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Multilayered criminal policy: The Finnish experience regarding the development of Europeanized criminal justice

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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'.

Keywords

Multilayered criminal policy, Europeanization and internationalization of criminal law, Finnish and Scandinavian criminal justice, criminal sanctions, united in diversity

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 multilayered 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

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Europe Conventions and other regulations, and the European Union (EU)'s legal order; (c) the subregional (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, that is, 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 globalization 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 multilayered 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]:

1. criticism of the so-called treatment ideology in the 1960s;
2. emphasis on cost–benefit thinking at the beginning of the 1970s;
3. the so-called neoclassicism in criminal law thinking at the end of the 1970s and the beginning of the 1980s;

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, Paris 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* (OUP, Oxford 2009) 97–103, 103.
3. See also Raimo Lahti, 'Towards Internationalization and Europeanization of Criminal Policy and Criminal Justice – Challenges to Comparative Research' in EW Plywaczewski (ed), *Current Problems of the Penal Law and Criminology/ Aktuelle Probleme des Strafrechts und der Kriminologie* (Wolters Kluwer Polska, Warsaw 2012) 365–79. 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, Leiden/Boston 2019), 66–85.
4. In more detail, see, for example, Raimo Lahti, 'Recodifying the Finnish Criminal Code of 1889: Towards a More Efficient, Just and Humane Criminal Policy' (1993) 27 *Israel Law Review* 100–17. As to recent reviews, see Tapio Lappi-Seppälä, 'Penal Policies in the Nordic Countries 1960–2010' (Supplement 1, 2012) 13 *Journal of Scandinavian Studies in Criminology and Crime Prevention* 85–111; Sakari Melander, 'Criminal Law' in Kimmo Nuotio et al. (eds), *Introduction to Finnish Law and Legal Culture* (Forum Iuris, Helsinki 2012), 246–60.

4. 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;
5. influence of human and basic rights – that is, influence of constitutionalization – on criminal law and procedural law since the 1990s;
6. 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' – that is, subregionalization – 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.

Scandinavization of Finnish criminal and sanction policy

The Nordic (Scandinavian) countries form a subregional area in Europe and the developments there seem to presage more general trends in Europe towards harmonization 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.

A total reform of the Finnish Penal Code of 1889 has in its essence been 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.[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 harmonized 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.

5. See generally Raimo Lahti, 'Towards a Rational and Humane Criminal Policy – Trends in Scandinavian Penal Thinking' (2000) 1 *Journal of Scandinavian Studies in Criminology and Crime Prevention* 141–55.
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 and others, *Criminal Justice Systems in Europe and North America – Finland* (HEUNI, Helsinki 2001).

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 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 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, that is 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

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 Theo Vogler et al. (eds), *Festschrift für Hans-Heinrich Jescheck*, II (Duncker & Humblot, Berlin 1985), 871–92, 884.
8. See also generally Raimo Lahti and Patrik Törnudd (eds), *Inkeri Anttila, Ad ius criminale humanius/Essays in Criminology, Criminal Justice and Criminal Policy* (Finnish Lawyers' Association, Helsinki 2011); 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, Berlin 2019).
9. See especially Lahti, Current Trends in Criminal Policy in the Scandinavian Countries (n 7), 66–9.

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 in the neoclassical 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 policymaking – 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.

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]

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

10. In more detail, see Tapio Lappi-Seppälä, 'Explaining imprisonment in Europe' (2011) 8 *European Journal of Criminology* 303–28; Lappi-Seppälä, (n 4).
11. See Patrik Törnudd, 'The Futility of Searching for Causes of Crime' (Universitetsforlaget, 1969) 3 *Scandinavian Studies in Criminology* 23–33.
12. In more detail, see Lappi-Seppälä, (n 10).

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 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, that is, 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

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).
14. See, for example, 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* (Forum Iuris, Helsinki 2012), 127–39.
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, Leiden 1996) 257–94.

