Helsinki 1976, (German summary), pp. 121 and 160.

[26] Forsman, *Straffrätten*, pp. 28 and 35 f.

final statutes. This principle receives its clearest expression in the execution of prison sentences designed upon the progression system. On the other hand, a punishment system constructed primarily in accordance with the philosophy of retribution has generally been regarded as being tolerably harmonious with the demands of general prevention (deterrence).[27]

As has been noted above, the punishment system which came into force with the 1889 legislation was built upon the following general principal punishments*: capital punishment, imprisonment with hard labour, imprisonment,* and *fines*. The most important general additional punishment was to be *forfeiture of civil rights*.

3 THE DEVELOPMENT DURING THE HALF CENTURY AFTER THE 1889 PENAL LEGISLATION CAME INTO FORCE (1895–1945)

(*a*) While the work on Finland's Penal Code was still in progress, increasing demands were being made in Europe, from the 1870s and the 1880s onwards, for a change of direction on the basic questions of penal law and criminal policy. Strong criticism was directed against the classical mode of penal-law thought, which had its roots in the philosophy of enlightenment, and especially in German idealistic philosophy.[28] A leading proponent of the demands for reform was the German expert in penal law, *Franz von Liszt* (1851–1919), who crystallized the new ideas in his inaugural address "Der Zweckgedanke im Strafrecht" (Marburg-Universitätsprogram).[29]

> According to the principal ideas in this programme, punishment was just when it was necessary (*die gerechte Strafe ist die notwendige Strafe*). In penal law, justice is manifested when the amount of punishment is limited to what is demanded by utility (*Gerechtigkeit im Strafrecht ist die Einhaltung des durch den Zweckgedanken erford erten Strafmasses*). The purpose of punishment is, through the education given in connection with the enforcement of the sentence, to reform the offender who can and must be reformed; to warn the (chance) offender who does not need reform; and to remove the danger posed by the (habitual) offender who cannot be reformed by incarcerating him for an indefinite period.[30]

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[27] See, e.g., Brynolf Honkasalo, *Nulla poena sine lege*, Helsinki 1937, pp. 37 ff.

[28] Regarding the classical penal-law doctrine, see, e.g., Leon Radzinowicz, *Ideology and Crime*, New York 1966, pp. 20 ff., and Backman, *op.cit*., pp. 40 ff., especially pp. 117 ff.

[29] See von Liszt, *Strafrechtliche Aufsätze und Vorträge*, vol. 1, Berlin 1905, pp. 126 ff.

[30] von Liszt, *op.cit*., pp. 161 ff.

The so-called *modern (sociological) penal-law school* was formed in Germany by the supporters of this programme. The international connections of this school led in 1889 to the establishment of the International Union of Criminalists (Internationale Kriminalistische Vereinigung). According to one description, the opinions expressed on the basic questions of penal law and criminal policy between the time of the publication of the Marburg programme and the period of the first world war could be divided into two, at times diametrically opposed, groups one group following the classical school and the other the modern school.[31] If this necessarily simplified division is adopted, it should be remembered that many currents following the positivist ideal of science either are incorporated in the modern school or connected with it.[32]

> This new mode of thought spread rapidly. Its principles were influencing the contents of many penal-law proposals prepared in Europe at the end of the 19th century, but its effect was strongest on the penal-legislation reforms proposed and carried out at the beginning of the present century. One reason why the classical penal-law principles were being thrust aside by the new ideas was that many important changes in the social conditions were occurring and these had the effect of increasing criminality. The new ideas, which emphasized the importance of criminology, were seen as offering better means of preventing increased criminality than did the classical school.[33]

(*b*) Knowledge of the principles represented by the new mode of penal-law thought, and of its manifestation in legislation, soon spread to Finland. For example, already in 1889 – the year in which the International Union of Criminalists was established – Forsman presented its background and programme in a legal periodical. In this article he spoke in positive terms of the new direction, and of the Union as its most significant expression – in his opinion no one could doubt the practical significance and scope of the Union's views and goals concerning the prevention of criminality, which form the nucleus of its teachings and demands.[34]

> When the Finnish Penal Code was four years old, Forsman again dealt with the new school, which he regarded as being directed by the International Union of Criminalists under the leadership of von Liszt. This Forsman did in an article on Switzerland's draft Penal Code of 1896. The cornerstone of the new doctrine, in his opinion, was formed by the ideas according to

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[31] Thus Backman, *op.cit*., pp. 142 f.

[32] For example, the positivist or Italian school is often mentioned as being separate from the modern school. See, e.g., Backman, *op.cit*., pp. 143 ff. *Cf*. also Radzinowicz, *op.cit*., pp. 29 ff.

[33] See Backman, *op.cit*., pp. 122 ff.

[34] "En ny internationel kriminalistisk förening", *F.J.F.T.* 1889, pp. 1 ff., especially p. 1.

> which in criminal justice attention must be focused on the offender and not the offence, and that the measures used in connection with the offender differed essentially according to his characteristics – specifically, according to whether he was a chance offender or an habitual offender. Forsman believed that the question of conditional sentences had come almost to dominate the Union's programme during the previous years. In the same article Forsman said that it was not at all strange that Finland's Penal Code could be criticized for being old-fashioned, as the legislative work had continued for a long time, and during the concluding stages there were no possibilities of utilizing the latest scientific findings.[35]

These opinions were symptomatic. Forsman, who has been called the spiritual father of Finland's Penal Code, and who retained a classical approach to the central questions of penal law despite the growing support for the new movement, saw praiseworthy features in that movement, and was prepared to admit that in some respects the new Penal Code was open to criticism. The largest share of the credit for spreading the new doctrines belongs to Forsman's successor as professor, *Allan Serlachius* (1870–1935), who later changed his surname to Särkilahti. Allan Serlachius has been hailed as the Finnish pioneer in propagating the doctrines represented by the school of von Liszt.

> Serlachius saw no great differences between the classical penal-law school and the sociological (or anthropological) school, nor did he fully adopt the opinions of either school as such. He believed that the former placed too much emphasis on the general-deterrence aspect of punishment and he made many proposals advocating that greater attention be paid especially to individual prevention. These proposals are to be found in the many articles and textbooks that Serlachius wrote at the beginning of the present century. They also find expression in the draft Penal Code which he prepared in 1920 at the request of the Ministry of Justice.[36]
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> According to this draft Penal Code, the legal system of sanctions for offences was to be reformed by, e.g., abolishing capital punishment and forfeiture of civil rights; by using only one type of imprisonment; by adopting the day-fine system when setting fines; by making it possible to place dangerous recidivists in special detention and mentally deficient offenders in an institution for mandatory care, and to undertake educative measures for 15–17-year-old offenders. Finally, it was proposed that in certain discretionary cases the courts should have the right, where reasonable, to mete out the punishment within a reduced scale or even discharge the defendant.[37]

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[35] *F.J.F.T.* 1898, pp. 177 ff.

[36] See, e.g., Serlachius, "Sananen nuorsaksalaisesta kriminalistikoulusta", *Lakimies* 1903, pp. 74 ff., *Suomen rikosoikeuden oppikirja*, Part I, Helsinki 1909, pp. 10 ff. and pp. 20 ff., "'Uudet taivaanrannat' rikosoikeudessa", *Lakimies* 1911, pp. 139 ff., and *Ehdotus uudeksi rikoslaiksi*, Part I, Helsinki 1920.

[37] See chaps. 3–7 and the argumentation in the proposal, *Ehdotus uudeksi rikoslaiksi*, pp. 16 ff.

(*c*) The discussion on *conditional sentences* began in the last few decades of the 19th century, and at the beginning of the present century the matter was taken up in Parliament. The first petitionary proposal was made by Serlachius to the Estate of Clergy during the 1904–05 Lantdag.

> In this petition, Serlachius stated that the punishments prescribed in the 1889 Penal Code only applied to, and were apparently also designed for, "real", in other words chronic, offenders. For chance i.e. acute offenders, imprisonment, especially, did more harm than good, and society should show its disapproval of their acts through the use of conditional sentences.[38]

The reform efforts resulted in the Conditional Sentences Act of 1918.[39] The final drafting of this statute was speeded up by the situation brought about by the Civil War: the idea was that the law would make it possible to apply conditional penalties to the defeated side. The *travaux préparatoires* of the statute mention the following individual prevention considerations as the basic philosophy behind the new type of sanction. If the enforcement or remission of a sentence for a petty offence is made dependent on how the offender behaves during the years following the sentencing, he will be motivated to live a blameless life. Short-term imprisonment, instead of reforming the offender, often has a detrimental effect on his future ability to resist criminal impulses. The fact that society's need for retribution was regarded as demanding the immediate punishment of offenders guilty of serious offences was seen to eliminate the possibility that conditional sentences would be applied to such offences.[40]

The new statute did not include provisions on the supervision of those sentenced conditionally. Apparently, this omission was not based on considerations of principle but was made for practical reasons: at that time, arranging supervision would have involved insurmountable difficulties. Nor was supervision arranged later on for conditionally-sentenced offenders over 21 years of age, even though several official proposals to this end were made.

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[38] See Anomusmietintö, no. 21, 1904–1905 Valtiopäivät ("Sessions of Parliament") (Vp.), *Asiakirjat* ("Documents"), vol. V: 2, Helsinki 1905, pp. 1 f.

[39] Regarding the development of the provisions before and after the 1918 statute, see P. J. Voipio, "Ehdollisen rangaistustuomion kehitys Suomessa", *Lakimies* 1959, pp. 478 ff.

[40] See Hallituksen esitys Eduskunnalle ("Government Bill to Parliament") (Hall. es.), no. 61, 1917 II Vp., *Asiakirjat*, vol. III, Helsinki 1918, pp. 1 f.

(*d*) The *day-fine system* was adopted in Finland in 1921. Thus, Finland was the first Nordic country to adopt this system.[41] Before this reform, fines had been fixed at a certain amount of marks; in other words they were cash fines. The main reason for adopting the new system, according to the official argumentation for the statute, was an attempt to introduce a system where fines would have an equal impact on people with varying means. For this reason the fine was to be made more dependent than before on the offender's financial status. The system was also intended to render the size of the fine more independent of fluctuations in the value of money.[42]

According to the *travaux préparatoires* of the legislation in question, the idea was, instead of setting the term of imprisonment following nonpayment of a fine ("conversion into imprisonment") according to a predetermined scale, to leave the term to the discretion of the court in a new trial on the matter. However, no reform was carried out in this respect, as the day-fine reform was regarded as a temporary measure, and the legislators wished to limit change to what was absolutely necessary.[43]

> After 1921, reform of the legislation on fines was suggested several times, but not until the last few decades have any significant changes been made, as will be noted later on. For example, the committee which was formed to consider measures to prevent criminality and formulate appropriate proposals, and which submitted its report in 1930, criticized the practice whereby many fines led to conversion imprisonment. During the 1920s, there was a great increase in the number of people who were imprisoned for non-payment of fines.[44] The committee's proposal, which was not adopted at the time, was that fines should be payable in instalments and that it should be possible to grant an extension of the period during which the fine was supposed to be paid. The committee also proposed that in some cases non-payment of fines should not lead to conversion imprisonment.[45]

(*e*) *Aggravated imprisonment* entered the system with a statute passed in 1930. According to this enactment, imprisonment and conversion imprisonment would generally be enforced as the so-called "bread-and-water" imprisonment recognized by the Code of 1734, so long as the offender's health was not endangered; an exception was made if the term exceeded six months. One

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[41] Regarding the later situation in the Scandinavian countries and especially in Sweden, see Hans Thornstedt, "The Day-Fine System in Sweden", in *Some Developments in Nordic Criminal Policy and Criminology*, Scandinavian Research Council for Criminology, Stockholm 1975, pp. 28 ff.

[42] See Hall. es. no. 36, 1920 Vp., *Asiakirjat*, vol. III: 1, Helsinki 1921, p. 1.

[43] *Ibid*.

[44] See *Komiteanmietintö* ("Committee Report"), 1931: 2, Helsinki 1931, p. 2.

[45] *Ibid*., pp. 3 ff.

day of bread-and-water imprisonment corresponded to five days of ordinary imprisonment. In the same way, when the health of the offender was not endangered, imprisonment for, e.g., certain serious violent offences could be aggravated, i.e. made more severe, without, however, any shortening of the term of imprisonment.

According to the official argumentation for the law, the principal ground for the adoption of aggravated imprisonment was that it would bring about a noticeable improvement in prison conditions. Especially the shortening of the length of imprisonment which resulted from aggravating it was expected to lead to a considerable reduction of man-days in prison, thus easing the pressure on accommodation. In those cases where the aggravation of the imprisonment would not shorten its length, the repressive effect of punishment would be increased. It was also believed that a result of alleviating the space problem in prisons would be a general increase in the efficacy of prison sentences, as more use could then be made of isolation of prisoners and of individual treatment.[46]

A statute passed in 1931 considerably relaxed the requirements for *the release of imprisoned offenders on parole*. The reform was not seen as posing any danger to legal security, as the supervision of parolees was at the same time to be made more efficient, and in general the probation period was to be lengthened. The principal reason for the reform was provided by a conclusion drawn from a statistical survey: in practice parole had proved to be effective in preventing recidivism.[47]

> The minimum portion of the sentence that the offender had to serve before being released on parole was lowered by the 1931 statute from three quarters to two thirds, and the absolute minimum was lowered from two years to six months. At the same time, discretionary release on parole was supplemented by "mandatory" release on parole, for which the minimum portion was eleven-twelfths of the sentence, and the absolute minimum was six months. The previous minimum for release on discretionary parole had been fixed by the legislative reform of 1921. At that time, the responsibility for the decision on release on parole was shifted from the Supreme Court to the Ministry of Justice. In 1944, the minimum portion of the sentence that had to be served was shortened even further: in some cases, discretionary release on parole was possible after half of the sentence had been served, and mandatory release on parole would occur after five-sixths of the sentence had been served, instead of eleven-twelfths.[48]

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[46] See Hall. es. no. 54, 1928 Vp., *Asiakirjat*, vol. III: 1, Helsinki 1929, pp. 3 ff.

[47] See Hall. es. no. 64, 1931 Vp., *Asiakirjat*, vol. III: 1, Helsinki 1932, pp. 5 ff.

[48] Regarding the development of these and other provisions on parole, see Jorma Uitto, *Vankien ehdonalaiseen vapauteen päästäminen ja sen edellytykset*, Helsinki 1950, (German summary), pp. 65 ff.

(*f*) In 1932, the *Dangerous Recidivists Act* was passed, in keeping with the example set by the other Nordic countries.[49] The purpose of the statute was to reinforce the prevention of chronic criminality. In the *travaux préparatoires* it was stated that imprisonment, unless it was for life or at least for a lengthy period, had no special deterrent effect on chronic offenders; its only positive effect was that by incarcerating them in a prison it rendered them harmless to society for the duration of the sentence. An offender is a chronic offender when he goes from one offence to another, and thus alternates between imprisonment and freedom. According to the argumentation for the statute, in order to protect society from repeated offences by such people and from the corrupting effect that they have on their surroundings, it is right that they should be isolated from society for a lengthy period.[50]

A special precautionary measure, *incarceration in "preventive detention"* (a special prison) *for a relatively indeterminate period*, was adopted through the statute concerning dangerous recidivists. To ensure that the procedure should be in proper proportion to the degree of dangerousness manifested by the recidivists' criminality, the legislators attempted to make the requirements for incarceration in preventive detention very strict. In addition to requirements concerning previous criminality and the nature of the new offence, it was necessary that the offender should be shown to constitute a danger to public or private safety. The procedure to be followed was in two stages. The court itself only decided on whether the offender could be incarcerated in preventive detention, the final decision being left to a special executive authority, the Prison Board.

> The Government had also proposed measures to be used in connection with offenders who were permanently in a state of diminished responsibility because of mental deficiency. However, in its official opinion on the legislative proposal, the Supreme Court stated that the provisions on preventive detention for recidivists and on the proposed institution of mandatory care for the mentally deficient ought to be embodied in two separate enactments, as had been done in Sweden. The legislation on the latter topic could not, in the belief of the Supreme Court, be realized as cheaply as the committee that prepared the matter had estimated; in consequence, dangerous mentally-deficient recidivists – whenever they fell outside the scope of recidivism as defined by the law – were not touched by the new safety measure.[51]

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[49] Regarding the inception of this legislation, see Inkeri Anttila, "Incarceration for Crimes Never Committed", *Research Institute of Legal Policy*, no. 9, Helsinki 1975 (mimeographed), pp. 2 ff.

[50] See Hall. es. no. 91, 1931 Vp., *Asiakirjat*, vol. III: 1, Helsinki 1932, pp. 1 ff.

[51] *Ibid*., pp. 12 f.

The above-mentioned statute of 1932 was intended to prevent recidivism, a goal which in the *travaux préparatoires* of the statute was stated to be currently one of the most important in criminal policy.[52] In 1939, the law on *recidivism* and *the combining of punishments* was reformed. The aim of the former reform was to prevent recidivism in all its forms as effectively as possible without encroaching upon legal security. The principal way in which this aim was to be furthered was by shifting from a recidivism system which took only certain offences into account (*récidive spéciale*) to a general recidivism system (*récidive générale*). Repeating an offence – i.e. where the offender had served a sentence for a previous offence – with certain prerequisites was either to be considered an aggravating circumstance within the normal scale of punishment or was a reason of the application of a scale increased by 50 or 100 per cent.[53]

The draft documents for the 1939 legislative reform noted that behind the provisions on recidivism lay the natural belief that an individual who violates the legal system by repeating his offence is guilty in a higher degree, or at least is more dangerous to his surroundings, than is a chance offender. The legislation in question, together with the 1932 statute, was believed to give the authorities a firm sanction system with a graduated degree of severity. This is shown by the following quotation from the draft documents:

> "An offender who is sentenced at the same time for a number of offences will receive the benefit of a lightened sentence when punishments are combined; if, having already been sentenced, he commits another offence for which he is again to be sentenced, then he will serve both of his sentences consecutively; but if he perpetrates a new offence after he has already served a sentence for a previous act, then he will receive an unusually severe sentence for the new offence, and this can be accompanied by incarceration in preventive detention for dangerous recidivists, in extreme cases for life."[54]

(*g*) In 1940 an important reform on *young offenders* was introduced.[55]

The argumentation for the reform proposal stated that the legislation in many countries had received impetus from the observation that 15–20-year-old offenders formed a large proportion of all offenders, that the reaction of society had a greater chance of success when directed at young people than when directed at older offenders and, finally, that a further impetus

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[52] *Ibid*., p. 5.

[53] See Hall. es. no. 9, 1939 Vp., *Asiakirjat*, vols. IIII, Helsinki 1939, pp. 1 ff., especially p. 7.

[54] *Ibid*., pp. 1 and 18.

[55] Regarding this reform, and in general on the Finnish system of sanctions for young offenders, see Anttila, *Nuori lainrikkoja*, Helsinki 1952, (English summary), *passim*, and Matti Joutsen, "Young Offenders in the Criminal Justice System of Finland", *Research Institute of Legal Policy*, no. 14, Helsinki 1976 (mimeographed), pp. 1 ff.

> had been provided by studies of the psychology of young offenders. Thus, educative measures had been used in addition to or instead of punishment even where the young offender had reached a level of maturity at which the use of a punishment in accordance with the retribution principle could be just and well-founded. Special care had been taken to try to avoid short terms of imprisonment which neither reform nor deter but instead usually turn young offenders into hardened criminals.[56]

In the light of these research results, the existing legislation on young offenders was regarded as being so out-moded and so out of tune with its purposes that the method it provided could not be regarded as being sufficiently effective in preventing juvenile delinquency. The new goal was the reform of legislation in such a way that the special characteristics of young offenders would be taken into consideration when prosecuting, sentencing, and enforcing sentences.[57] The most important provisions on the treatment of young offenders (i.e. those aged from 15 to 20) were gathered together in a special statute on young offenders.[58]

A novel feature of this statute was that in some cases it allowed the dropping of charges against 15–17-year-old offenders and, in a fairly large range of cases, their absolute discharge. However, it was not the intention to leave such offenders without attention; instead, they were to become the object of welfare measures.[59] To this end, all cases of the dropping of charges and of absolute discharge were to be reported to the appropriate municipal social board. The prerequisites for the use of conditional sentences were relaxed in favour of young offenders. It was also provided that they should be placed under supervision for the duration of the probationary period, except where the court believed that the young offender would mend his ways without supervision.

Another new feature of the statute was the juvenile prison. Before a sentence of imprisonment of at least six months and at most four years could be enforced on a young offender, he first had to be examined. The Prison Board was to order that the sentence should be served in a juvenile prison if there were firm grounds for supposing that the offender was in need of the education and teaching provided by the juvenile prison and if, in addition, he was capable of development. The statute prescribed that the period of punishment in the juvenile prison was to be longer than that of an offender consigned to a

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[56] See Hall. es. no. 10, 1939 Vp., *Asiakirjat*, vols. I–III, Helsinki 1939, pp. 1 ff.

[57] *Ibid*., pp. 9 ff.

[58] Young Offenders Act, Statutes of Finland no. 262, May 31, 1940.

[59] See Hall. es. no. 10, 1939 Vp., *ibid*., pp. 13 f. – Regarding the achievement of this goal, see Lahti, *op.cit*., pp. 138 ff., 151 ff., and 265 ff.

normal prison. However, offenders in juvenile prisons who had been sentenced for more than just a brief period could be released on parole earlier than those in ordinary prisons.[60]

(*h*) A study of the *travaux préparatoires* of the legislative reforms dealt with above shows that, in the development of the sanction system, weight has been given to the opinions of the modern penal-law school. The *system of punishment* which was originally based on the idea of retribution, and thus on the principle of guilt being manifested in the act (*Einzeltatschuld*) *was changed* in such a way that in the choice of the penal sanction *more consideration* could be *given to the demands of individual prevention and to the offender's personality beyond what had been manifested in the individual act*.[61] Reforms in this direction were carried out above all through the adoption of legislation on dangerous recidivists and on young offenders. The former type of legislation was intended to render chronic (incurable) offenders harmless by isolating them in a special prison, the latter to create educative sanctions adapted to the special needs of young offenders.

During the 1930s, the prevention of recidivism was seen as one of the primary tasks of criminal policy. In order to reach this goal, legislation on recidivism was developed; among other things, it authorized the isolation of dangerous recidivists in a special prison. At the same time, concern was expressed over the shortage of prison accommodation resulting from the increase in the prison population. The adoption of aggravated imprisonment was specifically intended to bring about an improvement in prison conditions. Furthermore, one of the reasons for relaxing the prerequisites for release on parole was an attempt to reduce the prison population.[62] The shortage of prison accommodation was caused above all by the rapid increase in the number of cases of criminalized drunkenness and of offences against the alcohol prohibition that was in force from 1919 to 1932, and by the increase in the number of cases of conversion imprisonment brought about by the depression beginning at the end of the 1920s.[63]

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[60] *Ibid*., p. 19.

[61] See also, e.g., Honkasalo, *Suomen rikosoikeus*, *Yleiset opit*, Part II, 2nd ed. Helsinki 1967, p. 18.

[62] See Inkeri Anttila and Patrik Törnudd, *Kriminologi i kriminalpolitiskt perspektiv*, Stockholm 1973, p. 108.

[63] See *Komiteanmietintö* 1976: 72, p. 17.

4 THE DEVELOPMENT DURING THE PAST FEW DECADES (FROM 1946 TO THE 1970s)

(*a*) In the turmoil of social and individual conditions that characterized the immediate post-war period, registered criminality as well as the number of prisoners rose rapidly. This development was specifically mentioned as a ground for introducing the statute of 1946 which *created* new institutions, called *labour colonies*, for the execution of prison sentences.[64] At the same time, the statute on aggravated imprisonment, the efficacy of which had been the subject of debate, was repealed.[65]

The labour colonies were intended for offenders sentenced to short terms of imprisonment for the first time. In the *travaux préparatoires* of the legislation, it was stipulated that no limit should be placed on the freedom of those sentenced to labour colonies except where called for by the maintenance of order and work discipline, and that the inmates should be paid according to the normal wage scale. The purpose of establishing labour colonies was to lessen the number of those serving short imprisonment sentences in closed institutions, thus realizing a principle that has been very widely accepted in modern criminal policy.[66]

In 1954 the *system of open institutions was expanded*.[67] In the argumentation for the reform, it was noted that the labour colonies had been regarded as beneficial, especially from the point of view of individual prevention.[68] Therefore, the prerequisites for placement in a labour colony were relaxed, although the idea of sentencing first-time prisoners to a labour colony irrespective of the length of their sentences was rejected. In the *travaux préparatoires* of the legislation it was noted that in labour colonies, as opposed to closed institutions, progressive enforcement of sentences, important in the educative sense, could not be arranged.[69] In accordance with the idea of progression the same statute

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[64] See Hall. es. no. 102, 1945 Vp., *Asiakirjat*, vol. III: 1, Helsinki 1946, p. 1, and Lakivaliokunnan mietintö ("Report of the Parliamentary Law Committee"), no. 21, *ibid*., p. 1.

[65] For an evaluation of this legislation, see Honkasalo, "Suomen rikosoikeuspolitiikka kahtena viimeisenä vuosikymmenenä", *Lakimies* 1939, pp. 389 f.

[66] See Hall. es. no. 102, 1945 Vp., *loc.cit*.

[67] Regarding the system of open institutions as it was enlarged in 1954, see, e.g., Valentin Soine, *Finland's Open Institutions*, Helsinki 1965.

[68] See Hall. es. no. 8, 1954 Vp., *Asiakirjat*, vol. I, Helsinki 1955, p. 3. – According to a later study, the labour colony and prison do not differ in regard to individual or general prevention. See Paavo Uusitalo, "Recidivism After Release from Closed and Open Penal Institutions", *The British Journal of Criminology*, vol. 12, 1972, pp. 211 ff.

[69] *Ibid*.

established "prison colonies" as the last stage in the incarceration of those sentenced to longer periods of imprisonment. Already in 1949, in accordance with a decision of the Ministry of Justice, labour camps had been established to provide temporary jobs for those released on parole.

Utilizing studies and legislative reforms carried out in Sweden, the committee on prison-administration reform, which finished its work in 1946, proposed that the *individually preventive effect of the execution of prison sentences be increased*. The committee believed that the need for reform had been rendered more acute above all as a result of the strong criticism of the defects expressed by political prisoners. However, as there was reason to reinforce the significance of the threat of punishment because of the noticeable increase in criminality, the committee stipulated that the execution be eased (humanized) using due caution.[70] In 1950 the statute on prison administration was revised on the basis of the committee's work. In the statute, the objective of execution of prison sentences was defined as being the furthering of the reformation of the prisoner.

(*b*) The idea of reformation and education was very much to the fore in the report submitted in 1950 by the committee appointed to deal with the *development of legislation on young offenders*. The committee proposed that the possibility of dropping charges against or absolutely discharging 15–17-year-olds should be increased, that the conditional sentencing of 15–20-year-olds should be replaced by probation and, similarly, that general punishments for this group be replaced by reformative measures in a juvenile institution.[71]

The committee's proposals provoked strong opposition, the critics especially emphasizing the importance of general deterrence and the observance of legal safeguards, and these proposals did not immediately lead to legislative reform. However, the legislation in question was slightly amended in 1953. For example, the lengthening of the punishment term of those sentenced to juvenile prisons was left to the discretion of the Prison Board, and the maximum extension was lowered.

> In its opinion on this report, the Supreme Court stated that the committee had laid too much emphasis on the reformation of the offender, and had thus prevented him from becoming the object of the actual punishment procedure. In this way it had been forgotten that the purpose of penal law and criminal justice, even in the case of young offenders, was to have a preventive effect on

[70] See *Komiteanmietintö* 1946: 8, Helsinki 1946, pp. 30 and 40 f.

[71] See *Komiteanmietintö* 1950: 29, Helsinki 1950 (mimeographed).

> the individual and his surroundings. Acceptance of the committee's proposals would, in the opinion of the Supreme Court, result in the loss of a proper balance between the offence perpetrated by a young offender and the consequent sanction, something which is demanded by the sense of justice. The Supreme Court believed that, e.g., the committee's recommendation about expanding prosecutorial discretion was questionable from the point of view of legal security.[72]

The idea of rehabilitating the offender also met with opposition during the second half of the 1940s. Consequently, when the Government introduced a bill, inspired by this aim, *for the abolition of forfeiture of civil rights* and similar penal sanctions, the legislature voted that it should be left pending until after the next election.[73] It was then defeated albeit by a narrow majority. Recourse to the sanctions in question was significantly curtailed in 1953 and 1958, but their use was not completely abandoned until 1969 almost a hundred years after the committee which had prepared the present Penal Code had proposed legislative measures along these lines.[74]

The fact that the ideology according to which general deterrence was to be achieved specifically through the use of severe punishments was strongly represented in the criminal policy of the 1940s and the 1950s is evident in the many *measures aggravating the punishment system* that were *enacted or* at least *proposed* at that time.[75] In 1946, for example, the legislation on property offences, primarily theft, was made more severe, and in 1952 and 1956 the same thing was done with regard to the legislation on sexual offences against minors. A committee report of 1954 on prison conditions proposed that the execution of prison sentences be tightened up.[76] The legislative reform of 1946 was supported on, *inter alia*, the ground that, in the fight against criminality, attention must be paid not only to adopting preventive measures but also to seeing that the offence always meets with a sufficiently effective punishment. The punishment must both protect society through the incarceration of offend-

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[72] This opinion is quoted in Anttila, *Nuori lainrikkoja*, pp. 392 ff. – Criticism similar to that of the Supreme Court was given by, e.g., the then professors of criminal law, Brynolf Honkasalo (1889–1973) and Bruno A. Salmiala. See Honkasalo, "Nuoria lainrikkojia koskeva lakiehdotus", *Defensor Legis* 1951, pp. 414 ff., especially pp. 439 ff., and Salmiala, "Nuorisorikollisuus ja nuoria lainrikkojia koskevan lainsäädännön uudistussuunnitelmat", *op.cit*., pp. 442 ff.

[73] This vote had been preceded by a vote in favour of the measure.

[74] See Hall. es. no. 73, 1968 Vp., *Asiakirjat*, vol. I, Helsinki 1969, pp. 1 ff.

[75] According to Anttila in *The Finnish Legal System*, pp. 237 f., there was in the 1950s a keen debate between adherents of "conservative" and of "modern" criminal policy: the then professors of criminal law expressly emphasized the importance of the "deterrent" theory and urged that rigid measures be taken against crime, whilst those responsible for prison administration were prepared to give greater prominence to educational and therapeutic measures.

[76] See *Komiteanmietintö* 1954: 31, Helsinki 1954 (mimeographed).

ers and deter individuals lacking in judgment from following a path of crime.[77]

Another increase in the severity of the system was brought about in 1953 through the *reform of the statute on the incarceration of dangerous recidivists*.[78] The prerequisites for incarceration in the old legislation of 1932 were considered too strict and formal, and the statute itself was thought incompatible with the requirements of legal safety and of the protection of society. Especially the 1939 reform of the penal-law provisions on recidivism had lessened the number of offenders sentenced to preventive detention. As a result of this reform, the severity of sentences for theft, and thus the number of persons sentenced to preventive detention for that offence, decreased considerably; on the other hand, the majority of all those sentenced to preventive detention had been convicted of theft offences.[79]

It was regarded as necessary for the protection of society to enlarge the scope of the legislation on preventive detention so as to include dangerous mentally-subnormal offenders. It was therefore provided that such offenders could be sentenced to preventive detention on lesser grounds than other recidivists. In contrast to other Nordic countries, however, in Finland separate sanctions and separate institutions were not developed for subnormal offenders. The procedure by which an offender could be sentenced to preventive detention, the very name of which indicated incarceration rather than care, took place in two stages, as before: decisions were first made by the court, and then ultimately by the Prison Board when the sentence was to be enforced. The above-mentioned differences between Finland and the other Nordic countries have been explained partly on ideological grounds and partly by reference to Finland's more limited resources.[80]

(*c*) The *increasing Nordic cooperation during the 1960s* had an effect on the contents of many penal reforms.[81] The 1962 Nordic Cooperation Agreement

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[77] See Hall. es. no. 74, 1945 Vp., *Asiakirjat*, vols. I–II, Helsinki 1946, p. 1.

[78] Dangerous Recidivists Act, Statutes of Finland no. 317, July 9, 1953.

[79] See Hall. es. no. 101, 1952 Vp., *Asiakirjat*, vol. III: 1, Helsinki 1953, pp. 1 ff. (*cf*. 3 f *supra*). – There was general agreement on the necessity of the statute. Regarding the discussion, see Anttila, "Vaaralliset vaarattomiksi", *Lakimies* 1971, pp. 441 f., which critically notes, e.g.: "The same experts who in another connection had fiercely opposed indeterminate sanctions as being dangerous to legal safety and in violation of the sense of justice were in favour of an extension of the preventive detention system". See also *idem, Research Institute of Legal Policy* 1975, pp. 5 f.

[80] Thus Anttila, *Research Institute of Legal Policy*, pp. 7 f.

[81] Regarding an evaluation of this cooperation, see Anttila in *The Finnish Legal System*, p. 238, and Heinonen in *Rikollisuus ongelmana*, pp. 107 and 111 f.

contains a special article on criminal policy, which states that the contracting parties should try to unify their respective legislation on offences and penal sanctions.[82] Two years previously the Nordic Committee on Penal Law had been set up. Its purpose was to prepare legislation as assigned by the various ministries of justice. Sweden's Penal Code of 1962 constituted a significant model.

Examples of the results of this cooperation are the 1960 Extradition of Offenders among Nordic Countries Act and the 1963 Nordic Cooperation in the Execution of Criminal Sentences Act.[83] The goal of unification of Nordic legislation was a principal motive for the 1966 reform of the provisions on release on parole. During the 1970s, the same goal has been mentioned in connection with the reform in 1973 of the provisions on pre-trial custody and on limitations.[84]

Another form of Nordic cooperation in criminal policy that deserves to be mentioned is the Scandinavian Research Council for Criminology, established at the beginning of the 1960s. In 1963 the Finnish Ministry of Justice established the Institute of Criminology (in 1974 renamed the Research Institute of Legal Policy) in order to maintain contacts with the Council. This arrangement significantly improved the possibilities of carrying out research, and the resulting increase in the store of scientific knowledge has had an effect on criminal-policy thinking and on the legislation in the field.[85] This is especially true as a result of some noteworthy features in Nordic criminology since the end of the 1960s: emphasis on the utility and value-consciousness of research, and the growing interest of researchers in participation in decision-making.[86]

(*d*) Progress in research has made it possible to re-evaluate the system of sanctions. Such a reappraisal has in fact taken place during the 1960s and 1970s. A typical feature of the resulting discussion has been strong criticism of the ideology of individualized punishment. At the same time, planning in the field

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[82] See art. 5 of this agreement on cooperation (March 23, 1962).

[83] Statutes of Finland no. 270, June 3, 1960, and no. 326, June 20, 1963.

[84] Regarding the statements in the argumentation for these provisions, see Hall. es. no. 130, 1972 Vp., *Asiakirjat*, vol. I: 2, Helsinki 1973, p. 1, and Hall. es. no. 237, 1972 Vp., *Asiakirjat*, vol. III: 2, Helsinki 1973, p. 4.

[85] See Anttila *et al*., "The Impact of Criminological Research in Finland", in *Criminological Research and Decision Making*, *United Nations Social Defence Research Institute*, Publication no. 10, Rome 1974 (mimeographed), pp. 123 ff.

[86] This is how the situation is described by Professor Inkeri Anttila, who has been Director of the Institute of Criminology (now the Research Institute of Legal Policy) since 1963. See Anttila, "Developments in Criminology and Criminal Policy in Scandinavia", in *Crime and Industrialization*, Scandinavian Research Council for Criminology, Stockholm 1976, p. 8.

of social-development policy has been the object of increasing attention from the public authorities, as is manifested by the establishment of planning bodies in various areas of administration. This development has resulted in demands that the general methods of social-development policy planning (such as cost-benefit analysis) shall be adapted to the problems faced by criminal policy. This new emphasis has radically changed the basis for decision-making in the field of criminal policy, as will be explained in detail in the next section.

Of course, one cannot always draw conclusions about a general movement in criminal policy, such as those pictured above, on the basis of individual legislative reforms. For example, it is possible that the experts in a field may long have regarded a certain legislative reform as being acceptable in principle but it has not been adopted, either because practical considerations have led to a delay or because the need for reform may not be felt to be urgent. Even under such circumstances a legislative reform can be hastened when it is in harmony with the dominant trend in criminal policy. The following reforms could perhaps be included in this category.

In 1963 and 1969, following proposals which had been made on several occasions, the *legislation on fines was reformed*. First, in 1963 it was made possible to pay a fine in instalments, and an extension of the period during which the fine had to be paid was allowed. In the 1969 statute, conversion imprisonment was left to the discretion of the court in a new trial on the matter, and the maximum fine was lowered from 300 to 120 day-fines, the maximum conversion being reduced from 180 to 90 days. The main aim of these reforms was to lessen the number of people imprisoned for not paying fines.[87] This goal was reached in so far as the number serving conversion decreased to a tenth of what it had been before the reforms (the number of those serving conversion in 1962 was 9,075 and in 1974 539).[88] The results of the reform were not regarded as completely satisfactory, however, and during the following decade the remaining defects led to a reappraisal of the legislation and to proposals for further reform.

Also during the 1960s and the 1970s, a series of measures to mitigate the severity of the penal-law system was adopted, in accordance with a number of prior proposals. In 1966, *there were issued general provisions on the possibility*

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[87] Regarding the goals of the reforms, see Hall. es. no. 15, 1963 Vp., *Asiakirjat*, vol. I, Helsinki 1964, pp. 1 ff., and Hall. es. no. 174, 1967 Vp., *Asiakirjat*, vol. III: 1, Helsinki 1968, pp. 1 ff. (*cf*. 3 d *supra*).

[88] This improvement was greatly influenced by the decriminalization of drunkenness in 1968, since many of those in conversion imprisonment had originally been fined for this offence.

of not reporting an offence, dropping charges, and absolute discharge, which enabled the police, the public prosecutor and the court to waive measures in connection with certain types of petty offences.[89] In 1972, the permissible discretion of the courts was further enlarged in so far as *courts were authorized to deviate generally from the normal punishment scales or punishment types* in the direction of greater leniency.[90] The actual use of these flexible measures has been limited, and recourse to the dropping of measures has been much less than in the other Nordic countries.[91]

Also in 1972, *capital punishment was abolished from the system of sanctions*. Even though this reform was important in principle, its practical significance was slight, as a statute passed over 20 years before forbade the use of capital punishment in time of peace, and capital punishment had been out of use under normal conditions for more than a century and a half.[92]

5 THE CRIMINAL POLICY DOMINANT DURING THE 1960s AND 70s, AND CORRESPONDING REFORMS AND PROPOSALS FOR REFORM OF THE SYSTEM OF SANCTIONS

(*a*) In sections 3 and 4 it has been shown that, in the development of the system of sanctions up to the end of the 1950s, increasing attention was paid, when imposing the punishment, to the offender's personality, his individual characteristics, and the requirements of individual prevention. In Finland, however, this ideology has never had the widespread support it has had in many other countries, such as Sweden and Denmark. The same can be said especially of the treatment ideology, which emphasizes the social rehabilitation of the sentenced offender. It has been mentioned above that the proposal for reforming the legislation on young offenders in order to place more emphasis on reformation and education met with stiff opposition at the beginning of the 1950s. However, it

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[89] Regarding the argumentation for the provisions, see Hall. es. no. 198, 1965 Vp., *Asiakirjat*, vol. III: 1, Helsinki 1966, pp. 1 ff. – For a detailed examination of these provisions, see Lahti, *op.cit., passim*.

[90] See Hall. es. no. 23, 1972 Vp., *Asiakirjat*, vol. I: 1, Helsinki 1973, pp. 4 ff., and Lahti, *op.cit*., pp. 306 ff.

[91] See Lahti, *op.cit*., pp. 124 ff. and 211 ff.

[92] See Hall. es. no. 1, 1972 Vp., *Asiakirjat*, vol. I: 1, Helsinki 1973, pp. 1 ff. – Regarding the stages in the use of capital punishment in Finland, see Honkasalo, "Die Todesstrafe", in *Sitzungsberichte der Finnischen Akademie der Wissenschaften* 1955, Helsinki 1956, pp. 89 ff., and Anttila, *The Death Penalty in Finland*, Coimbra 1967.

was at this same time that the scope of incarceration in preventive detention, based primarily on the offender's dangerousness, was enlarged.

Beginning during the 1960s, especially towards the end of the decade, there has been *increasing criticism of the ideology behind individualized sanctions*.[93] This has been due to many reasons. Despite the advances made in criminological research, there has not yet been discovered a method of treatment that would substantially decrease the risk of recidivism and, in general, be better than other sanctions. Furthermore, studies of the dark figure of criminality have shattered the belief that the average offence is a symptom of mental illness or deviance. This same conclusion has been reached by paying more attention to modern offences in addition to the traditional ones. The above-mentioned criticism of individualized sanctions has also been due to the consequent defects in legal safeguards. Indeterminate sanctions which are based on the offender's need of treatment or on his dangerousness are in conflict with many important legal principles, such as equality and predictability.

In the general debate on criminal policy which took place in Finland at the end of the 1960s and the beginning of the 1970s and which had received impetus from several widely-publicized trials, the establishment of two pressure groups in the field of criminal policy and the increasing attention paid by political parties to criminal policy, the *focus* as regards the system of sanctions was on *legislation on incarceration in preventive detention*.[94] It is understandable that, among the Nordic countries, criticism of the system was strongest in Finland. After all, in Finland preventive detention resulted in long periods of confinement in addition to the regular sentence. Furthermore, the treatment ideology offered no support for incarceration; and, finally, at one time 6 per cent of the entire prison population of Finland, in other words nearly 400 persons, could be in preventive detention.[95]

When reforming the legislation on preventive detention in 1971, the immediate goal was to confine preventive detention to those recidivists who actually represented a danger to society i.e. who were in certain ways a danger to the life

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[93] Regarding this criticism, see especially Anttila, "Conservative and Radical Criminal Policy", *Scandinavian Studies in Criminology*, vol. 3, Oslo 1971, pp. 11 ff., *idem,* "Punishment versus Treatment – Is There a Third Alternative?", *Abstracts on Criminology and Penology*, vol. 12, 1972, pp. 287 ff., and Norman Bishop, "Beware of Treatment!" in *Some Developments in Nordic Criminal Policy and Criminology*, pp. 19 ff.

[94] Regarding this discussion in general, see Heinonen in *Rikollisuus ongelmana*, pp. 110 f. Regarding criticism specifically of the preventive detention system, see Anttila, *Lakimies* 1971, pp. 443 ff., and *idem, Research Institute of Legal Policy* 1975, pp. 8 ff.

[95] See Anttila, *Research Institute of Legal Policy* 1975, p. 10. – Regarding the goals of the 1953 legislation, *cf*. 4 b *supra*.

or health of other people. In a broader perspective, the necessity of a separate incarceration system was questioned.[96] As a consequence of a considerable tightening of the requirements for incarceration, only eight persons were left in preventive detention after the statute came into effect (in 1976, there were only five). Before the reform, the majority of the inmates had been those found guilty of repeated property offences, primarily theft.

(*b*) It can be said that since the end of the previous decade *increasing attention* has been paid, in the setting of goals and the evaluating of means in criminal policy, *to the connections between* these goals and means and *those of general social-development policy*. In general, more emphasis has been placed on the interrelationship between the different sectors of social-development policy. This trend is connected with the increasing role played by social-development policy planning in government. *Cost-benefit thinking* (research) *and planning has been adopted in criminal policy*, just as it has been adopted in general in social-development policy and decisionmaking.[97] This new approach has also led to a *new set of criminal-policy goals*. Nowadays, it is generally accepted that the chief goals of criminal policy are (1) the minimization of suffering and other social costs caused by crime and the control of crime and (2) the just distribution of these costs.

> Traditionally, the main goal of criminal policy has been defined as the prevention or elimination of criminality, or the protection of society. Until recently, such goals, which seem to imply that the only test of the success of criminal-policy measures is their effect on criminality, have stood almost alone. For example, in an international survey carried out in connection with the Sixth International Congress on Criminology in 1970, only a Finnish researcher (Patrik Törnudd), who advocated the above-mentioned cost-benefit goals, deviated from the general consensus.[98]
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> This Finnish definition of goals was adopted by the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, where

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[96] See Hall. es. no. 176, 1970 Vp., *Asiakirjat*, vol. III: 2, Helsinki 1971, pp. 2 ff., Anttila, *Lakimies* 1971, pp. 447 ff., and *idem, Research Institute of Legal Policy* 1975, pp. 11 f.

[97] In this connection see, e.g., Anttila and Törnudd, *Kriminologi i kriminalpolitiskt perspektiv*, pp. 145 ff., and "Evaluation Research in Criminal Justice", *United Nations Social Defence Research Institute*, Publication no. 11, Rome 1976, *passim*.

[98] See Katja Vodopivec, "Relationship between Scientific Research and Criminal Policy", *Annales Internationales de Criminologie*, vol. 13, 1974, pp. 17 ff. Regarding Törnudd's opinion, see *ibid*., p. 22, and Törnudd's original paper, "The Futility of Searching for Causes of Crime", *Scandinavian Studies in Criminology*, vol. 3, Oslo 1971, pp. 29 ff. *Cf*. also Lahti, "On the Reduction and Distribution of the Costs of Crime", *Jurisprudentia*, vol. 2, Helsinki 1972, pp. 298 ff.

> it was embodied in the report of the section dealing with the economic and social consequences of crime. The same report also recommends encouragement of cost-benefit thinking. It deals with attitudes that constitute barriers to this way of thinking, and emphasizes that the economic costs are only part of the measurable social costs.[99]

A systematic comparison of costs and benefits is very evident in the 1972 report of the *Committee on Probation and Parole*.[100] The committee presents several alternative models for reaching the goals of probation and parole, and these models are compared on the basis of their discernible costs and benefits. Strictly speaking, the committee methodically examined criminal-policy measures only, but other measures were mentioned in its report. It is worth noting how the committee compared the benefits of institutional punishments with the alternative non-institutional sanctions in the light of different grounds for decision-making.

> Traditionally, the justifiability and utility of a punishment are matters to be evaluated by reference to three considerations, i.e. from the aspect of general prevention (deterrence), in other words the preventive effect of criminal law upon society in general, from the aspect of individual or special prevention, in other words its preventive effect on the individual punished, and from the aspect of retribution or atonement.[101] According to the last-mentioned idea, deriving from a modern approach, the guilt of the offender must be the basis for punishability, and the sentence must be proportionate to the punishable act.[102] This idea of retribution, together with the legality principle in penal law ("nullum crimen sine lege"), has been regarded as being instrumental in the realization of the central legal principles, such as equality and predictability, in criminal justice.
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> The report of the Committee on Probation and Parole compares institutional sanctions with non-institutional ones not only on the basis of the three aspects referred to above but also in the light of the following considerations: administrative and other costs caused to the society by the enforcement of the sentence; the suffering caused to the offender by the sanction (the suffering caused by the cumulation of sanctions being listed separately); the discriminating effect of sanctions on groups with little power in society; the

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[99] See *Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Geneva, September 1–12, 1975, United Nations, A/Conf. 56/10, New York 1976, pp. 41 ff., especially at p. 50. *Cf*. also working paper for this congress, *Economic and Social Consequences of Crime: New Challenges for Research and Planning*, A/Conf. 56/7, New York 1975, *passim*.

[100] See *Komiteanmietintö* 1972: A 1, Helsinki 1972.

[101] Regarding these arguments for punishment, see, e.g., Andenaes, *The General Part of the Criminal Law of Norway*, London 1965, pp. 55 ff. Regarding especially general prevention, see *idem, Punishment and Deterrence*, Ann Arbor 1974.

[102] *Cf*., e.g., H. L. A. Hart, *Punishment and Responsibility*, Oxford 1968, pp. 11 ff., 128 ff., 160 ff. and 230 ff., and Alf Ross, *On Guilt, Responsibility and Punishment*, London 1975, pp. 55 ff.

> effect of the sanction on the general feeling of safety; and the secondary criminality caused by the sanction itself. It is the conclusion of the committee that, in the light of most of the criteria used, non-institutional measures, regardless of their exact nature, are more beneficial than are institutional sanctions. Institutional sanctions can be supported only by reference to general prevention, the need for the greatest possible measure of individual prevention in the case of certain very limited groups of offenders, and the demands of the general feeling of safety.[103]

(*c*) The report of the Committee on Probation and Parole has not led directly to any legislative measures, although it is probable that later work on legislation has been partially based on it. Also, the research data presented by the committee, such as the results of the comparison of different penal sanctions, have been utilized in subsequent legislative work. This can be inferred from the emphasis given in later legislative reform to the various criminal-policy criteria examined by the committee.

A partial *reform of the imprisonment system* had been carried out in 1971, the year before the publication of the committee's report. A second partial reform took place three years later. It was considered that the proper ground for the carrying out of imprisonment sentences was their general-preventive effect. This demand was regarded as being sufficiently fulfilled by the proposal that imprisonment should mean merely a loss of liberty (within the limits, however, resulting from prison security and the maintenance of prison order). Other important principles mentioned were that the execution of the sentence should not unduly strain the position of the offender and that the costs of the system of sanctions should be in reasonable proportion to the results achieved through the punishment.[104]

The reforms of 1971 and 1974 were intended primarily to meet the following demands placed on the execution of prison sentences: increasing the prisoner's possibilities of succeeding, and counteracting the detrimental effects of imprisonment. Thus provisions on the right of prisoners to leave the institution for short periods ("prisoners' leave") were introduced, the progression system of executing prison sentences was abandoned, as was also the use of the imprisonment with hard labour as a sanction, and finally the system of open institutions was expanded. The progression system was abandoned, since its goal, the reform or rehabilitation of the prisoner through the use of measures

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[103] See *Komiteanmietintö* 1972: A 1, pp. 131 ff.

[104] See Lakivaliokunnan mietintö, no. 6, 1974 Vp., as to Hall. es. no. 239, 1972 Vp., *Asiakirjat*, vol. III: 2, Helsinki 1975, p. 2.

in connection with the carrying out of sentences, was no longer regarded as realistic in the light of recent research results. In addition, the division of prisoners into different categories, required by the progression system, had lost much of its significance in practice.[105]

In 1975 the *provisions on parole were made less stringent*, primarily by reducing from four to three months the minimum time a prisoner had to serve to be eligible. The reform was of practical significance as, a number of years previously, the average length of enforced imprisonment sentences had been 4.5 months. The argumentation for this legislative reform notes that, historically, release on parole has been connected with the recently abandoned progression system. However, the use of parole was held to be supported by other considerations. The parole can be seen as a means whereby the costs and inconveniences of the execution of punishment could be lessened without endangering the general-preventive effect of the system of criminal sanctions.[106]

(*d*) In 1976, several important reforms of the penal-sanction system were carried out, and both these reforms and the arguments for them throw an interesting light on recent points of emphasis in criminal policy. The reforms in question include a new Conditional Sentences Act, the replacement of the provisions on recidivism by legislation on the meting out of punishment, and the reform of some of the provisions on the imposing of fines.[107] The first- and last-mentioned changes were connected with a reform of the legislation on drunken driving.[108]

The reason for this combining of legislative proposals was that the aim of the *reform of the drunken-driving legislation* was a desire to increase the efficacy of the general prevention of the system of criminal sanctions in several ways. One of the methods used was to make conditional sentences and fines a more practical alternative to short-term imprisonment.[109] It became possible to impose a fine in addition to conditional imprisonment. The monetary value of day-fines was raised substantially. According to the new law, an amount equal to one-third of the offender's average gross daily income was to be regarded as a reasonable day-fine value.

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[105] Regarding the argumentation for the statutes, see Hall. es. no. 95, 1970 Vp., *Asiakirjat*, vol. III: 1, Helsinki 1971, pp. 1 ff., and Hall. es. no. 239, 1972 Vp., *Asiakirjat*, vol. III: 2, Helsinki 1973, pp. 1 ff.

[106] See Hall. es. no. 126, 1975 II Vp., *Asiakirjat*, vol. A 2, Helsinki 1976, pp. 1 ff.

[107] Statutes of Finland no. 135, Feb. 13, 1976, no. 466, June 3, 1976, and no. 650, July 29, 1976.

[108] Statutes of Finland nos. 960–65, Dec. 10, 1976.

[109] See Hall. es. no. 110, 1975 II Vp., *Asiakirjat*, vol. A 2, Helsinki 1976, pp. 1 and 6 ff.

> Other methods were, first of all, improving the possibility of supervising traffic by making it possible to oblige not only those suspected of drunken driving but also other drivers to take tests for drunkenness. The scope of the criminalization of drunken driving was enlarged and clarified in that even minor cases of drunken driving became punishable, depending on definite *per mille* levels of alcohol in the blood stream. Furthermore, the legislation on drunken driving was unified and incorporated in the Penal Code in order to emphasize the reprehensible nature of this offence. Increasing the severity of unconditional imprisonment sentences for drunken driving was explicitly rejected as an alternative, as it was noted that this offence had already resulted in an aggravation of the problems faced by prison administration.
>
> In the *travaux préparatoires* of this legislative reform, the opinion was expressed that efficient traffic supervision is the most effective direct method of preventing drunken driving. To augment this efficiency, and thus to increase the likelihood of detection, it was recommended that the reform should be paralleled by the adoption of other measures. It was recommended that the information campaign on careful driving and courtesy on the road should be stepped up and that a search for alcohol-policy measures preventing drunken driving should be instituted.[110]

The 1976 *statute* did not change the basic structure of the system *of conditional sentences*. It relaxed the prerequisites for the use of conditional sentences in a number of respects: a longer term of imprisonment than before can now be ordered by the courts (the new maximum being two years instead of one); a previous sentence is more seldom a barrier to conditional sentencing (as a rule, a sentence of more than one year's imprisonment passed within the previous three years bars the use of conditional sentences); and the probation period set by the court is shorter than before (1–3 years).

The argumentation for this statute noted that in the light of current thinking the role played by conditional sentences was greater than it had been when the previous statute was passed. About a third of all imprisonment sentences were given conditionally, and this proportion had not varied greatly during the entire post-war period. Conditional sentencing of young offenders (those under 21), especially those from 15 to 17 years old, was much more common than was conditional sentencing of older offenders. The principal benefit of the conditional sentence was regarded as being that it was not accompanied by the drawbacks usually attached to unconditional (imprisonment) sentences; from the point of view of individual prevention, a conditional sentence was on the whole likely to be more efficacious than an unconditional one would be. In addition, it was pointed out that conditional sentences are cheaper for society.[111]

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[110] *Ibid.*

[111] See Hall. es. no. 108, 1975 II Vp., *Asiakirjat*, vol. A 2, Helsinki 1976, pp. 1 ff.

It was, however, realized that the demands of general prevention set limits to the use of conditional sentences. The attempt to take general prevention into consideration when the statute was being drafted can clearly be seen in the provision that recourse to a conditional sentence cannot be had when the maintenance of general obedience to the law calls for an unconditional sentence. The corresponding stipulation in the previous statute was that a conditional sentence could be passed only if it could be presumed that the offender would mend his ways even if the sentence was not carried out. Also, the idea of general prevention was the principal one behind the provisions allowing the use of fines in addition to conditional imprisonment.[112] In contrast to the situation prevailing when the previous statute was being drafted, considerations of principle were evidently seen to militate against the placing of conditionally-sentenced adults under supervision; this possibility was not even mentioned in the *travaux préparatoires* of the statute.[113]

The principal motive in *increasing the monetary value of the day-fine* was the desire to improve the applicability of fines. Some idea of how widespread the use of fines as punishment is can be gathered from the fact that during recent years about 90 per cent of all convicted offenders have been sentenced to pay a fine (the number of those sentenced to a fine was in 1974 about 290,000). The goal is that the general-preventive effect of the higher fines should be equivalent to that of the shorter terms of imprisonment, and thus constitute an alternative. The lesser offences would continue to be met with mild fines. This would be made possible by lessening the number of day-fines. With the noticeable increase in the monetary value of the day-fine, it was regarded as especially important to make a more just evaluation of the offender's ability to pay and to avoid disparity in judicial practice. To this end, the statute provides that the size of the day-fine be set according to *gross* income, and more detailed rules for fixing the size of the day-fine are given.[114]

The *provisions on the meting out of punishment, which replaced the provisions on recidivism*, seek to guide the courts in the meting out of punishments in order to distribute severe and lenient punishments more equitably, more consistently, and so that they will be more instrumental in preventing criminality. The intention is that harsher sentences than before will be directed at planned

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[112] *Ibid.*

[113] As to views of principle in this regard, see *Komiteanmietintö* 1972: A 1, pp. 133 ff. – *Cf.* 3 c *supra*.

[114] See Hall. es. no. 109, 1975 II Vp., *Asiakirjat*, vol. A 2, Helsinki 1976, pp. 1 ff.

and organized criminality.[115] The aggravating effect of repeating an offence was confined to those cases where the relation between the offender's previous offence and his new offence shows that he is obviously heedless of the bans and commands of law. In itself, repeating an offence for which the offender has already served a sentence will not be an aggravating circumstance, and on no account will it justify in general the application of a more severe penal scale.[116] The statute only enumerates the grounds which have an aggravating or a mitigating effect within the scale applicable to the offence in question.

One of the basic provisions of the new statute is a demand that the punishment be meted out so that it is in just proportion to the harmfulness and dangerousness of the offence and to the guilt of the offender as manifested in the offence. A matter to be taken into consideration in meting out the sentence is, in addition to all the aggravating or mitigating circumstances (those grounds which are intended to be general are listed in the statute), the consistency in judicial practice. A noteworthy innovation in the statute is the provision which is intended to decrease the unregulated cumulation of sanctions. If, as a result of the offence or the sentence, the offender is faced with another harmful consequence which, together with his sentence, would lead to a result incompatible with the seriousness of the offence, then this consequence will reasonably be taken into consideration when meting out the punishment.[117]

(*e*) The contents of and reasoning behind the above-mentioned legislative reforms, especially those carried out in 1976, reflect very strongly *the emphasis laid on the general-preventive effect of the punishment*, at the expense of individual prevention, specifically the idea of individualized sentences. And although individual prevention is seen as supporting the use of conditional sentences, the statute provides in this respect that the choice of the type of sanction shall be based on the demands for general obedience to the law and not, for example, on the personality and prognosis of the offender. Of the different facets of general prevention, many have been emphasized: especially

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[115] See Hall. es. no. 125, 1975 II Vp., *Asiakirjat*, vol. A 2, Helsinki 1976, pp. 1 ff.

[116] Even though according to the 1939 Act the maximum punishment allowed by the scale could be one-and-a-half times or twice the normal scale (see 3 f *supra*), in judicial practice punishments lower than the maximum of normal scale were almost always applied to cases of recidivism. However, it has been noted that as a rule too much significance had been accorded to recidivism in the meting out of punishments. See *ibid*.

[117] According to the corresponding basic philosophy, under the 1976 Act consideration must be taken, when suspending a driver's licence for, e.g., drunken driving, of the effects of this suspension on the offender's income, or to other circumstances. Should this prove to lead to especially unreasonable results, the licence need not be suspended.

the risk of detection, the knowledge of norms, and the function of punishment as an indication of moral disapproval, and thus as a way of shaping attitudes. Punishments have been made more severe in a differentiating manner, keeping an eye on certain types of sanctions (fines and conditional sentences) and certain groups of offenders (those who act in a deliberate or organized manner).

In addition to general prevention, a related matter: *the idea of the justness of sentences,* has come to the fore. In this connection it has been emphasized, on the one hand, that in accordance with the proportionality principle the punishment must correspond to the harmfulness and dangerousness of the offence and to the offender's guilt as manifested in the offence and, on the other, that the consistency in judicial practice is a consideration of major importance.

(*f*) *The report on considerations of principle of the Penal Law Committee*, published at the beginning of 1977, contains a projection of future trends.[118] When the committee was appointed in 1972, it was charged with the preparation of an integrated basic reform of criminal law. The committee considered the most important task in this total reform to be the evaluation of uniformly protected values and of punishable forms of behaviour: in other words, it was necessary to establish what ought to be punished and how harshly it should be punished. In its report the committee notes that, up to the last few decades, the focus in criminal policy has been on the development of the system of penal sanctions. Therefore, in the committee's opinion, the reform of that system will not necessarily call for extensive further preparations.[119]

By and large, the same trends of thought which affected the abovementioned reforms and proposals for reform during the 1960s and 70s appear in a more developed form in the report. *A close linking of criminal policy with other forms of social-development policy* is apparent in those sections of the report which deal with the social functions of the penal system and with the grounds for punishability. According to the committee, when deciding on the social functions of the penal system and on how it should be directed, many more alternatives than before have to be considered, and these alternatives must be viewed in the light of an increasing number of considerations. In this way, the alternative nature of penal measures in relation to other social-development policy measures can be better understood. One can attempt to remove negative behaviour in a number of ways: by changing social structures and conditions that are conducive to it; by developing educative measures; by making such

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[118] See *Komiteanmietintö* 1976: 72, Helsinki 1977.

[119] *Ibid.*, pp. 4 and 43 f.

behaviour difficult or impossible through the use of technical devices; and so on.[120]

However, the committee sees the penal system, and the system of sanctions as a part of it, as a necessary indicator of some of the ultimate limits that are essential to social order. Especially significant is the indirect effect of authoritative disapproval on the attitudes, values and beliefs of citizens. In connection with this view of the committee, the report – as also do the *travaux préparatoires* of certain recent legislative reforms (see above) – *emphasizes the significance of general prevention* in relation to individual prevention, and of the channels through which general prevention has an effect, *especially the function of punishment as an indicator of disapproval*. The symbolic value of punishment is considered noticeable, partly because it is believed that the harshness of a sentence depends largely on factors other than its official content.[121]

> The committee believes that general prevention has often been one-sidedly tied in with the question of the harshness of the sentence. It considers, however, that the harshness of punishments has relatively little effect on the total level of criminality. It is true that by regulating the severity of the threat of punishment one can influence those offenders who act deliberately, and changes in the level of harshness of punishments have significance in the attempt to indicate the relative sequence of grossness among various offences. The committee especially emphasizes the indirect effect of a high risk of detection, a speedy reaction by society, and the proper function of the penal system on the attitudes of citizens. Also, attention should be paid to the actual process of pronouncing the sentence, as well as the social significance of related measures, by, e.g., upholding the official disapproval even in mild measures.[122]

The committee has laid down some *requirements for punishment*: penalties must not be inhuman, nor may they violate the principles of equality or proportionality; they should be directed only at the offender; the offender must not be subjected to needless suffering; the punishments should not cause unregulated cumulation; the system of sanctions must be economical. These requirements are regarded as being *in general applicable to* the *sanctions* that follow an offence.[123] First of all, the committee opposes individualized sanctions. It does not recommend the use of special sanctions for certain groups of individuals or for certain offences. All indeterminate sanctions (today, this would principally

[120] *Ibid*., pp. 38 ff.

[121] *Ibid*., pp. 38, 41 and 62 ff.

[122] *Ibid*., pp. 65 ff.

[123] *Ibid*., pp. 67 ff.

refer to preventive detention, and an extension of the imprisonment term of young offenders)[124] should be abandoned. Next, the committee believes that especially all emphatically punitive or severe sanctions that follow an offence and which have a pronounced effect on the life and rights of the offender should be brought within the criminal-justice system.[125] Wherever this is not possible, the principles to be applied in the infliction of criminal sentences should be given greater weight when using any punitive sanction.

In the committee's opinion, a large variety of sanctions is not to be recommended. *A simple and clear system of sanctions* is more effective as far as general prevention is concerned and, from the point of view of protecting consistency in judicial decisions, is more certain than a system based on a number of different types of sanctions. Above all, new alternatives to imprisonment are needed. These alternatives must be able to compete with short terms of imprisonment so that the infliction of imprisonment sentences can be lessened without prejudicing the general-preventive effect of the system of criminal sanctions. On this basis the committee has proposed that the structure of the new system of sanctions should be based on the following general types of sanctions: imprisonment and fines, and – as novelties – mandatory reporting and punitive warning. According to the committee, corporate bodies ought to be subjected to criminal liability. Sanctions intended for corporate bodies would be a corporate fine and a punitive warning.[126]

> The committee has stated that *terms of imprisonment* in Finland are often unnecessarily long, and has made proposals for shortening these sentences. Unconditional sentences of up to 60 days could be enforced as special custody ("arrest"), three days of imprisonment corresponding to one day of special custody.
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> It is proposed that parole be retained, but the present form of supervision attached to it would be abandoned. The committee believes that parole could be characterized as a conditional remission of punishment on fairly firm grounds. The committee also favours the retention of conditional imprisonment, while noting, however, that the carrying out of several conditional imprisonment sentences can lead to an unreasonable cumulation. Therefore, other non-institutional sanctions should be possible, especially for young people.

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[124] *Cf*. 3 g and 4 b *supra*. – Abandonment of extension of the term of imprisonment in juvenile prison has been proposed in a bill prepared within the Ministry of Justice in 1973 for a partial reform of the law on young offenders. It is pointed out in this bill that this extension had not been used for several years. See the appendix to *Laintarkastuskunnan lausunto* ("Statement of the Commission for Examining Legislation") 1973: 3, Helsinki 1973 (mimeographed).

[125] For example, sentences which are now set by administrative authorities for tax fraud are mentioned in this connection.

[126] *Ibid*., pp. 72 ff. and 148 f.

In regard to the development of *fines* as sanctions, the committee presents ideas similar to the argumentation for the 1976 legislative reform dealt with above. The system of fines should be differentiated along the following lines: day-fines, based on the ascertained financial position of the offender, would be a sanction having a noticeable effect on his standard of living, while, on the other hand, fee-type sanctions, fixed at a specific amount of money, would be applied especially to mass criminality. According to the committee, the method of enforcing fines must be made more effective. One should not attempt to abolish the infliction of conversion imprisonment until a sufficiently effective enforcement system has been developed.[127]

A new non-institutional sanction that is intended as an alternative to short imprisonment sentences and should, in the opinion of the committee, be adopted, is *mandatory reporting*. Mandatory reporting would be ordered for a period ranging from six to 60 days, and the sanction would involve 2–3 reports weekly to the police or to some other appropriate authority.[128] The committee discussed whether community service could be used, e.g., as a replacement for mandatory reporting or as a conversion penalty. Ultimately, the committee opposed this sanction, holding that it would be difficult to achieve equality in the use of community service, and it pointed out that enforcement would be difficult. Mandatory reporting is intended to be emphatically punitive. In general, the committee believes that it is not proper to connect social services with the enforcement of non-institutional sanctions; duress (control) and service must be separated from each other.[129]

In order to enhance general prevention and in order specifically to indicate the disapproval of an act, absolute discharge should generally be replaced by a sanction called *punitive warning*.[130] However, in view of the fact that there exist exceptional situations where a rebuke in the form of an official warning would be unreasonable, the possibility of absolute discharge should be retained. In the same way, prosecutors and the police could continue to administer a reprimand to those found guilty of a criminalized act, or they could waive prosecution or abstain from reporting the offender.

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[127] In 1976, there was also presented a proposal for a partial reform intended to increase the efficiency of the fine-enforcement procedure. See Hall. es. no. 65, 1976 Vp. – Regarding the future trends of the penalty fines, *cf*. the proposals of the Nordic Committee on Penal Law, *Nordisk utredningsserie* 1975: 5, Stockholm 1975.

[128] The corresponding sanction proposed by the Committee on Probation and Parole was called punitive supervision. See *Komiteanmietintö* 1972: A 1, pp. 163 ff. Regarding this sanction, see also Anttila, "Probation and Parole: Social Control or Social Service?", *International Journal of Criminology and Penology*, vol. 3, 1975, pp. 82 f.

[129] The importance of this classification was emphasized earlier in the report of the Committee on Probation and Parole. See *Komiteanmietintö* 1972: A 1, pp. 86 ff. See also Anttila, *International Journal of Criminology and Penology* 1975, pp. 83 f.

[130] Previously, this sanction was proposed for young offenders. See the appendix to *Laintarkastuskunnan lausunto* 1973: 3.

6 SUMMARY AND CONCLUSIONS

The foregoing survey covers a period of slightly over a hundred years in the history of Finnish criminal law: a period extending from the beginning of the preparation of the present Penal Code to the first stages of a new total reform of criminal law. The focus has been on changes in the system of penal sanctions, and such changes have been the most conspicuous of all the penal-law reforms since 1889. Discussion and reform in criminal policy have been largely directed at the system of sanctions. It has been presumed that a partial explanation of this is the fact that it is relatively simple to reach accord on many questions related to the system of sanctions, thanks to relatively unambiguous grounds for evaluation.[131] However, in the future development within criminal law, the main interest will be focused on other questions.

It has been observed above that many legislative reforms reflect a more general way of thought or approach in criminal policy. It has, for example, become customary to speak of two schools or doctrines: the classical and the sociological (or positivistic). Of these, the former arose during the 1800s and the latter at the turn of the century. Finland's 1889 penal legislation is a product of the classical school, while the reforms of the sanctions system carried out during the first decades of this century reflect the ideas of the sociological school. It is difficult to pinpoint the dominant themes in criminal policy during the last few decades. According to one characterization, the golden age of indeterminate sanctions in the Nordic countries lasted for three decades, beginning with the end of the 1920s. During the 1930s, attempts were made to divide recidivists into sick ones needing care and healthy ones needing incarceration. Treatment ideology was at its height during the 1950s, when the circle of offenders needing treatment and cure was believed to be very wide. During the next decade, the role of the official control system was subjected to a fundamental reappraisal.[132]

Fewer rules reflecting the ideology of individualized sanctions have been adopted in Finland than in the other Nordic countries. Also, at the end of the 1960s and during this decade, the renaissance of general prevention and the return to (neo-)classical ideology is perhaps more evident in Finnish criminal policy than elsewhere in the Nordic region. It is emphasized, for example, that punishment must primarily be understood as a rebuke delivered by society, and

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[131] Thus *Komiteanmietintö* 1976: 72, p. 44.

[132] This is how the development is characterized by Professor Anttila. See *Research Institute of Legal Policy* 1975, pp. 3 ff.

should thus depend on the offence.[133] These latter features in the development are interesting, as they show how in criminal policy an approach or emphasis can come back into favour after a period of rejection.

The fact that, for example, the importance of the principles of general prevention and proportionality has been emphasized at different times does not necessarily signify that these principles have been interpreted in the same way at those times. It has been reported above that, according to the present belief, the emphasis of general prevention does not mean a favouring of harsh punishments, but that punishment must be in just proportion specifically with the grossness that the offence displays in the offender. Previously, general deterrence was more closely tied to the harshness of sentences, and more weight was given to rendering the punishment proportional to the harmfulness of the offence rather than to the guilt of the offender.

The increase in knowledge concerning the direct and indirect effects of social measures has played a part in this change in beliefs. It should also be remembered that a certain emphasis in criminal policy may have a very different effect in different penal-sanction systems and in different social conditions. For example, during the 19th century emphasis on the idea of reformation of offenders could lead to proposals which may be found acceptable even today, but yet in the light of different grounds for decision-making. The 1875 Penal Law Committee, which put much weight on the idea of reformation, proposed legislative reforms which were not carried out until some 100 years later (removing forfeiture of civil rights from the system of sanctions, and including in legislation provisions on the meting out of punishment) or which are once more being planned (adoption of the sanction of short-term custody). Today, the provisions on parole are based on different grounds from those current during the 19th century, when they were drafted.

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[133] Regarding the renaissance of general prevention, see especially Törnudd, "Deterrence Research and the Needs of Legislative Planning", in *General Deterrence – a Conference on Current Research and Standpoints*, National Swedish Council for Crime Prevention, Stockholm 1975, pp. 326 ff. Regarding the return to the (neo-)classical ideology, see especially Anttila, "A New Trend in Criminal Law in Finland", *in Criminology between the Rule of Law and the Outlaws*, Volume in honour of Willem H. Nagel, Kluwer-Deventer 1976, pp. 145 ff.

Regarding the trends in criminal policy, particularly in the system of penal sanctions, in other Nordic countries, *cf*., e.g., Andenaes, *Punishment and Deterrence*, pp. 152 ff.; Erland Aspelin, "Some Developments in Swedish Criminal Policy", in *Some Developments in Nordic Criminal Policy and Criminology*, pp. 4 ff.; H. H. Brydensholt, "Udviklingen i sanktionssystemet", *Juristen & Økonomen* 1975, pp. 172 ff.; Nils Christie, *Hvor tett et samfunn?*, Copenhagen 1975, pp. 119 ff. and 208 ff.; and Göran Elwin *et al*., *Den första stenen*, 4th ed. Stockholm 1975, pp. 294 ff.

Some themes in the planning and decision-making in criminal policy recur decade after decade without ever finding complete solutions. An example of' this would be the once more topical question of replacing short-term (unconditional) imprisonment by more appropriate sanctions. It is especially important in Finland to find alternatives to imprisonment, inasmuch as the prison population since the 1920s has been noticeably higher in Finland than elsewhere in the Nordic countries.[134]

[134] Regarding the development of the prison population in Finland compared with other Scandinavian countries, see Christie, "Changes in Penal Values", *Scandinavian Studies in Criminology*, vol. 2, Oslo 1968, pp. 169 ff., and *idem, Hvor tett et samfunn*?, pp. 129 ff. and 309 f. *Cf.* also Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *The Treatment of Offenders, in Custody or in the Community, with Special Reference to the Implementation of the Standard Minimum Rules for the Treatment of Prisoners Adopted by the United Nations*, Working Paper Prepared by the Secretariat, A/Conf. 56/6, New York 1975, pp. 20 ff. and 67 ff.

11. Diversion from Criminal Justice – Some Experiences from Finland*

1 DIVERSION – WAIVING OF MEASURES

In the past few years, the term "diversion" has become generally used in the United States as an expression referring to a particular way of handling criminal cases by means other than those of traditional criminal process. The essential characteristic of diversion is to avoid the judicial infliction of penalty for apparently criminal conduct that has come to the notice of law enforcement agencies.[1] In the Finnish context, there is a close counterpart to diversion (provided the word is understood in the above sense) called the waiving of measures. It is a common name for various processes through which the authorities either refrain from measures normally leading to the passing of sentence or forgo the infliction of penalty itself. Even though the merits of a criminal offence have been sufficiently established, the police or possibly some other supervising agency may abstain from filing a report for purposes of further investigation and ensuing prosecution (waiver of report in the supervisory or pretrial phase), the public prosecutor may withhold from bringing a charge or withdraw a charge already brought (prosecutorial waiver or dropping of charges in the prosecutorial phase) or the court may refrain from passing

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* Original source: Diversion from Criminal Justice – Some Experiences from Finland. – In: Lenke Fehér /ed.): *Hungarian–Finnish Penal Law Seminary on Petty Offences*, 5–8 September 1983. Budapest 1984, pp. 119–134. – An earlier version in: Raimo Lahti & Lauri Lehtimaja: Selected Papers on Penal Problems. The Institute of Public Law, University of Turku, Turku 1978, pp. 16–26. Epilogue and chart 2 added to the essay.

[1] Thus in a recent report by an English working party. See NACRO (The National Association for the Care and Resettlement of Offenders). Diversion from Criminal Justice in an English Context, Emsworth 1975, pp. 3 ff. See also e.g. Inkeri Anttila, The Limits of Diversion. A report to the 8th International Congress on Criminology, Lisbon, Sept. 4–9, 1978, in Anttila, *Papers on Crime Control 1977–1978*, Research Institute of Legal Policy, No. 26, Helsinki 1978 (mimeographed), pp. 93–102.

a sentence (absolute discharge in the sentencing phase).[2] Sweden, as another Nordic country, has adopted a common term of similar nature, "eftergift".[3]

2 HOW COMMON IS DIVERSION IN FINLAND?

The chart included as an appendix to this report will provide a rough idea of how many criminal cases handled by the authorities will go through the normal or simplified course of criminal process and how many of such cases will "be diverted" in various phases.[4] The information underlined in the chart pertains to the waiving of measures in the sense defined above, whereas the figures marked out by broken line only partially refer to similar dispositions.

The chart discloses the fact that waiving of measures (or more generally: diversion) is rather scarce in Finland, as far as the prosecutorial and sentencing phases are concerned.

The portion of such dispositions, however, seems to be significant in the supervisory and pretrial phase, even though an assessment is rendered difficult by the lack of adequate statistical information.

3 DIVERSION IN FINLAND AND THE OTHER NORDIC COUNTRIES

In the so-called civil law countries, the legal culture of which Finland as well as the other Nordic countries adhere to, the discretionary powers vested in the criminal justice agencies have traditionally been narrower than those in the common law countries or the Socialist countries in Eastern Europe. On the whole, there is a way of legalistic thinking that characterizes the legal systems in the civil law countries. To be sure, there are also considerable

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[2] For more details, see Raimo Lahti, *Toimenpiteistä luopumisesta rikosten seuraamusjärjestelmässä* (Waiving of Measures in the System of Criminal Sanctions; Deutsche Zusammenfassung: Über das Absehen von Strafe, Klage und Strafverfolgung, pp. 577–590). Vammala 1974, pp. 42 ff.

[3] For particulars on this Swedish counterpart of diversion, see Göran Elwin et al., *Den första stenen*, 4th ed., Stockholm 1975, pp. 95 ff. and 151 f.

[4] The chart is included as appendix no. 2 in a report of a working party appointed by the Ministry of Justice. See Erik Svinhufvud et al., *Syyttäjälaitoksen uudistaminen*. Oikeusministeriön lainsäädäntöosaston julkaisu 11/1974. (Reform of the Prosecutorial Organization. Publication by the Legislative Department of the Ministry of Justice.) Helsinki 1974 (mimeographed). See also Lahti, *op.cit.*, pp. 124 ff.

differences among the Nordic countries as far as the discretion of criminal justice agencies in general is concerned and especially in regard to the question of diversion, in spite of the fact that they share nearly the same social and cultural traditions.[5]

A striking difference in the prosecutorial philosophy is this: whilst Sweden and Finland adhere to the so-called principle of legality (absolute duty to prosecute, *Legalitätsprinzip*), the Danish and Norwegian systems are characterized by the principle of prosecutorial discretion (relative duty to prosecute, *Opportunitätsprinzip*). The former principle, in its pure form, is interpreted to denote an absolute duty for the public prosecutor to prosecute, as soon as there is enough of evidence (reasonable grounds) to warrant the suspicion of a person's guilt. In an analogous way, the latter principle purports that the decision to bring charges against a person is referred to the public prosecutor's discretion, as a matter of expediency. These principles, however, have been adopted in the Nordic countries as elsewhere in a modified version.

In Danish and Norwegian law, prosecutorial discretion has been curtailed by various legal provisions elaborating the conditions for its use. On the other hand, Swedish law recognizes rather wide exceptions to the rule of obligatory prosecution. Little by little, the principle of legality has been mitigated in Finland, too, by virtue of special provisions, albeit more narrow than those in Sweden. In practice, the real differences among the systems are not necessarily so great, although the starting points as such, the presumptions applied to prosecution, are opposite.

Truly enough, there are also differences of more practical significance in the prevalence of prosecutorial waivers among the Nordic countries, especially between Finland and the others. The most striking difference, I believe, is the fact that whilst in Finland only a few young offenders (those below 18 years) avoid the court process, it is a rule in the other Nordic countries that no charges are brought against such offenders but they are subjected to the measures of child welfare authorities (should the child welfare authority decide not to take any steps, prosecutorial waivers may be revoked). In Denmark and Norway, certain conditions may be attached to a prosecutorial waiver, which possibility

[5] In reference to the text below, as far as Finland is concerned, see Lahti, *op.cit*., *passim*, (at length) and Lauri Lehtimaja, *The Protection of Human Rights in Finnish Criminal Proceedings*, University of Turku, Institute of Public Law, Turku 1977 (mimeographed), pp. 34 ff. (in brief). As regards the rest of the Nordic countries, see e.g. Stephan Hurwitz, *Den danske strafferetspleje*, 3rd ed., København 1959, pp. 215 ff. (Denmark), Johs. Andenæs, *Alminnelig strafferett*, 2nd ed., Oslo 1974, pp. 437 ff. (Norway) and Carl M. Elwing, *Tillräckliga skäl*, Lund 1960, *passim*, and Färre brottmål, *Statens offentliga utredningar* 1976:47, Stockholm 1976, *passim* (Sweden).

has tended to increase the use of this disposition as a substitute for a conditional sentence. In Sweden, it is possible in some cases to replace penalty with modes of treatment prescribed in social welfare legislation. This is done either by means of waiving prosecution or by committing the offender to treatment, a special measure at the court's disposal. It can be said that diversion of the described nature, as exercised in the above mentioned Nordic countries, often involves "some sort of intervention", replacement of penalty with a new measure, whereas in Finland, the purport of diversion is generally embodied in "simple refraining from measures".

4 THE DEVELOPMENT OF LEGAL PROVISIONS INVOLVING WAIVING OF MEASURES IN FINLAND

Why have the Finns been so inhibited in the process of extending the discretionary powers of criminal justice agencies – especially those of the police and the public prosecutor? In search for a viable explanation, one may point to a strong legalistic tradition. Viewed against the background of Finnish political history, it in hardly without significance that in the years 1809–1917, while Finland was a Grand Duchy under Russian rule, the constitutional status of Finland was often at issue and the Finns were waging a battle for justice against attempts at Russification. From the days of old, the principles of legal security ("rule of law") and consistency of judicial praxis (more generally: equality of citizens) have strongly been emphasized in Finland. It is one of the best guarantees for the attainment of these goals that criminal cases are handled and penalties are inflicted by a developed judiciary, in compliance with fairly exhaustive provisions laid down by the law. The imperative of linking a criminal offence almost invariably to a penalty imposed in the framework of a judicial process was well in line with the ideological values of the criminal policy that imbued the background of our Penal Code, enacted in 1889 and basically still in force. This code was thoroughly permeated by the spirit and principles of the classical penal-law school: a punishment was primarily regarded as a just desert (retribution) for the offence committed, whilst the emphasis put on the thought of reform only came second.[6]

In practice, these are the most significant legal provisions involving waiving of measures: firstly, special provisions concerning 15–17-year-old offenders

[6] See Lahti, Criminal Sanctions in Finland: a System in Transition. *Scandinavian Studies in Law* 1977, p. 127.

that are included in a Young Offenders Act of 1940; secondly, a provision concerning petty violations of traffic regulations, enacted in 1965; and thirdly, a general discretionary rule applicable to offenders of all ages, enacted in 1966.[7] The provisions concerning young offenders constituted a part of a legislative programme that strived to give young offenders a special status in terms of prosecution as well as passing and carrying out sentences, a status better responding to their special characteristics. According to the *travaux préparatoires* of the act, there was no intention of leaving a person without "care", even if charges had been dropped or the sentence had been withheld. On the contrary, he would become an object for social welfare measures.[8] – As already pointed out, prosecutorial waivers based on this scheme, in particular, have been definitely less frequent in Finland than similar dispositions in the other Nordic countries. According to a recent legislative proposal, these special provisions bearing upon young persons are proposed to be abolished.[9]

The idea of procedural economy (*minima non curat praetor*) played a central role in the background of the provisions of 1965 and 1966. Expressed in a more modern parlance, this idea can be defined as an endeavour to reallocate the resources available for the control of criminality in a more expedient manner. These provisions did in fact legalize a usage already widely adopted by policemen: failing to report petty traffic offences for prosecution. In the beginning, the legislative proposal only involved police discretion. Even this proposal was no more than a by-product of the drafting of the new Police Act. It was not until emphatic wishes were expressed in the various phases of the running of the bill for the Police Act that it became timely to draft provisions involving prosecutorial waiver and absolute discharge as well. There was no longer enough of time for a thorough consideration on whether it was possible to differentiate the contents of the said provisions. As a result, the general provisions of 1966, involving waiving of measures, are equally narrow in applicability and only bear upon such petty offences as have been caused by excusable oversight, thoughtlessness or ignorance. The only point of distinction is manifested in the fact that the use of prosecutorial waiver and absolute discharge does not depend on the possible claims of the victim as does the waiver of report in police discretion.

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[7] For details on these provisions and their background see Lahti, *op.cit.*, *passim*.

[8] See Lehtimaja, The Status of Post-Adolescents in Finnish Penal Law and Penal Policy, in Lahti – Lehtimaja, *Selected Papers on Penal Problems*, pp. 27 ff.

[9] *Ibid*.

5 A COMPARATIVE SURVEY OF THE PROS AND CONS OF THE WAIVING OF MEASURES IN THE LIGHT OF CERTAIN LAW-DRAFTING DOCUMENTS

In connection with certain legislative reforms, the advantages and disadvantages attached to the waiving of measures have been exposed to explicit deliberation.[10] When the above-mentioned discretionary provision concerning petty traffic offences was being outlined in the middle of the 1960's, also another alternative was being discussed: retaining petty forms of carelessness in traffic as unpunished. In view of the general preventive effect of the criminal justice system, the new model, however, was preferred to a virtual declaration making it known that petty traffic offences no longer deserved to be punished. Half a decade later, a scant majority in the Parliament based their view on the same general preventive standpoint, as they, departing from a government bill, retained the penalization of illegal use of narcotics. In the course of parliamentary discussion, it was remarked that the discretionary provisions of 1966 could also be applied to persons having illegally used narcotics. In the official rules issued later on by the highest prosecutorial agency, it was stated that, as a rule, a prosecutorial waiver was to be considered reasonable, if the person to be charged with such an offence already had committed himself to voluntary treatment, in order to get rid of his addiction to narcotics. The said type of offence has been one of the most common among those having ended in prosecutorial waiver or absolute discharge.

Alternative arguments came up in the *travaux préparatoires* of the law of 1970 where violations against certain parking regulations were decriminalized. The general preventive effect of the criminal justice system was presumed to decrease, if a parking violation, although petty enough to make a penal sanction seem unreasonable, should lack negative sanctions altogether. On the other hand, it was regarded as necessary, in view of the continual increase of parking offences, to avoid an inflationary use of penalties. As a result, most parking offences were in fact decriminalized and penalties were replaced by a fee-type sanction, fixed at a specific sum of money.

At the beginning of 1977, the Penal Law Committee published its report on considerations of principle, after having engaged in the preparation of a total reform of our criminal legislation for nearly 5 years. The Committee also took a stand in regard to the development of the system of penal sanc-

[10] For particulars on the legislative reforms reviewed below see Lahti, *op.cit.*, pp. 259 ff.

tions.[11] In view of the future prospects of the waiving of measures, we may, among other things, take notice of the following opinions expressed by the Committee: There is a good reason to take a negative attitude toward individualized sanctions. Therefore, to give an example, special sanctions reserved for certain groups of people or particular offences only are not to be recommended. A simple and clear-cut system of sanctions is more effective, as far as general prevention is concerned, and, from the viewpoint of securing consistency in judicial praxis, more certain than a system based on a number of different types of sanctions. In the light of these statements, treatment-oriented diversion hardly has any foothold in the future in Finland. On the whole, it is very little that the school of thought putting emphasis on the rehabilitation of the offender has influenced the reforming of the Finnish system of criminal sanctions, in contrast to the situation e.g. in Denmark and Sweden (*cf*., however, the goals of the Young Offenders Act as stated above).

The Committee also established as a general principle that, as a rule, only officially recognized punitive sanctions such as indicated in the Penal Code ought to be used for punitive ends. Judging from this principle, diversion in general would not be capable of great use. To be sure, the Committee felt that penalties for harmful acts that are only encumbered with a slightly negative character ought to be systematically replaced by fee-type sanctions (*cf*. the adoption of the parking fee system as stated above).

The report of the Penal Law Committee stresses the significance of general prevention in relation to individual prevention, and of the channels through which general prevention is to take an effect, it focuses on the function of punishment as an indicator of moral disapproval (deprecation). In order to make the expression of official disapproval more apparent in connection with the waiving of measures, absolute discharge should generally be replaced by a sanction called punitive warning. Waivers of reporting and prosecuting ought to be accompanied by oral or written admonitions more frequently than they are at present.

The present form of absolute discharge would be retained, primarily in view of various exceptional cases. For example, we may imagine an act fitting the legal description of a criminal offence beyond dispute but yet being characterized by such exceptional circumstances as would make a rebuke in the form of an official judicial warning seem unfair or unreasonable. Owing to the strict

[11] See Rikosoikeuskomitean mietintö, *Komiteanmietintö* 1976:72 (Report of the Penal Law Committee), Helsinki 1977. Swedish version: Straffrättskommitténs betänkande, Band I, Kommittébetänkande 1976:72, Helsingfors 1978. See also my review included in the article: Lahti, *Scandinavian Studies in Law* 1977, pp. 151 ff.

conditions of the present provisions on the waiving of measures, such circumstances have been incapable of receiving sufficient attention in the process of applying the said provisions. Truly enough, the need of reform is somewhat lessened by the fact that since the year 1972, it has been possible to take similar circumstances into account in the application of another discretionary provision authorizing the court to deviate from the regular type of penalty or the regular penal latitude in the direction of greater leniency and conferring in this regard a fairly wide degree of discretion on the court.

6 EPILOGUE[12]

The chart 2 on 1980 indicates that there have been no significant changes in the use of diversion or waiving of measures. This chart, however, renders an incomplete picture of diversion occurring previous to criminal investigation (the same has been stated before concerning the chart on 1970). In the case of petty traffic offences, for example, the police routinely lets the offender go with an admonition instead of reporting the offence for prosecution. Such an admonition may be accompanied by an order to repair a defective vehicle or to present a document which had been missing. Tax authorities usually order a punitive tax increase in petty tax fraud cases and refrain from reporting the case for prosecution.

The above-mentioned examples concern petty crimes. Even some rather serious cases may remain outside the criminal justice system. Certain offences have been defined as "complainant offences", where the prosecutor may not press charges unless the victim himself demands that the offender be punished. There are several reasons why this kind of policy has been adopted. For example, the interests of the victim may be considered be in need of protection. The Penal Law Committee (1977) proposed that the proportion of this kind of criminalizations be increased, however, modified so that public interest could under certain circumstances cause a case to be prosecuted. This proposal is a reflection of the idea that criminal cases should more often be settled by the parties themselves without involving the criminal justice system.

It has been made clear above that "simple" diversion and diversion with intervention – as they are used in Finland – aim to serve the goal of procedural economy, i.e. facilitating the work of the machinery of justice, in the first place.

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[12] For the newest development as far as diversion in Finland is concerned, see Matti Joutsen, *Diversion and Mediation*, Report for the AIDP Colloquium, 1982 (mimeographed).

On the other hand, Finnish law is rather restrictive towards diversion for the purpose of avoiding the infliction of penalty regarded as unfair or unreasonable in particular cases. The same holds true of diversion for the purpose of securing an optimated individually preventive response to a crime. There is a need for legislative reforms as far as the latter-mentioned aspects are concerned.