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 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 (ch 17, ss 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 ch 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 – 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 the 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

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* (Forum Iuris, Helsinki 2012), 97–110, 102.
17. So Scheinin, (n 15), 276.

'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.

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.

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 art 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, for example, whether to resort to criminalization or administrative sanctions and at what punitive level the sanctions should be. This discretion may,

18. See generally Raimo Lahti, 'Constitutional Rights and Finnish Criminal Law and Criminal Procedure' (1999) 33 *Israel Law Review* 592–606; Melander (n 4), 237–47.
19. See, for example, *C.R. v the United Kingdom* App no 20190/92 (ECHR, 22 November 1995).
20. See, for example, Mireille Delmas-Marty, 'The European Union and Penal Law' (1998) 4 *European Law Journal* 87–115, 100.

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 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 (ch 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.

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 certain aspects support the enlargement of criminalized behaviour and certain aspects restrict their scope

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 art 83 in the Consolidated Version of the Treaty on the Functions of the EU (TFEU, 2008).
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' (2018:1) 9 *New Journal of European Criminal law* 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 Karoly Bárd, 'The difficulties of writing the past through law – Historical trials revisited at the European Court of Human Rights' (2010) 81 *Revue Internationale de Droit Pénal* 27–45.
27. In more detail, see Raimo Lahti, 'Finnish Report on Individual Liability for Business Involvement in International Crimes' (2017) 88 *Revue Internationale de Droit Pénal* 257–66, 260.

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 criminalization so that it restricts fundamental freedom in an acceptable way; the advantages of criminalization 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 subcriteria 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 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.[30]

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

28. See ch 11, s 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].
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.

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]

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 19th 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 Europeanized economic criminal law and internationalized 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

31. See especially W. Schomburg, 'The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights' (2009) 8 *Northwestern Journal of International Human Rights* 1–29.
32. See M.S. Ellis, 'International Justice and the Rule of Law: Strengthening the ICC through Domestic Prosecutions' (2009) 1 *Hague Journal on the Rule of Law* 79–86.
33. See UN Doc A/Conf. 183/9, 17 July 1998.
34. See ch 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?' (2011) 11 *International Criminal Law Review* 155–76.
36. See especially Kai Ambos, 'Is the Development of a Common Substantive Criminal Law for Europe Possible?' (2005) 12 *Maastricht Journal of European and Comparative Law* 173–91; André Klip (ed), *Substantive Criminal Law of the European Union* (Maklu, Antwerpen 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) 107–17.
38. See Jussi Matikkala, 'Nordic Intent' in *Festschrift in Honour of Raimo Lahti*, (Forum Iuris, Helsinki 2007), 221–34.
39. See the first publications of the projects: Ulrich Sieber & Karin Cornils (ed), *Nationales Strafrecht in rechtsvergleichender Darstellung. Allgemeiner Teil 1–3* (Duncker & Humblot, Berlin 2008–2009). See also George P. Fletcher, *The Grammar of Criminal Law, American, Comparative, and International, Vol. I* (OUP, Oxford 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), 345–51.

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 the so-called organizational crimes. 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.

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 recognized and taken into account.

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. Especially the EU criterion of dissuasiveness is criticized 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 policymaking.[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 financial interests of the whole EU are in danger or when there are particularly strong common interests of the Member States to combat serious transborder 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 transborder crime, transitional crime control and EU criminal law is needed

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, London and New York 2017) 56–9.
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, Helsinki 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.
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 and Miikka Rainiala, 'Alternative Investigation and Sanctioning Systems for Corporate and Corporate-Related Crime in Finland' (2019) 90 *Revue Internationale de Droit Pénal* 131–63.

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 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]

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46. See generally, for example, Annika Suominen, 'The Characteristics of Nordic Criminal Law in the Setting of EU Criminal Law' (2011) 1 *European Criminal Law Review* 170–87; Karri Tolttila, 'The Nordic Arrest Warrant: What Makes for Even Higher Mutual Trust?' (2011) 2 *New Journal of European Criminal Law* 368–77.
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.