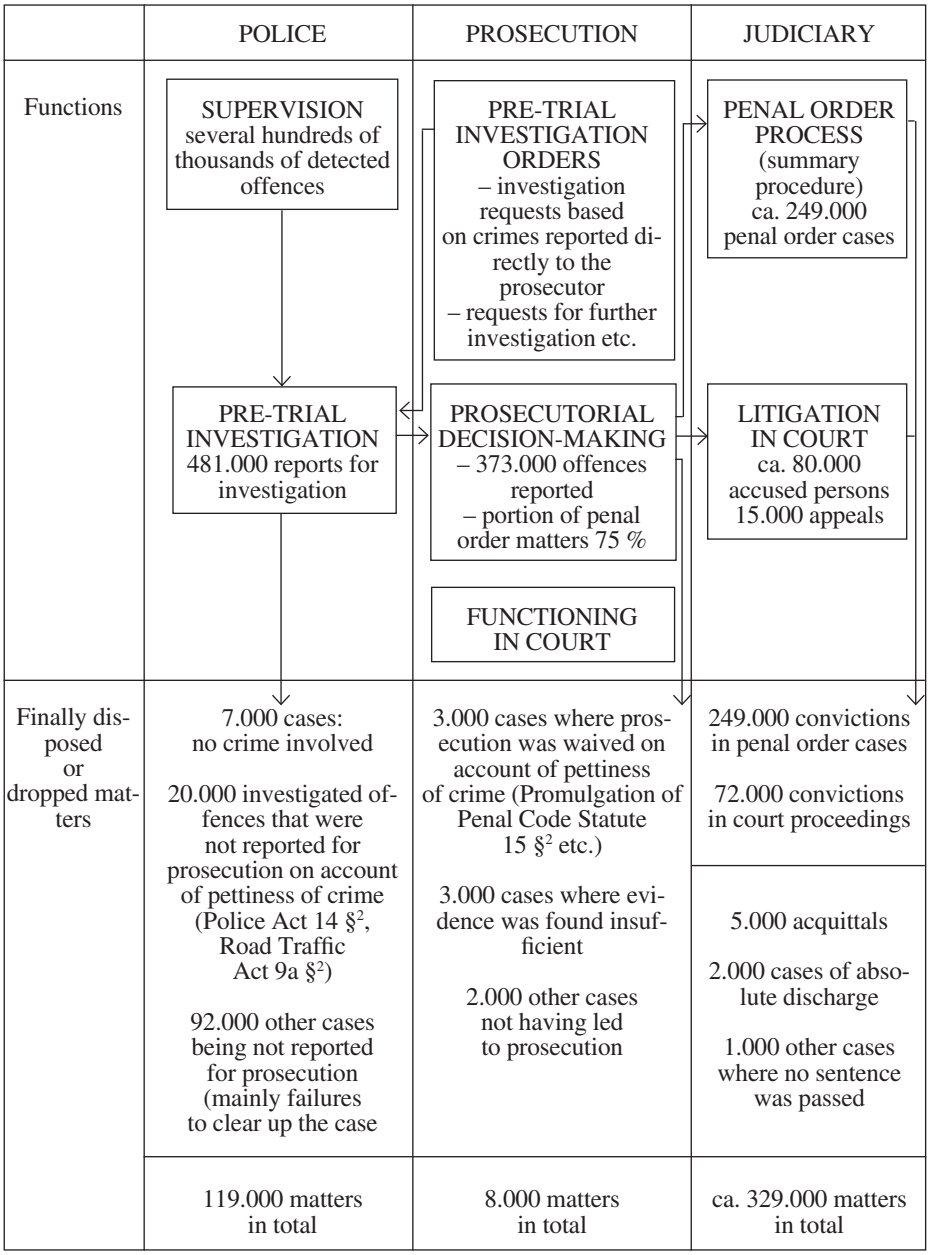
It is obvious that there are several other means to reach the goals assigned to diversion. For example, procedural economy can be furthered by decriminalization or depenalization.[13] It is important that waiving of measures is within certain limits possible also when some other kind of official control system is created to replace the criminal justice system: a punitive sanction may, of course, even then be inappropriate or unfair in a particular case.

[13] See e.g. *Report on Decriminalisation*, Council of Europe, Strasbourg 1980.

APPENDIX 1: Functions of criminal justice agencies in 1970

	POLICE	PROSECUTION	JUDICIARY
Functions	SUPERVISION several hundreds of thousands of detected offences PRE-TRIAL INVESTIGATION 362.000 reports for investigation	PRE-TRIAL INVESTIGATION ORDERS – investigation requests based on crimes reported directly to the prosecutor – requests for further investigation etc. PROSECUTORIAL DECISION-MAKING – 257.000 offences reported – portion of penal order matters 70 % FUNCTIONING IN COURT	PENAL ORDER PROCESS (summary procedure) – 151.000 penal order cases LITIGATION IN COURT – ca. 65.000 accused persons
Finally disposed or dropped matters	13.000 cases: no crime involved 42.000 investigated offences that were not reported for prosecution (Police Act 14 §, Road Traffic Act 9a §, perpetrators under age etc.) 56.000 failures to clear up the case	ca. 2.000 cases where prosecution was waived on account of pettiness of crime (Promulgation of Penal Code Statute 15 §[2]) or on similar grounds ca. 1.000 cases where evidence was found insufficient 2.000–3.000 other cases not having led to prosecution	150.000 convictions in penal order cases 58.000 convictions in court proceedings 5.000 acquittals 3.000 other cases where no sentence was passed
	111.000 matters in total	5.000–6.000 matters in total	ca. 220.000 matters in total

APPENDIX 2: Functions of criminal justice agencies in 1980



12. Towards a More Efficient, Fair and Humane Criminal Justice System: Developments of Criminal Policy and Criminal Sanctions during the Last 50 Years in Finland*

ABSTRACT

This article provides an overview of the developments of criminal law and criminal sanctions during the last 50 years in Finland. It reflects the author's experience as a criminal scientist and an expert in drafting criminal legislation during this period.

The total reform if Penal Code in 1972–2003 was aimed at a more rational penal system, i.e. for efficient, just and humane criminal justice. An ambitious attempt was made to assess in a uniform and systematic way the goals, interests and values which the new Criminal Code should promote and protect. The existence of the criminal justice system was justified using utilitarian arguments. The structure and operation of the penal system cannot, however, be determined solely on the basis of its utility. The criteria of justice and humanness must also be taken into account. The penal system must be both rational as to its goals (utility) and rational as to its values (justice, humaneness).

The latest developments since the 1990s are characterized by the influence of the human and basic rights on criminal and procedural law as well as the effects of internationalization and Europeanization of criminal justice system.

Criminal scientists in Finland and elsewhere in Scandinavia should strive more actively to influence European and global criminal policy. It is typical of 'Nordic model' that the role of crime prevention is particularly accentuated, specific criteria of rationality such as legitimacy and humaneness are widely applied, and the value of repression in criminal sanctions is relatively low.

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1. INTRODUCTION

The changes in the system of criminal sanctions normally reflect well the more general transition of criminal or penal ideologies and policies. Lahti (1977) illustrated this by making a survey which covers the development of the Finnish system of criminal sanctions from the latter part of the 19th century up to 1977, the year when the report of the Penal Law Committee was published. The committee had the task of preparing a report on the ideological foundations of the overall reform of the Penal Code (PC) of 1889.

The Finnish Penal Code of 1889 was originally permeated by the spirit and principles of the classical school of penal law wherein punishment was primarily regarded as retribution for the offence, and thereby the penal system was tolerably in harmony with the demands of general deterrence. More weight was given to individual prevention at the beginning of Code drafting. Later the influence of the sociological penal-law school – focusing on the offender and in individualized criminal sanctions – led to partial reforms of the penal system: for example, the introduction of Conditional Sentences Act in 1918, Dangerous Recidivists Act in 1932 and Young Offenders Act in 1940.

The system of criminal sanctions and the theory of criminal liability are the two main areas of the general doctrines of criminal law. The establishment of the Penal Law Committee in 1972 launched the process of the overall reform of criminal law in Finland which lasted until 2003. The preparatory work was done mostly by a task force named "Criminal Code Project" within the Ministry of Justice (1980–1999). The major enactment of the final stage – the reform of the general doctrines – was adopted in 2003 and entered into force at the beginning of 2004.[1]

The main focus of the overall reform was on the special part of the Penal Code, i.e. the reassessment of punishable acts on the basis of criminalization principles ("what acts should be punishable and how severely should they be punished?"). The system of criminal sanctions had undergone numerous partial reforms ever since the early 1970s, but no larger enactments in this area had been produced in the context of the overall reform before the final stage in 2003. The 2003 reform (Act 515/2003) contained an important systematic change: it conceptualized criminal sanctions, i.e. the provisions on sentencing

[1] As to the comprehensive reform of Finnish criminal law, see generally Lahti and Nuotio (1992) and Lahti (1993). An unofficial translation of the Finnish Penal Code, as amended up to 766/2015 is available from the website of the Ministry of Justice: http://www.finlex.fi/fi/laki/kaannokset/1889/en18890039_20150766.pdf

and the choice of the type of punishment were unified and collected into one chapter of the Penal Code (Chapter 6 of the PC).

The present article provides an overview of the reform trends in the system of criminal sanctions and its individual amendments from the 1980s to the 2010s as well as an assessment of their impact. In addition, at the end of the article, I will put forward certain critical viewpoints which could be useful in the revision of criminal policy and in the development of the criminal justice systems in countries comparable to Finland, primarily in the Member States of the European Union (EU).[2]

2. TENDENCIES AND GOALS OF THE FINNISH CRIMINAL POLICY SINCE THE 1960s

To put the issue in context, I refer to the following distinct tendencies in the Finnish criminal policy since the 1960s which are reflected in the changes to the system of criminal sanctions:

(i) criticism of the so-called treatment ideology (the 1960s);
(ii) emphasis on cost-benefit thinking (the beginning of the 1970s);
(iii) so-called neo-classicism in criminal law thinking (the end of the 1970s and the beginning of the 1980s);
(iv) pragmatic reform work for a new Criminal Code – the overall reform of criminal law – by utilizing modified ideas of the above-mentioned tendencies (since the 1980s until the beginning of the 2000s);
(v) influence of the human and basic rights thinking on criminal law and procedural law since the 1990s;
(vi) effects of the internationalization and Europeanization of criminal law since the end of the 1990s.

The penal theory adopted in the preparatory works of the comprehensive reform of criminal law is characterized by the demand for a more *rational criminal justice system, i.e. for efficient, just (fair) and humane criminal justice*[3]. The existence of the criminal justice system is justified on utilitarian grounds. The structure and operation of the penal system cannot, however, be determined solely on the basis of its utility. The criteria of justice and humaneness must

[2] See also more detailed reviews in Lahti (1985a, 1998, 2000, 2008, 2012 and 2016). Two comprehensive accounts of the Finnish and Scandinavian criminal justice systems are Tonry & Lappi-Seppälä (2011) and Bondeson (2005). As to the Finnish legal system in particular, see Nuotio, Melander, and Huomo-Kettunen (2012).

[3] As to this distinction originally, see Lahti (1985a, 63–69, 1985b, 884–885).

also be taken into account. The penal system must be both rational as to its goals (utility) and rational as to its values (justice, humaneness).[4]

To a large extent, it has been held possible to apply the main criteria of rationality of the criminal justice system – effectiveness, justice and humaneness – without this resulting in conflicting conclusions about the development of the system. In order for this to be possible, these principles must be defined in a particular way (Lahti, 1985a, pp. 66–69).

Thus, from all the different mechanisms through which the general preventive effect of the punishment should be reached, deterrence is not the most important; it is the socio-ethical disapproval which affects the sense of morality and justice – general prevention instead of general deterrence – without a need for a severe penal system. The legitimacy of the whole criminal justice system is an important aim, and therefore, such principles of justice as equality and proportionality are central. The emphasis on the non-utilitarian goals of the criminal justice system – fairness and humaneness – must be reconciled with the decrease in the repressive features (punitiveness) of the system, for example through the introduction of alternatives to imprisonment. The significance of individual prevention or incapacitation in the neo-classical penal thinking is regarded as very limited.

3. INDIVIDUAL CHANGES IN THE SYSTEM OF SANCTIONS AS A PART OF PRAGMATIC-RATIONAL CRIMINAL POLICY IN THE 1980s AND 1990s

The individual changes in the system of sanctions in the context of the overall reform of criminal law in the 1980s and 1990s were manifestations of the pragmatic-rational implementation of the criminal policy thinking described in the preceding section, without any principled re-evaluation of the validity of the policy during that time.

The first changes to the system of sanctions prepared by the Criminal Code Project pertained to the *alternatives for custodial sentences*. In addition, the first stage of the overall reform, which concentrated on the special part of the Penal Code (Acts 769–832/1990), was accompanied by reformed provisions on the waiving of penal measures (Acts 300–303/1990) and the provisions on the community service experiment (Act 1105/1990).

[4] See also generally Anttila (2001), *passim*, and Törnudd (1996), *passim*.

The provisions on the *waiving of penal measures* have a number of different objectives: (i) the decreased punitiveness and reasonableness of criminal sanctions; (ii) the enabling of other forms of official control (mainly social welfare measures) instead of prosecution; (iii) the organisation of the system of penalties along a series of steps from a lenient one to a more punitive; (iv) the appropriate allocation of the resources of the criminal justice system.

Mediation (conciliation) was mentioned in the preparatory works of the legislation pertaining to the waiving of punitive measures as one possible option in case the perpetrator had taken action to remedy his or her crime. Accordingly, a positive attitude was taken towards victim-offender mediation, while refraining from considering it as a noteworthy alternative to the custodial sentence. The practice of mediation – informal and based on the voluntary participation of the parties – was first begun in Vantaa in 1983 in the form of a research project. The legislation enacted in 2005 incorporated conciliation – including both criminal and civil cases – as a regular part of social welfare and restorative justice system.[5]

The introduction of *community service* on an experimental basis was justified on practical grounds: it would promote the achievement of one of the main objectives of the overall reform of the Penal Code, namely the reduction in the use of custodial sentences. The new type of sanction would also promote the rehabilitation of the offender back to the society and emphasise his or her own responsibility in this respect. This way the palette of sanctions available to the court would also be expanded, as there would be a new type of sanction whose severity ranks between that of a suspended sentence of imprisonment and that of a sentence of imprisonment served in custody. Community service, which consists of a number of hours of unpaid, socially beneficial work performed when the offender would otherwise be at leisure, was introduced as a sanction which could be imposed instead of a sentence of imprisonment in custody, of a duration not exceeding eight months.

Legislation enacted in 1996 incorporated community service as an ordinary part of the system of sanctions (Act 1055/1996). Some of the prerequisites for sentencing someone to community service were clarified at the same time. The formal prerequisite concerning the maximum duration of the custodial sentence was supplemented by the requirements of consent and suitability on the part of the offender. The other, substantive precondition gives the Court a discretionary power to deliberate whether the earlier sentences or other important reasons preclude the possibility to impose of a community service.

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[5] On mediation in criminal cases in Finland, see Iivari (1992, 2010).

The legislative reform relating to the *concurrence of offences* entered into force in 1992 (Acts 697–710/1991); this particular reform had been under preparation since the early 1970s. The reform introduced a system of "joint punishments", the basic premise of which is that only one joint punishment is to be imposed on several offences. At the same time, the court's discretionary power was increased so that unreasonably long custodial sentences could be avoided. The provisions in Chapter 7 PC on "retroactive concurrence" were again reformed in 1997 (Act 751/1997).

The legislative amendments relating to the special part of the overall reform of the Penal Code, such as the first and second stages of the reform (Acts 769–834/1990 and 578–747/1995), have also had a certain effect on the system of criminal sanctions. One of the most important elements in this respect was the *determination of penalty scales*, the arrangement of criminal offences to proportional order according to their seriousness, as well as the definition of grave and minor forms of given basic offences (aggravated cases and petty cases). The general level of punitiveness was reduced in line with the general aims of the criminal law reform, for example by lowering the penalty scales (and especially the minimum penalties) or, where the application of a provision on an aggravated case has been precluded, by a more precise, or even exhaustive, enumeration of possible grounds of qualification.

The *competence to impose sanctions* has increasingly been transferred out of the courts to other law enforcement authorities. For instance, in addition to the expansion of the scope of application of provisions on the waiving of prosecution, the public prosecutors were entrusted with the judicial power in respect to infractions by enacting a new Act on Penal Order Proceedings (692/1993)[6]. A harsh administrative penalty – the penalty payment for illegal restriction of competition – was introduced by the Act on Restrictions of Competition (480/1992)[7], which was modelled in accordance with EU competition rules. A similar type of harsh administrative sanction was introduced by the legislative acts 519–521/2016 for the protection against market abuse as prescribed in the Regulation (EU) 596/2014.

The second stage of the overall reform of the Penal Code included also the introduction of *corporate criminal liability* (Chapter 9 PC, Act 743/1995). Now corporations can, in specified criminal cases, be sanctioned by the imposition of a corporate fine (Tolvanen, 2009).

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[6] The Act is replaced by a new Act on the Determination of Fine and Penal Fee, 754/2010.

[7] The Act is replaced by a new Competition Act, 948/2011.

Individual legislative amendments have been carried out to introduce *juvenile punishment* as a special sanction for acts committed under the age of 18 (Act 1196/2004)[8] and to reform the provisions on the following penal sanctions: *fine, conversion imprisonment and summary penal fee* (550/1999), *conditional sentence of imprisonment* (520/2001), and *forfeiture* (875/2001).

The reform of the general part of the Penal Code (515/2003) had as its objective the achievement of a coherent set of rules concerning the principles and grounds governing the determination of penal sanctions and sentencing, thus facilitating even more the harmonization process of penal practice in Finland. The objective was not to affect the general punitive level of penalties or the proportions between the penalties imposed for various types of offence.

4. ENACTMENTS AFTER THE CRIMINAL CODE PROJECT IN THE FIRST DECADE OF THE 2000s

When the Criminal Code Project finished its work in March 1999, it left behind many unfinished draft proposals for partial reform of the system of sanctions. In the last meeting of the Steering Committee of the Project, the topic of discussion concerned the policies and principles governing the overall reform of the system of criminal sanctions. In a memorandum drafted for that meeting, the present author noted that, as the neo-classicism in criminal law thinking – as formulated originally in the 1970s – had already been modified with the introduction of individualized sanctions such as community service and juvenile punishment, it would be advisable to consider the broader implications which that modification have on the principled assessment of the relations between the various types of sanctions and on the drafting of the substantive provisions within their respective scope of application. My memorandum did not receive any support (cf. Section 6).

The further preparation of the partial reforms concerned custodial sentences of *imprisonment* and their enforcement as well as the conditional release of prisoners on parole. These revision tasks were assigned to specific law drafting bodies of the Ministry of Justice. The reform work led to the new Prison Act (767/2005), which adjusted the prison law to fulfil the requirements of the new Constitution and human rights obligations as well as with the strengthened legal safeguards and transparency of prison administration. This reform

[8] At first, the sanction was introduced on an experimental basis, Act 1058/1996. For a general review of youth justice in Finland and other Nordic countries, see Lappi-Seppälä (2011b).

also included the enactment of new provisions on the release of prisoners on *parole* (780/2005), and as a novelty, a regular release of prisoners serving a life sentence on parole (781/2005).[9]

The legislation on incarceration concerning *preventive detention* was repealed and replaced by new provisions on prisoners serving their entire sentence in prison due to their dangerousness to the life or health of others as manifested in their criminal activity (780/2005). The application of these provisions presupposes a multidisciplinary risk assessment of the offender and is a manifestation of the aim of incapacitation. *Electronic monitoring* was introduced as a new type of criminal sanction in 2011 (329–330/2011). It is imposed under certain material prerequisites as an alternative to a custodial sentence of imprisonment for at most six months.

5. ASSESSING THE EFFECTS OF THE REFORMS OF THE SYSTEM OF CRIMINAL SANCTIONS

An important effect of the new criminal and sanction policy can be seen in the *reduced use of custodial sentences* in Finland. Since the mid-1970s, the relative number of offenders sentenced to unconditional imprisonment was on the decrease until 1999: from 118 persons in 1976 to 65 in 1999 per 100 000 inhabitants which was the imprisonment level of the other Nordic countries. At the same time, the number of reported crimes followed the same trends in all Nordic countries which means that the dramatic cut in the prisoner rate in Finland did not result in a proportional increase in crime rates compared with other Nordic countries where the prisoner rates remained the same. In 2000–2005, the number of incarcerated people increased to 90 in 2005, but in the most recent years, the level seems to be normalized to 60–70 per 100 000 inhabitants (Lappi-Seppälä, 2008, 2011a, 2012).[10]

This effect should be assessed against the background of the general objectives and values of the criminal policy which was adopted in Finland. Cost-benefit thinking in policy-making – as it was originally formulated in the late 1960s (Törnudd, 1969) – suggests that we should aim at the reduction and distribution of the suffering and other social costs caused by crime and of the control of crime. In addition to crime prevention, a strong emphasis should be put on justice and humaneness. For instance, the argument of justice requires

[9] In more detail, see Lappi-Seppälä (2010).

[10] As to the situation in the Nordic countries, see v. Hofer, Lappi-Seppälä, and Westfelt 2012.

a just allocation of the social costs of crime and crime control among different parties, such as the society, offenders and victims, and the argument of humaneness speaks in favour of parsimony and leniency of penal sanctions and the respect of human dignity in crime control.

The reduced prisoner rate should be assessed in relation to the preventive effects of the system of criminal sanctions. The above-described Nordic experience, in addition to other criminological data, is an argument against the fear that a cut in the number of inmates will result in a proportional increase in the incidence of crime. Accordingly, the variations in the prisoner rate should not be looked at as a phenomenon separate from other events, nor should the criminal policy changes since the late 1960s be seen merely as a result of some ideological agenda pursued by a group of penal experts.

The Finnish scholar Lappi-Seppälä (2008, 2011a, 2012) has extensively studied the relationship between penal policy and prisoner rate. His conclusions include the following assertions: the penal severity is closely associated with the extent of welfare provision, differences in income equality, trust and political and legal cultures. So the Nordic penal model has its roots in consensual and corporatist political culture, high level of social trust and political legitimacy as well as a strong welfare state. These different factors have both indirect and direct influences on the contents of penal policy.

6. NEW CHALLENGES FOR THE REFORM OF THE SYSTEM OF CRIMINAL SANCTIONS

As indicated above (Section 2), the Finnish criminal policy has been strongly influenced by two tendencies since the 1990s: human and basic rights thinking as well as the internationalization and Europeanization of criminal law. Therefore, the question arises whether and to what extent the premises of the criminal policy which was based on the ideology of the 1970s and 1980s are in need of reassessment (Lahti, 2012).

In my role as a decision maker in the Criminal Code Project, I expressed criticism in 1999 about the fact that, at later stages of the overall reform of criminal law, the development of the system of sanctions had not been based on an adequately coherent policy model or penal theory (Section 4). The objectives and values driving the criminal policy as well as the more concrete interests and principles to be taken into account and balanced with each other in policy decisions, should undergo periodic re-evaluations.

When developing a comprehensive theory for the whole criminal justice system, it is necessary to take into account not only the principles and rules of the substantive and procedural criminal law, but also the whole statal machinery (police, prosecution, judiciary and enforcement agency) for implementing those legislative norms. For instance, in the special issue of "Trust in Justice", the editors suggest on the basis of procedural justice theories that fair, respectful and legal behaviour on the part of justice officials is a prerequisite for effective justice (Hough, Ruuskanen & Jokinen, 2011).[11]

The results of Lappi-Seppälä's studies (Section 5) suggest that developments in criminal policy must be assessed in the light of simultaneous structural (social, political and economic) and cultural changes. The criminal policy decisions must be examined with a discerning eye. These decisions should be based on research and rational reasoning. At the same time, structural and cultural circumstances of the society and the increased inter-dependence of states should be taken into account. The strengthened interaction between different criminal policy models (such as the Scandinavian type) in the European and global level is to be recognized. In this respect, it is a challenge to be able to react to, and to influence on, the development of criminal law and criminal policy in the European Union and in other international organisations (especially the United Nations[12]).

7. SANCTIONS AND THE EU AND SCANDINAVIAN CRIMINAL POLICY

The EU communication COM (2011) 573 final "Towards an EU Criminal Policy" presents a framework for ensuring the effective implementation of EU policies through criminal law and calls for careful consideration of, for example, whether to include types of sanctions other than imprisonment and fines to ensure a maximum level of effectiveness, proportionality and dissuasiveness as well as the need for additional measures, such as confiscation.

It is a positive thing that a more coherent and consistent criminal policy is being drafted in the EU, as the communication indicates. It is also positive to note that, according to the communication, necessity and proportionality should be guiding principles and clear factual evidence is required for policy

[11] As to the public's views on punishment in Scandinavia, see Balvig, Gunlaugsson, Jerre, Tham, and Kinnunen (2015).

[12] As to the role of the UN in criminal policy, see especially Redo (2012).

making. Nevertheless, the criterion of dissuasiveness can be criticized for its strong connotation with deterrence and high level of punitiveness in contrast to the emphasis on the aspects of socio-ethical disapproval and legitimacy (cf. Section 2).

One task is to outline consistent criteria for the choice of criminal and (punitive) administrative sanctions as many EU Member States including Finland and other Nordic countries are far from a comprehensive system of administrative sanctions.

More generally, "The Manifesto on European Criminal Policy", prepared by 14 university professors (European Criminal Policy Initiative, 2011), includes a cluster of principles and guidelines which are widely accepted for law drafting among the community of criminal scientists. It is promising that the Commission announces in its communication the will to continue the development of the EU criminal policy by resorting to a thorough evaluation of existing EU criminal law measures and to continuous consultation of Member States and independent experts.

For Finland and other Nordic countries, it is challenging to promote a better understanding and inclusion of the goals and values of their welfare societies and their criminal policy in the decision-making bodies of the EU. For instance, Lahti (1992) and Suominen 2011) have with good reason asked – and given their answer to the question – how could the trust in justice as a means of effective cross-border cooperation in penal matters be furthered effectively? Some preliminary considerations can already be read in the communication: a fair balancing between the effective enforcement and a solid protection of fundamental rights; a focus in the needs of EU citizens and the requirements of the EU area of freedom, security and justice, while fully respecting subsidiarity and the last-resort-character (*ultima ratio*) of criminal law.

There is a need for a deeper analysis about the principles of *ultima ratio*, subsidiarity and proportionality from a Pan-European perspective.[13] From the "Nordic model", where the role of crime prevention is particularly emphasized, we can learn how specific criteria of rationality, such as legitimacy and humaneness, are applied effectively while the level of repression in criminal sanctions is left relatively low.

[13] In more detail, see Lahti (2016) and, generally, Melander and Suominen (2014) (the special issue of the Effective-ness of EU Criminal Law).

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IV.
Development Trends in Nordic Criminal Policy

13. Current Trends in Criminal Policy in the Scandinavian Countries*

1 SCANDINAVIAN HARMONIZATION AND COOPERATION IN CRIMINAL LAW

The penal codes of the Scandinavian countries date from different periods. The Finnish criminal code is of 1889, the Norwegian of 1902, the Danish of 1930, the Icelandic of 1940 and the Swedish of 1962. Because of this difference in the dates of origin of the codes it is understandable that their underlying criminal policy ideology has also been quite different. Even so, the development over the most recent decades has been marked by an increasing similarity in approaches to crime control policy and, through a series of legislative amendments, by a consequent harmonization of criminal legislation.

The common historical legal traditions of the Scandinavian countries have been a factor in this harmonization of legislation. The economic, social and cultural development has been very much the same in these countries. All five societies are ethnically homogeneous and have the same dominant religion. Scandinavian cooperation in legal and criminal policy has become even more diversified and active since the 1960's. The 1962 cooperation agreement includes a special article on criminal policy in accordance with which the parties agree to attempt to harmonize their provisions on offences and on punishments. In 1960, a permanent body of civil servants, the Nordic Criminal Law Committee, was established. The Committee has been given the task of drafting legislative reforms designed to further the harmonization of criminal legislation by the respective Ministries of Justice. The coordination of penal codes and

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* Original source: In: *Scandinavian Criminal Policy and Criminology 1980–85*. Edited by Norman Bishop. Scandinavian Research Council for Criminology, Copenhagen 1985, pp. 59–72. – *Cf*. for example Inkeri Anttila, The Ideology of Crime Control in Scandinavia – Current Trends, in *Selected Issues in Criminal Justice*, Helsinki Institute for Crime Prevention and Control affiliated with the United Nations, Publication Series No. 4, Helsinki 1985, pp. 66–77; and *Crime and Criminal Policy in Sweden*. The National Swedish Council for Crime Prevention, Report No. 12, Stockholm 1984.

crime control policy in Scandinavia has been on the agenda of many official and unofficial joint organs.

Among the first significant results of this legislative cooperation were the laws on extradition of offenders among the Scandinavian countries (1960) and Scandinavian cooperation in the enforcement of penal judgments (1963). These laws demonstrate the mutual trust which exists between the Scandinavian countries. Under the provisions of the firstmentioned law, for example, a citizen of one Scandinavian country can, under certain circumstances, be extradited to another. Under the provisions of the latter law, for example, a sentence of imprisonment passed in one Scandinavian country can, under certain circumstances, be enforced in another.

Other work on legislative cooperation has been done on statutes of limitations in criminal cases, release from prison on parole, and a decrease in the use of pre-trial detention. Most recently, the Nordic Criminal Law Committee has outlined a common approach to developing alternatives to imprisonment and to regulating the due measure of punishment.[1]

The harmonization of approaches in criminal policy has been reflected most clearly in the work on reforming the system of penal sanctions. In all of the Scandinavian countries, major reforms of the system of sanctions are under way. In preparing these reforms, there have been discussions on matters of principle concerning the basis for reforms of criminal policy and criminal law in modern welfare states. The discussions arose especially on the basis of certain official reports which appeared at the end of the 1970's.[2] Now during the 1980's, both Finland and Norway are carrying out total reforms of their respective criminal codes and the first proposals have already been presented.[3] It is these two countries which have the oldest criminal codes in force in the Scandinavian countries, although the codes have been amended many times

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[1] *Alternativer til frihedsstraf* (Alternatives to imprisonment), *Nordisk utredningsserie* A 1980:13, Stockholm 1981; and *Utmåling* (The due measure of punishment), Nordisk utredningsserie 1984:2, Göteborg 1984.

[2] *Rikosoikeuskomitean mietintö* (Report of the Penal Code Committee), Komiteanmietintö 1976:72, Helsinki 1976; *Alternativer til frihedsstraf – et debatoplæg* (Alternatives to imprisonment – a contribution to the discussion), Betænkning nr. 806/1977, København 1977; *A New Penal System – Ideas and Proposals. English Summary*. The National Swedish Council for Crime Prevention, Report No. 5, Stockholm 1978; *Stortingsmelding* nr. 104 (197778), Om kriminalpolitikken (On criminal policy), Oslo 1978.

[3] For the situation in Finland, see in addition to the Report of the Penal Code Committee (note 2), the report entitled *Rikoslain kokonaisuudistus I* (Total reform of the penal code I), Oikeusministeriön lainvalmisteluosaston julkaisu 5/1984, Helsinki 1984. For the situation in Norway, see *Straffelovgivningen under omforming* (Penal law under reform), Norges offentlige utredninger 1983:57, Oslo 1983.

since they were first passed. In Sweden, extensive consideration has been given during the 1980's to the reform of the penal system.[4]

2 CRITICISM OF THE IDEOLOGY OF COERCIVE TREATMENT: SUBSTANCE AND EFFECTS

During the first half of this century, a dominant feature of the reform ideology in Scandinavia, as in many other Western countries, was the emphasis placed on the personality of the offender and on the individualization of the sanctions to be imposed on him for his offence. Each case was seen to call for individual prognosis and individually developed sanctions. A general attempt was made in criminal justice to adopt a medical and therapeutic model. This model was applied not so much to the average (incidental) offender but more to specific and distinct groups such as young offenders, mentally abnormal offenders, recidivists (chronic offenders), vagrants and misusers of alcohol. The increasing strength of the individual preventive ideology was most evident in Scandinavia in the adoption of special sanctions for young offenders, for mentally abnormal offenders and recidivists. It was typical of these new forms of sanctions that they were imposed for an indeterminate period and were to achieve one of two goals – either the treatment or the incapacitation of the offender. These trends were much less in evidence in Finland than in the other Scandinavian countries.

Coercive treatment of the individual, regardless of whether the ends to be served by it concerned criminal justice, social welfare or health care, became the subject of critical attention in the Scandinavian countries from the beginning of the 1960's. Among the questions taken up in this Scandinavian discussion were the notions of offence and illness, the reality of alcoholism treatment and in general the actual effects of various forms of deprivation of liberty.

There were many factors underlying the criticism.[5] Over the past decades, studies carried out in Scandinavia and elsewhere have dealt with the individual preventive effect of society's sanctions. In general, the studies have not demonstrated any clear differences in the resocializing effect of the various sanctions.

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[4] See e.g. the final report of the Committee on Probation, *Nya alternativ till frihetsstraff* (New alternatives to imprisonment), Statens offentliga utredningar 1984:32, Stockholm 1984. (English summary available).

[5] *Cf*. e.g. Norman Bishop, Beware of Treatment!, in *Some Developments in Nordic Criminal Policy and Criminology*, Scandinavian Research Council for Criminology, Stockholm 1975, pp. 19–27.

Even at their best, the sanctions have had only slight positive effects or have been successful with only limited groups of offenders.

The hidden delinquency studies carried out in the Scandinavian countries during the 1960's shattered the belief that the average offence was a sign of a mental disease or of some similar deviance. The focussing of increased attention on so-called modern offences as compared with traditional offences has had a similar effect.

Much of the criticism has been based on the lack of legal safeguards connected with the use of individualized sanctions. Sanctions which are determined by the offender's need for treatment or his perceived dangerousness, and which are of indeterminate length, run counter to the principles of equality and predictability in the application of sanctions.

Among the most important results of the criticism during the 1970's were the legislative reforms in Scandinavia which either abolished the special sanctions referred to above or at least clearly limited their scope of application. However, it should be noted that these reforms have led primarily to the adoption of stricter conditions of application – the adoption of *upper limits*. These are intended to ensure that the offender will not be subjected to coercive treatment in an institution or to incapacitation for a longer period than can be considered just and reasonable, having regard to the seriousness of his offence. But within the limits set in this way, the sanction should satisfy the demands made on it by the need to provide individual and humane treatment.

It is also significant that the most common sanction imposed by the courts in the Scandinavian countries has traditionally been the fine. Both Finland and Sweden make extensive use of the day-fine system. Furthermore, the sentences of imprisonment imposed in the Scandinavian countries are, by international standards, short. Usually such sentences are at most a few months in length. Thus, in practice, when the main sanctions used by Scandinavian courts were imposed, the need for treatment or incapacitation cannot have been of especial importance even before the legislative reforms referred to above were carried out.

As is typical of civil law countries, criminal justice in the Scandinavian countries is legalistically regulated, and so the discretion of the judicial bodies imposing criminal sanctions has traditionally been quite restricted. For example, the maximum punishment for each type of offence is always expressly stated in law. On the other hand, the extent to which waiving of prosecution is used because of the pettiness of the offence or on other grounds, varies considerably in the Scandinavian countries. In Finland, little use is made of the waiving of prosecution, whilst in Denmark, Norway and Sweden it is, for example, the usual outcome in cases involving property offences by young persons.

3 CRIMINAL POLICY AS PART OF SOCIETAL POLICY

In the Scandinavian discussion, the value goals of criminal policy can be seen to have become differentiated. In democratic welfare states, a number of different interests and values should be taken into consideration in making criminal policy decisions. It is not simply a question of punishing offenders or of a fight against crime at any price. Criminal policy must be an integral part of general societal policy.

There has been an increased awareness in the Scandinavian countries of the fact that the factors which exert a critical influence on the development of crime are those closely connected to the developmental processes of society (urbanization, scientific and technological progress, higher living standards) which have primarily been regarded as positive in themselves. Arguments based on criminal policy considerations can influence decisions concerning these developmental processes only to a limited extent, and the factors which significantly influence the level of crime are rarely open to effective regulation through the traditional means of criminal policy.

It is of course desirable that the amount of crime should be lessened. Ultimately, however, it is more important to minimize the social costs of crime, as well as of crime control and prevention. In attempting to decrease the amount of crime, the focus must be on prevention, above all on measures which prevent criminogenic situations, i.e. prevent the emergence of living and environmental circumstances which increase the susceptibility to commit crime. The criminal justice system should be used to combat undesirable behaviour only to the extent found to be necessary after comparing the social costs and benefits of different approaches.

Especially in Finland the attempt to apply general societal planning methods in relation to criminal policy, or at least an approach reflecting these methods can be seen. Cost-benefit thinking in policy-making has been encouraged as recommended by the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.[6] The making of systematic cost-benefit comparisons, of course, is greatly complicated by the fact that the costs and benefits cannot only be measured in economic terms, nor are they in other respects commensurable.

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[6] *Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, United Nations, New York 1976, pp. 41–51 (50). It was originally a Finnish criminologist, Patrik Törnudd, who at the turn of the 1970's launched a definition of the goals of criminal policy pertaining to the reduction and distribution of the social costs of crime. See Patrik Törnudd, The Futility of Searching for Causes of Crime, *Scandinavian Studies in Criminology* 3, Oslo 1971, pp. 23–33.

As an example of this type of analysis, reference can be made to the analysis that the Finnish Penal Code Committee carried out concerning the principles underlying criminalization. The Committee carefully considered the need for penal provisions in various spheres of social life. The significance of its analysis lies above all in the inspiration provided for new approaches. This analysis involves the following stages:

First, the Committee attempted to locate those forms of behaviour which appear to be most harmful when judged in the light of the specific goals of each sphere of life. Does certain behaviour harm or endanger the interests of an individual or of society, and if so, to what extent? Secondly, the Committee evaluated the blameworthiness of these harmful acts. This involved a discussion of, for example, the actual freedom of the human agent and the circumstances in which it is reasonable to pronounce the agent blameworthy. Thirdly, the Committee attempted a systematic weighing of the advantages and disadvantages of criminalization both in terms of legal and in social development. Any means of penal control must have a purpose related to a view of other possible methods of regulation such as supervision and technological or administrative arrangements. The Committee based its analysis on the assumption that the extent to which resort can be had to the criminal law is limited. In addition, penal regulation is subject to special restrictions; for example, a penal provision must never leave too much scope for interpretation.

An increased differentiation in determining the aims of criminal policy can also be seen in the fact that more attention is being paid to arguments of justice. What is the just allocation of the social costs of crime and crime control among the different parties, such as society, offenders and victims?

Improving the position of the victim has also been a matter of great interest in the Scandinavian countries. But it is true that the victim has already by tradition had a strong position in the legal systems of these countries which have even adopted systems for the compensation of crime damages from state funds.

The development of crime prevention strategies also brings up the following question of justice. To what extent is it fair and reasonable to oblige the public in general, and the potential victims of crimes in particular, to undertake preventive measures? Arguments based on both effectiveness and justice would appear to support paying increased attention to crimino- and victimogenic situations and to the controlling of the opportunity structure.[7]

[7] *Cf*. e.g. Eckart Kühlhorn – Bo Svensson, *Crime Prevention*. The National Swedish Council for Crime Prevention, Report No. 9, Stockholm 1982.

In order for it to be possible to coordinate the activity of the authorities and promote cooperation between the authorities and the public in criminal policy, special coordination and study bodies have been appointed in Denmark, Norway and Sweden. The Swedish body, the National Swedish Council for Crime Prevention, has been provided with ample resources for research. In Finland, too, criminological research has primarily an organizational link with decision-making.

4 FUTURE TRENDS IN THE DEVELOPMENT OF THE CRIMINAL JUSTICE SYSTEM

In the above-mentioned official publications on criminal policy appearing at the end of the 1970's and the beginning of the 1980's in the various Scandinavian countries, special attention is given to the criteria for the evaluation of the criminal justice system and of its development.

The relative significance of the criminal justice system in maintaining conformity in behaviour is seen to have decreased. The existence of the criminal justice system in the Scandinavian countries is justified on utilitarian grounds, i.e. on grounds of crime prevention and control. The structure and content of the criminal justice system cannot, however, be determined solely on the basis of arguments of effectiveness. The criteria of justice and humaneness must also be used.[8]

This emphasis on several criteria of rationality is allied to what has already been noted the possibilities of the criminal justice system to successfully combat crime are, at best, quite limited. That even quite severe punishments do not make a criminal justice system effective is demonstrated by the fact of the rather similar crime trends in both Finland and Norway over the past few decades yet the Finnish penal system during this period has clearly been more punitive than the Norwegian one.[9]

The emphasis on the non-utilitarian goals of the criminal justice system justice and humaneness – must thus be connected with the decrease in the repressive features of that system, for example through the development of alternatives to imprisonment. The principles of justice and humaneness have a restraining and limit-setting function.

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[8] *Cf.* in general *Effective, Rational and Humane Criminal Justice*, Helsinki Institute for Crime Prevention and Control affiliated with the United Nations, Publication Series No. 3, Helsinki 1984.

[9] A good illustration of this can be found in Hanns von Hofer, *Nordic Criminal Statistics 1950–1980* (81), Statistics Sweden, Stockholm 1984, pp. 24–25.

In the debate in the Scandinavian countries, it has been held that it is possible to a large extent to apply the main criteria for rationality in the criminal justice system – effectiveness, justice and humaneness – without this resulting in conflicting conclusions about the development of the system. In order for this to be possible these principles must be made specific in a particular way. Thus, in respect of the mechanisms through which the primary measure of efficiency, general prevention, exerts its effects, the emphasis must be on features other than the deterrent effect of the punishment itself. Similarly, the criteria of justice cannot simply refer to formal legal safeguards (for example, predictability) but must also encompass justice and legal guarantees that are determined on the basis of material criteria (for example, reasonableness *in casu*).

Some commentators have chosen to characterize the recent trends in criminal policy in the Scandinavian countries as "neo-legalism" or "neo-classicism". The basis for such a characterization has been that these trends place a relatively strong emphasis on general prevention and justice and are correspondingly critical of coercive treatment. However, the characterization is misleading, especially when the differences between the Scandinavian trends and the "just deserts" movement, which has received support in the United States of America, are considered. Some of the sources of the misconceptions are dealt with here.[10]

First of all, there is a preference in the Scandinavian countries for speaking of general prevention rather than general deterrence. The effectiveness of the criminal justice system and the credibility of the threat of punishment depend above all on the degree of certainty and speed with which offenders are apprehended and punished. Furthermore, unofficial mechanisms of social control should be activated as an alternative to formal punishment. The actual penal value of the different types of sanctions varies. Thus, for example, the shortening of periods of imprisonment along with increases in the standard of living, does not signify a greater leniency but can rather be interpreted as maintenance of an earlier balance.

The important specific function of punishment is to demonstrate socio-ethical reproach and, in this way, influence the sense of morals and justice. This function has long been emphasized in the Scandinavian countries and its fulfillment does not call for a severe penal system. There are, however, differing views about the extent to which the criminal justice system should

[10] *Cf*. also e.g. Inkeri Anttila, op. cit. in *Selected Issues in Criminal Justice*; and Inkeri Anttila – Patrik Törnudd, Reasons for Punishment, in *Crime and Crime Control in Scandinavia*. Scandinavian Research Council for Criminology 1980, pp. 48–52.

demonstrate authoritative reproach regardless of its preventive effects. These differing views relate in other words to the importance accorded to the symbolic, expressive value of the penal system as such as a reflection of the values prevailing in society.

The fact that the criminal justice system is used to influence the formation and maintenance of moral and social norms at the same time sets the criteria for the legitimacy of the system: the public must feel that it operates in an acceptable manner. From the point of view of legitimacy, the actual realization in criminal justice of such principles of justice as equality and proportionality are of central importance. As has already been noted, these principles should not be understood in too formal a manner. Substantive criteria of evaluation are significant when we consider what cases are similar in *relevant* respects, or what sanction stands in a proportional relation to a specific offence.

The Finnish Penal Code Committee for example – with reference to a rather extensive definition of the principle of proportionality – recommended the rejection of the use of types of punishment which, having regard to all the consequential effects, would, as a whole, be manifestly unfair from the point of view of the offender. The following application by the Committee of the principles of justice and proportionality is also of general interest: when considering the criminalization of, and punishment for, a certain type of unacceptable act, attention should be paid, for example, to the degree to which the act is deliberate and to the social resources of the potential offenders. This notion of the degree of reproach which is called for by different kinds of acts may, *inter alia*, lead to a reassessment of the relative importance of certain forms of economic crime as compared with traditional property crime.

Questions of criminalization and the determination of the level of the threat of punishment have been especially topical in Finland, Norway and Sweden. Economic crime and computer crime have been a focus of special attention in the Scandinavian countries.[11] Among the most important questions in the debate have been the role of the criminal justice system in the prevention and control of these types of modern violations of the law or abuses of power. On the one hand, a very extensive application of means which are an alternative to the criminal justice system can be considered, for example regulation through civil and/or administrative law. On the other hand, the dynamic development of the criminal justice system to meet the challenges set by modern forms of

[11] *Cf*. Bo Svensson's article in this publication (= *Scandinavian Criminal Policy and Criminology 1980–85*). – Drug criminality is another category of offences which have been the centre of common Scandinavian interest; see Sten Heckscher's article, *ibid*.

offences can be demanded. Thus, for example, reforms are under way in both Sweden and Finland to extend criminal responsibility to corporations (such responsibility already exists in Denmark and Norway) and in any case also to use criminal justice as a means of increasing the effectiveness of the prevention and control of corporate crime.

One problematic aspect is that along with the pressure to expand the scope of criminalized behaviour and increase the severity of punishments for certain offences, it is difficult to agree on corresponding decriminalizations and the lowering of the severity of punishment for other offences. It is true that the scope of so-called offences against morality has been radically diminished in the Scandinavian countries. At the same time greater emphasis has been placed, when considering the criminalization of acts, on the need to first demonstrate the harm presented by these acts, i.e. the extent to which they damage or endanger the interests of society or the individual. Similarly, the criteria for more specific definition of damage and danger are currently being considered.

A feature which is typical of the criminal justice systems of the Scandinavian countries is the breadth of the concept of "offence". There is no clear distinction between criminalized acts and infractions which can only be sanctioned administratively. Such a distinction has been made in many Continental European legal systems. The extent to which minor infractions should be subject to penal sanctions in the future is also one of the current topics of discussion with plans for reform.

5 AN ALTERNATIVE CRIMINAL POLICY IN THE SCANDINAVIAN COUNTRIES[12]

There has been disagreement in the Scandinavian countries about both the direction and the details of criminal policy. In particular, certain criminologists have presented views which accord with the so-called abolitionist tendency. Their criticism has, for example, questioned the rationality of the criminal justice system as such and regarded its function as being solely symbolic and expressive. Demands have come from many quarters to adopt alternative means of resolving conflicts, for example, though community service and mediation. Along with demands for greater diversity in the sanctions, additional criteria

[12] *Cf*. in general e.g. Thomas Mathiesen, The Politics of Abolition, *Scandinavian Studies in Crimonology* 4, Oslo 1974; Nils Christie, *Limits to Pain*, Oslo 1981; Verner Goldschmidt, Material Alternatives to Legal Resolution of Criminal Conflicts, *International Annals of Criminology* 22, 1984, pp. 75–95.

have been emphasized for the contents of those sanctions. Voluntary treatment, help and assistance should be offered to offenders and there should also be a readiness to forgive and show empathy and forbearance.

A closer examination shows that these differences of opinion are often more imaginary than real. For example, almost all criminal policy experts have agreed that major attention should be paid to the development of alternative means lying outside the criminal justice system and that the repressiveness of the penal system (for example, the use of imprisonment) should be reduced. This latter goal is of particular importance in Finland, which uses somewhat longer sentences of imprisonment than do the other Scandinavian countries.

There are, however, real differences of opinion concerning, for example, the extent to which the degree of reproach called for by different offences should find expression in proportion to the punitive element embodied in the criminal sanction. The more this aspect is emphasized, the more importance is attached to the rule of law and the predictability of systems of sanctions.

From the sociological point of view, this disagreement can be seen to revolve around the question of how much weight it is desired to place on the ideas of justice and law represented by the "Gesellschaft" type of society. An organized system of legal safeguards based on the rule of law represents the ideals of an industrialized and urbanized society ("Gesellschaft"). Its opposite, the "Gemeinschaft" type of society, is characterized by an emphasis on balance, solidarity and a sense of community. It follows from the values of such a society that what is sought is an integrated way to solve conflicts within the framework of a system of justice that is not regulated by rules. Such an approach follows from the values of such a community ("Gemeinschaft") that what is sought is an integrated way to solve conflicts within the framework of a system of justice that is not regulated by formal rules. Such an approach places primary importance on fairness, i.e. "reasonableness" in each particular case. The strengthening of these kinds of values is linked to the current so-called "green-wave" ideology in the Western countries.

14. Sub-Regional Criminal Policy – The Experience of the Nordic Countries*

1 INTRODUCTION

The need for inter-state co-operation in crime prevention and control has been increasing during the last few decades all over the world. The importance of this kind of co-operation has also been recognized in many recent documents of international and regional bodies and organizations. For example, the Guiding Principles for Crime Prevention and Criminal Justice, adopted by the Seventh United Nations (UN) Congress on the Prevention of Crime and the Treatment of Offenders at Milan in 1985, include a special chapter on this topic. The main parts of two articles (nos. 39–40) in these Guiding Principles propose that:

(i) the ways and means of international co-operation in penal matters should be made less cumbersome and more effective;
(ii) the international co-operation in criminal justice should be in accordance with the respective legal systems of the co-operating states and with due regard to human rights and internationally accepted legal standards.

Since the 1970s, UN organs have strengthened their activities in setting standards and guidelines for crime prevention and criminal justice. Following the Milan Congress (1985), the UN has also begun to elaborate model agreements and other instruments for international and regional co-operation in the field. In his paper for the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders at Havana in 1990, Professor *Albin Eser* advocates a rethinking of the basic issues concerning transnational co-operation in criminal cases. For example, in giving to the suspect the status of a subject possessing

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rights of his own, it might be possible to remove many of the traditional obstacles to efficient legal assistance (such as the principle of double criminality).[1]

As different modalities of inter-state co-operation are developed in accord with the recommendations of the Milan Guiding Principles and Professor Eser's paper, the experience of a *sub*-region of Europe, i.e. of the Nordic (Scandinavian) countries, may be of interest.[2]

2 TOWARDS AN EFFECTIVE CO-OPERATION IN CRIMINAL MATTERS

Various ways and means of Nordic co-operation have been developed since the Second World War, and these inter-state activities have become still more diversified since the 1960s. The role of Nordic co-operation in penal matters continues to be important even though these countries have also, to a large degree, acceded to multilateral regional treaties (i.e. European conventions) in the field. These forms of co-operation include extradition, "minor" judicial assistance, the transfer of criminal proceedings, and the enforcement of penal judgements. There are many reasons for the continued preference for sub-regional co-operation in Scandinavia. Among them are the following:

Firstly, co-operation and harmonization among the Nordic countries in the legal field has ancient historical roots. Even the first statutory provincial laws in the 12th and 13th centuries indicated a considerable Nordic unity in legal thinking. Denmark, Norway and Iceland, on the one hand, and Sweden and Finland, on the other, were politically united for long periods. During the time Finland was incorporated into Russia (1809–1917), it still proved possible to maintain the constitution and codified laws which were inherited from Sweden. Common legal traditions and crucial similarities in economic, social and cultural development can be regarded as the main reasons for the strong mutual *confidence* which prevails between the Nordic states.

Secondly, Nordic co-operation in criminal matters is based on a variety of sources. These consist primarily of the treaties between the Nordic countries, of multilateral European conventions, of common basic approaches in crime

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[1] Eser, Basic Issues Concerning Transnational Cooperation in Criminal Cases: A Problem in Outline, in: *Prevention of Crime and Treatment of Offenders* 18, 15–18 (Der Bundesminister der Justiz, 1990).

[2] Concerning the experience of the Benelux countries, *cf*. Fijnaut, Police Co-operation within Western Europe, in: *Crime in Europe* 115, 103–120 (F. Heidensohn *et al*. eds. 1991).

control and human rights policies, of uniform legislation in relevant areas, and of established practice between state authorities.

Thirdly, in consequence of the above-mentioned factors, certain material principles and procedural rules governing Nordic co-operation make their application more effective than is usually the case with this type of international co-operation.

Fourthly, most of the individual criminal cases involving foreign elements arise from relations between the Nordic countries. Movement from one Nordic country to another is very free and migration between these states (in particular from Finland to Sweden) is common.

3 TREATY OF HELSINKI (1962) AND UNIFORM LAWS ON NORDIC CO-OPERATION[3]

The objectives, means and organs of co-operation between the Nordic countries have been laid down in a special treaty – the Treaty of Helsinki – signed in 1962. This treaty covers co-operation in the legal, cultural, social and economic fields as well as in traffic and environmental matters. The main provisions concerning co-operation in *criminal* matters are the following:

> Article 5: The Contracting Parties should strive to create uniform provisions concerning crime and the sanctions for crime.
>
> The investigation and prosecution of a crime committed in one Nordic country should, to the greatest possible extent, be pursued also in another Nordic country.
>
> Article 7: Each Contracting Party should work for the creation of such provisions that a judgement by a court or other authority in another Nordic country can be executed also within the territory of the Party in question.

The uniform laws on the extradition of offenders from one Nordic country to another (1960) and on Nordic co-operation in the enforcement of penal judgements (1963) may serve as an illustration of the flexible provisions for co-operation that exist. The application of both instruments is more efficient than is the case with the corresponding European conventions.

Under the provisions of the first-mentioned uniform laws, one Nordic state may, with certain qualifications, extradite even its own citizen to another. The Nordic laws broadly allow extradition without requiring double criminality

[3] See also Littunen, Finlande, 55 *Revue Internationale de Droit Pénal* 136, 133–145 (1984). The volume was devoted to the topic "Structures and Methods of International and Regional Co-operation in the Field of Criminal Law".

something which is very exceptional from a comparative point of view.[4] With an exception concerning extradition of Finnish citizens, the Nordic Extradition Act (Finnish Act No. 270/1960) only requires that the offence be punishable in the *requesting* state by a more severe punishment than a fine. In relation to the required evidence, it is conclusive that the requesting Nordic state is satisfied of its sufficiency.

When transferring the enforcement of penal judgements in accordance with the unified Nordic laws, the consent of the prisoner is not necessarily required. This is an exception to the prevalent principle regarding the transfer of foreign prisoners.[5] One feature characterizing several instruments of Nordic co-operation is the fact that the procedural rules in judicial assistance are simplified in comparison with co-operation outside Scandinavia. Thus, the authorities in the Nordic countries may correspond directly with each other and agreements even have been concluded between certain central state authorities (e.g., police, prosecuting and tax authorities).

4 COMMON APPROACHES IN CRIME CONTROL AND HUMAN RIGHTS POLICIES

A precondition for continuing fruitful co-operation lies in a common approach to basic crime control and human rights issues. Essential similarities are discernible in the goals, values and principles governing the reform of Nordic penal codes and the criminal justice systems in these countries. Endeavours to harmonize criminal legislation have led to a number of positive results, particularly in the reform of systems of penal sanctions.[6]

It should be, however, said that there have also been divergent ideological trends in Scandinavia, and that efforts to reform criminal legislation are not always identical in the different Nordic states. One example of divergent crime policy concerns drugs.[7] When one looks at the differences from close up, they

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[4] See generally, *Double Criminality: Studies in International Criminal Law* (N. Jareborg ed. 1989).

[5] See, e.g., Convention on the Transfer of Sentenced Persons, *European Treaty Series* No. 112, and Epp, Strukturen und Methoden der internationalen und regionalen Zusammenarbeit auf dem Gebiete des Strafrechts, 97 *Zeitschrift für die gesamte Strafrechtswissenschaft* 728, 724–730 (1985).

[6] See, e.g., Lahti, Current Trends in Criminal Policy in the Scandinavian Countries, in: *Scandinavian Criminal Policy and Criminology 1980–85*, at 59 (N. Bishop ed. 1985), and Lahti, Finnish and Scandinavian Criminal Policy, *Cahiers de Défense Sociale,* at 64 (1989).

[7] See generally, Drugs and Drug Control, 8 *Scandinavian Studies in Criminology* (P. Stangeland ed. 1987).

seem striking.[8] But, as a whole, crime control policies in Scandinavia are essentially similar compared with most other corresponding subregions or regions.

The representatives of the Nordic countries have, in many ways, promoted efforts to elaborate internationally accepted (minimum) standards for criminal policy and criminal justice and to implement them.[9] There are also significant unifying features in the human rights policies of the Nordic states.[10]

5 CONCLUSIONS

The experience of the Nordic countries suggests that effective inter-state co-operation in criminal matters is possible. It also suggests that sub-regional co-operation may work in a less cumbersome manner than other forms of international co-operation.

The most important factor making for smooth co-operation is obviously strong confidence in, and respect for, the social and legal order as well as the criminal justice system of neighbouring countries in Scandinavia. This being the case, a pessimist might conclude that, without common legal traditions and crucial similarities in economic, social and cultural development, such a strong degree of confidence is impossible.

I am inclined to a more optimistic view. Elaboration and implementation of regionally and internationally accepted standards for crime control and criminal justice improve the possibilities for inter-state co-operation in criminal matters. Human rights aspects and humanitarian considerations are of special importance in this connection.

Harmonization of criminal legislation and approaches to criminal policy is also desirable. The goals, values and principles governing inter-state co-operation in penal matters must be carefully analyzed, and these criteria must be considered in the context of the criminal policy of individual states. Although there are disparities in the objectives and means of international or regional criminal policy, on one hand, and national criminal policy on the other, the differences should not be exaggerated. Accordingly, general trends in criminal policy thinking should be closely examined.

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[8] See, e.g., Sveri, Criminal Law and Penal Sanctions, 11 *Scandinavian Studies in Criminology*, at 11 (A. Snare ed. 1990).

[9] For some concrete examples of these endeavours, see Lahti (*supra* note 6).

[10] See *Human Rights and the Nordic Countries*. *Current Research on Peace and Violence* (A. Rosas ed. 1986). Finland joined Council of Europe in 1989 and ratified the European Convention on Human Rights in 1990.

It is also worth mentioning that various instruments of inter-state co-operation have partly divergent objectives and functions. Thus, the importance attached to different traditional principles (such as reciprocity and double criminality) may vary when balancing goals and values against each other; further, growing concern for the protection of human rights is reducing their significance down to nothing.[11]

[11] See Eser (*supra* note 1).

15. Towards a Rational and Humane Criminal Policy – Trends in Scandinavian Penal Thinking*

ABSTRACT

Ideological trends in the criminal policy of the Nordic countries since the 1960s are analyzed. Although criminal policy in these countries is not unified, one can argue for the existence of a 'Scandinavian criminal policy' characterized by several common features concerning historical tradition, intensive cooperation and a similar approach to crime prevention and control. The following trends and characteristics are examined in some detail: the cycle from criticism of the treatment ideology to a reappraisal of the role of the criminal justice system and the function of penal sanctions; the differentiation of criminal policy strategies (e.g. social and situational crime prevention, cost-benefit thinking, criminal law policy, sanctions policy). Discernible tendencies towards more unified or, at least, more harmonized criminal policies on the international and European level are also examined. Active participation in this developmental process is encouraged to ensure that the fundamental principles of Scandinavian criminal policy are properly utilized.

The development of Scandinavian criminal policy is such an extensive theme that its examination will necessarily have to be limited, both substantively and temporally. My personal temporal scope begins from the year 1967 when, as a young university assistant in criminal law, I took part in a Nordic conference of criminal scientists and practitioners (then arranged for the sixth time) in Stockholm, Sweden. That year, *Inkeri Anttila* gave her famous lecture on Conservative and Radical Criminal Policy in the Nordic Countries (Anttila, 1971); that lecture has also been the source of inspiration for this paper. Accordingly, I propose to examine the trends in criminal policy during the past decades, in

* Original source: *Journal of Scandinavian Studies in Criminology and Crime Prevention*, Taylor & Francis, 1:2, 2000, pp. 141–155. (Doi: 10.1080/140438500300076135) Reprinted by permission of Taylor & Francis Group, http://www.tandfonline.com, on behalf of The Scandinavian Research Council for Criminology.

part on the basis of my own, subjective observations and my participation in the framing of Finnish criminal policy over the past 30 years.

However, I will not limit myself to examining the past. Instead, I aim for an evaluating and future-orientated approach. Has Scandinavian criminal policy been successful? What challenges will it meet in the 21st century? Are we heading towards internationalized or Europeanized criminal policy, at the same time jeopardizing much of the positive impact that the penal thinking in the Nordic countries has had?

Discussion of Scandinavian criminal policy involves generalizations and often also a fair degree of idealism: there has not been any uniform criminal policy common to the various Nordic countries, but nevertheless it is possible to discern certain essential similarities among them, especially from a distance. We Nordics are aware of our common background in legal history, and the organs of Nordic cooperation and the various forms of cooperation between individual Nordic countries have contributed to the similarity of our legal systems. For instance, it is stated in Article 5 of the Nordic Cooperation Agreement (1962) that the contracting parties should aim for mutually consistent provisions on criminal offences and their sanctions. According to the same Article it should also be possible, in the broadest extent, for one Nordic country to investigate and judge offences when these have been committed in another. In these countries, uniform legislation on cooperation in crime control and direct contacts between the authorities make it quite simple to undertake inter-state measures in criminal matters (see Lahti, 1992).

As will be stated in greater detail below, it is becoming increasingly important to identify the distinguishing characteristics – especially the value judgements – that define, or should define, what Nordic criminal policy is all about, now that the tendencies of internationalization and Europeanization are clearly making inroads on criminal policy.

1 CRIMINAL POLICY: CONCEPT AND VARIATIONS

I use the concept of criminal policy in a broad sense, as a whole, covering the public debate and decision-making pertaining to crime prevention and to the control and sanctioning of criminal behaviour. Also other comparable deviant behaviour inviting punitive sanctions is to be understood to fall within this definition. This broadening of the scope, from (narrow) criminal policy to control policy is important, as it allows the consideration of the sanctions policy of the European Communities (EC) and the evaluation of European criminal policy.

The definition supplied above refers to the practical manifestations of criminal policy – the decisions of society with regard to crime and the measures against crime. In addition, the concept has a theoretical or scholarly dimension: research into criminal policy comes close to research into general legal policy and into applied criminology. Research into criminal policy is a form of criminal scholarship, taking its place on the side of research into penal law and criminology. Especially in Finland, it has been considered important that the problems formulated in the field of criminology are also set in the context of general social decision-making: that is, practical criminal policy. Moreover, the theoretical/scholarly dimension of criminal policy also lends itself to criticism against the real criminal policy decision-making and the penal law in force, as well as to the development of a critical theory of the same.

In this paper, I have mainly the theoretical dimension in mind; in other words, I will discuss such criminal policy that can be justified intellectually and by (other) rational considerations. At the same time, it is to be hoped that a fruitful interaction can be achieved between theoretical and practical criminal policy. It is likely that that interaction would often be wrought with tension and even outright controversy, affected as the practical side of criminal policy is by political considerations and high emotions.

Conceptual analysis is not without its implications in the study of the developments of criminal policy. The changes that have occurred over time are not limited to variations in the concept of criminal behaviour or in its prevention, control and sanctions. Indeed, we should ask ourselves what are the changes that have taken place in our perceptions of crime and its prevention; that is, of criminal policy and its emphases. For instance, the following questions merit some consideration: what factors of ideology and intellect have affected Nordic criminal policy since the 1960s? What is the relationship of these developments with criminological research and theories of criminal policy? To what extent has practical criminal policy been based on research and rational justifications; what sort of interaction between theory and practice will be realistic in the future?

In her 1967 lecture, Inkeri Anttila proposed that the decisive issue separating conservative and radical criminal policy is the difference of opinion on the rate at which the institutions, values, legal systems and attitudes should be changing. It is apparent that she sympathized with the radical movement in criminal policy, one that should build on a conscious, balanced ideology and be prepared to adopt a rapid implementation of reforms pertaining to decriminalization and crime prevention. She recommended that an analysis of the perceptible trends of the new criminal policy be carried out, e.g. so as to create

a basis for the well-thought-out planning of criminological research strategies (Anttila, 1971: 20–21).

2 FROM CRITICISM AGAINST TREATMENT IDEOLOGY TO A RECONSIDERATION OF THE ROLE OF THE CRIMINAL SYSTEM AND THE FUNCTION OF PENAL SANCTIONS

The origins of scholarly criminal policy are usually traced back to the sociological (modern) school of penal law, of *Franz von Liszt* and other like-minded people. The background of this school was in the positivistic ideal of scholarship. As is well known, the most important work of the school was directed against the traditional system of penal sanctions. The argument went that, in sentencing to penal sanctions, more attention should be given to the personal characteristics of the offender than what was possible merely by looking into those apparent in an individual criminal act. The central, albeit not the only, considerations in the selection of the type of sanction should be the offender's need of treatment (care) and his dangerousness.

The new ideology spread rapidly, already affecting the contents of many draft penal laws that were proposed in Europe at the end of the 19th century. Its influence was even more pronounced in the draft proposals and reforms of penal legislation drawn up in the beginning of the 20th century. The Norwegian professors *Francis Hagerup* and *Bernhard Getz* were trailblazers in the realization of the sociological school's programme in the Nordic countries. The Norwegian Penal Code, of 1902, to which Getz contributed intensely both in realization and content, was deemed to be the most modern of its time.

Thereafter, individual prevention was emphasized in the Nordic, as well as in other European countries and the United States, for most of the first half of the 20th century. The increasing influence of the theories of individual prevention could in the Nordic countries be seen especially in the drafting of special sanctions for, e.g. young offenders, as well as for the mentally ill and for repeat offenders. In addition, the introduction of suspended sentences (Norway 1894, Denmark 1905, Sweden 1906 and Finland 1918) arose from the programme of the sociological school.

In the Nordic countries, the golden age for indefinite or individualized sanctions, which aimed either for the treatment of the offender or for rendering him harmless, lasted for some 30 years. It should be noted none the less that the ideology of individual prevention did not operate with the same effect everywhere in

the Nordics, and that since the late 1960s it met with increasing criticism. The critics were mainly Norwegian and Finnish criminologists, such as *Nils Christie* (1960) and (summarizing) Inkeri Anttila (1971). Moreover, several pamphlets were published on the same theme; the foremost of these included 'Varning för vård' [Beware of treatment, 1967] and 'Behandling som straff' [Treatment as punishment, 1969]. (On the discussion see also, e.g. Bishop, 1975.)

The criticism built on numerous reasons. The improved criminological methodology had not been effective in identifying treatments that would be tangibly or generally better than others in decreasing recidivism. In addition, the studies of unreported crime carried out in the Nordic countries during the 1960s contributed, for their part, to breaching the conception that an average offence was a symptom of a mental illness or a comparable abnormal condition. The criticism was, to a considerable degree, based on points of principle; that is, the lack of legal security arising from a farreaching individualization of sanctions. Indefinite sanctions, imposed in accordance with the need of the offender for treatment or his dangerousness, were perceived as contrary to such important legal principles as proportionality and equality, or more generally contrary to justice and foreseeability.

This criticism against the idea of treatment and the reappraisal of the role of the criminal justice system and the function of penal sanctions were the central themes of the official reports on questions of principle, carried out in 1977 and 1978 in the various Nordic countries: the Report of the Finnish Penal Law Committee, the proposal 'Nytt straffsystem' [New penal system] of the Swedish Council for Crime Prevention, the Norwegian 'Kriminalmelding' [The justice and police ministry's communication on criminal policy to the Stortinget], as well as the Danish report 'Alternativer till frihedsstraf' [Alternatives to imprisonment].

These reports were reflective of a new criminal policy, often described as 'neoclassicism', as it had similarities with certain themes in the classical penal law of the 19th century – mainly, however, with regard to their foundations in the philosophy of the enlightenment and in the theories on the rule of law. This new criminal policy was the topic of the eighth Nordic conference of criminal scientists and practitioners in Oslo, Norway, in 1979; the following year, a joint Nordic pamphlet 'Straff och rättfärdighet' [Punishment and justice] was published on the same theme.

From the outset, it was evident that it would not be possible to clearly define what this new criminal policy actually meant (*cf*. e.g. Törnudd, 1996: 82–90). There was widespread agreement that emphasis should be put on justice, legal security and humaneness as leading legal principles in the crimi-

nal justice system, at the same time putting value on the general preventive effects of the penal law. The balance of these values and interests varied from one country to another, so that, for example, in the Danish and Norwegian reports the reasoning was pragmatic and consequence-orientated – requiring that the use of punishments be reduced and alternatives to imprisonment developed. The Finnish and Swedish reports gave rise to a new renaissance of general prevention, mainly in the sense of positive general deterrence and reinforcement of morals (the indirect effect of the penal system on morality and the popular attitude towards obeying the law), instead of plain deterrence (see especially Andenaes, 1974, *passim*; Törnudd, 1996: 11–22). The new ideology was at its most evident in the legislation on sentencing in Finland (1976) and Sweden (1989). It should be noted here that Denmark had already amended its penal legislation in 1973 so as to remove the possibility of indefinite penal sanctions.

Without a committal to the term 'neoclassicism' or similar slogans, I shall in the following provide a more detailed analysis of the development of criminal policy up to the new millennium, starting from the main points of the reports on questions of principle referred to above (and especially the Report of the Finnish Penal Law Committee). At the same time, I strive for an appraising and future-orientated approach: how have we succeeded in the new criminal policy, what are the threats facing it and the opportunities of the future in circumstances where criminal policy is becoming increasingly internationalized?

3 A DIFFERENTIATION OF CRIMINAL POLICY STRATEGIES (I): SOCIAL PLANNING AND CRIME PREVENTION

The Finnish, Swedish and Norwegian reports on questions of principle, referred to above, looked at criminal policy as a part of general social policy, even if their main emphasis was on the reappraisal of the system of sanctions in penal law. It was important to realize that the criminal justice system has a given limiting effect on the level or structure of crime, and to be aware of the role of social planning and crime prevention as alternatives or complements to the measures available under penal law.

Starting from these premises, the order of priority of criminal policy measures should be altered, while the planning and decision-making should take place on a broader platform. Taking these objectives into account, attempts

have been made to promote cooperation between authorities, organizations and citizens' groups in order to address crime problems and to improve the coordination of crime prevention measures. Accordingly, special coordination and research bodies have been established, first in Denmark: 'Det kriminalpræventive råd' (1971) and in Sweden: 'Brottsförebyggande rådet' (1974); later, similar consultative bodies were also established in Norway and Finland.

The interest in crime prevention and research into the same has recently been increasing. National crime prevention programmes have recently been adopted both in Sweden (1996) and in Finland (1999). The traditional approach in the Nordic countries has been to stress 'soft' measures – that is, general or social crime prevention – but during recent years the role of situational prevention (the immediate prevention of crime) has also become more pronounced to a degree that criticism has been raised, e.g. against increasing social segregation and the privatization of the legal system (see e.g. Greve, 1999: 47).

The goal of applying the general planning methods of social policy or other similar reasoning models in criminal policy in Finland, for example, was expressed in a more differentiated way of defining the objectives and means of criminal policy (see originally Törnudd, 1971: 29–31). The special goals of criminal policy were clearly laid out: (a) to minimize the suffering and other personal or social costs (injuries, inconvenience) caused by crime or by the measures of society to control crime, and (b) to allocate these costs in a fair manner. Hence, the leading principle is that crime should not be minimized 'whatever the cost'. Indicators of damage both from crime and from its control are necessary so that the relative costs can be measured. We should strive for an optimal balance of costs, and for an allocation of costs that is as fair as possible.

Recently, two Finnish criminologists, *Patrik Törnudd* and *Tapio Lappi-Seppälä*, have evaluated how the said goals have been achieved in Finnish criminal policy (Törnudd, 1993, 1996: 163–80; Lappi-Seppälä, 1998, 2000). They have, for example, compared the prison populations and reported criminal offences in four Nordic countries (Finland, Denmark, Norway and Sweden) from as far in the past as the 1950s, as well as looked into international crime victim studies. During the period under scrutiny, the prison population in Finland halved, while in the other countries it stayed about the same; none the less, the development of crime rates was quite similar in all of them. Hence, it can be argued that human suffering and real material costs had been reduced in Finland without the development of crime having been essentially different than what it otherwise would probably have been.

It is not possible to measure the success of criminal policy in a uniform manner. The goals noted above, of course, require an increased consciousness of values,

costs and alternatives in criminal policy, but they do not alter the prioritization and the weighing of values and interests that have to be present in social planning and policy-making. The requirement that criminal policy should be more based on empirical and other research does not exclude the role of values; it is more likely that we become increasingly conscious of them (Andenaes, 1974: 170).

On the other hand, we should naturally require that the goals and means of criminal policy are framed in a manner meeting the general criteria of rationality that may reasonably be required of public debate (see e.g. Aarnio, 1987, ch. IV: 2.4). To quote *Nils Jareborg*: explicate the values in a manner that makes them 'better considered, more rational' (Jareborg, 1974: 229). In the context of this discussion about rationality, criminal scholarship is close to the disciplines of moral and social philosophy, political science, social theory, and law and economics.

4 A DIFFERENTIATION OF CRIMINAL POLICY STRATEGIES (II): PENAL LAW POLICY AND SANCTIONS POLICY

A common feature for the reports on questions of principle from 1977–78, as mentioned above, was the sharp criticism against the existing penal system, especially indefinite penal sanctions and imprisonment in general. The requirement of humaneness and the goal of reducing control-caused damage were arguments for more lenient penalties and for alternatives to imprisonment. The developments of the 1980s and 1990s did not result in a decrease of repression envisaged in the reports, with the exception of the drastically reduced prison population in Finland (see section 3). In the other Nordic countries the prison populations have remained stable for the past decades, but in other respects the criminal policy climate underwent changes especially in Sweden and Norway, becoming chillier towards the end of the 1980s.

The causes and future outlooks of the change were analyzed in two anthologies, 'Nordiska kriminologer om 90-talets kriminalpolitik' [Nordic criminologists on criminal policy in the 90s, 1990] and 'Varning för straff' [Beware of punishment (Snare, 1995)]; some of the authors of the latter work were the same as those in the earlier pamphlet, 'Straff och rättfärdighet' [Punishment and justice, 1980]. Right at the end of the 1990s, another anthology was published on the initiative of the Swedish Crime Prevention Council, on the development needs of criminal policy at the onset of the new millennium (1999).

The anthologies cover the various dimensions of criminal policy; they are at their most inspiring when a critical presentation is made of the threats and opportunities faced by criminal policy (see section 5). With regard to penal law policy and sanctions policy, especially the article by Nils Jareborg – a sort of theoretical frame of reference for the whole of 'Beware of punishment' – is an important basis for discussion. Jareborg (1995) distinguishes defensive penal law policy and offensive penal law policy. These involve two ideal models for decision-making on the system of penal law (mainly: the principles of criminalization, the guarantees of legal security in criminal procedure, the sentencing principles, as well as the enforcement of criminal sanctions). Jareborg argues for the defensive model, whose principles and guarantees correspond to the penal law ideologies of a state governed by the rule of law (i.e. it summarizes the basic values of a *Rechtsstaat*).

The offensive approach, which has many of the same aspects as the defensive one, still emphasizes social technology and sees prevention as the dominant viewpoint. Jareborg's description of the methods and consequences of this approach shows many of the same traits as the penal law ideology of a social welfare state. Modern penal law provisions, such as those pertaining to economic crime, employment offences and environmental offences, all drafted since 1990 in the course of the overall reform of the Finnish Penal Code, display many of the characteristics of the offensive approach, making them susceptible to criticism from the points of view of legal security and legitimacy.

In my opinion, the critical views that can be expressed on the offensive approach should be taken duly into account. At the same time, we should aim for a proper balance between the penal law ideologies of a state governed by the rule of law and a social welfare state (see also Greve, 1999: 46). Penal law theory must be developed so that it provides the drafters and appliers of penal legislation with systematic arguments of principle to protect individuals against abuses of power and to limit the uses of penal law. The increasing recognition of human rights and considerations concerning constitutional rights, which have dominated Finnish legal theory in the 1990s, will probably be a fruitful source for the development of such penal law theory (see e.g. Nuutila, 1996; Lahti, 1999a).

With regard to sanctions policy, the anthologies of the 1990s do not offer much that is new in relation to the reports on questions of principle of 1977–78. The main issues are the need for humane penal law policy, which calls for less use of imprisonment, and the considerations of legal security, which argue against the offender being incarcerated for the purposes of incapacitation. Nevertheless, there have been some cautious legislative amendments, changes in

attitudes towards individualized sanctions and towards the treatment ideology; the pendulum of criminal policy has swung somewhat in the other direction.

Community service, which was proposed for adoption in the Danish paper 'Alternativer till frihedsstraf' [Alternatives to imprisonment, 1977], has been implemented not only in Denmark (1982, 1992), but also in the other Nordic countries. For instance, in Finland in 1998, some 43% (4,000 defendants, most of them drunk drivers) of those sentenced to an unconditional (i.e. unsuspended) term of imprisonment of at most 8 months (which is the maximum for community service to be available) had their sentences commuted to this form of non-custodial sanction.

Mediation or reconciliation between the offender and the victim, as well as other forms of alternative dispute resolution (conflict adviser operations), have also been introduced as new types of sanction in the Nordic countries; these sanctions are a form of privatization of the legal system, as well as a prioritization of the reparative function of justice. So far, however, this 'restitutive justice' approach has not made much of a breakthrough in the Nordic countries. All the same, the trend now is to cautiously reinforce this approach (see, generally, Victim–Offender Mediation in Europe, 2000).

The moderate renaissance of the treatment ideology is apparent in the rehabilitation programmes that are now available in the prison service, and in the treatment measures that (mainly in Denmark) have been introduced as alternatives to imprisonment (see e.g. Kyvsgaard, 2000).

5 CRIMINAL POLICY – THREATS AND OPPORTUNITIES

In the academic debate since the 1990s there have been doubts expressed as to how the practical decision-making process can be guided by theoretically sound premises of rational and humane criminal policy. These doubts were one of the dominating themes in the anthologies 'Nordiska kriminologer om 90-talets kriminalpolitik' (1990) and 'Varning för straff' (1995).

In the debate, references have been made to many factors that have decreased the possibility of rational communication (systematic reasoning, based on arguments of principle) in criminal policy. In this context, in particular the role of the mass media and that of general or party politics have been mentioned; increasingly often, the repressive measures of penal law policy have been taken in an atmosphere of 'moral panic' (see Mathiesen, 1990). The examples of such development vary somewhat from one Nordic country to another, as well as from one subject area to another. Drug control

measures are the most noticeable example of hard criminal policy, in stark contrast with our ideal picture of what Nordic criminal policy should be like (see Träskman, 1995). So far, it seems that Finland has been most successful in the avoidance of populist measures and the inappropriate politicization of crime problems.

The said tension, or indeed conflict, between theoretical and practical criminal policy is a difficult challenge to research and researchers. One solution would be to take measures for the easing of dialogue between researchers, practitioners, journalists and politicians, as well as to ensure the informed participation of citizens in matters of practical criminal policy (see Johnstone, 2000). The key concept in the system of penal law is legitimacy: the people must believe in the system, and perceive it as legitimate. To quote *Johannes Andenaes*, 'We need a system which will provide adequate protection against socially undesirable acts, without being in conflict with our requirements of humaneness and justice' (Andenæs, 1988: 48).

The criminal justice system is always a reflection of the structural and cultural aspects of society. If the level of repression in the society becomes higher, we should look for the reasons by examining these factors: seldom is the mere development of crime the full explanation for a change. Increased repression in a society gives rise to questions about its state of affairs, e.g. how well democracy functions there or what problems of equality can be pointed out in that society (see e.g. Garland, 1996: 460–61).

6 A LOOK INTO THE INTERNATIONALIZATION AND EUROPEANIZATION OF CRIMINAL POLICY: IS THIS DEVELOPMENT A THREAT OR AN OPPORTUNITY?

The internationalization of criminal policy can be observed in a number of signs (see, generally, Lahti 1999b). First, the system of international penal law is taking form in a robust manner. The international tribunal, which deals with international crimes committed in the area of the former Yugoslavia, was established in The Hague by the UN Security Council resolution 827 (1993). The following year, a similar *ad hoc* tribunal was established to deal with crimes against international law in Rwanda. The statutes of these tribunals, the complementary rules of procedure and evidence, as well as the pertinent case-law, will contribute much to the formation of international criminal law and doctrine. Moreover, in a UN diplomatic conference in Rome in 1998, a statute was adopted for a permanent international criminal court. The development of

international penal law has been much speedier than what could be anticipated, e.g. in the 11th Nordic conference of criminal scientists and practitioners in Copenhagen, 1994.

Secondly, the prevention and control of crime and the development of the criminal justice system are increasingly perceived as global exercises. The following international measures that were carried out in the 1990s will serve as examples. In a ministerial conference in Naples, in 1994, a political declaration and a global plan were adopted for the fight against organized, trans-border crime; this theme has since been carried forward by numerous follow-up measures. The criminal policy programme of the UN has been under construction since 1991, when the UN Commission on Crime Prevention and Criminal Justice was established by way of UN resolution 46/152. In recent years, the programme has been redrafted so that its emphasis now lies in the fight against organized cross-border (trans-national) crime; a UN Convention on this matter has been under preparation and was finalized by the end of 2000.

Thirdly, we may note that at the same time as penal law and criminal policy become more internationalized, they also become more Europeanized. Moreover, we can also see a comparable, albeit not equally intensive, trend of regionalization in other parts of the world, and not only in Europe. In Europe regional organizations, such as the Council of Europe and the European Union (EU), contribute to this development. These organizations have developed for and within themselves legal norms that are based on the values of democracy, human rights and the rule of law. Indeed, the significance of these values has been accentuated by the accession of the formerly socialist Central and Eastern European countries to the Council of Europe. In the EU, the mutual economic interests have increased the pressure to harmonize the penal laws of the member states and even to develop an EU penal law of its own (see especially Delmas-Marty, 1998).

How much, then, do the developments described above and the measures already carried out reflect a criminal policy that would be acceptable from the Nordic point of view? An answer to this question requires the formation of more concrete arguments – first, on international criminal policy.

Views differ as to what are the legitimate tasks and the effects of the international criminal tribunals. It is certain that their operations have an underlined symbolic function, the manifestation of censure. In contrast, there are many circumstances affecting the degree to which it is possible to achieve, in the long term, real (indirect) positive general deterrence effects, such as the reinforcement of fundamental humanitarian values and principles of justice underlying the very existence of the international community (*civitas maxima*). Are such

criminal tribunals capable of operating at least in a tolerably effective fashion, and is the selection of defendants at least marginally justified? These circumstances are very important when we consider the legitimacy of the work of the courts (for an optimistic view, see Akhavan, 1998: 751).

It is much too early to make any evaluation at this stage. For instance, up to 31 March 1999, charges had been brought against 59 people in the international criminal tribunal in The Hague, but only 26 of these had been apprehended to stand trial (KIip & Sluiter, 1999: 9). It is vital for any success in this area that the States and other parties lend their support in international trials and that the national penal law systems in each of the States take the primary responsibility also for dealing with international crimes.

With regard to another of the challenges of European criminal policy, there are certain common legal traditions and legal institutions for maintaining these common traditions especially the Council of Europe and the EU which have brought the criminal policies of the member states closer to one another. Of course, the most important instrument of the Council of Europe is the Human Rights Convention of 1950 (ECHR; revised 1998). In addition, the 20 multilateral agreements in the field of international penal law are very significant; the latest of these concern environmental crime (1998) and corruption (1999). In the Council of Europe, the duties of the member states in criminal matters are limited to inter-governmental cooperation. Similarly, police cooperation and cooperation in criminal law in the EU fall within the 'third pillar' of the Union; that is, they are based on inter-governmental cooperation even after the Treaty of Amsterdam took force (1999).

The famous French criminal scientist, *Mireille Delmas-Marty*, has posed the question of whether European criminal policy is on the way towards harmonization (applying common guiding principles; obligation of compatibility) or towards unification (requiring identical rules; obligation of conformity). In her opinion, we are going both ways; it is especially important to pay attention to the common principles that have been formed by way of the European Convention on Human Rights and the law of the European Communities. While neither the EC nor the Council of Europe have formal competence to frame binding penal legislation, both of these institutions exert an indirect influence on penal law, by way of the said common principles (see Delmas-Marty, 1996: 311).

The indirect influence of Community law has been directed mainly at penal law, and the influence of the ECHR has mainly been directed at the law of criminal procedure. It would appear from the latest legal developments that the harmonizing effect of EC law is difficult to anticipate, a product as it is of a complex process (see especially Albrecht & Braum, 1999).

In the Treaty of Amsterdam, which is in force within the EU, it was set as an objective under the third pillar that the Union be developed into an area of freedom, security and justice. The intention is also to reinforce the legal and democratic control of the use of legislation, to integrate the rules of the Schengen Agreement into the EU acquis and to recognize the central role of Europol.

Recently, two proposals, very different from each other, have been put forward in the context of the harmonization and unification of European criminal policy. First, the German professor *Ulrich Sieber* has produced a memorandum, at the request of the Council of Europe, on the preparation of a European model penal code (Sieber, 1997). Secondly, the initiative of *Francesco de Angelis*, the then director in the European Commission's Directorate-General for financial control (DG XX), has given rise to a proposal of an academic expert group for a Corpus Juris (1997). The proposal contains penal provisions, by which the intention is to safeguard the economic interests of the EU throughout the European area of justice through a more just, clear and effective system of criminal justice. The rules are based on seven principles (in penal law: the principles of legality, guilt and proportionality, and in the law of criminal procedure: the principles of territoriality, subsidiarity, contradictory proceedings and judicial control) (see Delmas-Marty, 1997). A revised edition of the Corpus Juris proposal has been published recently (Delmas-Marty & Vervaele, 2000).

A European model penal code would represent a 'soft' harmonization of the penal law systems in the member states. In the Nordic countries, a similar idea has been supported, e.g. by Vagn Greve, who is a committed opponent of the 'hard' unification of the morally loaded area of penal law (Greve, 1999: 49–56). Scandinavian scholars of penal law have also generally been critical of the Corpus Juris proposal. The fear has been that pan-European legislation in accordance with the proposal would jeopardize some of the main values or aims that are characteristic of the legal culture and criminal policy of the Nordic countries. These values include, e.g. the prevention of crime, as well as the requirements, in criminal and penal policy, of legitimacy, a relatively low level of repression and humaneness (see e.g. Träskman, 1999; Nuotio, 1999).

For the critics, the question of the legitimacy of the criminal justice system is of great importance. It is certainly difficult for trans-national, pan-European criminal and penal policy to achieve acceptability among the citizens of Europe. In contrast, within the Nordic legal area it is easier to develop trust in the legal systems of the other countries, owing to the common legal and cultural traditions. If we wish to cultivate a similar trust in the activities and institutions of the EU, we should apparently increase the familiarity with common European values among the public, improve the openness of the decision-making

process and reinforce the status and rights of individuals (see e.g. Delmas-Marty, 1995; Taylor, 1998: 32).

The direction towards unification, or in any event harmonization, of criminal policy can be promoted both on a global (UN) and a regional (Council of Europe, EU) platform. From the perspective of the rationality of criminal policy, there are some disquieting features of this development that have been pointed out in the general Scandinavian and also the domestic Finnish debate; accordingly, the Nordic countries should strive for increasing influence on such criminal policy. There would perhaps be a need to draw up a plan of action, or a strategy, for increasing the influence of Nordic criminal policy in this development. The Nordic legal tradition, the effective legal cooperation among these countries and the humane criminal policy they pursue can provide tools for the comprehension and development of the criteria for a comparable borderless area of justice within the EU.

A positive feature is the consolidation of the status of international penal law that happens when serious breaches of humanitarian law are brought into the jurisdiction of the existing international criminal tribunals. Also in these cases, and even more so in other types of crime, inter-state cooperation in the criminal matters and the functioning of their domestic systems of penal law are crucial factors in how efficiently the defendant is brought to justice. Naturally, it is conducive to improving cooperation in criminal matters if the criminal and penal-law policies of the countries in question are close to each other. Nevertheless, even more important than similarity is the legitimacy that the foreign criminal justice system is perceived to possess, and especially how the values and principles of democracy, human rights and the rule of law are realized there.

7 CONCLUSION

I have discussed the development of Scandinavian criminal policy, starting from quite an idealized and optimistic view of the (communicative) rationality of criminal policy. Factors that present an increasing threat to this rationality have also been discussed. A special analysis has been provided in the effects of the internationalization and Europeanization of criminal policy. My original idea, that is, to add to the tasks of research and researchers the development of the prerequisites of a rational and humane criminal policy, has been visible throughout the presentation.

In conclusion, I return to Inkeri Anttila's distinction between conservative and radical criminal policy. The rate at which the institutions, values, legal sys-

tems and attitudes are changing has become increasingly fast. The famous scholar on the social history of punishment, *David Garland* (1999: 8), has written: "A sure sign that we are indeed in a state of transition, occupying the unsettled terrain betwixt and between different policy regimes, is the uncertain character of today's penal politics. The battle lines of penal debate are blurred and constantly changing. No one today is quite sure what is radical and what is reactionary." In these circumstances, it is clear that research will be full of challenges.

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16. Towards a Principled European Criminal Policy: Some Lessons from the Nordic Countries*

1 INTRODUCTION

Before the entry into force on 1 January 2009 of the Treaty of Lisbon,[1] there was not space for a comprehensive and coherent European criminal policy within the European Union (EU). The Treaty of Lisbon changed the legal framework for such policy planning because the Treaty grants the EU a limited competence in the fields of both criminal procedure and substantive criminal law. In particular, the EU can adopt under Article 83 of the Treaty on the Functioning of the European Union (TFEU) directives with minimum rules of EU criminal law for certain crimes. In addition, Article 325 (4) of the Treaty provides for the possibility to take measures in the prevention of and fight against fraud affecting the financial interests of the EU.

The new legislative framework gives a stronger role to the European Parliament through the co-decision process and a full judicial contra! to the European Court of Justice. The Charter of Fundamental Rights is legally binding by the Treaty of Lisbon. Therefore, a better balance for human rights considerations in respect of the efficiency criteria has been established.

The Communication 'Towards an EU Criminal Policy', issued by the European Commission on 20 September 2011, aims at presenting a principled framework for ensuring the effective implementation of EU policies through criminal law. According to the Communication, the Treaty of Lisbon considerably enhances the progress with the development of a coherent EU criminal policy which should be based on both the effective enforcement and a solid protection of fundamental rights. The Communication calls for a careful con-

* Original source: In: *EU Criminal Law and Policy. Values, Principles and Methods*. Edited by Joanna Beata Banach-Gutierrez and Christopher Harding. Routledge Research in EU Law. Taylor & Francis Group, Routledge, London 2016 (2017), pp. 56–69. (https://doi.org/10.4324/9781315690605)

[1] *Official Journal of the European Union* (OJ), 9 May 2008, 2008/C 115; the newest consolidated version, 26 October 2012/C326.

sideration of, for example, whether to include types of sanction other than imprisonment and fines to ensure a maximum level of effectiveness, proportionality and dissuasiveness, as well as the need for additional measures, such as confiscation.[2]

European Parliament Resolution of 22 May 2012, on an EU approach to criminal law, encourages the Commission to put forward measures that facilitate more consistent and coherent enforcement at national level of existing provisions of substantive EU criminal law, without prejudice to the principles of necessity and subsidiarity. It also encourages the Commission to continue to include in its impact assessments the necessity and proportionality test, to draw on the best practices of those Member States with a high level of procedural rights guarantees, to include an evaluation based on its fundamental rights checklist and to introduce a test specifying how its proposals reflect the general principles governing criminal law.[3] It is noteworthy that the resolution lists separately the principles which govern criminalisation on one hand and criminal law on the other: the first-mentioned include the *ultima ratio* principles of necessity and proportionality (criminal law as a means of last resort) and the last-mentioned include the principles of individual guilt *(nulla poena sine culpa),* of legal certainty *(lex certa),* of non-retroactivity and of *lex mitior* as well as the principles of *ne bis in idem* and of the presumption of innocence.[4]

The positive influence of the 'Manifesto on European Criminal Policy' (2009), prepared by fourteen university professors from the Member States of the EU,[5] is discernible in those EU documents. According to the Manifesto, the fundamental principles of criminal policy consist of the requirement of a legitimate purpose, the *ultima ratio* principle, the principle of guilt *(mens rea),* the principle of legality (t he *lex certa requirement:,* the requirements of non-retroactivity and *lex mitior, nulla poena sine lege partamentaria),* the principle of subsidiarity and the principle of coherence.

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[2] European Commission, 'Towards an EU Criminal Policy: Ensuring the Effective Implementation of EU Policies through Criminal Law', COM(2011) 573 final, 20 September 2011, especially 7–8, 12.

[3] European Parliament Resolution of 22 May 2012 on an EU approach to criminal law (2010/2310(INI)), OJ 2013/C 264 E/02, points 6 and 8.

[4] *Ibid*., points 3 and 4.

[5] The Manifesto was originally published in December 2009 in the German online journal: *Zeitscbrift für Internationale Strafrechtsdogmatik* (www.zis-online.com) in seven languages. The Manifesto is also printed io the *European Criminal Law Review* in 2011, at 86–l03. Within tbe project on a European Criminal Policy Initiative also a 'Manifesto on European Criminal Procedure Law has been published in 2013 (see *ZIS* 2013, at 430 *et seq*.). See also discussion by Harding in Chapter 8 of this volume (= *EU Criminal Law and Policy).*

The first legislative instrument, which is based on Article 83(2) TFEU, is Directive 2014/57/EU of 16 April 2014 on criminal sanctions for market abuse.[6] Therefore, the grounds for this market abuse directive are particularly interesting in assessing whether this kind of approximation of criminal laws of the Member States 'proves essential to ensure the effective implementation of a Union policy' and whether the newly emphasized criminalisation principles are *de facto* applied.

The objective of the Directive 2014/57/EU is, according to the preamble, to ensure effective implementation of the European policy for ensuring the integrity of the financial markets set out in Regulation (EU) No 596/2014 on market abuse:[7] 'It is essential that compliance with the rules on market abuse be strengthened by availability of criminal sanctions which demonstrate a stronger form of social disapproval compared to administrative sanctions'. Minimum rules should be established with regard to the definition of criminal offences by natural persons, liability of legal persons and the relevant sanctions.[8]

The aim here is to critically analyse the values, interests and guiding principles for a regional (European) criminal policy from a perspective of its subregion (Finland and other Nordic countries). The above-mentioned documents and legal instruments of the EU illustrate the recent approach of EU institutions to criminal law. In Scandinavia, there is much criticism of the approximation of criminal laws of the Member States.[9] Therefore it is useful to highlight some characteristics of the 'Nordic model'.[10] Three issues will be elaborated in more detail, namely tensions and priorities in criminal policy, defensive versus offensive criminal law policy and the *ultima ratio* principle, as well as the role of punitive administrative sanctions.

2 TENSIONS AND PRIORITIES IN CRIMINAL POLICY

Christopher Harding and *Joanna Banach-Gutierrez* have analysed the Communication 'Towards an EU criminal policy' and framed it around three major

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[6] Market abuse directive, OJ L 173/179, 12 June 2014.

[7] Market abuse regulation, OJ L 173/1, 12 Tune 2014.

[8] Market abuse directive, note 6 above, preamble, points 6, 7 and 18.

[9] See e.g. Greve, V. (1995), 'The European Union and National Criminal Law', *Scandinavian Studies in Criminology,* 14, 185–203.

[10] Cf. generally Suominen, A. (2011), 'The Characteristics of Nordic Criminal Law in the Setting of EU Criminal Law', *European Criminal Law Review,* 1, 170–187.

tensions in contemporary criminal law development: criminalisation versus soft compliance, security versus justice and rights protection, and globalisation versus local diversity.[11] Their list of these tensions is illustrative. For instance, in penal theories a basic tension is often described by the contradiction of utility versus justice. Security and utility are comparable concepts.

According to utilitarian theories, the justification of punishment is dependent on how efficient the deterrent, rehabilitating or incapacitating effects of the punishment are, whereas the concept of justice is more connected with the retribution theories. The theory on the expressive function of punishment – demonstration of social disapproval – lies in the borderline, because its justification has been based both on the principle of utility (efficiency) and that of justice.[12] The mechanism through which the general preventive effect of punishment should be reached is not deterrence in the first place but the social-ethical disapproval which affects the sense of morals and justice – general prevention instead of general deterrence, without calling for a severe penal system.[13]

This theory has much support in the Nordic legal thinking when the preconditions for the legitimacy of the penal system are also emphasised. The public must have trust that the criminal justice system ope≈rates in an acceptable manner, and it is important to follow such principles as equality, fairness and proportionality in its structure and operation. The emphasis on non-utilitarian values of the criminal justice system – fairness and humaneness – leads to the decrease in the repressive features (punitiveness) of the system, for example through the reduction of prison rate and the introduction of alternatives to imprisonment.[14]

An important effect of the new criminal and sanction policy can been seen in the reduced use of custodial sentences in Finland. Since the mid-1970s, the relative number of offenders sentenced to unconditional imprisonment was on

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[11] Harding, C. and Banach-Gutierrez, J. B. (2012), 'The Emergent EU Criminal Policy: Identifying the Species', *European Law Revue,* 37, 758–770.

[12] See e.g., Lahti, R. (1985), 'Punishment and Justice – A Finnish Approach', Beiheft 24, *Archiv fiir Rechts- und Sozialphilosophie* (ARSP), 257–61 (260–61).

[13] See especially Andenaes, J. (1974), *Punishment and Deterrence,* Ann Arbor: University of Michigan Press, especially Chapter 4 ('The Moral or Educative lnfluence of CriminaJ Law'). See also Mäkelä., K (1974), 'The Societal Tasks of the System of Penal. Law', *Scandinavian Studies in Criminology,* 5, 47–67.

[14] For more detail, see Lahti, R. (1985), 'Current Trends in Criminal Policy in the Scandinavian Countries', in: Bishop, N. (ed.), *Scandinavian Criminal Policy and Criminology,* Copenhagen: Scandinavian Research Council for Criminology, 59–72 (66–9); Lahti, R. (2000), 'Towards a Rational and Humane Criminal Policy – Trends in Scandinavian Penal Thinking', *Journal of Scandinavian Studies in Criminology and Crime Prevention,* 1, 141–55 (145–9).

the decrease until 1999: from 118 in 1976 to 65 in 1999 per 100,000 of population and compared to the level in the other Nordic countries. At the same time, the development on registered criminality signalled a similar trend in all of the Nordic countries so that a dramatic cut in the prisoner rate in Finland did not result in a proportionate increase in the incidence of crime compared with other Nordic countries where the prisoner rate stayed quite stable.[15] In 2000–2005 the size increased, to 90 in 2005, but in the most recent years the level seems to be normalised to 65–70 per 100,000 population.

This effect should be assessed with a view to the general objectives and values of the criminal policy that was adopted in Finland. Cost-benefit thinking in policy-making – as it was originally formulated in the late 1960s[16] – suggests that we should aim at the reduction and distribution of the suffering and other social costs caused by crime and by the control of crime. In addition to crime prevention, a strong emphasis should be put on the arguments of justice and humaneness. For instance, the argument of justice requires a just allocation of social costs of crime and crime control among different parties, such as society, offenders and victims, and the argument of humaneness speaks in favour of parsimony and leniency of penal sanctions and the respect of human dignity in crime control.

The reduced prisoner rate should be assessed in relation to the preventive effects of the system of criminal sanctions. The above-described Nordic observation, in addition to other criminological data, is an argument against the fear that a cut in the inmate count will result in a proportionate increase in the incidence of crime. Accordingly, the variations in the prisoner rate should not be looked at as phenomena separate from other events, neither should the criminal policy changes since the late 1960s be seen merely as the results of some ideological agenda pursued by a group of penal experts.

Tapio Lappi-Seppälä has studied the relationship between the penal policy and the prisoner rate extensively. His conclusions include the following contentions: penal severity is closely associated with the extent of welfare provision, differences in income equality, trust and political and legal cultures. So the Nordic penal model has its roots in consensual and corporatist political culture, a high

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[15] For more detail, see Törnudd, P. (1993), *Fifteen Years of Decreasing Prisoner Rates in Finland,* Helsinki: National Research Institute of Legal Policy (NRILP); Lappi-Seppälä, T. (1998), *Regulating the Prison Population,* Helsinki: NRILP,

[16] See originally Törnudd, P. (1969), 'The Futility of Searching for Causes of Crime', *Scandinavian Studies in Criminology,* 3, 23–33; Törnudd , P. (1995), 'Setting Realistic Policy Goals', *Scandinavian Studies in Criminology,* 14, 37–50. See also Lahti, R., (1972), 'On the Reduction and Distribution of the Costs of Crime', *Oikeustiede – Jurisprudentia* (Helsinki), 2, 298–313.

level of social trust and political legitimacy, as well as a strong welfare state. These different factors have both indirect and direct influences on the contents of penal policy.[17]

The results of Lappi-Seppälä's studies suggest that the developments of criminal policy must be assessed in the light of simultaneous structural (social, political and economic) and cultural changes. The criminal policy decisions must be examined with a discerning eye. These decisions should be based on research and rational reasoning. At the same time, structural and cultural circumstances of the society and the increased interdependence of states should be taken into account. The strengthened interaction between different criminal policy models (such as a Scandinavian type) on the European and global level is to be recognised. It is a major challenge, in this respect, to be able to react to, and to influence, the development of criminal law and criminal policy in the European Union and in other international organisations (especially the United Nations).

3 DEFENSIVE VERSUS OFFENSIVE CRIMINAL LAW POLICY AND THE *ULTIMA RATIO* PRINCIPLE[18]

In a notable Scandinavian anthology, in which the main message throughout is a warning against increased penal repression, *Nils Jareborg* distinguishes defensive penal law policy and offensive penal law policy as two different ideal models for decision-making on the criminal justice system. Jareborg argues for the defensive model, whose principles for criminalisation and procedural safeguards correspond to the penal law ideology of a *Rechtsstaat* (a state governed by the rule of law) whereas the offensive approach aims at solving emerging social problems and its legitimacy lies in its efficiency of crime prevention. In the defensive model, criminalisation should be used only as a last resort or for the most reprehensible types of wrongdoing, whereas in the offensive approach the threat of penal sanc tions is used not as a last resort, but often in the first place and even for minor transgressions.[19]

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[17] For more detail, see Lappi-Seppälä, T. (2008), 'Trust, Welfure, anct Political Culture: Explaining Differences in National Penal Policies', *Crime and Justice,* 37, 313–87; and the same author, (2011), 'Explaining Imprisonment in Europe', *European Journal of Criminology,* 8, 303–328; and (2012), 'Penal Policies in the Nordic Countries', *Journal of Scandinavian Studies in Criminology and Crime Prevention,* 13, 1, 85–111.

[18] See also generally Lahti, R. (2010), 'Das moderne Strafrecht und das ultima-ratio-Prinzip', in: *Festschrift fiir Winfried Hassemer,* Heidelberg: C. F. Müller Verlag, 439–48.

[19] Jareborg, N. (1995), 'What Kind of Criminal Law Do We Want?', *Scandinavian Studies in Criminology,* 14, 17–36.

In a later article, Jareborg[20] deals in more detail with the *ultima ratio* principle. According to him, it should be perceived as a meta principle, which summarises the criminalisation principles and is of some normative importance. Criminalisation as last resort can hardly be distinguished from the principle of subsidiarity,[21] and it may then encompass the whole of the arguments restricting criminalisation in the sense of *in dubio pro libertate*. There are three sub-principals when deciding whether to punish and with what severity: a) the penal value principle. (including the requirements of blameworthiness and retrospective proportionality); b) the utility principle (covering arguments concerning criminalisation needs, control costs and inefficiency); and c) the humanity principle (including the requirement of prospective proportionality and arguments concerning the victim's interests and some sorts of control costs).

For Nils Jareborg, the *ultima ratio* principle has only some normative significance, and it is more a question of criminal justice ethics. *Panu Minkkinen* has compared a continental (German) and an Anglo-American approach to the last resort principle with the conclusion that while the Anglo-American approach understands the last resort principle more in terms of a moral restraint in the use of criminal legislation, the German approach is more inclined to infer the principle from the constitutional framework of the State under the rule of law.

For criminal law doctrine, the last resort principle is first and foremost a critical mode of reasoning.[22] In his later article, Minkkinen claims that *ultima ratio* is a politico-moral principle with constitutional significance. At the same time, this last resort principle has always been fuzzy: 'The "last resort" is the human rights fluff that the constitutional culture of "good governance" requires to justify its cultural apparatuses, and not more.'[23]

In the modern criminal law doctrine in Finland, criminalisation principles are derived from the fundamental rights doctrine – the *ultima ratio* principle primarily from the principle of (prospective) proportionality (necessity): funda mental rights may be restricted by means of criminal law only when the aim of protecting a legitimate legal interest *(Rechtsgut)* cannot be

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[20] Jareborg, N. (2005), 'Criminalization as Last Resort *(Ultima Ratio)', Ohio State Journal of Criminal Law,* 2, 521–34.

[21] See also European Committee on Crime Problems, (1980), *Report on Decriminalisation,* Strasbourg, 29: 'we endorse the principle of the subsidiarity and minimalisation (ultima ratio principle) of penal sanctions.'

[22] Minkkinen, P. (2006), "'If Taken in Earnest": Criminal Law Doctrine and the Last Resort', *Howard Journal,* 45, 521–536 (533),

[23] Minkkinen, P. (2013), 'The "Last Resort": A Moral and/or Legal Principle?', *Oñati Socio-Legal Series,* 3, 21–9 (28–9).

achieved by any means less invasive. The same applies to criminalisation principles in a more general sense as well.[24] The effect of criminalisation principles serving to restrict the scope of criminal legislation has by some commentators been expanded to the level of application of law, yet the application of such an interpretative effect remains unclear. In my view, the values underlying human rights and fundamental rights often serve as a counterweight to the utilitarian criminal policy aspects underlying a teleological interpretation, which gives rise to balancing the argumentation between restrictive and expansive interpretation. No common standard may be given for the order of priority or weight of such conflicting arguments, however. A heightened focus on human rights and fundamental rights has had a positive effect on the debate concerning criminalisation principles, as it has allowed an increasingly differentiated examination of the weight of human rights and fundamental rights and their merits and has thus added to criminal law theory. In earlier Finnish criminal law thinking, the argumentation concerning criminalisation principles was based on moral philosophy and/or criminal policy arguments only. However, it must be noted that an approach of legal positivism relying on human rights and fundamental rights will not even in future suffice as a foundation for criminal law theory.

The basic values and principles and values guiding the criminal justice system - such as utility, justice and humanity- cannot be reduced into considerations of fundamental rights or human rights without any remainder. Accordingly, crimi nal legislation aiming at rationality must be rational with regard to both goals and values, whether such justifying grounds are based on research or rational deliberation. The grounds giving legitimacy to the system have an effect at the various steps of the justification chain at the level of both legislation and application of the law. This kind of reasoning can be characterised as pragmatic-rational criminal law thinking. It is in a certain kind of conflict with the critical criminal law theory or critical legal positivism.[25]

What gives rise to tension between the emphases of pragmatic-rational and critical criminal law theory is their attitude towards the *(neo)* criminalisations

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[24] For more detail, see Melander, *S*. (2008), *Kriminalisointiteoria – rangaistavaksi säätämisen oikeudelliset rajoitukset [A Theory of Criminalization – Legal Constraints to Criminal Legislation* /, Helsinki: Suomalainen Lakimiesyhdistys.

[25] See Minkkinen, 'If Taken in Earnest', note 22 above, at 533; Tuori, K. (2002), *Critical Legat Positivism,* Aldershot: Ashgate. See also Tuori, K. (2013), 'Ultima Ratio as a Constitutional Principle', *Oñati Socio-Legal Series,* 3, 6–20.

that are characteristic of the welfare state, concerning the regulation of issues such as economic activity, environmental protection and industrial safety. In Nils Jareborg's terms, there is tension between the defensive and offensive penal law policy. The criminal law reform in Finland was started with those new forms of criminality. The total reform of Penal Code aimed at regulating new types of wrong, which on the basis of an assessment of their harmfulness and blameworthiness should be incorporated into the recodified Criminal Code. The new Criminal Code should handle various types of illegal activity in a more equal and fair way and thus increase its legitimacy among citizens. Thus the penal law policy was inclined towards an offensive one.[26]

There is also a strengthening tendency in the practice of the European Court of Human Rights (ECtHR) to infer positive obligations from the provisions of the European Convention of Human Rights (ECHR),[27] especially in respect to vulnerable people.[28] See, for instance, in *K.U. v. Finland*,[29] where a minor of twelve years old was the subject of an advertisement of a sexual nature on an Internet dating site. Finnish law at that time did not provide for the means to identify the person who placed the advertisement. The Court found there was of violation of Article 8 of the ECHR, because the gravity of the act at stake required efficient criminal law provisions.[30]

In consequence, criminal law is influenced by aims and values pulling in different directions, and criminal law is consequently developing in a more differentiated way. The significance of the *ultima ratio* principle in legislation and application of the law varies depending on the type of wrong, i.e. crime, when account in the consideration is also taken of the principle of fairness and/or positive obligations of criminal law which steer the criminal justice system. This presents a challenge to criminal law research, which must be able to identify the effects of such differentiation and become involved in the elaboration of somewhat differentiating general doctrines. With that in mind,

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[26] Cf. the criticism by Winfried Hassemer; 'Kennzeichen und Krisen des modernen Strafrechts, (1992), in; Lahti R. and Nuotio, K. (eds), *Criminal Law Theory in Transition: Finnish and Comparaitive Perspectives*, Helsinki: Finnish Lawyers' Publishing Company, 113–25.

[27] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, as amended by the provisions of Protocol No. 14 (CETS no. 194) as from its entry into force on l June 2010.

[28] See generally Ashworth, A. (2013), *Positive Obligations in Criminal Law,* Oxford: Hart Publishing, especially Chapter 8 .

[29] ECtHR 2 December 2008, *K.U. v. Finland,* Appl. No. 2872/02.

[30] For more detail, see Ouwerkerk, J. W. (2012), 'Criminalisation as a Last Resort: A National Principle under the Pressure of Europeanisation?', *New Joumal of European Criminal Law,* 3, 228–41 (238).

I have personally brought up the general doctrines of economic criminal law. The aim within the European Union should be maximum coherence in economic criminal law, yet at the same time certain differentiation concerning the totality of criminal law can be accepted. Correspondingly, one might refer to international and transnational criminal law as sectors of the subject containing particular characteristics.

4 THE ROLE OF PUNITIVE ADMINISTRATIVE SANCTIONS

Traditionally, the theories of criminal policy and criminalisation principles are usually elaborated with an eye to such unwanted forms of behaviour that are already defined as crimes under law, or the criminalisation of which is under consideration. Correspondingly, the word 'punitive' in such a context is perceived as referring to punishment under criminal law. During the last decades, it has been increasingly recognised that, in addition to criminal punishments, punitive (penal) sanctions are more and more introduced within the regimes of administrative law for transgressions outside the scope of criminal law.

Nowadays, the Europeanisation of criminal law through the influence of the ECHR and EU law makes it justifiable to use the term 'European criminal law' in a wide sense. Thus it comprises the norms governing behaviour and sanctions that originate in European law, regardless of whether the sanctions that the Member States may impose are in the nature of criminal law or administrative criminal law.[31]

Punitive administrative sanctions (typically punitive fees) have not been intro duced in Finland or other Nordic countries, in keeping with a cohesive and consistent approach, and these sanctions have been governed under different laws, making up a disparate group. This starting point can be explained by a legal tradition in which the scope of criminalised behaviour is maintained extensively without any clear distinction between crime and other transgression of law *(Übertretung)*. There has not been place for such a consistent system of admin istrative criminal law as developed in German *(Ordnungswidrigkeiten),* parallel to the criminal justice system proper. The aims of expediency and efficiency of the criminal proceedings were the objectives of simplified procedures within the penal justice system only.

In three Nordic countries (Finland, Norway and Sweden), legislative re-

[31] See, e.g., Klip, A. (2012), *European Criminal Law,* 2nd ed., Antwerp: Intersentia.

forms have been recently prepared and partly implemented towards a more principled administrative penal law system.[32] In all of these countries, the legislative materials express the objective to create a consistent system for punitive administrative sanctions, but in none of these cases has such a unified system yet been created. There are numerous types of such sanction already in use, but a systematic review and rethinking of them is still under investigation. Depenalisation relates to pri marily petty offences of a low penal value, with the consequence that the sanction to be imposed is a punitive fee instead of a fine.

The most severe punitive administrative fee that has been introduced applies to sanctioning cartels in the competition legislation, as modelled by the EU regulation. The reasoning behind that reform in Finland in the 1990s was (while harmonised legislation in the EU was pending) that the administrative process would provide greater flexibility and effectiveness. Competition law matters also call for specialised expertise. More important than the subjective culpability of the offender's actions is the harm caused by the illegal act on business in general. In the Swedish legislative work (2013), it was argued that not only petty offences but also transgressions in the economic and financial sectors and corporate activities in general could be suitable for depenalisation, and then the severe financial sanctions could serve the function of forfeiture to take away the illegal profit. At the same time, it was recognised that the application of Article 6 of the ECHR concerning fair trial has not been limited only to sanctions defined a criminal punishments in national legislation, and the case law of the ECtHR concerning this provision thus set legal boundaries on the imposition of both types of punitive sanction.[33]

What kind of interplay exists between criminal sanctions (punishments) and punitive administrative sanctions? To what extent is it a proper legislative response for the systems of criminal sanctions and punitive administrative sanctions to coexist in parallel? When the answer to the last mentioned question is affirmative, how can the appropriate and fair coordination of the systems and their compliance with the principles of *ne bis in idem* (double jeopardy) and of protection against self-incrim,ination – in line with the recent case law of the ECtHR and the Court of Justice of the EU – be ensured?

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[32] See *Rikosoikeuskomitean mietint*ö [Report of the Criminal Law Committee] 1976:72 (Helsinki 1977); Norges offentlige utredninger (NOU) [Norivay's Official Investigations] 2003:13 (Oslo 2003): *Fra bot til bedring* [From fine to remedy]; Statens offentliga utredningar (SOU) [State's Official Investigations] 2013:38 (Stockholm 2013): *Vad bör straffas?* [What should be punished?]

[33] See especially the 'Engel criteria' worked out by the ECtHR when interpreting autonomously the concept of a 'criminal' [charge] under Article 6 of the ECHR: *Engel and others v. The Netherlands,* Appl. No. 5100 / 71, 5101/7 1, 5102/71, 5354/72 and 5370/72, 8 June 1976 .

These questions are of considerable current interest at the European and global level when discussing the legal frameworks concerning market abuse, on one hand, and cartels on the other. The market abuse directive of 2014 prescribes criminalisation obligations ta Member States but does not exempt them from the obligation to provide in national law for administrative sanctions and other measures for breaches provided in the market abuse regulation (596/2014/EU) 'unless Member States have decided . . . to provide only for criminal sanctions for breaches in their national law'.[34]

In a recent report on criminalising cartels in Finland, the main issue was formulated as to whether individual criminal responsibility of the heads of business should be introduced in addition to the existing administrative sanctioning of corporations.[35] Among the Nordic penal systems, Norway and Denmark recognise such individual criminal responsibility for cartel infringements, but in Sweden, personal responsibility has been enforced by applying a ban from participation in business activities.

The answer in the Finnish report was affirmative, with the reference to the aims and values of the recodified Criminal Code: criminalisation, which may involve the deprivation of liberty of the individual, communicates the social and ethical disapproval of the offence and would probably have a significant preventative effect; the fairness in allocating criminal responsibility would also be in support of such a solution. There would, however, arise problems in consolidating the administrative procedure against the corporation and the criminal process against the individual(s). In the report, these problems are dealt with under the following sub-questions: right to a fair trial (protection from self-incrimination, *ne bis in idem);* the chronological relationship between the proceedings; exchange of data between the authorities; and the effects of criminalisation on the leniency system.[36]

The following tentative conclusions can be drawn from the reasoning in the Finnish legislative drafting. In the prevention of crime and other illegal activities in business and financial sectors, the significance and impact of various

[34] Market abuse directive, 2014/57/EU, 2014 OJ L L73, preamble, point 22.

[35] The report *Kartellien kriminalisointi Suomessa,* [*Criminalising Cartels in Finland]* (Helsinki 2014) was prepared in the Faculty of Law, University of Helsinki (authors: Ville Hiltunen and Raimo Lahti) by order of the Finnish Competition and Consumer Authority. See also chc discussion by Günsberg, Chapter 14, in: *EU Criminal Law and Policy*.

[36] Cf. generally: Harding, C. (2015), 'The Interplay of Criminal and Administrative Law in the Context of Market Regulation: The Case of Serious Competition Infringements', in : Mitsilegas, V. *et al*. (eds), *Globatisation, Criminal Law and Criminal Justice*. *Theoretical, Comparative and Transnational Perspectives,* Oxford: Hart Publishing, 199–217.

kinds of preventive tool and reactive enforcement systems on the achievement of the goals and value aims to be set shall be assessed from a comprehensive criminal policy and sanction policy perspective. Thus the examination of enforcement systems shall not be limited only to criminal justice policy or criminalisation principles; the approach to be adopted should instead be one of extensive enforcement policy and sanction policy assessment wherein the various forms of enforcement, such as punishments under criminal law and pecuniary administrative sanctions of a punitive nature, are subjected to a cost-benefit analysis.

The experiences gained from the Finnish legal reforms reinforce the view that the effective prevention of illegal activities in the business and financial sectors calls for the coordination of the regulation under criminal law and administrative law with the simultaneous comprehensive implementation of substantive law and other preventive and reactive tools. The socio-ethical disapproval demonstrated by the threat of punishment and sentencing - with imprisonment, when necessary - can have general preventive effects when the structure of criminalisation and the functioning of the criminal justice system are perceived to be fair and legitimate. The preventive role of criminal law alone is still very limited.

5 CONCLUSIONS

EU criminal policy is emerging. The recent EU documents of the Commission,[37] and the European Parliament,[38] as well as the Manifesto on European Criminal Policy in 2009[39] of the academic community, include good guidelines for further legislative drafting within EU to achieve a more consistent and coherent criminal policy, and they are good starting points for deeper analyses and research. These documents also include a promise to continue the development of the EU criminal policy by resorting to a thorough evaluation of existing EU criminal law measures and to continuous consultation of Member States and independent experts.

Best practices in the Member States and characteristics of their legal cultures should be systematically studied and information about the results disseminated. This would facilitate interaction and coordination between national

[37] Communication, note 2 above.

[38] Resolution, note 3 above.

[39] Note 5 above.

criminal policies and the emerging EU criminal policy. The discussion here has illustrated some dimensions of the Nordic legal cultures and their penal policies with the purpose that these experiences could be utilised in assessing the prospects for common European criminal policy. On the basis of this review, I shall now shortly comment on some details of these recent EU documents.

According to the Commission's Communication, an EU criminal policy is particularly warranted in respect of Article 83 (2) TFEU. This is true, but in order to enhance a more coherent criminal policy within the EU, good governance would require that the fundamental principles should guide the whole EU criminal legislation as much as possible. The main objective behind the ancillary competence regulated in Article 83 (2) TFEU is effectiveness (efficiency), and the same objective characterised the EU policy on sanctioning.[40] This objective is in collision with the traditional restraining principles of criminalisation, such as *ultima ratio* principle.[41]

There should be available convincing criminological research as clear factual evidence for assessing the effectiveness of difference sanctions or other measures in the enforcement of EU legislation.[42] The demand for measures that are effec tive, proportionate and dissuasive seems to reflect a belief in deterrence and severe punishment in relation to which there is much scepticism in the Nordic countries.[43] There is a concern that EU criminal law may lead to increased repression in the Nordic countries.[44] In Scandinavia, crime prevention instead of repression, the legitimacy of criminal justice system, a relatively low level of punitiveness, and humaneness in sanctioning are important values.[45]

In the Commission's Communication, among the fundamental principles guiding EU criminal legislation are the principles of subsidiarity, the protection

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[40] See e.g. Melander, *S*. (2014), 'Effectiveness in EU Criminal Law and Its Effects on the General Part of Criminal Law', *New Joumal of European Criminal Law,* 5, 274–300 (285).

[41] See e.g. Huomo-Kettunen, M. (2014), 'EU Criminal Policy at a Crossroad between Effectiveness and Traditional Restraints for the Use of Criminal Law', *New Journal of European Criminal Law,* 5, 301–26.

[42] See also the discussion by Harding in Chapter 8 of this volume: *EU Criminal Law and Policy*.

[43] Rapporteur Cornelis de Jong in his *Report on an EU approach on criminal law* (2010/2310(INI)) at the Committee on Civil Liberties, Justice and Home Affairs (24.4.2012, A7-0144/2012, European Parliament) took the view that 'all too easily criminal law provisions are proposed for their supposedly symbolic and dissuasive effects'.

[44] See e.g. Elholm, T. (2009): 'Does EU Criminal Cooperation Necessarily Mean Increased Repression?', *European Journal of Crime, Criminal Law and Criminal Justice,* 17, 191–226.

[45] As to the propensities towards punitiveness in four Nordic countries (Denmark, Iceland, Sweden and Finland), see e.g. Balvig, F. *et al*. (2015), 'The Public Sense of Justice in Scandinavia: A Study of Attitudes towards Punishments', *European Journal of Criminology,* 12, 342–61.

of fundamental rights, necessity and proportionality *(ultima ratio)* at the level of enacting criminal law measures, and necessity and proportionality at the level of specifying criminal measures. In addition, the legality principle (legal certainty) is mentioned as a principle guiding 'minimum rules' regarding the definition of criminal offences and sanctions.

When comparing the Communication and the Manifesto on European Criminal Policy, differences can be seen, in particular, to what extent the requirement of a legitimate purpose is emphasised. The Manifesto rightly requires thar the following criteria should be fulfilled: that the interests to be protected should be derived from a) the primary legislation of the EU and b) the Constitutions of the Member States; that the fundamental principles of the EU Charter of Fundamental Rights are not violated; and that the activities being regulated could cause significant damage to society or individuals. As the Parliament's Resolution points out, the damage can be either pecuniary or non-pecuniary.

But in none of these documents is the relationship between the principles of *ultima ratio*, subsidiarity and proportionality, elaborated very much. There is much academic discussion on the principle of *ultima ratio*, but its content is still quite vague from a pan-European perspective.[46] In any case, the principle of *ultima ratio,* subsidiarity and proportionality are keenly connected with one another, especially in respect of EU criminal law. Their legal basis lies in the EU legislation.

Both the Communication and the Manifesto point to the general principle of proportionality in Article 5(4) Treaty on European Union (TEU) and in the EU Charter of Fundamental Rights (especially Article 49(3)) as the legal (constitutional) basis for the *ultima ratio* principle. Criminalisation and criminal sanctions entail social stigmatisation (moral condemnation) and when resorting to imprisonment as penalty, the most intrusive measure. The national criminal justice systems are traditionally closely linked to the State's power and its value system, and in democratic Member States, reasonable legitimacy of State institutions and trust to their operation is normally attained.[47]

The democratic legitimacy of (and trust of) the EU institutions and its criminal legislation is much more difficult to attain. If we wish to cultivate

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[46] See especially the papers presented at the workshop *'Ultima ratio*, a Principle at Risk. European Perspective', in 2012 in Oñati, Spain: 3 *Oñati Socio-Legal Series* 2013 (l); also, the special issue on the Effectiveness of EU Criminal Law (eds Melander, S. and Suominen, A.), *New Journal of European Criminal Law,* 5, third issue of 2014.

[47] See generally Tankebe, J. and Liebling, A. (eds) (2013), *Legitimacy and Criminal Justice*. *An International Exploration,* Oxford: Oxford University Press.

a similar trust in the activities and institutions of the EU, we must increase the familiarity with common European values among the public, improve openness of the decision making process and reinforce the status and right of individuals. The legitimacy argument also strongly supports the demand of developing criminalisation prin- iples and other general principles governing criminal law at the level of EU, as pointed out in Resolution 2010/2310 (INI).

As to the principles of subsidiarity and proportionality and their interaction, the legal (constitutional) basis for them is provided in Article 5 (3)-(4) TEU.[48] These provisions imply that the principles of subsidiarity and proportionality are legally binding, increasingly important principles of EU criminal law and the criteria for their assessment and the procedures for their implementation should be developed. The case law of the European Court of Justice will be significant in this respect.[49]

Normally, a distinction is made between the principles of subsidiarity and proportionality by their different scope of application and legal effects. The principle of subsidiarity is applicable in assessing whether the EU should exercise its powers; the proportionality test answers the question of how the EU should exercise its powers. Nevertheless, these principles are keenly interrelated. Proportionality is a principle applied to (alleged) conflicts between two kinds of interest: the individual's interest for autonomy, and public interests. The proportionality principle is traditionally further divided into three tests: a) suitability, b) necessity (cf. *ultima ratio)* and c) proportionality *stricto sensu* .[50]

The principle of proportionality has in the field of criminal law not only the dimension of *prospective* proportionality. It has also the dimension of *retrospective* proportionality according to Article 49(3) of the EU Charter of Fundamental Rights on the severity of penalties. As indicated in the Commission's Communication, in the assessment of proportionality (necessity), the legislator needs to analyse whether measures other than those of formal criminal law, in particular punitive administrative sanctions, could address the problems more effectively, and to what extent various types of sanction should be introduced in *parallel*. For example, punitive administrative sanctions could be reserved for

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[48] See also Protocol (No. 2) on the application of the principles of subsidiarity and proportionality and the so-called 'emergency brake' in Article 83 (3) TFEU.

[49] For more detail, see Melander, S. (2013), 'Ultima Ratio in European Criminal Law', 3 *Oñati Socio Legal Series,* note 46 above, at 42–61, with references to the case law.

[50] See the conceptual analysis of Asp, P. (2007), 'The Notions of Proportionality', in: Nuotio, K. (ed.), *Festschrift in Honour of Raimo Lahti,* Helsinki: Faculty of Law, University of Helsinki, 207–19.

minor transgressions, and criminal liability and sanctions could be preserved for more serious offences; or administrative sanctions could be imposed on corporations, but it would not exclude individual criminal responsibility of the heads of these corporations.

When taking the principles of subsidiarity and proportionality seriously and requiring thorough analyses from the impact assessments preceding legislative proposals, we need much more comparative research on criminal law, criminology and criminal justice.[51] We also need much more evidence-based criminological research to be utilised in criminal policy planning and as a foundation for rational criminal policy. This is particularly true in relation to the decision-making and actors within the EU, where criminal policy has not so far been made on the basis of coherent conceptions and by utilising relevant criminological research. Collection of statistical data is not a sufficient basis for the analyses. There is also need for increased inter-institutional co-operation and coordination within EU organs.[52]

[51] Again, see also the discussion by Harding, in Chapter 8: *EU Criminal Law and Policy*.

[52] See European Parliament Resolution 2010/ 2310 (INI), points 11–20. Harding, Chapter 8, in: *EU Criminal Law and Policy*.

V.
Internationalization of Criminal Law

17. Article 11 of the Universal Declaration of Human Rights*

"1. *Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.*

2. *No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."*

1 INTRODUCTION

The first paragraph of article 11 of the Universal Declaration of Human Rights (UDHR) concerns the basic human rights which must be complied with in criminal procedures. Paragraph 2 of the same article deals with the principle of legality, which limits the application of criminal law. In terms of common law countries, the article defines standards, on the one hand, for procedural due process and, on the other hand, for substantive due process.[1] In continental legal thinking, the corresponding principles would be those of the "constitutionally governed State" and "legal certainty", principles which restrain legislative and judicial organs from misusing their repressive powers.[2]

Article 11 is not the only one in the UDHR that regulates the applicability of the principles of due process to persons accused of crimes. When the draft UDHR was discussed in the Third Committee of the UN General Assembly,

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* Original source: In: *The Universal Declaration of Human Rights. A Common Standard of Achievement*. Edited by Gudmundur Alfredsson and Asbjørn Eide. Martinus Nijhoff Publishers, Dordrecht 1999, pp. 239–249. The bibliography at the end of this article is separated from the Consolidated Bibliography of that whole book.

[1] See also, e.g., Noor Muhammad 1981.

[2] See also, e.g., Jescheck and Weigend 1996, pp. 26–27.

the representative for Belgium summarized the contents of this article under four basic headings: 1) the presumption of innocence until proven guilty; 2) the right to defence; 3) the right to a public hearing; and 4) the non-retroactivity of laws.[3] The reference to the right to a public hearing is problematic with respect to article 11(1), because this right is more precisely defined in article 10. It is true, however, that articles 10 and 11(1) of the UDHR are closely related.

When searching for the basis of article 11, we should begin with those documents that provided the general foundation for human rights thinking. The presumption of innocence, which is central to article 11(1), finds an early parallel in the 1789 Declaration of the Rights of Man.[4] The prohibition of retroactivity of laws, expressed in article 11(2), was confirmed as early as 1787 in the Constitution of the United States, and even earlier in the Declarations of Human Rights passed by various North American colonies in 1776.[5] As for the earliest codification of certain guarantees for due process, the Magna Charta (1215) is generally regarded as the first milestone.[6]

2 TRAVAUX PRÉPARATOIRES

At the first session of the United Nations Commission on Human Rights (the Commission), a drafting committee put forward the texts for articles 9 and 10(1), which have essentially the same contents as article 11 of the UDHR as adopted. However, these draft articles also regulated principles which were later expressed in what finally became article 10.[7] Article 9 would also have contained the requirements of an independent and impartial court, fair trial, and full hearing of the defendant. Furthermore, the prohibition of retroactivity of criminal law would have been expressed in the following article.

The above-mentioned proposal was based on a draft provided by the representative for France, Mr. *Cassin*.[8] According to this draft, the presumption of innocence would have been expressed at the beginning of the aforementioned articles in a separate paragraph.[9]

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[3] UN General Assembly Official Records (GAOR) I, Third Committee, SR 115, p. 266.

[4] See also Schubarth 1978, p. 1.

[5] See Schreiber 1976, pp. 64–65.

[6] See, e.g., van Dijk 1990, pp. 93–94.

[7] UN doc. E/CN.4/21, Annex F.

[8] *Ibid*., Annex D, articles 11 and 12.

[9] On the background to article 11 in general, see Verdoodt 1964, p. 131 ff.

The second session of the Commission produced the draft International Declaration of Human Rights of 1947, where the most important innovation with respect to the draft article in question was that the prohibition of retroactivity of criminal law should not "prejudice the trial and punishment of any person for the commission or any act which, at the time it was committed, was criminal according to the general principles of law recognized by civilized nations."[10]

In the third session of the Commission, this draft article was submitted in what was to be virtually its final form.[11] The French member of the Commission, Cassin (see above) summed up the issues to be considered when dealing with the article: innocence until proven guilty; public trial; guarantees of defence (the question of independent tribunals could be omitted in view of the preceding provisions); non-retroactivity of laws and punishment; and the non-applicability of these rights to war criminals.[12]

The proposal presented to the Third Committee of the General Assembly omitted – in connection with the prohibition of retroactivity of criminal law – the above-mentioned reference to the general principles of law recognized by civilized nations. On the other hand, the concept of offence, as used in relation to the prohibition of retroactivity, was specified in such a way that the definition of an offence could be based either on national or international law.

These changes resulted in differences of opinion at the meeting of the Third Committee of the General Assembly. The representatives for Belgium and Greece expressed their concern that the prohibition of retroactivity of laws, such as it was presented to the Committee, might be used to argue that trials of war criminals in general, and the trials of Nuremberg and Tokyo in particular, had been illegal.[13] Similar discussions were repeated when, during the preparation of the International Covenant on Civil and Political Rights (CCPR), the necessity of the provision which later became paragraph 2 of article 15 was considered.[14]

During the proceedings in the Third Committee, two amendments were made to the prohibition of retroactivity of laws. At the suggestion of the United States, the word "penal" was inserted before the word "offence" in order to clarify that the paragraph related to criminal matters only. Panama proposed

[10] UN doc. E/600, Annex A, article 7.

[11] UN doc. E/800, Annex A, article 9.

[12] UN doc. E/CN.4/SR.54/, p. 16.

[13] 3 UN GAOR I, Third Committee, SR 115–116, pp. 266, 270.

[14] See Bossuyt 1987, pp. 330333 with references, and below 6.

the insertion of an additional sentence in the same paragraph, containing the principle that the penalty for any crime cannot be altered for a heavier one *ex post facto*.

3 PARALLELS TO ARTICLE 11 OF THE UDHR IN OTHER HUMAN RIGHTS INSTRUMENTS

The presumption of innocence defined in paragraph 1 of article 11 has substantively close parallels in article 14(2) of the International Covenant on Civil and Political Rights (CCPR, 1966), article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, 1950), the first sentence of article 8(2) of the American Convention on Human Rights (ACHR, 1969), and article 7 (1.b) of the African Charter of Human and Peoples' Rights (African Charter, 1981).

Provisions on public trial and guarantees of defence for the accused can be found in article 14 of the CCPR, especially in paragraphs 1 and 3, in article 6(1) and 3 of the ECHR, article 8 of the ACHR, and article 7(1) of the African Charter, where the basic principle is that every individual has the right to have his/her cause heard.

The principle of freedom from *ex post facto* laws (this term is from the ACHR), regulated in article 11(2) of the UDHR, has its equivalents in article 15 of the CCPR, article 7 of the ECHR, article 9 of the ACHR, and article 7(2) of the African Charter. The essence of the prohibition of retroactive criminal law is the same in each of these articles, but there are differences in the precise formulation of the principle (see below 6).

4 THE RIGHT TO A FAIR TRIAL AND OTHER HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE

The presumption of innocence will be examined separately below (5). The principle of public trial and the guarantees of defence for the accused will only be briefly mentioned. The presumption of innocence is fundamental to the protection of human rights, as the Human Rights Committee has stated in its general comment.[15] Nevertheless, all principles and guarantees related to the legal status of the accused in criminal proceedings are aimed at ensuring

[15] CCPR/C/21/Add.3, p. 5.

the proper administration of justice.[16] In other words, they all concern certain aspects of the comprehensive concept of fair trial in criminal matters.[17]

In the case law on article 6 of the ECHR, it has been confirmed that, even when no specific right referred to in paragraphs 2 and 3 of the article has been violated, the question as to whether a trial conforms to the standard laid down in paragraph 1 must be decided by taking into consideration the trial as a whole, and not by isolating one particular aspect or incident.[18]

Indeed, when discussing human rights in relation to the administration of justice, the very characteristics of fair trial and the right to judicial proceedings are fundamental questions. It has been justifiably maintained with respect to article 14 of the CCPR that the right to a fair hearing in court, as provided for in the article, is one of the cornerstones of the CCPR as a guarantee of the rule of law.[19] The heading of article 8 of the ACHR does explicitly express this basic principle of a "right to a fair trial". Consequently, article 11(1) of the UDHR must be examined in relation to article 10.[20]

Article 14(3) of the CCPR, article 6(3) of the ECHR, and article 8(2) of the ACHR all concern the minimum guarantees or minimum rights enjoyed by the accused. The lists of these rights, although they must not be regarded as exhaustive, are exceptionally long in comparison with the customary manner of human rights standard-setting. Article 14(3) of the CCPR is in some respects more explicit and thus goes further than article 6(3) of the ECHR.[21]

Such precision is understandable if we bear in mind that the application of criminal law always has a drastic effect on the rights and liberties of the accused. The substance of article 11(1) of the UDHR has, to an unusual extent, become more concrete in the human rights conventions which have succeeded it.

On the guarantees necessary for the defence of the accused, the procedural rights known as "equality of arms" are especially important. When this principle, which falls within the broad concept of a fair hearing, is followed, the aim is procedural equality between the accused and the public prosecutor.[22] The

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[16] CCPR/C/21/Add.3, p. 3.

[17] See, in particular, van Dijk 1990.

[18] See Council of Europe, *Digest of Strasbourg Case-Law Relating to the ECHR*, vol. 2, pp. 5, 709, with references, and extensively Stavros, 1993.

[19] de Zayas *et al*. 1985, pp. 44–45. See also Nowak 1993, p. 246.

[20] In detail, see article 10 in this volume.

[21] Council of Europe Document H (70) 7, p. 38

[22] See, e.g., Trechsel 1978, pp. 555–558; Opsahl 1982, p. 494; Nowak 1993, p. 246.

Human Rights Committee has stated: "the accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defences and the right to challenge the case if they believe it to be unfair."[23]

When dealing with public trial, the above-mentioned articles of human rights conventions contain provisions allowing for exceptions to this principle. Article 11(1) of the UDHR does not acknowledge such exceptions. This was criticized by the representative of the Soviet Union when the draft declaration was discussed in the Third Committee of the UN General Assembly.[24] It must be noted, however, that there is a general limitation clause in article 29(2) of the UDHR.

With respect to exceptions to the principle of public trial, the CCPR and the ECHR do not significantly differ from each other.[25] The corresponding limitations are expressed more broadly in article 8(5) of the ACHR. Article 7(1) of the African Charter does not require a trial to be public at all; it is sufficient that a competent and impartial court or tribunal proves whether the accused is guilty or not guilty.

5 PRESUMPTION OF INNOCENCE

The presumption of innocence has been considered a universally recognized rule of natural justice.[26] In its general comment on article 14 of the CCPR, the Human Rights Committee has made, *inter alia,* the following statements about the presumption of innocence: the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt; no guilt can be presumed until the charge has been proved beyond a reasonable doubt; and all public authorities have a duty to refrain from prejudging the outcome of a trial.[27]

In the case law on article 6(2) of the ECHR, the presumption of innocence is first of all a "procedural guarantee",[28] although it operates mainly at the stage of court proceedings.[29] This paragraph requires, *inter alia,* "that when carrying out their duties, the members of a court should not start with the preconceived idea

[23] CCPR/C/21/Add.3, p. 6.

[24] 3 UN GAOR I, Third Committee, SR 115, p. 226.

[25] Council of Europe Document H (70) 7, pp. 37–38. See also Nowak 1993, pp. 247–248.

[26] Trechsel 1978, p. 554.

[27] CCPR/C/2l/Add.3, p. 5. See also de Zayas *et al*. 1985, pp. 45–46; Nowak 1993, pp. 253–255.

[28] Stavros 1993, p. 49.

[29] Harris *et al*. 1995, p. 242.

that the accused has committed the offence charged."[30] The onus of proving guilt falls upon the prosecution, and any doubt is to the benefit of the accused. Moreover, in the judgment, the accused can be found guilty only on the basis of direct or indirect evidence which is sufficiently strong in the eyes of the law to establish his/her guilt.[31]

The close link between the presumption of innocence and freedom from self-incrimination should be noted.[32] The presumptions of fact and law in penal provisions have been considered to be acceptable under the condition that they are confined "within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."[33] The organs of the ECHR have also taken a stand on the "conviction in disguise", for example on the admissibility of evidence of past convictions and on the imposition of costs in cases of acquittal or discontinuance of proceedings.[34]

In international practice and juridical literature, there is wide support for a broad definition of the presumption of innocence. In criminal procedure and criminal law, the presumption of innocence amounts to considerable legal consequences of varying degrees of obligation.[35]

6 PROHIBITION OF RETROACTIVE CRIMINAL LAW: *NULLUM CRIMEN, NULLA POENA SINE LEGE*

In the light of its drafts, paragraph 2 of article 11 of the UDHR was created in order to protect individuals against *ex post facto* criminal laws operating to their detriment. The same is true with regard to article 15 of the CCPR.[36] The last sentence of article 15(1) of the CCPR (as well as article 9 of the ACHR), however, prescribes the retroactive operation of a new law imposing a "lighter penalty". When drafting this article of the CCPR, it was regarded as a tendency

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[30] European Court of Human Rights, Case of Barberà and others, judgment of 6 December 1988, Series A, no. 146, para. 77.

[31] See Council of Europe, *Digest of Strasbourg Case-Law Relating to the ECHR,* vol. 2, pp. 721–722 with references.

[32] See, e.g., Harris *et al*. 1995, p. 243.

[33] See the leading case of *Salabiaku v. France*, judgment of 7 October 1988, Series A, no. 141-A.

[34] See Stavros 1993, pp. 116–124 with references.

[35] See, e.g., Schubarth 1978; Trechsel 1981; Opsahl 1982, pp. 491–493; Kühl 1983; Träskman 1988; Tiedemann 1993, pp. 854–857; Pocar 1995, pp. 141–143.

[36] de Zayas *et al*. 1985, p. 51; Nowak 1993, pp. 274–275.

in modern criminal law to allow a person to enjoy the benefit of such lighter penalties as might be imposed after the commission of the offence with which he/she was charged.[37]

In the case law on article 7(1) of the ECHR it has been pointed out that the paragraph does not merely prohibit retroactive application of the criminal law to the detriment of the accused; it also confirms, in a more general way, the principle that only the law can define a crime and prescribe a penalty *(nullum crimen, nulla poena sine lege),* and prohibits the extension of the application of the criminal law *in malam partem,* for instance by analogy. Furthermore, the paragraph includes the requirement of certainty in criminal law; the offence shall be clearly described by law.[38] Hence, the case law on article 7(1) of the ECHR has given an expansive interpretation to the paragraph. The prohibition of retroactive criminal law has developed into a wider concept, the legality principle, which is subdivided into four more specific rules. This kind of subdivision of the legality principle is common in the legal literature.[39]

The most noteworthy requirements behind the legality principle as guaranteed by article 7(1) of the ECHR are those of accessibility and foreseeability. The concept of law in this article comprises written and unwritten law, and the article permits the progressive development of criminal law, "provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen."[40]

Both article 15(2) of the CCPR and article 7(2) of the ECHR include a provision which had already been scrutinized during the preparation of article 11(2) of the UDHR. It states that the prohibition of retroactive criminal law shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations (CCPR) or by "civilized" nations (ECHR).[41] As discussed above (2), this provision was deleted from the final version of article 11(2) of the UDHR.

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[37] See Bossuyt 1987, pp. 326–329 with references. On this exception in favour of a lighter penalty, see Nowak 1993, pp. 278–280.

[38] See Council of Europe, *Digest of Strasbourg Case-Law Relating to the ECHR,* vol. 3, pp. 119 with references. On recent practice see, especially, the Case of *C.R. v. the United Kingdom,* judgment of 22 November 1995, Series A, no. 355-C.

[39] See, e.g., Frände 1989; Jescheck and Weigend 1996, pp. 126–142; Lahti 1996.

[40] Case of *C.R. v. the United Kingdom,* judgment of 22 November 1995, Series A, no. 355-C, paras. 32–34.

[41] The wording "according to the general principles of law recognized by civilized nations" is identical to article 38(1.c) of the Statute of the International Court of Justice.

The case law on article 7(2) of the ECHR sheds some light on this question. It has been stated that, according to the *travaux préparatoires*, the purpose of article 7(2) is to clarify that article 7 does not affect laws which were passed under the exceptional circumstances at the end of World War II to punish war crimes, treason and collaboration with the enemy; nor does the article aim at any legal or moral condemnation of those laws.[42]

Article 15(2) of the CCPR and article 7(2) of the ECHR contain an exception to the first paragraph of the respective articles. Retention of article 15(2) of the CCPR was intended to eliminate any doubts as to the legality of the judgments rendered by the Nuremberg and the Tokyo tribunals. It was also said that this paragraph of the CCPR would confirm those principles, so that any future crimes similar to those punished at Nuremberg would be punished in accordance with the same principles.[43]

The legal significance of article 15(2) of the CCPR has been questioned in light of the reference to international law in article 15(1), which applies equally to international treaty law and customary international law.[44] Similarly, article 7(2) of the ECHR has been considered useless insofar as a conviction under national law can be justified under article 7(1) as being for a "crime … under international law" at the time of its commission.[45]

The recent development of international criminal law has been remarkable. In May 1993, the UN Security Council took decisive measures to create the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991; in November 1994, the Security Council established the International Criminal Tribunal for Rwanda.[46] In 1994, the International Law Commission adopted a draft statute for a permanent international criminal court, and the preparatory work was finalized when the Rome Statute of the International Criminal Court was adopted by the UN Diplomatic Conference of Plenipotentiaries on 17 July 1998.[47]

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[42] See Council of Europe, *Digest of Strasbourg Case-Law Relating to the ECHR*, vol. 3, pp. 34–36.

[43] See Bossuyt 1987, pp. 331–332 with references.

[44] Nowak 1993, p. 281.

[45] Harris *et al*. 1995, p. 282.

[46] See, in particular, the Report of the Secretary-General, UN doc. S/25704 of 3 May 1993. The Statute of the International Criminal Tribunal for the Former Yugoslavia (Annex to the just-mentioned Report) was approved by Security Council resolution 827, adopted on 25 May 1993. As for the literature, see, e.g., Sunga 1997.

[47] UN Doc. A/CONF.183/9, http://www.un.org/icc/part1-13.htm.

Notwithstanding the judgments of the Nuremberg and Tokyo tribunals following World War II, it has often been difficult to determine which of the acts prohibited under international law are offences.[48] Now the statutes, rules of procedure and evidence and the practice of the International Criminal Tribunals for the former Yugoslavia and Rwanda have contributed to the development of international humanitarian law.[49]

The commentary of the United Nations Secretary General in his report on the Yugoslavia Statute is especially worthy of note: the principle of *nullum crimen sine lege* requires that the Tribunal "apply rules of international humanitarian law which are beyond any doubt part of customary law."[50] The Rome Statute of the International Criminal Court codifies, *inter alia,* the principles of *nullum crimen sine lege* and *nulla poena sine lege* (articles 22–23), although it shall not affect the characterization of any conduct as criminal under international law independently of that Statute.

The recent case of *Prosecutor v. Duško Tadi*[51] confirms that, despite the emphasis on the legality principle in the relevant Statute of the Tribunal, a progressive development of criminalized international humanitarian law is – within certain limits – acceptable and legitimate.[52]

7 CONCLUDING REMARKS

The fundamental rights or principles which are defined in article 11 of the UDHR and are related to criminal procedure and criminal law have received increasing reinforcement in a variety of international instruments of human rights. Norms and standards whose aim is to strengthen human rights in the administration of justice have also received continuous attention in the activities of the United Nations, the Council of Europe and other international and regional organizations.[53]

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[48] Meron 1995, pp. 554, 563.

[49] As for practice so far, see in particular, the decisions in the cases of *Prosecutor v. Tadi*, no. IT-94-AR72 (Appeals Chamber, 2 October 1995) and no. IT-94-I-T (Trial Chamber, 7 May 1997).

[50] UN doc. S/25704, para. 34.

[51] International Criminal Tribunal for former Yugoslavia, Case no. IT-94-1-AR72, 2 October 1995 (printed in Criminal Law Forum 1996).

[52] See in more detail, e.g., Greenwood 1996, pp. 265, 281; Werle 1997, pp. 808, 820.

[53] See, e.g., the Report "The Right to a Fair Trial: Current Recognition and Measures Necessary for Its Strengthening", UN doc. E/CN.4/Sub.2/1994/24 of 3 June 1994. As for the commentaries in the recent legal literature, see, e.g., Delmas-Marty 1995; Pocar 1995; Sunga 1997, pp. 307–320.

Although minimum standards for what constitutes a fair trial are universally recognized, there is still much to do before they are universally guaranteed both in theory and practice.[54] One major weakness is that the international fair trial rights applicable in domestic criminal procedures are usually not available in proceedings in which the admissibility of acts of international cooperation in penal matters is decided in the requested State.[55] Nonetheless, there have recently been positive developments in the protection of human rights in international criminal proceedings.[56]

The most dramatic developments concern the codification and implementation of international criminal law: the establishment of International Criminal Tribunals for former Yugoslavia and Rwanda (1993–1994) and the adoption of the Rome Statute of the International Criminal Court (1998). While improving the enforcement of international justice in combating serious violations of international humanitarian law, these instruments also strengthen the implementation of the fundamental rights which are defined in article 11 of the UDHR.

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[54] van Dijk 1990, p. 128.

[55] Van den Wyngaert 1998, ch. 6.

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18. Towards an International and European Criminal Policy?*

1 INTRODUCTION

a. The subject is of topical importance owing to recent developments both on the international and the European level. Firstly, the system of international criminal law is right now emerging forcefully.[1] The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia was established by the UN Security Council's Resolution 827 of 25 May 1993. One year later, the Statute of the International Criminal Tribunal for Rwanda was adopted. These statutes, rules of procedure and of evidence, and practice all contribute to the development of international criminal law.[2] The latest important step was taken last year, when the Statute for the International Criminal Court was adopted by the United Nations (UN) Diplomatic Conference of Plenipotentiaries in Rome on 17 July 1998.[3]

Secondly, the globalization of crime and criminal justice is a noteworthy trend. In particular, combating transnational organized crime is a priority task both on the global and the European level. The Political Declaration and Global Plan against Organized Transnational Crime, adopted at the World Ministerial Conference held in Naples, Italy, on 21–23 November 1994, have been taken as the basis for numerous further actions in the field.[4] The UN Crime Prevention

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* Original source: In: *Liber Amicorum Bengt Broms*. Edited by Matti Tupamäki. Finnish Branch of the International Law Association. Helsinki 1999, pp. 222–240.

[1] See generally, L. S. Sunga, *The Emerging System of International Criminal Law* (Kluwer Law International, 1997).

[2] See, e.g., T. Meron, "International Criminalization of Internal Atrocities", 89 *American Journal of International Law* (1995), 554–577, at 555.

[3] See, in particular, *The Statute of the International Criminal Court:* A Documentary History. Compiled by M. C. Bassiouni (Transnational Publishers, 1998).

[4] See, e.g., M. C. Bassiouni and E. Vetere (eds.), *Organized Crime*, A Compilation of UN Documents 1975–1998 (Transnational Publishers, 1998); S. Adamoli *et al*., *Organized Crime around the World* (HEUNI Publication 31, Helsinki 1998).

and Criminal Justice Programme was restructured some years earlier, when the UN Commission on Crime Prevention and Criminal Justice was established by the General Assembly's Resolution 46/152 of 18 December 1991. The recent emphasis of this programme lies clearly in the prevention and control of organized transnational crime, and especially in the elaboration of a new international convention on the subject.

Thirdly, we can see the strong development of international criminal law and the increase of the importance of the UN's activities in global criminal policy taking place at the same time as the regional strengthening of similar tendencies, e.g. on the European level. In our region, the most powerful organizations are of course the Council of Europe and the European Union; their legal instruments have reflected and generated common principles based on the values of democracy, human rights and the rule of law. The significance of these values and principles has been emphasized when several central and eastern European countries, after their political transformation, have joined the Council of Europe in the 1990s.[5] Certain common European interests – most notably, the need to protect the financial interests of the European Union – have increased pressures towards the evolution of a (nascent) penal law of the EU.[6]

b. The aim of this brief essay is to scrutinize the tendencies towards more unified or harmonized criminal policies on the international and the European level, as well as to look into the trends of intensified international cooperation in criminal matters. Do these movements reflect coherent and rational criminal-policy decisions? What are the limitations of such an international or European criminal policy?

The term "criminal policy" should here be given a broad meaning, i.e. as the totality of public decisions and debate relating to the prevention, control and sanctions of crime as well as to criminal justice systems. The applied research relating to these issues may of course also be called criminal policy, in this sense a sector of the criminal sciences (the others being criminal law and criminology).

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[5] See generally, *Europe in a Time of Change: Crime Policy and Criminal Law*. Recommendation No. R (96) 8 and explanatory memorandum and report on responses to developments in the volume and structure of crime in Europe in a time of change (Council of Europe, 1999).

[6] See, in particular, M. Delmas-Marty, "The European Union and Penal Law", 4 *European Law Journal* (1998), 87–115.

2 GLOBAL CRIMINAL POLICY: THE ROLE OF THE UNITED NATIONS

a. When speaking about global criminal policy, the UN and its instruments are at the center of attention. The basis for the UN's work in the field of crime prevention and criminal justice can be found in the Charter of the UN (1945) and the Universal Declaration of Human Rights (UDHR; 1948). The relevant provisions of the Charter and UDHR are of importance in two ways:

- "They posit the right of the people of the world to enjoy domestic tranquillity and security of person and property without the encroachment of criminal activity. At the same time, they predicate efficient criminal justice systems that do not deprive citizens of their rights." – The relevant provisions include the Preamble and Article 1 of the Charter, and the Preamble and Articles 3, 12, 17(2) and 28 of the UDHR.[7]
- The Economic and Social Council decided in 1948 that the UN should take a leading role in setting criminal policy worldwide. The General Assembly forwarded this initiative in 1950.[8]

Traditionally, the field of crime prevention and criminal justice has within the UN been treated as an adjunct of social and economic affairs, although the importance of due respect for human rights in the administration of justice has also been emphasized from the beginning. The 1991 reorganization of the UN activities in the field led to the creation of a special programme covering the field and to certain changes in the priorities of the substance and forms of the work. The general goals were defined in the new UN programme in the following way:

a) The prevention of crime within and among States;
b) The control of crime both nationally and internationally;
c) The strengthening of regional and international cooperation in crime prevention, criminal justice and the combating of transnational crime;
d) The integration and consolidation of the efforts of Member States in preventing and combating transnational crime;
e) More efficient and effective administration of justice, with due respect for the human rights of all those affected by crime and all those involved in the criminal justice system;
f) The promotion of the highest standards of fairness, humanity, justice and professional conduct.[9]

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[7] *The United Nations and Crime Prevention* (United Nations, 1991), 28–29, 33. See also R. S. Clark, *The United Nations Crime Prevention and Criminal Justice Programme* (University of Pennsylvania Press, 1994), 10–11.

[8] Clark, note 7, 13–14; The United Nations and Crime Prevention, note 7, 29.

[9] The UN General Assembly Resolution 46/152 (19 December 1991), Annex (II. Programme of Action: B).

The clearest change in the priorities concerns the increased emphasis on the combating of transnational crime. The recent structural changes, in 1998, that is the reconstitution of the Secretariat into the Centre for International Crime Prevention and the reorganization of the UN Office in Vienna into the Office for Drug Control and Crime Prevention, reinforce this trend. The elaboration of the UN Convention against Transnational Organized Crime and the protocols thereto is now the major subject on the agenda of the current UN Crime Prevention and Criminal Justice Programme.

In its seventh session (1998) the UN Commission on Crime Prevention and Criminal Justice, however, reaffirmed the need to maintain a balance between combating transnational organized crime, as the present main priority issue, and the other priority issues of the programme. In the practical enforcement of the programme during the 1990s, a large amount of the resources has been used for training, advisory services and technical cooperation; this work has been carried out in cooperation with other actors (such as UN-affiliated Institutes and, recently, the UN Development Programme).[10]

b. When assessing the activities of the UN in the field of crime prevention and criminal justice during the past fifty years, the impact of these particular measures should be seen in the context of the whole of the work and instruments of this global organization. The general basic documents on international human rights law (in particular, UDHR of 1948, and the International Covenant on Civil and Political Rights of 1966) have been most influential.[11] Nevertheless, the standards and guidelines developed in the field of crime prevention and criminal justice are also crucial. Most of these standard-setting instruments are relevant, not only from the aspect of human rights protection, but also as ethical norms for professional conduct.

The Standard Minimum Rules for the Treatment of Prisoners (1957) are the oldest and best known of these UN instruments; their implementation in national legislations and practices has probably also been the most effective. The 1985 Milan Congress and the 1990 Havana Congress on the Prevention of Crime and the Treatment of Offenders were particularly active in the formulation of norms and standards.[12] A compilation of this "soft-law" material

[10] See the report on the seventh session of the UN Commission on Crime Prevention and Criminal Justice, 6 *ISPAC Newsletter* No. 22 (1998).

[11] As for the UDHR, see esp. *The Universal Declaration of Human Rights*. Edited by G. Alfredsson and A. Eide (Martinus Nijhoff Publishers, 1999).

[12] See, in detail, Clark, note 7, Parts II–IV. As for the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, see esp. M. Joutsen, *The Role of the Victim of Crime in European Criminal Justice Systems* (HEUNI Publication 11, Helsinki 1987).

has been published for information and training purposes.[13] It is noteworthy that the UN General Assembly resolutions and other statements of principle may in some circumstances contribute to the process of making customary international law.[14] These kinds of UN norms and standards can also have interpretative effects on the application of domestic law, even if they are not regarded as legally binding.[15] In general, however, the follow-up (reporting and other supervision) mechanisms of the implementation of these norms and standards are still insufficiently developed.[16]

c. One dimension in the UN's role in the field of crime prevention and criminal justice is the examination of the conception on criminal policy that the relevant UN documents reflect. The definition, described above in section 2.a, of the goals for the restructured UN programme in crime prevention and criminal justice (1991) seems to be traditional. However, a closer look reveals interesting details. The introductory definition of that UN programme states that its purpose is to provide assistance to Member States in their efforts "in reducing the incidence and costs of crime and in developing the proper functioning of their criminal justice systems". Among the priorities of the programme, particular consideration should be given to empirical evidence on the nature and extent of crime and on trends in crime, and to the social, economic and other costs of crime and its control.[17]

These items refer to a concept of *rational* criminal policy, the importance of which has been emphasized in Finland and the other Nordic countries since the beginning of the 1970s.[18] Among the UN-affiliated Institutes, the European Institute for Crime Prevention and Control, Helsinki, (HEUNI) has been active

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[13] *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice*. UN Publication Sales No. E.92.IV.1 (1992).

[14] See, in particular, S. Redo, "United Nations Criminal Justice Norms and Standards and Customary Law", in: M. C. Bassiouni (ed.), *The Contributions of Specialized Institutes and Non-Governmental Organizations to the United Nations Criminal Justice Programme* (Martinus Nijhoff Publishers, 1995), 109–135.

[15] See, for an example from the Finnish practice of the Parliamentary Ombudsman, L. Lehtimaja, "International Human Rights and Domestic Legality: Experiences of the Finnish Parliamentary Ombudsman", A. Rosas (ed.), *International Human Rights Norms in Domestic Law* (Helsinki 1990), 93–108, at 107.

[16] See Clarke, note 7, Part IV.

[17] The UN General Assembly Resolution 46/152, Annex (II. Programme of Action: A and D).

[18] See esp. I. Anttila, "Conservative and Radical Criminal Policy in the Nordic Countries", and P. Törnudd, "The Futility of Searching for Causes of Crime", both in: 3 *Scandinavian Studies in Criminology* (1971), 9–21 and 2333. See also, e.g., R. Lahti, "Scandinavian Criminal Policy: Trends and Interactions", 4 *Kansainoikeus – Ius Gentium* (1987), 128–148.

in promoting debate and studies on the criteria of rationality. For instance, the criteria of a rational criminal justice system as well as the indicators of criminal policy and the strategies of crime prevention have been deliberated.[19] Recently, a pathbreaking analysis of the national responses to the Fifth UN Survey of Crime Trends and Operation of Criminal Justice Systems (19901994) was published in the framework of HEUNI's activities.[20]

A coherent and rational criminal policy should be based on research and strategic analysis; it should be comprehensive, covering all sectors and actors of crime prevention and control, of sanctions and their enforcement, and of the entire criminal justice system. The concept of rationality ought not to be limited to the criteria of goal-rationality (utility, efficiency), but it should include the criteria of value-rationality (justice, legitimacy, humaneness) as well. The significance of the latter principles has been strengthened with the increased awareness of the fundamental values of democracy, human rights and the rule of law. It is important to carry out criminal-policy measures at various levels: the international and regional (e.g. European) levels are particularly relevant when combating transnational and trans-border crime (see *infra*, section 3); as for national (domestic) responses to crime, crime prevention strategies should be developed also locally and regionally.

Much research and analysis is still needed, for instance for the creation of successful strategies of crime prevention and for the development of proper indicators of crime and of the performance of the criminal justice system.[21] Some criticism has been expressed to the effect that true international strategies are still missing in the international cooperation against transnational crime[22] as well as in international crime prevention.[23]

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[19] See *Effective, Rational and Humane Criminal Justice* (HEUNI Publication 3, Helsinki 1984); and M. Joutsen (ed.), *Five Issues in European Criminal Justice* (HEUNI Publication 34, Helsinki 1999), 156–213.

[20] See K. Kangaspunta *et al*. (eds.), *Crime and Criminal Justice Systems in Europe and North America 1990–1994* (HEUNI Publication 32, Helsinki 1998). Never before have so much data been available from so many European and North American countries (Foreword, iii).

[21] See, e.g., the discussion in: *Five Issues in European Criminal Justice*, note 19, *passim*.

[22] See M. C. Bassiouni, "A Comprehensive Strategic Approach to International Cooperation for the Prevention, Control and Suppression of International and Transnational Crime", 15 *Nova Law Review* (1991), 353–432, at 360; R. Godson and P. Williams, "Strengthening Cooperation against Transnational Crime", unpublished paper presented at the International Conference on Responding to the Challenges of Transnational Crime, Courmayeur, Italy, 25–27 September 1998.

[23] See discussion summary in: *Five Issues in European Criminal Justice*, note 19, 17.

3 INTENSIFIED COOPERATION AND INTERNATIONAL TRIBUNALS FOR THE COMBATING OF INTERNATIONAL (OR TRANSNATIONAL) CRIME

a. The recent emphasis on transnational organized crime in the UN Crime Prevention and Criminal Justice programme provides continued support for the efforts to improve methods of international cooperation in criminal matters. According to the Guiding Principles for Crime Prevention and Criminal Justice (Articles 39–40), adopted by the 1985 Milan Congress, those methods should be made less cumbersome and more effective – still with due regard to human rights and internationally accepted legal standards. After the Milan Congress, a comprehensive set of model treaties for international cooperation in criminal matters has been elaborated and adopted. The most important of them, i.e. the Model Treaties on Extradition and on Mutual Assistance in Criminal Matters (1990), have already been provided with manuals (1995)[24] as well as with alternative or complementary articles to them (1997, 1998).

The UN model treaties in crime prevention and criminal justice are intended to serve as a basis for bilateral or multilateral negotiations in areas of international cooperation.[25] They are not simply codifications of already existing state practices. "Rather, they represent a thoroughgoing effort to create levels of co-operation in accordance with modern needs", as *Bert Swart* points out; the UN model treaties seek a new balance between the interests of effective inter-state cooperation, the interests of individual States in a certain freedom of action, and the protection of individual rights.[26]

The on-going elaboration of the UN Convention against Transnational Organized Crime can also be seen as a continuation of the endeavors to combat transnational crime by the means of international multilateral conventions. According to *M. Cherif Bassiouni*'s study, there are 24 categories of international crimes represented by some 316 international instruments established between 1815 and 1989.[27]

Bassiouni has analyzed so-called penal characteristics, several of which are normally contained in these international instruments:

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[24] *See International Review of Criminal Policy*, Nos. 45 and 46 (1995; UN Publication Sales No. E.96.IV.2).

[25] *International Review of Criminal Policy*, Nos. 45 and 46, note 24, iii.

[26] Swart, "Refusal of Extradition and the United Nations Model Treaty on Extradition", XXIII *Netherlands Yearbook of International Law* (1992), 175–222, at 178.

[27] Bassiouni, *Draft Statute International Criminal Tribunal* (Nouvelles études pénales 9 bis, A.I.D.P., érès 1993), 40.

(1) Explicit recognition of the proscribed conduct as constituting an international crime, or a crime under international law, or a crime;
(2) Implicit recognition of the penal nature of the act by establishing a duty to prohibit, prevent, prosecute, punish, or the like;
(3) Criminalization of the proscribed conduct;
(4) Duty or right to prosecute;
(5) Duty or right to punish the proscribed conduct;
(6) Duty or right to extradite;
(7) Duty or right to cooperate in prosecution and punishment (including judicial assistance in penal proceedings);
(8) Establishment of a criminal jurisdictional basis (or theory of criminal jurisdiction or priority in criminal proceedings);
(9) Reference to the establishment of an international criminal court or international tribunal with penal characteristics (or prerogatives);
(10) Elimination of the defense of superior orders.[28]

Bassiouni has also examined the rationale for categorizing international crimes and made the following distinction: an international instrument may be justified, because (a) an international element, (b) a transnational element, or (c) an element of necessity for international cooperation is reflected in those crimes.[29] This kind of examination is useful in order to increase rationality in the policy of international criminalizations. As borders can now be crossed more easily, there is more and more need for inter-state cooperation in order to prevent and control types of crime which used to have connections with only one state and jurisdiction.

There are, of course, many other issues to be resolved in an inquiry about the merits of the system of international criminal law. In this consideration the traditional limitations of any criminalization (i.a. *ultima ratio* and various aspects of utility and justice) should be taken into account. An important question relates to the enforcement models for international criminal law: To what extent does the availability of an international tribunal improve law enforcement? How should international and domestic jurisdiction, i.e. the direct and indirect enforcement models, be coordinated? In what ways could the indirect enforcement model, by resorting to national criminal justice systems and their cooperation, operate more effectively (*cf*. Bassiouni's list of "penal characteristics", *supra*)?

The newest developments of international criminal law indicate two major trends. Firstly, the draft UN Convention against Transnational Organized

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[28] Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (Martinus Nijhoff Publishers, 1987), 25–26.

[29] *Ibid*., 35–46, where the international crimes are put into a hierarchy by using the distinction. This gradation is aimed at reflecting how serious a threat the crime is to the international community. See also, *ibid*, 53–59, where some additional criteria and distinctions are presented.

Crime and the protocols thereto are intended to create a comprehensive set of multilateral agreements for promoting cooperation in preventing and combating serious *transnational crime* (money-laundering as a typical example) and for safeguarding their effective implementation in national legal systems. The obvious model for this draft Convention is the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 1988), which was the first global multilateral convention covering all existing instruments of international cooperation in criminal matters.[30]

Secondly, the *ad hoc* International Criminal Tribunals for Former Yugoslavia and Rwanda and the adoption of the Statute for the permanent International Criminal Court aim at reining in any impunity for the most serious crimes of international concern, that is, *international crimes stricto sensu* (genocide, crimes against humanity and war crimes)[31]: The introduction of a direct, supranational enforcement model should "put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes". This objective ought to be ensured also "by taking measures at the national level and by enhancing international cooperation"; the permanent court "shall be complementary to national criminal jurisdictions".[32]

There are divergent opinions about the ultimate functions of these tribunals and their general preventive effects. When assessing the impact of the *ad hoc* tribunal for former Yugoslavia, *Payam Akhavan* warns against expecting short-run effects. The most significant and realistic influence of the international court on general prevention is "in the gradual internationalization of expectations of individual accountability and the emergence of habitual conformity with elementary humanitarian principles, both in the former Yugoslavia and the international community".[33] The expression of disapproval, i.e. the symbolic function of punishment, is here particularly important.[34] To what extent the

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[30] As for Vienna Convention, see J. J. E. Schutte, "Extradition for Drug Offences", 62 *Revue Internationale de Droit Pénal* (1991), 135–157.

[31] See generally on that aim, C. C. Joyner (ed.), *Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights* (Nouvelles études pénales 14, A.I.D.P., érès 1998).

[32] The citations are from Preamble and Article 1 of the Rome Statute for the International Criminal Court. As for a detailed documentation, see *The Statute of the International Criminal Court*, note 31.

[33] Akhavan, "Justice in The Hague, Peace in the Former Yugoslavia?", 20 *Human Rights Quarterly* (1998), 737–816, at 751.

[34] See also Bengt Broms' discussion on the arguments in favor of the establishment of an international criminal court. He mentions except the prevention aspect the court's function as preserving a common belief in the importance of implementing the legal order. Broms, "The Establishment of an International Criminal Court", in: Y. Dinstein and M. Tabory (eds.), *War Crimes in International Law* (Martinus Nijhoff Publishers, 1996), 183–196, at 195.

international criminal tribunals will have long-term (indirect) positive effects, by strengthening humanitarian values and fundamental principles of justice common to all states (*civitas maxima*), will obviously depend on whether the courts are reasonably effective and whether the selection of the accused persons is reasonably fair. These factors are decisive as to the legitimacy of these courts and, more generally, of the enforcement of international criminal law.[35] The effective and legitimate enforcement of international criminal law is also essentially dependent on the way how the domestic jurisdictions and judiciaries operate and complete the work of supranational bodies.[36]

4 CHALLENGES OF EUROPEAN CRIMINAL POLICY

a. Europe is the area where, for several reasons, a trend towards a more unified or harmonized criminal policy is evident. The move towards a European criminal policy relies on common legal traditions and the established European institutions which have maintained them.[37] Accordingly, the regionalization of international criminal law is particularly developed in Europe.[38] As for the European institutions, the role of the Council of Europe and the European Union (European Community) and their instruments has been decisive for harmonizing criminal policy and intensifying inter-state cooperation in criminal matters.

The legal instruments of the Council of Europe deal with all aspects of criminal law and procedure; these instruments include the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR; 1950, as amended by Protocol No. 11, 1998) and more than 20 multilateral Conventions on various issues of criminal law and procedure.[39] Within the Council of

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[35] *Cf*. the skepticism of P. O. Träskman, "Etableringen av en internationell brottmålsdomstol", 80 *Nordisk Tidsskrift for Kriminalvidenskab* (1993), 169–208, at 204.

[36] On the principle of "complementarity" and the problematic coordination of the tasks of international and domestic jurisdiction, see in detail I. Tallgren, "Completing the 'International Criminal Order"', 67 *Nordic Journal of International Law* (1998), 107–137. Tallgren speaks e.g. about a polycentric 'international criminal law' and about the tension between communitarian and sovereignty-based approach when enhancing "the effective prosecution and suppression of crimes of international concern"; *ibid*. 110, 137.

[37] See H. Jung, "Criminal justice – a European Perspective", *Criminal Law Review* (1993), 237–245, at 240.

[38] See generally, The Regionalization of International Criminal Law and the Protection of Human Rights in International Cooperation in Criminal Proceedings, 65 *Revue Internationale de Droit Pénal* (1994), Nos. 1–2.

[39] Among the latest treaties are: Convention on the Protection of the Environment through Criminal Law (4.XI.1998, *European Treaty Series* 172) and Criminal Law Convention on Corruption (27.I.1999, *European Treaty Series* 173).

Europe, the obligations of the member states in criminal matters are confined to cooperation of an intergovernmental nature. The same is true, in relation to the European Union, under Title VI of the Maastricht Treaty (the so-called pillar III); traditionally, criminal law does not belong to the scope of application of Community law (pillar I of the EU), but instead falls within pillar III, hence it is an issue of inter-state cooperation. The Amsterdam Treaty (1999) retained the provisions on police and judicial cooperation in criminal matters within pillar III.

Mireille Delmas-Marty has put the question whether we are going towards harmonization (common guiding principles, obligation of compatibility) or unification (identical rules, obligation of conformity) in European criminal policy. Her answer is that we are in fact going in both directions, and it is particularly important to notice the appearance of common principles both in the ECHR and European Community law.[40] Because neither the European Community nor the Council of Europe officially have the competency to establish rules in criminal law, it is "thus in an indirect fashion, through interpretation of principles not specifically criminal, that the European criminal policy is defined in a more or less restrictive, but not totally coherent, way".[41] Roughly analyzed, Community law mainly affects substantive criminal law and the ECHR criminal procedure.

The latest developments indicate that the application of European Community law has led to an unforeseen and complex process of the harmonization of the criminal justice systems in the member states of the EU.[42] The Amsterdam Treaty has under pillar III adopted the objective of maintaining and developing the EU as an "area of freedom, security and justice" and, at the same time, brought about the review of various aspects involved; for example, the legal instruments are made subject to tighter judicial and democratic control, the Schengen *acquis* is integrated into the framework of the EU, and the central role of Europol is recognized.[43]

Article 29 in the Title VI of the Amsterdam Treaty on the EU defines the means to obtain a high level of safety within an area of freedom, security and

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[40] Delmas-Marty, "Politique Criminelle d'Europe", in: N. Jareborg (ed.), *Towards Universal Law* (Iustus Förlag, 1995), 55–90. See also M. Delmas-Marty (ed.), *What Kind of Criminal Policy for Europe?* (Kluwer Law International, 1996), *passim*.

[41] Delmas-Marty, in: *What Kind of Criminal Policy for Europe?* note 40, 311.

[42] See Delmas-Marty, note 6, 87–106 with references.

[43] See in detail, Action Plan of the Council and the Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice; Adopted by the Justice and Home Affairs Council of 3 December 1998 (1999/C 19/1).

justice. The objective shall be achieved by preventing and combating crime, organized or otherwise, trough

- cooperation between police forces, customs authorities and other competent authorities in the Member States,
- closer cooperation between judicial and other competent authorities of the Member States, and
- approximation, where necessary, of rules on criminal matters in Member States.

These provisions are specified by Articles 30–32.

b. There are two interesting proposals for alternative ways to strive for common European objectives of criminal policy. Firstly, on the request of the Council of Europe, *Ulrich Sieber* has prepared a memorandum on a European Model Penal Code for the Council's Parliamentary Assembly (1997).[44] Secondly, within the European Legal Area Project, launched in 1995 by Director *Francesco de Angelis* (European Commission, Directorate-General XX), a proposal called "Corpus Juris" was prepared by an expert group (1997). The proposal includes a set of penal rules "limited to the penal protection of the financial interests of the European Union, designed to ensure, in a largely unified European legal area, a fairer, simpler and more efficient system of repression". These rules are based on seven principles (the principles of legality, fault and proportionality as to criminal law; and the principles of European territoriality, judicial control, "contradictoire" and subsidiarity as to criminal procedure).[45]

The elaboration of a European Model Penal Code would be a "soft" form of harmonization. This method is among Scandinavian scholars accepted by *Vagn Greve*, who is critical of the "hard" forms of unification: "The road ahead leads through an identification of neutral or common areas, the establishment of a model penal code for the relevant parts, and thereafter a local or regional acceptance of the move."[46]

In the Scandinavian criticism against the unification of European criminal policy, and also against the "Corpus Juris" proposal, the main arguments have concentrated on the concern that the basic values of the "Nordic model" would then be endangered. In the Scandinavian thinking, for example, the role of

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[44] Sieber, *A Model European Penal Code*. Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, 5 February 1997, AS/Jur (1996) 76. See also A. Cadoppi, "Towards a European Criminal Code?", 4 *European Journal of Crime, Criminal Law and Criminal Justice* (1996), 2–17.

[45] See M. Delmas-Marty, *Corpus Juris* (Economica, 1997), esp. 40.

[46] Greve, "European Criminal Policy", in: *Towards Universal Law*, note 40, 91–116, at 112.

crime prevention is particularly emphasized; specific criteria of rationality in criminal policy such as legitimacy and humaneness (see *supra* 2.c) are applied; and the level of repression in criminal sanctions is relatively low.[47]

Perhaps the most important question relates to the preconditions for the legitimacy of criminal justice systems. Greve's criticism also relies primarily on the low acceptability of a unified, supranational European criminal policy, because it cannot be based on similar cultural traditions or a democratic mandate, as a national criminal policy can.[48] In these respects a sub-regional, Nordic criminal policy has much better chances of success, and so, for example, the existing inter-state cooperation works effectively and smoothly.[49]

At a regional, European level such legitimacy is difficult to achieve. In order to increase acceptability of and confidence in European institutions (primarily in the EU), there should be general awareness of common European values (as now captured by the concept of the area of freedom, security and justice in the Amsterdam Treaty); deficiencies in the decisionmaking processes and their transparency should be removed (the idea of citizens' Europe and the sufficient and equal freedom of action of member states should be combined); and the commitment to the observance of human rights and fundamental freedoms ought to be strengthened.[50]

There are, in my opinion, good reasons for these kinds of measure. The features and positive effects of the Scandinavian inter-state cooperation in general and the criminal policy in particular should be considered as a Nordic model for common European criminal-policy decisions.

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[47] See Greve, note 46, 94, 97–107; P. O. Träskman, "Corpus Juris", 84 *Nordisk Tidsskrift for Kriminalvidenskab* (1997), 262–277, at 264. See also Seminar on the Protection of the European Communities' Financial Interests, *Agon* 1997 No. 14, 1819. – Generally on Scandinavian criminal policy, see, e.g., R. Lahti, "Current Trends in Criminal Policy in the Scandinavian Countries", in: N. Bishop (ed.), *Scandinavian Criminal Policy and Criminology 1980–85* (1985), 59–72; A. Snare (ed.), *Beware of Punishment* (Scandinavian Studies in Criminology, Vol. 14, 1995).

[48] Greve, *ibid*.

[49] See generally, R. Lahti, "Sub-Regional Co-operation in Criminal Matters: The Experience of the Nordic Countries", in: A. Eser and O. Lagodny (eds), *Principles and Procedures for a New Transnational Criminal Law* (Freiburg, 1992), 305–310.

[50] As for further elaborations on the theme, see, e.g., M. Delmas-Marty (ed.), *The Criminal Process and Human Rights,* Toward a European Consciousness (Martinus Nijhoff Publishers, 1995), *passim*; I. Taylor, "Crime, Market-Liberalism and the European Idea", in: V. Ruggiero *et al*. (eds.), *The New European Criminology* (Routledge, 1998), 19–36, at 32.

5 CONCLUSIONS

Tendencies towards more unified or, at least, more harmonized criminal policies on the international and the European level are increasingly apparent. Nevertheless, there continue to be crucial limitations and weaknesses in international and European criminal policy, when the criminal-policy decisions are rated in accordance with the criteria of coherence and rationality.

The recent emergence of the system of international criminal law indicates that the solidarity of nations in crime prevention may lead to the establishment of a supranational judiciary at least in case of "the most serious crimes of concern to the international community as a whole". Agreed multilateral cooperation on the international and the European level is more often the solution, under the precondition that strong common state interests unite nations in combating certain types of transnational crimes (such as serious trans-border organized crime). In both cases the states parties normally maintain their sovereignty-based interests, for example by demanding that the principle of complementarity or subsidiarity is applied to criminal jurisdiction and by putting limits to cooperation. On the other hand, an effective inter-state cooperation is supported by the harmonization of criminal policies and by common approaches in the protection of human rights and fundamental freedoms.

On the European level harmonization and, partly, unification of criminal policy is more feasible, owing to the common legal traditions and the established institutions (Council of Europe and the EU) which maintain and strengthen them. Nevertheless, the legitimacy of criminal law instruments which have been determined at a regional level is weak, unless effective measures are taken in order to increase the acceptability of and the confidence in those European institutions. The experiences of the Nordic countries in criminal policy and in inter-state cooperation in criminal matters should be utilized in the deliberation of these measures.

19. Concurrent National and International Criminal Jurisdiction and the Principle of *ne bis in idem*. Finland*

1 INTRODUCTION

The principle of *ne bis in idem* is recognized by Finnish law at the domestic level, although no explicit provisions prescribe it in national legislation. The relevant human rights provisions create nowadays the most important legal basis for this principle. As for the recognition of the principle involving horizontal transnational concurrence, there are provisions on the legal force of foreign judgments in the Penal Code chapter on criminal jurisdiction (PC, 39/1889; Chapter 1, as amended 626/1996). Criminal jurisdiction is extensive but the principle of *ne bis in idem* is also recognized widely. In respect of the cases of "vertical national-supranational concurrence", there is a special legal provision on the recognition of the decisions of the International Criminal Tribunal for the Former Yugoslavia (ICTY).

2 THE PRINCIPLE OF *NE BIS IN IDEM* AT THE DOMESTIC (NATIONAL) LEVEL

1. The term *ne bis in idem* is not common in the traditional legal literature. Instead of that it is usual to speak about the negative authority of *res judicata*. This principle has been recognized as a customary law norm without an explicit expression in domestic legislation.[1] However, there are certain legal provisions which in an indirect way indicate the acknowledgement of this principle:

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* Original source: *Revue Internationale de Droit Pénal*, 73:3–4, 2002, pp. 901–911. – When preparing this report an unpublished LL.M. thesis of my project student, Mr. *Jaakko Lehessaari* on the topic has been useful; see Lehessaari, *Tuomioiden oikeusvoima rikosprosessissa* [Res judicata of judgments in criminal proceedings]. University of Helsinki, Faculty of Law, March 2003.

[1] On the legal literature, see especially Tauno Tirkkonen, *Suomen rikosprosessioikeus* [Finnish criminal procedural law]. Porvoo 1972, pp. 436–458; Jyrki Virolainen, Oikeustapaus-

a) In the old provision (1868) of the Code of Judicial Procedure it is prescribed punishable to bring the case again to court although a final judgment had been given.
b) Certain provisions on extraordinary appeal in the same Code reflect the principle (see Chapter 31).
c) A provision of the Code of Criminal Procedure (689/1997; Chapter 5, Section 17) restricts crucially the prosecutor's right to amend the charge during the trial. On the other hand cogent reasons require that amending the contents of the charge during the proceedings should be allowed in all situations where the bringing of a new charge is precluded by the principle of *ne bis in idem*[2].

The relevant human rights provisions, i.e. Article 14, Section 7, of the International Covenant on Civil and Political Rights (ICCPR) and Article 4 in the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), have the status of Parliamentary laws after the ratification of these conventions in Finland (in 1976 as to the ICCPR and 1990/1998 as to the ECHR). In the ratification process these conventions have been incorporated through Acts of Parliament *in blanco* into the domestic legal order. In a way Finland represents dualism in form but monism in practice, when implementing human rights treaties into the domestic legal order.[3] It should be noted that Finland made a reservation when ratifying the ICCPR in order to keep in force the possibility to reversal of a final penal judgment to the detriment of the accused according to the Code of Judicial Procedure (31:9).

2. In a recent Government proposal for the amendment of the Code of Judicial Procedure (bill no. 190/2002) the *rationales* of the negative authority of *res judicata* of a judgment have been analysed in the following way.

- Legal certainty and public peace require that each litigation should have its conclusion. Although it is the purpose of trial and appeal processes to

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kommentti, KKO 2000:37 [Commentary on the Supreme Court decision 2000:37], *Lakimies*, no. 5/2000, pp. 776–788, at 779781; Dan Frände, *Finsk straffprocessrätt I* [Finnish criminal procedural law I]. Helsingfors 1999, pp. 424–429; Pekka Koponen, Uudempaa tulkintakäytäntöä syytesidonnaisuudesta ja rikostuomion oikeusvoimasta, I–II [Binding effect of a criminal charge and the principle of *ne bis in idem* in recent practice, I–II]. *Lakimies,* nos. 2 and 3/2003, pp. 183–200, 375–397, at 183 and 375.

[2] See Virolainen 2000, p. 782; Koponen 2003, p. 184.

[3] See in more detail Martin Scheinin, Incorporation and Implementation of Human Rights in Finland. In: Martin Scheinin (ed.): *International Human Rights Norms in the Nordic and Baltic Countries*. Martinus Nijhoff Publishers, The Hague 1996, pp. 257–294; Kimmo Nuotio, Transforming International Law and Obligations into Finnish Criminal Legislation… *Finnish Yearbook of International Law* [FYBIL], Vol. X, 1999. Kluwer Law International, 2002, pp. 325–350.

attain materially truthful decisions, the weight of the arguments in favour of ending the litigation increases when the decision has become final, so that no ordinary appeal is possible. For instance, the individual freedom of the accused after acquittal requires that he or she does not need to live in uncertainty as to the possibility of reopening the case.
- The legal safeguards and the resocialization of the sentenced person are also important arguments against the possibility of a new criminal procedure, in which a more severe punishment could be imposed.
- Additionally, the doctrine of the negative authority of *res judicata* reduces costs caused by renewed processes and induces the police and prosecuting authorities to do their jobs properly, so that the case is carefully investigated before bringing it to the court.

Essentially similar arguments have been presented in Finnish legal literature.[4]

3. The meaning or identity of the concept "*idem*" is generally regarded as to be determined on the basis of the actual, *historical event*. The Supreme Court decisions 1992:116, 1999:36, 2000:37 and 2003:30 have confirmed this legal position. This is also the dominant view among legal scholars.[5] A nearer look at the case-law of the Supreme Court since the 1990s gives a fuller account of the law in action.

According to the *Supreme Court decision 1992:116*, a new charge for the crimes of aggravated drunken driving, causing a traffic hazard and negligent bodily injury was precluded, because the accused had already been sentenced for drunken driving, which had been committed through one and the same act. In the later *decision 1999:36* the historical event consisted of the following act of A: he had, on behalf of the company X, unlawfully sold a motor boat owned by B to the company Y. A had been prosecuted for fraud against Y but the charge was dismissed. A new charge for embezzlement against X was raised. The fact that these two crimes had two separate injured parties was not regarded as a significant divergence when assessing the identity of the acts; therefore, the negative authority of the acquittal was recognized and a new charge could not be examined by court. In the latest *Supreme Court decision 2003:30* the accused was found guilty of a violation of the Medicine Act, because he had

[4] See especially Virolainen 2000, p. 780; Koponen 2003, pp. 183–184. See also Immi Tallgren, Commentary on Article 20 (*Ne bis in idem*). In: Otto Triffterer (ed.): *Commentary on the Rome Statute of the International Criminal Court*. Nomos Verlagsgesellschaft, Baden-Baden 1999, pp. 419–434, at 421.

[5] Virolainen 2000, pp. 782–788; Koponen 2003, pp. 376–380. *Cf*. Frände 1999, pp. 427–429, who draws the limits of *res judicata* according to what the essential features of the punishable act are.

unlawfully exported and distributed medicaments. This judgment precluded a new charge against him for narcotics offence, because the historical event was the same as in the first proceedings. The fact that the judicial nature of the act was not fully established in the first proceedings did not change the assessment.

The explained view has been slightly modified by the *Supreme Court decision 2000:37*. In that case the accused had been sentenced for unauthorized use of a motor car and the judgment had gained legal force. In a later process the same person was accused for causing a serious traffic hazard, traffic violation, causing a traffic hazard and operation of a vehicle without licence. The earlier judgment did not preclude the new charge, although the acts belonged to the same series of events caused by the unauthorized use of the motor car, because the new acts were not regarded as identical with the earlier one in relation to time, place and other conditions of the event. This precedent has been criticized by saying that in these kinds of cases of the ideal concurrence of offences the historical event should be seen as identical. The fact that the offences in question had different protected objects (legal interests, *Rechtsgüter*) – i.e., property on one hand and traffic safety on the other – is probably the factor which explains the partially different interpretation of the identity of the acts.[6]

4. As to the character of the tribunals and decisions, which qualify for a *ne bis in idem* effect, first and foremost are *the final decisions made by criminal courts*. The judgments may be final convictions, acquittals or guilty verdicts (waiving of punishment). Penal orders (day fines imposed by prosecutors) and decisions on summary penal fees (pecuniary penalties of a fixed amount imposed by police) – which both represent summary criminal proceedings – have the same effect. Dropping of charges does not have the same binding effect, although the prosecutor's right to withdraw his decision to drop the charge is strongly restricted (Code of Criminal Procedure, 1:11) and, therefore, non-prosecution has similar effects than *res judicata*.

The principle of *ne bis in idem* applies, as a principle, inside the criminal justice and its sanction system. A judgment rendered in the criminal proceedings precludes imposing any sanctioning in a new criminal process, for instance for ordering forfeiture. The decisions made by criminal courts do not bind civil or administrative courts except in relation to the evidence of facts. Penal ad-

[6] See, e.g., the critical comments of Virolainen 2000, *passim*, and Koponen 2003, pp. 378–379. *Cf*. Tirkkonen 1972, p. 454, who accepts a new charge in certain cases of the ideal concurrence of offences (when their objects or effects are different than those of the offences for which the first charge was raised).

ministrative law – such as the German *Ordnungswidrigkeitensystem* – has not been systematically developed in Finland. Certain types of penal administrative sanctions have been adopted, but their scope of application is limited to specific areas of law (traffic and taxation) so that these sanction systems partially collide with the criminal justice system. Due to the limited role of penal administrative law the principle of *ne bis in idem* has not gained the same significance in relation to these punitive administrative sanctions as it traditionally has inside the criminal justice system.

The decisions by which penal administrative fees are imposed for petty misdemeanours in traffic (such as parking violations or unpaid tickets in public transport), do not exclude ordinary or summarized criminal proceedings based on the same historical behaviour. The same concerns punitive tax increases which are imposed by tax authorities for fraudulent tax evasions. However, it should be noted that legal mechanisms for avoiding factual double sanctioning have been created. For instance, the payment for a parking ticket must on request be returned if criminal proceedings are initiated. In a similar situation the process for imposing a punitive fee for unpaid transportation should also be interrupted. A discretional mitigation of punishment in the cases of accumulative sanctions is provided by the general sentencing provisions of the Penal Code, although this ground is intended to be applied in exceptional cases only (PC 6:4, 466/1976; PC 6:7.1, 515/2003).

A stricter application of the principle *ne bis in idem* in relation to penal administrative sanctions would obviously require a reassessment of the role and conditions of these sanctions. The more they will serve as real substitutes of criminal sanctions and criminal proceedings, the more cogent arguments are in favour of the strengthening of that principle.[7]

5. *Corporate criminal liability* was introduced in 1995 in Finland (743/1995; Chapter 9 of the PC). The regulation prescribes that a penal sanction – i.e., corporate fine – may under defined conditions be imposed to the corporation itself as well as the individual(s) who have committed the offence on behalf of the corporation (e.g., by belonging to a statutory organ or other management thereof).[8] On the other hand, the possible accumulation of sanctions has been taken into account. Accordingly, a court may waive imposition of a corporate

[7] As for this kind of argument, see Koponen 2003, p. 397.

[8] As for the introduction of the criminal liability of corporations in Finland, see M. Riihijärvi, in: Hans de Doelder & Klaus Tiedemann (eds): *La Criminalisation du Comportement Collectif – Criminal Liability of Corporations*. Kluwer Law International, 1996, pp. 203–233.

fine on a corporation when that punishment is deemed unreasonable, taking into consideration the punishment which had already been imposed to a member of the management of the corporation. This may be the case when the corporation is small, the offender owns a large share of the corporation and his or her personal liability for the duties of the corporation are significant (see PC 9:4.3 and the *Supreme Court decision 2002:39*). The public prosecutor may also waive the bringing of charges against a corporation when the individual offender has already been sentenced to a punishment and it is to be anticipated that the corporation for this reason is not to be sentenced to a corporate fine (PC 9:7.2). In addition, accumulation of sanctions is a general ground for mitigating the punishment in sentencing.

6. According to Finnish law (Code of Judicial Procedure, 31:9), an *extraordinary re-opening of a criminal case is permitted* also to the detriment of the sentenced person, under certain restricted conditions. A recent legislative amendment makes a similar re-opening possible in relation to forfeiture (Code of Judicial Procedure, 31:9b; 360/2003).

3 THE PRINCIPLE OF *NE BIS IN IDEM* IN "HORIZONTAL (TRANS)NATIONAL CONCURRENCE"

1. According to the revised provisions on *criminal jurisdiction* (Ch. 1 of the PC; as amended 626/1996), *a broad field of extraterritorial application of Finnish criminal law is recognized*. Before this reform the scope of criminal jurisdiction was in some respects even wider (Ch. 1; as amended 320/1963), and that regulation was criticized for its "maximalist" extension. The revision was therefore welcomed. The reform also contained following two major improvements: by providing the requirement of double criminality when extraterritorial jurisdiction is applied and by introducing the international *ne bis in idem* principle.[9] The reformulated principles of criminal jurisdiction are now following:

[9] As for the critics, see A. H. J. Swart, Jurisdiction in Criminal Law: Some Reflections on the Finnish Code from a Comparative Perspective. In: Raimo Lahti & Kimmo Nuotio (eds): *Criminal Law Theory in Transition – Strafrechtstheorie im Umbruch*. Finnish Lawyers' Publishing Company, Helsinki 1992, pp. 527–543, at 528, 533. See also Per Ole Träskman, Provisions on Jurisdiction in Criminal Law …, *ibid*., pp. 511–526; Karin Cornils, Zur Regelung des räumlichen Geltungsbereichs im finnischen Strafgesetzentwurf, *ibid*., pp. 571–586.

a) The *territoriality principle* (PC 1:1) is supplied by the *flag principle* (PC 1:2). The place of commission has been defined, and it has a wide extension. See PC 1:10:

> "(1) An offence is deemed to have been committed both where the criminal act was committed and where the consequence contained in the statutory definition of the offence became apparent. An offence of omission is deemed to have been committed both where the offender should have acted and where the consequence contained in the statutory definition of the offence became apparent.
> (2) If the offence is a mere attempt, it is deemed to have been committed also where, had the offence been completed, the consequences contained in the statutory definition of the offence either (i) would probably have become apparent or (ii) would in the opinion of the offender have become apparent.
> (3) An offence by an inciter and abettor is deemed to have been committed both where the act of complicity was committed and where the offence by the offender is deemed to have been committed.
> (4) If there is no certainty of the place of commission, but there is justified reason to believe that the offence was committed in the territory of Finland, said offence is deemed to have been committed in Finland."

b) The *active personality principle* (PC 1:6). The Finnish citizenship must be owned either at the time of the offence or at the beginning of the trial concerned. Equivalent to a Finnish citizenship are deemed (1) a person who is permanently resident in Finland and (2) a person who was apprehended in Finland and who is a citizen of another Nordic country or has a permanent residence in such a country.

c) The *protective principle* (PC 1:3–4). It has been specified that an offence has been directed at Finland (1) if it is an offence of treason or high treason, (2) if the act has otherwise seriously violated or endangered the national, military or economic rights or interests of Finland, or (3) if it has been directed at a Finnish authority. Finnish law also applies to offences in public office and military offences.

d) The *passive personality principle* (PC 1:5). Finnish law applies to an offence that has been directed at a Finnish citizen, a Finnish legal entity or a foreigner permanently resident in Finland. This principle is applicable under the condition that the act may, under Finnish law, be punishable by imprisonment for more than six months.

e) The *universality principle* (PC 1:7). This principle has been defined to be applied "where the punishability of the act is based on an international agreement binding on Finland or on another statute or regulation internationally binding on Finland". In these cases of international and transnational crimes the condition of double criminality is not set as a prerequisite for punishment. The detailed provisions on the application of the universality principle are issued by Decree. The recently defined terrorist offences (Ch. 34a of the PC; as amended 17/2003) belong to the international crimes under the universality principle.

f) The *representation principle* or the principle of vicarious administration of criminal justice (PC 1:8). According to this principle, Finnish law is applicable to an offence committed outside Finland which may be punishable by imprisonment for more than six months, under the following condition: (1) either the State in whose territory the offence was committed had requested that charges be brought in a Finnish court or (2) that the offender be extradited because of the offence, but the extradition request was not granted (*aut dedere aut judicare*).

It should noticed that the extraterritorial jurisdiction is in practice restricted by the provision which, as a rule, sets the prosecution order of the Prosecutor-General as a prerequisite for the investigation of such a criminal case (PC 1:12; as amended 205/1997).

There is no provision in the Penal Code on the priority of the jurisdictional principles.

2. One of the objectives of the revision of the provisions on criminal jurisdiction was *to strengthen the transnational application of* "*ne bis in idem*". This can be read from the provision on "Foreign judgment" as follows (PC 1:13):

"(1) A charge shall not be brought in Finland if a judgment has already been passed and become final in the State where the act was committed or in another member state of the European Union and
(a) the charge was dismissed,
(b) the defendant was found guilty but punishment was waived,
(c) the sentence was enforced or its enforcement is still in progress or
(d) under the law of the State where the judgment was passed, the sentence has lapsed. (814/1998)
(2) The provisions of paragraph (1) notwithstanding, the Prosecutor-General may order that the charge be brought in Finland if the judgment passed abroad was not based on a request of a Finnish authority for a judgment or on a request for extradition granted by the Finnish authorities and
(a) under section 3, the offence is deemed to be directed at Finland,
(b) the offence is an offence in public office or a military offence referred to in section 4,
(c) the offence is an international offence referred to in section 7, or
(d) under section 10, the offence is deemed to have been committed also in Finland. However, the Prosecutor-General shall not order a charge to be brought for an offence that has been partially committed in the territory of that member state of the European Union where the judgment was passed. (814/1998)
(3) If a person is sentenced in Finland for an offence for which he or she has already served in full or in part a sanction imposed abroad, a reasonable amount shall be deducted from the sentence. If the sanction that has been imposed has been a custodial sentence, the court shall deduct from the

> sentence the time corresponding to the loss of liberty. The court may also note that the sanction that has been served is to be deemed a sufficient sanction for the offence."

The main model for this kind of formulation of *"ne bis in idem"* in 1996 was taken from the European Convention on the International Validity of Criminal Judgment and the European Convention on the Transfer of Proceedings in Criminal Matters.[10] Articles 54–58 of the 1990 Convention applying the Schengen Agreement have given a significant impetus to the 1998 amendment of the provision, and the exceptions to the prohibition of double jeopardy which are allowed in Article 55 of that Convention have been included in the cited provision of the Penal Code.

It is interesting to notice the views of the Finnish Government and Parliament, when the proposal from the Hellenic Republic concerning the adoption by the Council of a draft Framework Decision on the application of the "*ne bis in idem*" principle (Council of the European Union; 13 February 2003, 6356/03) was under their consideration. Generally, the views were positive towards the draft Framework Decision, and it was found useful in strengthening the principle of mutual recognition of foreign judgments. The draft provisions of the proposal were regarded as equivalent with the Schengen Agreement and Finnish Penal Code provisions except in one respect: the exception to the prohibition of double jeopardy which is based on the reasons connected with the application of the territoriality principle (see PC 1:13.2.d) would not be allowed. The proposed Framework Decision would not allow an exception to the principle of *ne bis in idem* in the cases of international offences (PC 1:13.2.c), either. The Finnish Government and Parliament did not consider these enlargements of the "*ne bis in idem*" problematic, because a consultation procedure between the authorities of the involved Member States would be provided and the co-operating Member States should trust to the operation of the legal systems of other States. So far there are no national legal provisions on such a consultation procedure with the list of preferences as to criminal jurisdiction, which is regulated in Article of the Draft Framework Decision.[11]

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[10] See Träskman 1992, p. 525.

[11] See Communication of the Government to the Parliament, U 2/2003 (3 April 2003); Opinion 1/2003 of the Legal Committee of the Parliament. This kind of participation of the Parliament in the national preparation of European Union matters is prescribed in Section 96 of the Constitution of Finland (731/1999).

3. Very few cases have occurred in practice so far concerning the horizontal-transnational application of the principle *ne bis in idem*. As indicated above (II.1), a prosecution order by the Prosecutor-General is normally required for investigating a criminal case when the offence was committed abroad. It can be estimated that such a prosecution order will primarily be given in cases of fake trials, i.e., when the first proceeding were initiated for the purposes of shielding the suspected person from criminal liability.

There are also few explicit legal opinions on the horizontal-transnational application of "*ne bis in idem*". As for the prerequisite of the concept "*idem*", it has been assessed in legal literature that the recent Finnish court practice (see above I.3) would in essence correspond with the case-law of the European Court of Human Rights, as expressed in the newer cases of *Franz Fischer v. Austria* (29 May 2001), *W.F. v. Austria* (30 May 2002) and *Sailer v. Austria* (6 June 2002).[12] The definition of "*idem*" in the draft Framework Decision on the application of the "*ne bis in idem*" principle was regarded as fully acceptable by the Finnish Government and Parliament[13], and that definition follows the criteria of the identity which are based on the historical event ("… the same, or substantially the same, facts, irrespective of its legal character").

The views of the Finnish Government and Parliament about the draft Framework Decision are worth noticing also in respect of the definition of "*judgment*". Any decision which as the status of *res judicata* under national law should be considered a final judgment, such as an extrajudicial mediated settlement in a criminal matter (see the *Decision of the Court of Justice on 11 February 2003, C-187/01 and C-385/01*). This was regarded as acceptable.[14] The Finnish Penal Code already considers the waiving of punishment equivalent with an acquittal (PC 1:13.1.a–b).

A new Finnish Act on the *surrender procedures between the European Union Member States* (1286/2003) was enacted for the implementation of the Framework Decision of 13 June 2002 on the European arrest warrant (2002/584/JHA). The provisions of the Act enlarge the application of the principle of *ne bis in idem* as grounds which absolutely or discretionally prohibit the surrender procedure, in line with Articles 3.2 and 4.3 of the Framework Decision.

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[12] Koponen 2003, pp. 385–387.

[13] See the Communication of the Government and the Opinion of the Legal Committee (*op.cit.*).

[14] *Ibid.*

4 THE PRINCIPLE OF *NE BIS IN IDEM* IN CASES OF "VERTICAL NATIONAL-SUPRANATIONAL CONCURRENCE"

As for the *supranational criminal jurisdiction* and the legal assistance to the International Tribunals, following national legislation has been enacted:[15]

- Act on the Jurisdiction of the International Tribunal for the Prosecution of Persons responsible for Crimes Committed in the Territory of the Former Yugoslavia [ICTY] and on Legal Assistance to the International Tribunal (12/1994).
- Act on the Implementation of the Provisions of a Legislative Nature of the Rome Statute of the International Criminal Court [ICC] and on the Application of the Statute (1284/2000).

The first-mentioned Act governs: a) the exercise of jurisdiction by ICTY and by Finnish courts, b) the recognition and enforcement in Finland of decisions made by the ICTY, c) the surrender of offenders in a matter falling within the jurisdiction of the ICTY, and d) other international legal assistance to the ICTY and co-operation between the ICTY and Finnish courts and other competent authorities. Section 3 of the Act regulates the recognition in Finland of the decisions of the ICTY prescribing, i.a., that "[p]roceedings in a matter pending before the Tribunal or in a matter which the Tribunal has already decided upon, may not be initiated in a Finnish court". So the provision confirms the principle of *ne bis in idem*, as required by Article 9 of the ICTY's Statute.

The Act on the Implementation of the ICC Statute presribes in its Section 1 *in blanco* that the provisions of the ICC Statute, "insofar as they are of a legislative nature, shall be in force as applicable law in accordance with the commitments of Finland". Other Sections of the Act deal primarily with the issues of legal assistance to the ICC. Accordingly, the provisions of a legislative nature – such as Article 20 on "*Ne bis in idem*" – are in force as national legislation. The interpretations of this Article 20 on the principle *ne bis in idem*, as reflected in the commentaries and other international legal literature, will obviously be taken seriously into account in the Finnish doctrine and practice. The wording of "*idem*" in Paragraphs 2 and 3 of Article 20 is different, and should therefore be interpreted differently.[16]

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[15] See also generally Nuotio, FYBIL 1999.

[16] See especially Tallgren 1999, pp. 428, 431.

5 CONCLUDING REMARKS

It is important to strengthen the principle of *ne bis in idem* as a human rights norm internationally and, in particular, at the regional (European) level. There are convincing reasons to harmonize legislations of the European Union countries by adopting a Framework Decision on the subject, as proposed by the Hellenic Republic in 2003. When Finnish provisions on criminal jurisdiction were under planning at the beginning of the 1990s, the draft provisions on the principle of *ne bis in idem* were criticized by several commentators for their "half-way" improvement.[17]

International measures for limiting positive conflicts of criminal jurisdiction, on one hand, and for solving such conflicts by adopting preference criteria and creating negotiation procedures, on the other, would certainly further international judicial co-operation.

[17] See Träskman 1992, p. 525; Swart 1992, p. 543.

20. Towards Harmonization of the General Principles of International Criminal Law*

1 ON THE SOURCES AND NATURE OF GENERAL PRINCIPLES

Before the consideration of the general principles of Rome Statute of the International Criminal Court (ICC), as defined in Part 3 of the Statute, Article 21 on the applicable law should be studied. The Court shall apply, in the first place, the Statute itself (including "Elements of crime"); in the second place, applicable treaties and the principles and rules of international law; and, if these primary sources are insufficient, general principles of law derived from national laws of legal systems of the world (under prescribed restrictions).

When discussing the significance of the principles and rules of international law, Professor *Thomas Weigend* refers in his general report to Article 38 of the Statute of the International Court of Justice. He puts the question whether general principles of substantive criminal law can be found in conventions, in customary international law or in general principles of law recognized by all civilized nations. According to Weigend's answer, the criminal laws of most states rely on similar concepts and rules; in this sense it can be spoken about universally recognized general concepts but the exact contents of these concepts vary widely from one country to another.

This justified observation increases the role of the *general principles of criminal law derived from national laws* of legal systems of the world. These general principles of criminal law have been developed since the 19th century primarily by the doctrines and practices of national criminal laws and criminal justice systems. Such concepts, principles and theories have mainly been developed within two different legal cultures, either in civil law or common

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* Original source: *Proceedings of the International Conference* held in Siracusa, Italy, 28 November – 3 December 2002, on the Occasion of the 30th Anniversary of ISISC. *Nouvelles Études Pénales* No 19, 2004, Éditions érès, pp. 345–351. – Ms. Satu Ruutiainen, law student (Faculty of Law, University of Helsinki), has efficiently assisted me in collecting relevant legal material, and I thank her for this very valuable help. – An extra note (17) is added.

law countries, and have therefore been differentiated to large extent. Research on comparative criminal law has not been carried out enough, so as to create the basis for a coherent and principled system of international criminal law.[1] The trend towards more harmonized criminal laws within European Union (EU) has increased the need and interest for such a comparative research and system building.[2] The ICC Statute with its general part hopefully encourages the scientific community to new research projects, comparable to those of Max Planck Institute for Foreign and International Criminal Law.[3]

The ICC Statute is the first instrument to codify generally international criminal law and specially the general principles of international criminal law. Part 3 concerns these principles. Neither the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) nor the Statute of the International Criminal Tribunal for Rwanda (ICTR) have such a part of general principles but they do recognize some of these principles, in particular the principle of individual criminal responsibility (including the sub-questions of command responsibility and of superior orders). The jurisprudence of the *ad hoc* International Criminal Tribunals, ICTY and ICTR, has taken up views of many of these issues, and the case-law of these Tribunals has influenced on the elaboration of the relevant provisions of the ICC Statute.

The ICC Statute is still far from a comprehensive and coherent general part, because the doctrines on it are not yet in the same developmental stage as are most of the national criminal law systems following the continental European tradition.[4] Part 3 of the ICC Statute is rather an attempt to merge the world's criminal law systems into one legal instrument that was more or less acceptable to the delegations present in Rome after the three years' intensive preparatory work.[5]

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[1] See, e.g., Kai Ambos: General Principles of Criminal Law in the Rome Statute. 10 *Criminal Law Forum* (CLF), pp. 1–32 (1999), at 32.

[2] *Cf*. generally Raimo Lahti: Towards an International and European Criminal Policy? In: Matti Tupamäki (ed.), *Liber Amicorum Bengt Broms*. Finnish Branch of the International Law Association, Helsinki 1999, pp. 222–240.

[3] See especially Albin Eser and George P. Fletcher (eds.): *Rechtfertigung und Entschuldigung / Justification and Excuse*, I–II. Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg 1987–1988.

[4] See Albin Eser: Individual Criminal Responsibility. In: Antonio Cassese, Paola Gaeta and John R. W. D. Jones (eds.): *The Rome Statute of the International Criminal Court: A Commentary* (hereafter: Commentary), Oxford University Press, 2002, Vol. 1, pp. 767–822, at 774.

[5] Ambos, 10 *CLF* (1999), p. 1. See also Immi Tallgren: We Did It? The Vertigo of Law and Everyday Life at the Diplomatic Conference on the Establishment of an International Criminal Court. 12 *Leiden Journal of International Law*, pp. 683–707 (1999), at 683: "International law is a projection of the imagination and professional identity of the practitioners in the field."

The ICC Statute issues important challenges to (international) criminal law theorists. For instance, it could be traced the elements of crime in the Statute which are reflecting a common law tradition only and which of them rather express some kind of convergence of the continental and common law thinking. Another task would be to (re)construct the general concept of crime for systematizing the doctrines of individual responsibility in international criminal law.[6]

In my presentation I will firstly (Part 2) deal with the following general questions: To what extent do the general principles reflect a differentiation of international criminal law on national, trans-national and supra-national levels and what are the prospects for harmonizing these principles on those levels? In this connection I will also touch upon the role of the legality principle in relation to the general principles of individual criminal responsibility. Secondly (Part 3), I shall illustrate my general observations by giving examples of these principles (doctrines) and, finally (Part 4), draw some conclusions.

2 DIFFERENTIATION OF INTERNATIONAL CRIMINAL LAW AND HARMONIZING THE GENERAL PRINCIPLES OF THIS SPECIFIC AREA OF LAW

When considering the structure and contents of international criminal law a distinction between various levels, i.e., national, trans-national and supra-national ones, has proved to be useful.[7] On the one hand, certain *differentiated* areas of criminal law have traditionally been developed, such as military criminal law; some of them are in the phase of development, such as economic criminal law and international criminal law. These tendencies are discernible both nationally and internationally. On the other hand, the elaboration and application of general principles both in domestic settings and on trans- and supra-national levels probably lead towards more *harmonized* doctrines of international criminal law.

The diversification of various areas of criminal law (especially the emergence of economic and international criminal law) is reflected in the pluralism

[6] As to these issues, see the detailed analysis of Kai Ambos: *Der Allgemeine Teil des Völkerstrafrechts*. Duncker & Humblot, Berlin 2002; as to the dominant role of common law, see esp. pp. 46–47, and to the concept of crime, see esp. pp. 541–542.

[7] See, e.g., the structure of the book Albin Eser and Otto Lagodny (eds.), *Principles and Procedures for a New Transnational Criminal Law*. Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg 1992.

of general legal doctrines and in the need to develop a more dynamic conceptual and system thinking in order to control many parallel legal regulations and the diversity of the regulated phenomena.[8] As for international criminal law, certain general principles have their doctrinal roots in this area: in particular, irrelevance of official capacity, responsibility of commanders and other superiors and superior orders. It is interesting to look at the developments of these doctrines; already the comparison between the Statutes of *ad hoc* Tribunals ICTY and ICTR, on one hand, and the ICC Statute, on the other, indicates substantial changes in the provisions concerning superior responsibility and superior orders. Even more attention should be paid to those general principles which are for the first time regulated in the ICC Statute, such as the provisions on Individual criminal responsibility (Article 25) as well as on Mental element (Article 30) and on Mistake of fact and mistake of law (Article 32). Following *Mireille Delmas-Marty*'s theoretical concepts, it may be questioned to what extent the elaboration of these principles of international criminal law has been conducted through *hybridization*, i.e. by combining and fusing elements from both common law and continental law systems to qualitative different outputs; another question is to what extent the implementation of those principles furthers *harmonization* of national criminal laws.[9]

The significance of the *legality principle* in international criminal law has been essentially strengthened in the ICC Statute. The different rules of this fundamental principle have been defined in Articles 22–24: *Nullum crimen sine lege, Nulla poena sine lege* and Non-retroactivity *ratione personae*. The rule of strict construction and the "more favourable" clause in Article 22, paragraph 2, should be especially mentioned, because such provisions are seldom in national criminal laws. Thomas Weigend suggests in his general report that the legality principle and the just-mentioned paragraph would also be applied towards the general principles of criminal law (Part 3 of the ICC Statute). Cogent reasons are in favour of this interpretation.[10] On the other hand, it can also be argued for a smoother application of the legality principle

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[8] *Cf.* generally Kimmo Nuotio: Transforming International Law and Obligations into Finnish Criminal Legislation. 10 *Finnish Yearbook of International Law* (FYBIL), pp. 325–350 (1999), at 346; Mireille Delmas-Marty: *Towards a Truly Common Law. Europe as a Laboratory for Legal Pluralism*. Cambridge University Press, 2002; idem: The ICC and the Interaction of International and National Legal Systems. In: Cassese, Gaeta and Jones (eds.), *Commentary*, Vol. II, pp. 1915–1929.

[9] See Delmas-Marty, in: *Commentary II*, at 1923–1929.

[10] So also, e.g., Machteld Boot: *Genocide, Crimes Against Humanity, War Crimes*. Intersentia, 2002, p. 395.

when taking into account the role of the general part (which in certain respects differs from that of the special part).[11]

3 THE ICC STATUTE AS REFLECTING THE LATEST DEVELOPMENTS OF THE GENERAL PRINCIPLES (DOCTRINES): EXAMPLES FOR A CRITICAL ASSESSMENT

Individual criminal responsibility as such is a generally recognized principle of international criminal law since the judgments of the International Military Tribunal. Articles 25(3) and 28 of the ICC Statute define the scope of individual criminal responsibility, covering the basic rules and rules expanding attribution. An important question is how the characteristic of international criminal law to create liability for acts committed in a collective context and systematic manner can be adjusted to the principles of individual responsibility and culpability. So criminal attribution for such international crimes as defined in the Articles 5–8 of the ICC Statute ("macro-delinquency") has distinguishing features in comparison with the individual criminal liability for "ordinary" offences according to domestic criminal laws: "the individual's own contribution to the harmful result is not always readily apparent".[12]

Subparagraph (d) of Article 25(3) extends the liability for *contributions to a collective crime* or its attempt in such a way which deviates from the civil law (Romano-Germanic) tradition when criminalizing participation in ordinary offences. It is noteworthy that this liability form is not fully in line with the common law concept of "conspiracy" but presents a compromise formulation, which was also included in a similar provision of the anti-terrorism convention[13].

A general regulation on the criminal *responsibility for omission* (commission by omission) was not adopted in the ICC Statute, although it was proposed

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[11] *Cf.* generally Antony Duff (ed.): *Philosophy and the Criminal Law*. Cambridge University Press, 1998.

[12] Citation from Kai Ambos, in: Otto Triffterer (ed.), *Commentary on the Rome Statute*. Nomos, 1999, article 25, margin No 3. See in detail Klaus Marxen: Beteiligung an schwerem systematischen Unrecht. In: Klaus Lüderssen (Hrsg.), *Aufgeklärte Kriminalpolitik oder Kampf gegen das Böse?* Band III. Makrodelinquenz. Frankfurt a.M. 1998; pp. 220–236; Kai Ambos: *Der Allgemeine Teil des Völkerstrafrechts*, pp. 518–542.

[13] See *International Convention for the Suppression of Terrorist Bombings*, U.N. Doc. A/RES/52/164 (1998), annex, Article 2(3)(c).

during the preparatory work. In this respect the ICC Statute is not following a legislative trend of the recent reforms of Continental criminal laws (for instance, that of the Finnish Penal Code).

Nevertheless, the criminal liability for omission is recognized in Article 28 concerning *superior responsibility*. The responsibility of commanders and other superiors is based on customary international law, but the broad concept as adopted in this provision can be criticized. For instance, it is questionable to draw a parallel between the cases of knowledge and negligent ignorance of impending offences – as also Thomas Weigend rightly points out in his general report.[14] The solution of the German Code of Crimes against International Law (2002) to regulate the superior responsibility in three separate provisions might serve as a model how to clarify and differentiate the contents of this general principle.[15]

The subjective requirements of individual responsibility according to the ICC Statute (in particular, the definitions on mental element in Article 30 and on the mistakes of fact and law in Article 32) mean a remarkable progress towards having the *culpability principle* as an essential independent element of crime in addition to the objective wrongdoing.[16] The recognition of mistake of law and duress as grounds for excluding criminal responsibility indicates a somewhat larger conception of culpability than to regard it as a psychological concept of *mens rea* (guilty mind) only, when it would be synonymous with intent and knowledge.

Nevertheless, the provision on the mistakes of fact and law is unsatisfactory. Article 32 is based on the traditional common law doctrine that a mistake shall be a defence only if it is negates the guilty mind. The doctrine implies that mistake as to the wrongfulness of the act cannot in any case exclude criminal liability (i.e., *error iuris nocet*). In this strict form the doctrine disregards the culpability principle as it has been adopted in recent Continental criminal laws. Mistake as to circumstances affording a ground excluding liability should also be recognized. I agree with Thomas Weigend, when he in this connection refers to Article 31(3), which allows the ICC to rely on an unwritten ground for excluding criminal responsibility.

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[14] See further Kai Ambos: Superior Responsiblity, in: Cassese, Gaeta and Jones (eds.), *Commentary*, Vol. II, pp. 823–872.

[15] See Gerhard Werle and Florian Jessberger: International Criminal Justice is Coming Home: The New German Code of Crimes against International Law. 13 *CLF*, pp. 191–223 (2002), at 204.

[16] See especially Albin Eser: Mental Elements – Mistake of Fact and Mistake of Law. In: Cassese, Gaeta and Jones (eds.), *Commentary*, Vol. I, pp. 889–948, at 890–891.

4 SOME CONCLUSIONS

My examination of certain general principles of criminal law has been fragmentary. It still indicates that there has been a remarkable evolution of these principles in the jurisprudence of ICTY and ICTR as well as in the doctrines codified in the ICC Statute. It is easy to agree with Thomas Weigend's comment in his general report that "international criminal law has made great strides toward finding common ground on perennially controversial problems."[17] Nevertheless, much controversy in doctrinal issues remains.

When striving for a more coherent and rational system of international criminal law the general principles, concepts and the values and theories behind them should be carefully analysed and clarified by the international scientific community in order to satisfy the demands for legitimacy and legal security in the application of the ICC Statute. The significance of comparative criminal law in this scrutiny cannot be overemphasized, when taking into account Article 21(1)(c) and its reference to national laws of legal systems of the world as a secondary source of the general principles of law. It would be recommendable to find out common grounds for approaches based on different legal traditions (especially those of civil law and common law cultures) in these doctrinal issues. We should be able to combine and fuse elements of these different legal traditions in a fruitful way. For securing the appropriate implementation of international criminal law both in domestic courts and in international courts it would be advisable to develop more harmonized general principles of law.

[17] See Weigend's general report: The Harmonization of General Principles of Criminal Law: The Statutes and Jurisprudence of the ICTY, ICTR, and the ICC: An Overview, in: *Nouvelles Études Pénales* No 19 (2004), pp. 319–335, at 335.

21. Finnish Report on Individual Liability for Business Involvement in International Crimes*

1 FOREWARD

In Finnish legal history, there have not been cases on the liability of business involvement in international crimes. So far only one case on the individual liability for an international crime (*in sensu stricto,* 'core crimes') has been adjudicated in criminal proceedings in Finland, namely Prosecutor vs. Francois Bazaramba, in which the accused Rwandan citizen was sentenced for genocide committed in Rwanda[1].

There has not either been much public or scientific discussion on the liability for business involvement in international crimes. However, on assignment by the Ministry of Foreign Affairs, a research on the relationship between the business and corporate activities and human rights was in 2008 carried out by the Erik Castrén Institute of International Law and Human Rights, University of Helsinki[2]. It relied much on John Ruggie's report on the subject for the United Nations (UN)[3].The research report ends with a number of recommendations particularly directed at the Finnish Government and at various public authorities. The recommendations called for a more active role of the government authorities towards the issue of human rights in order to assist Finnish corporations to become more responsible actors.

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* Original source: *Revue Internationale de Droit Pénal* 88:1, 2017, pp. 257–266. Association Internationale de Droit Pénal. – Appendices of the original report have been added.

[1] See Kimpimäki, M., Genocide in Rwanda – Is It Really Finland's Concern? *International Criminal Law Review* (ICLR) 11 (2011), pp. 155–176. Kimpimäki deals with the case as it was decided by a district court (Itä-Uudenmaan käräjäoikeus), on 11 June 2010. That decision was essentially upheld by the *Appeal Court of Helsinki, Judgement No. 882, 30 March 2012* (R 10/2555). An unofficial French translation of the judgement is available from the Appeal Court (helsinki.ho@oikeus.fi).

[2] See Pentikäinen, M., *Yritystoiminta ja ihmisoikeudet* [Business activity and human rights]. The Erik Castrén Research Reports 26/2009. Helsinki 2009.

[3] *Protect, Respect and Remedy: a Framework for Business and Human Rights.* Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. John Ruggie, UN, A/HRC/8/5, 7 April 2008.

2 GENERAL REMARKS ON THE REGULATION OF THE INTERNATIONAL CRIMES IN FINNISH CRIMINAL LAW

The international crimes ('core crimes'), as defined in the Rome Statute of the International Criminal Court (ICC Statute), have been implemented into the Finnish Criminal Code (CC)[4] in 2008, as cited in *Appendix 1*. These provisions in the *Chapter 11 of the Criminal Code* cover genocide, crimes against humanity and war crimes in line with the ICC Statute, but their definitions are not identical. For instance, the Finnish interpretation of the legality principle and its sub-principle *lex certa* prevented the use of such an open phrase as "other inhumane acts…" in the definition of the crime against humanity (cf. Article 7, Sub-paragraph 1.k in the ICC Statute).

The Chapter 11 of the Criminal Code also includes, among others, provisions on aggression (Section 4a, as added into Code by the Act No. 1718/2015) and on torture (Section 9a, as added by the Act No. 990/2009).

The general doctrines of the Criminal Code, as amended by the Act No. 515/2003 in the *Chapters 3–5 of the Code* (cited in *Appendix 2*), are applicable as such to the international crimes, too. However, there are special provisions in *Sections 12–14 of Chapter 11 of the Criminal Code* on the responsibility of commanders and other superiors as well as on the superior orders, which correspond to Articles 28 and 33 in the ICC Statute. They are cited in *Appendix 3*.

3 INDIVIDUAL MODES OF RESPONSIBILITY AND CORPORATE LIABILITY IN FINNISH CRIMINAL LAW

1. Chapter 5 of the Finnish Criminal Code (Act No. 515/2003) includes the provisions on attempt and complicity (see below, cited in *Appendix 2*). The *complicity provisions* follow substantially the model of German Criminal Code. In the recodification of the Finnish criminal law in 1990–2003, the complicity provisions were mainly retained such as they had been in force since the enactment of the Criminal Code in 1889.

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[4] The Criminal Code was originally enacted in 1889, but it has been essentially revised during 1990–2003 (as part of the total reform of the Code) and fragmentarily later. The Chapter 11 (War crimes and crimes against humanity) was amended by the Act No. 212/2008). An unofficial English translation of the Criminal Code up to 766/2015 is available from the website of the Finnish Ministry of Justice: http://www.finlex.fi/fi/laki/kaannokset/1889/en18890039_20150766.pdf.

The Finnish provisions (CC 3:3–7) *differentiate* between principals and co-perpetrators, on one hand, and inciters (instigators) and accomplices (abettors), on the other. This differentiated model of participation is in line with the emphasis on the *expressive* or symbolic *function of criminal law*. This punishment theory is strongly supported in Finnish and Scandinavian criminal policy. The authoritative disapproval expressed by the criminal law should be differentiated according to the various roles of participants.

The indirect principal (commission of an offence through an agent) is also one type of perpetrator, and a new clarifying provision (CC 3:4) was in 2003 added into the Code. The penal latitude of an abettor is mitigated. The system of 'borrowed criminality' (*Akzessoritätsprinzip*) is applied in the participation doctrine; *i.e*., in both types of participation (instigation or abetting) the liability is of accessorial or derivative nature.

Sections 3–8 in Chapter 5 of Criminal Code apply to acting in concert of individuals in the commission of the offence. The provisions in CC 5:3–6 define the different forms of participation:

– CC 5:3 on *co-perpetration*: If two or more persons have committed an intentional offence together, each is punishable as an offender. The term 'committed' has been interpreted extensively in the juridical practice. In the legal literature it has been recommended to apply the German doctrine of 'control over crime'(*Tatherrschaft*) in drawing the line between co-perpetration and accomplice[5].

– CC 5:4 on commission of an offence through an agent, *i.e*., *indirect principal* (*mittelbare Täterschaft*): A person is sentenced as an indirect principal if he has committed an intentional offence by using, as an agent, another person who cannot be punished for said offence due to the lack of criminal responsibility or intention or due to another reason connected with the conditions for criminal liability. It should be noted that if the immediate actor fulfills the conditions of criminal responsibility and is thus punishable for the offence, the concept of indirect principal and CC 5:4 are not applicable, in contrast to many other legal orders (such as German Criminal Code). That fact does not exclude that such a commission of an offence through an agent could trigger a perpetrator's responsibility (by interpreting 'commission' extensively).

In the only Finnish case on an international crime so far, the district court convicted the accused Francois Bazaramba of genocide as perpetrator, when he had, *i.a*., ordered the murders of four persons on different occasions and taken

[5] See Frände, D., *Yleinen rikosoikeus* [General criminal law]. Helsinki: Edita 2012, pp. 245–246.

part in the attacks against Tutsis in one place and been one of the leaders of the attacks against Tutsis in another place.[6] I see in the reasoning similarities with the 'integral part' doctrine as an expanded form of commission, such as it has been developed in the practice of the International Criminal Tribunal for Rwanda.[7]

– CC 5:5 on *instigation*: A person who intentionally persuades another person to commit an intentional offence or to make a punishable attempt at such an act is punishable for incitement to the offence as if he was the offender.

– CC 5:6 on *aiding and abetting (accomplice)*: A person who, before or during the commission of an offence, intentionally furthers the commission by another of an intentional act or of its punishable attempt, through advice, action or otherwise, shall be sentenced for abetting on the basis of the same legal provision as the offender. The sentenced is determined in accordance with a mitigated (-> ¾) penal scale.

According to the legislative drafts and precedents of the Supreme Court (*KKO 2009:87 and KKO 2015:10* concerning accomplice to fraud or dishonesty by a debtor), an active act or omission by the accomplice does not need to be a necessary precondition for the consequence; furthering the probability of the commission of the offence is enough. A special intention or specific direction is neither required; the applicable lowest level of intention is defined in the general provision on intention (CC 3:6) by using a probability assessment[8].

– Incitement to punishable aiding and abetting is punishable as aiding and abetting.

2. C*orporate criminal liability* was introduced by the enactment of Chapter 9 of the Criminal Code (Act. No. 743/1995; cited in *Appendix 4*).[9] This liability form is applicable to a corporation, foundation or other legal entity1 in the operations of which an offence has been committed, if such a liability has been specifically provided in the Criminal Code for the offence. The offence is deemed to have been committed in the operations of a corporation, if the

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[6] See the reference by Kimpimäki, *ICLR* 2011 (n. 1), p. 157.

[7] See, e.g., Lahti, R., Commentary on the Judgement and Sentence *Prosecutor v. Munyakazi, Case No. ICTR-97-36-A,* 28 September 2011. In: Klip, A. & Freeland, S. (eds.), *Annotated Leading Cases of International Criminal Tribunals,* Vol. LIII. Cambridge: Intersentia 2018, pp. 401–405.

[8] As for the intention in Finnish criminal law, see Matikkala, J., Nordic Intent. In: Nuotio, K. (ed.), *Festschrift in Honour of Raimo Lahti.* Helsinki: Forum Iuris 2007, pp. 221–234.

[9] See, generally, Tolvanen, M., Trust, Business Ethics and Crime Prevention – Corporate Criminal Liability in Finland. *Fudan Law Journal* 2009/4, pp. 99–112.

perpetrator has acted on the behalf or for the benefit of the corporation and belongs to its management or is in a service or employment relationship with it or has acted on assignment by a representative of the corporation. An additional prerequisite is that the perpetrator has been a part of the corporation's statutory organ or other management or has exercised actual decision-making authority therein or if the care and diligence necessary for the prevention of the offence have not been observed in the operations of the corporation. A corporate liability may be imposed even if the offender cannot be identified or otherwise is not punished.

International crimes are not included into those specifically listed offences for which corporate criminal liability is provided. This liability form is mainly applicable to economic and financial offences but also, among others, to participation in the activity of a criminal organization (CC 17:1a, 24) and to terrorist offences (Chapter 34a of the Criminal Code). The main sanction is corporate fine up to 850,000 euro.

Individual criminal liability and the liability of legal entities are applicable *cumulatively*. Indictments for both types of liability are tried independently. Imposing a corporate liability is possible even though the individual offender cannot be identified or for another reason gets unpunished.

3. The corporate criminal liability is not the only liability form linked to *organizational crime*. The *criminal liability within legal persons* – i.e., the principles governing the allocation of individual criminal responsibility, especially the *liability of the heads of business* – was partly regulated in 1995 (Act No. 578/1995), when special provisions on such liability as to labor and environmental offences were given (CC 47:7; 48:7).[10]

A more general provision on the allocation of individual liability was included into the reformed chapter on the attempt and complicity (CC 5:8: "Acting on behalf of a legal person"; see below, cited in *Appendix 2*). The guidance given in those provisions is rather vague: "in the allocation of liability due consideration shall be given to the position of that person, the nature and extent of his duties and competence and also otherwise his participation in the arising and continuation of the situation that is contrary to law". The provision in the CC 5:8 is, however, clear when prescribing that the person who exercises actual decision-making power in the legal person (*faktischer Geschäftsführer*)

[10] On the interaction between these two liability forms, see in more detail Lahti, R., Über die strafrechtliche Verantwortung der juristischen Person und die Organ- und Vertreterhaftung in Finnland. In: *Festschrift für Keiichi Yamanaka*. Berlin: Duncker & Humblot 2017, pp. 131–152.

is to be considered equal to the member of a statutory body or management of a corporation.

The allocation of individual criminal responsibility has in practice been the primary form of corporate complicity in relation to the criminal liability of the corporation itself. This state of affairs can be explained with the facts that corporate criminal liability is still relatively young construction in Finland and it covers fragmentarily offences to which it is applicable. However, it is increasingly applied to economic and financial offences.

The practice in allocation of individual criminal responsible has been very much in line with the guiding principles of Corpus Juris 2000 as formulated in the follow-up study, Article 12 (see below, cited in *Appendix 5*).[11] For instance, in a recent precedent of the Supreme Court (*KKO 2016:58*), members of the board of directors of a potato flakes' factory (limited company) were convicted of impairment of environment through gross negligence (CC 48:1), when effluent from the factory's potato sludge had contaminated environment. These directors had omitted their supervisory duties as members of the company's board and were therefore liable for their omission to prevent the contamination (in line with the provisions of CC 3:3.2, see below *Appendix 2*, and CC 48:7). A factual division of labor between the managing director (having the main responsibility for factory's operational activities) and board members did not exclude the supervisory duty neither the board members' liability for the consequence.

4. In all, the legislator when recodifying of the Finnish Criminal Code was cautious in expanding forms of preparation and participation. This caution is explained by the significance of the criminalization principles and the importance of the principles of legality and culpability. When a Norwegian scholar Erling Johannes Husabø is critically assessing the new global rules on terrorism, he speaks about the tendencies of "more 'pre-activism' in criminal law" and "more 'subjectivism' in criminal law".[12] The Finnish legislator has generally been reluctant to these ideas in the recodification of the criminal law, although the scope of criminalized dangerous behavior (*Gefährdungsdelikte*) was enlarged in comparison with traditional criminal law.

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[11] See Delmas-Marty, M. & Vervaele, J.A.E. (eds.), *The Implementation of the Corpus Juris in the Member States*. Vol. I. Antwerpen: Intersentia 2000, pp. 189–210 (193).

[12] Husabø, E.J., The Implementation of New Rules on Terrorism through the Pillars of the European Union. In: Husabø, E.J. & Strandbakken, A. (eds.), *Harmonization of Criminal Law in Europe*. Antwerpen: Intersentia 2005, pp. 53–78 (73–75).

A Danish scholar Jørn Vestergaard advised Finnish law drafters to preserve its legal tradition in regulating criminal participation, because it "is in accordance with important developments in terms of continuously elaborating a doctrine which stresses the principles of *lex certa* and of penal restraint". In contrast to Finnish (and German) type of regulation, Danish provisions on the liability for attempt and participation are "rather brief and their scope is somewhat wide and indeterminate", and the Danish Criminal Code is based on an extreme variation of a 'unitary perpetratorship' (*Einheitstäterbegriff*).[13] Nevertheless, also the Finnish legislator has in the 2000s been compelled to make exceptions due to Finland's international (or European) obligations in combating terrorism and organized crime.

The Parliamentary Committees undertook critical examinations on the Government Bills concerning the participation in the activity of a criminal organization and the terrorist offences. These legislative proposals led later to the enacted law provisions in CC 17:1a (participation in the activity of a criminal organization) and CC 34a:2 and 4 (preparation of an offence to be committed with terrorist intent; promotion of the activity of a terrorist group). The role of the Constitutional Committee of the Parliament is important in evaluating the Government Bill from the point of view of constitutional and human rights law aspects.

Criminalization of the participation in the activity of a criminal organization was regarded as a new area in Finnish criminal law. In this situation it could not be resorted to the traditional doctrine on complicity or to other established concepts of criminal law. Therefore, the principles of *lex certa* and of penal restraint were of great significance. The proposals in the Government Bills, which were based on the European Union (EU) Joint Action (participation in a criminal organization) and Framework Decision (terrorist offences) were revised in order to make these new participation provisions more certain and to make them more equivalent with the traditional complicity doctrine (so that the liability for complicity should also in these cases be derivative).At the same time it was striven for loyal implementation of those EU instruments.[14] The statutory definition of the participation in the activity of an organized criminal group was revised in 2015 (Chapter 17, Section 1a of the Criminal Code, Act No. 564/2015).

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[13] Vestergaard, J., Criminal Participation in Danish Law. In: Lahti, R. & Nuotio, K. (eds.), *Criminal Law Theory in Transition.* Helsinki: Finnish Lawyers' Publishing Company 1992, pp. 475–490 (490).

[14] Statements of the Constitutional Committee, No. 10/2000 (as for Government Bill No. 183/1999) and No. 48/2002 (Government Bill No. 188/2002).

The definition of a terrorist group is provided by Chapter 34a, Section 6 of the Criminal Code. The provisions on terrorist offences (Chapter 34a) were adopted due to the national implementation of the Framework Decision (FD) of the EU of 2002 by the Act No. 13/2003. Accordingly, the definitions and the provisions in general in this new Chapter 34a of the Criminal Code are harmonized with this FD. The definition in question reads as follows: A terrorist group refers to a structured group of at least three persons established over a period of time and acting in concert in order to commit offences referred to in CC 34a:1.

It should be noted that in Chapter 34a of the Criminal Code terrorism as such has not been defined. Instead of that the chapter defines the constituent elements of terrorist acts. As for the basic offence (CC 34a:1), there must be "terrorist intent" as defined in CC 34a:6, and the offender's activity must be likely to cause serious harm to a State or an international organization, and his activity must fulfill the criteria of some of the common crimes listed in CC 34a:1.1. These kinds of terrorist offences could be regarded as exceptionally aggravated offences.

Because the pressure towards expanding criminal liability has originated from international and European (EU) obligations in combating terrorism and organized crime, critical voices have often directed against the legitimacy of those tendencies. When expanding criminal liability there is often too much reliance on the use of extensive criminalizations and deterrent effects of severe punishments and too little reliance on research and rational consideration what kinds of measures are the most effective in crime prevention and what is needed in order to secure fair and humane criminal proceedings cross the state borders.[15]

[15] As to critical voices against certain features of the recent developments of criminal law, see, e.g., Lahti, R.,Towards Internationalization and Europeanization of Criminal Policy and Criminal Justice. In: Pływaczewski, E. W. (ed.), *Current Problems of the Penal Law and Criminology*. Warszawa: Wolters Kluwer Polska 2012, pp. 365–379; idem, Towards a Rational and Humane Criminal Policy. *Journal of Scandinavian Studies in Criminology and Crime Prevention*, vol. 1, 2000, pp. 141–155; Nuotio, K., On the Significance of Criminal Justice for a Europe 'United in Diversity'. In: Nuotio, K. (ed.), *Europe in Search of 'Meaning and Purpose'*. Helsinki: University of Helsinki 2004, pp. 171–211; Melander, S., The implementation of the EU-based criminal law instruments in Finland. In: Hollán, M. (ed.), *Towards More Harmonised Criminal Law in the European Union*. Budapest: Hungarian Academy of Sciences 2004, pp. 119–141.

4 FORMS OF COMPLICITY IN "MACRO-DELINQUENCY" AND THE ROLE OF INTERNATIONAL CRIMINAL COURTS

1. I start with some general comments on the differentiation of international criminal law and harmonizing the general principles of this specific area of law. This kind of diversification of various areas of law is reflected in the pluralism of general legal doctrines and in the need to develop a more dynamic conceptual and system thinking in order to control many parallel legal regulations and the diversity of the regulated phenomena.[16] As for international criminal law, certain general principles have their doctrinal roots in this area: in particular, irrelevance of official capacity, responsibility of commanders and other superiors and superior orders. Complicity in international criminal law and, in particular, corporate complicity is a complex doctrine in transition.

Already the comparison between the Statutes of *ad hoc* Tribunals ICTY and ICTR, on one hand, and the Rome Statute of the International Criminal Court (ICC), on the other, indicates changes in the provisions concerning superior responsibility and superior orders. Even more attention should be paid those general principles which are for the first time regulated in the ICC Statute, such as the provisions on Individual criminal responsibility (Article 25) as well as on Mental element (Article 30) and on Mistake of fact and mistake of law (Article 32). Following Mireille Delmas-Marty's theoretical concepts, it may be questioned to what extent the elaboration of these principles of international criminal law has been conducted through *hybridization*, i.e. by combining and fusing elements from both common law and continental law systems to qualitative different outputs; another question is to what extent the implementation of those principles furthers *harmonization* of national criminal laws.[17]

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[16] See, generally, Lahti, R.,Towards Harmonization of the General Principles of International Criminal Law. In: *International Criminal Law: Quo Vadis?* Association Internationale de Droit Pénal (AIDP), érès 2004, pp. 345–349; Nuotio, K., Transforming International Law and Obligations into Finnish Criminal Legislation. 10 *Finnish Yearbook of International Law* (1999), pp. 325–350 (346); Delmas-Marty, M., *Towards a Truly Common Law. Europe as a Laboratory for Legal Pluralism*. Cambridge: Cambridge University Press 2002; idem, The ICC and the Interaction of International and National Legal Systems. In: Cassese, A., Gaeta, P. and Jones, R.W.D. (eds.), *The Rome Statute and the International Criminal Court: a Commentary,* Vol. II. New York: Oxford University Press 2002, pp. 1915–1929.

[17] See Delmas-Marty, in: *Commentary* II (n. 16), pp. 1923–1929.

2. *Individual criminal responsibility* as such is a generally recognised principle of international criminal law since the judgments of the International Military Tribunal. Articles 25 (3) and 28 of the ICC Statute define the scope of individual criminal responsibility, covering the basic rules and rules expanding attribution. An important question is how the characteristic of international criminal law to create liability for acts committed in a collective context and systematic manner can be adjusted to the principles of individual responsibility and culpability. So criminal attribution for such international crimes as defined in the Articles 5–8 of the ICC Statute ("macro-delinquency") has distinguishing features in comparison with the individual criminal liability for "ordinary" offences according to domestic criminal laws: "the individual's own contribution to the harmful result is not always readily apparent".[18]

Subparagraph (d) of Article 25(3) extends the liability for *contributions to a collective crime* or its attempt in such a way which deviates from the civil law (Romano-Germanic) tradition when criminalizing participation in ordinary offences. It is noteworthy that this liability form is not fully in line with the common law concept of "conspiracy" but presents a compromise formulation, which was also included in a similar provision of the anti-terrorism convention[19].

A comparison between the Article 7 (1) of the ICTY Statute and Article 25 (3) of the ICC Statute shows a clear difference: while the first-one covers with a vague and general formulation perpetration and various models of participation, the latter-one is quite differentiated, distinguishing committing (solitary perpetration, co-perpetration and intermediary perpetration), instigating, aiding, otherwise supporting, and inciting a crime. Nevertheless, also the provision of the ICC Statute proved to be unclear and contested. For instance, to what extent the responsibility of a party to crime is dependent of the principal perpetrator; should the regulation be classified as representing a 'unitary perpetration model' instead of a 'differential participation model'? It was also questioned whether the doctrine of *joint criminal enterprise*, which has been applied in the ad hoc tribunal since the *Tadić Appeals Chamber Judgement (IT-*

[18] A citation from K. Ambos, in: Triffterer, O. (ed.), *Commentary on the Rome Statute*. Baden-Baden: Nomos 1999, Article 25, margin No 3. See, in detail, Ambos, K., *Treatise on International Criminal Law. Vol. I: Foundations and General Part.* Oxford: Oxford University Press 2013, Ch. IV. See also Nollkaemper, A. & van der Wilt, H. (eds.), *System Criminality in International Law.* Cambridge: Cambridge University Press 2009.

[19] See International Convention for the Suppression of Terrorist Bombings, U.N. Doc. A/RES/52/164 (1998), annex, Article 2(3)(c).

94-1-A, 15 July 1999)[20], would be a legitimate general concept of international criminal law or whether new concepts of co-perpetration and other forms of participation would be developed in the practice of the ICC? It is interesting that the concept of *indirect perpetration* or perpetration-by-means received dominant position in the practice of the ICC and largely in the legal doctrine.[21] A critical discussion on the subject has produced several monographs into recent legal literature.[22]

There have been cogent reasons, based on the *lex certa* principle and the principle to culpability (*mens rea*), to limit the scope of the concept of joint criminal enterprise. Nevertheless, the doctrine of co-perpetration needs further clarification. From a Finnish point of view, the theory of indirect perpetration by means of control over an organized structure should be complemented by other aspects of drawing line between co-perpetration and other forms of participation and superior responsibility.[23] It should also be taken account the recommendation of the AIDP-resolution 2009[24], which calls International Tribunals upon to harmonize their application of general notions of perpetration and participation, in order to develop a coherent body of international criminal law.

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[20] The Appeals Chamber (paras. 185 et sqq.) defined the forms of joint criminal enterprise in the following way: (i) the 'basic' form includes cases where all participants, acting pursuant to a common purpose, share the same criminal intent and act to give effect to that interest; (ii) the second category is essentially similar to the first one, but is characterized by the 'systemic' nature of the crimes committed pursuant to the joint criminal enterprise, in the sense that it implies the existence of 'an organised system of ill-treatment'; (iii) the third and most controversial category, known as the 'extended' form of joint criminal enterprise, concerns cases where all participants share a common intention to carry out particular criminal acts and where the principal offender commits an act which falls outside of the intended joint criminal enterprise but which was nevertheless a 'natural and foreseeable consequence' of effecting the agreed joint criminal enterprise. See in more detail, e.g., Jain, N., *Perpetrators and Accessories in International Criminal Law.* Oxford: Hart Publishing 2014, Chs. 2.II, 3, 4 and 11.

[21] On the rich legal literature see, e.g., a special issue of the *Journal of International Criminal Justice* (JICJ), Vol. 9 (2011), No. 1, which includes the papers presented at a symposium on *indirect perpetration by means of control over an organized power structure.* See also its Foreword by G. Werle and B. Burghardt.

[22] See, in particular, van Sliedregt, E., *Individual Criminal Responsibility in International Law.* Oxford: Oxford University Press 2012; Jain, N., *Perpetrators and Accessories in International Criminal Law* (n. 20); Aksenova, M., *Complicity in International Criminal Law.* Oxford: Hart Publishing 2016.

[23] As for instance T. Weigend points out in his article Perpetration through an Organization. *JICJ* 2011, pp. 91–111, the existence of an organization controlled by the perpetrator may be no more than one factor relevant for the distinction.

[24] See the Resolution of the XVIII AIDP International Congress of Penal Law (Istanbul, Turkey, 20–27 September 2009), Section I (The Expanding Forms of Preparation and Participation). On the Resolutions of the Congress, see *Revue Internationale de Droit Pénal*, Vol. 80, Nos. 3–4/2009.

A general regulation on the criminal *responsibility for omission* (commission by omission) was not adopted in the ICC Statute, although it was proposed during the preparatory work. In this respect the ICC Statute is not following a legislative trend of the recent reforms of Continental criminal laws (for instance, that of the Finnish Criminal Code[25]).

Nevertheless, the criminal liability for omission is recognized in Article 28 concerning *superior responsibility*. The responsibility of commanders and other superiors is based on customary international law, but the broad concept as adopted in this provision can be criticized. For instance, it is questionable to draw a parallel between the cases of knowledge and negligent ignorance of impending offences.[26] The solution of the German Code of Crimes against International Law (2002) as well as of the amendment of the Finnish Criminal Code (2008) to regulate the superior responsibility in separate provisions might serve as models how to clarify and differentiate the contents of this general principle.[27]

5 SUMMARIZING OBSERVATIONS ON THE CORPORATE COMPLICITY FROM A FINNISH POINT OF VIEW

As described above, there is so far no court case in Finland in which an entrepreneur or a business corporation were involved in international crimes. Corporate criminal liability, which is adopted in Finland, is not extended to cover international crimes (*in sensu stricto*). However, the general principles (regulated in the Criminal Code) on complicity and on the liability of the heads of business are applicable to business involvement in international crimes in a similar way as to other crimes. The same is true as for the general prerequisites of criminal liability and grounds for exemption from liability (see below *Appendix 2*). The Finnish examples from the court practice, which are explained above, concern economic and financial crimes. Similar application

[25] See Section 3 (2), Chapter 3 of the Criminal Code (cited below, *Appendix 2*).

[26] See further e.g. Ambos, K., Superior Responsibility, in: Cassese, Gaeta and Jones (eds.), *Commentary*, Vol. II (*supra n. 16*), pp. 823-872; idem, *Treatise on International Criminal Law,* I (*supra n. 18*), Ch. V.C.

[27] As to the German legislation, see Werle, G. and Jessberger, F., International Criminal Justice is Coming Home: The New German Code of Crimes against International Law. 13 *Criminal Law Forum* (2002), pp. 191–223 (204).

of the general principles is anticipated in relation to business involvement in international crimes.

In her recent monograph Marina Aksenova shows that the ad hoc tribunals and hybrid courts applying international criminal law have adopted their own approaches to the modes of participation. Even within one institution the legal standards may differ from case to case. An illustrative example of this variation in the court practice is the question whether the requirement of 'specific direction' should be an element of the actus reus of aiding and abetting.[28] (As mentioned above, Finnish criminal law does not require such an element.)

Harmonization of the practices of the international criminal courts in assessing the modes of participation is most desirable. A more extensive use of the general principles of law as a legal source, and an increased resort to comparative criminal law for recognizing those principles, could help in reaching that objective.

[28] See Aksenova, *Complicity in International Criminal Law* (n. 22), Ch. 4.II (esp. pp. 114–115) with references.

APPENDICES

Appendix 1

Chapter 11 of the Criminal Code – War crimes and crimes against humanity (212/2008)

Section 1 – *Genocide* (212/2008)
(1) A person who for the purpose of entirely or partially destroying a national, ethnic, racial or religious group or another comparable group
(1) kills members of the group,
(2) inflicts grievous bodily or mental illness or injuries on members of the group,
(3) subjects the group to such living conditions that can cause the physical destruction of the group in whole or in part,
(4) undertakes forcible measures to prevent procreation among the group, or
(5) forcibly moves children from one group to another, shall be sentenced for *genocide* to imprisonment for at least four years or for life.
(2) An attempt is punishable.

Section 2 – *Preparation of genocide* (212/2008)
A person who for the purpose referred to in section 1
(1) conspires with another to commit genocide, or
(2) makes a plan for genocide
shall be sentenced for *preparation of genocide* to imprisonment for at least four months and at most four years.

Section 3 – *Crime against humanity* (212/2008)
A person who, as part of a broad or systematic assault on civilian population,
(1) kills or enslaves another, subjects him or her to trade by offer, purchase, sale or rent, or tortures him or her, or in another manner causes him or her considerable suffering or a serious injury or seriously harms his or her health or destroys a population by subjecting it or a part thereof to destructive living condition or in another manner,
(2) deports or forcibly transfers population lawfully residing in an area,
(3) takes a person as a prisoner or otherwise deprives him or her of his or her liberty in violation of fundamental provisions of international law or causes the involuntary disappearance of a person who has been deprived of his or her liberty,

(4) rapes another, subjects him or her to sexual slavery, forces him or her into prostitution, pregnancy or sterilization or commits other corresponding aggravated sexual violence against him or her,
(5) engages in racial discrimination or persecutes a recognizable group or community on the basis of political opinion, race, nationality, ethnic origin, culture, religion or gender or on other comparable grounds, shall be sentenced for a *crime against humanity* to imprisonment for at least one year or for life. An attempt is punishable.

Section 4 – *Aggravated crime against humanity* (212/2008)
(1) If in a crime against humanity
(1) the offence is directed against a large group of persons,
(2) the offence is committed in an especially brutal, cruel or degrading manner or
(3) the offence is committed in an especially planned or systematic manner, and the offence is aggravated also when assessed as a whole, the offender shall be sentenced for an *aggravated crime against humanity* to imprisonment for at least eight years or for life.
(2) An attempt is punishable.

Section 5 – *War crime* (212/2008)
(1) A person who in connection with a war or other international or domestic armed conflict or occupation in violation of the Geneva conventions on the amelioration of the condition of the wounded and sick in armed forces in the field, the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea, the treatment of prisoners of war or the protection of civilian persons in time of war (Treaties of Finland 8/1955, *Geneva conventions*) or the additional amendment protocols done in 1949 to the Geneva Conventions, on the protection of victims of international armed conflicts and the protection of victims of non-international armed conflicts (Treaties of Finland 82/1980, *I and II protocols*) or other rules and customs of international law on war, armed conflict of occupation,
(1) kills another or wounds or tortures him or her or in violation of his or her interests maims him or her or subjects him or her to a biological, medical or scientific experiment or in another manner causes him or her considerable suffering or a serious injury or seriously harms his or her health,
(2) rapes another, subjects him or her to sexual slavery, forces him or her into prostitution, pregnancy or sterilization or commits other corresponding aggravated sexual violence against him or her,

(3) destroys, confiscates or steals property arbitrarily and without military need,
(4) in connection with an assault or otherwise plunders a town or another corresponding place, (5) takes or recruits children below the age of 18 years into military forces or into groups in which they are used in hostilities,
(6) forces a prisoner of war or another protected person to serve in the military forces of the enemy or participate in military action against their own country,
(7) denies a prisoner of war or another protected person the rights to a fair and lawful trial or in another manner denies him or her legal guarantees,
(8) initiates an attack that causes the loss of human life or injuries or extensive, long-term and serious environmental damage that are clearly excessive in comparison with the anticipated real and direct military benefit,
(9) attacks civilian populations, civilians not taking part in hostilities or civilian targets or persons engaged in tasks referred to in the Charter of the United Nations (Treaties of Finland 1/1956) or property used by them,
(10) attacks undefended civilian targets or bombs them, attacks places used for religious worship, science, art, medical treatment or charity or historical monuments or attacks persons who are using the symbols referred to in the Geneva conventions or the I or III protocol to the Geneva conventions,
(11) misuses a white flag, the flag of the enemy, the flag of the United Nations, military insignia, a military uniform or the symbols referred to in the Geneva conventions or the I or III protocol to the Geneva conventions,
(12) holds in unlawful detention or forcibly transfers or deports population or parts thereof,
(13) takes persons as hostages, announces that no mercy shall be given, uses civilians or other protected persons in order to protect military targets, prevents civilians from receiving foodstuffs or other supplies necessary for survival or emergency assistance or uses other means of warfare prohibited in international law, or
(14) uses poison or a poison weapon, suffocating or poisonous gases or other corresponding substances, weapons, ammunition or materiel that cause excessive injuries or unnecessary suffering, or chemical, biological or other prohibited weapons or ordnance, shall be sentenced for a *war crime* to imprisonment for at least one year or for life.

(2) Also a person who commits another act defined under article 8 of the Rome Statute of the International Criminal Court (Treaties of Finland 56/2002) or in another manner violates the provisions of an international agreement on war, armed conflict or occupation that is binding on Finland or the generally recog-

nized and established laws and customs of war in accordance with international law shall be sentenced for a war crime.
(3) An attempt is punishable.

Section 6 – *Aggravated war crime* (212/2008)
(1) If the war crime is committed as part of a plan or policy or as part of extensive war crimes and
(1) the offence is directed against a large group of persons,
(2) the offence causes very serious and extensive damage,
(3) the offence is committed in an especially brutal, cruel or degrading manner, or
(4) the offence is committed in an especially planned or systematic manner,
and the offence is aggravated also when assessed as a whole, the offender shall be sentenced for an *aggravated war crime* to imprisonment for at least eight years or for life.
(2) An attempt is punishable.

Section 7 – *Petty war crime* (212/2008)
(1) If the war crime, considering the consequence caused or the other relevant circumstances, is petty when assessed as a whole, the offender shall be sentenced for a *petty war crime* to a fine or to imprisonment for at most two years.
(2) An attempt is punishable.

Appendix 2

Chapter 3 of the Criminal Code – The general prerequisite of criminal liability (515/2003)

Section 1 – *The principle of legality* (515/2003)
(1) A person may be found guilty of an offence only on the basis of an act that has been specifically criminalized in law at the time of its commission.
(2) The punishment and other sanction under criminal law shall be based on law.

Section 2 – *Temporal application* (515/2003)
(1) The law in force at the time an offence was committed applies to the offence.

(2) However, if the law in force at the time of conviction is different from the law in force at the time of the commission of the offence, the new law applies if its application leads to a more lenient result.
(3) If the law is intended to be in force only for a fixed period of time, and there are no provisions to the contrary, the law in force at the time of the commission of the act applies to an act committed during this period.
(4) If the specific contents of a penal provision in law are determined by other provisions in law or by provisions or rules issued on its basis, the punishability of an act is assessed on the basis of the provisions or rules in force at the time of the act, unless there are provisions in law to the contrary or unless the new provisions demonstrate that the attitude towards the punishability of the act has changed.

Section 3 – *The punishability of omission* (515/2003)
(1) An omission is punishable if this is specifically provided in the statutory definition of an offence.
(2) An omission is punishable also if the offender has neglected to prevent the causing of a consequence that accords with the statutory definition, even though he or she had had a special legal duty to prevent the causing of the consequence. Such a duty may be based on:

(1) an office, function or position,
(2) the relationship between the offender and the victim,
(3) the assumption of an assignment or a contract,
(4) the action of the offender in creating danger, or
(5) another reason comparable to these.

Section 4 – *The age of criminal liability and criminal responsibility* (515/2003)
(1) Prerequisites for criminal liability are that the perpetrator had reached the age of fifteen years at the time of the act and is criminally responsible.
(2) The perpetrator is not criminally responsible if at the time of the act, due to mental illness, severe mental deficiency or a serious mental disturbance or a serious disturbance of consciousness, he or she is not able to understand the factual nature or unlawfulness of his or her act or his or her ability to control his or her behaviour is decisively weakened due to such a reason (*criminal irresponsibility*).
(3) If the perpetrator is not criminally irresponsible pursuant to subsection 2 but, due to mental illness, mental deficiency, mental disturbance or disturbance of consciousness, his or her ability to understand the factual nature or unlaw-

fulness of his or her act or his or her ability to control his or her behaviour is significantly weakened (*diminished responsibility*), the provisions in Chapter 6, section8(3) and 8(4) are to be taken into account in the determination of the sentence.
(4) Intoxication or other temporary mental disturbance induced by the perpetrator himself or herself is not taken into account in the assessment of criminal responsibility unless there are particularly weighty reasons for this.
(5) If, due to the mental condition of the person accused of an offence, the court waives punishment, the court shall, unless this is obviously unnecessary, submit for clarification the question of his or her need for treatment, as provided in section 21 of the Mental Health Act (1116/1990).

Section 5 – *Imputability* (515/2003)
(1) Intent or negligence are prerequisites for criminal liability.
(2) Unless otherwise provided, an act referred to in this Code is punishable only as an intentional act.
(3) What is provided in subsection 2 applies also to an act referred to elsewhere in law for which the statutory maximum sentence is imprisonment for more than six months or on which the penal provision has been issued after this law entered into force.

Section 6 – *Intent* (515/2003)
A perpetrator has intentionally caused the consequence described in the statutory definition if the causing of the consequence was the perpetrator's purpose or he or she had considered the consequence as a certain or quite probable result of his or her actions. A consequence has also been intentionally caused if the perpetrator has considered it as certainly connected with the consequence that he or she has aimed for.

Section 7 – *Negligence* (515/2003)
(1) The conduct of a person is negligent if he or she violates the duty to take care called for in the circumstances and required of him or her, even though he or she could have complied with it (*negligence*).
(2) Whether or not negligence is to be deemed gross (*gross negligence*) is decided on the basis of an overall assessment. In the assessment, the significance of the duty to take care, the importance of the interests endangered and the probability of the violation, the deliberateness of the taking of the risk and other circumstances connected with the act and the perpetrator are taken into account.

(3) An act which is deemed to have occurred more through accident than through negligence is not punishable.

Chapter 4 of the Criminal Code – Grounds for exemption from liability (515/2003)

Section 1 – ***Mistake as to the definitional elements of an offence***
If at the time of the act that perpetrator was not aware of the existence of all those factors required for the completion of the statutory definition of the offence or if he or she errs regarding such a factor, the act is not intentional. Nonetheless, liability for a negligent offence may enter the question pursuant to the provisions on criminal liability for negligence.

Section 2 – ***Mistake as to the unlawfulness of the act*** (515/2003)
If the perpetrator errs in regarding his or her act as lawful, he or she is exempt from criminal liability if the mistake is to be deemed manifestly excusable due to the following factors:
(1) the defective or erroneous publication of the law,
(2) the particular obtuseness of the contents of the law,
(3) erroneous advice by an authority, or
(4) another reason comparable to these.

Section 3 – ***Mistake as to a ground for exemption from liability*** (515/2003)
If the act does not involve grounds referred to below in sections 4 through 6 which would exempt the perpetrator from liability, but such grounds would have been connected with the situation in which the act was committed as reasonably understood by the perpetrator, he or she may not be punished for an intentional offence. Nonetheless, liability for a negligent offence may enter the question pursuant to the provisions on criminal liability for negligence.

Section 4 – ***Self-defence*** (515/2003)
(1) An act that is necessary to defend against an ongoing or imminent unlawful attack is lawful as self-defence, unless the act manifestly exceeds what in an overall assessment is to be deemed justifiable, taking into account the nature and strength of the attack, the identity of the defender and the attacker and the other circumstances.
(2) However, if the defence exceeds the limits of self-defence (*excessive self-defence*), the perpetrator is exempt from criminal liability if the circumstances

were such that the perpetrator could not reasonably have been expected to have acted otherwise, taking into account the dangerousness and sudden nature of the attack and the situation also otherwise.

Section 5 – *Necessity* (515/2003)
(1) An act other than that referred to above in section 4, necessary to ward off an immediate and compelling threat to a legally protected interest, is permissible as an act of necessity if the act when assessed as a whole is justifiable, taking into account the nature and extent of the interest to be rescued and the damage and detriment caused by the act, the origin of the danger and the other circumstances.
(2) If the act committed in order to rescue a legally protected interest is not to be deemed permissible pursuant to subsection 1, the perpetrator is nonetheless free from criminal liability if the perpetrator could not reasonably have been expected to have acted otherwise, taking into account the importance of the interest to be rescued, the unexpected and compelling nature of the situation and the other circumstances.

Section 6 – *Use of forcible measures* (515/2003)
(1) Separate provisions in an Act apply to the right to use forcible measures in the performance of official functions or for another comparable reason and to the right to assist persons appointed to maintain order.
(2) In the use of forcible measures, recourse may be had only to such measures necessary to perform the function and that can be deemed justifiable when assessed as a whole, taking into account the importance and urgent nature of the task, the dangerousness of the resistance and the situation also otherwise.
(3) If the limits provided in subsection 2 have been exceeded in the use of forcible measures, the perpetrator is nonetheless free of criminal liability if there are very weighty grounds to deem that the perpetrator could not reasonably have been expected to have acted otherwise, taking into account his or her position and training, the importance of the function and the unexpected nature of the situation.

Section 7 – *Mitigation of penal liability* (515/2003)
Even if the perpetrator is not fully exempted from penal liability pursuant to the grounds provided in this Chapter, the circumstances may nonetheless be taken into account as mitigation of the penal liability in accordance with what is provided in Chapter 6, section 8, subsection 1(4), subsection 2 and subsection 4.

Chapter 5 of the Criminal Code – On attempt and complicity (515/2003)

Section 1 – *Attempt* (515/2003)
(1) An attempt of an offence is punishable only if the attempt has been denoted as punishable in a provision on an intentional offence.
(2) An act has reached the stage of an attempt at an offence when the perpetrator has begun the commission of an offence and brought about the danger that the offence will be completed. An attempt at an offence is involved also when such a danger is not caused, but the fact that the danger is not brought about is due only to coincidental reasons.
(3) In sentencing for an attempt at an offence, the provisions of Chapter 6, section 8, subsection 1(2), subsection 2 and subsection 4 apply, unless, pursuant to the criminal provision applicable to the case, the attempt is comparable to a completed act.

Section 2 – *Withdrawal from an attempt and elimination of the effects of an offence by the perpetrator* (515/2003)
(1) An attempt is not punishable if the perpetrator, on his or her own free will, has withdrawn from the completion of the offence, or otherwise prevented the consequence referred to in the statutory definition of the offence.
(2) If the offence involves several accomplices, the perpetrator, the instigator or the abettor is exempted from liability on the basis of withdrawal from an offence and elimination of the effects of an offence by the perpetrator only if he or she has succeeded in getting also the other participants to desist withdraw from completion of the offence or otherwise been able to prevent the consequence referred to in the statutory definition of the offence or in another manner has eliminated the effects of his or her own actions on the completion of the offence.
(3) In addition to what is provided in subsections 1 and 2, an attempt is not punishable if the offence is not completed or the consequence referred to in the statutory definition of the offence is not caused for a reason that is independent of the perpetrator, instigator or abettor, but he or she has voluntarily and seriously attempted to prevent the completion of the offence or the causing of the consequence.
(4) If an attempt, pursuant to subsections 1 through 3, is not punishable but at the same time comprises another, completed, offence, such offence is punishable.

Section 3 – *Complicity in an offence* (515/2003)
If two or more persons have committed an intentional offence together, each is punishable as a perpetrator.

Section 4 – *Commission of an offence through an agent* (515/2003)
A person is sentenced as a perpetrator if he or she has committed an intentional offence by using, as an agent, another person who cannot be punished for said offence due to the lack of criminal responsibility or intention or due to another reason connected with the prerequisites for criminal liability.

Section 5 – *Instigation* (515/2003)
A person who intentionally persuades another person to commit an intentional offence or to make a punishable attempt of such an act is punishable for incitement to the offence as if he or she was the perpetrator.

Section 6 – *Abetting* (515/2003)
(1) A person who, before or during the commission of an offence, intentionally furthers the commission by another of an intentional act or of its punishable attempt, through advice, action or otherwise, shall be sentenced for abetting on the basis of the same legal provision as the perpetrator. The provisions of Chapter 6, section 8, subsection 1(3), subsection 2 and subsection 4 apply nonetheless to the sentence.
(2) Incitement to punishable aiding and abetting is punishable as aiding and abetting.

Section 7 – *Special circumstances related to the person* (515/2003)
(1) Where a special circumstance vindicates, mitigates or aggravates an act, it applies only to the perpetrator, inciter or abettor to whom the circumstance pertains.
(2) An inciter or abettor is not exempted from penal liability by the fact that he or she is not affected by a special circumstance related to the person and said circumstance is a basis for the punishability of the act by the perpetrator.

Section 8 – *Acting on behalf of a legal person* (515/2003)
(1) A member of a statutory body or management of a corporation, foundation or other legal person, a person who exercises actual decision-making power in the legal person or a person who otherwise acts on its behalf in an employment relationship in the private or public sector or on the basis of a commission may be sentenced for an offence committed in the operations of a

legal person, even if he or she does not fulfil the special conditions stipulated for a perpetrator in the statutory definition of the offence, but the legal person fulfils said conditions.
(2) If the offence has been committed in organised activity that is part of an entrepreneur's business or in other organised activity that is comparable to the activity of a legal person, the provisions in subsection 1 on an offence committed in the operations of a legal person correspondingly apply.
(3) The provisions of this section do not apply if different provisions elsewhere apply to the matter.

Appendix 3

Chapter 11 of the Criminal Code (212/2008)

Section 12 – *Responsibility of the superior* (212/2008)
A military or other superior shall be sentenced for the offence or the attempt of an offence referred to in section 1, 3 through 7 or 13 in the same way as the offender or participant if forces or subordinates that are factually under the command and supervision of the superior have been guilty of an act as a consequence of the failure of the superior to properly supervise the actions of the forces or subordinates, and if
(1) the superior knew or on the basis of the circumstances he or she should have known that the forces or subordinates committed or intended to committed said offences, and
(2) the superior did not undertake the necessary measures available to him or her and that could have been reasonably expected of him or her in order to prevent the completion of the offences.

Section 13 – *Failure to report the offence of a subordinate* (212/2008)
(1) A military or other superior who neglects to undertake the necessary measures that can be reasonably expected of him or her in order to submit to the authorities for investigation an offence referred to in section 1 or sections 3-7 or the present section suspected to have been committed by a person factually under his or her command and supervision, shall be sentenced for *failure to report the offence of subordinate* to a fine or to imprisonment for at most two years.
(2) However, a superior who is a participant in the offence committed by his or her subordinate or under the conditions referred to in section 12 is an offender

or participant in the offence committed by his or her subordinate shall not be sentenced for failure to report the offence of the subordinate.

Section 14 – *Order by the Government and command of a superior* (212/2008)
A person who has committed or attempted a war crime, an aggravated war crime or a petty war crime on the order of an authority exercising governmental power or of an entity exercising other public power or on the command of a superior is free of penal liability only if:
(1) he or she had had a legal obligation to obey the orders of the Government or the commands of his or her superior;
(2) he or she did not know that the order or command is against the law; and
(3) the order or command was not clearly against the law.

Appendix 4

Chapter 9 of the Criminal Code – Corporate criminal liability (743/1995)

Section 1 – *Scope of application* (61/2003)
(1) A corporation, foundation or other legal entity1 in the operations of which an offence has been committed shall on the request of the public prosecutor be sentenced to a corporate fine if such a sanction has been provided in this Code for the offence. (441/2011)
(2) The provisions in this Chapter do not apply to offences committed in the exercise of public authority.

Section 2 – *Prerequisites for liability* (61/2003)
(1) A corporation may be sentenced to a corporate fine if a person who is part of its statutory organ or other management or who exercises actual decision-making authority therein has been an accomplice in an offence or allowed the commission of the offence or if the care and diligence necessary for the prevention of the offence have not been observed in the operations of the corporation.
(2) A corporate fine may be imposed even if the offender cannot be identified or otherwise is not punished. However, no corporate fine shall be imposed for a complainant offence which is not reported by the injured party so as to have charges brought, unless there is a very important public interest for the bringing of charges.

Section 3 – ***Connection between offender and corporation*** (743/1995)
(1) The offence is deemed to have been committed in the operations of a corporation if the perpetrator has acted on the behalf or for the benefit of the corporation, and belongs to its management or is in a service or employment relationship with it or has acted on assignment by a representative of the corporation. 1 In the following, "corporation".
(2) The corporation does not have the right to compensation from the offender for a corporate fine that it has paid, unless such liability is based on statutes on corporations and foundations.

Section 4 – ***Waiving of punishment*** (61/2003)
(1) A court may waive imposition of a corporate fine on a corporation if:
(1) the omission referred to in section 2(1) by the corporation is slight, or the participation in the offence by the management or by the person who exercises actual decision-making authority in the corporation is slight, or
(2) the offence committed in the operations of the corporation is slight.
(2) The court may waive imposition of a corporate fine also when the punishment is deemed unreasonable, taking into consideration:
(1) the consequences of the offence to the corporation,
(2) the measures taken by the corporation to prevent new offences, to prevent or remedy the effects of the offence or to further the investigation of the omission or offence, or
(3) where a member of the management of the corporation is sentenced to a punishment, and the corporation is small, the sentenced person owns a large share of the corporation or his or her personal liability for the liabilities of the corporation are significant.

Section 5 – ***Corporate fine*** (971/2001)
A corporate fine is imposed as a lump sum. The corporate fine is at least 850 euros and at most 850,000 euros.

Section 6 – ***Basis for calculation of the corporate fine*** (743/1995)
(1) The amount of the corporate fine shall be determined in accordance with the nature and extent of the omission or the participation of the management, as referred to in section 2, and the financial standing of the corporation.
(2) When evaluating the significance of the omission and the participation of the management, consideration shall be taken of the nature and seriousness of the offence, the status of the perpetrator as a member of the organs of the corporation, whether the violation of the duties of the corporation manifests

heedlessness of the law or the orders of the authorities, as well as the grounds for sentencing provided elsewhere in the law.
(3) When evaluating the financial standing of the corporation, consideration shall be taken of the size and solvency of the corporation, as well as the earnings and the other essential indicators of the financial standing of the corporation.

Section 7 –*Waiving of the bringing of charges* (61/2003)
(1) The public prosecutor may waive the bringing of charges against a corporation, if: (441/2011)

(1) the corporate omission or participation of the management or of the person exercising actual decision-making power in the corporation, as referred to in section 2, subsection 1, has been of minor significance in the offence, or
(2) only minor damage or danger has been caused by the offence committed in the operations of the corporation and the corporation has voluntarily taken the necessary measures to prevent new offences.

(2) The bringing of charges may be waived also if the offender, in the case referred to in section 4, subsection 2(3), has already been sentenced to a punishment and it is to be anticipated that the corporation for this reason is not to be sentenced to a corporate fine.
(3) Service of a decision not to bring charges against a corporation or to withdraw charges against a corporation shall be given to the corporation by post or through application as appropriate of what is provided in Chapter 11 of the Code of Judicial Procedure. The provisions of Chapter 1, section 6(a), subsection 2 and section 11, subsections 1 and 3 of the Criminal Procedure Act on the waiving of charges apply correspondingly to the decision. (673/2014)
(4) The provisions of Chapter 1, section 12 of the Criminal Procedure Act on the revocation of charges apply to the revocation of charges on the basis of subsection 1. However, service of the revocation shall be given only to the corporation.

Section 8 – *Joint corporate fine* (743/1995)
(1) If a corporation is to be sentenced for two or more offences at one time, a joint corporate fine shall be imposed in accordance with the provisions of sections 5 and 6.
(2) No joint punishment shall be imposed for two offences, one of which was committed after a corporate fine was imposed for the other. If charges are brought against a corporation which has been sentenced to a corporate fine by a final decision, for an offence committed before the said sentence was passed,

a joint corporate fine shall also not be imposed, but the prior corporate fine shall be duly taken into account when sentencing to the new punishment.
[section 9 has been repealed; 297/2003]

Section 10 – *Enforcement of a corporate fine* (673/2002)
(1) A corporate fine is enforced in the manner provided in the Enforcement of Fines Act (672/2002).
(2) A conversion sentence may not be imposed in place of a corporate fine.

Appendix 5

Articles 12–13 of the Corpus Juris 2000 (above n. 11)

Article 12. Criminal liability of the head of business or persons with powers of decision and control within the business: public officers
1. If one of the offences under Articles 1 to 8 is committed for the benefit of a business by someone acting under the authority of another person who is the head of the business, or who controls it or exercises the power to make decisions within it, that other person is also criminally liable if he knowingly allowed the offence to be committed.
2. The same applies to any public officer who knowingly allows an offence under Articles 1 to 8 to be committed by a person under him.
3. If one of the offences under Articles 1 to 8 is committed by someone acting under the authority of another person who is the head of a business, or who controls it or exercises the power to make decisions within it, that other person is also criminally liable if he failed to exercise necessary supervision, and his failure facilitated the commission of the offence.
4. In determining whether a person is liable under (1) and (3) above, the fact that he delegated his powers shall only be a defence where the delegation was partial, precise, specific, and necessary for the running of the business, and the delegates were really in a position to fulfil the functions allotted to them. Notwithstanding such a delegation, a person may incur liability under this article on the basis that he took insufficient care in the selection, supervision or control of his staff, or in the general organisation of the business, or in any other matter with which the head of business i properly concerned.
5. Where liability is incurred under this article, the maximum penalty shall be half the penalty prescribed under Article 14.

Article 13 – Criminal liability of organisations

1. The offences defined above in Articles 1 to 8 may be committed by corporations, and also by other organisations which are recognised by law as competent to hold property in their own name, provided that the offence is committed for the benefit of the organisation by some organ or representative of the organisation, or by any person acting in its name and having power, whether by law or merely in fact, to make decisions.

2. Where it arises, the criminal liability of an organisation does not exclude that of any natural person as main offender, inciter or accomplice to the same offence.

22. Commentary on the Judgement and Sentence Prosecutor vs. Munyakazi, Case no. ICTR-97-36-A, 28 September 2011*

1 INTRODUCTION

In its Judgement and Sentence in *Prosecutor v. Munyakazi*, the Trial Chamber I of the International Criminal Tribunal for Rwanda ("ICTR") concluded that Yussuf Munyakazi had held *de facto* authority over the *Interahamwe* (paramilitary group) based in Bugarama during the attacks against the Shangi and Mibilizi parishes on 29 and 30 April 1994 respectively. Based on Munyakazi's leading role during these attacks, the Trial Chamber convicted him of genocide and extermination as a crime against humanity. The Trial Chamber sentenced Munyakazi to a single term of 25 years of imprisonment.[1]

Both Munyakazi and the prosecution appealed against the sentence. In his appeal, Munyakazi presented eight grounds of appeal challenging his convictions and sentence and, consequently, requested the Appeals Chamber to enter a judgement of acquittal. The prosecution presented three grounds of appeal against the Trial Chamber judgement. The prosecution requested the Appeals Chamber to convict Munyakazi of committing genocide and extermination as a crime against humanity at Nyamasheke parish; to find him responsible for genocide and extermination as a crime against humanity based on his participation in a joint criminal enterprise in connection with the massacres at Nyamasheke, Shangi, and Mibilizi parishes; and to increase his sentence to life imprisonment.

The Appeals Chamber dismissed Munyakazi's Appeal in its entirety, as it did the prosecutor's Appeal. The Appeals Chamber confirmed Munuyakazi's convictions for genocide and extermination as a crime against humanity. It also affirmed Munyakazi's sentence of 25 years of imprisonment imposed on him by the Trial Chamber.

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* Original source: In: André Klip and Steven Freeland (eds.): *Annotated Leading Cases of International Criminal Tribunals*. Vol. LIII (53) (ALC 53), Intersentia, Cambridge 2018, pp. 401–405. (https://intersentia.com/en/product/series/show/id/9154/)

[1] ICTR, Judgement and Sentence, *Prosecutor v. Munyakazi*, Case No. ICTR-97-36A-T, T. Ch. I, 5 July 2010, Klip/Freeland *ALC-42-485* (*Munyakazi* Trial Judgement).

The Trial Chamber Judgement has been commented upon by Yuliya Mik in an earlier volume of this series.[2] Therefore, this commentary will focus on an examination of the legal issues in the Appeals Judgement.[3] In particular, I will concentrate on the issues related to the legal elements and the modes of liability of the crimes concerned.

The Appeals Chamber recalled the applicable standards of appellate review pursuant to Art. 24 of the ICTR Statute. Accordingly, the Appeals Chamber reviewed only errors of law which have the potential to invalidate the decision of the Trial Chamber, as well as errors of fact which could have occasioned a miscarriage of justice.[4]

2 *DE FACTO* AUTHORITY OVER THE BUGARAMA *INTERAHAMWE* AND LEADING THE ATTACKS AT THE SHANGI AND MIBILIZI PARISHES

Munyakazi submitted in his appeal that the Trial Chamber erred in its assessment of his authority over the Bugarama *Interahamwe*.[5] He also challenged the Trial Chamber's consideration of the evidence underlying its findings that he led the attacks at the Shangi and Mibilizi parishes.[6] The conviction of Munyakazi for committing genocide and extermination as a crime against humanity by the Trial Chamber was based on his role in the attacks at the Shangi and Mibilizi parishes on 29 and 30 April 1994 respectively.

The following three factors were particularly mentioned as grounds for Munyakazi's guilt in the judgement of the Trial Chamber: Munyakazi was a leader of the attacks and exercised *de facto* authority over the Bugarama *Interahamwe* during the course of those attacks, and he had approved the decision to commit the crimes and embraced it as his own.[7] Munyakazi disclaimed the imputability of these acts to him by submitting that the Trial Chamber erred in identifying him as the leader of the two attacks and in relying on this purported role to hold him responsible for the crimes committed. Munyakazi contested the findings

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[2] Yuliya Mik, Klip/Freeland *ALC-42-588*.

[3] ICTR, Judgement, *Prosecutor v. Munyakazi*, Case No. ICTR-97-36A-A, A. Ch., 28 September 2011, in this volume, *ALC 53*, p. 349–400 (*Munyakazi* Appeals Judgement).

[4] *Munyakazi* Appeals Judgement*, supra* note 3, par. 5.

[5] *Ibid.*, par. 30.

[6] *Ibid.*, par. 39.

[7] *Munyakazi* Trial Judgement, par. 125, 134, 376, 380, 422, 423, 491; *Munyakazi* Appeals Judgement, par. 29, 132.

of the Trial Chamber by alleging errors both in the assessment of evidence and in relation to the interpretation of the legal elements of the crimes in question.

The Appeals Chamber considered (i) whether Munyakazi had notice of his role as the leader – with *de facto* authority over Bugarama *Interahamwe* – of the attacks at the Shangi and Mibilizi parishes; and (ii) whether the Trial Chamber had properly assessed the underlying evidence. As a conclusion, the Appeals Chamber was satisfied that the Indictment provided Munyakazi with notice that he did hold the role of a leader and exercised *de facto* authority over the Bugarama *Interahamwe* during these attacks. According to the Appeals Chamber, the fact that the prosecution's theory of the scope and basis of Munyakazi's leadership of that paramilitary group was broader than that ultimately proven at trial did not mean that the notice of his role in the crimes was deficient.[8]

It is noteworthy that the prosecution sought to hold Munyakazi responsible also for the killings of hundreds of Tutsi civilians on 16 April 1994 at Nyamasheke parish in Kagano Commune located in Cyangugu Prefecture, where he lived and had become a wealthy landowner and farmer.[9] After assessing the totality of the evidence, the Trial Chamber concluded that it had reasonable doubt about Munyakazi's participation in the attack at Nyamasheke parish on 16 April 1994.[10] The Appeals Chamber upheld this conclusion because the prosecution had not demonstrated that the Trial Chamber's assessment of the totality of the evidence was unreasonable.[11] Accordingly, the Trial Chamber and the Appeals Chamber found that Munyakazi was the *de facto* leader of the Bugarama *Interahamwe* during the two attacks at the Shangi and Mibilizi parishes, but it made no findings as to his degree of leadership or authority over the Bugawara *Interahamwe* outside of these two isolated incidents, in particular no findings concerning his alleged leadership during the attack at Nyamasheke parish.[12]

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[8] *Munyakazi* Appeals Judgement, par. 30, 37.

[9] *Ibid.*, par. 2, 3, 146.

[10] *Munyakazi* Trial Judgement, par. 316.

[11] *Munuakazi* Appeals Judgement, par. 155.

[12] See also Yuliya Mik's commentary, Klip/Freeland *ALC-42-589*.

3 COMMISSION OF GENOCIDE AND EXTERMINATION AS A CRIME AGAINST HUMANITY AND THE MODE OF LIABILITY

The contested questions of interpretation related to the correct application of the statutory definition of the commission of genocide (Art. 2 ICTR Statute) and extermination as a crime against humanity (Art. 3 ICTR Statute) and, in particular, the correct mode of liability or participation (Art. 6(1) ICTR Statute).

Munyakazi argued that he did not physically perpetrate any of the crimes nor engage in a culpable omission as required by Art. 6(1) of the ICTR Statute. He also denied playing an integral part in the crimes. He argued that, in other cases where authority was relevant to criminal liability, the Tribunal has found that the accused played a pivotal role. He also recalled that the Trial Chamber did not find that he recruited, trained, armed, fed, or acted in concert with other perpetrators named in the Indictment.[13]

The Appeals Chamber refuted the alleged errors in law and referred to the jurisprudence of the ICTR, in particular the *Seromba* Appeals Judgement and the *Gacumbitsi* Appeals Judgement:[14]

> In relation to genocide and extermination as a crime against humanity, the Appeal Chamber has held that "committing" under Article 6(1) of the Statute, which envisions physical perpetration of a crime, need not only mean physical killing and that other acts can constitute direct participation in the *actus reus* of the crimes. The question is whether an accused's conduct "was as much integral part of the [crimes] as were the killings which it enabled". In this case, the Trial Chamber found that Munykazi's leadership role constituted an integral part of the crimes. This approach is in line with the jurisprudence of the Appeals Chamber.[15]

The Appeals Chamber emphasized that Munyakazi's liability as a principal (perpetrator) was not based on his prominence or influence alone, but rather on his active involvement in the crimes committed at the Shangi and Mibilizi parishes on 29 and 30 April respectively. The Trial Chamber had correctly found that Munyakazi personally participated in the attacks, led the assailants,

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[13] *Munyakazi* Appeals Judgement, par. 134.

[14] *Ibid.*, par. 135, with reference to ICTR Judgement, *Prosecutor v. Athanase Seromba*, Case No. ICTR-01-66-A, A. Ch., 12 March 2008, Klip/Sluiter *ALC-XXXI-757*, par. 164–172, 190 (*Seromba* Appeals Judgement); and ICTR Judgement, *Sylvestre Gacumbitsi v. Prosecutor*, Case No. ICTR-2001-64-A, A. Ch., 7 July 2006, Klip/Sluiter *ALC-XXIV-495*. par. 60 (*Gacumbitsi* Appeals Judgement).

[15] (Internal citations omitted).

issued instructions and, in particular, oversaw key aspects of the crimes, such as the destruction of the door at Shangi parish and the removal of refugees from Mibilizi parish.[16]

Three of the five judges appended separate opinions raising concerns about the adoption of this kind of expanded form of commission. Nevertheless, they accepted that this form of commission was established in the ICTR's jurisprudence even if, at the same time, they also recommended a restrictive application of the mode of responsibility.[17]

The Appeals Chamber also noted that the Trial Chamber correctly set forth the requisite elements of the *mens rea* for genocide and extermination as a crime against humanity. The evidence of Munyakazi's active participation in the killings of thousands of Tutsi civilians at the two parishes (approximately 5,000 to 6,000 refugees at Shangi parish and 60 to 100 Tutsis at Mibilizi parish) demonstrated that he possessed both genocidal intent and the intent for extermination as a crime against humanity - *i.e.* the intent to kill on a large scale with awareness that the crimes formed part of a widespread and systematic attack against Tutsi civilians.[18]

It is noteworthy that Munyakazi was convicted as a principal (as a form of commission liability) for both genocide and extermination as a crime against humanity. Accordingly, crime against humanity was not completely subsumed by the commission of genocide. The way in which the rules of *concursus delictorum* were applied is, in my mind, justified, although the jurisprudence concerning this specific kind of concurrency is not fully established.[19]

4 PARTICIPATION IN A JOINT CRIMINAL ENTERPRISE ("JCE")

The prosecution charged Munyakazi of participating in a JCE, the purpose of which was to commit genocide and crimes against humanity targeting the Tutsis as a group. According to the indictment, Munyakazi participated in a JCE with a number of named individuals and, more generally, with the Bugarama *Interahamwe*.[20]

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[16] *Munyakazi* Appeals Judgement, par. 136.

[17] *Ibid.,* Opinion Séparée du Juge Mehmet Güney, Separate Opinion of Judge Liu, Opinion Séparée du Juge Andrésia Vaz.

[18] *Ibid.*, par. 139, 141, 142.

[19] See, in more detail, Guénaël Mettraux, *International Crimes and the ad hoc Tribunals*, Oxford U. P., Oxford 2005, p. 337–340; Kai Ambos, *Treatise on International Criminal Law*, Vol. II: *The Crimes and Sentencing*, Oxford U. P., Oxford 2014, p. 258–259, both with references.

[20] *Munyakazi* Trial Judgement, par. 435, 472; *Munyakazi*, Appeals Judgement, par. 156.

The Trial Chamber considered that the charge of participating in a JCE was too vague to support a conviction.[21] The prosecution appealed against the Trial Chamber's rejection of JCE as a mode of Munyakazi's liability. It submitted that the allegation about Munyakazi's participation in a JCE with Bugarama *Interahamwe* was sufficiently specific.[22] The Appeals Chamber accepted this plea of the prosecution. It relied on the theory of JCE, as established in the ICTR jurisprudence, according to which it is enough to identify the participants of a JCE as a general category, such as *Interahamwe*, and then further identifying them with geographic and temporal details related to each massacre site.[23]

Nevertheless, the Appeals Chamber dismissed the prosecution's appeal on the grounds that Munyakazi participated in a JCE in connection with a crime for which he was convicted as a principal perpetrator. Therefore, the conviction "fully encapsulated" his criminal conduct.[24] This result finds its explanation from the application of the principles of merger concurrence, primarily that of consumption.[25]

5 SENTENCING

Both Munyakazi and the prosecution appealed against the sentence, which was a single term of 25 years of imprisonment. The Appeals Chamber referred to the settled jurisprudence of the ICTR when arguing that, as a rule, it revises a sentence only if the appealing party demonstrates that the Trial Chamber made a discernible error in exercising its sentencing discretion or that it failed to follow the applicable law.[26]

The Appeals Chamber rejected Muyakazi's submission about the alleged error of qualifying him as an influential man in the Bugarama community and in assessing the alleged abuse of such a position as an aggravating factor. It did not identify any contradiction between the Trial Chamber's findings of Munyakazi's influence, which was based on his relative wealth and prior, prominent positions within his community, and his lack of overall authority

[21] *Munuakazi* Trial Judgement, par. 489.

[22] *Munyakazi* Appeals Judgement, par. 158.

[23] *Ibid.*, par. 162, citing ICTR Judgement, *Aloys Simba v. Prosecutor*, Case No. ICTR-01-76-A, A. Ch., 27 November 2007, par. 71–72 (*Simba* Appeals Judgement).

[24] *Ibid.*, par. 163.

[25] See, in general, Ambos, *op. cit., supra* note 19, p. 248–249.

[26] *Munyakazi* Appeals Judgement, par. 166, and the cited jurisprudence in n. 451.

over the Bugarama *Interahamwe* throughout the indictment period.[27]

The Appeals Chamber also rejected the prosecution's submission about the failure to consider the massive scale of Munyakazi's crimes which, as noted above, resulted in the deaths of approximately 5,000 to 6,000 Tutsi refugees at Shangi parish and 60 to 100 refugees at Mibilizi parish. According to the prosecution, the imposed sentence should be modelled in line with the reasoning of the *Gacumbitsi* Appeals Judgement, where it was argued that the Trial Chamber had exceeded its scope of discretion by imposing only thirty years of imprisonment.[28] The Appeals Chamber emphasized that each case must be examined based on its own individual factual background. It also noted that, in deciding Munyakazi's sentence, the Trial Chamber had correctly sought guidance from comparable cases (the *Simba* Appeals Judgement, the *Semanza* Appeals Judgement and the *Kayishema and Ruzindana* Appeals Judgement), each of which did not result in life sentences.[29]

In their reasoning, both the Trial Chamber and the Appeals Chamber seem to have followed the idea of defendant-relative proportionality, in the sense that more culpable defendants ought to be punished more severely than less culpable defendants, and that similarly situated defendants ought to be treated, *ceteris paribus*, roughly equal.[30] Notwithstanding, the reasoning is not transparent and clear enough and, therefore, leaves open whether there is coherence and consistency in the sentencing practice of the ICTR.[31]

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[27] *Ibid.*, par. 170. According to Yuliya Mik (Klip/Freeland *ALC XLII-594*), the Trial Chamber took the "interesting, yet not unheard-of, approach" of finding that Munyakazi was a *de facto* leader of the *Interahamwe* during two specific attacks but declined to identify that he was a *de facto* leader of that paramilitary group beyond these two isolated incidents.

[28] Munyakazi Appeals Judgement, par. 183–184, quoting *Gacumbitsi* Appeals Judgement, par. 204–205.

[29] *Ibid.*, par. 186, citing *Simba* Appeals Judgement, par. 279–288; ICTR Judgement, *Laurent Semanza v. Prosecutor*, Case No. ICTR-97-20-A, A. Ch., 20 May 2005, par. 388–389 (*Semanza* Appeals Judgement); ICTR Judgement, *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, A. Ch., 1 June 2001, par. 191, 194, 352 (*Kayishema and Ruzindana* Appeals Judgement).

[30] As for this kind of proportionality, see Jens David Ohlin, Proportional Sentences at the ICTY, in B. Swart, A. Zahar and G. Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford U. P., Oxford 2011, p. 322, 324.

[31] See, in general, Ambos, *op. cit., supra* note 19, p. 267–270; Barbora Holá, Consistency and Pluralism of International Sentencing, in E. v. Sliedregt and S. Vasiliev (eds.), *Pluralism in International Criminal Law*, Oxford U. P., Oxford 2014, p. 187, 197.

6 CONCLUSION

The major legal issue in the Judgement of the Appeals Chamber dealt with the mode of liability for genocide and extermination as a crime against humanity. The *Munyakazi* Appeals Judgement confirmed the "integral part" doctrine as an expanded form of commission (direct participation in the *actus reus*). This doctrine had been adopted and developed primarily in the ICTR case law, especially in the *Gacumbitsi* Appeals Judgement and in the *Seromba* Appeals Judgement, which were also quoted in the *Munuakazi* Appeals Judgement.[32]

In the jurisprudence, this doctrine to widen the concept of 'commission' has raised much criticism. In the *Seromba* Appeals Judgement, Judge Liu, in his dissenting opinion, criticized the majority for the extension of the definition of 'committing' without any indication of the criteria or legal basis. According to him, Seromba's participation in crimes amounted only to aiding and abetting genocide and extermination, as decided by the Trial Chamber.[33] The critique is similarly heard in various commentaries on the judgement.[34]

The doctrine of "integral" participation seems to have been interpreted by the Appeals Chambers in *Gacumbitsi* and *Munyakazi* in a slightly stricter way than in *Seromba*, due to the accused persons' heightened degree of their prominence or influence over the physical perpetrators, on one hand, and in their active involvement in the crimes in question, on the other.[35] As noted in the legal literature, these criteria resemble the notion of control over a crime applied by the International Criminal Court when interpreting Art. 25(3)(a) of the ICC Statute, as well as the theories of co-perpetration and indirect perpetration applied for the first time by the Trial Chamber in the case of *Stakić* when interpreting Art. 7(1) ICTY Statute.[36]

Elies van Sliedregt rightly points out that the participation models in the ICTY/ICTR and ICC are mixed models and are much more alike than is usu-

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[32] See *supra* note 14.

[33] *Seromba* Appeals Judgement (*supra* note 14), Dissenting Opinion of Judge Liu, especially par. 18.

[34] See, in particular, Flavia Zorzi Giustiniani, Stretching the Boundaries of Commission Liability, 6 *Journal of International Criminal Justice* 2008, p. 783; Kai Ambos and Katarzyna Geler, Commentary, Klip/Sluiter *ALC-XXXI-828*.

[35] See Neha Jain, *Perpetrators and Accessories in International Criminal Law*, Hart Publishing, Oxford 2014, p. 80.

[36] See, in more detail, Barbara Goy, Individual Criminal Responsibility before the International Criminal Courts, 12 *International Criminal Law Review* 2012, 1, 12, 37, with references; ICTY Judgement, *Prosecutor v. Stakić*, No. IT-97-24-T., T. Ch., 31 July 2003, par. 438–442 (*Stakić* Trial Judgement) and Jain, *op. cit.* (*supra* note 35), p. 80.

ally admitted.[37] Forming an even more harmonized doctrine of participation for establishing criminal responsibility of senior leaders for international crimes therefore deserves further attention.[38]

[37] Elies van Sliedregt, *Individual Responsibility in International Law*, Oxford U. P., Oxford 2012, p. 101.

[38] See Marjolein Cupido, Pluralism in Theories of Liability, in *Pluralism in International Criminal Law* (*supra* note 31), p. 129, 158.

VI.
Europeanization of Criminal Justice

23. The European Union Membership and Finnish Criminal Justice and Criminal Policy*

1 INTRODUCTION

When discussing about the influence of the EU membership on the Finnish criminal justice and criminal policy, a longer and wider perspective is in fact needed than that which is restricted to the period of Finland's membership within EU since 1995. I would prefer to speak about *emerging European criminal policy*. The move towards a European criminal policy relies on common legal traditions and the established European institutions which have maintained them. Accordingly, the regionalization of international criminal law is particularly developed in Europe. As for the European institutions, the legal instruments of the Council of Europe and, in recent years those of the EC/EU, have been decisive for harmonizing criminal policy and intensifying inter-state cooperation in criminal matters.[1]

Mireille Delmas-Marty has put the question whether we are going towards harmonization (common guiding principles, obligation of compatibility) or unification (identical rules, obligation of conformity) in European criminal policy. Her answer is that we are in fact going in both directions, and it is particularly important to notice the appearance of common principles both in the ECHR and European Community law.[2] Because neither the European Community nor the Council of Europe officially have the competency to establish rules in criminal law, it is "thus in an indirect fashion, through interpretation

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* Original source: *Agon*, Liège, 2000, No. 27, pp. 2–5. – Also In: Miklós Lévay (ed.): *Transnational Crime – Transnational Criminal Justice*. Proceedings of Criminal Justice Publication, University of Miskolc, Miskolc 2001, pp. 37–44. – The proceedings were bilingual, also in Hungarian.

[1] See in more detail Raimo Lahti, "Towards an International and European Criminal Policy?" In: M. Tupamäki (ed.), *Liber Amicorum Bengt Broms*. Finnish Branch of the International Law Association. Helsinki 1999, pp. 222–240, at 223, 235. See also, e.g., Károly Bárd, "European Criminal Law?" In: R. Lahti (ed.), *Kohti rationaalista ja humaania kriminaalipolitiikkaa*. [Liber Amicorum Inkeri Anttila.] Helsinki 1996, pp. 241–253.

[2] Delmas-Marty, "Politique Criminelle d'Europe". In: N. Jareborg (ed.), *Towards Universal Law*. Iustus Förlag, Uppsala 1995, pp. 55–90.

of principles not specifically criminal, that the European criminal policy is defined in a more or less restrictive, but not totally coherent, way."[3] She is also suggesting that Europe, which has been called the laboratory of judicial nationalism, could become in future the "laboratory of pluralism".[4]

Mireille Delmas-Marty has made a distinction between the penal law *in* the EU (where ongoing harmonization is discernible) and the penal law *of* the EU (where – primarily *de lege ferenda* – a trend towards unification is typical).[5] Nevertheless, the Treaty of Amsterdam can be regarded as modest in the last-mentioned respect. This Treaty has under pillar III adopted the objective of maintaining and developing the EU as an "area of freedom, security and justice" and, at the same time, brought about the review of various aspects involved; for example, the legal instruments are made subject to tighter judicial and democratic control, the Schengen *acquis* is integrated into the framework of the EU, and the central role of Europol is recognized.[6]

According to the conclusions which were adopted in Tampere on 15–16 October 1999, the European Council "is determined to develop the Union as an area of freedom, security and justice by making full use of the possibilities offered by the Treaty of Amsterdam".

2 ON THE INFLUENCE OF THE EU MEMBERSHIP ON THE FINNISH CRIMINAL JUSTICE

2.1 General Observations

It is important to keep in mind that both the Council of Europe and the EU are firmly rooted in a shared commitment to freedom based on human rights, democratic institutions and the rule of law. In the Amsterdam Treaty a provision is included saying that the EU shall respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law (Treaty on European

[3] See Delmas-Marty (ed.), *What Kind of Criminal Policy for Europe?* Kluwer Law International, The Hague 1996, p. 311.

[4] Delmas-Marty, "Les Défis d'un Droit Pénal Européen." In: V. Heiskanen & K. Kulovesi (eds.), *Function and Future of European Law*. Publications of the Faculty of Law, University of Helsinki, Helsinki 1999, pp. 185–206, at 206.

[5] Delmas-Marty, "The European Union and Penal Law", 4 *European Law journal* (1998), pp. 87–115.

[6] See in detail, Action Plan of the Council and the Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice; Adopted by the Justice and Home Affairs Council of 3 December 1998 (1999/C 19/1).

Union [TEU], Article 6, paragraph 2)[7]. This common heritage means that the effective implementation of the ECHR into national legal orders also complies with the obligations derived from the EU membership.

Finland ratified the ECHR in 1990, immediately after Finland had joined the Council of Europe. Before that, an in-depth study on the compliance of Finnish legislation with the ECHR and Strasbourg case-law was carried out. Several Acts of Parliament were amended, for example with respect to coercive criminal investigation means.[8] The influence of the ECHR can clearly be seen for instance in the case-law and legislation on criminal procedure. For instance, Article 6 of the ECHR has been directly applied in order to fill certain gaps in Finnish legislation on criminal procedure or, at least, references to them have been made when interpreting domestic provisions. The ECHR and its case-law have *inter alia* clarified and strengthened the significance of fair trial principles, such as presumption of innocence and "equality of arms" (the parties of the criminal trial shall be equal). The Finnish constitutional reform in 1995 produced a lot of new provisions on basic rights, mostly equivalent to the corresponding articles in international human rights treaties but in some respects more extensive.[9]

The influence of the EU membership on Finnish criminal justice system seems to be more invisible and limited – at least so far – when compared with the effects of the membership within the Council of Europe. In a more detailed examination the first impression is not fully justified. Community law and the general principles governing it have more or less indirect effects on criminal legislation and its application in the member states, among them in Finland. The same is true in respect to the system of penal administrative sanctions.[10] Without examining the effects of the EU membership in detail I will confine my following presentation to selections, primarily to such issues on which critical comments have been expressed in the Finnish or Scandinavian academic discussion.[11]

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[7] In this article the numbers refer to the consolidated version of the Treaty on EU. The same applies to the Treaty establishing the European Community [EC-Treaty].

[8] See Matti Pellonpää, "The Implementation of the European Convention on Human Rights in Finland". In: A. Rosas (ed.), *International Human Rights Norms in Domestic Law*. Finnish Lawyers' Publishing Company, Helsinki 1990, pp. 44–67.

[9] See in detail Raimo Lahti, "Constitutional Rights and Finnish Criminal Law and Criminal Procedure", 33 *Israel Law Review*, 1999 (pp. 592–606). The new Constitution of Finland was enacted on 11 June 1999, and the revised provisions were kept unchanged.

[10] See generally, e.g., Delmas-Marty, *supra* n. 5, at 88–106.

[11] See generally, e.g., Vagn Greve, "European Criminal Policy", in *Towards Universal Law*, *supra* n. 2, pp. 91–116; Risto Eerola, "Eurooppalaistuva rikosoikeus" [Europeanization of Criminal Law]. In*: Juhlajulkaisu Leena Kartio* 1938 – 30/8 – 1998 [Festschrift Leena Kartio]. Turku 1998, pp. 31–46.

2.2 Enforcing Community Norms into Finnish Criminal Law

The most striking example of the influence of the EC law concerns the *obligation to incorporate Community norms into national criminal legislation*, i.e. the definitional elements of crime. Because the *EC Regulations* must be integrated as such without any national transformation, the so-called blanket provision (reference) technique has been used in criminal law provisions.

> For instance, in the Chapter 46, Section 1, on the regulation offences in the Penal Code (PC) there is a following prescription (sub-paragraph 11): "A person who violates or attempts to violate a regulatory provision in a Regulation, adopted on the basis of Article 73g or 228a of the Treaty establishing the European Community, on the interruption or limitation of capital transfers, payments or other economic relations as regards the Common Foreign and Security Policy of the European Union, or a regulatory order on the basis of one of the above, shall be sentenced for a regulation offence to a fine or to imprisonment for at most two years."

This reference technique is problematic from the point of view of the legality principle (*nullum crimen, nulla poena sine lege*). The legality principle was confirmed by the constitutional reform in 1995 when among other important provisions one regarding this principle was adopted. One of the aims in the strengthening of the legality principle was to reduce and specify the use of that kind of reference technique.[12] The primacy of Community law over national provisions seems now to lead to such blanket penal provisions which do not fully comply with the objectives of Finnish constitutional reform.

Because Finland belongs to those countries where the principle of dualism is normally applied when implementing international treaty obligations, the direct applicability of the EC legal norms has been more problematic than in the countries where monism is a general principle of international law.

When enforcing *EC Directives* into national legal orders the member states have certain discretion in choosing the legal remedies, e.g. whether to resort to criminalization or administrative sanctions and at what level the penality of sanctions should be. This discretion may, however, in fact be very limited, for instance when enforcing the EC Directive on money laundering (91/308/EEC). The member states must ensure that money laundering as defined in the Directive shall be forbidden. When the Finnish PC (Ch. 32) was in 1994 amended in order to fulfil the obligation arisen from this Directive, another international obligation was equally relevant (i.e., the Council of

[12] See Raimo Lahti, "The Rule of Law and Finnish Criminal Law Reform", 37 *Acta Juridica Hungarica* (1995/96), pp. 251–258, at 256.

Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8 November 1990). On the other hand, the principle of EC law friendly interpretation of national legislation does not apply to the detriment of the accused (see the Cases C-74/95 and C-129/95 Criminal proceedings against X, where a reference to the legality principle and the constitutional traditions of the member states and the ECHR was in this respect made).

One area where the influence of the EU membership on the administration of justice is evident does in Finland concern *administrative penal law*. This sphere of European criminal law is expanding, while the distinction between criminal and administrative law is often blurred.[13] A recent example of that expansion is the enactment of the Regulation for the Protection of the Financial Interests of the EC (No. 2988/95 of the Council of 18 December 1995), which contains penalties regarding "irregularities". The system of administrative penal sanctions has in Finland been developed fragmentarily without a consistent policy.[14]

The emergence of administrative penal law within EU compels the Finnish authorities to create a more coherent system for these kinds of sanctions into the national legal order.

2.3 On the EC Sanction Policy versus Finnish and Scandinavian Criminal Policy

As for the sanctions imposed in national legal orders for the violations of obligations which are based on Community law, in several cases the three criteria of effectiveness, proportionality and dissuasiveness have been confirmed (originally in the Case 68/88 *Commission v. Greece*). What the influence of these criteria factually is, cannot easily be assessed. In any case the combination of these criteria seems to mean that a utilitarian and even repressive sanction policy is strongly reflected in them.

In the Scandinavian criticism against the unification of European criminal policy and also against the "Corpus Juris" proposal (1997)[15] – the main argu-

[13] See also Peter-Alexis Albrecht and Stefan Braum, "Deficiencies in the Development of European Criminal Law", 5 *European Law Journal* (1999), pp. 293–310, at 302–305.

[14] See generally the Finnish papers in: *Hungarian-Finnish Penal Law Seminary on Petty Offences*. [5–8 September, 1983, Budapest.] Ed. by Lenke Fehér. Complex Development Research Programme in Public Administration. Budapest, 1984.

[15] See Mireille Delmas-Marty, *Corpus Juris* [introducing penal provisions for the purpose of the financial interests of the European Union]. Economica, Paris 1997. A revised version of this proposal has been prepared published: see M. Delmas-Marty and J. A. E. Vervaele (eds), *The Implementation of the Corpus Juris in the Member States*. Vol. I. Intersentia, Antwerpen 2000.

ments have been directed to the concern that the basic values of the "Nordic model" would then be endangered. In the Scandinavian thinking, for example, the role of crime prevention is particularly emphasized; specific criteria of rationality in criminal policy such as legitimacy and humaneness are applied; and the level of repression in criminal sanctions is relatively low.[16] For example, the sanction-criterion of dissuasiveness can be criticized for its strong connotation with deterrence and high level of punitiveness. The Corpus Juris proposal has been mentioned as a typical example of this kind of repressive policy, while in Scandinavian thinking moral or socio-pedagogical influence of the criminal law and its enforcement is more emphasized[17] and the protection of individuals' rights is strongly balancing the state's interest in effective prevention and control.

The demand for more effective sanctioning and penal provisions sounds justified when one's attention is focused on transnational organized crime or on the protection of the financial interests of the whole EU or when there are particularly strong common interests of the member states to combat other serious trans-border crime.[18] A nearer look at the issue, however, provokes critical comments. The situation of these crimes is not similar in all member states. There should also be pluralism enough in the national means of criminal policy, while the main emphasis should be laid on – in line with the TEU – a closer cooperation between police, administrative and judicial authorities as well as, where necessary, on an approximation of the rules of criminal matters.[19] In the last-mentioned respect Finland belonged to the first EU member states who have ratified the Convention on the protection of the European Communities' financial interests (Council Act of 26 July 1995; 95/C 316/03). Although a certain degree of differentiation among the sub-systems of the administration

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[16] See e.g. Greve, *supra* n. 11, at 94, 97–107; P. O. Träskman, "A Good Criminal Policy Is More Than Just New Law", in: *Function and Future of European Law*, *supra* n. 4, pp. 207–219; Seminar on the Protection of the European Communities' Financial Interests, Agon 1997 No. 14, pp. 18–19.

[17] See especially the classical writings of Johannes Andenaes in his collection of articles: *Punishment and Deterrence*. The University of Michigan Press, Ann Arbor 1974.

[18] See Article 29, paragraph 2, of the TEU: the objective of a high level of safety shall be achieved by "preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud …".

See also Article 280, paragraph 1, of the EC-Treaty: "The Community and the Member States shall counter fraud and any other illegal activities affecting the interests of the Community through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States."

[19] The last formulation follows Article 29, paragraph 2, of the TEU.

of justice must be recognized, their coherence as to essential legal principles should be guaranteed both on the national and European level.

3 CONCLUDING REMARKS

Criminal policy is increasingly affected by actors whose spheres of operations extend from domestic or sub-regional (Scandinavian) arenas to regional (European) and global (e.g., UN's) levels.[20] This development means that it will be more difficult to reach such kind of rationality and coherence in these policy-decisions as the case of Finnish criminal policy has been for last three decades due to its proneness to professionalism and consensus of a homogenous small country. The influence of the EU membership on Finnish criminal policy has been moderate and restrictive so far, but a clear tendency is to strengthen the Europeanization of criminal law – including, in the long run, the trend towards the criminal law of the EU (as reflected in the Corpus Juris proposal).

For instance, the European Council is according to the Presidency conclusions in Tampere (on 15–16 October 1999) "deeply committed to reinforcing the fight against serious organised and transnational crime. The high level of safety in the area of freedom, security and justice presupposes an efficient and comprehensive approach in the fight against all forms of crime." (Paragraph 40.) In the same paragraph a balance is required between the unionwide measures against crime and the protection of the freedom and legal rights of individuals and economic operators.

The just-mentioned balancing is the weak point in the unionwide criminal policy. On the basis of Finnish experience this balancing is also problematic in domestic law drafting, when legislative reforms are increasingly justified by arguments of efficiency and effective unionwide cooperation and when the role of the Ministry of the Interior is at the same time expanding (and the role of the Ministry of Justice and academic professionals decreasing).

According to critics, the principles of subsidiarity should be strongly emphasized when the criminal justice systems of the EU's member states are in question. The demand for the legitimacy is particularly strong as to criminal justice systems; so cultural and national traditions should be taken seriously into account. At a regional, European level such legitimacy is difficult to achieve. In order to increase acceptability of and confidence in European

[20] *Cf*. Lahti, in: *Liber Amicorum Bengt Broms*, *supra* n. 1.

institutions (primarily in the EU) there should be general awareness of common European values (as now captured by the concept of the area of freedom, security and justice in the Amsterdam Treaty); deficiencies in the decision-making processes and their transparency should be removed (the idea of citizens' Europe and the sufficient and equal freedom of action of member states should be combined); and the commitment to the observance of human rights and fundamental freedoms ought to be strengthened.[21] As European integration advances, it is necessary to rediscover fundamental rights and freedoms in European criminal law.[22]

Even a sub-regional criminal policy seems to have much better chances of success than that of a common-European criminal policy. At least the existing inter-state cooperation between the Nordic countries works effectively and smoothly – primarily due to the reciprocal confidence in the legal systems of neighbourhood countries.[23] The experiences of the Nordic countries in criminal policy and in inter-state cooperation in criminal matters should be utilized in the deliberations about common European criminal policy.

[21] See Lahti, in: *Liber Amicorum Bengt Broms*, *supra* n. 1, at 239.

[22] So Albrecht and Braum, *supra* n. 13, at 310.

[23] See generally Raimo Lahti, "Sub-Regional Co-operation in Criminal Matters: The Experience of the Nordic Countries". In: A. Eser and O. Lagodny (eds), *Principles and Procedures for a New Transnational Criminal Law*. Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg 1992, pp. 305–310.

24. Harmonization of Criminal Law and Its Relation to National Law. Problems of Substance in the Administration of Justice *

1 INTRODUCTION

Since the 1990s tendencies towards more unified or harmonized criminal policies and criminal laws on both the international and the European level have been strengthened. At the same time, the trends of intensified international cooperation in criminal matters have been discernible. The focus in the following presentation will be brought into the European development, in particular within the European Union (EU). An emphasis will be put on the latest development, including the relevant provisions in the Draft Treaty establishing a Constitution for Europe from 18 July 2003 and the reasons for these provisions as expressed in the report of the Working Group X "Freedom, Security and Justice", submitted on 2 December 2002.

The activities in the field of criminal policy and criminal law have been systematically developed within the EU, as it will be examined. Therefore, there are good reasons to consider the problems related to the increased diversification of various spheres of criminal law and the increased legal pluralism of the general doctrines of criminal law. The issues about the legitimacy and limits of criminal law and punishing power should also be rethought. It should, however, be noticed that so far 'the European criminal law' is not a legal concept but more or less a phrase used to cover developmental fragments affecting national criminal law systems.

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* Original source: In: *Györgyi Kálmán ünnepi kötet* [Festschrift Györgyi Kálmán]. Szerkesztö: Gellér Balázs. Bibliotheca Iuridica, Az ELTE Állam- és Jogtudományi Karának tudományos kiadványai Libri Amicorum 11. Budapest 2004, pp. 347–355.

2 FIRST STEPS OF THE EUROPEANIZATION OF CRIMINAL LAW

Europe is a region where, for several reasons, a trend towards a more harmonized criminal policy is more evident than in other similar areas. The move towards a European criminal policy relies on common legal traditions and the established European institutions which have maintained them. As for the European institutions, the role of both the Council of Europe and the EU and their instruments has been significant in harmonizing criminal policy and intensifying inter-state cooperation in criminal matters.

The legal instruments of the Council of Europe deal with all aspects of criminal law and procedure. They include the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR; 1950, as amended by Protocol No. 11, 1998) and more than 20 multilateral Conventions on various issues of criminal law, criminal procedure and inter-state cooperation. Within the Council of Europe, the obligations of the member states in criminal matters are confined to cooperation of an intergovernmental nature. The same is true within the EU under Title VI of the Maastricht Treaty (the so-called Third Pillar). Traditionally, criminal law does not belong to the scope of application of Community law (the First Pillar of the EU), but instead falls within the Third Pillar, hence it is an issue of inter-state cooperation. The Amsterdam Treaty, signed in 1997 and entered into force in 1999, retained the provisions on police and judicial cooperation in criminal matters within the Third Pillar.

The institutional creations of the Third Pillar are important ones. Europol, a European police network, was established by a Convention in 1995. Another organizational structure, 'magistrats de liaison', was created in 1996, and from this grew a more ambitious scheme for a 'European Judicial Network' in 1998. The origin of the European Anti-Fraud Office (OLAF) goes back to the late 1980s when UCLAF (Unité de coordination de la lutte anti-fraude) was established as a body to help the member states to combat fraud on Community finances. The body was reconstituted in 1999 as OLAF, with greater independence, a bigger staff and more extensive powers.

The prominent French scholar *Mireille Delmas-Marty* has since the middle of the 1990s raised the question whether we are going towards harmonization (= common guiding principles, obligation of compatibility) or unification (= identical rules, obligation of conformity) in European criminal policy. Her answer is that we are in fact going in both directions, and it is particularly important to notice the appearance of common principles both in the ECHR and European Community law. Because neither the European Community nor the Council of Europe officially have the competency to establish rules in criminal

law, it is "thus in an indirect fashion, through interpretation of principles not specifically criminal, that the European criminal policy is defined in a more or less restrictive, but not totally coherent, way".[1] Roughly analyzed, Community law mainly affects parts of substantive criminal law and the ECHR criminal procedural law. According to Delmas-Marty's critical assessment, the application of European Community law had led to an unforeseen and complex process of the harmonization of the criminal justice systems in the member states of the EU.[2]

3 THE AMSTERDAM TREATY (1999) AND THE TAMPERE MILESTONES (1999)

The Amsterdam Treaty adopted under the Third Pillar the objective of maintaining and developing the EU as an "area of freedom, security and justice" and, at the same time, brought about the review of various aspects involved; for example, the legal instruments were made subject to tighter judicial and democratic control, the "Schengen acquis" was integrated into the framework of the EU, and the central role of Europol was recognized. The integration of Schengen Convention meant that its rules on extradition, mutual assistance, double jeopardy, the transfer of sentenced persons and cooperation on fines for road traffic offences now formed part of EU law.

Article 29 in the Title VI of the Amsterdam Treaty on EU defines the means to obtain a high level of safety within an area of freedom, security and justice. The objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through

- cooperation between police force, customs authorities and other competent authorities in the Member States,
- closer cooperation between juridical and other competent authorities of the Member States, and
- approximation, where necessary, of rules on criminal matters in the Member States.

These provisions are specified in Articles 30–32.

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[1] Mireille Delmas-Marty, Conclusions, in *What Kind of Criminal Policy for Europe?* 307–332, at 311, Mireille Delmas-Marty ed., The Hague–London–Boston: Kluwer Law International, 1996.

[2] Mireille Delmas-Marty, The European Union and Penal Law, 4 *European Law Journal* (*E.L.J)*. 87–106, 1998.

A new type of instrument – framework decisions – was introduced, and the Commission was given the right to make initiatives within the Third Pillar (see Article 34). Both reforms strengthened the role of the Third Pillar measures. The problem with conventions, i.e. the traditional Third Pillar instrument, turned out to be their slow and poor ratifications in the member states. Nevertheless, the important Convention on Mutual Assistance in Criminal Matters (2000) has by 2004 received enough ratifications (e.g. that of Finland). Currently, there are no draft conventions in preparation, and such initiatives which might in the past have been proposed as conventions now take the form of draft framework decisions. Like directives under the First Pillar they are "binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods"; any possibility of direct effect is however excluded.

The Presidency conclusions of the Tampere European Council (15 and 16 October 1999), in other words the Tampere Milestones towards a Union of Freedom, Security and Justice, were intended to send a strong political message to reaffirm the objective of creating the European legal space and confirm a number of policy orientations and priorities. A close connection with the creation of an area of freedom, security and justice, on one side, and the need to strengthen the legal position of the individual, on the other, was recognized: a Charter of fundamental rights of the EU should be rapidly prepared. In the preamble of this Charter, which was adopted only one year later in 2000, this connection is clearly stated:

> Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual in the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

As to the milestones in creating a genuine European area of justice, the Tampere conclusions endorsed the principle of mutual recognition, which should become the cornerstone of judicial cooperation in both civil and criminal matters within the EU. "Enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights" (item B.VI.33). A special programme of measures to implement the principle of mutual recognition should therefore be adopted.

> In this programme, work should be launched on a European Enforcement Order and on those aspects of procedural law on which common minimum

> standards are considered necessary in order to facilitate the application of the principle of mutual recognition, respecting the fundamental legal principles of Member States. (Item B.VI.37.)

The mutual recognition of judgments, the approximation of legislation, and the strengthening of the legal safeguards of individuals have turned out to be the key objectives in implementing the necessary measures in order to create a real European legal space, and much progress has been reached (as the biannual Scoreboards prepared by the Commission since 2000 indicate). There are, however, tensions or conflicts between these objectives, and critical discussions about these issues are conducted among legal scholars, as it will be explained in more detail below.

One of the Tampere conclusions was an agreement that a unit (Eurojust) should be set up, and it would be composed of national prosecutors, magistrates, or police officers of equivalent competence. The establishment of this new body was finalized soon, in 2002. Its objective is to facilitate criminal judicial cooperation and coordination between national competent authorities.

4 MUTUAL RECOGNITION OF CRIMINAL JUDGEMENTS, APPROXIMATION OF CRIMINAL LEGISLATION AND THE PROTECTION OF INDIVIDUAL (DEFENCE) RIGHTS

A British scholar *Steve Peers* has made a distinction between positive legal integration, which covers the approximation of national legislation, and negative legal integration, which includes the recognition of national laws coupled with the abolition or reduction of international border controls.[3] Recently, Peers has critically examined the principle of mutual recognition and posed the question whether the EU Council got it wrong.[4] Similar critical voices have been also expressed by *Susie Alegre* and *Marisa Leaf*.[5] This criticism deserves a more detailed study.

How many instruments or proposed measures have been adopted so far for implementing the principle of mutual recognition? The following list illustrates the application of this principle:

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[3] See Steve Peers, *EU Justice and Home Affairs Law*, 140–41, Longman, London, 2000.

[4] See Steve Peers, Mutual Recognition and Criminal Law in the European Union: Has the Council Got it Wrong? 41 *Common Marmet Law Review*. *5–36*, 2004.

[5] See further Susie Alegre & Marisa Leaf, Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant, 10 *E.L.J*. 200–217, 2004.

- a proposed Framework Decision on mutual recognition of orders to freeze assets or evidence in 2001 (Council adoption in 2003)
- a proposed Framework Decision on mutual recognition of financial penalties in 2001 (Council agreement in 2003)
- a proposed Framework Decision on a European Arrest Warrant in 2001 (Council adoption in 2002)
- a proposed Framework Decision on mutual recognition of confiscation orders in 2002
- a proposed Framework Decision on the double jeopardy principles ("ne bis in idem") in 2003
- a proposed Framework Decision on a European evidence warrant in 2003
- a proposed Framework Decision on certain procedural rights in criminal proceedings in 2004

The European arrest warrant (EAW) is the first and most significant example of the extensive judicial cooperation in criminal matters. It replaces traditional extradition between EU member states and, accordingly, many of the conditions of extradition (grounds for refusal) have been abolished or crucially restricted, for instance the dual criminality requirement. The EAW relies heavily on the confidence towards a proper administration of justice in other EU member states and that the rights of the individuals are protected adequately all over the EU. Are these presumptions well-grounded?

The starting point, i.e. the adoption of a similar approach as applied in the development of the internal market or when the principle of mutual recognition is applied to civil judicial rules, has with good reasons been called into question. There is not enough balance between the objective of efficient judicial cooperation on the one hand and the protection of individual rights and legal certainty in the European legal space on the other. Peers refers in particular to two arguments: 1) The role of the individual in criminal prosecutions is turned upside down in the mutual recognition model: he or she is the *object* of free movement arranged by States, rather than the subject of free movement rights claimed in national courts against State authorities (as regards internal market law). 2) In the field of criminal law a State which assists another Member State cannot – due to human rights obligations – exclude its responsibility for what happens on that other State's territory, especially where it exercises coercive powers. Peers' conclusions are following: 1) the abolition of dual criminality cannot be defended in principle; 2) the acceptable mutual recognition of criminal judgements requires that a certain level of harmonization or comparability of both *a)* the substantive criminal law and *b)* the rules on protection of criminal suspects and defendants has been achieved.

Peers emphasizes more than it is commonly done – and with good reasons – that the principle of mutual recognition and harmonization of criminal legis-

lation should be furthered at the same time in order to guarantee both efficient inter-state cooperation in criminal matters and the protection of the individual rights. Peers also points out in an illustrative way that the principle of mutual recognition in criminal matters is different from the traditional forms of cooperation between States. When speaking about cooperation in criminal matters one State requests another to assist with some aspect of the operation of its criminal justice system. The requested State then takes a decision to cooperate, but that decision takes place within the requested State's legal system following its rules. In the system of mutual recognition, the decision of the 'issuing' State takes effect *as such* within the legal system of the 'executing' State, although the latter retains some power to refuse to implement the issuing State's decision into an act within its own legal system.

An important question remains: what kind of harmonization of criminal legislation should be achieved? Are there good reasons to maintain diversity in the criminal justice systems? Are we ready to accept the necessary birth of the many criminal law irritants that will inevitably be generated when implementing the common rules on a national level?[6]

In particular, the system of penal scales and sentencing practices should leave place for cultural differences at least in cases where the offences in question do not violate the financial interests of the EU or are not by nature serious transnational crimes. When speaking in favour of cultural differences I have in mind such defensible values which are characteristic of the legal culture in the Nordic countries: for instance, the primary role of crime prevention, and the requirements – in criminal policy – of legitimacy, a relatively low level of repression and humaneness.[7]

5 DRAFT CONSTITUTION FOR EUROPE AND CRIMINAL LAW AND PROCEDURE

The Draft Treaty establishing a Constitution for Europe[8] mainly represents a continuity for the gradual development which already has taken place step by

[6] See *e.g*. Kimmo Nuotio, On the Significance of Criminal Justice for a Europe 'United in Diversity', in *Europe in Search of 'Meaning and Purpose'* 171–211. Kimmo Nuotio ed., Helsinki, Forum Iuris, 2004.

[7] See in more detail Raimo Lahti, Towards a Rational and Humane Criminal Policy – Trends in Scandinavian Penal Thinking, 1 *Journal of Scandinavian Studies in Criminology and Crime Prevention* 141–155 (2000); *cf*. Green Paper on the Application, Mutual Recognition and Enforcement of Criminal Santions in the European Union, Brussels 30.4.2004, COM(2004)334 final.

[8] Submitted in Rome 18 July 2003, CONV 850/03, see *OJ* C 169/1 (2003).

step. The maintenance of the European Area of Freedom, Security and Justice would gain an even strengthened status among the objectives of the EU. The EU shall "endeavour to ensure a high level of security by measures to prevent and combat crime, racism and xenophobia, and measures for coordination and cooperation between police and juridical authorities and other competent authorities, as well as by the mutual recognition of judgments in criminal matters and, if necessary, the approximation of criminal laws" [Chapter IV, Section 1, Article III–158 (3)]. The cooperation in criminal matters and the approximation of laws in substantive criminal law and criminal procedure would be part of the general EU law and law-making. After the merger of the pillars the legal instruments would consist of European laws and framework laws.

When looking at the draft provisions in detail some new emphases can be noticed. Article III–171 (1) expresses the primacy of the mutual recognition approach. The approximation of the laws and regulations of the Member States is restricted into the areas defined specifically: European framework laws may establish minimum rules concerning mutual admissibility of evidence, the rights of individuals in criminal procedure and the rights of victims of crime [Article III–171 (2)]; European framework laws may also establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with cross-border dimensions resulting from the nature or impact of such offences or from a special need to combat them on a common basis [Article III–172 (1)]. These last-mentioned crimes are separately listed in subparagraph 2 but Article III–172 leaves also open the possibility to establish minimum rules with regard to the definition of criminal offences and sanctions when identifying other areas of crime that meet the specified criteria (serious crime with cross-border dimension) or when the approximation of criminal legislation proves essential to ensure the effective implementation of a EU policy in an area which has been subject to harmonisation measures.

The just-described possibility has raised critical discussion in Finland. The coherence of the national criminal justice system, which has been gained through extensive reforms in the fields of criminal law and procedural law, would be endangered. In particular, the adoption of Article III–172 (2) would lead to increased fragmentation and differentiation of the criminal justice system. The crucial change in the decision-making, i.e. the introduction of the supra-national legislative powers and qualified majority voting procedure in criminal law and procedure law matters has met criticism in Finnish discussion, although these powers concern limited areas of the former Third Pillar decision-making.

Articles III–173 and 174 concern Eurojust and European Public Prosecutor's Office. Eurojust could be given powers to initiate and coordinate prosecutions

to be conducted by the Members States' prosecutors in a European law. A European Public Prosecutor's Office could be established from the Eurojust but it would require a unanimous European law of the Council and the consent of the European Parliament. The establishment of a European Public Prosecutor – and a new legal structure for a vertical cooperation – has received significant resistance among the Member States.

On the other hand it may be said that the proposal for the establishment of a European Public Prosecutor as well as the extensive academic Corpus Juris study (1997, 1999)[9] represent the kind of comprehensive conceptions of European criminal policy which aim at increased coherence and rationality at the EU level. This kind of new legal structure should however have enough added value in relation to the already existing legal instruments. The most important added value could concern the strengthening of individual rights in the international, border-crossing proceedings. Corpus Juris study expressly would set out common rules regarding the rights of the defence and would put the police investigation powers under the control of a judge of freedoms or a European preliminary Chamber. In line with the subsidiarity principle, the competence of the European Public Prosecutor should be arranged according to a similar principle of complementarity which relates to the competence of the Prosecutor of the International Criminal Court in the Rome Statute (1998).

6 NEW CHALLENGES FOR EUROPEAN JUDGES AND PROSECUTORS

It is clear that the Europeanization of criminal justice puts new demands to law-drafting and the activities of judges and prosecutors. Differentiation and legal pluralism are the realities of the criminal justice operations in the future. The general doctrines of substantive criminal law and criminal procedural law should be rethought in a way that the European elements would not be repellent irritants.

National prosecutors and judges are increasingly criminal justice actors who apply also European law in criminal matters. The European Court of Justice (ECJ) has already on the basis of the Amsterdam Treaty a role in giving preliminary rulings in the field of the Third Pillar. Under the condition of a declaration on part of each member state, the ECJ is competent to give such rulings as

[9] See further *The Implementation of the Corpus Juris in the Member States, Vol. I–IV,* M. Delmas-Marty & J. A. E. Vervaele eds., Antwerpen–Groningen–Oxford, Intersentia, 2000).

regards the validity and the interpretation of, for example, framework decisions and conventions. This role of the preliminary rulings of the ECJ is different when applied to the interpretation of the Third Pillar instruments, because the national courts are not applying those instruments as such but the national legislation which implements that instrument. The first references for preliminary rulings by national courts under the Third pillar concerned questions of judicial cooperation, i.e. the application of the *ne bis in idem* -principle.[10]

So it is obvious that the role of the ECJ and European law will be strengthened in criminal matters all over the EU. It is therefore very understandable that draft Treaty establishing Constitution for Europe also foresees measures to encourage the training of the judiciary and judicial staff [Article III–171 (1c)]. European and international criminal jurists are needed.

[10] See Joined Cases C–187/01 and C–385/01, *Criminal Proceedings against Hüseyin Gözütok and Klaus Brügge*, delivered on 11 February 2003.

25. On the Establishment of the European Prosecutor's Office*

1 GENERAL

The European Public Prosecutor's Office (below EPPO) is one of the central legislative projects in the field of European criminal law and policy. The founding of the EPPO has been under discussion and legislative drafting for the past 20 years or so and it was also one of the proposals in the so-called Corpus Juris -research project.

As a chairman of the Finnish Association for European Criminal Law, I have myself given a statement concerning the Green paper on the EPPO in the public hearing organized by the European Union in Brussels on 16th–17th of September in 2002. I attach those comments here in the *Appendix*, below.

I concur with the understanding of the Government where it states that "the draft regulation resulted from the negotiations can be accepted as the official stand of the Council of the European Union and it can be presented to the EU Parliament for approval" (appendix to the supplementary report 4.11.2016, Ministry of Justice general memorandum 4.11.2016, OM2016-00255, p. 2).

In continuation, I will discuss the founding of the EPPO and concentrate on the questions raised by the Ministry's request for comment. Furthermore, I will also comment on the issues which have been regarded as being of special importance for Finland in the Ministry of Justice's general memorandum 4.11.2016, especially the jurisdiction of the EPPO to investigate the so-called inextricably-linked (ancillary) offences.

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* Expert Statement on 18 November 2016 to the Committee of Legal Affairs of the Finnish Parliament about the Communication U 64/2013 of the Government to the Parliament concerning the EU Regulation on the founding of the European Public Prosecutor's Office: a supplementary report 4.11.2016 to the Government's Communication of 26.9.2013. The statement answered to the questions formulated in the Government's request. The statement included originally two appendices, the other one prepared on behalf of the Finnish Association for European Criminal Law together with Tuomas Pöysti (part of it is summarized in the statement below).

At that time it was a controversy about Finland's official stand on EPPO. Later Finland was among the first participating countries in the founding of EPPO. See generally the PIF-Directive 2017/1371; the Regulation (EU) 2017/1939 and, e.g., Ángeles Pérez Marín, The European Public Prosecutor's Office. *Eucrim* 2020/1, pp. 36-41.

2 WHICH CRITERIA ARE THE MOST FUNDAMENTAL WHEN DETERMINING WHETHER FINLAND SHOULD PARTICIPATE IN THE FOUNDING OF THE EPPO?

Already on the 16th–17th of September 2002, when I delivered a statement (Appendix below) on the Green paper, I expressed the central rationale for founding an institution such as the EPPO with the following overall view: "Corpus Juris study and the EPPO-proposal represent such kind of comprehensive conceptions of European criminal policy which aim at increased coherence and rationality at the EU level."

The recent impact assessment (Non-paper from Commission services on initial estimates of a Cost and Benefits analysis of the European Public Prosecutor's Office) introduces similar arguments which in my mind are the most central reasons for founding the EPPO: "The expected benefits of the EPPO go beyond purely financial considerations, and notably are to be seen in a more coherent and just treatment of fraud involving EU financial interests across the EU. These benefits will include better coordinated investigations and prosecutions and overall a more efficient enforcement system for both EU and the Member States compared to the current situation … The EPPO will improve fraud-related investigations and prosecutions through a common EU approach and thus bring more justice to the EU when it comes to fighting crimes affecting the financial interests of the Union. In doing so, the EPPO will be also about fostering and enhancing public trust in the EU and its institutions." (Non-paper, p. 1 and 10.)

In the legislative financial statement of the European Commission proposal for a council regulation (COM(2013)534 final, section 1.5.1, p. 50), it is with good reason stated that the added value of establishing a European Public Prosecutor's Office will be found in the increased number of prosecutions of crimes affecting the Union's financial interests, in the improvement of the use of resources and information exchange necessary to be able to conduct successful investigations and prosecutions of the relevant offences and in the increase of the preventive effect (deterrence) for potential criminals. The Finnish decision-makers should carefully consider the soundness of these arguments as favouring the founding of the EPPO.

However, the attainment of those envisaged effects cannot be guaranteed. That is why the crux of the matter is to evaluate whether the same effects can be attained by alternative means such as enhancing the functioning of domestic measures in the Member States and of the existing EU-level institutions (Europol, OLAF and Eurojust) as well as the criminal justice cooperation between

Member States (European Arrest Warrant and European Investigative Order). In the drafting process of the EPPO regulation, it has already been necessary to consider the proposal against the principles of proportionality and subsidiarity. These principles are relevant when drafting the provisions of the regulation and applying them in the future.

In the above-mentioned legislative financial statement (sections 1.5.3–4, pp. 51-53), the sufficiency of these alternative measures is weighed and considered. It is noted, *inter alia*, that the suspected offences against the EU funds and their investigation do not usually receive enough attention in the Member States nor is their prosecution effective enough. There is also a lack of sufficiently effective cooperation and there is a notable disparity between Member States in their investigations and prosecutions of these offences.

The theme of the recent issue of *Eucrim* 2016/2 (The European Criminal Law Association's Forum; http://www.mpicc.de) is "The Costs of Non-Europe in the area of freedom, security and justice". The expression refers to the problems, such as massive financial losses resulting from EU-fraud, which are traceable to the fact that the EU does not have a unified or consistent criminal law or procedural law statutes nor its own criminal law system. This conundrum is under investigation in the study ordered by the European Parliament and detailed in the same Eucrim issue. In Eucrim 2016/2, there is also an article written by the European Commissioner for Justice, Consumers and Gender Equality *Véra Jouróva* where she strongly supports the founding of the EPPO in order to safeguard the interests of the European taxpayers; the EU organs Europol, Eurojust and OLAF and domestic criminal law systems are not up to the task because their activity in this field is insufficient and too divided.

In my mind, the most important argument for founding the EPPO is the need to increase the effectiveness of investigations and prosecutions of offences against the financial interests of the EU which often have also a cross-border nature. This in turn would enhance the functioning of the criminal law system of the EU itself and the domestic systems of Member States.

In my opinion, Finland should continue in the process of founding the EPPO even if the unanimity required in the Treaty on the Functioning of the EU (TFEU) Article 86 Paragraph 1 is not attained (cf. Paragraph 2 of the same article). Finland should strive to be profiled as a country that out of commitment to the European cooperation and to other Member States supports the vision of a more unified, consistent and efficient system to fight and prevent EU fraud at the level of a supranational European criminal justice system.

The founding of the EPPO appears to me as a similar kind of regulatory project as the founding of the International Criminal Court (ICC). The criminal

and procedural law statutes enable us to appropriately conduct investigations and prosecutions of international crimes in Finland. As a rule, the ICC operates on the principle of complementarity meaning that only crimes that cannot be handled by the domestic courts are referred to the ICC.

Nevertheless, the intent of Finland was from the beginning to sign and ratify the Rome Statute of the ICC in order to strengthen the development of international criminal law and further the eradication of the global culture of impunity in international crimes.

The founding of the EPPO is a significant first step to develop a supranational criminal justice system within the EU. As in the case of the ICC, in the founding of the EPPO, there is a good chance to strengthen and unify the way in which human and basic rights are applied through the investigations and prosecutions which fall within EPPO's jurisdiction. After we have more (positive) experience of the future functioning of the EPPO, it is possible to expand its jurisdiction to other serious cross-border crimes pursuant to TFEU Article 86 Paragraph 4. The added value provided by the EPPO would thus be further increased. Also, even if the EPPO is founded by at least nine Member States pursuant to TFEU Article 86 Paragraph 2, it is to be expected that the number of participating Member States would grow after time passes and positive experiences accumulate.

3 HOW DO YOU ASSESS THE BENEFITS AND POSSIBLE DISADVANTAGES OF THE EPPO FOR FINLAND? WHAT ABOUT FROM THE POINT OF THE EU AS A WHOLE? WHAT EFFECTS DO YOU THINK IT WOULD HAVE IF FINLAND DID NOT PARTICIPATE IN THE EPPO?

The benefits I mentioned above are first and foremost for the EU as a whole. I understand that Finland's current criminal justice system works well in the fight against EU fraud, as well as other crimes, in a pan-European comparison. In cross-border crimes, too, the current EU instruments on EU judicial cooperation in criminal matters (including the European Arrest Warrant to be enforced in Finland) also work so well that the establishment of the EPPO would not provide significant added value from a purely national perspective.

It can even be estimated that the EPPO would increase the exchange of information and contacts between authorities and the centralization of decision-making in the investigation and prosecution of EU fraud committed in Finland,

which has so far become fewer, due to the division of competences between it and national authorities. These obligations can be expected to prolong the handling of cases. On the other hand, the EPPO proposal before the Council (28.10.2016 / 13459/16) has increased the influence of national authorities compared to the Commission proposal and reduced the supranational features of the proposal (for example, the EPPO College would have a representative from each Member State).

If Finland did not participate in the EPPO, it would not be one of the core states in the development of EU criminal law. Finland would thus as an outsider weaken the achievement of the additional effectiveness of the fight against EU fraud and the harmonization of the operation of national criminal justice systems.

It is also important to note that the assessment cannot draw a sharp line between EU and Finnish interests, as the EPPO's competence would cover offenses against the EU's financial interests and, under certain conditions, directly related offenses (EPPO proposal, Article 17). Thus, it is also a question of protecting the money of Finnish taxpayers in an EU Member State, as, for example, EU Commissioner Véra Jourová, whom I mentioned above, has emphasized.

4 IF THE EPPO IS SET UP, SHOULD IT ALSO BE RESPONSIBLE FOR VAT FRAUD? DO YOU HAVE ANY OTHER VIEWS ON THE SCOPE OF THE EPPO'S COMPETENCE?

I think it would be important for VAT fraud, given its very high economic importance, to fall within the competence of the EPPO from the outset. VAT fraud causes significant tax losses not only for the EU but also for the Member States.

The above-mentioned article by Commissioner Véra Jourová estimates, on the basis of recent research, that the loss of tax revenue due to cross-border VAT fraud alone would be as much as EUR 50 billion a year in the EU. The same article also refers to the preliminary results of a study carried out for the Commission, according to which VAT fraud and tobacco smuggling would lead to a reduction in revenue of around EUR 1 billion for the EU budget for each type of act (*Eucrim* 2016/2, p. 95 with references).

5 WHAT OTHER ASPECTS DO YOU THINK SHOULD BE TAKEN INTO ACCOUNT WHEN DECIDING TO PARTICIPATE IN THE EPPO? COMMENTS ON ISSUES OF PARTICULAR RELEVANCE TO FINLAND, IN PARTICULAR THE COMPETENCE OF THE EPPO ANCILLARY OFFENSES.

As expressed in the Appendix, I assumed that the essential added value of setting up the EPPO was to strengthen fundamental and human rights in cross-border criminal matters within its competence. In this respect, the provisions on procedural safeguards in the proposed EPPO Regulation in Chapter V of the proposal are particularly relevant and attention should also be paid to strengthening those safeguards in the finalization of the proposal.

In addition, attention should be drawn to the need to clarify the division of competences between EPPO and national authorities and which instruments (EU or national law) apply. The opinion also proposes additional measures to set up the EPPO to step up the fight against irregularities against the EU's financial interests, as well as changes to OLAF's (European Anti-Fraud Office) role.

Accordingly, the becoming Directive on the fight against fraud to the EU's by interests by means of criminal law (PIF-Directive) should be effectively and rapidly implemented by the Member States. Only a good implementation guarantees conditions for improved protection. Additional measures are needed in order to intensify the protection of EU's financial interests, among them the following ones: recovery of the illegally obtained funds in a sufficiently speedy procedure; improvement of the institutional capacity of the Member States' investigative and judicial authorities; creation of sufficiently resourced investigation units to support the EPPO mission in the Member States; these units shall have sufficient powers and access to multi-disciplinary collaboration, for example with tax offices and access to special audit capabilities; further approximation of the law on evidence and procedure; improvement of the procedures in the Member States' courts to strengthen the capacity to deliver complex cases of financial crime; and criminal liability of moral persons should be changed so that corporations could really be sentenced (now it is mainly theoretical and in practice many cases collapse because of the difficulties to prove).

As for the OLAF, its role in the administrative and judicial investigations should be clarified. OLAF could/ should become a service which can help the EPPO in investigations which are judicial investigations; OLAF can support Member States in judicial investigations and in joint investigation themes; OLAF should be further aligned with Europol and its intelligence and joint

investigation theme activities; even a merger with Europol could be considered; OLAF has still a significant role to investigate illegal activities in Union institutions and bodies outside the scope of protection of financial interests – so both administrative and criminal investigations are needed; and proper judicial control of OLAF investigative measures should be arranged

The basic memorandum of the Ministry of Justice of 4 November 2016 considers the structure of EPPO, EPPO's relationship with national jurisdictional arrangements, EPPO's competence, especially in ancillary crimes, EPPO's available investigative measures, cross-border investigative measures, relations with Eurojust and the application of the Transparency Regulation to EPPO's activities.

These issues have highlighted the critical remarks made in the previous deliberations of the Parliament's Committee on Legal Affairs and the Administrative Committee and the revised contents of the points of the EPPO proposal thus criticized in the deliberations of the EU Council. In my view, the amendments tabled by the Council, which increase the powers of national authorities vis-à-vis the supranational EPPO, are a sufficient response to the criticisms made by these committees.

From Finland's point of view, the issue of ancillary crimes is perhaps the most important, because it has a constitutional dimension. In assessing this issue on the basis of the draft Regulation of 28 October 2016, as explained in the Ministry of Justice's general memorandum 4.11.2016, pp. 5–6, Firstly, the statement of the Council's Legal Service is significant, because it explains that EPPO's competence reaching to the ancillary offences is in line with the legal basis regulated in TFEU Article 86. Secondly, the assessment of the admissibility of ancillary powers is affected by the fact that, under Article 20 (5) of the proposed Regulation, the power to settle related disputes lies with the national authorities. Thirdly, it is important to include in the preamble of the proposed Regulation a recital 49 clarifying the criterion of the inextricably incidental nature of ancillary offenses. In addition, characterizations of the nature of ancillary offenses as preliminary or subsequent acts inextricably linked to EU fraud are close to typical situations of the apparent concurrence of offenses, which, according to criminal law doctrine, would not necessarily be punished separately. – In conclusion, I consider that the revised wording of the EPPO's competence is acceptable.

6 APPENDIX*

Madame President,
I am here representing Finnish academic expertise (as a University Professor), having been the Finnish national reporter for the Corpus Juris study (II, 2000) and being the Chairman of the Finnish Association for European Criminal Law.

We have heard very critical comments on the Green Paper by the representatives of the Finnish Ministries and other authorities. Much in that criticism is what an academic scholar shares: When a new European agency, European Public Prosecutor (EPP), and even more – a new legal structure for a vertical cooperation – is under planning, it is reasonable to expect that the preparation is based on rational argumentation and on the experience from the existing or just adopted alternative means (i.e., of the horizontal cooperation, Eurojust, European arrest warrant) as well as on the cost-effectiveness analysis of the proposed new agency and its legal structure.

On the other hand, the responsible organs of the EU must also prepare visionary planning papers for the future when the enlargement of the EU has been realized. The development and implementation of such planning papers require several years. During that time we can learn about the experience of those alternative means. The development towards more harmonized European criminal laws and criminal procedures obviously continues at the same time and will make it easier to introduce new models for a vertical cooperation.

Generally, the Corpus Juris study and the EPP-proposal represent such kind of comprehensive conceptions of European criminal policy which aim at increased coherence and rationality at the EU level. It has often been said that the preparation of new legal instruments within EU's third pillar is too fragmentary and lacking those planning qualities. Nevertheless, when striving for a new comprehensive and coherent legal structure (like the EPP-proposal), t should also have enough added value in relation to the already existing legal instruments – so that this value is clearly seen in the Member States.

Firstly, the most important added value could concern the strengthening of individual rights in the international, border-crossing proceedings. Corpus Juris study expressly would set out common rules regarding the rights of the defence, and would put the police investigation powers under the control of a

* Original source: Contribution at a public hearing on the Green Paper on the protection under criminal law of the Communities' financial interests and the establishment of a European Public Prosecutor, Brussels on 16–17 September 2002. Unpublished.

judge of freedoms or a European preliminary Chamber. This aspect should be particularly taken into consideration when the next version of the EPP-proposal will be developed. By strengthening the protection of fundamental rights at the pre-trial stage we could also increase the legitimacy and mutual confidence towards a vertical cooperation between the Member States.

Secondly, in line with the subsidiarity principle governing the EU law, the competence of the EPP should be arranged according to a similar principle of complementarity as relates to the competence of the Prosecutor of the International Criminal Court in the Rome Statute (1998): only in case the Member State is unwilling or unable genuinely to carry out the investigation or prosecution the EPP should have the primacy over the national authorities. When this kind of complementarity principle were adopted the EPP could have even wider jurisdiction over offences violating the financial interests of the EU (cf. Corpus Juris study in this respect).

As to the question of the EPP's independence, Finland represents such a European country where the Prosecutor General and the prosecution service under his supervision already have a very independent status as organs of the criminal justice system. The public prosecutor is a strong actor in the adversarial proceedings, which is to be complied with the principles of oral, immediate and concentrated procedure. On the other hand, the role of the public prosecutor in conducting pre-trial investigations as well as the role of the court or a judge in controlling the investigations and the use of coercive measures are more limited as in many other European countries. (See, in more detail, M. Joutsen, R. Lahti, P. Pölönen: Finland. *Criminal Justice Systems in Europe and North America*. Helsinki 2001.)

It is obvious that the increased harmonization of European procedural laws would facilitate the establishment of the EPP. I personally do not see the establishment of the European Prosecution Service as such a threat to the legal cultures of Member States or of such a homogenous sub-region as the Nordic countries, as I regard the increasingly used legal instruments for harmonizing and even unifying substantive criminal law and the system of penal sanctions. In particular, the system of penal scales and sentencing practices should leave place for cultural differences at least in cases where the offences in question do not violate the financial interests of the EU or are not by nature serious transnational crimes. When speaking in favour of cultural differences I have in mind such defensible values which are characteristic of the legal culture in the Nordic countries: for instance, the primary role of crime prevention, and the requirements in criminal policy of legitimacy, a relatively low level of repression and humaneness. (See, in more detail, R. Lahti: Towards a Ra-

tional and Humane Criminal Policy Trends in Scandinavian Penal Thinking. *Journal of Scandinavian Studies in Criminology and Crime Prevention*, vol. 1, pp. 141–155, 2000.)

26. Liability of Company Directors in a Comparative EU Criminal Justice Context. Finland. National Report*

OBJECTIVES:

The rise of new forms and modes of commission of EU-related offences and the corresponding challenges for law enforcement have triggered a series of developments in the area of the criminal law protection of the financial interests of the EU. In particular, many recent examples of fraudulent or corrupt management of corporations in the areas of customs, taxes, subsidies *et cetera* urge for a debate on whether or not to 'pierce the corporate veil' also with respect to the punitive law enforcement of EU policies.

Article 3 of the 1995 PIF Convention provided for an obligation on the Member States to take all the necessary measures to hold criminally liable the "heads of business or any persons having power to take decisions or exercise control" for a PIF crime committed "by a person under their authority".

The provision, however, expressly specified that such a form of liability had to be established "in accordance with the principles defined by the national law" of the Member State concerned.

The two Reports on the implementation of the Convention released by the European Commission in 2004[1] and 2008[2] highlighted a significant reluctance of the Member States to introduce *ad hoc* provisions, with some notable exceptions.

The level of harmonization on the liability of the heads of business across the EU territory, therefore, appears low and, as the Commission has pointed out in its reports, this may potentially jeopardize effective enforcement in this area.

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* Original source: In: Katalin Ligeti & Angelo Marletta (eds.): *Punitive Liability of Heads of Business in the EU: a Comparative Study*. Wolters Kluwer, CEDAM, Milano 2018, pp. 5–36. This version is the final draft on the topic for the study conducted by Université du Luxembourg and co-founded by the European Commission's European Anti-Fraud Office (OLAF). The form of questions and answers has been preserved. In the publisher's version the title of the study and the manner of expression were changed to those ones of the original source. (Open access: https://hdl.handle.net/10993/38710).

1 COM (2004) 709 final, p. 5.

2 COM (2008) 77 final, p. 3.

On the other hand, the current text of the proposal for a Directive on the protection of the EU's financial interests by means of criminal law[3] seems to have overlooked the issue previously considered under the 1995 Convention.

The aim of this questionnaire, within the broader objectives of the HOB study, is to map and systematize the national frameworks on the responsibility of heads of business, taking into particular consideration the hypothesis of commission by omission and the interplay between the individual liability of the head of business and the liability of the legal person (either administrative or – where applicable – criminal).

National rapporteurs are therefore requested to present their national legal framework under the 6 conceptual clusters of the questionnaire, providing where possible an account of the most relevant case law and the problems that have arisen in practice.

PART 1: CRITERIA FOR IMPUTATION OF CRIMINAL LAW RESPONSIBILITIES OF HEADS OF BUSINESSES AND THEIR THEORETICAL JUSTIFICATIONS

A. Preliminary information

1. Has your country implemented article 3 of the 1995 Convention on the protection of the European Communities' financial interests on the liability of heads of business through a specific provision? In the affirmative case, could you please provide an unofficial translation of the relevant legal provision?

1.1 In case of non-implementation, which were the reasons?

1.2 Were considerations relating to procedural safeguards involved in the national decision whether to implement or not the provision?

When the 1995 Convention on the protection of the European Communities' financial interests was nationally implemented in Finland in 1998, no specific provision on the liability of heads of business was introduced. In the Government Proposal it was stated that the Convention did not require a more extensive liability for the liability of heads of business than what was valid law in Finland: the provisions on complicity in the Chapter 5 of the Criminal (Penal) Code (CC) should be applied also in relation to the heads of business[4].

3 Commission Proposal COM (2012) 363 final; interinstitutional file 2012/0193 (COD).

4 Government Proposal 45/1998, 13. At that time the provisions on complicity were in force in their original contents of the Penal Code of 1889.

The statement of the Government Proposal was deficient, because in the doctrine and case-law applicable to the liability of the directors of corporations were not restricted to the use of complicity provisions but they were developed into principles and rules of *sui generis* (see below). In 1995 two such partial revisions of the Criminal Code were carried out as part of the total reform of the Code, and they both were significant for the doctrine on the liability of heads of business. Firstly, corporate criminal liability was introduced by the enactment of Chapter 9 of the Criminal Code (Act. No. 743/1995; cited in Appendix 1). Secondly, the criminal liability within legal persons – i.e., the principles governing the allocation of individual criminal responsibility, especially the liability of heads of business – was partly regulated in 1995 (Act No. 578/1995), when special provisions on such liability were given for labour and environmental offences (CC 47:7; 48:7).

Considerations relating to procedural safeguards were not involved in the national implementation of the 1995 Convention.

2. Could you provide some relevant examples of cases in which top managers were investigated for offences committed by an employee acting on behalf of the business[5]?

As to the examples of case-law, see below.

3. Could you provide a brief description of the policy debate in your country about the introduction of liability of company directors[6]?

The legislative works for drafting the partial revisions of the Criminal Code in 1995 and for the total reform of the Code mentioned above (Part 1, A.1) illustrate the policy debate.

Economic criminality became a source of concern for the authorities for the first time in the late 1970s. At that time, tax fraud was regarded as the most common economic crime. It was estimated that tax fraud led to 5–10 % reduction in the collection of taxes. In 1980, the Ministry of Justice established a broadly-based project organization to prepare a proposal for a total reform of

[5] We are interested in both court cases and out of court cases. Please, focus only on the most recent cases and, particularly, highlight if there is the need for a supranational intervention. Please, consider both cases where the "rogue employee" was identified and cases where he/she was not clearly identified.

[6] Please provide a short overview on the historical evolution, including prosecutorial policy (if any).

the Criminal Code of 1889 (39/1889). The goal was to give the highest priority to the reassessment of the provisions on economic crime. Two years later, the Ministry of Justice established a separate working party for examining the factual phenomena of economic crime as well as the material legislation and control machinery on economic crime; the work group was also entitled to make proposals for the improvement of the prevention, supervision and investigation of economic crime.

These preparations led to various government measures to tighten up control of economic crime. On the level of legislation, the most important action was the revision of provisions on economic crime in gradual parts of the total reform of the Criminal Code in the 1990s (1990, 1995 and 1999)[7]. For instance, completely new provisions on subsidy offences and business offences were incorporated in Chapters 29 and 30 of the revised Criminal Code in 1990 (769/1990). A major legislative reform dealt with the introduction of corporate criminal liability in 1995 (in Chapter 9 of the Criminal Code; 743/1995) as well as provisions of labour and environmental offences (Chapters 47 and 48 of the Criminal Code; 578/1995). New clarifying provisions were also enacted on the individual criminal responsibility of directors in a corporate body into those Chapters 47 and 48 of the Code; CC 47:7; 48:7).

According to the Finnish Criminal Code, a corporation may be sentenced to a corporate fine for certain enumerated, mostly economic offences. The main reasons for the introduction of this type of corporate liability, as expressed in the legislative drafts, can be summarized in the following way: the social significance of corporate activity; the cumulation of actions and default; the lack of proportionality between offences and punishment; the difficulties in allocating individual criminal responsibility; the transfer of responsibility in hierarchical relationships; the need for directing an effective sanction in an equitable manner; and the idea that it is fair to direct the reproach at a corporate body when the offence had been committed in the operations of the corporation.[8]

It should be noted that the allocation of individual criminal responsibility has in practice been the primary form of corporate complicity (or liability linked to organizational crime) in relation to the criminal liability of the corporation itself. This state of affairs can be explained with the facts that corporate

7 An unofficial English translation of the Criminal (Penal) Code, as it was in force in 2015 (766/2015), is available at the website of the Ministry of Justice: https://www.finlex.fi/fi/laki/kaannokset/1889/en18890039_20150766.pdf.

8 As to a more detailed review, see M Tolvanen, 'Trust, Business Ethics and Crime Prevention – Corporate Criminal Liability in Finland' (2009) *Fudan Law Journal* 99.

criminal liability is still relatively young construction in Finland and it covers fragmentarily offences to which it is applicable. However, it is increasingly applied to economic and financial offences.

B. Preliminary information on corporate liability

4. Does your national legal system provide for corporate criminal liability? In the affirmative case, is corporate criminal liability established for all offences or is it restricted to specific offences? Are PIF offences[9] covered by the provisions on corporate criminal liability?

Yes, corporate criminal liability was introduced in 1995. See above, part 1, A. Corporate criminal liability is restricted to specific offences, mostly economic offences. PIF offences are covered by the provisions on corporate criminal liability, including e.g. subsidy offences except when it is question of subsidies granted for personal consumption (CC 29:6–8, 9.2, 10), tax fraud when related to taxes collected on the behalf of the European communities (CC 29:1–2, 9.1, 10), active corruption of officials or members of Parliament (CC 16:13–14b, 18), and money laundering (CC 32:6–7, 9, 14).

5. Does your national legal system provide for the administrative liability of legal persons as a consequence of an offence? In the affirmative case, is the administrative liability of legal persons established for all offences or is it restricted to specific offences? Are PIF offences covered by the provisions on the administrative liability of legal persons?

Administrative (penal) liability of legal persons is provided to cover specific infringements and, exceptionally, (criminalized) offences. Finnish law does not contain a clear and uniform system or definition of administrative sanctions or administrative penal law. The field of administrative sanctions is quite heterogeneous, and sector-specific rules are laid down in laws governing the use of public authority.[10] There are, however, several types of such sanctions already

9 For the purposes of our questionnaire, we are considering the current PIF framework established under the 1995 Convention and the First and Second Protocols, i.e. fraud affecting the EU financial interests both in respect of the expenditure and of the revenue of the EU, active and passive corruption of officials and money laundering.

10 See R Lahti, 'Towards a principled European criminal policy: some lessons from the Nordic countries' in J B Banach-Gutierrez and C Harding, *EU Criminal Law and Policy* (Routledge 2016), 56-69. See also L Halila and V Lankinen, 'Administrativa sanktionsavgifter i nordisk kontext' (2014) *Tidskrift utgiven av Juridiska Föreningen i Finland* 305, 325.

in use, but a comprehensive systematic review and rethinking of them is still under investigation, lastly (2018) in a working group of the Ministry of Justice.

A typical feature of (punitive) administrative sanctions is that most of them can be imposed on legal persons as well (corporate bodies etc.). However, the legislation is not coherent in this case either. Provisions do not always indicate explicitly whether it is possible to impose sanctions on both legal and natural persons.

Normally, a criminal sanction and a punitive administrative sanction (penalty) are not established for a parallel use. However, the fraudulent tax evasion has traditionally been an exception. Accordingly, minor violations of fraudulent tax evasion have been sanctioned (also when it is question of a criminal offence) by the tax authority: a penalty fee (called 'tax or customs increase') is imposed to the taxpayer (either a legal or natural person) by this administrative public authority. As mentioned above (Part 1, B.4), the provisions on tax fraud (CC 29:1–3) cover also tax frauds which are related to taxes collected on the behalf of the European communities

In 2013 a separate legal Act (781/2013) a prohibition of double jeopardy was introduced for tax fraud cases (*i.e.*, a prohibition against the cumulative use of criminal punishment and punitive administrative fee). So, as a rule, charges may not be brought for nor court judgment passed if a punitive tax or customs increase had already been imposed on the same person in the same case (CC 29:11).

When the market abuse regulation (EU No 596/2014) and the market abuse directive (2014/57/EU) were nationally implemented in Finland in 2016, the scope of punitive administrative sanctions for security markets offences (which are regulated in Chapter 51 of Criminal Code) was dramatically enlarged. Financial supervisory authority (FSA) may exercise supervisory powers in respect of financial markets. FSA imposes an administrative fine for a failure to comply with or violation of provisions in Section 38 of the Act on the Financial Supervisory Authority (878/2008).

Already before the 2016 reform of market abuse legislation administrative penalties could in quantity be several millions of euros and be imposed for a restraint on competition (see Competition Act of 948/2011 with the amendments up to the Act of 1078/2016). It should be noted that this competition infringement is not criminalized in Finland, and so the administrative penalty can be imposed only.

6. Could you describe the policy debate about the introduction of corporate liability in your national system?

See above (part 1, A.3). It should be noted that the introduction of corporate criminal liability was a part of total reform of Finnish Criminal Code and one of the major objectives of that reform was to reassess the punishability and penal regulation of economic and corporate crime.

PART 2: RELATIONSHIP WITH GENERAL PRINCIPLES OF CRIMINAL LAW

6. Does your national criminal law provide for a unified or differentiated system of participation in a criminal offence?
7 Does your system formally distinguish and define different forms of accessory liability such as instigating, aiding and abetting? In the affirmative case, could you please provide a translation of the relevant legal provisions or a brief account of the most relevant case law? How does this apply in the field of punitive administrative law?

Chapter 5 of the Finnish Criminal Code (Act No. 515/2003) includes provisions on attempt and complicity (see below, cited in Appendix 2). The complicity provisions follow substantially the model of the German Criminal Code. In the recodification of the Finnish criminal law in 1990–2003, the complicity provisions were mainly retained such as they had been in force since the enactment of the Criminal Code in 1889.

The Finnish provisions (CC 5:3–7) differentiate between principals and co-perpetrators, on one hand, and inciters (instigators) and accomplices (abettors), on the other. This differentiated model of participation is in line with the emphasis on the expressive or symbolic function of criminal law. This kind of punishment theory is strongly supported in the Finnish and Scandinavian criminal policy. The authoritative disapproval expressed by criminal law should be differentiated according to the various roles of participants.

The indirect principal (commission of an offence through an agent) is also one type of perpetrator, and thus a new clarifying provision (CC 5:4) was in 2003 added into the Code concerning the indirect principal. The penal scale for an abettor is mitigated. The system of 'borrowed criminality' (Akzessoritätsprinzip) is applied in the participation doctrine; i.e., in both types of participation, instigation and abetting, the liability is of accessorial or derivative nature.

Sections 3–8 in Chapter 5 of Criminal Code apply to two or more individuals acting in concert in the commission of the offence. The provisions in CC 5:3–6 define the different forms of participation:

– CC 5:3 on co-perpetration: If two or more persons have committed an intentional offence together, each is punishable as an offender. The term 'committed' has been interpreted extensively in the juridical practice. In the legal literature, it has been recommended to apply the German doctrine of 'control over crime' (Tatherrschaft) in drawing the line between co-perpetration and accomplice[11].

– CC 5:4 on commission of an offence through an agent, i.e., indirect principal (mittelbare Täterschaft): A person is sentenced as an indirect principal if he has committed an intentional offence by using, as an agent, another person who cannot be punished for the said offence due to the lack of criminal responsibility or intention or due to another reason connected with the conditions for criminal liability.

It should be noted that if the immediate actor fulfils the conditions of criminal responsibility and is thus punishable for the offence, the concept of indirect principal and CC 5:4 are not applicable, in contrast to many other legal orders (such as German Criminal Code). This fact does not exclude that such a commission of an offence through an agent could trigger a perpetrator's responsibility (by interpreting 'commission' extensively).

– CC 5:5 on instigation: A person who intentionally persuades another person to commit an intentional offence or to make a punishable attempt at such an act is punishable for incitement to the offence as if he was the offender.

– CC 5:6 on aiding and abetting (accomplice): A person who, before or during the commission of an offence, intentionally furthers the commission by another of an intentional act or of its punishable attempt, through advice, action or otherwise, shall be sentenced for abetting on the basis of the same legal provision as the offender. The sentence is determined in accordance with a mitigated (-> ¾) penal scale.

According to the legislative drafts and precedents of the Supreme Court (KKO 2009:87 and KKO 2015:10 concerning aiding and abetting fraud or dishonesty by a debtor, respectively), an active act or omission by the accomplice does not need to be a necessary precondition for the consequence; furthering the probability of the commission of the offence is enough. Neither is a special intent or specific direction required; the applicable lowest level of intention is defined in the general provision on intention (CC 3:6) by using a probability assessment[12].

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[11] See D Frände, *Yleinen rikosoikeus* [General criminal law] (Edita, Helsinki 2012) 245–246.

[12] As for the intention in Finnish criminal law, see Jussi Matikkala, 'Nordic Intent' in Kimmo Nuotio (ed), *Festschrift in Honour of Raimo Lahti* (Forum Iuris, Helsinki 2007) 221–234.

– Incitement to punishable aiding and abetting is punishable as aiding and abetting.

There are not legal provisions or legal practice as to whether the complicity provision should be applied by analogy also in the field of punitive administrative law. Because such provisions are missing I presume that a unified system of participation would be applicable.

8. Does your national criminal law provide for omission liability? Could you please provide a brief, general description of the requirements for such a form of liability and, in particular:

8.1 is there any general provision about the duty of care? How does your national system reconcile the concept of "duty of care" and the principle of lex certa?

8.2 is a causal link required between the omission and the commission of the offence? And in what terms (conditio sine qua non, increase of risk of commission)?

8.3 what is the mens rea required for omission liability?

8.4 how does this apply in the field of punitive administrative law?

8.1. After the revision of the general part of the Criminal Code in 2003, a special provision on omission liability was included in Chapter 3 of the Code (CC 3:3):

> *Chapter 3, Section 3 – The punishability of omission* (515/2003)
> (1) An omission is punishable if this is specifically provided in the statutory definition of an offence.
> (2) An omission is punishable also if the offender has neglected to prevent the causing of a consequence that accords with the statutory definition, even though he or she had had a special legal duty to prevent the causing of the consequence.
> Such a duty may be based on:
> (a) an office, function or position,
> (b) the relationship between the offender and the victim,
> (c) the assumption of an assignment or a contract,
> (d) the action of the offender in creating danger, or
> (e) another reason comparable to these.

Section 1 defines the punishability of 'genuine' omission and Section 2 derivate omission (commission by omission; *unechter Unterlassungsdelikt*). The last one is here significant. The definition of the prerequisites for derivate omission liability is vague and therefore problematic from the point of view of the

principle of *lex certa*. In the *travaux préparatoires* the introduction of new legal definitions into the general part of the Criminal Code – not only regarding omission but other prerequisites of liability – was regarded as an improvement in relation to the earlier state of affairs when no legal definition existed. It is also noteworthy that it must be question about an omission of a *special legal* duty to prevent the causing of the consequence (concerning so-called 'result offence').

8.2. The types of special legal duties have been defined in the provision (CC 3:3.2), although very generally, e.g. by saying that such a duty may be based on a function or position (point a) or on another reason comparable to the specifically mentioned in Section (point e).

When assessing the causal link required between the omission and the commission of offence (consequence) the formula of *condition sine qua non* is commonly used: the omission O of the legal duty in question is considered to by causal for result R, if R would not have occurred but for O. The probability test of this assessment should qualify very near certainty.

8.3. The *mens rea* (imputability) requirement for omission liability is determined by the type of offence in question, so depending on the statutory definition of the offence in the special part of the criminal law. Chapter 3, Section 5, Subsection 2, of the Criminal Code prescribes that "unless otherwise provided, an act referred to in the Code is punishable only as an intentional act". Intent and negligence are the basic forms of imputability (CC 3:5.1), although negligence is divided into 'normal' negligence and gross negligence (CC 3:7).

8.4. In the field of punitive administrative law the same principles which are valid in criminal law and criminal procedural law should be to great extent followed. The Constitutional Law Committee of Parliament has a key role in the legislative process to supervise that relevant human rights' obligations and constitutional rights are taken into account in final drafting. In its practice it is emphasized, e.g., that the regulation on administrative sanction should be proportionate. Issues which are related to proportionality are for example sanctioning of very minor misconducts and the scaling of sanctions based on the severity of the conduct.[13] Although the principle of legality and legal certainty (*lex certa*) in criminal cases does not, as such, apply to the administrative sanctions, principle of *nulla poena sine lege* cannot be ignored generally in such regulation either. This provides that a sanction provisions must define the punishable conduct and the sanction with sufficient definiteness. It must emerge from the provisions that breaking of the statutes may be sanctioned. In

[13] E.g. *Constitutional Law Committee* 58/2010.

addition, acts and negligence behaviors sanctioned must be described by law in order to identify them.[14] However, the requirement of *mens rea* (personal guilt, blameworthiness) is in punitive administrative law weaker and not followed without exceptions.

9. Does your system provide any general provisions about the duty to report an offence and on the criminal consequences for the failure to do so? In the affirmative case, could you please indicate the subjective and objective scope of the duty and the requirements to establish criminal liability in case of a failure to report an offence?

9.1 How do reporting obligations relate with the privilege against self-incrimination?

There is no general provision about the duty to report an offence and on the criminal consequences for the failure to do so. When the Rome Statute of the International Criminal Court was nationally implemented in Finland in 2008 (212/1998), a penal provision on failure to report the international offence (genocide, crimes against humanity and war crimes) of a subordinate was included in the Chapter 11 of Criminal Code (CC 11:13). There is also a penal provision on failure to report serious offence (CC 15:10; 563/1998), but its prerequisite is that there is still time to prevent the offence (i.e., the result offence is not yet completed).

10. Does your national system allow for strict liability offences? Is there any constitutional case law on the minimum requirement of mens rea for criminal liability? How does this relate to the presumption of innocence? How does this apply in the field of punitive administrative law?

Strict liability for criminal offences is not allowed in Finnish law. Intent and negligence are prerequisites for criminal liability (CC 3:5.1). The requirement of personal guilt or blameworthiness in criminal law is in recent legal literature drawn from the constitutional right of the inviolability of human dignity[15].

The requirement of *mens rea* (personal guilt, blameworthiness) is in punitive administrative law weaker and not followed without exceptions (see above Part 2, 8.4). A recent legislative example concerns penalty fee in taxation (see above Part 1, B.5). Constitutional Law Committee of Parliament accepted in its

[14] E.g. *Constitutional Law Committee* 60/2010 and *Constitutional Law Committee* 74/2002.

[15] E.g. D Frände, *Yleinen rikosoikeus* (n 11), 165.

statement that such a tax increase can be imposed irrespective of the negligence of the taxpayer under the condition that the threshold for waiving the penalty fee is not too high and the discretion of the tax authority is bound by law[16].

[11.] Does your national system allow for special rules on liability with regard to specific fields, such as taxation?

I repeat my answer above (Part 1, 8.5.):

Normally, a criminal sanction and an administrative sanction are not established for a parallel use. However, the fraudulent tax evasion has traditionally been an exception. Accordingly, minor violations of fraudulent tax evasion have been sanctioned (also when it is question of a criminal offence) by the tax authority: a penalty fee (called 'tax or customs increase') is imposed to the taxpayer (either a legal or natural person) by this administrative public authority. As mentioned above (Part 1, B.4), the provisions on tax fraud (CC 29:1-3) cover also tax frauds which are related to taxes collected on the behalf of the European communities

In 2013 a separate legal act (781/2013) a prohibition of double jeopardy was introduced for tax fraud cases (*i.e.*, a prohibition against the cumulative use of criminal punishment and administrative penal fee). So, as a rule, charges may not be brought for nor court judgment passed if a punitive tax or customs increase had already been imposed on the same person in the same case (CC 29:11).

PART 3: CONCEPT AND SCOPE OF THE CRIMINAL LAW RESPONSIBILITIES OF HEADS OF BUSINESS

11. Does your national criminal law system expressly establish the criminal liability of heads of business through a specific provision?

As mentioned above (Part 1, A.3), new clarifying provisions were also enacted on the individual criminal responsibility of directors in a corporate body into the Chapters 47 and 48 on labour and environmental offences of the Criminal Code in 1995 in connection with the partial reform of whole Code CC 47:7; 48:7). Their contents are following:

[16] *Constitutional Law Committee* 39/2017.

Chapter 47, Section 7 - Allocation of liability (578/1995)
Where this Chapter provides for punishment of the conduct of an employer or representative thereof, the person into whose sphere of responsibility the act or omission belongs shall be sentenced. In the allocation of liability due consideration shall be given to the position of said person, the nature and extent of his or her duties and competence and also otherwise his or her participation in the origin and continuation of the situation that is contrary to law.

Chapter 48, Section 7 – Allocation of liability (578/1995)
Where this Chapter provides for punishment of conduct, the person into whose sphere of responsibility the act or omission belongs shall be sentenced. In the allocation of liability due consideration shall be given to the position of said person, the nature and extent of his or her duties and competence and also otherwise his or her participation in the origin and continuation of the situation that is contrary to law.

A more general provision on the allocation of individual liability was included into the reformed chapter on attempt and complicity in 2003 (CC 5:8: 'Acting on behalf of a legal person'; cited in Appendix 2).

The guidance given in those provisions is rather vague: 'in the allocation of liability due consideration shall be given to the position of that person, the nature and extent of his duties and competence and also otherwise his participation in the arising and continuation of the situation that is contrary to law'. The provision in the CC 5:8 is, however, clear when prescribing that the person who exercises actual decision-making power in the legal person (faktischer Geschäftsführer) is to be considered equal to the member of a statutory body or management of a corporation.

It is noteworthy that these special provisions on the allocation of liability should be interpreted in coherency with the general provision on derivate omission (CC 3:3.2; see above Part 2, 8.1).

12. In the affirmative case, what is the subjective scope of such liability? Does it cover corporate owners, members of the board of directors and executive directors?

The provision of Chapter 5, Section 8 of Criminal Code defines the subjective scope in the following way: "A member of a statutory body or management of a corporation, foundation or other legal person, a person who exercises actual decision-making power in the legal person or a person who otherwise acts on its behalf in an employment relationship in the private or public sector or on

the basis of a commission [may be sentenced for an offence committed in the operations of a legal person …]

This provision as well as the provisions of CC 47:7 and CC 48:7 leave the subjective scope open. According to the doctrine and case-law it is important to take into consideration – except the general provision on derivate omission (CC 3:3.2) – the Acts and other regulations concerning the corporation, foundation or other legal person in question: how the duties of various statutory bodies or management are prescribed. For example as to the limited liability companies, following provisions in the Act of 624/2006 define the duties of the board of directors and managing director are important:

> The Board of Directors shall see to the administration of the company and the appropriate organisation of its operations (general competence). The Board of Directors shall be responsible for the appropriate arrangement of the control of the company accounts and finances. (Chapter 6, Section 2, Subsection 1.)

The Managing Director shall see to the executive management of the company in accordance with the instructions and orders given by the Board of Directors (general competence). The Managing Director shall see to it that the accounts of the company are in compliance with the law and that its financial affairs have been arranged in a reliable manner. The Managing Director shall supply the Board of Directors and the Members of the Board of Directors with the information necessary for the performance of the duties of the Board of Directors. (Chapter 6. Section 17, Subsection 1.)

As to the liability of corporate owners, there is not case-law available on that liability. With reference to the provision of CC 5:8 it may be said that the liability is possible when he or she exercises actual decision-making power in the legal person.

When taking into account the general provision on derivate omission (CC 3:3.2), in which an omission of a special legal duty based on, i.a., an office, function and position is required, it can be concluded that the normal employee must have certain independence. For instance, an account clerk has not been regarded as being in such a position and being able to act on behalf of the legal person, but he or she may be an accessory to accounting offence.

13. Is such a form of liability based on specific duties to control and supervise the activities of the subordinates[17]?

[17] As, f.i. labour safety, environmental regulations, social security.

At least it is typical that such a liability of heads of business is based on specific duties to control and supervise activities of the subordinates (e.g. as to labour safety and environmental regulations). After the introduction of a provision on subordinate omission (CC 3:3.2; see above Part 2, 8.1) there is a strengthened legal basis for such duties.

14. Does your national criminal law require a causal link between the violation of the duties by the supervisor and the commission of the crime by the subordinate? Which type of causal relation is required?

In principle, there should be such a causal relation as described in connection with the provision of CC 3:3.2 (see above Part 2, 8.2), at least when it is question about a result offence.

15. Which form of mens rea is required to establish the responsibility of the supervisor? And in particular:

15.1 Must the supervisor actually be aware of the commission of the offence? F.i. by consciously disregarding information indicating the commission of an offence?

15.2 Or would it suffice that he or she should have known that an offence had been committed?

Also the prerequisite of *mens rea* should be assessed as described in connection with the provision of CC 3:3.2 (see above Part 2, 8.3). This means often difficulties in proving intent, when the statutory definition of the offence in question requires intent as the form of imputability. The lowest level of intent is to be drawn by using a probability theory[18]. There are court decisions in which the formula 'must have known …' is used, but it is often explained to indicate a certain way to draw conclusions from the evidence presented by the prosecutor without referring to widening of the scope of intent.

16. Under which limitations and conditions are corporate officials allowed to delegate control or supervision functions to subordinates?

[18] See Chapter 3, Section 6 (515/2003) of Criminal Code: "A perpetrator has intentionally caused the consequence described in the statutory definition if the causing of the consequence was the perpetrator's purpose or he or she had considered the consequence as a certain or quite probable result of his or her actions."

The practice in allocation of individual criminal responsible has been very much in line with the guiding principles of Corpus Juris 2000 as formulated in the follow-up study[19]. See Article 12 of the study[20].

For instance, in a recent precedent of the Supreme Court (KKO 2016:58), members of the board of directors of a potato flakes' factory (limited company) were convicted of impairment of environment through gross negligence (CC 48:1), when the effluent from the factory's potato sludge had contaminated environment. These directors had omitted their supervisory duties as members of the company's board and were therefore liable for their omission to prevent the contamination (in line with the provisions of CC 3:3.2 and CC 48:7). A factual division of labour between the managing director (having the main responsibility for factory's operational activities) and board members did not exclude the supervisory duty neither the board members' liability for the consequence.

In another precedent of the Supreme Court (*KKO 2007:62*) the chairman of the board of directors of a housing company was sentenced for negligent homicide when he had omitted the duty to take care of that snow and ice was deleted properly from the roof of the house of the company with the result that the snow and ice fell down on a pedestrian and caused his death. The Supreme Court argued that because the responsibility to delete the snow and ice from the roof was not *clearly delegated* to a service company, the housing company was responsible and the liability was allocated to the chairman of its board of directors.

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[19] See Mireille Delmas-Marty and John AE Vervaele (eds), *The Implementation of the Corpus Juris in the Member States (*Vol. I, Intersentia, Antwerpen 2000) 189–210 (193).

[20] *Article 12. – Criminal liability of the head of business or persons with powers of decision and control within the business: public officers*

1. If one of the offences under Articles 1 to 8 is committed for the benefit of a business by someone acting under the authority of another person who is the head of the business, or who controls it or exercises the power to make decisions within it, that other person is also criminally liable if he knowingly allowed the offence to be committed.

2. The same applies to any public officer who knowingly allows an offence under Articles 1 to 8 to be committed by a person under him.

3. If one of the offences under Articles 1 to 8 is committed by someone acting under the authority of another person who is the head of a business, or who controls it or exercises the power to make decisions within it, that other person is also criminally liable if he failed to exercise necessary supervision, and his failure facilitated the commission of the offence.

4. In determining whether a person is liable under (1) and (3) above, the fact that he delegated his powers shall only be a defence where the delegation was partial, precise, specific, and necessary for the running of the business, and the delegates were really in a position to fulfil the functions allotted to them. Notwithstanding such a delegation, a person may incur liability under this article on the basis that he took insufficient care in the selection, supervision or control of his staff, or in the general organisation of the business, or in any other matter with which the head of business i properly concerned.

17. How should the control and supervision duties of the head of business be discharged once an offence by a subordinate is discovered? Would the adoption of disciplinary measures and removal of the subordinate suffice to exclude the responsibility of the head of business? Is reporting to the judicial authority necessary?

When the offence in question has been committed (the result offence is completed), there is no ground for exclusion of his or her responsibility in that actual case. It is another thing that participation in the *continuation* of the situation that is contrary to law is one of the factors to be taken into account when assessing into whose sphere of responsibility the act or omission belongs (see the wordings of CC 47:7 and 48:7).

Similarly, when corporate criminal liability is concerned, the continuation of the situation that is contrary to law can be taken into consideration when assessing if the care and diligence necessary for the prevention of the offence have not been observed in the operations of the corporation (so-called 'corporation guilt'; CC 9:2.1). See below.

18. How is the liability of heads of business established with regard to collective decisions?

In principle, the liability of heads of business is assessed individually. An example of collective decision-making bodies is the board of directors of companies or other legal persons. I refer to the precedent of the Supreme Court (KKO 2016:58), where members of the board of directors of a potato flakes' factory (limited company) were convicted of impairment of environment through gross negligence (see above Part 3, 16). A factual division of labour between the managing director (having the main responsibility for factory's operational activities) and board members did not exclude the supervisory duty neither the board members' liability for the consequence.

19. How does the individual liability of heads of business relate to corporate criminal liability (if applicable)? And in particular:

19.1 Who are the individuals whose activity may implicate the liability of the corporation?

19.2 May the two forms of liability concur? (see also infra)

19. 3 How may the liability of the corporation affect the liability of the individual?

As mentioned above (Part 1, B.4), a corporation may be sentenced to a corporate fine for certain enumerated, mostly economic offences (Chapter 9 of the Criminal Code, as amended 743/1995; cited in *Appendix 1*). The corporate fine – which is the only criminal sanction available – is at least 850 euros and at most 850,000 euros.

The Finnish doctrine behind corporate criminal liability is not clear.[21] The acts or omissions of the individual offender are under certain conditions attributed to the legal person, not as acts of the legal person but as acts of the individual for the company (CC 9:3). A crucial precondition is that a person, who is part of its statutory organ or other management or who exercises actual decision-making authority therein, has been an accomplice in an offence or allowed the commission of the offence, or *alternatively* that the care and diligence necessary for the prevention of the offence has not been observed in the operations of the corporation (CC 9:2). The description of those whose position me implicate the liability is in the first-mentioned precondition similar to the beginning of the definition in Chapter 5, Section 8 (Acting on behalf of a legal person), but as a whole the wording in CC 9:2 is more restricted . According to a precedent of the Supreme Court (*KKO 2008:3*) in a case of negligent impairment of the environment (CC 48:4), only such representatives of the limited company who had so much independent and considerable decision-making power that it would qualify the compliance of identification principle can be regarded as implication the liability for the corporation.

The last-mentioned precondition in CC 9:2 refers to the blameworthy organizational conduct (fault) of the corporation. In case of the last-mentioned alternative it is possible to impose a corporate fine based on anonymous culpa. For instance, in the Supreme Court case KKO 2008:3 this last-mentioned precondition of organizational fault was proven but not the precondition ('identification') which is firstly mentioned in CC 9:2.

Corporate criminal liability does not replace individual criminal responsibility but they both are *parallel* forms of liability. Normally, both the individual manager and the company are prosecuted when the formal conditions are met.[22] An exception is a situation where the company is so small that the corporate fine would in fact direct to its managing director, who was in in the same proceedings sentenced to imprisonment for intentional impairment of the

[21] See also M Tolvanen, in *Fudan Law Journal* (n. 8), Chapter 2.

[22] See generally R Lahti, 'Über die strafrechtliche Verantwortung der juristischen Person und die Organ- und Vertreterhaftung in Finnland' in *Festschrift für Keiichi Yamanaka* (Duncker & Humblot, Berlin 2017) 131–152.

environment (CC 48:1), it was decided to dismiss the corporate fine (precedent of the Supreme Court, *KKO 2002:39*).

[20.] What is the role of compliance programmes on the liability of heads of business?

[21.] Does your national system provide for an obligation to adopt a compliance programme and/or to appoint a compliance officer?

[21.2] In the affirmative case, what are the consequences of failing to adopt a compliance programme?

There is no Finnish case-law or legal literature on these issues so far.To my mind it is obvious that the adoption of compliance programmes and appointments of compliance officers may have significance in assessing a) the acceptability of the behavior of heads of business, in particular whether there was a breach of duty of diligence (*actus reus* of negligence*),* and b) whether organizational fault existed as a prerequisite for corporate criminal liability (see above, Part 3, 19).

PART 4: DEFENCES

20. May the actual effectiveness of supervision and control powers be raised in order to exclude the liability of heads of business, and if so to what extent? Can, f.i., an executive director claim as a defence that he was actually lacking effective powers of control and supervision?

This kind of defence is possible but primarily in relation to lower-level managerial employees. However, in a quite recent precedent of Supreme Court (*KKO 2013:56*) concerning work safety offence (CC 47:1) it was decided that the technical director and production manager of a limited company were not responsible for the elimination of the deficiencies of a squeezer, because they did not have enough factual influence on the resources for repairing the squeezer. The shifter was regarded as responsible for the supervision of the machines and their use and was sentenced also for negligent bodily injury (CC 21:10) when an employee was injured in using that deficient squeezer. Managing director or members of the board of directors were not prosecuted.

21. May the delegation of control and supervision powers relieve the head of business of his/her duties, and if so to what extent? Is a formal delegation sufficient to discharge the duty and to shift the responsibility onto the subordinate?
22. Is the effective implementation of the compliance program/ or the appointment of the compliance officer reviewable in order to establish or exclude the liability of the head of business?
23. To what extent may the liability of an external auditor limit or exclude the responsibility of the head of business, f.i., with regard to bookkeeping offences?

As to the delegation of control and supervision powers, see my answer and references to the precedents of Supreme Court *KKO 2016:58* and *KKO 2007:62* (above; Part 3, 16). Decision KKO 2016:58 reminds that A factual division of labour between the managing director (having the main responsibility for factory's operational activities) and board members did not exclude the supervisory duty neither the board members' liability for the consequence.

As to the significance of the implementation of compliance programmes, see my answer above (Part 3, 21).

The subjects of liability have been defined in the penal provisions on accounting offences (CC 30:9, 9a and 10; 61/2003). There is also a penal provision on auditing offence (CC 30:10a; 474/2007). The basic statutory definition of accounting offence is following:

> *Chapter 30, Section 9 - Accounting offence* (61/2003)
> If a person with a legal duty to keep accounts, his or her representative, a person exercising actual decision-making authority in a corporation with a legal duty to keep books, or the person entrusted with the keeping of accounts,
> (1) in violation of statutory accounting requirements neglects the recording of business transactions or the balancing of the accounts,
> (2) enters false or misleading data into the accounts, or
> (3) destroys, conceals or damages account documentation
> and in this way impedes the obtaining of a true and sufficient picture of the financial result of the business of the said person or of his or her financial standing, he or she shall be sentenced for an accounting offence to a fine or to imprisonment for at most two years.

To liability of an external auditor should, to my mind, assess in an analogous way as the delegation of liability (see above, Part 3, 16 and Part 4, 21).

PART 5: SANCTIONS

24. What type of criminal or punitive administrative sanctions are provided in your system in regard to the responsibility of the head of business?

Some general remarks on the sanction systems, firstly about criminal sanctions, which are applicable to all kinds of sentenced persons, not only to the heads of business:[23]

The mechanism through which the general preventive effect of the punishment is assessed to be reached is not deterrence in the first place but the socio-ethical disapproval which affects the sense of morals and justice – general prevention instead of general deterrence, without calling for a severe penal system. The legitimacy of the whole criminal justice system is an important aim and, therefore, such principles of justice as equality and proportionality are central. The emphasis on the non-utilitarian goals of the criminal justice system – fairness and humaneness – must be connected with the decrease in the repressive features (punitiveness) of the system, for example through the introduction of alternatives to imprisonment. The significance of individual prevention or incapacitation is regarded as very limited.

The first changes in the system of criminal sanctions prepared since the 1970s pertained to the alternatives to custodial sentences. Accordingly, legislation enacted in 1996 incorporated community service as a regular part of the system of sanctions. Legislation enacted in 2005 incorporated conciliation – including both criminal and civil cases – as a regular part of social welfare and restorative justice system. Electronic monitoring was introduced as a new type of criminal sanction in 2011; it shall be imposed under certain material prerequisites as an alternative to a custodial sentence of imprisonment for at most six months.

The general punishments in force are the following: fine, conditional imprisonment, community service, electronic monitoring and unconditional imprisonment (Chapter 6 of Criminal Code; 515/2003 with the amendments up to 564/2015).

A special criminal sanction for those who have in their business activity as an entrepreneur or a manager of an enterprise committed economic

[23] R Lahti, 'Towards a more efficient, fair and humane criminal justice system: Developments of criminal policy and criminal sanctions during the last 50 years in Finland' (2017) *Law, Criminology & Criminal Justice. Cogent Social Sciences*, 3 (http://dx.doi.org/10.1080/23311886.2017.1303910).

crime or otherwise crucially omitted their legal duties was introduced in 1985 (1059/1985), namely prohibiting of engaging in business. Although it is not a necessary precondition that the suspected person has fulfilled all definitional elements of an economic crime, this sanction can be characterized as a criminal sanction, because the investigation and prosecution follows the rules of a criminal process.

As to the punitive administrative sanctions, they have been increasingly introduced, especially in the attempt of eliminating criminal penalties for minor and/or negligent offenses (decriminalizations). It has also been presented that to some extent the flexibility of administrative decision making also explains their introduction. In addition, administrative sanctions are used in the EU law, particularly in order to safeguard the financial interests of the Union, and this development is also reflected in national legislation.

Administrative sanctions are closely related to the specific legislative objectives of a particular sector of administration and its regulatory objectives enforced by specialized administrative authorities. The legislative differences in sanctioning are largely due to the sectoral nature of administrative sanctions. Administrative sanctions are closely linked to enforcement and supervision procedures and methods of a specific public authority. Aforementioned sectoral nature of the administrative sanctions and the priority of specific regulation (*lex specialis*) emphasizes the fact that administrative sanctions are part of the sectoral sanction scheme.[24]

There are no punitive administrative sanctions which would have been established especially for the heads of business. See also my answer above, Part 1, B.5.

25. Which are the sentencing criteria/guidelines followed in criminal and administrative punitive law in order to determine the punishment for the individual head of business? Are there any specific sentencing criteria which are accorded particular weight in the national practice?

There are general sentencing provisions in Chapter 6 (515/2003) of Criminal Code including grounds increasing and reducing the punishment, grounds mitigating the punishment and the penal latitude and grounds for the choice of the type punishment. The general principle governing the assessment of

[24] *Rangaistusluonteisia hallinnollisia seuraamuksia koskevan sääntelyn kehittäminen* [Developing the regulation of punitive administrative sanctions] (Oikeusministeriön työryhmän muistioluonnos 8.11.2017), 12–13 [Draft Memorandum of the Ministry of Justice working group].

punishment to an individual offender reads as follows: the sentence shall be determined so that it is in just proportion to the harmfulness and dangerousness of the offence, the motives for the act and the other culpability of the offender manifest in the offence (CC 6:4). The basis for calculating the corporate fine is formulated in the following way: the amount of the corporate fine shall be determined in accordance with the nature and extent of the omission or the participation of the management and the financial standing of the corporation (CC 9:6.1).

There are no specific sentencing criteria in order to determine the punishment for the individual head of business. There are neither general criteria/guidelines followed in administrative punitive law because of the sectoral nature of administrative sanctions.

26. Could you compare the actual level of criminal sanctions or punitive administrative sanctions applied?

Punitive administrative sanctions (typically punitive fees) have been introduced in various sectors of business and financial activity, and the implementation of EU's legislative instruments has increased the use of administrative criminal law in combatting economic and financial offences. In practice, the most important administrative fee with a penal nature is the punitive tax increase which is set concurrently with the assessment of taxes in cases of tax deceit. Another early example of the adoption of a noticeable punitive fee concerns competition law: since 1992, subsequently a new Act on Competition Restrictions was enacted, the competition restriction offence has been decriminalized and replaced by the provisions on competition restriction fee. A similar type of punitive administrative fee was adopted by the legislative Acts in 2016 for the protection against market abuse as prescribed by the Regulation (EU) 596/2014[25]

The actual level of monetary administrative sanctions which have been introduced when implementing EU's legislative instruments is much higher than the actual level of monetary criminal sanctions. For example, the maximum of corporate fine is only 850,000 euros.

27. Are other types of punitive measures, such as administrative bans on negotiations in tender procedures or suspension of a professional licence, available

[25] See Securities Markets Act /258/2013), as amended by the Act of 519/2016. See also the amendment of Chapter 51 (Security markets offences) of the Penal Code by the Act of 521/2016.

in your national legal system? Are those measures available for all offences or just for specific offences? Where such measures exist, what is their target?

As mentioned above (Part 5, 24), a special criminal sanction for those who have in their business activity as an entrepreneur or a manager of an enterprise committed economic crime or otherwise crucially omitted their legal duties was introduced in 1985 (1059/1985), namely prohibiting of engaging in business.

28. Is confiscation provided as a sanction for PIF offences? Is confiscation possible in criminal or administrative proceedings against the legal person? Under which conditions can confiscation be operated against a third party?

Forfeiture, especially forfeiture of the proceeds of crime, is a commonly imposed criminal sanction in respect to economic and corporate crime. The forfeiture shall be ordered on the perpetrator, a participant or a person on whose behalf or to whose benefit the offence has been committed, where these have benefited from the offence. As a prerequisite for a forfeiture order is that the relevant act is criminalized by law, and so the forfeitures are imposed in criminal proceedings. In Finnish doctrine, forfeiture is classified as a security measure instead of punishment. Therefore, Article 6, Paragraphs 2–3 (fair trial) of the European Convention on Human Rights are not regarded applicable as such to the forfeiture proceedings.

Chapter 10 of the Penal Code includes the general provisions on forfeiture, and they were revised in by the Act of 875/2001 as a part of the total reform of the Code. By the Act of 356/2016 these provisions were reshaped in order to implement Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the EU. The provisions were preserved as general and so their application is not restricted to the crimes listed in Article 3 of the Directive 2014/42/EU only.

PART 6: RELATIONSHIP WITH PUNITIVE ADMINISTRATIVE LAW

29. Are parallel criminal and administrative proceedings against the individual HoB allowed? In the affirmative case:

29.1 Does your national legal system impose the concentration of the proceedings?

29.2 Does your national legal system impose coordination of the two proceedings? And in which terms?
29.3 To what extent can evidence gathered in the course of administrative proceedings be used in criminal proceedings against the head of business?
29.4 To what extent can information gathered in a foreign proceeding be used in the proceedings against the HoB?
29.5 Is the head of business allowed to exercise his/her right to silence in the context of an administrative investigation? In the affirmative case, under which conditions?

As mentioned above (Part 1, B.5), a criminal sanction and a punitive administrative sanction are not normally established for a parallel use. However, the fraudulent tax evasion has traditionally been an exception and the most recent example area covers security markets offences.

In 2013 a separate legal Act (781/2013) a prohibition of double jeopardy was introduced for tax fraud cases (*i.e.*, a prohibition against the cumulative use of criminal punishment and punitive administrative fee). So, as a rule, charges may not be brought for nor court judgment passed if a punitive tax or customs increase had already been imposed on the same person in the same case (CC 29:11). This special Act was introduced in order to take into account the case-law of European Court of Human Rights on the application of the principle of *ne bis in idem*. It also indicates the direction of legislative reforms in other fields of economic and financial activity.

In Finnish procedural law, the traditionally recognized basic elements of a due process or fair trial are the right to access to court, independent and impartial tribunal, the presumption of innocence and guarantees of procedural rights. It is noteworthy that these procedural principles and rules are applicable to all kinds of offences (including corporate and corporate-related crime), except that summary (simplified) penal proceedings and fixed fine penal proceedings for minor offences have some specific features which make the proceedings more expeditious and cost-effective.

A fundamental principle that reflects the presumption of innocence is *favor defensionis* (in favour of the defence). This 'meta' principle implies specifying principles, most importantly the principle of *nemo tenetur se ipsum accusare* or privilege against self-incrimination (an individual may not be compelled to testify against him-/herself and the right to silence) and the principle of *in dubio pro reo* (in case of unclear guilt the accusation shall be dismissed). The burden of proof is on the prosecutor's side. A judgment of guilty may be made only on the condition that there is no reasonable doubt regarding the guilt of the defendant

In addition to the accusatorial principle, other leading principles governing the main hearing in the proceedings are the requirements of orality and immediacy. Therefore, all pleadings shall, as a rule, be oral and the opposing party has the right to cross-examine all evidence presented against him/her. The acceptability of other than oral evidence in the open court is very restricted.[26]

A general provision on evidence stipulates following: " (1) A party has the right to present the evidence that he or she wants to the court investigating the case and comment on each piece of evidence presented in court, unless provided otherwise in law. (2) The court, having considered the evidence presented and the other circumstances that have been shown in the proceedings, determines what has been proven and what has not been proven in the case. The court shall consider the probative value of the evidence and the other circumstances thoroughly and objectively on the basis of free consideration of the evidence, unless provided otherwise in law."[27]

The general provisions on criminal procedure and evidence are applicable also when assessing the use of such evidence which has been gathered in the administrative proceedings or in foreign proceedings.

The application of the privilege against self-incrimination is clear in criminal proceedings. According to the Code of Judicial Procedure (4/1734 with amendments, Chapter 17 Section 25 Subsection 2), the court may not, in criminal proceedings, use evidence which was obtained from a person in proceedings other than a criminal investigation or in criminal proceedings, through the threat of coercive measures or otherwise against his or her will, if he or she at the time was a suspect in an offense or a defendant or a criminal investigation or court proceedings were underway in respect of an offense for which he or she was charged. If, however, a person in other than criminal proceedings or comparable proceedings has, in connection with fulfilling his or her statutory obligation, given a false statement or submitted a false or untruthful document or a false or forged object, this may be used as evidence in a criminal case concerning conduct in violation of his or her obligation. According to *travaux préparatoires*, therefore, privilege against self-incrimination is respected in criminal procedure, even though certain other law obliges to provide authorities

[26] See generally Criminal Procedure Act (689/1997). An unofficial translation is available from the website of the Ministry of Justice: https://www.finlex.fi/fi/laki/kaannokset/1734/en17340004_20150732.pdf.

[27] Code of Judicial Procedure (4/1734), as the provisions on evidence in Chapter 17 enacted in 2015 (732/2015); cited Section 1 of Chapter 17. An unofficial translation is available from the website of the Ministry of Justice:
https://www.finlex.fi/fi/laki/kaannokset/1734/en17340004_20150732.pdf.

with information that otherwise could incriminate the one giving the required information[28].

As to the privilege against self-incrimination in the context of administrative investigations or more generally in administrative procedures, its contents and scope are uncertain and determined on the case-law of the European Court of Human Rights.

30. Are parallel criminal or administrative proceedings against the legal person and against the individual head of business allowed? In the affirmative case:

30.1 Does your national legal system impose the concentration of the proceedings?

30.2 Does your national legal system impose coordination of the two proceedings? And in which terms?

30.3 To what extent can evidence gathered in the administrative proceedings against the legal person be used in the proceedings against the head of business?

30.4 To what extent can information gathered in a foreign proceeding against the legal person be used in the proceedings against the head of business (or viceversa)?

30.5 Is the head of business allowed to exercise his/her right to silence in the context of an administrative investigation against the legal person? In the affirmative case, under which conditions?

Answer to the main question 30 is – both in legal doctrine and practice – yes. The principle of *ne bis in idem* is not regarded as applicable, because the subjects (defendants) are different (legal person and individual head of business).

There is normally a concentration (and in that sense coordination) of the criminal proceedings against the legal person and the individual head of business.

As to the questions 30.3 and 30.4, see *mutatis mutandis* above Part 6, 29.

As to the question 30.5, see *mutatis mutandis* on the privilege against self-incrimination, above Part 6, 29. To the extent privilege against self-incrimination is applicable in administrative investigations it is also applicable to those representatives of the legal person who have such an independent and considerable decision-making power that it would qualify the compliance of identification principle and therefore could be regarded as implication the li-

[28] *Government Proposal* 46/2014, 88.

ability for the corporation (cf. above a reference to the argument of the Supreme Court decision KKO 2008:3; Part 3, 19).

31. Is the individual liability of the head of business shielded or diminished if the corporation has previously pleaded guilty?

Plead guilty has a modest role in Finnish procedural law. A new legislation on consensual proceedings was enacted in 2014 (670/2014) as a part of the revision of Criminal Procedure Act. The new legislation maintains the legality principle in prosecution as a main rule, but the exceptions – grounds to waiving of prosecution – have become more extensive. One of the grounds to waiving of prosecution is that criminal proceedings and punishment are to be deemed unreasonable or inappropriate in view of a settlement reached by the suspect in the offence and the injured party, the other action of the suspect in the offence to prevent or remove the effects of the offence (Chapter 1, Section 8).

An innovation concerns the introduction of plea bargaining, which is intended to be applied particularly in complicated cases of economic and corporate crime. So the prosecutor may, on his or her own motion or on the initiative of the injured party, undertake measures for the submission and hearing of a proposal for judgment in confession proceedings. The prosecutor must in his discretion take into consideration the nature of the case and the claims to be presented, the expenses apparently resulting from, and the time required for, a hearing in confession proceedings on one hand and in the normal procedure on the other. As preconditions for confession proceeding are that the suspect in the offence in question case admits having committed the suspected offence and consents to confession proceedings as well as the injured party has no claims in the case or consents to confession proceedings. The prosecutor must commit to requesting punishment in accordance with a third mitigated scale. The proposal for judgment will be handled and confirmed by the court. (Chapter 1, Sections 10–11, and Chapter 5b of Criminal Procedure Act.) It should be noticed that the mitigation of the punishment does concern plea of own guilty only and not testifying about the guilty of accomplices.

The explained provisions on plea bargaining do not recognize such a situation as described in the question 31.

32. Is the previous imposition of an administrative penalty against the head of business taken into account in a subsequent criminal proceedings against the head of business for the same facts?

In case this situation of double jeopardy would occur, which should be avoided in line with the practice of the European Court of Human rights and in line with the separate legal Act (781/2013) on the prohibition against the cumulative use of criminal punishment and administrative penal fee) in fraudulent tax evasion cases, following sentencing provision is applicable: Chapter 6, Section 7, Subsection 1 (515/2003) of Criminal Code prescribes that another consequence (sanction) of the offence or of the sentence shall be taken as a ground mitigating the punishment. See also the precedent of Supreme Court *KKO 1981 II 14*.

APPENDICES

Appendix 1

Chapter 9 of the Criminal Code – Corporate criminal liability (743/1995)

Section 1 – Scope of application (61/2003)
(1) A corporation, foundation or other legal entity (in the following, 'corporation') in the operations of which an offence has been committed shall on the request of the public prosecutor be sentenced to a corporate fine if such a sanction has been provided in this Code for the offence. (441/2011)
(2) The provisions in this Chapter do not apply to offences committed in the exercise of public authority.

Section 2 – Prerequisites for liability (61/2003)
(1) A corporation may be sentenced to a corporate fine if a person who is part of its statutory organ or other management or who exercises actual decision-making authority therein has been an accomplice in an offence or allowed the commission of the offence or if the care and diligence necessary for the prevention of the offence have not been observed in the operations of the corporation.
(2) A corporate fine may be imposed even if the offender cannot be identified or otherwise is not punished. However, no corporate fine shall be imposed for a complainant offence which is not reported by the injured party so as to have charges brought, unless there is a very important public interest for the bringing of charges.

Section 3 – Connection between offender and corporation (743/1995)
(1) The offence is deemed to have been committed in the operations of a corporation if the perpetrator has acted on the behalf or for the benefit of the corporation, and belongs to its management or is in a service or employment relationship with it or has acted on assignment by a representative of the corporation.
(2) The corporation does not have the right to compensation from the offender for a corporate fine that it has paid, unless such liability is based on statutes on corporations and foundations.

Section 4 – Waiving of punishment (61/2003)
(1) A court may waive imposition of a corporate fine on a corporation if:
(1) the omission referred to in section 2(1) by the corporation is slight, or the participation in the offence by the management or by the person who exercises actual decision-making authority in the corporation is slight, or
(2) the offence committed in the operations of the corporation is slight.
(2) The court may waive imposition of a corporate fine also when the punishment is deemed unreasonable, taking into consideration:
(1) the consequences of the offence to the corporation,
(2) the measures taken by the corporation to prevent new offences, to prevent or remedy the effects of the offence or to further the investigation of the omission or offence, or
(3) where a member of the management of the corporation is sentenced to a punishment, and the corporation is small, the sentenced person owns a large share of the corporation or his or her personal liability for the liabilities of the corporation are significant.

Section 5 – Corporate fine (971/2001)
A corporate fine is imposed as a lump sum. The corporate fine is at least 850 euros and at most 850,000 euros.

Section 6 – Basis for calculation of the corporate fine (743/1995)
(1) The amount of the corporate fine shall be determined in accordance with the nature and extent of the omission or the participation of the management, as referred to in section 2, and the financial standing of the corporation.
(2) When evaluating the significance of the omission and the participation of the management, consideration shall be taken of the nature and seriousness of the offence, the status of the perpetrator as a member of the organs of the corporation, whether the violation of the duties of the corporation manifests

heedlessness of the law or the orders of the authorities, as well as the grounds for sentencing provided elsewhere in the law.
(3) When evaluating the financial standing of the corporation, consideration shall be taken of the size and solvency of the corporation, as well as the earnings and the other essential indicators of the financial standing of the corporation.

Section 7 – Waiving of the bringing of charges (61/2003)
(1) The public prosecutor may waive the bringing of charges against a corporation, if: (441/2011)
(1) the corporate omission or participation of the management or of the person exercising actual decision-making power in the corporation, as referred to in section 2, subsection 1, has been of minor significance in the offence, or
(2) only minor damage or danger has been caused by the offence committed in the operations of the corporation and the corporation has voluntarily taken the necessary measures to prevent new offences.
(2) The bringing of charges may be waived also if the offender, in the case referred to in section 4, subsection 2(3), has already been sentenced to a punishment and it is to be anticipated that the corporation for this reason is not to be sentenced to a corporate fine.
(3) Service of a decision not to bring charges against a corporation or to withdraw charges against a corporation shall be given to the corporation by post or through application as appropriate of what is provided in Chapter 11 of the Code of Judicial Procedure. The provisions of Chapter 1, section 6(a), subsection 2 and section 11, subsections 1 and 3 of the Criminal Procedure Act on the waiving of charges apply correspondingly to the decision. (673/2014)
(4) The provisions of Chapter 1, section 12 of the Criminal Procedure Act on the revocation of charges apply to the revocation of charges on the basis of subsection 1. However, service of the revocation shall be given only to the corporation.

Section 8 – Joint corporate fine (743/1995)
(1) If a corporation is to be sentenced for two or more offences at one time, a joint corporate fine shall be imposed in accordance with the provisions of sections 5 and 6.
(2) No joint punishment shall be imposed for two offences, one of which was committed after a corporate fine was imposed for the other. If charges are brought against a corporation which has been sentenced to a corporate fine by a final decision, for an offence committed before the said sentence was passed,

a joint corporate fine shall also not be imposed, but the prior corporate fine shall be duly taken into account when sentencing to the new punishment.

[section 9 has been repealed; 297/2003]

Section 10 – Enforcement of a corporate fine (673/2002)
(1) A corporate fine is enforced in the manner provided in the Enforcement of Fines Act (672/2002).
(2) A conversion sentence may not be imposed in place of a corporate fine.

Appendix 2

Chapter 5 of the Criminal Code – On attempt and complicity (515/2003)

Section 1 – Attempt (515/2003)
(1) An attempt of an offence is punishable only if the attempt has been denoted as punishable in a provision on an intentional offence.
(2) An act has reached the stage of an attempt at an offence when the perpetrator has begun the commission of an offence and brought about the danger that the offence will be completed. An attempt at an offence is involved also when such a danger is not caused, but the fact that the danger is not brought about is due only to coincidental reasons.
(3) In sentencing for an attempt at an offence, the provisions of Chapter 6, section 8, subsection 1(2), subsection 2 and subsection 4 apply, unless, pursuant to the criminal provision applicable to the case, the attempt is comparable to a completed act.

Section 2 – Withdrawal from an attempt and elimination of the effects of an offence by the perpetrator (515/2003)
(1) An attempt is not punishable if the perpetrator, on his or her own free will, has withdrawn from the completion of the offence, or otherwise prevented the consequence referred to in the statutory definition of the offence.
(2) If the offence involves several accomplices, the perpetrator, the instigator or the abettor is exempted from liability on the basis of withdrawal from an offence and elimination of the effects of an offence by the perpetrator only if he or she has succeeded in getting also the other participants to desist withdraw from completion of the offence or otherwise been able to prevent the

consequence referred to in the statutory definition of the offence or in another manner has eliminated the effects of his or her own actions on the completion of the offence.
(3) In addition to what is provided in subsections 1 and 2, an attempt is not punishable if the offence is not completed or the consequence referred to in the statutory definition of the offence is not caused for a reason that is independent of the perpetrator, instigator or abettor, but he or she has voluntarily and seriously attempted to prevent the completion of the offence or the causing of the consequence.
(4) If an attempt, pursuant to subsections 1 through 3, is not punishable but at the same time comprises another, completed, offence, such offence is punishable.

Section 3 – Complicity in an offence (515/2003)
If two or more persons have committed an intentional offence together, each is punishable as a perpetrator.

Section 4 – Commission of an offence through an agent (515/2003)
A person is sentenced as a perpetrator if he or she has committed an intentional offence by using, as an agent, another person who cannot be punished for said offence due to the lack of criminal responsibility or intention or due to another reason connected with the prerequisites for criminal liability.

Section 5 – Instigation (515/2003)
A person who intentionally persuades another person to commit an intentional offence or to make a punishable attempt of such an act is punishable for incitement to the offence as if he or she was the perpetrator.

Section 6 – Abetting (515/2003)
(1) A person who, before or during the commission of an offence, intentionally furthers the commission by another of an intentional act or of its punishable attempt, through advice, action or otherwise, shall be sentenced for abetting on the basis of the same legal provision as the perpetrator. The provisions of Chapter 6, section 8, subsection 1(3), subsection 2 and subsection 4 apply nonetheless to the sentence.
(2) Incitement to punishable aiding and abetting is punishable as aiding and abetting.

Section 7 – Special circumstances related to the person (515/2003)
(1) Where a special circumstance vindicates, mitigates or aggravates an act, it applies only to the perpetrator, inciter or abettor to whom the circumstance pertains.
(2) An inciter or abettor is not exempted from penal liability by the fact that he or she is not affected by a special circumstance related to the person and said circumstance is a basis for the punishability of the act by the perpetrator.

Section 8 – Acting on behalf of a legal person (515/2003)
(1) A member of a statutory body or management of a corporation, foundation or other legal person, a person who exercises actual decision-making power in the legal person or a person who otherwise acts on its behalf in an employment relationship in the private or public sector or on the basis of a commission may be sentenced for an offence committed in the operations of a legal person, even if he or she does not fulfil the special conditions stipulated for a perpetrator in the statutory definition of the offence, but the legal person fulfils said conditions.
(2) If the offence has been committed in organised activity that is part of an entrepreneur's business or in other organised activity that is comparable to the activity of a legal person, the provisions in subsection 1 on an offence committed in the operations of a legal person correspondingly apply.
(3) The provisions of this section do not apply if different provisions elsewhere apply to the matter.

27. Multilayered Criminal Policy – The Finnish Experience Regarding the Development of Europeanized Criminal Justice *

ABSTRACT

The article examines the development towards a multilayered criminal policy in Europe on the basis of the Finnish experience. Three basic trends are noticeable from that point of view: Scandinavization of Finnish criminal and sanction policy; the influence of human and basic rights on the Finnish legal culture and criminal procedural law; and the effects of constitutional, human rights and EU law obligations on the Finnish criminal law reform. In addition, the challenges arising from Europeanization and internationalization of criminal law and criminal justice are analysed. In the concluding remarks, Finnish and Scandinavian criticism is expressed in relation to the unification of European criminal law, in favour of 'united in diversity'.

1 INTRODUCTION

In order to understand the development of the Finnish criminal policy and criminal justice, it should be examined in the context of its major ideological tendencies of criminal policy in Finland and Scandinavia. In addition, the relationship between criminal policy and criminal law and criminal justice system more generally should be studied and then take into account the various actors of criminal policy and their roles.

The multi-layered patchwork of legislation and legal practice must also be noticed. In principle, the following different levels of legal orders can be separated: (a) the global (international) – primarily United Nations (UN) – level; (b) the regional (European) level divided into Council of Europe Conventions and other regulations, and the European Union (EU)'s legal order; (c) the

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sub-regional (Nordic/Scandinavian) level; and (d) the national (Finnish) level, including constitutional and other legal dimensions.

There is an intensifying interaction between European and global legal regulatory regimes and the national legal orders. This means among other things an enlargement of legal sources of national criminal laws, for instance: (a) the effect of the supranational criminal law, i.e. international criminal law in *sensu stricto* ('core crimes'*)*, and transnational (treaty-based) criminal law; and (b) the effect of European law (European Convention on Human Rights, ECHR, and the European Union, EU, law), On the other hand, the national legal orders may reciprocally have an impact on the global and European law.

The German scholar Ulrich Sieber has analysed the trend to harmonize criminal law as one result of worldwide globalisation and he explains it by four significant forces: the increasing development and international recognition of common legal positions for the protection of human rights and for the political and economic aims; the growth in international security interests; the growing influence of actors other than nation states; and the increasing international cooperation based on new institutions with new instruments of legal approximation.[1] The French scholar *Mireille Delmas-Marty* repudiates "any binary vision that opposes the national to the supranational and the relative to the universal"[2].

The internationalization and Europeanization of a legal order is challenging, because criminal justice systems are traditionally closely linked to the States' power and their value systems. Therefore, irrespective of the general trend to harmonize criminal law there exists an obvious risk of fragmentation of regulatory regimes, and thus also a risk of decrease of the legitimacy, consistency and coherence of the national legal orders.

These problems of multi-layered criminal policy will be examined on the basis of the Finnish experience.[3] The starting point will be in the analysis of the tendencies which can be identified in the Finnish criminal policy since the 1960s:[4]

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[1] Ulrich Sieber, 'The Forces Behind the Harmonization of Criminal Law' in Mireille Delmas-Marty *et al*. (eds.), *Les chemins de l'harmonisation pénale* (Broché 2008), 385–417, 387.

[2] Mreille Delmas-Marty, 'Comparative Criminal Law as a Necessary Tool for the Application of International Criminal Law' in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009), 97–103, 103.

[3] See also Raimo Lahti, 'Towards Internationalization and Europeanization of Criminal Policy and Criminal Justice – Challenges to Comparative Research' in E. W. Plywaczewski (ed./Hrsg.), *Current Problems of the Penal Law and Criminology / Aktuelle Probleme des Strafrechts und der Kriminologie* (Wolters Kluwer Polska 2012), 365–379. Cf. the research questions presented by Christopher Harding and Joanna Beata Banach-Gutierrez, 'The Search for Evidence Relating to the Application and Impact of EU Legislation: Probing the National Experience' in Jannemieke Ouwerkerk *et al*. (eds.), The Future of EU Criminal Justice Policy and Practice (Brill/Nijhoff 2019), 66–85.

[4] In more detail, see e.g. Raimo Lahti, 'Recodifying the Finnish Criminal Code of 1889: To-

(i) criticism of the so-called treatment ideology in the 1960s;
(ii) emphasis on cost-benefit thinking at the beginning of the 1970s;
(iii) so-called neo-classicism in criminal law thinking at the end of the 1970s and the beginning of the 1980s;
(iv) pragmatic reform work for a new Criminal Code – a total reform of criminal law – by utilizing modified ideas of the above-mentioned tendencies since the 1980s until the beginning of the 2000s;
(v) influence of human and basic rights – i.e., influence of constitutionalisation – on criminal law and procedural law since the 1990s;
(vi) Europeanization – especially due to the increased role of EU criminal law – and internationalization of the national criminal justice system since the end of the 1990s.

The basic features of the major tendencies will be analysed in more detail below. The first three tendencies are examined under the title of 'Scandinavization' – i.e., sub-regionalization – of Finnish criminal and sanction policy. The special aspects of 'internationalization' are dealt with briefly only. The main emphasis in the later discussion will be put on the trend towards Europeanization of criminal law.

2 SCANDINAVIZATION OF FINNISH CRIMINAL AND SANCTION POLICY

The Nordic (Scandinavian) countries form a sub-regional area in Europe and the developments there seem to presage more general trends in Europe towards harmonisation of criminal laws. Therefore, a view of the experience may be illustrative also in assessing the effects of increased regionalization (Europeanization) of criminal policy and criminal justice.[5] It can also be said that originally Finland adopted the Scandinavian models for its criminal policy, but later Finland also served as a model for other Nordic countries. For instance, the day-fine system, which was adopted in Finland in 1921, was later introduced in other Nordic countries.

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wards a More Efficient, Just and Humane Criminal Policy'. 27 *Israel Law Review* (1993),100–117. As to recent reviews, see Tapio Lappi-Seppälä, 'Penal Policies in the Nordic Countries 1960–2010'. 13 *Journal of Scandinavian Studies in Criminology and Crime Prevention* (Supplement 1, 2012), 85–111; Sakari Melander, 'Criminal law' in Kimmo Nuotio *et al*. (eds.), *Introduction to Finnish Law and Legal Culture* (Forum Iuris, Helsinki 2012), 246–260.

[5] See generally Raimo Lahti, 'Towards a Rational and Humane Criminal Policy – Trends in Scandinavian Penal Thinking' 1 *Journal of Scandinavian Studies in Criminology and Crime Prevention* (2000), 141–155.

A total reform of the Finnish Penal Code of 1889 has in its essence been finalised after 30 years' drafting process. The four most comprehensive partial reforms were concluded by amendments to the Penal Code in 1990, 1995, 1998 and 2003.[6] The penal codes of the Nordic countries date from different periods. From the Scandinavian codes the Danish is of 1930, the Icelandic of 1940, the Swedish of 1962 and the Norwegian of 2005 (which replaced the Code of 1902). Their underlying criminal policy ideology has been quite different. Even so, the development over the recent decades has been marked by a similarity in approaches to criminal policy, by an efficient Nordic cooperation in penal matters and, to a lesser degree, by harmonised legislation in the fields of criminal law and criminal procedure.

Since the 1960s, the Nordic countries have had a close cooperation in the legal area for several reasons. The common legal traditions and crucial similarities in cultural, economic and social development make it understandable that a strong mutual confidence prevails between the Nordic countries, and that confidence furthers efficient cooperation. The Nordic cooperation in legal matters is based on a variety of sources: of multilateral (European) conventions, of the treaties between the Nordic countries, of uniform legislation and of established practice among the public officials in these countries.

The legal culture and legal thinking in the Nordic countries reveal some specific features. Although these countries belong to the so-called civil (statutory) law tradition, the approaches in legislative reforms and legal doctrines are often less strict in 'system-building' (in constructing theories and concepts) and are more pragmatically oriented than typically in the continental civil law countries. This is also true in relation to the general system for analysing criminal acts, although Finland is in this respect nearer to German penal thinking than the other Nordic countries. The models offered by common law countries and the theories developed by scholars coming from these countries are now taken more seriously into consideration than in earlier times. This is true, in particular, when reforming criminal procedure. The influence of the case law of the European Convention on Human Rights (ECHR) on the principles of criminal procedure is remarkable.

Essential similarities are discernible in the goals, values and principles governing the Nordic penal codes and the criminal justice systems in these countries, although they are far away from identical. At the same time as the

[6] Concerning an unofficial English translation of the Code, see the electronic version which is available from the web site: *www.finlex.fi/fi/laki/kaannokset/1889/en18890039_20150766.pdf* (amendments up to 766/2015 included). As to a profile of Finnish criminal justice, see Matti Joutsen *et al., Criminal Justice Systems in Europe and North America – Finland* (HEUNI, Helsinki 2001).

Nordic countries have been social welfare states, their crime control policies and the systems of criminal sanctions are characterized by the emphasis on such values as liberalism, rationalism and humaneness. The Nordic countries have also been active in promoting the efforts to elaborate internationally accepted standards for criminal policy and criminal justice and to implement them. Human rights aspects and humanitarian considerations are of special importance in this connection.

The penal thinking which was adopted in the preparatory works of the total reform of criminal law is characterized by the demand for a more rational criminal justice system, i.e. for efficient, just (fair) and humane criminal justice[7]. The existence of the criminal justice system is justified on utilitarian grounds. The structure and operation of the penal system cannot, however, be determined solely on the basis of its utility. The criteria of justice and humaneness must also be taken into account. The penal system must be both rational as to its goals (utility) and rational as to its values (justice, humaneness).[8]

It has been held possible to a large extent to apply the main criteria of rationality in the criminal justice system – effectiveness, justice and humaneness – without this resulting in conflicting conclusions about the development of the system. In order for this to be possible these principles must be made specific in a particular way.[9]

Thus, in respect of the mechanisms through which the general preventive effect of the punishment should be reached, it is not deterrence in the first place but the socio-ethical disapproval which affects the sense of morals and justice – general prevention instead of general deterrence, without calling for a severe penal system. The legitimacy of the whole criminal justice system is an important aim and, therefore, such principles of justice as equality and proportionality are central. The emphasis on the non-utilitarian goals of the criminal justice system – fairness and humaneness – must be connected with

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[7] As to this distinction originally, see Raimo Lahti 'Current Trends in Criminal Policy in the Scandinavian Countries' in Norman Bishop (ed.), *Scandinavian Criminal Policy and Criminology 1980–85* (Scandinavian Research Council for Criminology, Copenhagen 1985), 59–72, 63; Raimo Lahti, 'Zur Entwicklung der Kriminalpolitik in Finnland' in *Festschrift für Hans-Heinrich Jescheck*, II (Duncker & Humblot 1985), 871–892, 884.

[8] See also generally Inkeri Anttila, *Ad ius criminale humanius. Essays in Criminology, Criminal Justice and Criminal Policy*. Edited by Raimo Lahti & Patrik Törnudd (Finnish Lawyers' Association, Helsinki 2001); Patrik Törnudd, *Facts, Values and Visions. Essays in Criminology and Crime Policy* (National Research Institute of Legal Policy, Helsinki 1996); Raimo Lahti, *Zur Kriminal- und Strafrechtspolitik des 21. Jahrhunderts. Der Blickwinkel eines nordischen Wohlfahrtsstaates und dessen Strafgesetzreformen: Finnland* (De Gruyter 2019).

[9] See especially Lahti, in *Scandinavian Criminal Policy and Criminology*, *supra* note 7, 66–69.

the decrease in the repressive features (punitiveness) of the system, for example through the introduction of alternatives to imprisonment. The significance of individual prevention or incapacitation is in the neo-classical penal thinking regarded as very limited.

An important effect of the new criminal and sanction policy can be seen in the *reduced use of custodial sentences* in Finland. Since the mid-1970s, the relative number of offenders sentenced to unconditional imprisonment was on the decrease until 1999: from 118 in 1976 to 65 in 1999 per 100 000 population and to the level of the other Nordic countries. At the same time the development on registered criminality signalled a similar trend in all of Nordic countries so that a dramatic cut in the prisoner rate in Finland did not result in a proportionate increase in the incidence of crime compared with other Nordic countries where the prisoner rate stayed quite stable. In 2000–2005 the size was increased, to 90 in 2005, but in the most recent years the level seems to be normalized to 60–70 per 100 000 population.[10]

This effect should be assessed with a view to the general objectives and values of the criminal policy which was adopted in Finland. Cost-benefit thinking in policy-making – as it was originally formulated in the late 1960s[11] – suggests that we should aim at the reduction and distribution of the suffering and other social costs caused by crime and of the control of crime. In addition to crime prevention, a strong emphasis should be put on the arguments of justice and humaneness. For instance, the argument of justice requires a just allocation of social costs of crime and crime control among different parties, such as society, offenders and victims, and the argument of humaneness speaks in favour of parsimony and leniency of penal sanctions and the respect of human dignity in crime control.

The reduced prisoner rate should be assessed in relation to the preventive effects of the system of criminal sanctions. The above-described Nordic observation, in addition to other criminological data, is an argument against the fear that a cut in the inmate count will result in a proportionate increase in the incidence of crime. Accordingly, the variations in the prisoner rate should not be looked at as phenomena separate from other events, nor should the criminal policy changes since the late 1960s be seen merely as the results of some ideological agenda pursued by a group of penal experts.

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[10] In more detail, see Tapio Lappi-Seppälä, 'Explaining imprisonment in Europe' 8 *European Journal of Criminology* (2011), 303–328; Lappi-Seppälä, *supra* note 4.

[11] See Patrik Törnudd, 'The Futility of Searching for Causes of Crime' 3 *Scandinavian Studies in Criminology* (Universitetsforlaget 1969), 23–33.

The Finnish scholar *Tapio Lappi-Seppälä* has extensively studied the relationship between the penal policy and the prisoner rate. His conclusions include following contentions: penal severity is closely associated with the extent of welfare provision, differences in income-equality, trust and political and legal cultures. So the Nordic penal model has its roots in consensual and corporatist political culture, a high level of social trust and political legitimacy, as well as a strong welfare state. These different factors have both indirect and direct influences on the contents of penal policy.[12]

3 THE INFLUENCE OF HUMAN AND BASIC RIGHTS ON THE FINNISH LEGAL CULTURE AND CRIMINAL PROCEDURAL LAW

Human rights or constitutional aspects of criminal law or criminal procedure did not normally get serious attention until the 1990s in Finland. A remarkable change in legal thinking and practice in this respect was connected with two major legislative reforms: firstly, Finland ratified the ECHR in 1990, and, secondly, new provisions on fundamental (basic) rights were incorporated into the Finnish Constitution in 1995 (in a formally revised form in the new Constitution of 1999[13]).

Those aspects were not, however, fully overlooked even earlier. Most of the relevant human rights treaties had been ratified in Finland in due course (e.g. International Covenant on Civil and Political Rights, ICCPR) and, when ratified, they have also been incorporated into the domestic legal order. Nevertheless, courts or administrative authorities referred very seldom to human rights treaties or constitutional rights until the late 1980s; a tradition to invoke constitutional rights in courts was lacking. Human rights treaties and constitutional rights were regarded as binding primarily upon the legislator. First references to the human and constitutional rights were made in the practice of the Supreme Administrative Court and the Parliamentary Ombudsman.

The Finnish legal system has traditionally reflected a model of democratic *Rechtsstaat* where democracy and fundamental rights are regarded as complementary principles in a strong sense: there is neither judicial review nor a constitutional court for reviewing the constitutionality of laws, but the conformity

[12] In more detail, see Lappi-Seppälä, *supra* note 10.

[13] An unofficial English translation of the Constitution of Finland is accessible from the web site: *www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf* (amendments up to 817/2018 included).

of a bill to the constitution is reviewed only during the legislative process.[14] Therefore, the ratification of the ECHR and the reform of constitutional rights in the 1990s were remarkable when implying the direct applicability of the individuals' fundamental rights in courts.

The ECHR and other important human rights treaties have been incorporated through an act of parliament *in blanco*. Because of the predominance of the incorporation method, Finland can be said to represent dualism in form but monism in practice when implementing international law into the domestic legal order. This implementation method affects the application of human rights treaties. The Parliamentary Constitutional Law Committee has confirmed the following principles: the hierarchal status of the domestic incorporation act of a treaty determines the formal rank of the treaty provisions in domestic law (i.e., their rank is normally that of an act of Parliament); incorporated treaty provisions are in force in domestic law according to their contents in international law; and the courts and authorities should resort to "human-rights-friendly" interpretations of cases having domestic status, in order to avoid conflicts between domestic law and human rights law.[15]

Before the Finnish ratification of the ECHR there were no references to international human rights conventions in the case law of the Finnish Supreme Court, although the Parliamentary Ombudsman had applied international human rights law in his decision-making in the years leading up to ratification. The first cases in which the Supreme Court expressed its willingness to apply international human rights norms were decided in 1990 and dealt with the extradition of persons accused of hijacking an aeroplane in the former Soviet Union.

Since these extradition cases, the Supreme Court has mostly applied human rights norms in issues concerning criminal procedure, i.e. Article 6 of the ECHR and Article 14 of the ICCPR. These treaty provisions have been applied directly in order to fill certain gaps in the Finnish legislation on criminal procedure, although in most cases references to them have been made when interpreting domestic provisions. Justice Lauri Lehtimaja has analysed the influence of the ECHR on Finnish law and court decisions. While the Supreme Court annually publishes 100–200 judgments in its yearbook, in these judgments so

[14] See e.g. Antero Jyränki, 'Taking Democracy Seriously. The problem of the control of the constitutionality of legislation' in Maija Sakslin (ed.), *The Finnish Constitution in Transition*. (Helsinki 1991), 6–30; Juha Lavapuro, 'Constitutional Review in Finland' in *Introduction to Finnish Law and Legal Culture*, *supra* note 4, 127–139.

[15] In more detail, see Martin Scheinin, 'Incorporation and Implementation of Human Rights in Finland' in Martin Scheinin (ed.), *International Human Rights Norms in the Nordic and Baltic Countries* (Martinus Nijhoff Publishers 1996), 257–294.

far, express reference has been made to the ECHR in a total of 111 cases up to 2008. Because the substance of the ECHR has been integrated into domestic legislation, there is nowadays only seldom a need for a direct application of the ECHR. "The ECHR is used as a kind of litmus paper testing whether the interpretations of the domestic law are also in harmony with international human rights obligations"; a more general effect of the ECHR covers a change in judicial thinking: the reasoning in court judgments has become more open and transparent.[16]

In the most recent years, the case law of the European Court of Human Rights (ECtHR) has influenced especially the fair trial guarantees of evidentiary procedure (such as the privilege against self-incrimination and the exclusion of unlawfully obtained evidence) and the significance and contents of the *ne bis in idem* principle. In this respect Finnish procedural law has been reformed and applied in line with the practice of the ECtHR and, when necessary, in line with the judgments of the Court of Justice of the EU (CJEU). For instance, explicit provisions have been included in the revised Code of Judicial Procedure (Chapter 17, Sections 18 and 25; 732/2015) on the privilege against self-incrimination and on the exclusion of unlawfully obtained evidence.

A separate legislative Act (781/2013) on the prohibition of double jeopardy (*i.e.* a prohibition against the cumulative use of criminal punishment and administrative penal fee) was introduced for tax fraud cases. Accordingly, as a rule, no charges may be brought nor court judgments passed if the same person in the same case has already incurred a punitive tax or customs increase (Penal Code 29:11).

The reformed evidence law regulated in Chapter 17 of the Code of Judicial Procedure contains – in addition to clarifying general provisions and those regarding the obligation or right to refuse to testify – innovative provisions, such as the above-mentioned on the privilege against self-incrimination and on the exclusion of unlawfully obtained evidence. There are also new provisions on secret evidence and anonymous witnesses.

A new law on consensual proceedings was enacted in 2014 (670/2014) as part of the revision of the Criminal Procedure Act. The new legislation maintains the legality principle in prosecution as a main rule, but the exceptions

[16] Lauri Lehtimaja, *The View of the Finnish Supreme Court on the European Convention on Human Rights*. Paper presented in a seminar on the ECHR, 6 June 2008; accessible from the Supreme Court of Finland. See also Tuomas Ojanen, 'The Europeanization of Finnish Law – Observations on the Transformations of the Finnish Scene of Constitutionalism' in *Introduction to Finnish Law and Legal Culture*, *supra* note 4, 97–110, 102.

– grounds for waiving prosecution – have become more extensive. One innovation concerns the introduction of plea bargaining. The prosecutor may, on his or her own motion or on the initiative of the injured party, take measures for the submission and hearing of a proposal for judgment in confession proceedings. The prosecutor must use his or her discretion in considering the nature of the case and the claims to be presented, the expenses apparently resulting from, and the time required for, a hearing in confession proceedings on one hand and in the normal procedure on the other.

It is noticeable that several of the enacted constitutional provisions reference both basic and human rights, thus giving semi-constitutional status to human rights treaties.[17] In addition to the 'human rights friendly' interpretation of the law, a similar 'basic rights friendly' interpretation is recommended, although the prohibition of courts to examine the constitutionality of Acts of Parliament was maintained.

4 FINNISH CRIMINAL LAW REFORM AND CONSTITUTIONAL, HUMAN RIGHTS AND EU LAW OBLIGATIONS

The ideological change with greater emphasis on constitutional and human rights has had effects on the total criminal law reform in Finland (which was implemented in 1990–2003).[18] The rise of these rights in legal thinking and practice has had an influence, not only on the Finnish criminal law but also on its theoretical basis. The preparatory work for the recodification of the Finnish Penal Code of 1889 started already in the 1970s, before the emergence of human and basic rights thinking and obligations. Nevertheless, two basic legal principles have governed Finnish criminal law reform: the legality principle and the principle of culpability.

These principles are justified primarily on the basis of their compatibility with the judicial values of legal certainty and predictability. At the same time, these principles are defended by referring to the utilitarian argument of general prevention. A necessary prerequisite for the persuasiveness of such a parallel or complementary justification is that general prevention means so-called integration prevention, in other words, the effect that criminal law has in maintaining and strengthening moral and social norms.

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[17] So Scheinin, in *supra* note 15, 276.

[18] See generally Raimo Lahti, 'Constitutional Rights and Finnish Criminal Law and Criminal Procedure' 33 *Israel Law Review* (1999), 592–606; Melander, in *Introduction to Finnish Law and Legal Culture*, *supra* note 4, 237–247.

The legality principle in criminal law can be divided into four sub-principles: the rule that only the law can define a crime and prescribe a penalty (*nullum crimen sine lege scripta*), the rule that criminal law must not be applied by analogy to the accused's detriment, the prohibition of retrospective application of the criminal law to the accused's disadvantage (*nullum crimen sine lege praevia*), and the rule that a criminal offence must be clearly defined in the law (*nullum crimen sine lege certa*). This kind of classification of the main contents of the legality principle is generally accepted, for instance in the case law relating to Article 7 (1) of the ECHR.[19]

The regulation in the Constitution has strengthened the significance of the legality principle as the leading principle in criminal law, which has institutional support in both human rights and constitutional law. This provision is intended to be applied more strictly than the corresponding provisions in the ECHR and ICCPR, insofar as the definition of a crime and the prescription of a penalty must be based on an Act of Parliament. One way to strengthen the legality principle is the effort to reduce and specify the use of the so-called blanket (reference) provision technique. A new challenge was created by Finland's membership in EU, because of the so-called integration by reference, for the purpose of incorporating the European Community norms, was extensively used in the Member States of the EU.[20]

When enforcing EC or EU Directives into national legal orders the Member States have certain discretion in choosing the legal remedies, e.g. whether to resort to criminalisation or administrative sanctions and at what punitive level the sanctions should be. This discretion may, however, be very limited, for instance when enforcing the Directive on money laundering;[21] the enlarged criminal-law competence of the EU in the Treaty of Lisbon will make that discretion even more limited.[22] The Member States must ensure that money laundering as defined in the Directive shall be forbidden; the Finnish Penal Code has been amended in order to fulfil the obligation arising from this directive and also from other international treaties. On the other hand, the principle of EU law friendly interpretation of national legislation does not apply to the detriment of the accused; see for example the cases of the Court of Justice of

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[19] See, e.g., *C.R. v the United Kingdom* App no 20190/92 (ECHR, 22 November 1995).

[20] See, e.g., Mireille Delmas-Marty, 'The European Union and Penal Law' 4 *European Law Journal* (1998), 87–115, 100.

[21] See the latest version: Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing,

[22] See Article 83 in the Consolidated Version of the Treaty on the Functions of the EU (TFEU, 2008).

the European Union (CJEU), where a reference to the legality principle and the constitutional traditions and ECHR, on which it is based, was in this respect made.[23] One of the recent cases, the Court of Justice's ruling in Taricco II[24], raises fundamental questions on the applicability of EU law constitutional principles – including primacy, effectiveness and direct effect – in relation to constitutional objections at a national level[25].

The new constitutional provision on the legality principle, taking account of its legislative drafts and the tradition to transform the international treaties requiring the penalizing of certain acts, leads also to the conclusion that the Finnish courts are not allowed to sentence for an act which constitutes a criminal offence under international law only.[26]

It should be noted that the strengthening of the culpability principle did not exclude the adoption of corporate criminal liability in 1995 (Chapter 9 of the Penal Code). This indicates a tendency towards diversification of general doctrines of criminal liability and, at the same time, a tendency towards harmonized principles of the criminal liability of legal persons and the heads of business within the EU.[27]

The legality principle is not the only basic right which is relevant for the Finnish criminal law and its reform. Many of the basic principles which were behind the reform work can after the constitutional reform be classified as fundamental. For instance, the moral and political arguments of justice and humanity, which have played an important role in Finnish criminal policy and criminal law theory, have now a strong institutional support as legal principles, too, when being firmly attached to human rights and constitutional law. Thus, the principle of culpability and, accordingly, the prohibition of strict liability can from a legal point of view be based on the explicit human rights norms and constitutional provisions which guarantee the inviolability of human dignity.

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[23] See Joined Cases C-74/95 and C-129/95 *Criminal proceedings against X* [1996], ECR 1996 I–06609.

[24] See Case C-42/17 *Criminal proceedings against M.A.S. and M.B.* [2017].

[25] So Valsamis Mitsilegas, 'Editorial' 9 *New Journal of European Criminal law* (2018:1), 3.

[26] Cf. Decision 53/1993 (X.13) of the Hungarian Constitutional Court, where individual responsibility for war crimes and crimes against humanity was established irrespective of their punishability under domestic law, but was based on the general cogency of the relevant international law. As to the applicability of ECHR in historical trials, see Károly Bárd, 'The difficulties of writing the past through law – Historical trials revisited at the European Court of Human Rights' 81 *Revue Internationale de Droit Pénal* (2010, 27–45.

[27] In more detail, see Raimo Lahti, 'Finnish Report on Individual Liability for Business Involvement in International Crimes', 88 *Revue Internationale de Droit Pénal* (2017), 257–266, 260.

As for the principles of criminalisation, various human and basic rights must be taken into account. In the argumentation constitutional (and human rights) aspects may collide so that certain aspects support the enlargement of criminalized behaviour and certain aspects restrict their scope or the methods for using criminal law; there is often a tension between contrary arguments. When dealing with some of the recent Government Bills concerning criminal law the Parliamentary Constitutional Law Committee deliberated generally upon the question: There must be a considerable social need and also from the basic rights point of view acceptable reasons for a criminalisation so that it restricts fundamental freedom in an acceptable way; the advantages of criminalisation must also be in proportion to the extent to which fundamental freedoms are restricted.

As for the criminal sanctions, explicit human rights norms and constitutional provisions forbid death sentences, torture and other degrading or inhumane treatment in a very absolute way. In the Finnish Penal Code, there is also a special provision forbidding torture.[28] In traditional penal theory, the debaters rely primarily on the utilitarian arguments of social defence and/or the arguments of justice and humaneness. In recent Finnish academic literature on the general doctrines of criminal law much attention has also been paid to the role of constitutional rights (and human rights) for legal theory in general and criminal law theory in particular.[29]

Thus, the value(s) of *justice* is particularly significant, and the aspect of social justice is one of its connotations. The legality principle and the principle of culpability can also be seen as sub-criteria of justice, and the same is true of the *proportionality* principle, which governs the assessment of the seriousness of crime and sentencing. However, it is worth pointing out that it is largely possible to apply the main criteria for rationality in the criminal justice system – justice, efficiency, and humaneness – without creating conflict over the development of the penal system.

The original objective of enacting a unified, coherent, and systematic criminal law (consisting of a general and a special part, as well as of the system of criminal sanctions) has been challenged by the increased tendency towards diversification of various areas of criminal law (in particular, the emergence of European economic criminal law and international criminal law). This di-

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[28] See Chapter 11, Section 9a (990/2009) in the Penal Code.

[29] See especially the doctoral theses of Ari-Matti Nuutila, *Rikosoikeudellinen huolimattomuus* (Helsinki 1996) [German summary: Fahrlässigkeit als Verhaltensform und als Schuldform], of Kimmo Nuotio, *Teko, vaara, seuraus* (Helsinki 1998) [German summary: Handlung, Gefahr, Erfolg], and of Sakari Melander, *Kriminalisointiteoria* (Helsinki 2008) [English abstract: A theory of criminalization – Legal constraints to criminal legislation].

versification is reflected in the pluralism of general legal doctrines and in the need to develop a more dynamic conceptual and systematic approach in order to control many parallel legal regulations and the diversity of the regulated phenomena.[30]

5 THE CHALLENGES ARISING FROM EUROPEANIZATION AND INTERNATIONALIZATION OF CRIMINAL LAW AND CRIMINAL JUSTICE

The increased internationalization and Europeanization of criminal policy and criminal justice are challenging for legal scientists, legislators and practitioners. The administration of criminal justice, which so far has been an essential element of state sovereignty, has partially moved and is still moving, beyond the direct control of nation States. The ECHR and its case law have an important role in creating the European model of criminal procedure. The international criminal tribunals have a similar role in furthering respect for fair trial rights.[31] Domestic courts are in key positions in strengthening human rights according to these standards. In particular, the International Criminal Court (ICC), whose competence relies on the principle of complementarity, needs a jurisdictional shift from the ICC to domestic courts when dealing with the serious violations against humanitarian law[32], as defined in the provisions of the Rome Statute [33]. For example, Finland has transformed those provisions into Penal Code provisions[34], and in one case a person has been charged for participation in genocide in Rwanda and found guilty and sentenced by the Helsinki Court of Appeal[35].

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[30] See generally Sakari Melander, 'The Differentiated Structure of Contemporary Criminal Law' in Kimmo Nuotio (ed.), *Festschrift in Honour of Raimo Lahti* (Forum Iuris, Helsinki 2007), 189–206.

[31] See especially W. Schomburg, 'The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights' 8 *Northwestern Journal of International Human Rights* (2009), 1–29.

[32] See M. S. Ellis, 'International Justice and the Rule of Law: Strengthening the ICC through Domestic Prosecutions' 1 *Hague Journal on the Rule of Law* (2009), 79–86.

[33] See UN Doc A/Conf. 183/9, 17 July 1998.

[34] See Chapter 11 of the Penal Code, amendment made in 2008 (212/2008).

[35] Judgment of the Helsinki Court of Appeal, *Prosecutor v. François Bazaramba*, 30 March 2012 (R 10/2555). In more detail, see Minna Kimpimäki, 'Genocide in Rwanda – Is It Really Finland's Concern?' 11 *International Criminal Law Review* (2011), 155–176.

One of the challenging questions to comparative criminal scientists is: to what extent can we speak about common legal positions in respect of the general part of criminal law, the common legal principles and concepts? The general principles and concepts of criminal law have been developed since the nineteenth century primarily by the doctrines and practices of national criminal law and national criminal justice systems. Such concepts and principles have been mainly developed within two legal cultures, under either civil law or the common law tradition, and have therefore largely differentiated. It is certainly a cumbersome way to a common general part of European criminal law or harmonized general parts of national criminal laws.[36] For instance, the Hungarian scholar *Norbert Kis* demonstrated this difficulty by his analysis on the principle of culpability.[37] Although there is a common ground for the doctrines of intent in the Nordic countries, a unified 'Dolus nordicus' is missing even in this sub-region of Europe where the countries have common legal traditions.[38] An outstanding comparative research project of the Max Planck Institute for Foreign and International Criminal law for creating a universal meta structure for criminal law ('universale Metastruktur des Strafrechts') is an ambitious endeavour to develop international criminal law doctrines.[39]

The diversification of certain areas of criminal law – typically Europeanised economic criminal law and internationalised humanitarian law – is reflected in the pluralism of general legal doctrines. Therefore, there is a need for developing a more dynamic conceptual and system thinking in order to control many parallel legal regulations and the diversity of the regulated phenomena.[40] For instance, there are cogent criminal-policy reasons for a certain differentiation of traditional concepts and principles of criminal law in order to take into account the nature of macro-criminality and so-called organisational crimes.

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[36] See especially Kai Ambos, 'Is the Development of a Common Substantive Criminal Law for Europe Possible?' 12 *Maastricht Journal of European and Comparative Law* (2005), 173–191; André Klip (ed.), *Substantive Criminal Law of the European Union* (Maklu 2011).

[37] Norbert Kis, 'The Principle of Culpability in European Criminal Law Systems' in Miklós Hollán (ed.), *Towards More Harmonised Criminal Law in the European Union* (Hungarian Academy of Sciences, Budapest 2004), 107–117.

[38] See Jussi Matikkala, 'Nordic Intent' in *Festschrift in Honour of Raimo Lahti*, *supra* note 27, 221–234.

[39] See the first publications of the projects: Ulrich Sieber & Karin Cornils (Hrsg.), *Nationales Strafrecht in rechtsvergleichender Darstellung. Allgemeiner Teil 1–3* (Duncker & Humblot 2008–2009). See also George P. Fletcher, *The Grammar of Criminal Law, American, Comparative, and International, Vol. I* (Oxford University Press 2007).

[40] In more detail, see Raimo Lahti, 'Towards Harmonization of the General Principles of International Criminal Law' in *International Criminal Law: Quo Vadis?* (Association Internationale de Droit Pénal, érès, 2004), 345–351.

Nevertheless, there are limits to this differentiation, because the utilitarian (effectiveness) aims must be balanced with the considerations of fundamental rights and freedoms of the accused persons.

6 CONCLUDING REMARKS: SCANDINAVIAN CRITICISM IN RELATION TO THE UNIFICATION OF EUROPEAN CRIMINAL POLICY – IN FAVOUR OF 'UNITED IN DIVERSITY'

In Scandinavian criticism of the unification of European criminal policy, the main arguments have concentrated on the concern that the basic values of the 'Nordic model' would then be endangered.[41] The Finnish scholar *Kimmo Nuotio* has described the future of criminal justice for Europe with the formula 'united in diversity'[42]. There should be enough space for national criminal policy. It is necessary also therefore that the "fundamental aspects" of the national criminal justice system (see TFEU 83(3)) can be recognised and taken into account.

In the Scandinavian thinking, for example, the role of crime prevention is particularly emphasised; specific criteria of rationality in criminal policy such as legitimacy and humaneness are applied; and the level of repression in criminal sanctions is relatively low. Especially the EU criterion of dissuasiveness is criticised for its strong connotation with deterrence (negative general prevention) and high level of punitiveness and repression. It is, however, a positive sign that according to a recent EU planning document (Commission Communication *Towards an EU Criminal Policy*) necessity and proportionality are underlined as guiding principles in criminal policy and that clear factual evidence ought to be required for the policy-making[43].

It is true that the demand for more effective sanctioning and penal provisions is evident as to transnational organized or financial crimes, when the

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[41] See generally Raimo Lahti, 'Towards a principled European criminal policy: some lessons from the Nordic countries' in Joanna Beata Banach-Gutierrez and Christopher Harding (eds.), *EU Criminal Law and Policy. Values, Principles and Methods* (Routledge 2016), 56–69.

[42] Kimmo Nuotio, 'On the Significance of Criminal Justice for a Europe 'United in Diversity'' in Kimmo Nuotio (ed.), *Europe in Search of 'Meaning and Purpose'* (Forum Iuris 2004), 171–210.

[43] COM(2011)573 final. In the proposal for Council Regulation on the establishment of the European Public Prosecutor's Office for the fight against fraud to the EU's financial interests by means of criminal law, the legal basis is determined by relevant Treaty provisions (including the principles of subsidiarity and proportionality); see COM(2013) 534 final.

financial interests of the whole EU are in danger or when there are particularly strong common interests of the Member States to combat serious trans-border crime.[44] One individual task could be formulating consistent criteria for the choice of criminal and (punitive) administrative sanctions, when many EU Member States like Finland and other Nordic countries are so far missing a comprehensive system of administrative sanctions.[45]

Nevertheless, there is among scholars a fear about net-widening effects; this trend towards increased repression may affect the whole criminal justice system. More theoretical discussion and empirical research on trans-border crime, transitional crime control and EU criminal law is needed in order to carry out an evidence-based as well as a coherent and consistent European criminal policy.

According to critics, the principles of subsidiarity and proportionality should be strongly emphasized in criminal policy. The demand for legitimacy is particularly strong as to criminal justice systems; so cultural and national traditions should be taken seriously into account. At a regional, European level such legitimacy is difficult to achieve. In order to increase acceptability of and confidence in European institutions (primarily in the EU), there should be general awareness of common European values (as now captured by the concept of the Area of Freedom, Security and Justice). Deficiencies in the decision-making processes and their transparency should also be removed (the idea of citizens' Europe and the sufficient and equal freedom of action of Member States should be combined). And finally, the commitment to the observance of human rights and fundamental freedoms ought to be strengthened.

For Finland and other Nordic countries, it may be challenging to promote a better understanding and inclusion of the goals and values of these welfare societies and their criminal policy in the decision-making bodies of the EU. For instance, how the trust in justice as a means for effective cross-border cooperation in penal matters could be furthered[46]. Some preliminary considerations can already be read in the Commission's Communication (above): a fair balancing between the effective enforcement and a solid protection of fundamental

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[44] As to the effectiveness of EU criminal law, see especially a special edition of New Journal of European Criminal Law, Vol. 5/2014/03/Special edition, edited by Annika Suominen and Sakari Melander.

[45] As to the situation in Finland, see Raimo Lahti & Miikka Rainiala, 'Alternative Investigation and Sanctioning Systems for Corporate and Corporate-Related Crime in Finland' 90 *Revue Internationale de Droit Pénal* (2019), 5–37.

[46] See generally, e.g., Annika Suominen, 'The Characteristics of Nordic Criminal Law in the Setting of EU Criminal Law'. 1 *European Criminal Law Review* (2011), 170–187 and Karri Tolttila, 'The Nordic Arrest Warrant: What Makes for Even Higher Mutual Trust?' 2 *New Journal of European Criminal Law* (2011), 368–377.

rights; a focus on the needs of EU citizens and the requirements of an EU Area of Freedom, Security and Justice, while fully respecting subsidiarity and the last-resort-character of criminal law[47].

[47] See also the special issue on *Trust on Justice* of European Journal of Criminology, Vol. 8, No. 4, July 2011, edited by Mike Hough, Elina Ruuskanen and Anniina Jokinen.

VII.
Criminal Law and Bioethics

28. Criminal Law and Modern Bio-Medical Techniques. General Report*

1 INTRODUCTION

1.1. In the preparation of this general report, I have had at my disposal national reports from 29 countries. I have also had at my disposal the report on the Conférence Inter-Arabe (Le Caire 14–17 Mars 1987).

1.2. This general report is an amended version of the draft report that I presented at the preparatory colloquium in Freiburg/Breisgau in September 1987. To a large extent, I have retained the structure and approach of the draft report. It is not the intention of my report to analyze in depth the differences between countries in issues of detail, but instead to provide a general view, on the basis of the national reports, of the central problems connected with the topic. An annex to the report contains, in the form of theses, my positions on the separate issues. I prepared these theses in order to facilitate the discussions at the preparatory colloquium and simplify the preparation of the resolutions.

A separate report has been prepared on the discussions at the preparatory colloquium. Together with this general report, it will aid the reader in understanding the substance of the resolutions which were adopted at the colloquium.

1.3. The following general report does not follow the outline and list of questions presented in the commentary given to the national rapporteurs. This is because not many national reports precisely followed the commentary outline. It also turned out that the significance of individual problems and the means of regulating these problems vary considerably from one country to the next.

1.4. As we are dealing with a theme on the agenda of the International Association of Penal Law, it is natural that, in doing so, we should pay special attention to the role and significance of *criminal law*. In other words, we should

* Original source: *Revue Internationale de Droit Pénal* 59:3–4, 1988, pp. 603–628.

consider the relation between criminal law and the use of (modern) bio-medical techniques. However, a review of the national reports demonstrates quite clearly how necessary it is to deal with *other types of regulation* and with the *phenomena themselves*, with bio-medical techniques and in particular with the problems raised thereby. Without first doing so, it would be impossible to assess, in a meaningful manner, the need for regulation designed to solve these problems as well as the forms that such regulation would take.

2 COMMENTS ON PROBLEMS ARISING FROM DEVELOPMENTS IN MEDICINE, BIOSCIENCE, MEDICAL TECHNOLOGY AND BIOTECHNOLOGY, AS WELL AS PROPOSED SOLUTIONS TO THESE PROBLEMS

2.1. The national reports agree that recent revolutionary developments in medicine, bioscience, medical technology and biotechnology have led to new ethical, legal and social problems that cannot be dealt with satisfactorily by traditional ethical and legal norms and methods of regulation. Nevertheless, individual problems and their significance vary considerably from one country to the next, and the degree to which the problems are pressing is felt in different ways.

On the one hand, scientific and technological achievements and their utilization vary from one state to the next in accordance with societal development, the level of general welfare and health care, and the volume of research and development activity in the state in question. On the other hand, basic religious, ethical and legal principles are dependent on the societal and cultural development within each state and have been shaped differently, and these principles lead to the consideration of different approaches to the regulation and control of modern bio-medical techniques.

2.2. In particular the development of biotechnology significantly affects the development of humanity in ways other than through applications immediately directed at *human beings*. However, the theme was limited to problems connected with such immediate applications, and to deal with new problems involved in the relation between medicine and law. Traditional principles governing the responsibility of the physician and sanctions directed at health care personnel are no longer adequate. To an increasing degree, emerging regulations must include the *responsibility of the researcher*.

2.3. It is apparent from the national reports that in general, the tendency has been to be quite *cautious in increasing the use of legal regulation* as a means for dealing with new problems. It is sensible to see the development of medicine and biology as part of general scientific and technological advancement. According to a general sociological hypothesis, legislation or legal regulation can not maintain pace with scientific and technical (or even societal) development. In the light of comparative law, it would appear that this hypothesis of a *lag* in (legal) culture would apply also to the modern applications derived from biomedicine and biotechnology, thus justifying caution in the development of legal restraints.

2.4. Historically, medical activity has been a sector that has been the focus of little legal regulation. It was considered enough that the relationship between patient and physician was regulated by professional ethics based on the Hippocratic Oath dating from the fifth century B.C. The principles presented in the Hippocratic Oath, the good of the patient and the need to refrain from injurious action, together with virtuous nursing, have been the core principles in medical ethics up to the present century.

In regard to the above, it is only recently that emphasis has been given to ethical guidelines for physicians on the integrity and right of patient self-determination. This decisive change in principle took place after the Second World War. In connection with the Nuremberg trials, the socalled Nuremberg Code was issued, in which the consent of the subject was established as a precondition for the morality of medical experimentation on humans. Since then, the requirement of consent has gradually expanded to the area of medical treatment. Especially since the 1970s, it has become more common to emphasize the *rights of patients and the subjects of medical experiments* in guidelines on medical ethics.[1]

For example in 1985 the committee of Ministers of the Council of Europe approved a Recommendation on the Legal Duties of Doctors vis-à-vis their Patients, in which Member States were exhorted to take the necessary measures to ensure that their national requirements conformed to rules appended to that recommendation, and that there be provision within their legal systems for the effective enforcement of those duties.[2]

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[1] See, i.a., Ruth R. Raden and Tom L. Beauchamp, *A History and Theory of Informed Consent*, 1986.

[2] Recommendation R(85) 3.

2.5. Such a development towards the strengthening of the rights of patients and the subjects of medical experiments is, in turn, a consequence of the development of medicine and the biosciences, as is noted for example in the explanatory memorandum to the Council of Europe recommendation just cited. It should also be noted that since the conference on human rights held by the United Nations in Teheran in 1968, the questions of human rights raised by scientific and technological development have been a constant topic of international discussion.

A report issued by the United Nations in 1982 deals, inter alia, with the balance which should be established between scientific and technological progress and the intellectual, spiritual, cultural and moral advancement of humanity.[3]

According to the proclamation adopted by an international meeting of experts on this topic in 1975, certain specific scientific and technological advances do pose *risks to individual human rights*, the welfare of society or the global condition of mankind.[4] The report reviewed the development also in fields of science other than biology and medicine; however, one chapter dealt specifically with the increased need arising from advances in these fields of science for the protection of the human personality and its physical and intellectual integrity.

2.6. Awareness of problems is a prerequisite to seeking adequate means for solving them. Such means can be developed on either an international or a national level. At the moment, however, the focus is on legislative action at the national level, as effective implementation (even of internationally binding conventions) calls for an effective legal means of enforcement within each country concerned.

M. Cherif Bassiouni has differentiated between the stages through which human rights evolve in accordance with the degree to which the right has attained *international acceptance*: he lists the enunciative, declarative, prescriptive, enforcement and criminalization stages.[5] *New problems* of human rights raised by recent developments in medical science and technology appear to be at the enunciative or declarative stage. This means that we are either at the stage where we are creating "internationally perceived shared values through intellectual and social processes" or we are declaring "certain identified hu-

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[3] *Human Rights and Scientific and Technological Developments*. Department of Public Information. United Nations, New York 1982.

[4] *Ibid*. (note 3), p. 76.

[5] Bassiouni, The Proscribing Function of International Criminal law in the Processes of International Protection of Human Rights, in: *Festschrift für Hans-Heinrich Jescheck*, 1985, pp. 1453–1475 (1455).

man interests or rights in international documents". In this regard, the furthest developed plans for internationally binding solutions exist for the protection of genetic integrity and for the prevention of unlawful human experimentation (*cf*. below). It is also important to recall that already existing and internationally binding agreements such as the International Covenant on Civil and Political Rights can be reinterpreted to a certain extent, so as to include the new problems in human rights (see also Article 7 of this Covenant which establishes the requirement of the free consent of a subject of experimentation).

To an increasing extent, and in order to take into consideration the problems of human rights arising from the development in medical science and technology, the growing demands for a strengthening of the rights of patients and the subjects of medical experiments have apparently received more acceptance on the *national level*. Many countries have either already carried out legislative reforms or are preparing such reforms.

2.7. Several national reports draw attention to the importance of seeking as *uniform regulation* as possible so that there would not be room for example for so-called "genetic niches". Modern bio-medical technology and the problems it brings are transnational. This is due in part to the increasing interdependence of nations on one another. However, uniformity of regulations is not sufficient in all respects. To follow the stages outlined by Bassiouni, we must also seek internationally *binding* regulations (*cf*. below).

2.8. The differentiation presented by Bassiouni is of analogical interest also when we consider the development of *national law* and its enforcement. Before it is possible to begin to create new judicial remedies or control mechanisms in a legal system, the society in question must have reached sufficient agreement on the importance of the values and interests to be protected by the new means. Furthermore, one must consider what type of protection the already existing legal system offers, and what means of regulation would be preferable in promoting new values and interests. Also when developing judicial remedies on the national level, criminalization should be considered a last resort.

2.9. The discussion in the following sections will begin with a *general review* of the (new) *values* and interests brought to the fore by modern bio-medical technology and then go on to (new) *means* of regulation needed to protect them. Special attention shall be paid to the significance of criminal law in the totality of means of regulation. Next, the discussion will deal with the *special questions* that are connected with each separate entity to be found in this field:

– human experimentation;
– the transplantation of organs and tissues of human origin;
– human artificial procreation;
– interference with embryos and foetuses;
– interference with genetic inheritance; and
– genetic analysis and selection.

It is clear that a general review will remain quite superficial, as it will not be until the individual special questions are brought together that we will have a sufficiently clear image of the need for the development of regulation.

3 GENERAL COMMENTS ON THE VALUES AND INTERESTS TO BE PROTECTED AS A RESULT OF THE DEVELOPMENT OF MODERN BIOMEDICAL TECHNOLOGY

3.1. The development described in brief in the foregoing (section 2.4) led to an emphasis on the consideration of the *integrity* and *right of self-determination* of patients and subjects of experimentation in all bio-medical activity directed at them, no matter whether this is purely therapeutic, purely experimental or treatment that falls midway between those two extremes. Human rights norms, for example the provisions in the International Covenant on Civil and Political Rights, recognize these rights among others. These norms, as is the case with the Universal Declaration of Human Rights, emphasize the fundamental importance of the respect of *human dignity*.

These rights have generally found expression also in the constitutions of various countries, and they are backed up by criminalizations. After all, life, personal integrity and liberty belong to the legal values that have traditionally been protected by criminal law. The penal provisions to be found in criminal law always provide the strongest expression of what values and interests are considered important in society.

When it is a question of "ordinary" therapeutic medical treatment that is at odds with physical integrity, there are considerable differences between legal systems in respect of the prerequisites for the application of the general penal provisions on life or personal integrity.

The immediate significance of provisions of criminal law protecting life or physical integrity is greater when we consider forms of medical treatment other than those carried out for the benefit of (i.e. in treating) the patient in question; an example is human experimentation. The development of modern

bio-medical technology has revealed the inadequacy of classical rights and traditional values protected by criminal law.

3.2. *The protection of human life or health before birth* is particularly inadequately addressed as, for example, with human experimentation on embryos. It is apparent from the national reports that the protection provided by the laws in force is, in this respect, quite fragmentary in the different countries. In reforming law, attention must be paid to the extent to which attempts should be made to protect the life or physical integrity of a *potential* person through judicial remedies. Similarly, one must take a position on whether or not legal provisions should specifically seek to protect human *genetic* integrity.

The rights and values just mentioned are not the only ones that should be considered. Among others the right to privacy (confidentiality), the prohibition of discrimination as well as environmental protection and the institutional protection of marriage and family may set bounds to the use of, or prohibition of certain bio-medical techniques (see, e.g., the constitutional discussion in *Koenig*, USA).

3.3. On the other hand, the *freedom of research* is a value that is secured in some countries also on the constitutional level, as is the case in Brazil, the Federal Republic of Germany, Greece, Hungary and Italy. The freedom of research, in turn, furthers some collective goals for the future benefit of society. The need for regulation is, of course, due to the fact that the freedom of research does not necessarily only lead to positive effects from the point of view of society (for example, it does not always further goals in health care); instead, modern medicine and technology may also have negative side-effects, not only from the point of view of the rights of individuals but also from the point of view of the collective goals of society.

As a consequence of the above one must compare and fit together quite different rights, values and interests in considering how modern biotechnology should be regulated. The difficulty of such a balance is reflected in the choice of means: apparently what is needed is a selection of means that is *more differentiated* than normally.

3.4 The assessment of the balance referred to above may be eased or at least clarified by the use of distinctions and principles of argumentation borrowed from *moral philosophy*. Of the national reporters, in particular *Mantovani* (Italy) has dealt with concepts of man that are so influenced: “la conception

utilitariste de l'homme et la conception personaliste de l'homme".[6]

A corresponding distinction can be made among the principles that may form the basis of ethical thinking according to whether they are teleological (utilitarian) or deontological.[7] If this distinction is tied to the above, the collective goals that are furthered by freedom of research accord with utilitarian thinking, and human rights are values that accord with deontological ethics.

4 GENERAL COMMENTS ON THE MEANS FOR REGULATING MODERN BIO-MEDICAL TECHNOLOGY

4.1. Many national reports deal with various aspects of the above issue. The analysis is understandably oriented towards legal policy and criminal policy. Many reports also contain elements of the philosophy of law; after all, in considering alternative means of regulation one must define interdisciplinary boundaries between law and morals.

For example *Shapira* (Israel) has presented two significant points of departure for an analysis of means of regulation. Because of the fact that "certain novel bio-medical technologies are often the object of acute ethical controversy, the precise nature of the optimal mechanism of legal control if any (!) ought to be scrutinized with utmost caution". Secondly, "in devising a system of normative regulation, one must bear in mind all pertinent rights and interests of the groups and individuals involved".

To a very large extent, the national reports have adopted a careful position (following similar points of departure as just quoted) in relation to the adoption of new legal means of regulation, and in particular to new means of regulation under criminal law. Of course, there are different nuances in the justification presented for this, and there are differences in the positions on individual issues. Apparently, the ideas of many rapporteurs are reflected in the following statement by *Baudouin* (Canada): "The real problem with new medical technologies is probably … the delineation for the scientific community of *what should be permitted and what should not be permitted*, and the *setting up of the conditions* under which certain acts can validly be performed" (emphasis added here).

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[6] Mantovani notes that the Italian Constitution is based on a personal concept of man.

[7] See, i.a., Tom L. Beauchamp and James F. Childress, *Principles of Medical Ethics*, 2nd ed. 1983.

4.2. In considering alternatives in regulation and control, one fundamental question is the extent to which one believes that *"soft" measures* will be enough, in other words the extent to which one believes that a society may manage on the basis of measures directed towards the maintenance of high professional *ethics* through the development of ethical norms and the machinery for their implementation. However, it should be noted that control through professional ethics is not sharply opposed to legal regulation – for the following reasons.

First of all, ethical and legal norms stand in a reciprocal relationship. Even if special legal provisions have not been given on certain forms of medical treatment, the general principles of liability and sanctions that can be derived from the totality of the legal system in force (civil, administrative and criminal law) apply also to such activity. It is true that there may be legal uncertainty regarding the contents of these principles and there may be gaps, but even then medical activity or the use of modern biotechnology does not exist in a complete legal vacuum (see, e.g., *Mémeteau*, France). On the other hand, specifically in the cases where one essentially relies on the general principles of legal responsibility, these principles are basically formed by the corresponding rules of medical and research ethics.

Secondly, on the basis of the national reports one can see a development in different countries towards a clarification of the legal status of local and national commissions and other bodies established for the consideration of medical and/or research ethics, and they have been given certain statutory supervisory duties. In addition, there is a tendency to improve the working conditions of these ethical commissions in many ways. Also, these bodies are trying to make the practice more uniform by issuing general sets of ethical norms in the different sectors of medical activity and research.

4.3. As for the development of *legal mechanisms* in particular, it can be deduced on the basis of the national reports that quite different official systems of supervision have been set up for overseeing medical and health care personnel. These systems of supervision are affected for example by the proportional size of the public sector and the private health care sector in the society in question. Accordingly, the relationship between the patient and the physician may tend towards private law (the contractual nature of the relationship is emphasized) or towards public law (emphasis is given to the nature of the act of taking into care as an administrative decision). The legal mechanisms available to the patient may tend, correspondingly, either towards private law or public law. In particular in those countries where public health care has a significant

role, the supervision is largely taken care of through administrative channels, through disciplinary measures, or through a restriction of the right to engage in the profession (this is the case, for example, in the Nordic countries).

Similarly, in developing means of assigning legal responsibility, the emphasis may be given either to the reparative or the repressive function. For example, a special system of no-fault compensation to patients on the basis of mandatory insurance was adopted in Sweden in 1975, and in Finland in 1987. Under this system, patients and the subjects of experiments are guaranteed compensation on a par with the law of damages for personal injury connected with treatment or experiments or the effect of medicine; the costs of the insurance are borne by those potentially liable for the injury (in practice public authorities responsible for public health care). The immediate significance of criminal law, for example when measured by the number of criminal trials, is small in these countries in regard to the supervision directed at health care personnel.

In addition, the historical background of the country in question may influence the significance of criminal law in the health care sector. For example, it appears that in the Federal Republic of Germany, more importance than usual is attached to the development of criminal law so that it meets the challenges posed by modern bio-medical technology.

5 SPECIAL COMMENTS ON THE ROLE OF CRIMINAL LAW

5.1. The problem of assigning criminal liability to the physician has received little attention in the national reports, although for example the reports concerning Canada, Israel, the Netherlands, Nigeria and Sweden contain a good review of existing law on this issue in each of those countries.[8] As has already been observed, in many reports the approach is directed towards criminal policy in general or administrative or other legal policy.

In considering when criminalization is called for, the general conditions of rationality placed on the application of criminal law should be analyzed, especially the principles that establish limits on the use of criminal law. The widest known such principles were originally presented by *Bentham*: The criminal law

[8] Baudouin's report mentions an interesting provision, section 45 of the Canadian Criminal Code. This states that "legal justification is provided for medical and surgical procedures, if they are performed with reasonable skill and care, for the benefit of the person and if, having regard to the state of health of the patient at the time they are performed, and all the circumstances of the case, it was reasonable to do so".

should not be used to penalize behaviour which does no harm; the criminal law should not be used to achieve a purpose which can be achieved as effectively at less cost in suffering; the criminal law should not be used if the harm done by the penalty is greater than the harm done by the offence.[9]

By adapting Bentham with some modifications, we can demand that criminalization and penal measures must be the last resort (*ultima ratio*). Firstly, we should be fully convinced of the harmfulness and blameworthiness of the acts to be punished (*Strafwürdigkeit*); secondly, the penal measures should prove to be necessary in a cost-benefit (efficiency) comparison of different means of regulation (*Strafbedürftigkeit, Straftauglichkeit*).[10]

The views of criminalization and the application of criminal law are determined, of course, to a large extent by the observer's position on moral philosophy and criminal policy. Argumentation may tend either more towards goal rationality (*Zweckrationalismus*) or more towards value rationality (*Wertrationalismus*) in accordance with what significance is given to utilitarian goals (such as the preventive effects of criminal law) and what significance is given to values that emphasize the rights of individuals and the principles of justice and humanity.

5.2. In general, the national reports have strongly emphasized the *subsidiarity of criminal law*, and the requirement has been voiced that decisions on criminalization should be based on a *precise and nuanced assessment of the arguments* speaking for and against the use of criminal law. There is a negative attitude towards the idea of "the anticipated protection by criminal law" (this was explicitly noted by *Schick*, Austria).

This criticism of the applicability of criminal law may reflect the observer's view on the preconditions for criminalization. For example by specifically defining the function of criminal law to be the demonstration of the moral wrongfulness of the conduct *and* by emphasizing the declaratory function of criminal law (the assertion of the limits of society's tolerance), the result may be a particularly narrow view of the role of criminal law in biomedicine (see, for example, *Thomson*, Australia).

Indeed, one issue is whether or not the symbolic function of criminal law

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[9] In regard to these principles and further refinements, see Nigel Walker, *Punishment, Danger and Stigma*, 1980, ch. 1.

[10] See, e.g., Albin Eser, Strafrechtliche Schutzaspekte im Bereich der Humangenetik, in: Braun/Mieth/Steigleder (Hrsg.), *Gentechnologie. Ethische und rechtliche Fragen der Gentechnologie und der Reproduktionsmedizin* 1987, pp. 120–149 (123–126). Regarding the national reports, see, e.g., da Costa Andrade (Portugal).

in reinforcing morality can be sufficient justification for its use, without the presence of utilitarian grounds for criminalization. Of course, a difference of opinion may also apply to the definition of "harm" or to the assessment of whether the threat of punishment is a suitable and effective means of control. In a discussion directed at rationality, it is at least in principle easier to agree on these latter factors.

Smith (Great Britain) emphasized the importance of distinguishing between the regulatory and condemnatory functions of (criminal) law. "If the law should be used at all, it should simply establish a regulatory framework, setting up a licensing authority to supervise work in this area." In this, the (criminal) sanctions that would be available would be of a regulatory kind.

In this respect, one may note that the field of values and interests to be protected by criminalization has expanded and, at the same time, become less distinct. Certain acts which cause negative effects to individual or collective interests are not directly criminalized; instead, for example, certain activity may be allowed under certain conditions, while the criminalization is directed at a failure to give reports, obtain a licence or undertake certain measures. Such development is typical of economic and business criminal law. On the basis of the national reports, it would appear that the area of emphasis tends to be the same in connection with the regulation of medical activity and modern biotechnology by criminal law if criminal law is invoked at all.

5.3. It should be noted that for example many criminal justice systems in Europe distinguish between criminal law and administrative penal measures (droit administratif-pénal; Ordnungswidrigkeitensystem). The regulatory function of law referred to above is apparently best satisfied by measures under administrative (penal) law.

In assessing the applicability of criminal law as a means of control, one must also recall that it need not be limited to the criminalization of acts causing certain injurious results; also behaviour that incurs the risk of injury may be criminalized. As a result specifically of problems arising from the development in science and technology, criminalization constructed on the basis of the causing of concrete, abstract or even presumed *danger* has been created in many fields of law. For example Mantovani (Italy) has considered, in his report, the possibilities that a "new preventive criminal law" (nouveau droit pénal de prévention) would offer in the regulation of the new bio-medical technology. In the national reports of *Künsemüller* (Chile) and *Horváth/Györgyi* (Hungary) there are interesting references to endangerment offences defined in the Criminal Codes of these countries.

6 HUMAN EXPERIMENTATION (INCLUDING DRUG CONTROL)

6.1. This subject was dealt with in some of the national reports only. The inclusion of human experimentation as one of the subthemes can be justified in part by historical reasons (the Nuremberg Code). Furthermore, the principles applicable to research with human subjects form the basis, or at least an important point of comparison, when developing rules applying to research with human embryos and genetic research.

The *Nuremberg Code* grew out of the trial rather than preceding it, and it was based on what were said by the judges to be the ethical standards accepted among bio-medical scientists.[11] The background to the development of the Code establishes it as a phenomenon belonging within the sphere of international criminal law. In particular as a result of the efforts of Professor Bassiouni, there is an ongoing project directed at the approval of a Convention on the Prevention and Suppression of Unlawful Human Experimentation.[12]

6.2. Later on, other international instruments developed on the basis of the Nuremberg Code. Perhaps the most significant of these is the "*Declaration of Helsinki*" adopted by the World Medical Assembly in Helsinki, 1964 and revised in Tokyo, 1975. Another instrument calling for special attention is the "Proposed International Guidelines for Biomedical Research Involving Human Subjects", a joint project of the World Health Organization and the Council for International Organizations of Medical Sciences, 1982.

It can be deduced on the basis of the national reports that ethical guidelines drafted specifically along the lines of the Declaration of Helsinki have been adopted widely in different countries, although in many countries they exist in the form of guidelines or regulations drafted in a uniform manner by a national body. However, it is not always easy to deduce in detail on the basis of the reports whether it is a question solely of internal self-regulation by a profession or whether, in addition, administrative (legal) regulation is involved, (i.e.: regulation that establishes requirements for notification, records or licences in experimental activity), and whether these requirements are backed up by administrative sanctions.

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[11] See, e.g., A. M. Capron, Research Ethics and the Law, in: Berg/Tranøy (Eds.), *Research Ethics*, 1983, pp. 13–23 (15).

[12] See: Le contrôle de l'expérimentation sur l'homme, *Revue Internationale de Droit Pénal*, 3e et 4e trimestres 1980.

There are very few countries where human experimentation is the subject of *special legal regulation*. Subsequent to a 1985 amendment to its Criminal Code, Poland is one of the rare exceptions in this respect (see *Buchała/Kubicki*). A feature that is also of special interest in the Polish amendment is that it includes provisions on the substantive conditions for acceptable human experimentation, in other words on the grounds justifying such activity. An approach that is considerably more common than this is through legislative regulation of experiments involving *drugs*, often in the form of drug laws (e.g., Belgium, the Federal Republic of Germany, Italy, Japan, Poland, South Africa and Sweden). Legal regulations of both types of experimental activity exist not only in Poland, but also in Hungary, Israel and the United States of America.

The fact that research on human subjects is not separately regulated by the law of very many countries does not, of course, mean that legal protection is entirely absent (see section 4, above). For example, judicial remedies designed for the protection of physical integrity or freedom may be available.

6.3. The core principle approved in the Nuremberg Code requires the voluntary *consent* of the human subject. This principle remains an important one, and it has received expression also in Article 7 of the International Covenant of Civil and Political Rights. However, the demand for the consent of the human subject is not expressed in as unconditional a form in the Declaration of Helsinki as it was in the Nuremberg Code.

Indeed, there is reason to clarify the legal position of the contents of the principles of consent. In this, particular attention must be paid to the position of human subjects who, because of their age or mental state, are not themselves capable of giving valid consent to the action, or for whom the independence of their decision-making is threatened.

6.4. Another important prerequisite for acceptable human experimentation is the demand that the interests and *welfare of the human subject* remain primary in medical research, and that inherent risks of research shall be in proportion to the anticipated benefits to the subject or to others. The amendment to the Polish Criminal Code approved in 1985 is even more detailed in the conditions for acceptable human experimentation (Buchała/Kubicki).

6.5. Among the innovations adopted in the Declaration of Helsinki is the *distinction* made between principles applying to clinical research (that is, medical research combined with professional care) and non-clinical research (non-therapeutic bio-medical research). It is important to emphasize that the traditional

ethical guidelines based on the physician/patient relationship or supervision directed towards health care personnel, are not enough. New legal mechanisms are needed specifically to control non-therapeutic bio-medical research.

6.6. A second important innovation of the Declaration of Helsinki is the demand for the preparation of a research plan and the submission of such a plan to an *ethical commission*. The system of ethical commissions has developed along different lines in the various countries. Apparently, however, the legal status and jurisdiction of these ethical commissions are unclear in many countries and call for clarification. In regulating the position of these commissions, care should be taken that they are independent and unbiased in their review of research plans and that they represent many fields of expertise.

6.7. Some national reports deal with the regulation of medicines other than solely in connection with clinical tests of medicines (for example, with their registration or with licences for marketing them). Thomson (Australia) and Koenig (USA) note that the general regulations on medicines also apply to products that are produced by genetic engineering.

6.8. In my draft recommendations, I have enclosed provisions not only on the above points, but also to the effect that every subject participating in medical research should be entitled to reasonable and expeditious *compensation* for any injury sustained as a result of participation. A special no-fault compensation system to this effect has already been implemented in, e.g., Finland and Sweden.

I also recommend that the handling of the above-mentioned *Draft Convention* on the Prevention and Suppression of Unlawful Human Experimentation in the proper international bodies should be accelerated.

7 TRANSPLANTATION OF ORGANS AND TISSUES OF HUMAN ORIGIN

7.1. In most of the countries covered by the national reports, *special provisions* have been given *on the legislative level* on the transplantation of organs or tissues. Transplantations of substances from deceased persons are more commonly covered by legislative provisions than are transplantations of substances from living persons. Quite recent laws on transplantation have been passed in the United States (1984), Finland (1985) and Belgium (1986).

The legislation in this sector in Europe has in part been made more uniform by the recommendation adopted by the Council of Ministers of the Council of Europe in 1978.[13] At the Inter-Arabian conference held in Cairo in March of 1987, which dealt with the present AIDP theme in a preparatory fashion, a resolution was passed dealing specifically with transplantations.[14]

7.2. The basic *attitude* that, among others, these last-mentioned recommendations have towards the transplantation of organs is a *favourable* one. A factor that has contributed in part to this favourable attitude is the encouraging results that have been obtained from such organ transplantation along with the development of medical technology. For example, kidney transplantations are today considered standard treatment for irreversible renal failure, and the "experimental treatment" label is disappearing also from certain other organ transplantations.

7.3. Organ transplantations involve ethical and legal problems similar to those involved in human experimentation, as dealt with above in section 6. Among these are, first of all, *respect for the donor's right of self-determination*, although when we are dealing with transplantations from deceased persons the question of consent takes on a different meaning. What should our attitude be towards transplantations from a deceased person when we do not know his or her explicit wish? Should the use of the organs of liveborn anencephalic babies be allowed? In what cases should the use of a dead embryo and foetus be permitted? Also, what should our attitude be towards transplantations from minors or other legally incapacitated individuals? Should living donors be used at all?

Secondly, we must consider the question of *equitable distribution of potential risks and benefits* connected with transplantations. For example, how should we limit transplantations of substances that cannot regenerate and transplantations presenting a foreseeable risk to the life or health of the donor? How should we ensure the right of the donor to compensation when the organ transplantation injures his or her health?

7.4. The draft recommendations that I have prepared contain a provision according to which the *death criteria* should be clarified aiming at internationally

[13] Resolution (78) 29 on Harmonization of Legislations of Member States Relating to Removal, Grafting and Transplantations of Human Substances.

[14] See also WHO: *Human Organ Transplantation*, No. EB 79/8, Geneva 1986.

agreed standards and practices. The basis for consideration of the matter, of course, is that the method of the determination of death affects the possibilities for the transplantation of organs. There is a quite noticeable international tendency to accept *brain death* as such a criterion.

7.5. Since the transplantation of organs is expensive and it is difficult to procure a sufficient number of organs, there is the danger of *commercialization* of the field. This should be resisted on ethical grounds.

8 HUMAN ARTIFICIAL PROCREATION

8.1. In most of the countries covered by the national reports, there has been or is currently in progress an *extensive reform of the regulations* applying to this area of reproductive medicine. The different pace of, and need for, regulations is apparently connected in part with the acceptability and utility of this medical technology, and in this respect are considerable differences between the countries.

For example the position of the *Vatican* on artificial procreation is extremely negative on religious and moral grounds, and in accordance with the doctrine advanced by the Vatican, restrictions are placed even on homologous artificial insemination.[15] The Islamic position is similar (Conférence Inter-Arabe, Le Caire, Mars 1987). States where the Catholic Church or Islam has a strong position in society (Italy is an example of the former and Egypt of the latter) are understandably more reserved in respect of the acceptability of reproductive medicine than are more secular countries. (Sec also *Agarwal* regarding India.)

8.2. In an international sense, considerable interest has been attached to the legislative projects already carried out in the field of artificial reproduction in two jurisdictions, *Victoria, Australia* (the Infertility [Medical Procedures] Act 1984) and *Great Britain* (the Surrogacy Arrangements Act 1985). In the present connection these acts are very significant in that they also contain penal provisions. Mention might also be made of the Human Tissue Act 65 of 1983 in South Africa.

It is apparent from the national reports that during the recent years also other legislation concerned with this sector has been passed in different countries,

[15] See: Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation, Vatican City 1987.

but this legislation has been considerably more oriented towards *family law* (for example the Belgian Act of 31 March 1987, the Family Law Reform Act 1987 in Great Britain and the Swedish Acts on Artificial Insemination 1985 and on In Vitro Fertilization 1988). Furthermore, one may note that in many countries provisions have been given on artificial procreation on a level below that of legislation (for example in Chile, Czechoslovakia, Hungary, Israel, the Netherlands and Portugal). In some countries, in turn, guidelines on this sector have been issued by authoritative ethical commissions (as is the case in Austria, France, Great Britain and Switzerland).

Similarly, extensive legislative *reform* is under way in many countries in the field of reproductive medicine. Special mention should be made of the *Federal Republic of Germany*, where reports have been issued by the Benda Commission and the Enquete Commission, and where the Ministry of Justice has produced a preliminary draft on embryo protection.[16] Among other recent legislative proposals, mention may be made of the Canadian report of the Law Reform Commission of Ontario (1985), the report of the Commission pour l'Encadrement Législatif des Nouvelles Technologies, in Portugal and the Finnish Draft Bill on the Techniques of Human Artificial Procreation (1988).[17] Mention might also be made of the draft recommendation on human artificial procreation by a committee in the Council of Europe (CAHBI; 1987).

8.3. *Artificial insemination by the husband* (AIH) is generally considered to be lacking problems from the ethical and legal point of view. The only significant controversy appears to be connected with the admissibility of post-mortal insemination. In this respect, the greatest need is for clarification of the legal status of the child in question.

In connection with this form of human artificial procreation (as with the other forms) one must, of course, require that the persons concerned have given their free informed *consent* to the procedures. It is another matter whether or not special penal provisions are needed to ensure such a right of self-determination (on such penal provisions, see article 214 of the Penal Code of Portugal and section 4 of the Diskussionsentwurf of the Federal Republic of Germany).

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[16] See: *In-vitro-Fertilisation, Genomanalyse und Gentherapie*, 1985, *Chancen und Risiken der Gentechnologie*, 1987, and *Diskussionsentwurf eines Gesetzes zum Schutz von Embryonen*, 1986. On these, see not only the report by Jung but also, for example, Albin Eser (note 10), pp. 120–149.

[17] See also, e.g., an international review of committee statements in the field of new reproductive technologies by LeRoy Walters, in: Biomedical Ethics: A Multinational View, *Hastings Center Report*, June 1987, pp. 3–9.

There is also reason to maintain as a principle applying to all types of human artificial procreation the following: Any act required by artificial procreation techniques should be performed *under the responsibility of a physician* and within establishments authorized by public authorities.

8.4. *The admissibility of in vitro fertilization by the husband* (IVF/H) is generally assessed in the same way as the corresponding homologous insemination. The extra corporal fertilization procedure, however, contains certain risks for the egg and embryo, risks that should be taken into consideration when regulating this procedure.

8.5. *Artificial insemination and in vitro fertilization by a donor* (AID-IVF/D) are more problematic than the medical procedures dealt with above. One can also regard donations of ova as more problematic than donations of sperm (*cf*., e.g., the reports of *Holmqvist*, Sweden, and *Hinderer*, the German Democratic Republic). In most countries these doubts do not mean that an attempt would be made to ensure the sanctity of marriage by prohibiting such procedures. It is a question above all of how the interest of the child will be properly taken into account.

In this, apparently the most important matter is the *strengthening of the status of the child* under family law. A second question that, according to the national reports, is subject to controversy is whether or not the child should have a right to know his or her genetic origin. If the answer to this is in the affirmative, one must decide what data is to be recorded and under what conditions the information will be provided as well as the sanctions involved. On the other hand, the search of the child's origin is forbidden for example in the family law of Yugoslavia (see *Šeparoviæ*).

The interests of the unborn child are also promoted by prohibiting the possibility that the semen used for the artificial insemination could be produced by more than one man (this is the case with section 26 of the Victoria Infertility Act). Restrictive provisions are apparently also needed to ensure that the semen of the same donor is not used for more than a certain, quite limited, number of successful fertilizations.

8.6. *Storage and donations of gametes and embryos* often lead to many problems calling for regulation. In respect of the donation of gametes, it would appear that the behaviour that is considered the most blameworthy, even to the point of calling for criminalization, is the deliberate giving of false or mislead-

ing information on one's genetic make-up (this is the case, for example, with section 27 of the Victoria Infertility Act).

Embryo donations – as is the case with other interferences with embryos – are in a different position than manipulations with gametes (see below). The complete prohibition of such transfers, however, does not appear to be the appropriate solution. According to some opinions, one should permit donations in order to avoid the death of left-over embryos of in vitro fertilization or an abortion. Apparently, the key question here is avoiding surplus fertilizations (see, for example, section 2 of the *Diskussionsentwurf* of the Federal Republic of Germany).

8.7. *Surrogate motherhood* is commonly seen to involve dangers to human dignity. It is seen to involve the use of a human being as an instrument and possibly as a subject of trade. Indeed, in general a negative position has been taken on surrogate motherhood, although there are differences in the details of the position of different countries and of different reporters.

It would appear that most commonly, all surrogacy agreements are regarded as unenforceable. Professional actions for the establishment of a surrogacy pregnancy have been forbidden in the Surrogacy Arrangements Act (Great Britain) and in the Victoria Infertility Act.

Even so, it has not proven an easy task to draw the limits for the use of criminalizations. Also in this connection we must remember the possibility of the development of remedies under private and administrative law as well as of ethical norms.

8.8. *Cryoconservation of embryos* is accepted only to limited extent and as a secondary measure in relation to the conservation of egg cells. The justification of cryoconservation is based on consideration of the interest of the woman concerned. However, it is generally required that the embryos are conserved only for a specified period, two or three years.

9 INTERFERENCE WITH (LIVING) EMBRYOS AND FOETUSES. ESPECIALLY RESEARCH ON EMBRYOS

9.1. This question has become a matter of interest on a general level because, for example, in 1986 the Parliamentary Assembly of the Council of Europe adopted rules governing the use of human embryos or foetuses and the removal

of their tissues for diagnostic and therapeutic purposes.[18] However, the discussions referred to in the different countries and also in the different national reports have related above all to research or experiments on *living* embryos.

9.2. It is precisely on the means of regulating *research or experiments on embryos* that the opinions appear to differ. The disagreements in principle on the role of criminal law are rendered concrete in connection with this question. The differences of opinion are directed for example at what the values and interests ultimately are that would be protected by a prohibition on research and experimentation on embryos, and whether all the conditions that rational criminal policy requires of the application of criminal law are met (see above, sections 4–5).

Even so, as *Jung* (Federal Republic of Germany) points out, positions have become somewhat clearer in this controversial issue: Firstly, it must be agreed that embryos should not be produced for the sake of experimentation; secondly, experiments for other than therapeutic reasons are ruled out; thirdly, the cultivation of these embryos will – if at all – only be allowed for a limited period of time.[19]

Among very recent legislative proposals, mention may be made of the British government report (1987) which leaves two alternatives on embryo research to a Parliament "free vote": a complete prohibition on such research, or "controlled" research on embryos up to fourteen days after fertilization (a recommendation previously made by the 1984 Warnock Report), carried out under the auspices of an independent Statutory Licensing Authority.[20]

It is apparent from the national reports that the traditional provisions in criminal law on the protection of life, health or the embryo are poorly – if at all – suited to a prohibition on research or experiments with embryos. For example, in many countries the protection that the embryo has under criminal law is not seen to begin until the moment of nidation, and the protection covers the embryos *in utero* only. – The Victoria Infertility Act (sec. 6.3–8) contains a penal provision prohibiting certain experimental procedures, as well as provisions closely connected to this. Similar penal provisions are proposed for the

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[18] Recommendation 1046 (1986).

[19] See also, e.g., Albin Eser, Forschung mit menschlichen Embryonen in rechtsvergleichender und rechtspolitischer Sicht, in: Günther/Keller (Hrsg.), *Fortpflanzungsmedizin und Humangenetik – Strafrechtliche Schranken?*, 1987, pp. 263–292.

[20] See: *Human Fertilisation and Embryology: A Framework for Legislation*, Department of Health and Social Security, London 1987.

Federal Republic of Germany (Diskussionsentwurf, sec. 23) and the Finnish Draft Bill on the Techniques of Human Artificial Procreation (sec. 34).

9.3. Due to the controversial nature of the issue, the attached proposed recommendations are quite general in this respect.

10 INTERFERENCE WITH GENETIC INHERITANCE. GENETIC ANALYSIS AND SELECTION

10.1. In general, the national reports contain quite fragmentary information on these issues. This can be considered evidence of the fact that these problems have not become as topical as those involved in, for example, reproductive medicine. In considering means for the regulation of these phenomena the question therefore arises of whether or not one should be quite cautious in any anticipation of the means of legal regulation, at least those of criminal law. On the other hand, there is a close connection between this and the preceding subtheme, because the interference with embryos often involves genetic manipulation.

10.2. In 1982 the Parliamentary Assembly of the Council of Europe adopted a recommendation on genetic engineering in which several measures both on the regional and on the national level were considered desirable.[21] According to this recommendation, for example, the *right to a genetic inheritance which has not been artificially interfered with* should be explicitly recognized.

Official proposals for legislative and other measures have been prepared in many European countries in the 1980's: the Federal Republic of Germany (Benda Commission, Enquete Commission, Diskussionsentwurf); France (Comité consultatif national d'éthique); Italy (Commission 1986); the Netherlands (the Broad DNA Commission); Portugal (Commission 1986) and Sweden (Committee 1984).

It may be mentioned that the Victoria Infertility Act 1984 already includes a penal provision which prohibits certain genetic engineering procedures (sec. 6.1–2 cloning; certain interspecies-interactions). Also the Danish Act 1987 (on the setting up of an Ethical Council and provisions governing certain biomedical experiments) prohibits certain experiments: experiments facilitating the production of genetically identical human beings; experiments facilitating

[21] Recommendation 934 (1982).

the production of human beings by mixing genetically different pre-embryos or parts of embryos, before they are implanted into the uterus; and experiments facilitating the production of living human individuals being hybrids with a genetic mass, in which elements of other species are incorporated (sec. 11–12; the infringements are punishable).

In the United States there has been a tendency not to regulate DNA research as a distinct technology. The main stress has been laid on ethical norms and professional self-regulation. Guidelines on rDNA and human gene therapy provided by Recombinant DNA Advisory Committee (RAC) must be applied to research under the National Institutes of Health which apply to all federally funded projects. (See the detailed report of Koenig.)

As far as the *safety control of experiments* in genetic engineering is concerned, it is presumed in some reports that legislation for labour welfare, environmental protection et al. is applicable in accordance with the general prerequisites of these laws.[22]

10.3. In many national reports there is agreement that the creation of identical human beings by *cloning* or any other similar method as well as *interspecies-interactions* (interbreeding of human or animal chimera and the production of hybrids) *should be forbidden*. (See the reports concerning Czechoslovakia, Federal Republic of Germany, France, Italy, the Netherlands, Portugal and Rumania.) Many rapporteurs consider these kinds of procedures so menacing to human identity and individuality that they support explicit penal provisions in accordance with the above-mentioned Victoria Infertility Act and the Danish Act.

10.4. There are no great differences in the attitudes to *somatic cell gene therapy*: it is regarded as admissible under certain prerequisites similar to experimental medical procedures. The situation is different in regard to *gene transfer in the germ track*. For example, Jung (Federal Republic of Germany), sees in it the notion of positive eugenics, and endorses the prohibition of this procedure as proposed by the Benda Commission and Enquete Commission (see also *Roşca*, Rumania). On the other hand, Koenig (USA) seems to have a rather permissive attitude to germ line therapy to eliminate diseases inherited through cell deficiencies.

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[22] See, e.g., *Recombinant DNA Safety Considerations*, OECD 1986.

10.5. At present *genetic analysis* (diagnosis) is the main scope of application for human genetic engineering. Especially the Swedish Committee on Genetic Engineering (1984) has consistently considered ethical norms to be applied to genetic analysis and selection, and these have influenced my recommendation for the draft resolution. The means of regulation should also in this connection be properly differentiated.

Annex*

Discussion paper by Raimo Lahti for the draft resolution
Criminal law and modern bio-medical techniques

1 GENERAL OBSERVATIONS

1.1. The recent revolutionary progress in medicine and biotechnology has raised new ethical, legal and social problems which must be solved by means of ethical and legal regulation at the national level as well as at the regional and international level.

1.2. This progress has laid the foundation for intensified legal protection of patients and research subjects as well as control and containment measures directed at medical activity and biotechnology.

1.3. New problems to be solved have arisen especially in the fields of human artificial procreation and human genetic engineering. In the consideration of means of regulation in these fields, also ethical and legal questions concerning human experimentation and transplantation of human organs and tissues come to the fore.

1.4. The means of regulation vary with the different legal cultures and social structures and are influenced by varying religious, ethical and political opin-

* The draft resolution adopted at the Colloquium in Freiburg i.Br. on 21–23 September 1987 is printed in *Revue Internationale de Droit Pénal* 59:3–4, 1988, pp. 1337–1347. The final resolution was adopted at the XIVth International Congress of Penal Law, Vienna 2–7 October 1989, see *Revue Internationale de Droit Pénal* 61:1–2, 1990.

ions. Nevertheless, due to the transnational character of the problems and the growing interdependence of nations, internationally agreed standards and practices and, when possible, internationally binding forms of legal regulation should be created.

1.5. Very different considerations must be reconciled when regulating medical activity and biotechnological research. On the one hand, certain universal human rights and constitutionally guaranteed basic rights should be taken into account; on the other hand, some collective goals for the future benefits of society may collide with individual rights.

1.6. Human dignity, the protection of the life and physical and mental integrity of individuals, and self-determination (autonomy) should be respected as fundamental rights and freedoms. Further, the right to privacy (confidentiality), the protection of a potential individual (embryo and foetus), the prohibition of discrimination as well as, inter alia, environmental protection and the institutional protection of marriage and family may establish bounds on the use of certain bio-medical techniques. On the other hand, freedom of research and the advantages of medical science and technology, as well as the right to health care call for a less restrictive policy in using these techniques.

1.7. A variety of means is needed in order for a balance to be established between the different considerations when regulating medical activity and biotechnological research. These means include "soft" measures aiming at the maintenance of a high standard of professional ethic as well as differentiated legal regulations with varying enforcement models and sanctions. A strategy which integrates private and public remedies and reactions is desirable.

1.8. These means of regulation, including the use of criminal law as control mechanism, must be chosen on the basis of rational argumentation. Criminalization and penal measures must be the last resort (*ultima ratio*). Firstly, we should be fully convinced of the harmfulness and blameworthiness of the acts to be punished (*Strafwürdigkeit*); secondly, the penal measures should prove to be necessary in a cost-efficiency comparison of different means of regulation (*Strafbedürftigkeit*, *Sraftauglichkeit*).

1.9. The appropriateness of different mechanisms of controlling the use of bio-medical techniques depends, inter alia, on the ways in which the activities of health care and research personnel are in general supervised according to

national legislation. Relevant laws may also differentiate between criminal sanctions and measures of administrative penal law. A further alternative is that the legislation establishes only a regulatory framework by setting up a licensing authority to supervise work in this area and through sanctions of a regulatory kind.

1.10. It is especially important to strive for uniform and, if possible, internationally binding legal regulations for the protection of genetic integrity (identity) and for the prevention of unlawful human experimentation.

2 HUMAN EXPERIMENTATION (RESEARCH ON HUMAN SUBJECTS)

2.1. The principles underlying the ethics of research with human subjects are defined, inter alia, in the international codes of the Declaration of Helsinki (adopted by the World Medical Assembly in Helsinki 1964, as revised in Tokyo 1975) and of the Proposed International Guidelines for Biomedical Research Involving Human Subjects (the result of a joint WHO/CIOMS project in 1982). Consideration should be given to these kinds of internationally acknowledged common principles when national standards are established.

2.2. These principles include respect for individuals, contribution to the well-being of people, and the equitable distribution of potential risks and benefits throughout society.

2.3. In order to secure the rights and well-being of patients and research subjects, multi-disciplinary ethics committees should be established in all countries for an independent and impartial review of research projects. The legal status of these ethical review committees should be clarified.

2.4. Each research subject must consent freely, and with full information, to participate in the research. Special legal protection should be afforded to such vulnerable subjects as children, pregnant or nursing women, the mentally ill and prisoners.

2.5. Every subject participating in medical research should be entitled to reasonable and expeditious compensation for any injury sustained as a result of participation.

2.6. The handling of the Draft Convention on the Prevention and Suppression of Unlawful Human Experimentation (formulated by a committee under the chairmanship of Professor M. C. Bassiouni in 1980) in the proper international bodies should be accelerated.

2.7. Research with human embryos and genetic research deserve special consideration (*cf*. *infra* 5–6).

3 TRANSPLANTATION OF ORGANS AND TISSUES OF HUMAN ORIGIN

3.1. The conditions and procedures governing the transplantation of human organs and tissues should be consistently regulated.

3.2. The regulation should be duly differentiated and shall deal separately with the transplantations of substances from living and deceased persons.

3.3. Special legal protection should be afforded to living donors, particularly when transplantations of substances from legally incapacitated persons are concerned. Restrictive provisions should also be given regarding transplantations of substances which cannot regenerate and transplantations presenting a foreseeable risk to the life or the health of the donor. A transplantation must not be effected without the free informed consent of the donor or his legal representative.

3.4. When regulating the conditions for the transplantations of substances from deceased persons, primary significance should be given to the explicit or implicit wish of the deceased.

3.5. The death criteria should be clarified and internationally agreed standards and practices sought.

3.6. Commercialization of human organs and tissues shall be resisted.

4 HUMAN ARTIFICIAL PROCREATION (REPRODUCTIVE MEDICINE)

4.1. The conditions and procedures governing the use of artificial procreation techniques should be consistently regulated. This regulation should be duly differentiated according to the special problems connected with these different techniques for the treatment of infertility: artificial insemination by husband or by donor (AIH or AID) and in vitro fertilization and embryo transfer (IVF and ET).

4.2. When regulating the techniques of human artificial procreation, the interests of the child to be born should be taken into particular account. The legal status of children born as a result of these techniques should be clarified.

4.3. The techniques of artificial procreation may be used only if the persons concerned have given their free informed consent.

4.4. Any act required by artificial procreation techniques must be performed under the responsibility of a physician and within establishments authorized by public authorities.

4.5. Special restrictive provisions should be given concerning the storage and the donation of gametes and embryos (*cf*. *infra* 5).

4.6. The techniques of artificial procreation must not – possibly with a few exceptions – be used for the birth of a child by the employment of a surrogate mother. All surrogacy agreements shall be unenforceable. Professional actions for the establishment of a surrogate pregnancy should be forbidden.

5 INTERFERENCE WITH EMBRYOS AND FOETUSES

5.1. The extent of the legal protection of human life should be defined, and the legal status of embryos at different stages of their growth should be clarified.

5.2. The conditions and procedures governing the use of human embryos and foetuses should be consistently regulated. When national standards are established, consideration may be given to Recommendation 1046 (1986) of the Parliamentary Assembly of the Council of Europe on this subject.

5.3. No intervention on the living embryo *in vitro* or *in utero* or the foetus whether inside or outside the uterus shall be permitted unless for strictly defined diagnostic, therapeutic or scientific purposes.

5.4. Embryos and foetuses may not be used without the consent of both members of the couple or gamete donors.

5.5. Any use of the embryo or foetus must be undertaken by highly qualified teams in approved hospitals or scientific centres supervised by public authorities.

6 INTERFERENCE WITH GENETIC INHERITANCE. GENE THERAPY

6.1. The right to a genetic inheritance which has not been artificially interfered with should be explicitly recognized as a human right.

6.2. The boundaries of the legitimate application of human genetic engineering techniques should be defined in law.

6.3. When regulating the techniques of human genetic engineering, special safeguards should be established for protecting individuals against non-therapeutic applications of these techniques as well as for guaranteeing public health and the non-contamination of the environment against the risk of experiments in genetic engineering.

6.4. The creation of identical human beings by cloning or any other similar method shall be forbidden.

6.5. Interspecies-interactions – i.e. interbreeding of human or animal chimera and the production of hybrids – shall be forbidden.

6.6. Germ line gene therapy, affecting unborn human generations, should be forbidden, until experience with somatic cell therapy and animal studies have established the reproducibility, reliability and safety of germ line therapy.

6.7. Somatic cell gene therapy for patients suffering serious genetic disorders is acceptable if carried out under strict criteria covering new and experimental medical procedures.

7 GENETIC ANALYSIS (DIAGNOSIS) AND GENETIC SELECTION (SCREENING)

7.1. The use of prenatal genetic diagnosis should be restricted to severe genetic disorders which threaten the development of the foetus or the child. The physician, in mutual understanding with the mother (parents), should decide whether or not to use genetic analysis.

7.2. Genetic diagnosis may be used in public health investigations of genetic disorders if the investigation has a clear medical aim and if the collected genetic information is reliably protected. Participation in such public investigations shall be voluntary.

7.3. Recording, storing and use of genetic information from individuals shall be medically motivated. The individual involved shall give his/her free informed consent.

7.4. Special legal safeguards should be established for preventing the use of genomanalysis (genetic screening) as a basis for discrimination.

29. Life's Beginnings: Law and Moral Dilemmas*

1 INTRODUCTION

1.1

The moral and legal problems that concern the beginning of life have, in an unprecedented manner, become topical as a result of the rapid scientific and technological development in biology and medicine that has taken place over the past decades. We can speak of a global revolution in biomedicine which has even cast doubt on the basic categories of our thinking and language[1]. The pressure for change has been directed at such fundamental concepts in our culture as human life, the human being, the (human) person and human dignity – concepts that one could imagine would have received an established content during the long history of humanity.

The development in genetic engineering and reproductive technology has been of particular significance. With the progress in human genetics, one has begun to speak about the 'Frankenstein factor', which means the public uneasiness about the notion that gene splicing could change the nature of human beings.[2] The development of reproductive technology, in addition, has led to a reassessment of such institutions in society as maternity, paternity, motherhood and fatherhood.[3]

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* Original source: *The Finnish Yearbook of International Law*, Helsinki 1991, Vol. 2, pp. 438–468. – Also in: Law and Moral Dilemmas Affecting Life and Death. Proceedings of the 20th Colloquy on European Law. Glasgow, 10–12 September 1990. Strasbourg 1992, pp. 60–81.

[1] See, e.g., Derek Morgan, Technology and the Political Economy of Reproduction, in: M. D. A. Freeman (ed.), *Medicine, Ethics and the Law*, London, Stevens & Sons, 1988, pp. 23–54 (39).

[2] See, e.g., *Splicing Life: A report on the Social and Ethical Issues of Genetic Engineering with Human Beings*. President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research. U.S. Government Printing Office, Washington, D.C. 1982, p. 14, and Willard Gaylin, Fooling with Mother Nature, in: *Hastings Center Report*, Vol. 20, No. 1, 1990, pp. 17–21 (18).

[3] See Morgan; *op.cit*. (see n. 1 above), p. 40.

1.2

The new problems have in part shed new light on the traditional discussion on abortion and on the arguments used in this discussion. Modern biological and medical technology has also forced an expansion and differentiation of the discussion in that, in addition to human life, certain other individual rights and fundamental freedoms (such as human dignity, identity and integrity) should be examined and balanced against divergent collective values and interests.

Alongside the question, for example, of when human life begins, or of the status of the foetus, it would seem that consideration is now being given to how we can protect human identity and integrity (including genetic identity or integrity) or human dignity from violations that may arise through the new technology and its applications. This discussion has not necessarily been limited to considering the protection of the life or personality of the human species only.

1.3

The fact that the rise of new problems has been due in part to certain scientific and technological advances does not shut out the need to ultimately solve the problems through the general conditions of moral, political and legal discourse. Even so, these problems set considerable demands on this discourse. Before examining the topic in detail, it is necessary to deal with the general conditions of this discourse (section 2).

2 HOW SHOULD WE DEBATE THE MORAL DILEMMAS AND THE LEGAL ASPECTS OF THE BEGINNINGS OF LIFE?

2.1 On moral reasoning

Questions dealing with life and its limits are linked to several scientific disciplines, from the natural sciences and their applications to the social sciences and the humanities, as well as to various ideological systems, from religion to feminism. When we take into consideration the moral dilemmas of the subject or the aspects of legal *policy*, it is important to find types of argumentation that make sensible discourse possible. There are several types of such argumentation, and the question arises of whether it is possible to reach a tolerable consensus on some of the substantive questions or at least on how to proceed closer to consensus.

In *moral philosophy*, a distinction is often made between a *consequentialist* and a *non-consequentialist* approach. According to the former, when selecting from among various alternatives we must take into consideration the totality of the good and bad effects of each alternative. According to the latter, we should draw our attention to the value of each alternative as such – to how well it fulfills certain principles. A corresponding distinction in moral theories is between the *utilitarian* and the *deontological* approach.

It has been suggested that these two basic forms of reasoning are not necessarily fully separated from one another: at the same time as moral principles influence (or should influence) our action, these principles are in turn determined to some extent by the consequences of the action[4]. According to the moral philosopher *R. M. Hare*, who defends this position, when discussing for instance *in vitro* fertilisation a utilitarian is a person who is able to demonstrate why it is desirable to adopt his conviction of a certain state of affairs, while an intuitionist is unable or unwilling to give any cogent reasons for his conviction.[5] Similarly, *Mary Warnock* considers it a mistake to think that reason and feeling (or sentiment) would be essentially opposed to each other; in her opinion a moral view, being grounded in feelings, may at the same time be rational.[6]

My own point of departure is that in a moral (ethical) discussion we should seek rationality, or at least the fulfillment of certain minimum preconditions of rational discourse. This means, *inter alia*, that we should seek to achieve consensus on the contents of the concepts used in the discussion; we should utilize as far as possible research results in biology and medicine; and we should try to test, in various ways, the persuasiveness of the reasons which have been used. Such an approach does not shut out the probability that those participating in the discourse may be left with irreconcilable differences in their value judgements.[7] Such differences of opinion are diminished by the fact that there is wide-spread consensus on some of the guiding principles of (bio)ethics.[8]

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[4] See, e.g., Michael Lockwood, Introduction, in: Lockwood (ed.), *Moral Dilemmas in Modern Medicine*, Oxford/New York, Oxford University Press, 1985, pp. 1–8 (5).

[5] See Hare, In Vitro Fertilisation and the Warnock Report, in: Ruth F. Chadwick (ed.), *Ethics, Reproduction and Genetic Control*. London/New York/Sydney, Croom Helm, 1987, pp. 71–90 (79).

[6] Warnock, The Artificial Family, in: Lockwood, *Moral Dilemmas in Modern Medicine* (see n. 4 above), pp. 138–154 (154).

[7] Regarding the general conditions of rational discourse, see, e.g., Aulis Aarnio, *The Rational as Reasonable*. Dordrecht/Boston/Lancaster/Tokyo, D. Reidel Publishing Company, 1987, pp. 195–204.

[8] See Arthur Kaufmann, Rechtsphilosophische Reflexionen über Biotechnologie und Bioethik in der Schwelle zum dritten Jahrtausend, in: *Juristen-Zeitung*, Vol. 42, 1987, pp. 837–847 (841).

On the basis of the foregoing, I come to the tentative conclusion that when considering the beginning of life from the moral or legal point of view (see sections 3–4 below) it is desirable to try to engage in a *'structural' reasoning* that uses a thorough analysis of the concepts in question and that takes the different individual rights and collective interests into account. An alternative approach might already to begin with require the construction of a 'holistic' outlook. When arguing the topic it is also useful to bear in mind *Immanuel Kant*'s idea that morality is the domain of practical sense. There should be sufficient interplay between ethical discourse (theory) and ethical practice (action).[9]

2.2 On legal reasoning

The areas of application of ethical practice are legislation and political decision-making in general. There is reason to deal with the *special features of the legal aspects* in greater detail. In so doing we can distinguish an approach based on *legal policy* from an approach that considers one or several *legal systems in force*, perhaps from the comparative point of view.

In this connection the legal policy approach is more important. First of all, in many countries the legal regulation concerning the beginning of life is full of gaps and undergoing development.[10] Secondly, there is a relatively widespread tendency to harmonize regulations on human artificial procreation and human genetics and, with this end in view, create international or regional standards.[11] Even a legally binding convention in the field of biomedicine and human biotechnology has been regarded as desirable.[12]

Argumentation in the field of legal policy has many points of contact with moral (ethical) discourse, in particular when the subject is the morally laden topic of the beginning of life. Even so, legal policy has its own special features:

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[9] See Leon R. Kass, Practicing Ethics: Where's the Action? in: *Hastings Center Report*, Vol. 20, No. 1, 1990, pp. 5–12.

[10] See, e.g., Resolution "Criminal law and modern biomedical techniques", XIVth International Congress on Penal Law, Vienna, 2–7 October 1989, paragraph 5.1. This resolution has been published in *the Newsletter of the International Association of Penal Law*, 1990/1, pp. 16–28 and 54–69 as well as *Revue Internationale de Droit Pénal* 61:1–2, 1990.

[11] See, e.g., the information document of the Council of Europe, *Human artificial procreation*, Strasbourg 1989; *Recommendations* 934 (1982), 1046 (1986) and 1100 (1989) *of the Parliamentary Assembly of the Council of Europe* as well as *Resolutions on genetic engineering*, 16 March 1989, Docs. A2-327/88 and A2-372/88, of the European Parliament.

[12] See *Recommendation* 1100 (1989) *of the Parliamentary Assembly of the Council of Europe*, paragraph 9.C.

The drafting of legislation is institutional and collective activity. A legislator who seeks rationality must be aware of the goals and values established for the law or other legal regulation, and must assess the appropriateness of the regulation in fulfilling those goals and values. When one comes to a certain position on a desirable state of affairs through moral reasoning, it is not clear that legislation or even other regulation is needed in the matter.

It is also important to note that the form of legal regulation and the system of legal control and sanctions that are selected vary from one country to another, for example according to the type of legal culture to which the country belongs and the legal tradition in the country. In those countries where a cost/benefit thinking as that mentioned above is utilized this approach does not exclude the significance of value judgements, when assessing the various points of view (*inter alia*, which individual rights and collective interests should be taken into account and how great weight each of them should be afforded).

Since the ethical and legal problems of the beginning of life have become topical specifically as a consequence of the progress in biomedicine and human biotechnology, the features of the development of the regulation of medical activity are of special interest. A few illustrations of this: historically, this field has been the focus of little legal regulation. For a long time, the focus has been on guidance through professional ethics, and even today, unofficial or semi-official bodies (ethical committees) have a central role in the supervision.

Since at present an increasing number of different legal mechanisms have been established, the systems of supervision have been affected *inter alia* by the proportional size of the public health and the private health sector in the society in question. Accordingly, the relationship between the patient and the physician may tend towards private law (the contractual nature of the relationship is emphasized) or towards public law (emphasis is given to the nature of the act of taking into care as an administrative decision). The legal mechanisms available to the patient may tend, correspondingly, either towards private law or public law.[13]

The following are some of the central questions in legal regulation:

– what subjects (entities) or interests should be provided with legal protection,
– what lawful (actionable) rights these entities should be recognized as having, and
– what preventive, reparative or repressive means should the possessor of a lawful right or of the violated legal interest (*Rechtsgut*), or a person

[13] See, e.g., Raimo Lahti, Criminal Law and Modern Bio-Medical Techniques. General report, in: *Revue Internationale de Droit Pénal*, Vol. 59, No. 3–4, 1988, pp. 603–628 (605 and 610).

– acting on behalf of such a possessor, have in order to fulfill his right or receive compensation for the violation of his rights.

In order for actionable rights ("claim-rights") to be fulfilled, other legal subjects should correspondingly have legal obligations, and for this the necessary competence and procedural norms should be created and sufficiently effective supervision and sanctioning systems established. There is reason to note that the legal order may protect several rights and interests at the same time, in which case there must be procedural norms that state how conflict situations are to be resolved.

There are thus very different types of legal regulation and supervision systems. A comparative analysis would provide elements for an assessment of the differences between various legal systems, and of how they function. From the point of view of the hierarchy of legal norms, the basis for the analysis should lie in international human rights and national constitutions. The supervision and sanctioning systems that come in question are generally to be found in civil, administrative and/or criminal law.

From another point of view, the means used in legal regulation can emphasize either prevention, reparation or repression; it is true however, that the threat of reparative or repressive sanctions that follow upon a violation of rights has a central role in prevention. It may also be mentioned that there are basically two different approaches in the protection of lawful rights: the protection of so-called classical (civil) rights and freedoms means above all that rights are secured against infringement by a public authority, while the protection of social rights requires positive action by a public authority in order to promote these rights.

2.3 Divergent roles of legal regulation

On the basis of the foregoing scrutiny, I would emphasize tentatively that there is a wide diversity of ways to take into consideration legal aspects and, in particular, legal policy aspects. Accordingly, *the forms of legal regulation* and supervision systems that come in question *should be analyzed in a differentiated manner*. For example, when considering the role of law in reproductive medicine, *David Jabbari* has distinguished three forms of legal regulation: the formal, the substantive and the reflexive.[14] This point of departure can be

[14] Jabbari, The Role of Law in Reproductive Medicine: a New Approach, in: *Journal of Medical Ethics*, Vol. 16, 1990, pp. 35–40, with reference to *G. Teubner's* article.

connected with the earlier preliminary conclusion (see section 2.1 above), that in considering the beginning of life, a structural reasoning should be pursued even though we may not reach consensus on the moral and legal implications of such an argumentation.

One should be aware of *the limits of legal regulation*. Certain drawbacks will follow if we harness legal regulation in the fulfillment of controversial moral principles. In so doing, the goals set by law will probably be poorly reached at least when traditional forms of legal regulation are being applied. Another aspect is that in such a case morality cannot retain its function of being critical towards legal practice. According to this, the legislator in a pluralist society should limit himself to establishing borderline conditions that are as loose as possible and within which individuals and groups can exercise their moral autonomy.[15] I shall come back to the question of recommendable legal regulations after the survey of the moral and legal implications related to the beginnings of life (see section 4.5 below).

3 TRADITIONAL AND NEW DISTINCTIONS REGARDING THE BEGINNINGS OF LIFE AND THEIR SIGNIFICANCE FROM A MORAL AND LEGAL POINT OF VIEW

3.1 Insufficiency of the traditional distinctions

At first sight, one could assume that a natural point of departure in defining the beginning(s) of life would be our biological and medical knowledge. As shall be seen, however, scientific knowledge only partially informs our position in regard to the moral and legal implications of that demarcation line. It would appear that the various concepts we use for the beginning of life are morally or legally coloured to different extents. Thus, one crucial subject of disagreement proves to be what concepts we should use when speaking of phenomena related to the beginning of life.

The easiest approach would be to give a short general picture of first the stages of human life, which have been regarded as significant in the legal systems of many countries. *Live birth* is, in particular from the point of view of criminal law, the most important demarcation line; however, the *viability of*

[15] See Ingeborg Maus, The Differentiation between Law and Morality as a Limitation of Law, in: Aulis Aarnio & Kaarlo Tuori (eds.), *Law, Morality, and Discursive Rationality*, Publications of the Department of Public Law, University of Helsinki, D:8, Helsinki 1989, pp. 141–164 (142 and 155).

the foetus has received increasing acceptance alongside of this.[16] In addition, it must be noted that for a long time a *foetus in utero* – an unborn child (even if not viable) – has received a certain protection under criminal and/or civil law (see a fuller account in section 4 below).

The adoption of modern reproductive technology has raised the issue of a new entity of protection, the *embryo in vitro*. For this reason moral and legal considerations of the beginning of life have received a new topicality. It has been said that "by the technique of fertilisation *in vitro*, man has achieved the means of intervening in and controlling human life in its earliest stages".[17] This technology has made it possible to use new methods – with or without genetic manipulation – and the prohibition or at least close supervision of these methods, on both the national and international level, are considered to be an urgent matter (see section 4.4 below).

3.2 Modern human embryology and its implications in relation to the definition of life's beginnings

The development that has taken place in the biomedical sciences, and in particular in human fertilization and embryology, has produced new information on the biology of the beginning of life, and has also created the need to formulate more and more precise biological and medical classifications. For example, Recommendation 1100 (1989) of the Parliamentary Assembly of the Council of Europe, on the use of human embryos and foetuses in scientific research, notes (in paragraph 7):

> "Considering that the human embryo, though displaying successive phases in its development which are designated by different terms (zygote, morula, blastula, pre-implantation embryo or pre-embryo, embryo, foetus), displays also a progressive differentiation as an organism and none the less maintains a continuous biological and genetic identity."

In the considerations annexed to the Recommendation, "Scientific research and/or experimentation on human gametes, embryos and foetuses and donation of such human material", the principles are grouped according to whether what is at issue is

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[16] See, e.g., Edward John Main, The Relevance of a Biological Definition of Life to Fundamental Rights, in: *Medicine and Law*, Vol. 6, 1987, pp. 189–209 (199) and J. K. Mason & R. A. McCall Smith, *Law and Medical Ethics*. 2nd ed. London, Butterworths, 1987, p. 76.

[17] See *Recommendation* 1046 (1986), Parliamentary Assembly of the Council of Europe, paragraph 3.

– gametes,
– live pre-implantation embryos,
– dead pre-implantation embryos,
– post-implantation embryos or live foetuses *in utero*,
– post-implantation embryos or live foetuses outside the uterus, or
– dead embryos or foetuses.

In the appropriate sections of the annexed principles, a significant distinction is also made, on one hand, between pre-embryos and embryos, and on the other hand between life embryos and foetuses, whether viable or not. In addition, some principles deal specifically with the use of genetic engineering.

In a recent report prepared for the Council of Europe's Select Committee of experts on the use of human embryos and foetuses, *Anne McLaren* emphasizes that the distinction between the embryonic and pre-embryonic stage is not arbitrary, while the distinction between foetus and embryo (the foetal stage starting at eight weeks after fertilisation) has no scientific basis.[18]

The report of the Committee on Science and Technology, which preceded Recommendation 1046 (1986) of the Parliamentary Assembly of the Council of Europe, notes that "closer acquaintance with the biological and medical facts … will help considerably in moving towards agreed ethical guidelines" in the area; such an approach may involve the recognition of a "pre-embryonic" period of development.[19] Even so, paragraph 5 of that Recommendation considered that "from the moment of fertilisation of the ovule, human life develops in a continuous pattern, and that it is not possible to make a clear-cut distinction during the first phases (embryonic) of its development". There is also reason to note that in a closer examination even such biologically oriented distinctions as live/dead (foetus) and viable/non-viable (embryo or foetus) prove to be problematic.[20]

3.3 More and more precise bio-medical distinctions and their moral and legal implications in the light of Council of Europe documents

What are the moral and legal implications of the more and more precise biological and medical distinctions related to the beginnings of life? We can again

[18] McLaren, *Report on the use of human foetal, embryonic and pre-embryonic material for diagnostic, therapeutic, scientific, industrial and commercial purposes*, Council of Europe, CAHBI-R-EF (89) 1 rev 2, 1990, pp. 7 and 9.

[19] Doc. 5628, Parliamentary Assembly of the Council of Europe, 1986, pp. 7–8.

[20] See McLaren, *op.cit.* (see n. 18 above), pp. 10–11.

find interesting points of comparison from the discussion that has taken place within the framework of the Council of Europe.

One of the basic considerations underlying the principles on human artificial procreation proposed by the *ad hoc* Committee of experts on bioethics (CAHBI), is stated as follows (as point of departure no. xii):

> "There is a variety of opinions with regard to the status of the human embryo in contemporary society; human development proceeds in a continuous pattern from the moment of fertilisation. Therefore, beyond this plurality of opinions as to its status, the human embryo should be treated in all circumstances with due respect for human dignity".[21]

Paragraph 10 of Recommendation 1046 (1986) of the Parliamentary Assembly emphasizes correspondingly that "human embryos and foetuses must be treated in all circumstances with the respect due to human dignity, and that use of materials and tissues therefrom must be strictly limited and regulated." Also, paragraph 3 of Recommendation 1100 (1989) of the Parliamentary Assembly stresses "the necessity of ensuring that the human embryo and foetus are treated in conditions appropriate to human dignity and that products and tissues therefrom may be used solely under strict regulation for limited scientific, diagnostic and therapeutic purposes." In paragraph 6 of the last mentioned Recommendation, it is considered "appropriate to determine the legal protection to be given to the human embryo from the time that the human egg is fertilised, as foreseen in Recommendation 1046."

An examination of the committee reports that underlie Recommendation 1046 provides a more nuanced view of the problem area dealt with above. In the explanatory memorandum to the report of the Legal Affairs Committee, by Mr. *Haase*, it is noted, *inter alia*, that human embryos and foetuses are a form of human life; on the other hand a fundamental value protected by our legal and constitutional system is the respect for human dignity inherent in all human life.[22] Human life should thus be respected as required by human dignity. However, the report casts doubt over the moment when human life begins. Correspondingly the concept of human dignity can be regarded as problematic.

According to the report, various points of reference can be provided for the question of when human life begins:

- the moment of the fertilisation of the ovule;
- the individualisation of the embryo's life occurs on the fourteenth day

[21] *Human artificial procreation*, see n. 11 above, p. 15.

[22] Doc. 5615, Parliamentary Assembly of the Council of Europe, 1986, pp. 10–11.

of cellular development (previous to that, transplantation of the nucleus and parthenogenesis are possible);
– about the twentieth day, the first neuronal folds (the rudiments of the nervous system) appear, and so this stage can be considered as the criterion of the commencement of human life (cerebral birth as opposed to cerebral death); and
– on the fortieth day neurological sensitivity appears.[23]

Among the *legal policy* considerations of the report regarding the beginning of life is, first of all, the conclusion that the concept of being human is particularly important in law because a child who is only conceived does not possess legal personality. Secondly, it is noted that there are different attitudes towards the question of from what moment all rights that are normally enjoyed by a human being (including the right to inviolability of the person) are enjoyed by the embryo.

Are we to regard, from the point of view of legal protection, the fertilisation of the ovule, the nesting of the zygote in the uterus as decisive – or does the embryo not yet enjoy legal rights at an early stage of its development? Thirdly, the protection of human life becomes progressively more definite as it develops in the uterus, although it is not absolutely protected. Fourthly, a person who wants to carry out operations on a human embryo or foetus must strike a balance, on a case by case basis, between the human dignity inherent in this human life and the diagnostic, therapeutic and scientific aims pursued.[24]

The report of Mrs. *Morf* for the Committee on Science and Technology departs from the point of view that an embryo is to be considered as a *prospective*, potential human being. The fertilised human egg should be accorded respect and protection in proportion to its potential to develop into an autonomous human person. This potential changes radically in the first two to three weeks of its existence. The report refers with approval to the 1983 bulletin of the Catholic Office of Information on European Problems, which describes the four 'key moments' in the first three weeks of development – fertilisation, segmentation, implantation in the wall of the uterus, formation of the cerebral cortex – none of which could be claimed "… with absolute scientific certainty as marking the beginning of a properly human life", nor should any be regarded as "… decisive either for the legislator or the Church".[25]

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[23] *Ibid*. p. 11.

[24] *Ibid*. pp. 11–12.

[25] Doc. 5628, see n. 19 above, pp. 1–2 and 5–6. Regarding the current official standpoint of the Catholic Church, *cf. Congregation for the Doctrine of the Faith, Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation*, Vatican City 1987, esp. pp. 12–14.

In the last cited report for the Parliamentary Assembly of the Council of Europe, two alternative approaches are presented. According to the first alternative, the embryo is defined as beginning from the fertilisation of the human egg, but it is noted that the embryo can be subjected in the first weeks of its existence to procedures other than those designed to express its own specific human potential. According to the second alternative, the concept "pre-embryonic" is adopted. During this stage the pre-embryo can be subjected, under external ethical control, to procedures having substantial value for the advancement of general diagnostic and therapeutic understanding. The central statement in the report is that we cannot escape the challenge of balancing an assessment of the relative potential of the fertilised human egg in the very first weeks of its existence to develop into an autonomous human person, against a simultaneous assessment of the humanitarian potential of certain types of research and experimentation on embryos.[26]

3.4 Supplementary arguments in moral assessments of the beginnings of life: the concepts of personhood and personal identity

The difficulties of the definition of the beginning(s) of life as well as of the moral and legal implications of the definition is demonstrated in the Council of Europe documents cited above. The conclusions drawn in these documents are formulated in such a way that they could be very widely acceptable or regarded as neutral. An example of these inferences: the human (pre-)embryo is in any case a form of human life, and the embryo should be treated with due respect for human dignity. Secondly, the documents conclude that respect for a (pre-) embryo does not signify its absolute inviolability; instead, for example certain diagnostic or therapeutic purposes may justify the use of human embryo.

Already on the basis of the foregoing, it also appears reasonable to conclude that there are stages of progressive differentiation in the development of a human life, and that varying value has been and can be assigned to these initial stages from the moral point of view.[27] Such a moral assessment, in turn, has

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[26] *Ibid*. pp. 5–6. Regarding the presented latter alternative, see also the Report of the Committee set up by the American Fertility Society, in *Fertility and Sterility*, Vol. 46, No. 3, Suppl. 1, 1986, pp. 26S–31S.

[27] See, e.g., Beverly Wildung Harrison, *Our Right to Choose*. *Toward a New Ethic of Abortion*. Beacon Press, Boston, 1983, chapter 7.

an influence on the legal assessment of the issue, although the effect is not straightforward (see section 4 below).

It is necessary to present some supplementary arguments in moral assessments of the beginning of life. When speaking about the moral position of an embryo or foetus, a distinction has been made not only between *human life* and *human being*; *personhood* is also a common category. If a human person is deemed to come into existence after human life begins, one avoids the speciesism according to which all human life automatically has a greater intrinsic value than that of any other species.[28]

There is a great number of definitions of personality. The views of two authors may illustrate this. *Gary M. Atkinson* lists 19 possible definitions of the term "person", most of them – 16 – relating to particular stages of human development: fertilisation, nidation, blastocyst formation, heartbeat, motility, brainwaves, human appearance, completely formed body, movement felt by mother, viability, birth, capability of relating to others, willingness of others to relate to it, minimal intelligence, envisaging a future for oneself, capacity to enter into a contract. Three other definitions are tied to more discretionary turning points: human/rational/immortal soul; an individual with whom we can identify; capacity for meaningful life.[29]

Edward John Main examines two philosophical positions (rationalism and utilitarianism), religious perspectives as well as certain phases of foetal development (conception, sentience, appearance of the nervous system) as possible starting points of moral obligations. He concludes that no specific stage of development is satisfactory as the point at which personhood and moral obligation begins, to one who does not already accept the inference.[30]

Of those criteria in particular the moment of 'ensoulment' is well known, as the traditional Roman Catholic view is determined on its basis. Even when one seeks to define personhood on the basis of the totality of different mental or physical characteristics (which constitute, *inter alia*, the potential for self-consciousness), very little consensus has been reached on the decisive criteria. Part of the disagreement has been due to the fact that some characteristics that have been required of personality are also lacking in a newly born child[31].

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[28] See, e.g., Jane E. S. Fortin, Legal Protection for the Unborn Child, in: *The Modern Law Review*, Vol. 51, 1988, pp. 54–83 (56).

[29] Atkinson, Persons in the Whole Sense, 1977, cit. according to Main, *loc.cit*. (see n. 16 above), pp. 198 and 206.

[30] Main, *loc.cit*. (see n. 16 above), pp. 191–199, esp. 198.

[31] See, e.g., Fortin, *loc.cit*. (see n. 28 above), p. 57.

One method of avoiding this last implication, drawn from the concept of personhood, has been the adoption of several concepts which describe the various stages of human development. For example *Michael Lockwood* distinguishes between human organisms, human beings and persons, and in this classification a human being is something which has not yet attained the status of personhood. Lockwood associates the personal identity of a human being with a concept which underlies certain discernible continuities such as memory and personality. The decisive stage of human development can thus be characterized as personhood which exists when the brain becomes able to sustain distinctively mental processes, i.e. the time limit of about ten weeks' gestation.[32]

The relative nature of this demarcation line is evident from a recent article by *D. Gareth Jones*. Having dealt with the relationship between brain birth and personal identity, the author notes that brain birth has been placed at various points between 12 days' and 20 weeks' gestation. The conclusions of the author are, firstly, an observation about the gradualness with which new features generally appear, and secondly, that if the concept of brain birth is a valid one, it should be placed at 24–28 weeks' gestation.[33]

The view that human life can be divided into stages has been criticized by *John D. Biggers*, according to whom conception and birth should be recognized merely as phases of a more fundamental biological process, the life cycle; it should be recognized that life is a continuum. Biggers poses the question of whether all phases of life should have equal moral status.[34]

When the concept of a human individual or a human person is closely tied to the concept of *personal identity*, we approach the borderline of *genetic identity* and the recognition of the fact that genetic manipulation endangers this. The technology of genetic engineering with human beings is significant from the point of view of the *quality of life* and not so much from the aspect of the existence of life, and insofar some forms of gene technology affect future generations (compare with Biggers' view of life as a continuum).[35]

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[32] Lockwood, When Does Life Begin?, in: *Moral Dilemmas in Modern Medicine* (see n. 4 above), pp. 9–31 (10–23). See also Fortin, *loc.cit*. (see n. 28 above), p. 61.

[33] Gareth Jones, Brain Birth and Personal Identity, in: *Journal of Medical Ethics*, Vol. 15, 1989, pp. 173–178.

[34] Biggers, Generation of the Human Life Cycle, in: William B. Bondeson et al. (eds.), *Abortion and the Status of the Foetus*. Dordrecht/Boston/Lancaster, D. Reidel Publishing Company, 1983, pp. 31–53.

[35] See already *Recommendation* 934 (1982) of the Parliamentary Assembly of the Council of Europe, esp. paragraphs 4.i and 7a–b.

3.5 Features of normative evaluation

Summing-up: Increased biological and medical knowledge about gestation and prenatal development have, on one hand, offered arguments for a moral and legal discourse on the beginning of life, but ultimately the demarcation line and above all the moral and legal implications to be made on its basis prove to depend on *value judgements*, which are not often reconcilable. Thus, questions regarding *what value is to be assigned*, from the moral or legal point of view, *to the various stages in gestational* (pre-natal) *development* are more important than drawing lines regarding the beginning of life as such.[36]

Also here it is useful to aim at an *elaborated reflection* (*cf*. section 2.1 above). First, even when certain acts and procedures carried out on (pre-) embryos or foetuses are deemed morally or legally prohibited, such acts or procedures may be *prima facie* wrong, but they are not necessarily wrong all things considered.[37]

The protection enjoyed by an entity or interest is often not absolute but *relative*: in considering the extent and intensity of the protection, other rights and interests may have to be balanced. The extent and intensity of the legal protection enjoyed by an entity may vary considerably, for example, according to what legal remedies are available to secure the rights of the entity concerned (*cf*. section 2.2 above).

4 LEGAL REGULATIONS REGARDING THE BEGINNINGS OF LIFE

4.1 Introductory remarks on the current legal situation

This section (4) provides a brief and rather general description, based on legal comparative information, of what stages at the beginning of life have – and should have – legal consequences. The main focus shall be on legal policy aspects. The central question is what *legal protection* is generally *accorded an unborn child* and, particularly, what trends in development can be seen in this regard.

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[36] See also, e.g., A. Eser, The Status of the Human Embryo: Legal View, in: Umberto Bertazzoni et al. (eds.), *Human Embryo and Research*. Campus Verlag, Frankfurt/New York, 1990, pp. 105–116 (110–111).

[37] See, e.g., Lockwood, *loc.cit*. (n. 32 above), p. 25.

From the point of view of legal protection, as already has been noted (see section 3.1 above), life birth is an important line of demarcation. This is apparent, for example, in the fact that the protection that an embryo and foetus enjoy under criminal law is weaker than that enjoyed by a new-born child; and an embryo *in vitro* often totally lacks protection under criminal law. It is true that also the pre-natal existence of a foetus may be recognised retroactively after its live birth, for example in that compensation can be demanded for injuries suffered by a foetus *in utero*. The more detailed examination of the issue below shows, that the legal protection accorded an embryo and foetus is a more complex subject than what first impression indicates. It also appears that the trend in development is towards a strengthening of the legal position or interests of the embryo and foetus.

4.2 Legal protection of foetal life: abortion and foetal maternal conflict

A crucial question in connection with foetal protection concerns legal attitudes towards abortion. While certain ancient cultures widely permitted abortion, and even infanticide, western legal development, which was strongly influenced by the Judaeo-Christian tradition, indicated and increased condemnatory outlook on abortion.[38]

Current national approaches to abortion can be roughly divided into four categories:

- about 40% of the world's population live in countries allowing abortion on request, especially during the first trimester (e.g., the United States);
- about 25% live in countries providing abortion, in practice, virtually on request (e.g., Great Britain);
- another 25% live in countries permitting abortion either not at all, or else only to save the mother's life (e.g., those countries strongly influenced by the Roman Catholic Church); and
- the rest, about 10%, live in countries allowing abortion to women whose lives are not endangered by pregnancy, but only for narrowly defined health or similar reasons.[39]

[38] See, e.g., Richard Harrow Feen, Abortion and Exposure in Ancient Greece, in: Bondeson et al. (eds.), *Abortion and the Status of the Foetus* (see n. 34 above), pp. 283–300, and *Crimes against the Foetus*. Law Reform Commission of Canada, Working Paper 58, 1989, pp. 5–6.

[39] *Crimes against the Foetus*, see n. 38 above, p. 10 with reference to Alan Guttmacher's review. See also, e.g., Hans-Georg Koch, Law and Practice of Abortion in an International Comparison, in: *The National Review of Criminal Sciences*, Special Issue, No. 1,2,3, 1987, pp. 289–328, where two basic models for abortion laws are distinguished: indication-model and time-limit-model.

When discussing the legal regulation on abortion, the object of legal protection is a topical issue. The legislative solutions demonstrate the divergent ways of how priorities can be set between different (individual) rights and (collective) interests and how these rights and interest may – or may not – be balanced against each other. Two landmark decisions – i.e. United States Supreme Court in *Roe v. Wade* (1973) and the Constitutional Court of the Federal Republic of Germany in *BVerfGE* 39,1 (1975) – are very illustrative in this respect.

In the case *Roe v. Wade*, according to its majority opinion delivered by *Justice Blackmun*, the pregnant woman's right to privacy or her right of self-determination was regarded as a constitutionally protected individual right and this right was weighed against two distinct collective (= state) interests, protecting the health of the woman and protecting the *potentiality* of human life. The interest of protecting potentiality of human life is compelling not earlier than at the stage of *viability*, because the foetus only then has the capability of "meaningful life" outside the mother's womb. Even at this final stage of pregnancy, abortions that are necessary for the preservation of the life or health of the woman may not be prohibited.

It is worth noticing that, according to the majority opinion, in *Roe v. Wade* it was not necessary to "… resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer".[40]

In the case *BVerfGE 39,1* (1975) priority was given to the protection of unborn life. Another difference in relation to the case *Roe v. Wade* is that the "nasciturus" was recognized as an independent human being, i.e. an individual subject which is protected by the constitution's command to respect human life. A balance which would reconcile the protection of unborn life and the right of a pregnant woman to procure an abortion was declared impossible. Thus the protection of the foetus takes precedence over the right to reproductive choice of the woman during the entire time of pregnancy, although the state may refrain from compelling a woman to carry the foetus to term where this would impose an undue burden on her. The court also established the state's obligation to provide efficient protection of the unborn life.

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[40] 410 U.S. 113 (1973). Concerning this case, see, e.g., the analysis of Stanislaw J. Frankowski, United States of America, in: Frankowski & George F. Cole (eds.), *Abortion and Protection of the Human Foetus*. Dordrecht/Boston/Lancaster, Martinus Nijhoff Publishers, 1987, pp. 17–74 (23–33).

As for the definition of the beginning of life, the German court stated: "Life in the sense of the historical existence of a human individual exists according to definite biological-physiological knowledge in any case from the 14th day after conception." The process of human life is a continuous one and does not permit a precise division of the various stages in its development.[41]

Restrictive abortion laws give decisive preference to the protection of unborn life in relation to the pregnant woman's right of self-determination. One should still pay attention to the fact that also in countries with rigid prohibition of abortion, the punishment provided for illegal abortion is not as severe as for intentional homicide, even in the case when the abortion is illegally induced without the consent of the pregnant woman. In addition, abortion induced by criminal negligence or mere injury of the foetus – intentional or negligible – is hardly ever punished by law.[42]

4.3 Towards an increased legal protection of the human foetus: the rights of the foetus

Internationally seen, it is very seldom that even the viable foetus would enjoy a similar protection by means of criminal law than that of the new-born child, although a tendency for strengthening the legal status of the viable foetus is discernible. The Infant Life (Preservation) Act 1929 of England is an example of this kind of exceptional regulation. The "viability test", however, has proved to be very problematic. While a viable foetus has normally been defined as one that has reached a stage of maturity such that it is capable of continued independent existence, the borderline between non-viability and viability is not an absolute one but depends on the facilities available for the intensive care of premature babies.[43]

Among those considering the judicial practice in the United States, on the basis of *Roe v. Wade* and the succeeding cases, slightly divergent voices have arisen. *Roe v. Wade*, when legalizing widely non-therapeutic abortions, seems to seriously weaken the protection of the foetus. Being opposed to this conclusion, for example *Jeffrey A. Parness* thinks *Roe v. Wade* recognizes a

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[41] Concerning the case *BVerfGE 39,1* (1975), see, e.g., Donald P. Kommers, Abortion and Constitution: United States and West Germany, in: *The American Journal of Comparative Law*, Vol. 25, 1977, pp. 255–285 (267–275). The citation is according to Kommers, *loc.cit.*, p. 267.

[42] See Koch, *loc.cit.* (see n. 39 above), p. 294.

[43] See, e.g., McLaren, Report for CAHBI, see n. 18 above, pp. 10–11, and Mason & McCall Smith, *op.cit.* (see n. 16 above), pp. 78–79.

state interest in the potential life of the unborn and does not limit the states' power to act in situations where a mother's privacy right is not implicated. According to him the states, nevertheless, provide only limited protection for the unborn under current criminal and civil law, and he advocates strengthening the means of criminal, tort, family and regulatory law in favour of protection of the potential life of the unborn and even of the unconceived.[44]

There are also slightly different views on the rights (rights with or without quotation marks) of the foetus. As, for example, *Jane Fortin* in the British discussion puts it, the traditional approach of the civil law is to deny any legal status to the unborn child.[45] On the other hand, for instance, *Mason* and *McCall Smith* point out that the status of the child *in utero* is legally established: "The foetus has a general right not to be injured by the wrongful act of a third party".[46] The real difference between these two opinions is not great, because the last-mentioned authors admit the limits of the current legal protection accorded to the foetus: they refer to the preconditions for the rights to be actionable in the Congenital Disabilities (Civil Liability) Act 1976, i.e. the requirements of *live birth* and surviving for at least 48 hours.

The disagreement just described is interesting from a legal policy aspect. When is it justified to speak about the foetus (unborn child) as a legal personality having actionable rights of its own, and when is it rather a question of the future rights (and interests) of physical persons or of the rights of the pregnant woman? The recent development in the United States is in this respect worth noticing, because there have also been successful "*wrongful death*" actions. *Stanislaw Frankowski* summarizes the legal situation in 1987 in the following way:

- all American jurisdictions allow recovery to a surviving child for prenatal injuries;
- at least thirty-two jurisdictions allow recovery for the wrongful death of a viable foetus while nine states deny recovery for the wrongful death of such a foetus (other jurisdictions having not decided the issue);
- an emerging trend in American tort law is to allow the cause of action for preconception injuries on certain specified grounds.[47]

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[44] Parness, Crimes against the Unborn: Protecting and Respecting the Potentiality of Human Life, in: *Harvard Journal on Legislation*, Vol. 22, 1985, pp. 97–172.

[45] Fortin, *loc.cit*. (see n. 28 above), p. 76.

[46] Mason & McCall Smith, *op.cit*. (see n. 16 above), p. 94.

[47] Frankowski, *loc.cit*. (see n. 40 above), pp. 52–59.

One cause for increased actions for prenatal injuries arises from new procedures of induced abortion, i.e. the medical termination of pregnancy and selective pregnancy reduction: in these practices a foetus may survive and the physician risks a legal action brought by a deformed surviving child.[48]

A very controversial type of action for damages is called a "*wrongful life*" claim, and it is an action brought by a handicapped child alleging that he should never have been born. A corresponding action, brought by the parents, is called a "*wrongful birth*" claim. While in the United States and England there is a continuing trend toward judicial recognition of the "wrongful birth" action, the "wrongful life" claims have succeeded poorly.[49]

For example, in England the Court of Appeal in *McKay v. Essex A.H.A.*, rejected the "wrongful life" action in common law for several reasons: the child has suffered no injury because some life is better than none; such an action is contrary to public policy because it would undermine the principle of the sanctity of human life; the existence of such actions might encourage abortions and even put a doctor under a duty to carry out an abortion; and the court could not calculate the damages that it would have to award by comparing the child's non-existence and its present handicapped existence.[50]

Mason and McCall Smith recommend that the principle of "wrongful life" should be discarded in favour of "diminished life": the comparison should not be made between non-existence and a deprived life but between a defective life and one of a normal child.[51] Even more important is to acknowledge the advantages of such a social security system and/or a no-fault compensation (patient insurance) system which would make it unnecessary to bring action for damages against health personnel.[52]

There is reason to connect the tendency of according the foetus greater rights and the following two developments: the *availability of foetal therapy* and a recognition of the significance of pregnant women voluntarily taking risks

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[48] See Robert P. S. Jansen, Unfinished Feticide, in: *Journal of Medical Ethics*, Vol. 16, 1990, pp. 61–65.

[49] See, e.g., Frankowski, *loc.cit*. (see n. 40 above), pp. 59–62, and Andrew Grubb, Conceiving – A new Cause of Action? in: *Medicine, Ethics and the Law* (see n. 1 above), pp. 121–146. A more critical article is by Robert Lee, To Be or Not to Be: Is That the Question? The Claim of Wrongful Life. In: Lee and Derek Morgan (eds.), *Birthrights. Law and Ethics at the Beginnings of Life*. London, Routledge, 1989, pp. 172–194.

[50] Cit. according to Grubb, *loc.cit*. (see n. 49), pp. 122–123.

[51] Mason & McCall Smith, *op.cit*. (see n. 16 above), pp. 100–101.

[52] That kind of no-fault patient insurance system was introduced in Sweden in the 1970s and in Finland in the 1980s.

which endanger the health of the foetus.[53] It is a realistic prospect that even genetically defective foetuses can be treated using (somatic) gene therapy; a prenatal genetic diagnosis may then lead to gene therapy instead of an induced abortion.[54] Gene transfers in human somatic cells should be regarded as an acceptable form of therapy, as long as the rules provided for medical treatment are adhered to.[55]

In his work on comparative medical malpractice law, *Dieter Giesen* refers to recent case law indicating that at least in some jurisdictions a viable foetus has such rights to protection which may be enforced while it is still *dans le ventre de sa mère*: for instance, a mother who objects on religious grounds can be forced to undergo a blood transfusion to save the life of her unborn child.[56] I personally adhere to an opinion according to which there ought to be some form of moral responsibility for the well-being of offspring but to this end, civil, administrative and/or criminal law should be resorted to very cautiously in order to carry out that responsibility of the pregnant woman for foetal endangerment.[57] I also think it is advisable to protect the foetus in indirect ways, that is, through the protection of the pregnant woman by means of labour law designed to guarantee the woman safe work conditions during the pregnancy or exempting her from certain activities at the critical stages of pregnancy.[58]

4.4 Research on (living) human embryos and foetuses

As already indicated in section III, one of the key questions when regulating the beginnings of life concerns the status accorded to human embryos and foetuses, particularly the permissiveness of the research on living (pre-)embryos. In this

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[53] So Mason & McCall Smith, *ibid*., p. 76.

[54] See, e.g., Ruth. F. Chadwick, The Perfect Baby: Introduction, in: *Ethics, Reproduction and Genetic Control* (see n. 5 above), pp. 93–135 (118). As for a fuller account, see Mark I. Evans et al. (eds.), *Fetal Diagnosis and Therapy: Science, Ethics and the Law*. J.B. Lippincott Company, 1989.

[55] See, e.g., the *Resolution on genetic engineering of the European Parliament*, Doc. A2-327/88 (see n. 11 above), paragraphs 22–26, and the *Resolution "Criminal law and modern bio-medical techniques*", XIVth International Congress of Penal Law (see n. 10 above), paragraph 6.7.

[56] Giesen, *International Medical Malpractice Law*. Tübingen, J.C. Mohr (Paul Siebeck), 1988, p. 647.

[57] Regarding this issue, see e.g. the papers for a symposium on Criminal Liability for Fetal Endangerment, published in: *Criminal Justice Ethics*, Vol. 9, No. 1, 1990, pp. 11–51, with an introduction of John Kleinig.

[58] Regarding this kind of regulation in Eastern Europe, see Eleonora Zielińska, European Socialist Countries, in: *Abortion and Protection of the Human Foetus* (see n. 40 above), pp. 310–311.

issue there are, generally speaking, more permissive and more reserved views.[59]

Legal regulations in this field are, at least for the present, very defective. For instance, Resolution on "Criminal law and modern bio-medical techniques", adopted at the XIVth International Congress on Penal Law in 1989, states on the current situation and on the preferable legal regulation as follows:

> "Apart from the more or less extensive abortion legislation enacted in most countries, special legal protections for the fertilized egg between conception and nidation … are lacking. As a result, researchers may do what they wish with extra-corporeally produced embryos that have not been implanted… The same freedom applies to embryos which have been removed from the woman before nidation is completed. If there exist ethical guidelines on the interference with human embryos at all, usually they cannot be enforced or their breach sanctioned legally. This situation of underregulation is not satisfactory (paragraph 5.1).
> – It is generally preferred that the production of embryos for the sole purpose of research be subjected to state prohibition, if necessary by penal measures.
> – It has been held desirable not to fertilize more human ova than needed for a single treatment.
> – Apart from that, it is the prevailing opinion that manipulation of an embryo resulting in its intentional or unavoidable death is in any event admissible only if the embryo cannot be implanted in due course, if the research goal is strictly defined and oriented to achieve highranking gains, which cannot be accomplished other than by research on human embryos, and if the embryo is not developed beyond the normal stage of nidation… (paragraph 5.4).
> – Manipulation of embryos has to be subjected to special regulations setting out conditions and procedures. To the extent that this cannot be done by ethical rules and by safeguards against breaches (for instance by way of preventive control through ethics commissions …), penal law and its enforcement mechanisms should be taken into consideration" (paragraph 5.6).[60]

Leroy Walters has reviewed fifteen extended committee statements on the new reproductive technologies dating from 1979–1987 and originating in the United States, Australia, Canada or Western Europe, among other things in relation to human embryo research. The eleven extended committee statements approved at least some kinds of research with early embryos, while the remaining four committees regarded research on early human embryos as ethically unacceptable under any circumstances. The proponents of human embryo research fell

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[59] See, e.g., *Human Embryos and Research* (see n. 36 above), which includes the proceedings of the European Bioethics Conference in Mainz, 7–9 November 1988.

[60] Regarding this Resolution, see fuller information n. 10 above. See also Lahti, *loc.cit*. (see n. 13 above), pp. 619–620.

into two groups: those (six) allowing research only on embryos that are left over from the clinical context and those (five) permitting even the deliberate creation of embryos through *in vitro* fertilisation for research purposes.[61]

The legal regulation on research on (pre-)embryos has been under consideration in several European countries. Two examples of the recent legislative proposals may be mentioned. The Human Fertilisation and Embryology Bill (1989) of England contained two alternative options: a clause criminalizing any procedures on a human embryo other than those aimed at its transfer to the uterus, and a clause permitting such a research in approved circumstances. (In the final act of 1990 the latter alternative was adopted.) At the same time the German Government Bill for the Protection of Embryos was given to Parliament, and this bill prohibits the creation of human embryos specifically for research purposes, the use of embryos for other purposes than for its own benefit and the fertilization of more human ova than needed for a single treatment.[62]

These two bills illustrate the diversity of ways to balance the two kinds of conflicting values (rights) and interests, the value inherent in human life on one hand and the research interests on the other. The Council of Europe documents contain additional illustrations. For example, Recommendations 1046 (1986) and 1100 (1989) of the Parliamentary Assembly, concerning the use of human embryos and foetuses for diagnostic, therapeutic and scientific purposes, are quite elaborate both in relation to the definition of life's beginnings (see section 3.2 above) and to the purposes and preconditions of the use of embryos and foetuses.

It is also worth noticing that certain bio-medical techniques affecting human life have been regarded as so manifestly violating human dignity that those methods should be absolutely prohibited: *inter alia*, the creation of identical human beings by cloning or any other method; the implantation of a human embryo in uterus of another animal or the reverse; the fusion of human gametes with those of another animal; the creation of embryos from the sperm of different individuals; the fusion of embryos or any other operation which might produce chimeras; ectogenesis, or the production of an individual and autonomous human being outside the uterus of a female; the creation of children from people of the same sex.[63]

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[61] See in greater detail Walters, Ethics and New Reproductive Technologies, in: *Biomedical Ethics*: A *Multinational View, Special Supplement*, June 1987, pp. 3–9.

[62] See *Entwurf eines Gesetzes zum Schutz von Embryonen, Drucksache* 11/5460, 25.10.1989.

[63] See esp. *Recommendation* 1046 (1986) *of the Parliamentary Assembly of the Council of Europe*, paragraph 14.A.iv.

4.5 Concluding remarks on the recommendable methods of legal regulation

From the foregoing it is clear that very different methods of legal regulation have been used or are being planned in this field. Some of my personal views have cropped up when dealing with individual questions. In order to give a more general description of the aspects to be taken into consideration in drafting models for legal regulation which affects bio-medical activities, I shall again cite Resolution on "Criminal law and modern bio-medical techniques", adopted at the XIVth International Congress on Penal Law in 1989:

> "To take care of … different interests requires differentiated means: ranging from rather 'soft' professional guidelines in order to reach or keep a rather high medical-ethical standard to legal rules with diverse enforcement models and sanctioning methods. A strategy which integrates private law schemes with administrative measures and criminal sanctions would seem most adequate. The appropriateness of different control mechanisms regarding bio-medical procedures depends also on the ways in which the activities of health care in general and of research personnel in particular are supervised by respective countries' national legislation. This can also include differences between criminal and mere administrative sanctions. A further alternative can be the law's providing only a regulatory framework, in connection with a licencing authority controlling the work in this field, with that authority possibly creating rules by itself and taking the necessary enforcement measures. The employment of criminal law as a control mechanism has to be done on the basis of rational argumentation. Criminalization of medical activity as well as the threatening of penalties has to remain a means of 'last resort' (*ultima ratio*): the first pre-condition has to be the worthiness of endangered good and the blameworthiness of the endangering action (*Strafwürdigkeit*). Furthermore, on the basis of a cost-efficiency comparison of different means, the employment of criminal punishment must prove both as necessary (*Strafbedürftigkeit*) and suitable (*Straftauglichkeit*)" (paragraphs 1.6–1.8).[64]

The most urgent measures include the endeavours to internationally *harmonize* the rules and principles guiding human fertilization and embryology and the *creation of national* multidisciplinary *bodies*. These bodies could be entrusted with such tasks as delivering information about technological advances in embryology and biological research, guiding and monitoring the potential applications thereof, evaluating results and possibly authorizing specific projects

[64] Regarding this Resolution, see n. 10 above. See also Lahti, *loc.cit*. (n. 13 above), pp. 607–613.

of scientific research in these fields.[65]

In accordance with the last mentioned preference of legal measures Denmark, when introducing a new law aimed at governing certain bio-medical experiments in 1987, above all established a national ethical council. The council was supposed to propose legislation, *inter alia* on the use of fertilized eggs and living foetuses for research, and to guide the research-ethical committees which have been formed to implement the Helsinki-II declaration. There is reason to believe that the legal regulation of human embryology should strive to be continually responsive – "reflexive" – to changes in medical technology and in enlightened public opinion. As Jabbari puts it,[66] in the context of embryonic research we cannot appeal to substantive moral values, for agreement is denied by the conflict of ethical theories. The aim of the law in this area should be to create both institutions which are a forum for informed discussion and procedures which can promote compromise.[67]

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[65] See *Recommendation* 1100 (1989) *of the Parliamentary Assembly of the Council of Europe*, paragraph 9.B.i.

[66] Jabbari, *loc.cit*. (see n. 14 above), p. 39.

[67] For the assistance in preparing this report I would like to thank Ms. *Riitta Turunen*, LL.M. In addition to the Council of Europe, the Finnish National Board of Health has also financially supported the preparation of the report.

30. Euthanasia*

1 INTRODUCTION

Over the past few years, the ethical and legal debate concerning euthanasia and terminal care has been on the increase both in Finland and elsewhere in Europe. The debate in Europe has been fuelled by the Dutch *Termination of Life on Request and Assisted Suicide Act* of 2001[1] and the Belgian *Act on Euthanasia* of 2002[2], as well as the 2002 ruling of the European Court of Human Rights (ECHR) in the case of *Pretty v. the United Kingdom*. In Finland, similar debate has been going on especially at those moments when the Penal Code (PC) provisions on offences against life and health are being amended, as in 1969 and 1995 (amending Acts 491/1969 and 578/1995), as well as in the context of documents drawn up on the initiative of the National Advisory Board on Health Care Ethics (ETENE) in 2002 and 2003[3]. As regards our recent legal literature, euthanasia is broadly covered in Irma Pahlman's doctoral dissertation in the field of medicolegal research, *Potilaan itsemääräämisoikeus* (Patient's Right of Self-Determination), and it features also in Vilja Hahto's dissertation in the field of criminal law and tort law, *Uhrin myötävaikutus ja rikoksentekijän vastuu* (Contribution by the victim and liability of the offender).[4] There have been interesting developments also in the common law system and e.g. in Germany.[5]

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* Original source: In: Erkki J. Hollo (ed.): *Finnish Legal System and Recent Development*. XVIIth International Congress of Comparative Law. Organised by the International Academy of Comparative Law. 16–22 July 2006, Utrecht, Netherlands. Edita, Helsinki 2006, pp. 81–104. This is the final draft for the publisher's version.

[1] The English translation of this Act, which was issued on 10 April 2001 and entered into force on 1 April 2002, has been published in *European Journal of Health Law* (EJHL) 2001, pp. 183–191.

[2] The English translation of this Act, which was issued on 28 May 2002 and entered into force on 23 September 2002, has been published in EJHL 2003, pp. 329–335. For a comparison of the Belgian and the Dutch legislation, see *Nys* 2003.

[3] See ETENE 2002 and 2003.

[4] See *Pahlman* 2003, chapter 9 and *Hahto* 2004, chapter V.2.

[5] For the situation in common law countries, see esp. *Otlowski* 1997, and in Germany, *Roxin* 2000. For a comparative law view, see *Taupitz* 2000. As to the newest debate, see e.g. *Becker-Schwarze* 2005, *Biggs* 2005, *Laurie* 2005 and *Pakes* 2005.

In this essay, the author will describe the main issues of this debate, mainly from the viewpoint of Finnish legal development and legal policy. Earlier positions by the author in this field appear in the expert opinions issued in the context of the reform of the PC provisions referred to above[6] and in his articles on terminal care and euthanasia[7]. In this essay, the author draws from these notions and develops them further. The motto of the paper can be taken from an evaluation in a 2004 preliminary study commissioned by the Committee for the Future of the Parliament of Finland, "Suomen terveydenhuollon tulevaisuudet" (The Futures of the Finnish Health Care), to the effect that euthanasia will become more broadly accepted and that Finland, together with many other EU Member States, will follow the example of Belgium and the Netherlands in another 10 to 15 years.[8]

2 EUTHANASIA AS A LEGAL CONCEPT AND THE STATE OF THE LAW UP TO 1969

Euthanasia, as a concept, does not feature in Finnish legislation. When chapter 21 PC was being reformed in 1969, the Legal Affairs Committee of the Parliament drew specific attention to euthanasia, defining it as *mercy killing*, that is, the termination of another person's life by reason of mercifulness or pity.[9] Purely etymologically, euthanasia means a 'good death', from the Greek *eu* and *thanatos*. This original meaning underlies the conceptual definition of *medical euthanasia*, or *assisted death*, which normally means the contribution of a medical professional in the easing of, or bringing about, the death of a hopelessly and/or painfully terminally ill patient, in accordance with the patient's wishes.[10] However, euthanasia is not an unambiguous concept, nor has its precise definition been established in the international or domestic ethical-legal debate.[11] In this paper, the focus will be on medical euthanasia, unless it is specifically stated otherwise.

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[6] That is, the author's memorandum drafted in the context of the preparation of the proposal of the Ministry of Justice PC reform project (1989) and the opinion given to the Legal Affairs Committee of the Parliament on 25 May 1994 in a hearing preceding the issue of Committee report LaVM 22/1994.

[7] See *Lahti* 1988b, 1996 and 2002.

[8] See *Ryynänen* et al. 2004, p. 85–86.

[9] See LaVM 11/1969 vp, p. 4 (concerning Government bill HE 68/1966 vp).

[10] See e.g. *Uotila* 1975, p. 514 and *Pahlman* 2003, p. 305-307.

[11] For a broader discussion on the various definitions, categorisations and regimes concerning euthanasia, see *Pahlman* 2003, chapter 9, and *Pakes* 2005, p. 121.

The indeterminate nature of euthanasia as a concept and the incoherence of the regulations governing euthanasia are apparent e.g. in the results of the recent questionnaire from the Steering Committee on Bioethics of the Council of Europe to the Member States of the Council.[12] For instance, in the Belgian Act of 2002, euthanasia has been defined neutrally, as the deliberate termination of another person's life on that person's request, even though there are very detailed material and procedural provisions on the prerequisites for impunity. Thus, the matter is always of euthanasia performed by a physician on a patient in a medically hopeless and persistently agonising condition, with no chances of easing the agony, which ensues from illness or a serious and incurable trauma (sections 2 and 3). The Dutch Act of 2001 does not refer to the concept of euthanasia at all.

In the Finnish debate, the 1969 reform of the PC was a significant turning point. The amendment contained a wholesale rewriting of chapter 21 PC, which concerns the protection of human life and health. It was decided that the earlier specific provision on mitigation in the sentencing of a person who kills another on the victim's resolute request, as compared to normal deliberate homicide, would be retained. In contrast, the idea put forward in the 1922 proposal for criminal law reform authored by Allan Serlachius, namely that the deliberate termination of another person's life for reason of pity would be treated in the same manner as killing on request, was not incorporated in the legislation[13].

In the said reform of chapter 21 PC, enacted at the end of the 1960s, the Parliament removed as unnecessary a provision proposed by the Government to the effect that assistance to another person's suicide would carry a penal sanction. The original PC, from 1889, did not contain this kind of specific criminalisation, even though also Serlachius later proposed the same[14]. Hence, assistance to another person's suicide or other participation in the same carries no penalty under the PC, but the killing of another person on request carries a penalty as deliberate homicide, either under the specific or the general provisions. The specific criminalisation of killing on request remained a part of Finnish criminal law until the reform of 1995. This distinction, and the question whether, and when, assistance to another person's suicide can also be punishable will be discussed in more detail below (section 4).

When the Legal Affairs Committee of the Parliament considered the issue of euthanasia in the context of the 1969 reform of the PC, it opined that the then

[12] See Council of Europe 2003.

[13] See *Serlachius* 1922, p. 32 (PC 25:1.2).

[14] *Serlachius* 1922, p. 32 (PC 25:2). For a similar earlier proposal, see *Kaila* 1913, p. 314.

debate on euthanasia had concentrated on the borderline between medical care and homicide prohibited in the PC. Progress in medicine had made it easier to maintain the vital functions of a dying patient. Physicians had emphasised to the Committee that their duty to provide medical treatment covered also dying patients and that the decision to discontinue a treatment was itself a part of the treatment. It appeared to the Committee that it was becoming a more and more difficult question whether and to what extent the treatment of a patient covered also "assisted death". Nevertheless, the Committee, and the Parliament as a whole, declined to take specific provisions on this matter into the PC, because these might give rise to misunderstandings about patient safety. The Legal Affairs Committee insisted that a total ban on euthanasia be maintained.[15]

For decades, this position of the Legal Affairs Committee constituted the authoritative Finnish legal understanding of the issue, albeit that the reasons supplied by the Committee are open to differing interpretations. The reasons do not indicate, beyond dispute, whether the total ban on euthanasia in fact extends also to the treatment of a "dying patient". The author has in his earlier writings suggested that the Committee intended to leave it to accepted medical practice to determine the preconditions for the discontinuation of life-prolonging or life-sustaining treatment to patients with hopeless prognoses.[16]

This is not a new innovation in Finnish legal literature, as Inkeri Anttila came to the same conclusion already 60 years ago, when she was pondering on the lawfulness of "assisted death": There should be no requirement to artificially sustain a dying patient, unless the patient self wishes the same, and such assisted death by way of an omission of action should not be considered unlawful. There was no need for specific legislation, but instead customary law should be developed in this direction. As a matter of fact, Anttila's legal policy position on even a broader definition of medical euthanasia – the bringing about of the death of a hopelessly ill patient in agonising pain, on request, by way of active measures by the physician – is relatively affirmative.[17]

[15] LaVM 11/1969 vp, p. 4.

[16] See *Lahti* 1988b, p. 1434 and *Lahti* 1996, p. 4.

[17] See *Anttila* 1945, esp. p. 247.

3 EUTHANASIA AND TERMINAL CARE IN THE ETHICAL-LEGAL DEBATE BETWEEN 1969 AND 1995

In an article from some 30 years ago, Unto Uotila, Professor of Forensic Medicine, discussed medical euthanasia, utilising the psychiatrist Clarence Blomquist's conceptual categorisation of active and passive euthanasia and, as issues separated from them, bringing about death, and death as an unintended by-product of a treatment.[18] Uotila's conclusion was to keep within the original definition of euthanasia and to approve of the easing of death within strict limits, subject to the discretion of the physician; accordingly, the suffering of a hopelessly, terminally ill patient is not to be prolonged unnecessarily through extraordinary life-sustaining measures. On the basis of this position, as well as the facts that assistance to suicide is not punishable, that the patient's right of self-determination, including the right to refuse treatment, is to be respected, and that the concept of brain death is accepted as valid, Uotila argued that there was no need for the adoption of a broader definition of justified (passive) euthanasia. Active euthanasia, of course, is prohibited under the homicide legislation (except for the case of assistance to suicide). The deliberate bringing about of death is likewise punishable, but the bringing about of death as a by-product of the administration of heavy painkilling medication against unbearable suffering would be justified.[19]

This Uotila's position, which would seem to agree with the 1969 stance of the Legal Affairs Committee of the Parliament, is a very good reflection of the opinion prevailing among the majority of Finnish experts in the field at the time, and, indeed, later. One can even go as far as to suggest that, during the past three decades, the state of the law and the conceptual framework have undergone mere *clarifications* and no relevant material development. However, since the 1980s there have been more and louder voices for the broader acceptance of euthanasia, both among academics and on behalf of the "Exitus" Association, which was established in 1993 (see section 4 below).

Inkeri Anttila's reference to the development of customary law, as mentioned above, and the statements of Unto Uotila on the importance of a physician's discretion ("clinical autonomy") can be combined into the requirement that the applicable medical practice must be driven by accepted (medico)legal principles. These principles, again, get their essential content from medical

[18] See *Blomquist* 1967 and *Uotila* 1975.

[19] *Uotila* 1975, p. 515 and 521. Uotila's position on the concept and the acceptability of passive euthanasia is not clearly evident in this work.

ethics, governing the actions of physicians and other medical professionals. The principles and rules are not immutable, but e.g. changes in domestic and international medicoethical and medicolegal norms affect their content. In all, there is a mutual interaction between the ethics and the law of medical care and treatment.[20]

The development of the past decades has been marked by increased legal regulation of medical activity, as well as by the inclusion of medicoethical rules in the international human rights regime; the most significant such instance was the conclusion in 1997 of the Council of Europe Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Convention on Human Rights and Biomedicine).[21] It can be stated that this development of medical law (and the parallel development of biolaw) a rise in the proportional significance of legal norms. First and foremost, we should note the increased significance of general fundamental rights and human rights norms and especially of the norms governing the status of patients (treatment relationship), the prime examples being the Patient Injury Act (585/1986) and the Act on the Status and Rights of the Patient (785/1992; in the following, the "Patient Act").[22] The 1997 Convention on Human Rights and Biomedicine entered into force on 1 December 1999, but Finland has as of yet not ratified it – albeit that we have committed to implementation before long.

The accepted practices in the treatment of dying patients in Finland have been greatly influenced by the *Instructions for Terminal Care* issued by the National Board for Health Care and Treatment in 1982.[23] Terminal care, as referred to in the instructions, means care given to a patient at a stage of his or her illness where the available treatments will no longer improve the prognosis, as well as care given when death approaches. As defined in the instructions, the content of terminal care is to provide the patient with adequate treatment of symptoms and other care respecting his or her dignity as a human being, as well as to offer support to the patient's close ones.

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[20] For more detail, see *Lahti* 2002, *Nielsen* 1998 and *Lahti* 1988a.

[21] See European Treaties, ETS No. 164, Oviedo 4 April 1997, Convention for the protection of human rights and dignity of the human being with regard to the application of biology and medicine.

[22] See in more detail *Lahti* 1994 and 1995, *Pahlman* 2003 and *Lötjönen* 2004.

[23] See DNo 3024/02/80, 14 April 1982. When the National Board for Health Care and Treatment (in Finnish: *Lääkintöhallitus*) was disestablished in 1990, also these instructions were formally repealed; however, the principles underlying the instructions have remained in application also afterwards (see ETENE 2003, p. 9).

The National Board used to send out circulars so as to influence the practices in health care and treatment institutions subject to its control and supervision. The circulars were not to contain rules or instructions that would be contrary to legislation or customary law, but under conditions of uncertainty of interpretation and irregular practices, the circulars were useful in formulating and reinforcing legally accepted practices and, hence, in determining professional duties of good care. It is likely that the instructions for terminal care had the same effect on medical practice and attitudes. The instructions played their part in reinforcing the ethically and legally valid consideration that the physician is duty bound also to ease the suffering of the patient and to respect his or her humanity – everyone has the right to die with dignity.[24]

The instructions for terminal care were not without their difficulties of interpretation, e.g. as regards the definition of the terminal stage of a person's illness and the delimitation of the treatments that can be forgone under the instructions. Moreover, the instructions did not spell out explicitly that the decisions on the terminal care of a lucid patient must be made in concord with him or her.[25]

The state of the law was clarified in this respect with the entry into force of the Patient Act on 1 March 1993. The Act contains provisions e.g. on a patient's right of self-determination and the status of patients without legal competency, as well as lays down the basis for the legally binding effect of "living wills" (see especially sections 5, 6(1) and 8). Of course, it had been possible to derive the right of self-determination already from the fundamental rights and human rights guaranteeing personal liberty and integrity.[26]

In the context of the Stage II recommendations of the PC reform project of the Ministry of Justice of Finland (1989), it was proposed – on the basis of a suggestion made by the present author, a member of the steering committee of the project – that a restrictive provision concerning "terminal care" be incorporated into the PC. The provision would have constituted a statutory affirmation that the homicide provisions in the PC do not apply to an act where medical treatment sustaining the vital functions of a terminally ill patient is withheld in accordance with accepted medical practice. The withholding of treatment means both the decision not to begin and the decision to discontinue

[24] The duties of medical professionals include *inter alia* the easing of the suffering of the ill (see the relevant Act, 559/1994, section 15). For the legal basis of human dignity, see the Constitution of Finland (731/1999) sections 1(2) and 7(2) and Article 1(1) of the Convention on Human Rights and Biomedicine.

[25] For this criticism, see already the author's expert opinion on the draft instructions to the National Board, 13 November 1981.

[26] For the earlier state of the law, see *Lahti* 1972 and *Pahlman* 2003, passim.

the provision of treatment. According to the preparatory works for the suggested restrictive provision, it would not have legitimised active assisted death, where death is caused directly, e.g. by the administration of a lethal dose of a pharmaceutical substance. Neither would the restrictive provision have solved all of the legal problems inherent in terminal care. For instance, the significance of the will of the patient and of the patient's consent was supposed to be left to be determined in accordance with the relevant medicolegal principles.[27]

During the continued preparation of the law reform project, the idea of such a restrictive provision was abandoned, because the invited comments had contained doubts as to the necessity of the provision. Legitimate terminal care would continue to be defined in accordance with customary law.[28] In contrast, Mr Henrik Lax, a parliamentarian, and a number of his colleagues introduced a legislative initiative so as to have such a provision adopted.[29] When dealing with the ensuing Government bill, the Legal Affairs Committee of the Parliament noted that medical progress had enabled the physicians to sustain the vital functions of terminally ill patients also in situations when it was evident that the treatment constituted merely a delay before the death of the patient. Furthermore, the Committee considered that terminal care had become a part of established, accepted medical practice. As the Government bill, in its final form, did not contain any provision clarifying the legal status of a person in charge of the treatment of a terminally ill patient, the Committee issued an exhortation for a thorough study into the issue, which was deemed to raise very important questions of principle.[30]

The present author appeared as an expert advisor in the Legal Affairs Committee on this issue; in his opinion dated 25 May 1994[31] he outlined for the Committee a draft for a provision covering both passive assisted death (terminal care) and active assisted death:

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[27] See the proposal of the PC reform project 1989, p. 230–232 and 256–257. In his memorandum of 8 September 1988, the author had proposed a more precise wording for the restrictive provision: "Bringing about the death of a hopelessly/incurably ill patient shall not be considered an offence against life, if this is achieved through the discontinuation of treatment that pointlessly prolongs the life of the patient or through the administration of medication intended to ease the patient's suffering. Such terminal care shall be provided in mutual understanding with the patient and in accordance with approved medical practice."

[28] See HE 94/1993 vp, p. 91.

[29] See Legislative initiative 9/1996 vp.

[30] See LaVM 22/1994 vp, p. 7.

[31] The author did not adopt any personal position on whether the PC should contain also a provision allowing active euthanasia.

> "It shall not be considered a criminal offence under this chapter [21] for a person, in mutual understanding with a terminally ill patient, to discontinue treatment sustaining the vital functions of the patient (terminal care) or to take such measures for bringing about the patient's death that the patient resolutely requests (assisted death).
>
> – – – shall issue more detailed orders/instructions on the procedures to be observed in terminal care and assisted death."

Already the designations of the acts (terminal care and assisted death) would under the proposed provision have indicated that there was a difference between them, thus emphasising the established division of the concepts in the ethical-legal practice. As has been described above, terminal care has long been accepted in customary law, which position is nowadays further reinforced by the patient's right of self-determination under law, as well as by the established view of terminal care as a form of legitimate medical treatment. Accordingly, one can argue that the constituent elements of an offence of homicide have not been completed in the event of terminal care and there concomitantly is no need to apply the criminal law rules on vindication.[32] In contrast, there is no similar, established customary law validation of active assisted death, capable of precluding the application of the provisions on homicide. The restrictive provision relating to active assisted death would have constituted an explicit exception to the punishability of taking another person's life.

It is to be noted that assistance to suicide was not rendered punishable even in the context of the 1995 reform of the PC, and that in that same context the specific criminalisation of killing on request was abandoned. The new orders or instructions on procedure could be modelled on the Dutch or Belgian legislation on assisted death. The provision outlined by the present author would of course not have obliged anyone to undergo terminal care or assisted death. Nor would the provision have obliged anyone to engage in terminal care or assisted death, but the it would have entitled to the same, having the effect of a negative constituent element of an offence.

Up to the reform report of 2000, the general principles of criminal law included a "defence of necessity". According to that defence, if a punishable act was committed under circumstances where the person could not reasonably have been expected to do otherwise owing to severe compulsion or coercion, insurmountable conflict of obligations or some other similar compelling reason, the person was free of criminal liability. Active assisted death (or, more precisely, mercy killing) – the killing on request of a family member severely ill

[32] See e.g. *Lahti* 1972, p. 85 and *Lahti* 1988b, p. 1428–1429.

or in agonising pain – was cited as an example of a situation where the defence of necessity could be applied.[33] This defence was not, however, included in the 2002 reform bill nor in the legislative amendment adopted on the basis thereof. The criminal penalties system does contain certain other mitigating provisions that can be applied instead, such as the reduction of the sentencing scale and, under exceptional circumstances, the waiver of punishment (see chapter 6, sections 6–8 and 12, in PC amendment 515/2003).[34]

4 THE PAST DECADE'S DEBATE ABOUT EUTHANASIA AND TERMINAL CARE: THE LIMITS OF ACCEPTABLE EUTHANASIA

The debate on assisted death and terminal care did by no means end with the enactment of the 1995 reform of the PC. In fact, already in its report (1994) on the reform bill in question the Legal Affairs Committee of the Parliament required clarification of the status of dying patients. This call was later answered by the National Advisory Board on Health Care Ethics (ETENE), a body established in 1998, which issued a seminar report in 2002 on the ethical issues pertaining to death. The title of the report was *Kuolemaan liittyvät eettiset kysymykset terveydenhuollossa* (Death and health care ethics). A lot of attention was given to the problematic issues of treatment of dying patients, underlined also by the present author who was involved in the drafting of the 2002 report: There was a clear need for a new recommendation on appropriate terminal care, and the regulation of consent issues and the status of incapacitated patients needed clarification.[35]

Work continued on the issues just mentioned. A working group appointed by ETENE prepared a memorandum on terminal care, for use in instruction and in the issue of regional and local guidelines. The memorandum clarifies the concepts of dying and terminal care and palliative care: Dying care is given to patients who are facing death, with terminal care being defined as care given immediately before death; palliative care is given to the incurably ill. An essential element to all three is the easing of symptoms and of suffering, because there is no cure. Also under these circumstances, the patient's right of self-

[33] See the proposal of the PC reform project 2000, p. 167-169.

[34] On the consideration of alternative sanctions in cases of euthanasia, see *Hahto* 2004, p. 262–269 and the works cited. See also section 6 below.

[35] See ETENE 2002 and *Lahti* 2002, p. 30-32.

determination must be respected, with the treatment decisions and treatment plans being made in mutual understanding with the patient or in accordance with his or her expressed wishes relating to treatment.[36] These points made in the memorandum correspond to Recommendation no 1418 (1999) of the Parliamentary Assembly of the Council of Europe on the protection of the human rights and dignity of the terminally ill and the dying.

In addition, an initiative for the amendment of sections 6 and 8 of the Patient Act was made, so as to strengthen the patient's right of self-determination in the spirit of the Convention on Human Rights and Biomedicine, and also to clarify and reinforce the status of a patient's expressed wishes relating to treatment. The realisation of the right of self-determination would be promoted also by issuing legislation entitling a patient to nominate a proxy for the eventualities of incapacity or limited competence.[37]

The measures described above can be seen as a way to reinforce the right of the incurably and/or painfully terminally ill patients to receive desired, high-quality and humane care. They are also conducive to reducing the pressures for providing active assisted death. At least, this is an assumption made on two different publication forums for the Finnish medical profession.[38] It has been estimated that active euthanasia has been given an impetus by situations where hospital staff has persisted in refusing to discontinue treatment in a hopeless situation regardless of the suffering of the patient.[39]

On the other hand, it has been assumed that the trend is towards the broader acceptability of euthanasia, as "people these days are more prepared to control their own death".[40] This view is supported by a Finnish opinion poll for the Finnish Broadcasting Corporation in 1994 and 2004, indicating that the proportion of the population with a positive attitude towards active euthanasia varies between 75 and 80 per cent (N=500); the question asked was whether an incurably ill patient in great pain should self have the right to decide when his or her life is terminated. In the 2004 poll, the proportion of affirmative

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[36] See ETENE 2003, esp. section 9 (recommendations).

[37] See Working Group report 2003:25 of the Ministry of Social Affairs and Health. The bill for the relevant amending Act is intended to be submitted to the Parliament in 2005. See also Working Group report 2004:13 of the Ministry of Justice, containing a proposal for general legislation on the nomination of proxies for the eventuality of incapacity.

[38] See *Vainio* 2003 and *Ryynänen* et al. 2004, p. 86. See also *Pahlman* 2003, p. 364–365 and *Kokkonen* et al. 2004, p. 130–135. According to *Vainio* (2003), the discontinuation of life-prolonging treatment in hopeless situations should no longer be described as (passive) euthanasia; compare *Kokkonen* et al. 2004, p. 132.

[39] *Vainio* 2003. See also *Kosunen* et al. 2001, p. 51 and *Ryynänen* et al. 2004, p. 86.

[40] *Ryynänen* et al. 2004, p. 86.

answers was 75 per cent (with 17 per cent opposing and 9 per cent declining to express an opinion). It was further indicated in the question that the patient was to be aware of his or her condition and that two physicians had to concur in affirming the decision.[41]

Nonetheless, the attitude of medical professionals towards active euthanasia is quite negative, with little variation regardless of whether the matter is of active euthanasia or assisted suicide. A randomised poll of 508 physicians (members of the Finnish Medical Association), 582 nurses (members of the Finnish Nurses Association) and 587 members of the general public (aged between 18 and 65) was taken in 1998. In a hypothetical case where the patient (age varying between 10 and 80) was suffering of painful and incurable cancer estimated shortly to result in death, 8 per cent of the physicians approved of active euthanasia and 20 per cent assisted suicide, with the corresponding proportions among nurses being 22 and 34 per cent and among the general public 42 and 49 per cent.[42] Of course, there is also a number of holders of the contrary opinion among the Finnish medical profession.[43]

As regards Finish law, a noteworthy result of the polls described above is that the moral attitudes of the respondents did not vary overmuch between assistance to suicide and medical euthanasia, a form of killing on request, even though there is a clear distinction between the two in the PC, as has been noted above (sections 2 and 3). In difficult situations, it is not a simple thing to make such a distinction, however, albeit that the starting premises are clear:

If the person requesting euthanasia retains full freedom ("mastery") to decide on his or her life or death even after the acts committed by the addressee of the request, and hence is self the perpetrator of the killing act (e.g. by swallowing lethal pharmaceuticals), the matter is of assisted suicide; in killing, the act completing the event is committed by the addressee. Liability for homicide may arise also from "indirect" action, where the subject of the euthanasia is merely an instrument owing to incapacity, lack of intent or some other similar reason, or by application of the principles governing the duty of protection under criminal law.[44]

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[41] Data from the polling company Taloustutkimus Oy.

[42] See *Ryynänen* et al. 2002.

[43] See esp. *Palo* 1994. Note also the position of *Hänninen* (2003), the director of the terminal care institution Terhokoti: Terminal care and euthanasia are not mutual alternatives, nor are euthanasia and the respect for life necessarily in controversy. For pro-euthanasia remarks by Finnish philosophers, see esp. *Häyry – Häyry* 1987, part II.

[44] See LaVM 11/1969 vp, p. 4, *Lahti* 1972, p. 71 and *Nuotio* 2003, p. 422.

In fact, it is even more difficult to draw a line between impunity and a punishable act, as the accepted medical practice recognises also certain active measures desired by the patient and bringing about his or her death; the easing of severe pain, with death an imminent by-product, and the discontinuation of an ongoing treatment process by active measures (such as the removal of breathing apparatus) when the patients withdraws his or her consent for such treatment, resulting in death. In the former of these cases, the restriction of the punishability of the act can most conveniently be justified by reference to the lack of the constituent elements of homicide, without there being a need to consider the possibility of vindicating or mitigating circumstances. In the latter case, it is essential that the discontinuation of treatment is evaluated in parallel with the omission-like withholding of treatment, that is, the justifiable refusal of the patient to undergo given treatment, as referred to above.[45]

Moreover, the distinction is blurred further by the question whether assistance to suicide, unpunishable under the PC, can nevertheless be criticised as a violation of the professional obligations of a physician, or whether there is impunity of other sanctions as well, owing to the act being considered legitimate as professionally accepted pain reduction. According to the guidelines on medical ethics adopted by the Finnish Medical Association, the participation of a physician in the assistance of suicide is governed by the duty of the physician to protect his or her patient.[46] The Dutch Act of 2001 treats killing on request and assisted suicide the same way, while the silence of the Belgian Act on assisted suicide has given rise to legal uncertainty.[47]

This state of the law, with its problems of application, has given Pahlman reason to argue, in her dissertation, that physician-assisted death, in the nature of assistance to suicide, should not be considered as inappropriate medical practice. On balance, the main consideration of medical law should be on the easing of the patient's suffering and on the patient's right of self-determination. Indeed, there are solid grounds for this position. In contrast, however, the evaluation of euthanasia, in the nature of killing on request, is a much more difficult proposition under the present state of the law. Pahlman argues that in

[45] Cf. the German criminal law debate, where essentially the same results have been reached by partially different lines of argument, *Roxin* 2000, p. 90–91 and 95, and the works cited. (Assistance to suicide has not been criminalised in Germany, either.)

[46] See Lääkärin etiikka (*Medical Ethics)* 2005, section on Euthanasia. See also *Ryynänen* et al. 2002. Cf. *Kokkonen* et al. 2004, p. 131, where – in the section on active euthanasia – it is merely noted that the issue of active euthanasia remains unsettled. Of the authors, Paula Kokkonen was the long-time director of the National Authority for Medicolegal Affairs (TEO) until 2004, and Tarja Holi the deputy director of TEO.

[47] See *Nys* 2003, p. 241–242.

the medicolegal balance, under strictly defined circumstances, also this kind of euthanasia might develop into an accepted medical practice and thus form a basis for the restriction of criminal liability for homicide.[48]

Pahlman presents a tortuous path of reasoning which is not without its ambiguities; its credibility would be enhanced by additional argument. In the evaluation of the feasibility of Pahlman's ideas, the usefulness of the various grounds and means of restricting criminal liability should be examined in detail. The scale of exceptionality of a criminal case has several dimensions, pertaining to the constituent elements of the act, its unlawfulness, the culpability of the perpetrator and the discretion inherent in sentencing.[49] Should the intent to restrict the interpretation of the constituent elements of homicide through a given application of medicolegal principles, in which event the applicable principles and their relative legal significance must be carefully evaluated so as to resolve any conflicts that will arise? Or, should we instead adopt a broad interpretation of inevitability in criminal law and of the closely connected concept of conflict of obligations? And what is the effect of an insurmountable conflict of obligations, as it was decided not to include any provision on a defence of unavoidable circumstances in the PC? The sentence may be mitigated, and perhaps even waived, if the act has been committed under circumstances closely resembling the circumstances giving rise to the application of the provisions on vindication (see chapter 6, section 8(1)(4) and section 12, of the PC).

The author discusses the first of these issues in the light of the *Pretty* ruling of the ECHR (in section 5). As for the latter two issues, suffice it to be mentioned here that there is certain interesting theoretical discussion available in the pre-2001 case-law of the Dutch Supreme Court as well as in German jurisprudential debate, which is based on a legislative framework not all too different from the Finnish. Before the enactment of the 2001 legislation in the Netherlands, case-law was developed there on the conditions for the impunity of physician-assisted suicide and active euthanasia on the basis of the theories of inevitability and the conflict of obligations.[50] Correspondingly, it has been proposed in German debate that the impunity of active euthanasia can be based on a restrictive interpretation of the provision on killing on request (the emphasis being on the patient's right of self-determination) or on the

[48] See *Pahlman* 2003, chapters 8 and 9, esp. p. 341 and 360–365 and the criticism against Pahlman in *Nuotio* 2003, p. 421–424.

[49] See e.g. *Lahti* 1974, p. 334–336 and *Hahto* 2004, p. 155–175.

[50] For more detail, see e.g. *Tak* 2002, chapter 3.

application of the rules of inevitability (the conflict of interest being resolved with an emphasis on the patient's right of self-determination and the easing of the patient's pain).[51]

5 ECHR: *PRETTY V. THE UNITED KINGDOM*, 29 APRIL 2002

The application of human rights and fundamental rights norms – especially those in the Council of Europe Convention on Human Rights and Fundamental Freedoms (the Convention) and in the Convention on Human Rights and Biomedicine – is very significant in any consideration of the principles of medical law and biolaw. These norms should be carefully observed when the acceptability and the limits of euthanasia are being considered. So far, there is relatively little case-law to this point.[52] A specific mention should be made of the Strasbourg Court (ECHR) case of *Pretty v. the United Kingdom*, of 20 April 2002, concerning the application of the Convention to assisted suicide and mercy killing.[53]

> Facts of the case: The applicant was 43 years old, married, with one daughter. She suffered from a neuro-degenerative disease which is associated with progressive muscle weakness affecting the voluntary muscles of the body. As a result of the progression of the disease, severe weakness of the arms and legs and the muscles involved in the control of breathing are affected. Death usually occurs as a result of weakness of the breathing muscles, leading to respiratory failure and pneumonia. No treatment can prevent the progression of the disease. The applicant's disease was diagnosed in 1999, and was at an advanced stage at the time of the proceedings. She was essentially paralysed from the neck down, had virtually no decipherable speech and was fed through a tube. Her life expectancy was measurable only in weeks or months. However, her intellect and capacity to make decisions were unimpaired. The final stages of the disease are exceedingly distressing and undignified. As she was frightened and distressed at the suffering

[51] For an overview of this debate, see *Roxin* 2000, p. 106–110, and the works cited. Roxin does not himself accept these views, because their adoption would constitute an essential intervention into the nature of a physician's work and because the impunity of assistance to suicide means that there is no overwhelming reason for changing the state of the law. Nonetheless, he supports the adoption of a specific provision on the waiver of punishment in cases of euthanasia.

[52] See *Lötjönen* 2004, chapter 3, and especially for the human dignity point of view, *Beyleveld – Brownsword* 2001, *passim*.

[53] This case has been commented on by at least *Leenen* 2002, *Husabø* 2003, *Lötjönen* 2004, p. 102–106 and briefly *Pahlman* 2003, p. 344 note 1216.

and indignity that she was to endure if the disease ran its course, she very strongly wished to be able to control how and when she would die. However, the applicant was prevented by her disease from committing suicide without assistance.

Intending that she might commit suicide with the assistance of her husband, the applicant's solicitor asked the Director of Public Prosecutions (DPP) on her behalf to give an undertaking not to prosecute the applicant's husband should he so assist her. This request was refused. The applicant applied for judicial review of the DPP's decision and an order to the effect that giving the requested undertaking would not be an unlawful act. The appellate court rejected the application, and after further appeal to the House of Lords, the rejection was upheld.

The applicant died on 10 May 2002.

The case involved the possible violation of several Articles in the Convention: Article 2 (right to life), Article 3 (prohibition of inhuman and degrading treatment), Article 8 (right to privacy), Article 9 (freedom of conscience) and Article 14 (prohibition of discrimination). The case is not directly to the point of the acceptability of medical euthanasia, nor does it involve the evaluation of already committed acts of assistance to suicide or mercy killing. There are also certain other factors causing uncertainty in the interpretation of the ruling. But notwithstanding these disclaimers, the ruling of the ECHR contains significant arguments relating to the issue of euthanasia.

First of all, the ECHR held, in clear terms, that no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2 of the Convention. The ECHR considered that this view was supported also by Recommendation 1418 (1999) of the Parliamentary Assembly of the Council of Europe. The ECHR was also not to assess whether those countries which do permit assisted suicide would be in breach of the Convention, were a right to die under the Convention acknowledged to exist. The ECHR cited the case of *Keenan v. the United Kingdom*, 3 April 2001, where it was held that Article 2 of the Convention necessitated measures for the protection of a prisoner from self-harm, but that such measures were subject to restraints imposed by other provisions of the Convention, as well as more general principles of personal autonomy.[54]

The other significant line of argument in the ruling concerns the application of Article 8 of the Convention. According to the ECHR, the refusal to accept a particular medical treatment might lead to a fatal outcome, but yet the imposition of medical treatment, without the consent of a competent patient, would

[54] See paragraphs 37 to 41 in the statement of reasons in *Pretty*.

interfere with a person's physical integrity as protected under Article 8(1) of the Convention. The essence of the Convention is respect for human dignity and human freedom. Without negating the principle of sanctity of life protected under the Convention, the ECHR considered that notions of the quality of life take on significance under Article 8. "In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity… The applicant in this case is prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life." The result of this line of reasoning was that, in this case, the ECHR could not exclude the possibility of interference with the right to private life as guaranteed under Article 8(1) of the Convention.[55] Nevertheless, the ECHR held that the grounds referred to in Article 8(2) of the Convention existed for the criminalisation of assistance of suicide (and hence there was no violation of Article 8), as the provision had been intended for the protection of the weak and vulnerable, and especially those who cannot withstand pressure at the end stages of their life.[56]

In sum, *Pretty* shows that there is a strong argument for the right to die with dignity under Article 8(1) of the Convention, albeit that there is certain ambiguity in the ECHR's choice of words. At the same time, the Convention leaves a margin of discretion for the Member States regarding how – and especially with what criminal law provisions – they will protect the life of the weak, vulnerable and pressured against measures compromising their safety. The most difficult question relating to the case is whether, so as to ensure the application of Article 2, the Member States are *obliged* without exceptions to issue criminal sanctions against mercy killing and medical euthanasia and, if there is no such obligation, what kind of legal safeguards they must have in place so as to prevent abuses. The ruling's most relevant paragraph to this point, para. 41, leaves much to interpretation: "[T]he extent to which a State permits, or seeks to regulate, the possibility for the infliction of harm on individuals at liberty, by their own or another's hand, may raise conflicting considerations of personal freedom and the public interest that can only be resolved on examination of the concrete circumstances of the case".

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[55] In support of this conclusion, the ECHR referred also to a similar ruling by the Canadian Supreme Court in *Rodriguez v. the Attorney General of Canada* (1994), para. 66 (more precisely in paras. 19-23).

[56] Paras. 61-78 of the statement of reasons, esp. 65 and 74.

Hence, it remains unclear, also after this ruling by the ECHR, how the principles of human dignity, liberty and self-determination, as guaranteed under the Convention, and the derived right to die with dignity, are to be weighed in concrete cases against the right to life as protected by the public authorities (the "sanctity of life"), when the matter is of forms of homicide such as mercy killing or active euthanasia.[57] In the opinion of the author, the ruling does not imply that the Member States would be obliged to criminalise assistance to suicide, or even impose sanctions, without exceptions, for violations of the prohibition against taking human life.[58] As it appears to the author, Recommendation 1418 (1999) of the Parliamentary Assembly of the Council of Europe goes one step further in this respect, as section 9.c.iii of the Recommendation requires the recognition that a dying person's wish to die cannot of itself constitute a legal justification to carry out actions intended to bring about death.

In its evaluation of the periodic report on the Netherlands under the 1966 Covenant on Civil and Political Rights (the Covenant), the UN Human Rights Committee has expressed certain criticism against the 2001 Act on Euthanasia: The new legislation did not lay down sufficient precautionary controls against abuses, such as inappropriate pressure, under conditions where more than 2,000 cases of euthanasia per year are discovered in retroactive inspection.[59] This position by the UN Human Rights Committee can in the opinion of the author be interpreted so that the Covenant's human rights provisions on the right to life do not give rise to an absolute ban on euthanasia, even though they are deemed to impose on the controlling authority a very strict obligation to monitor whether the right to life has been appropriately guaranteed in the state in question.

6 CONCLUSIONS

The past decades' intensive debate on euthanasia in Finland should be further expanded to various professional and societal contexts; in addition, it should be deepened by reference to diverse philosophical, ethical, medical, legal and political considerations. The debate should not be restricted to physician-

[57] *Leenen* 2002, p. 261 and *Husabø* 2003, p. 46, argue for caution in the conclusions to be drawn from this case.

[58] Cf. *Lötjönen* 2004, p. 105, who considers it to have been absolutely established in the case of *Pretty* that a person cannot consent to his or her own death.

[59] Concluding Observations of the Human Rights Committee, The Netherlands, U.N.Doc. CCPR/CO/72/NET (2001).

assisted death, or passive euthanasia (e.g. the development of palliative or terminal care), even though it is likely to remain the most important aspect in the safeguarding of the right of the terminally ill to a dignified death.

The reasons in the case of *Pretty* and in various other cases in the ECHR, the euthanasia legislation in the Netherlands and Belgium and the experiences gained from the same, the relatively accepting attitudes of the Finnish public also towards active euthanasia, as well as the difficulties in the determination of ethical and legal limits in the application of the current legislation; all of these call for a thorough legal policy study and debate on the issues and problems relating to medical euthanasia in this country. There is ample background material already available for such measures, both in Finland and in the European and international debate.[60]

It cannot be expected that, in the absence of statutory provisions similar to the Dutch and Belgian models, medical practice would in the near future develop so that euthanasia would be acceptable also in the form of killing on request. Indeed, in the light of the case of *Pretty*, this would not even be in accordance with the human rights principle of right to life, because the Member States are to pay specific attention to the safety of the weak, vulnerable and susceptible to pressure. Legislation is required so that both the material and the procedural provisions are in place for the prevention of abuses.

It is a completely different issue that specific legislation is not always a simple solution to morally loaded questions. As has been shown above, it has been very difficult to achieve clarifying legislation even on the topic of passive euthanasia. Where the values of society are heavily divergent, as they are at the frontiers of medical law and medical ethics, there is even more reason to look at various regulatory alternatives without prejudices.[61] A system of liability and sanctions under criminal law offers a wide array of possible alternatives: We can adopt a restrictive interpretation of the constituent elements of a criminal offence; an act that is criminal *per se* can be socially acceptable if the conditions of vindication exist; an act can be excusable and hence understandable if the circumstances are such that the offender is not culpable; an act can be considered exceptionally inconsequential at the sentencing stage, so that it is punished leniently or not at all (or not even prosecuted) even though the type of offence is serious – in other words, the act can be deemed socially tolerable.

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[60] See in general the works cited in this article, as well as the discussion papers of the Danish National Ethics on this topic (see *Vestergaard* 1995).

[61] The author has pointed this out also in his earlier comments on the acceptability of male circumcision; see *Lahti* 2003, p. 17.

It is useful to apply such ideas of gradualisation to medical procedures whose social acceptability is a matter of controversy, as is the case with the regulation of active euthanasia. We should not restrict ourselves to a binary proposition: Either the procedures are socially acceptable and hence available without limitation also through the public health care system, or they are not acceptable and may in fact carry heavy criminal penalties. It is necessary to operate also a regulatory regime reflecting social *toleration*, which would appear to be the most feasible approach to active euthanasia in the near future. Accordingly, there is no reason at all to exclude the possibility of waiver of sentencing in respect of such acts (see chapter 6, section 12(3), of the PC).[62]

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[62] Also in *Pahlman* 2003, p. 340. Cf. *Hahto* 2004, p. 266.

[63] The bibliography does not contain parliamentary papers nor certain official sources (which have been mentioned in the text or footnotes).

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31. Infant Male Circumcision – Finnish Supreme Court Ruling on a Multicultural Legal Problem*

1 INTRODUCTION

The acceptability and practical aspects of religiously based, non-medical infant male circumcision have given rise to brisk debate in Finland from time to time over the past two decades. Depending on perspective, this debate on the one hand has emphasised the right of the infant male, unable to give his consent, to physical integrity and, on the other, the protection of religious freedom and minority culture as well as protection of family life as enjoyed by certain communities. Similar debate has been conducted in many other countries.[1] In the international arena, the main focus has been on the circumcision of girls and women for non-medical reasons. While this is unanimously rejected in all Western legal cultures, views vary as to the appropriate preventive means.[2]

This article is an examination of the legal and ethical debate in Finland on this topic extending back to the 1990s and it centres on the Finnish Supreme Court ruling in its precedent *KKO 2008:93*. Some comparative observations will be made on the situation in the other Nordic countries.

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* Original source: In: Elisabeth Rynning & Mette Hartlev (eds.): *Nordic Health Law in a European Context – Welfare State Perspectives on Patients' Rights and Biomedicine*. Martinus Niihoff Publishers / Brill, Leiden 2011 (2012), pp. 216–227. Epilogue (ch. 8) added to the essay.

[1] On international debate, see *e.g*. Smith, 'Male Circumcision and the Rights of the Child'; Fox & Thomson, 'Law, Ethics, and Medicine'; Putzke, 'Die strafrechtliche Relevanz der Beschneidung von Knaben'.

[2] For an overall review, see *e.g*. Denniston *et al*.(eds.), *Circumcision and Human Rights*. On the circumcision of women in particular, see *e.g*. Oba, 'Female Circumcision as Female Genital Mutilation'; Gozdecka, *Religions and Legal Boundaries of Democracy in Europe*, pp. 166–168.

2 REACTIONS TO INFANT MALE CIRCUMCISION IN THE 1990S

The original impetus to the attention paid to the topic was the circular dispatched by the Ministry of Social Affairs and Health to municipalities in 1992 recommending that male infant circumcisions be performed within the public health care system. Whilst the Jewish and Tatar communities in Finland, among whom the practice is common, had little call for public health care services in the performance of circumcisions, this situation changed with the increasing influx of immigrants from Islamic countries.

In a complaint to the Parliamentary Ombudsman dated 12 August 1997, Professor and Chief Physician *Esko Länsimies* criticised the performance of infant male circumcisions at university hospitals and asked the Ombudsman to review the matter. Resolving the complaint on 30 November 1999, Deputy Ombudsman *Riitta-Leena Paunio* assessed the issue first in a general legal perspective and arrived at the following conclusions, deemed well justified by this author: having regard to the Act on the Status and Rights of Patients and legislation concerning the duty of municipalities to organise health care and medical treatment, public health care units were under no obligation to perform non-medical circumcisions of infant males. While Paunio did not consider such procedures to be clearly unlawful, considering that there were no express legal provisions or regulations governing these and that the Ministry of Social Affairs and Health had in the early 1990s recommended a positive stance towards the performance of the procedures within the municipal health care system, she held the circumcision of infant males, incapable of giving consent, in the absence of any medical indication to be highly questionable from a legal point of view. According to Paunio, public health care units should refrain from performing the said procedure until such time that the child in question was of an age at which he was capable of giving informed consent.[3]

In the opinion issued by the National Advisory Board on Health Care Ethics ('ETENE') on 15 June 1999[4], before the complaint resolution by Deputy Ombudsman Riitta-Leena Paunio, a majority of advisory board members held non-medical infant male circumcision to be an ethically acceptable procedure which could be carried out in public health care on members of the Jewish and Islamic faiths, the rationale being to avoid intolerance and disparagement of religious traditions. Moreover, a policy of accepting such circumcisions

[3] See Annual Report of the Parliamentary Ombudsman (1999), pp. 273–275.

[4] See Publication of 'ETENE' 5/2002, pp. 40–43.

was deemed to protect the children concerned from traumatising physical and psychological experiences of pain when the procedure was performed by experienced health care professionals.

As a member of the Advisory Board standing in the minority, this author criticised the majority opinion for not giving sufficient weight to the child's interest: an intervention in the health field on a person who does not have the capacity to consent is acceptable – except in certain situations on which express provisions are laid down – only when the procedure has direct health-related or other benefit to the person concerned. In support of this reasoning, this author made particular reference to the Article 6 of the Council of Europe's Convention on Human Rights and Biomedicine[5], which Finland had immediately signed but at the time was yet to ratify. This author furthermore made reference to that stated in the preparatory documents of the Basic Rights Reform Act (969/1995) regarding the relationships between the various basic rights and their relative balancing. Freedom of religion or freedom of conscience cannot justify actions which infringe upon human dignity or other basic rights, or which are contrary to the foundations of legal order. All in all, this author held the acceptability of infant male circumcision performed absent medical indications to have proven highly questionable in respect of Finnish legal order.[6]

3 INVESTIGATIONS BY THE AUTHORITIES IN 2004

The approach to non-medical infant male circumcision took a new turn when the Ministry of Social Affairs and Health together with the Association of Finnish Local and Regional Authorities reaffirmed in its circular of 3 March 2003 the recommendation issued by the same Ministry in the early 1990s, despite compliance with the circular being tantamount to a wholesale dismissal of the views of a supervisor of legality, *i.e*. Deputy Ombudsman Riitta-Leena Paunio. It was also around this time that State Prosecutor *Päivi Hirvelä* was considering charges in a case which involved a physician and Muslim fathers suspected of assault for having boys circumcised on religious grounds absent compliance with the relevant health requirements.[7]

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[5] Opened for signature on 4 April 1997 in Oviedo (Spain), hereinafter the Biomedicine Convention.

[6] Regarding this author's views, see besides the Publication of 'ETENE', *supra* note 4, pp. 43–43, also Lahti, 'Ärztliche Eingriffe und das Selbstbestimmungsrecht des Invidiuums', p. 522.

[7] State Prosecutor Hirvelä issued on 30 June 2004 a decision of diversionary non-prosecution in the case.

Owing to conflicting opinions as to the legality of the circular and the acceptability of infant male circumcision in general, the Ministry of Social Affairs and Health had a compelling need to set up a working group to investigate the matter. The members of this group, appointed on 11 April 2003 and headed by Archiatre *Risto Pelkonen*, were selected to represent a wide range of expertise. *Kristina Stenman* was appointed rapporteur to assist the working group in its investigation of international and Finnish infant male circumcision practices.

According to the memorandum produced by the working group, the non-medical circumcision of boys was to be allowed subject to certain conditions. The working group based this view on the good of the child, which concept was nonetheless examined in a wider perspective than merely the health-related benefit "in emphasising socially adequate grounds arising from religious and cultural traditions". As in Sweden[8], provisions setting out the conditions for circumcision should be laid down in a special Act, as the procedure represents an intervention into the physical integrity of male infants. Circumcisions could only be performed by licensed physicians or duly authorised physicians, and only with the consent of the male infant's guardians. The working group goes on to propose that male infant circumcision should be carried out within the public health care system in the same manner as medically indicated procedures.[9] According to rapporteur Kristina Stenman, male infants should be safeguarded the performance of circumcisions in safe conditions and on equal grounds throughout the nation. A special Act in accordance with the Swedish model might, in her opinion, bring clarity to the situation.[10]

These official investigations did not result, however, in the submission of a Government Bill for a special Act.

4 MAIN SUBSTANCE OF PRECEDENT RULING *KKO 2008:93*

In its ruling *KKO 2008:93*, Finland's Supreme Court held that the conduct of a mother who – as her child's sole guardian – had her 4.5-year-old Muslim son circumcised for religious reasons was not to be deemed illegal, and that the conduct was thus not punishable as assault (either through complicity or

[8] See *Lag* (2001:499) *om omskärelse av pojkar* [Act on the circumcision of boys].

[9] See Ministry of Social Affairs and Health Working Group Memorandum 2003:39 (hereinafter Ministerial Memorandum) , *passim*.

[10] See Ministry of Social Affairs and Health Stencil 2004:3, *passim*.

instigation). At the legal core of the ruling was the question of whether the intervention into a person's physical integrity which circumcision entails (the irrevocable removal of the foreskin) met the constituent elements of the offence of assault and, if the answer was in the affirmative, whether the religious, cultural and social reasons underlying the procedure might, when possible other conditions were met, be deemed as grounds for exemption from criminal liability (para 6 of the reasoning). The charge was brought against the boy's guardian who arranged for the circumcision, while the person who actually performed the procedure remained unidentified, although according to the Supreme Court's evaluation of the evidence, that person was a physician (para 1 of the reasoning).

In this case the judgment issued by Turku Court of Appeal on 14 March 2007 was the same in terms of outcome as the unanimous ruling returned by the Supreme Court on 17 August 2008, despite the fairly considerable difference in the reasoning of the two decisions, whereas the court of first instance, i.e. Tampere District Court, had held that constituent elements of the offence of assault had been proven and that no justification had been put forward or come to light. Nonetheless, Tampere District Court held the illegal conduct of the accused to be manifestly excusable owing to mistake as to the unlawfulness of the act (Criminal Code, Chapter 4:2) and therefore dismissed the charge.

As regards the legal issues relating to infant male circumcision, the ruling first of all spoke directly to the question of whether non-medical infant male circumcision commissioned by the child's guardian in circumstances where the child due to his age is unable to make a decision on the procedure is punishable instigation or other participation in assault, as was charged. In the Supreme Court's view, the constituent elements of the offence of assault were proven: the point of departure therefore was that the conduct *prima facie* constituted the *actus reus* of the offence of assault, or petty assault at the least (para. 6 of the reasoning).

When the Supreme Court, nonetheless, resolved to dismiss the charge, one must pose the second question of the grounds on which such intervention into physical integrity is non-punishable, either through a restrictive interpretation of the constituent elements of assault or by holding such intervention to be a justified (acceptable) or excusable (understandable) measure. In consequence of the legislative amendments enacted in 2003 (515/2003), the grounds for exemption from liability governed by Chapter 4 of the Criminal Code differentiate to a greater degree of clarity and consistency between justification and excuse. According to the reasoning of the Supreme Court's ruling, the case involved evaluation of whether a justification ground which removes illegality

was at hand (paras. 19 and 29), although the position was not formulated in a clear way. The question of justification was evaluated in the ruling through a balancing of divergent basic and human rights without reference in this context to the concept of 'social adequacy', developed in criminal law theory – unlike the Supreme Court of Sweden in its ruling of 29 September 1997 in an equivalent case[11].

In this author's opinion, the Supreme Court in its precedent ruling KKO 2008:93 adopted a novel justification that is not governed by the Criminal Code's grounds for exemption, *i.e.* a justification not written into law; the alternative would have been a restrictive interpretation of the constituent elements of assault.[12] Being for the benefit of the accused, the outcome is not contrary to the principle of legality in criminal law. With regard to the values underlying the principle of legality (predictability and equality), it is nonetheless desirable for such grounds for exemption acting in favour of the accused also to be provided in law.[13]

5 ON THE BALANCING OF BASIC AND HUMAN RIGHTS IN THE RULING *KKO 2008:93*

According to the Supreme Court, the central legal issue in this case was whether the religious, cultural and social reasons underlying circumcision may be considered to constitute grounds which justify conduct that meets the constituent elements of assault. As relevant background information (para 7 of the reasoning), the ruling states that non-medically indicated infant male circumcision is a global phenomenon and common practice in several communities owing to reasons having to do with religion, culture or traditions. It is estimated that roughly 200 boys are circumcised for non-medical reasons each year in Finland. According to the Supreme Court, nowhere in the world is infant male circumcision based on religious or cultural tradition banned outright, although a special Act governing the procedure has been enacted in Sweden.

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[11] See *Nytt juridiskt arkiv* 1997, 636-645 (NJA 1997:107). A critical review of the case and its outcome has been published by Ravn,'Omskærelse i strafferetten'. On the earlier legal situation in Sweden, see Rynning, *Samtycke till medicinsk vård och behandling*, pp. 296–298.

[12] Thus also Frände, *Yleinen rikosoikeus*, p. 57 note 124. Cf. Tolvanen, Comment on *KKO 2008:93*, p. 143, according to whom the circumcision of the boy should have been examined as an issue of the interpretation of the constituent elements of assault.

[13] See also Melander, *Kriminalisointiteoria*, p. 501.

Among Muslims, infant male circumcision is deemed to be based on religious tradition and is a deeply-rooted practice in the said communities. According to the Supreme Court, the information put forward in the case demonstrates circumcision also be an integral component of the identity of the community's male members; the circumcision performed on Muslim boys between the ages of four and thirteen serves to attach them into their religious and social community. (Para. 8 of the reasoning.) It is this author's observation that in this respect, the Supreme Court's reasoning relies more or less directly on the Ministerial Memorandum[14].

The reasoning proper by the Supreme Court consists of balancing divergent basic and human rights, the outcome of this balancing being a decision on whether compelling reasons exist for adopting an unwritten justification. Balancing of this kind has been fairly uncommon in the Finnish court decisions, although incorporation of such considerations into the decision-making process is on the rise. In criminal law, the prohibition of analogy and prohibition of vague statutes set the boundaries for balancing to the detriment of the accused. However, as stated above, as grounds for exemption from criminal liability not written into law, the Court may have relied on the concept of 'social adequacy'. The Supreme Court of Sweden defined this concept as a conflict between the protected interest under the criminal provision concerned and an opposite interest, appearing in unwritten grounds for exemption: circumcision performed for religious reasons satisfied the requirements of social adequacy in light of the facts that the parents had given their consent and that the children, aged between 18 months and 7 years, were not caused excessive pain (although the circumcisions had been performed without analgesia and four out of six had suffered infections as a result of the procedure).[15]

The reasoning of the Supreme Court in the ruling *KKO 2008:93* is considerably more detailed and weighed with a greater degree of differentiation than in the equivalent Swedish decision. The argumentation in the decision, focusing on basic and human rights, strives comprehensively to identify all relevant rights, to prioritise these rights and to balance them against each other, the apparent aim being to have optimal regard to divergent rights.

Ahead of a more detailed analysis of that consideration, this author wishes to draw attention to a shortcoming in the Supreme Court's decision: it lacks any mention of the Biomedicine Convention. Admittedly, the Convention had not yet been ratified at the time of commission or sentencing of the offences

[14] Ministerial Memorandum, *supra* note 9, p. 34.

[15] NJA 1997, *supra* note 11, pp. 642–644.

charged, yet as an instrument signed by Finland in 1997 and taking international effect in 1999, the Convention constituted an important permitted[16] source of law. As concerns this Biomedicine Convention, it has also been argued that in the case-law of the European Court of Human Rights when the Court applies the European Convention on Human Rights, the Biomedicine Convention will constitute the 'European standard' and influence application of the European Convention on Human Rights also in respect of States which have not ratified the Biomedicine Convention.[17] Finland ratified the Biomedicine Convention and its two Protocols in 2009 to have status of law effective 1 March 2010 (23/2010).[18] These instruments have thus become binding sources of law with interpretative effect in particular upon future application of Finnish legislation in the sector.

In this author's opinion, the reasoning of the Supreme Court when addressing relevant basic right and human right norms (paras 10–18) is appropriate, with the exception of the Biomedicine Convention being ignored. The relevant provisions of the Finnish Constitution along with its legislative drafts[19] as well as the relevant Articles of the European Convention on Human Rights and related case-law of the European Court of Human Rights are reviewed in a laudable manner, as are the relevant Articles of the UN Convention on the Rights of the Child. Among basic and human rights, protection of family life is raised alongside the right to physical integrity and freedom of religion.

The evaluation portion of the reasoning (paras. 19–27) presents the core issue in balancing divergent basic and human rights to be the question of whether a male child's right to physical integrity prevents his guardians from deciding on circumcision on behalf of their child, who is unable to given consent, when the grounds for the procedure are not medical but involve the family's religious traditions. The acceptability of the procedure is thus linked both to protection of family life and freedom of religion. In the reasoning, the protection of a child's right to physical integrity is found to be strong also relative to the rights of the guardian, the protection of family life and religious freedom (para. 21). An emphasis such as this, relying on the legislative drafts of the basic rights reform, is important when prioritising these basic and human rights.

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[16] The term 'permitted' refers to the fact that such a Convention (not yet ratified) does not belong to the binding legal sources to be observed in the first place.

[17] See Roscam Abbing, 'The Convention on Human Rights and Biomedicine', p. 380; Nys, 'The Biomedicine Convention as an Object and a Stimulus for Comparative Research', p. 277.

[18] Of the ratification instruments, see in particular Government Bill 216/2008.

[19] See in particular Government Bill 309/1993, p. 56 (para 17 of the Supreme Court's reasoning).

In determining and balancing the relative weights of the said basic and human rights, the argumentation of the Supreme Court can be boiled down to the following: "Intervention into a male child's physical integrity taking the form of medically appropriate circumcision performed on religious grounds may be deemed to be a defensible measure with regard to the child's overall interests and also, when assessed as a whole, an intervention of such minor significance that there is no cause to consider the conduct of the child's guardians in having their child circumcised in this manner to constitute such an act in infringement of the interests and rights of the child that would be punishable as the offence of assault" (para. 26). In other words, an infant male circumcision with the guardians' consent is thus justified if it is both defensible with regard to the child's overall interests and represents only a relatively minor intervention into the child's physical integrity, irrespective of the child's own will (para. 24 of the reasoning).

The requirement of the overall interest of the child, according to the Supreme Court, was to be read as the procedure having the purpose of promoting the child's well-being and development while not being contrary to the interest of the child even in an objective assessment (para 23). Here, the Court relies earlier in the reasoning (para 8) mainly on the view in keeping with the text of the Ministerial Memorandum[20], viz. that circumcision performed for religious reasons has a positive impact on the boy himself, the development of his identity, and his attachment to his religious and social community (para. 26).

In the decision, infant male circumcision is judged to be a fairly harmless procedure when performed with appropriate medical care, in hygienic conditions and when using the analgesia warranted by the procedure. It is stated that the procedure may give rise to some discomfort but no health-related or other permanent injury. Even though the procedure is irreversible, no qualities are associated with it that would impart a negative brand on the child or the adult into which the child will develop (para. 25).

The degree of intervention into physical integrity is judged to be materially different with regard to the circumcision of boys and that of girls. The latter, according to the Supreme Court, constitutes conduct that shall primarily be categorised as aggravated assault – genital mutilation – that under no circumstances can be justified with religious or social reasons (para. 27).

[20] Ministerial Memorandum, *supra* note 9.

6 CRITIQUE OF THE BALANCING ARGUMENTATION IN THE RULING *KKO 2008:93*

Criticism may be levelled at the balancing argumentation recounted above on the basis of the Biomedicine Convention and international debate. Firstly, with regard to the argument of 'overall interest of the child' in circumcision.

Under Article 6(1) of the Biomedicine Convention, an intervention may only be carried out on a person who does not have the capacity to consent, for his or her direct benefit.[21] Article 26(1) provides an exhaustive list of the grounds for restricting the rights secured under the Convention ("in the interest of public safety, for the prevention of crime, for the protection of public health or for the protection of the rights and freedoms of others"). It would appear the kinds of religious, cultural or social reasons mentioned in the Supreme Court's reasoning, in reliance on which infant male circumcision would be justified in the sense of that Article, cannot be derived from the grounds listed above. This non-fulfilment of the requirement of direct benefit under the Biomedicine Convention was a key argument in this author's minority opinion of 15 June 1999 to the National Advisory Board on Health Care Ethics as well as in Deputy Ombudsman Riitta-Leena Paunio's complaint resolution of 30 November 1999 and State Prosecutor Päivi Hirvelä's decision of diversionary non-prosecution of 30 June 2004.[22]

Regardless of whether Article 6 of the Biomedicine Convention is relied upon in assessing 'the interest of the child', criticism has been directed in international debate against the definition of the entire concept. British researchers *Marie Fox* and *Michael Thomson* have called for a re-formulation of the concept of the "best interests" of the child, used in common-law countries in connection with infant male circumcision. In assessing the permissibility of the procedure from the viewpoint of a male child's best interests, it is not enough to pay attention to the degree of intervention into physical integrity or other direct impacts, a much wider interpretation instead having to be given to the concept of 'interests'. Factors to be taken into account in this assessment include issues such as the effects of the procedure on a maturing child's right to choose and his subsequent sex life.[23]

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[21] On Article 6 of the Biomedicine Convention and its effects in ratifying States, see Stultïens *et al*., 'Minors and Informed Consent'.

[22] See for details, *supra* ch. 2.

[23] Fox and Thomson, 'Reconsidering 'Best Interests'', p. 26.

One may also ask if the factors described in the Supreme Court's ruling in respect of the child's overall interest do not refer to the community interests of family life as defined by the relevant religious community and the guardians rather than to the individual interests of the maturing child, for instance in the sense referred to by Fox and Thomson. A key aspect of the Supreme Court's reasoning in this respect is that circumcision is deemed to foster the development of the boy's identity and his attachment to his religious and social community. In his critical commentary, *Matti Tolvanen* brings up the danger of circumcision constituting such a tight bond between a boy and his religious community as to render impossible any future departure therefrom when it is time for the child to form his independent world view.[24]

The question has also been posed in international debate of whether there is any cause to differentiate so radically between male and female circumcision on the basis of intervention into physical integrity as is currently the case, and as is also done in the Supreme Court's reasoning. Dutch researcher Jacqueline Smith, for example, contests this double standard that is commonplace in the West and finds discrimination against circumcised (Jewish and Muslim) boys in that they are not afforded the same protection from the useless causation of pain as are girls and those boys who do not belong to religious communities which practice ritual circumcision.[25] In its reasoning (para. 27), the Supreme Court rejected this allegation of discrimination.

7 MALE CIRCUMCISION AND SUPREME COURT RULING *KKO 2008:93* AS EXAMPLES OF MULTICULTURAL LEGAL ISSUES

The circumcision of boys and the related case *KKO 2008:93* illustrate the issues faced by multicultural criminal law as well as the entire legal regime. What kind of flexibility can there be in the application of the conditions for legal liability and the grounds for exemption from liability, and to what degree can practices diverging from dominant legal order be accepted or at the very least tolerated as defences, on the grounds of religious or (sub)cultural tradition, in the spirit of cultural diversity?[26] With its regard to multiculturalism,

[24] Tolvanen, Comment on *KKO 2008:93*, p. 144.

[25] Smith, ' Male Circumcision and the Rights of the Child', Conclusion.

[26] On multiculturalism in modern (criminal) law, see e.g. Foblets and Renteln, *Multicultural Jurisprudence*, and on divergent Finnish views, Tolvanen, Comment on *KKO 2008:93*, p. 144, and Nuotio, Kulttuurien kohtaaminen rikosoikeudessa', p. 144.

the argumentation in the ruling *KKO 2008:93* is to a laudable extent based on a balancing of basic and human rights, even if the details of the argumentation leave room for criticism.

Being a part of the religious traditions of the Jewish community, male infant circumcision is anything but a new phenomenon in Finland. As it becomes more prevalent in consequence of the immigration of persons of the Muslim faith and when public health care services must adopt a position on a procedure of this kind, performed for reasons other than medical, increasing attention is being paid to the issue.

Within the same time frame, the sector of medicine and health care has grown increasingly legalistic: that which is not clearly condoned by society on the basis of existing legislation or customary norms (by established legal practice) requires justification through new legislation. This development is in Finland influenced by the growing emphasis on human rights and basic rights starting in the 1990s. For example, when personal integrity is protected by basic right and human right norms as well as criminal law norms, any derogation therefrom must be backed by solid reasons based on the legal system.

The portions of the ruling *KKO 2008:93* susceptible to criticism demonstrate the difficulty of drafting thoroughly compelling and readily applicable legal rules by weighing up basic and human rights. In order to safeguard the diversity of the phenomenon in question and its full regulation, legislation would be in order – the special Act in keeping with the Swedish model and proposed in the Ministerial Memorandum.[27] In drafting this special Act, the degree of national latitude possibly permitted under Article 6 of the Biomedicine Convention should be determined.

The status of physicians and other health care professionals as well as the role of public health care in the performance of circumcisions should also come under consideration in the drafting of the special Act. Since the case *KKO 2008:93* was a criminal case, the status of the physician who performed the procedure could not come under distinct examination in terms of e.g. how the acceptability of the procedure should be assessed in light of the disciplinary liability and professional supervision to which the physician is subject. Owing to these liabilities, a double standard is imposed on health care professionals and the preclusion of criminal liability does not necessarily rule out incompatibility with professional obligations. In assessing these, account

[27] As to the Swedish Act and Ministerial Memorandum, see *supra* notes 8 and 9. See also Tolvanen, Comment on *KKO 2008:93*, pp. 143–144, and the Opinion of the Finnish League for Human Rights on non-medical infant male circumcision, 18 December 2008

must also be taken of compliance with professional codes of ethics[28], and in these a negative or at the very least cautious position has been adopted to male infant circumcision.[29]

8 EPILOGUE

In its precedents *KKO 2016:24–25* the Supreme Court confirmed its earlier ruling with some specifications: the minor intervention in a male child's physical integrity with his guardians' consent, taking the form of a medically appropriate circumcision conducted on religious or cultural grounds, should be regarded as justifiable measure (and not punishable as an assault) with regard to the child's overall interests, irrespective the child's own will. In the precedent KKO 2016:24 the Supreme Court also dealt with the effect of Article 6 (1) of the Biomedicine Convention. According to its reasoning, the child's direct benefit could be interpreted as covering cultural or social benefit (especially for the child's attachment to his religious and social community) and not only medical benefit to the child. This argument represents to my mind more a collective interest than an individual interest (as the individual right to corporal integrity), and this individual interest should prevai l over the collective interests of the society or certain community (minority) groups, reflecting so better the basic values of the Finnish Constitution and Biomedicine Convention.

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[28] See section 15 of the Act on Health Care Professionals (559/1994) and Article 4 of the Biomedicine Convention

[29] See Ministerial Memorandum, *supra* note 9, p. 25; Äärimaa, Editorial; Opinion of the *Svenska Läkaresällskapet* [Swedish Medical Association] on non-medical circumcision of boys, 25 February 2010.

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32. Medical Law and Biolaw*

1 INTRODUCTION

In Finnish legal science, medical law and the closely linked field of biolaw, addressing biomedicine and its technical applications, represent new and evolving disciplines and sectors of law. At the Faculty of Law of the University of Helsinki a subject combining the two sectors, entitled 'Medical law and biolaw' has been taught since 1997, until 2011 through the efforts of part-time lecturers, before a full-time university lecturer was appointed to the subject in 2012. Five doctoral dissertations have been prepared on this subject over that period on the following themes: the patient's right to privacy, the self-determination of a patient, medical research on humans, assisted reproduction and the rights of the human foetus, and the regulation of human embryonic and stem cell research.

The boundaries of these new sectors of law are fluid. Medical law conventionally comprises legal issues relating to healthcare personnel, medicine and healthcare especially insofar as these have to do with the relationship between patient and doctor (or other healthcare professional). When health law is addressed instead of or complementary to medical law, the former typically covers legal issues relating to the healthcare system as a part of public law. Health law is integrally linked with social welfare law, which conventionally comprises sets of legal norms concerning social security.

Biolaw is the most recent of the sectors of law enumerated here, and its emergence has to do with advances made in biology and medicine, in particular with regard to the applications of biomedicine and biotechnology, and with the enhanced understanding of bioethics. Bioethics has become the established umbrella term covering the ethical dimensions of medical treatment and care, healthcare, biological and medical research, and of environmental issues. Developments in medical reproductive technologies and genetic engineering

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* Original source: In: *Introduction to Finnish Law and Legal Culture*. Kimmo Nuotio, Sakari Melander & Merita Huomo-Kettunen (eds.). Forum Iuris, Publications of the Faculty of Law, University of Helsinki, Helsinki 2012, pp. 249–260. Two notes (1–2) have been added.

in particular have given rise to wholly new ethical and legal dilemmas. The combination of medical law and biolaw has in the Nordic research community also been called 'Biomedical law'.

2 CROSS-DISCIPLINARITY AND PROBLEM ORIENTATION IN MEDICAL LAW AND BIOLAW

Of greater importance than drawing the precise lines of demarcation for a new sector of law is the need to examine the reasons why medical law and biolaw might constitute a distinct research area or field of legal science. What purpose is served by the establishment of such a new and independent discipline or sector of law? Does the object or context of regulation in this hybrid sector, for instance, involve particular characteristics that research based on a traditional division of subjects is incapable of adequately addressing?

In international discussion, the answer to the question regarding the independence of medical law or health law has long been in the affirmative: a problem-oriented and coherent approach which crosses the boundaries of different sectors of law has been needed to address the legal issues arising in medicine, medical treatment and care, and healthcare. Medical and nursing ethics and professional standards have traditionally held a key position when assessing the correctness and even lawfulness of actions taken by physicians and other healthcare personnel. At the same time, it should be born in mind that the professional skills of health care personnel are primarily based on the utilisation of their expertise in medical and nursing sciences.

Interaction between medical and legal knowledge traditionally takes place within the settings of forensic medicine and forensic psychiatry: expertise and research findings in these sectors of medicine are applied to help resolve legislative and other legal dilemmas. According to one characterisation, forensic medicine is medicine applied in order to safeguard the legal protection of the individual. In the legal science, it has been necessary to develop a counterpart for forensic medicine. The fact that (bio)medical law has evolved into a distinct sector of law instead of being perceived as merely as an adjunct to the discipline of forensic medicine has in my opinion put legal and medical expertise on a more equal footing in the development of our healthcare system and with regard to the application of biology and medicine.

The legal speciality of medical law and biolaw focuses on the legal issues of healthcare and those involving medical technology and other applications in an integrative way. Within such a new legal discipline, the general princi-

ples and concepts contained in the legal regulation of healthcare and medicine can be structured and systematised into more consistent and coherent general doctrines of law than in case of the traditional division of subjects. This goal of creating coherence into legal science is challenging at the present time, when the fragmentation and pluralism of legal orders and the 'polycentricity' of legal sources are characteristic features of the legal development.

When considering the need for cross-disciplinarity or multi-disciplinarity, one should not only consider the interaction between law and ethics concerning healthcare and medicine, but also bear in mind the relevance of health economics, health sociology and health policy. The interplay among the various sectors of law and disciplines, as well as the experts representing these branches, is vital to the resolution of these issues.

3 THE INCREASE IN MEDICO-LEGAL AND BIO-LEGAL REGULATION AND ITS RELATIONSHIP WITH ETHICAL NORMS AND PROFESSIONAL STANDARDS

The need for a cohesive body of research in medical law and biolaw has been boosted by the rapid development of legislation in this field over the past few decades. And given that (bio)medicine has traditionally been considered to be an area of social life which should be subject to as little legal regulation as possible, this change in perspective is a marked one. Mutual trust is required in the relationship between patient and doctor, and the principles guiding such relationships are traditionally deemed to be drawn from medicine and medical ethics rather than from law. Professional codes of conduct have played an important role here. Such codes are usually international in nature, being approved either by international official organisations or professional societies.

Questions to take into account when considering the necessity of legal regulation include the following: (a) the subjects or interests to which legal protection should be afforded, (b) the legal rights those subjects should be acknowledged to possess, (c) the *ex ante* and *ex post* remedies which the holder of a legal right or infringed interest may resort to in exercising his or her right or gaining restitution due to the infringement, and (d) what kind of supervision and system of sanctions should be established for securing the legal protection.

In a Nordic welfare state such as Finland, public healthcare services account for a considerable part of the total healthcare sector. This gives additional import to questions concerning the position and duties of the public authorities (the State and local government). For example, what is the legal position

of the individual and what are the legal remedies available to him against a healthcare sector authority or official exercising public power or deciding on health services? Or what means are employed to steer and supervise healthcare staff and the healthcare system as a whole?

In the early 1990s, municipalities and municipal federations were saddled with the responsibility of arranging public healthcare and were given increased independence in its implementation. The same time period saw a transition in healthcare administration from administrative supervision and guidance to the less regulated performance guidance and information steering. Administrative supervision and guidance have been reorganised in the reforms of recent years. The use of administrative coercive measures has been streamlined and extended to apply equally to healthcare units.

The expansion of legislation governing healthcare in Finland is explained in part by the increased regulation of the sector's organisation, resources and steering, which is typical of welfare states. In addition, particular emphasis was placed at the initial stages on rectifying defects of a fundamental nature having to do with the rights and freedoms of patients (examples include the elimination of forced castration and the revised regulation of the involuntary treatment of psychiatric patients). With the 1980s came preparations for measures to improve the legal position of 'ordinary', somatic patients as well. This work resulted in the enactment of the Patient Injuries Act (585/1986)[1] and the Act on the Status and Rights of Patients (785/1992, hereinafter 'Patient Rights Act'). Underlying these reforms was the rise of due process philosophy, in consequence of which the human and fundamental rights of the individual as well as the rights of consumers are strengthened in the legal system.

Debate is ongoing in the sectors of medicine and healthcare as to the extent to which legal regulation should be increased in fields which in essence are governed by morals and professional standards. In keeping with the idea of so-called reflective law, there has been a clear understanding that in a pluralistic society the legislator's role should be restricted to imposing only boundary conditions and flexible procedures, offering a framework within which individuals and groups may then exercise their moral autonomy. Debate of this kind has focused on the principles for regulating medical research, to take just one example.

There is traditionally a close interplay between medical law and biolaw on one hand and medical ethics and bioethics on the other. The correctness of

[1] The Act was replaced from 1 January by the Patient Insurance Act (948/2019). However, the basic structure and main contents of the Act of 1986 are retained.

legally regulated medical procedures and biomedical techniques, as well as the legal principles governing medical law and biolaw, still derive much of their material substance from the corresponding rules and principles of medical ethics and bioethics. The link between law and ethics has even grown tight with the rise in status of human rights and fundamental rights in our legal system, as these are an expression of fundamental values also in terms of public morals.

The increasing regulation of professional duties in healthcare through international human rights norms and national legislation appears to have been accomplished in Finland as well as elsewhere in Europe (especially the Nordic countries) largely in a spirit of consensus, through a reconciliation of ethical and legal points of view. As stated earlier, the aim in the enactment of Finnish patient legislation was to improve the legal protection of patients without compromising the conditions for a confidential relationship between patient and doctor. Likewise, it must be noted that although the Medical Research Act (488/1999) imposes limits on the permissibility and conditions of such research, no attempt is even made to exhaustively regulate the grounds employed by the ethics committees provided for in law as they go about their task of evaluating the ethicality of research projects, nor indeed are penal sanctions laid down for all infringements.

4 PATIENT INJURIES ACT AND PATIENT RIGHTS ACT AS CORE STATUTES IN MEDICAL LAW

The enactment of the Patient Injuries Act and Patient Rights Act had the aim of enhancing the legal protection of both patients and staff in healthcare and medical treatment. In keeping with its title, the Patient Rights Act expressly lays down provisions on the legal rights of patients. This Act was intended to clarify, harmonise and strengthen the principles to be observed in the care and treatment of patients. Structural changes in the healthcare system – the increasing degree of technicality and specialisation in healthcare, and the growing size of healthcare units – served to underscore the aim of legal protection underlying the Acts.

To the best of my knowledge, these Acts, which improved the legal position of patients, were the first of their kind in the word, although a similar development of legislation and professional standards occurred in several other countries as well, usually as a part of an overall strengthening of human and fundamental rights thinking. In Finnish legal culture, human and fundamental rights clearly gained in status in the 1990s, with the ratification of the European

Convention on Human Rights (ETS No. 5, 1950) in1990 and the entry into force of the basic rights reform in the Finnish Constitution in1995. As a result of this development, patient rights too have been given increasing weight. Under the Finnish Constitution (731/1999, Section 19), the public authorities are obligated to guarantee for everyone adequate social, health and medical services and to promote the health of the population.

The Patient Injuries Act and the Patient Rights Act may today be considered to constitute the core statutes of medical law. Follow-up data on the application of both Acts has been systematically compiled in order to evaluate the achievement of the aims set for the Acts and to determine any need for amendment.

These Acts are of particular significance when determining the basic legal concepts and general legal principles belonging to the general doctrines of medical law. The general doctrines of the sector of law itself, meanwhile, provide the key justification for its independence.

The Patient Injuries Act introduced a mandatory liability insurance scheme to improve patient access to compensation. The scheme was thought in most cases to replace in practice the enforcement of ordinary tort liability and penal liability and by such means to avoid the conventional court proceedings by a simplified dispute settlement. The principles of general tort law are observed in the determination of the amount of compensation but the preconditions for the right to compensation differ from general tort law in that malpractice or negligence on the part of any individual need not be established. Patient injury within the meaning of the Act, i.e. a bodily injury to a patient in connection with healthcare or medical treatment, is defined in the initial sections of the Act, and it thus constitutes a special type of injury. For example, compensation shall be paid for bodily injuries if it is probable that these injuries result from examination or treatment taken or neglected, providing that an experienced healthcare professional would have examined or treated the patient in a different manner and would thereby probably have avoided the injury.

The Patient Rights Act lays down coherent provisions to govern the status and rights of patients, whether in receipt of in public or private healthcare. In a way, the Act unifies features of law concerning persons, falling within the scope of private law, and social welfare law, falling within the scope of public law. This manner of regulation – taking into account the relevance of the Patient Injuries Act – has an impact on the understanding of the legal relationship between patient and healthcare professional, and on the formation of the principles which guide that relationship. The emphasis in the Act is on the determination at the level of law of the principles defining the status of the patient, and the Act lacks, for example, its own sanction provisions.

The Patient Injuries Act and Patient Rights Act are also significant with regard to the guidance, supervision and sanctions system in healthcare. The Patient Injuries Act underscores the meaning of damages as a restorative sanction, whereas the Patient Rights Act introduced certain new means for guidance and supervision: the Patient Ombudsman and the objections procedure. The supervision of healthcare professionals in Finland has traditionally taken place by administrative means, i.e. through disciplinary procedures and the control of the rights to practice medicine. Criminal sanctions are of little significance in the field of healthcare.

The aim of strengthening certain legal principles comes across clearly in a reading of the Patient Rights Act. These principles are also constitutive as to the basic concepts of modern medical ethics and bioethics: respect for the human dignity, integrity, right of self-determination and the privacy of the patient. Furthermore, the values reflected in these principles occupy centre stage in our fundamental rights provisions of the Constitution laid down in 1995.

Throughout history, the central aim of medical ethics has been to achieve and sustain the health of the patient. The principle of a patient's right to self-determination only gained a foothold in medical ethics after World War II, in connection with the Nuremberg trials. The decision by the military tribunal led to the creation of the Nuremberg Code (1947) on the performance of medical trials on human subjects. In the practices of Finnish authorities, the binding effect on the physician of the expressed will of the patient was not confirmed until 1973, in a decision of the Parliamentary Ombudsman.

The Patient Rights Act upholds and specifies the substance of this right of self-determination and the related right of access to information, as well as the status of minor patients. At the same time, the principle concerning the binding nature of a patient's advance directive, relevant to both terminal treatment and living wills, was also recorded in law.

For a long time, the weight of these basic principles of medical law was not sufficiently acknowledged in legal thinking for a long time. For example, in connection with the drafting of the provisions of the Criminal Code in its Chapter 21 concerning homicide and bodily assault (1995) , it was necessary to clarify in my expert's statement to the Legal Affairs Committee of Parliament the following: when a patient's right to self-determination has been confirmed by a statutory act, the provisions of the Criminal Code cannot impose on physicians a duty to sustain the life of terminally ill patients through extraordinary measures contrary to the wishes duly expressed by the patient.

It must also be noted that it is typical of medical law and biolaw that it reconciles and balances divergent legal-ethical values, interests and principles.

In like manner, a key aspect of the legal argumentation here, instead of the ordinary interpretation of the law under legal rules, is the weighing against each other of mutually divergent legal principles of different strengths.

5 BIOMEDICINE AND FUNDAMENTAL AND HUMAN RIGHTS

The rise of human and fundamental rights thinking since the early 1990s has in Finland increased the necessity for legal regulation by statutory acts in many fields while at the same time clarifying the characteristics of such need and the manner of its implementation. Finland's accession to the European Union (EU) in 1995 in turn obliged it as new member-state to implement Community legislation to a part of the national legal order and after that to recognise where the Community legislation affects the application of national law. The implementation of human rights binding on Finland, as well as of EU law (as it stands after the Lisbon Treaty) must be safeguarded through statutory legal remedies.

The prerequisites for restricting human and fundamental rights are precisely defined in the relevant legislation. Section 21 of the Finnish Constitution concerning protection under the law gives everyone the right to have his or her case dealt with by a legally competent court of law or other authority, as well as to have a decision pertaining to his or her rights or obligations reviewed by a court of law or other independent organ for the administration of justice. The guarantees of a fair trial and good governance shall be laid down by an Act. Section 80 of the Constitution further requires that the principles governing the rights and obligations of private individuals and the other matters that under this Constitution are of a legislative nature shall be governed by Acts, i.e. instruments passed by Parliament. EU law imposes requirements having to do with the efficiency, proportionality and effectiveness of national legal remedies in its implementation.

Based on the above, it would not be overstating the case to say that human and fundamental rights have created a new value foundation for our legal system, and one which introduces a greater degree of coherence. The trend in law otherwise is one of differentiation and fragmentation, as indicated by the emergence of medical law and biolaw as a distinct sector of law. The strengthening of human and fundamental rights has a positive, cohering effect on this new sector of law too.

A need for new kinds of legal regulation has arisen from the rapid advances seen in recent years in methods of artificial human reproduction (assisted fer-

tility treatments) and medical genetics. The development of biomedicine has made topical, for example, the protection of unborn life (the human embryo). Advances in biomedical methods, genetic engineering in particular, has focused awareness on a new value to be afforded legal protection, the inviolability of the human genome. Equally the concept of human dignity – counted already earlier among human rights of a fundamental nature and principles of medical law alike – has assumed new dimensions and gained in scope.

6 THE SIGNIFICANCE OF THE EUROPEAN CONVENTION ON BIOMEDICINE IN PARTICULAR

The Convention on Human Rights and Biomedicine of the Council of Europe (ETS No. 164) was adopted in Oviedo on 4 April 1997 and it took international effect in 1999. This Biomedicine Convention and its Additional Protocols on the Prohibition of Cloning Human Beings (ETS No. 168, 1998) and on Transplantation of Organs and Tissues of Human Origin (ETS No. 186, 2002) were ratified by Finland in 2009. The substantive provisions of these European legal instruments were implemented to Finnish legal order on 1 March 2010, and after that the provisions have the status of statutory law equal to those of Parliamentary Acts.

The Biomedicine Convention serves to supplement or specify the European Convention on Human Rights in the field of biomedicine. The case law of the European Court of Human Rights in application of the Convention has occasionally made references to the standards of the Biomedicine Convention even when the allegedly infringing State has not even ratified it. One may conclude from this that the provisions of the Biomedicine Convention may in effect guide the evolutionary interpretation of the Human Rights Convention.

As its full name suggests, the Biomedicine Convention seeks to protect human rights and human dignity with regard to the application of biology and medicine. Its provisions define general principles (such as consent, private life and the right to information) as well as special standards as for human genome, biological and medical research on persons and human embryos, and organ and tissue transplants. The Biomedicine Convention and its Additional Protocols afford a minimum level of protection which does not prevent wider protection from being afforded in the application of biological and medical knowledge, respectively.

Of particular importance is Article 1 of the Biomedicine Convention, according to which the purpose of the Convention is to protect the dignity and

identity of all human beings. The Biomedicine Convention and its Protocols are of significance, not only for the sake of formulating human rights principles and standards to be applied in the field of biomedicine, but also for providing guidance for priority-setting and balancing these divergent principles and standards. No conflict between the ratified Convention or its Protocols and the Constitution of Finland could be demonstrated, even though Article 1 of the Convention – when emphasising the protection of human *beings* – represents a certain change in the protected values, because it may be understood as a reason for increased legal protection of the human embryo.

From Finland's point of view, the Convention and its Protocols reinforce and specify already existing and applied constitution and human rights provisions in the field of biomedicine. The ratified Convention and its Protocols have affected the relevant legal regulation in Finland even before ratification. Following the ratification, the public authorities shall, under Section 22 of the Finnish Constitution, guarantee the observance of basic rights and liberties and human rights. Consequently, norms equivalent by their nature to human rights are given a special position, as are basic rights and liberties. The said effect extends to both the legislator and to those who apply the law, including the professional in the field of healthcare and biomedical activities.

Finnish legislation has for the most part been amended to comply with the requirements under the Biomedicine Convention and its ratified Protocols. In certain respects, the regulations enforced become directly applicable in the absence of specific legislation. Examples of such regulations would be Articles 12 and 13 of the Biomedicine Convention (predictive genetic tests and interventions on the human genome). However, it would be highly desirable for national legislation to implement such Articles by specifying legal provisions.

The interpretative effect of the Biomedicine Convention and its ratified Protocols shall also be taken into consideration. I mention as an example infant male circumcision, on which the Finnish Supreme Court issued a precedent in its decision *KKO 2008:93*. Supreme Court held that the conduct of a mother who had a Muslim son of 4 years circumcised for religious reason was not to be deemed illegal. In its argumentation, the Supreme Court made no reference to the Biomedicine Convention – which admittedly at the time had yet to be ratified. Subsequent to the ratification of the Convention, the effect of Article 6 (1) must be considered; accordingly, an intervention in the health field may only be carried out on a person who does not have the capacity to consent, for his or her direct benefit. In the decision of 30 November 1999 the Parliamentary Deputy-Ombudsman gave the recommendation that with regard to infant male circumcision, the different fundamental rights should be weighed up by Parliament in a

legislative process. Such weighing can be accomplished through the enactment of a special Act on this topic, in keeping with the model adopted in Sweden.

As for the effect on the legislator and those applying the law, it has been important for the Finnish research community to determine that therapeutic cloning by somatic cell nuclear transfer remains legal also after the ratification of the Biomedicine Convention. In this view, only cloning with the aim of procreation is prohibited under Article 18 (2) of the Convention, which forbids the creation of human embryos for research purposes (see also the Additional Protocol on the Prohibition of Cloning Human Beings). It would be desirable to clarify national legislation in this respect, in keeping with the example set by Sweden. It should be noted that in equivalent circumstances, Sweden considers it warranted to enter a reservation against the said Article if and when the Convention is ratified.

7 CHALLENGES IN THE DEVELOPMENT OF MEDICAL AND BIOLAW AS PARTS OF THE LEGAL ORDER AND LEGAL SCIENCE

Healthcare legislation in Finland has in recent decades been developed in quite a consistent and comprehensive manner. Finland has been in the international vanguard in the development of compensation coverage for patients as well as legislation governing the rights and status of patients. In some sectors, mainly genetic engineering and reproductive technology, the development of legislation has been slow when compared with many other Western nations, and the European Convention on Biomedicine was not ratified until ten years after the Convention took international effect.

In the latter sectors, the delays in legislation are explained by the moral and political differences prevailing in our society regarding the objects of regulation and the need for regulation in the first place. With increases in the regulation of genetic engineering and reproductive technology, one is forced on the one hand to recognise the inviolability of human dignity and to guarantee the protection of genetic integrity, and on the other to weigh against each other the principles expressed by the various human and fundamental rights when of their very nature these are less than absolute.

The legal remedies and sanctions afforded to patients by healthcare legislation are softer than in general. For example, except for emergency medical treatment, no effective legal remedies to safeguard access to health services have been created through legislation. Our Constitution provides for the duty

of the public authorities to guarantee for everyone adequate social, healthcare and medical services, yet omits to define any criteria for adequacy. The Patient Rights Act recognises the right of everyone to healthcare and medical care required by their state of health, but only within the resources available to healthcare at the time in question. While the Patient Injuries Act guarantees the injured person a more extensive right to compensation that general tort legislation, the lack of healthcare resources does not constitute grounds for compensation under that Act either.

The health policy and legal policy debate going on in Finland in the 21st century has acknowledged that essential weaknesses exist in the adequacy of healthcare resources and the regional distribution of such resources, at a time when the average life expectancy is rising and the ageing population account for a growing proportion of the whole. Certain partial reforms to address these issues have been undertaken as part of national projects to secure the future of healthcare, yet uncertainty continues to reign with respect to the wider strategic choices and the timetable for their implementation.

In order to maintain public trust in the fair functioning of the healthcare system, the adequate availability of healthcare services must be ensured in the manner required under the Constitution, as must the realisation of the principles of equality and non-discrimination in the provision of those services. Individual legislative amendments to introduce more effective legal remedies and sanctions to guarantee the availability of healthcare services and to ensure the quality of such services will not suffice. The crucial question is how to make the healthcare system as a whole function in a more effective and equitable manner, taking into account the resources allocated to healthcare, the healthcare organisation, and healthcare personnel and their training and recruitment. Another important issue is how to ensure the increased impact of the guiding values – such as those reflected in the Finnish Constitution and the Biomedicine Convention – on the practical work with patients.

States acceding to the European Convention on Biomedicine are required to ensure that the fundamental questions raised by developments in biology and medicine are the subject of appropriate public discussion. In Finland, the National Advisory Board on Social Welfare and Health Care Ethics (ETENE), originally set up in 1998, has a special role in fostering such discussion and publishing documents to serve as its basis. It is not sufficient to ensure that medical and bioethical issues are discussed in public, or that more education is provided in ethics; equally important is the development of medical and biolaw as a discipline and sector of law working in tandem with the development of the relevant ethics and professional codes of conduct.

Topical challenges to legal research involve, for example, the creation of legal doctrines and 'legisprudence' to address the issues arising from genetic engineering and reproductive technology: for example, the legal-ethical issues related to genetic information, stem cell and embryo research, and the regulation of biotechnology.

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[1] A full list of Raimo Lahti's publications can be found at the following website of the University of Helsinki: https://researchportal.helsinki.fi/en/persons/raimo-lahti.

[2] Sign * after the article indicates that it is included in the open-access compilation of Raimo Lahti's essays in German: *Zur Kriminal- und Strafrechtspolitik des 21. Jahrhunderts. Der Blickwinkel eines nordischen Wohlfahrtsstaates und dessen Strafgesetzreformen: Finnland* (De Gruyter, Berlin 2019), mentioned *infra*.

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Professor Lahti was a member of the Task Force on the Finnish Criminal Code Reform in 1980–99. He has also carried out several other expert tasks, especially in law drafting, for the Government and Parliament. He is a Vice-President of the International Association of Penal Law (AIDP) since 1994.

Professor Lahti was invited to a Fellow of the Finnish Academy of Science and Letters in 1984. He received as a homage a Medal *SL K* (Knight Commander of the Order of the Lion in Finland), bestowed by the President of the Republic, in 2005. He received as a homage *Festschrift in Honour of Raimo Lahti.* Edited by Kimmo Nuotio. Forum Iuris, University of Helsinki, Helsinki 2007. He received the 'Ombudsman's Statuette' for the sake of his lifetime merits in furthering the respect for the rule of law and human and fundamental rights, bestowed by the Parliamentary Ombudsman, in 2016.

Finnish Lawyers' Association (Suomalainen Lakimiesyhdistys) is the publisher. In addition to a printed book in the series of Publications of the Finnish Lawyers' Association, Series D (Ius Finlandiae), as No. 8, the contents of the anthology will be freely accessible from the digital publication platform of 'Open Monograph Press' (Edition.fi) of the Federation of Finnish Learned Societies (Tieteellisten Seurain Valtuuskunta).

The Faculty of Law, University of Helsinki, has provided outward circumstances for the author's research work during 55 years and also for preparing this anthology. The kind permissions of the original publishers have made it possible to republish essays in this compilation.

This collection of essays on criminal law, criminology and criminal policy includes a selection of my articles from the year of 1972 to the year of 2020, *i.e.*, from a period of 49 years. The writings – in all 32 – chosen for the compilation are written in English and 30 of them have been published earlier. The main aim with this anthology is to crucially widen the access of my writings for comparative purposes. The articles are divided into seven chapters. Chapters I–VI cover a large spectrum of criminal sciences, and they are – in particular, in Chapters IV–VI – written rather from a Nordic (Scandinavian) than from a narrower Finnish perspective. The title of the anthology expresses its main message: towards an efficient, just and humane criminal justice.

Chapter VII includes five articles related to bioethics and (criminal) law. The reason for that chapter's attachment is to present some of my contributions to the new discipline entitled 'Medical law and biolaw'.

The intensified internationalization and Europeanization of criminal law and justice have changed the role of comparative law and criminal sciences in general. There is much more need for comparison of legal orders due to the emergence of European criminal law and international criminal law and due to the increased interaction between European and global legal regulations and the national legal orders. We also need more evidence-based criminological research to be utilized in criminal-policy planning and as a foundation for rational policy decisions.

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