

Special Issue

**Balancing criminal law
- vulnerabilities as an interest to protect by and from criminal law**

Introduction

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This special issue has been developed through the work of the Nordic Women's Network in Criminal Law and is dedicated to our dear late colleague and friend professor emerita Madeleine Leijonhufvud (in memoriam) who, together with professor emerita Suzanne Wennberg, founded this network in early 2000's. Leijonhufvud was the first woman to take her doctorate and to become a professor in Criminal Law in Sweden. She was engaged in various societal areas and involved in the public debate and policy making on issues such as pornography, procuring and the rape legislation. Leijonhufvud's assiduous work, never-ending and patient commitment and efforts to create gender equal living conditions, and especially to combating men's violence against women and girls, the network wishes to dedicate this anthology to her memory.

Just as she did, we take our point of departure in societal matters and challenges in the articles. We live in a time characterised by an ongoing Global Pandemic (COVID-19) and the Shadow Pandemic growing amidst the COVID-19 crisis,¹ refugee flows due to armed conflict in different regions, climate and environmental change,² economic

¹ UN Women has raising awareness of the shadow pandemic of increase in domestic violence against women and girls during COVID-19. As more countries report infection and lockdown, government authorities, women's rights activists and civil society across the world have flagged increasing reports of domestic violence during the crisis, and heightened demand for emergency shelter. In addition, online abuse targeting women has been recognized as a shadow pandemic too. <https://www.unwomen.org/en/news/stories/2020/4/statement-ed-phumzile-violence-against-women-during-pandemic>. All internet entries last accessed 19 December 2021.

² See UN Security Council's press release SC/14445 23 February 2021. <https://www.un.org/press/en/2021/sc14445.doc.html>.

instability,³ technological advances and the challenges that follow their path.⁴ These extensive alterations have in common that they both challenge and threaten society as we know it at different levels and on several fronts. At the same time, we see several worrying trends that may be consequences of the aforementioned challenges and that constitute challenges in themselves.

These societal challenges inevitably raise fundamental questions about power and the exercise of power. What role does media descriptions of realities play and how are these interpreted and reformulated as part of a political agenda? How does the government exercise its power against individuals through the use of law, and in particular the criminal law, to deal with societal problems connected to these challenges? Whose reality and whose rationalities are used as a background and thus legitimizes the measures undertaken by the government?

Over the past decade, we have been confronted with a series of populist political proposals towards a more punitive criminal policy. At the same time, there seem to be two conflicting images – partly an offensive criminal policy, partly a prudent policy regarding the use of criminal law, including instruments of restraint, to combat men's violence against women and girls.⁵ We also know that some groups are affected by a repressive criminal law and/or that vulnerable groups do not enjoy criminal protection in some situations to the same extent as others.⁶ In addition, it seems that feminist arguments have been “hijacked” by those who demand harsher and longer sentences, but only regarding certain crimes. The contributions in this anthology problematise both these images and point to the difficulty to strike a balance between the rule of law and the interests of the perpetrator as well as of the victim/survivor.

³ The World Bank report (2021) Global Economic Prospects.

⁴ See Häggström, *Tänkande maskiner. Den artificiella intelligensens genombrott* (Stockholm: Fri tanke 2021), where he discusses, among other things, how we should handle the risk of an explosive breakthrough in AI that threatens humanity's prosperity, and in the worst case, human survival?

⁵ An example of this is the ongoing political discussion that electronic tagging should be used much more often in the event of a contact ban on a person with whom the perpetrator has or has been in a close relationship (Non-Contact Orders Act 1988: 688). This issue has gained renewed strength due to the high-profile murders of five women in Sweden this spring. The women have been murdered for three weeks in their home or on the open street. All five suspected perpetrators are men with some form of relationship with the victims. However, the issue is not a new issue but has been put forward by The Hidden Women's new resistance movement as a demand for change and as a protest against the system. They got society's help to go underground and have to live at a secret address and with a fabricated life story. About 800 women in Sweden live in the same way hidden, most from a threatening and violent ex-husband. They testify that they and the children are forced to live with a limited living space, but that their perpetrators are allowed to live freely in society and continue to 'chase' them through life, <https://www.aftonbladet.se/nyheter/a/8mnPPW/de-gomda-kvinnornas-nyamotstandsrorelse>.

⁶ See for example Kerstin Nordlöfs contribution, *The Absence of the Child's Best Interests and the Preservation of Structures with Body Examinations*.

Criminal law is one of the most powerful instruments for the state can use to deal with various problems in society. Unfortunately, less attention has been paid to the state's responsibility to create equal living conditions for its people and thereby form responsible citizens. The political solutions through the use of criminal law, such as the introduction of more criminalisation and harsher punishment, may seem effective (in the short-term perspective) but instead we may be going down a slippery slope. All political proposals, if using criminal law, includes to balance between different interests and principles, the rule of law and an 'effective' enforcement, but also the principle of *ultima ratio* is of importance meaning that the state should choose other (less intruding) options if possible. Populist policy has been given precedence over the rule of law.⁷ The idea that seeks to strive to protect both i.e., a fair trial for the perpetrator and justice⁸ for the victim/survivor in line with the values and principles of the rule of law seems to have been given less importance. At present, there is too much of a one-sided focus on *either or*, instead of trying to strive for *both*. We believe that the increased focus on criminal law as an instrument to govern society and citizens hides deeper structural societal problems while shifting responsibility for solutions from the state to individuals through individual punishments in accordance with the neoliberal ideology.⁹ Some of the contributions in this special edition show that this idea of *either or* is problematic and we argue that we must reconsider and strive to balance the inter-

⁷ Some examples of ongoing legislative processes, laws, legislative amendments that have been adopted where the rule of law has been given lower priority for a more effective criminal prosecution and thus a more oppressive criminal law are SOU 2021: 35 *A strengthened legal process and increased prosecution* regarding the protection of and support for witnesses and their relatives – through the investigation into the introduction of anonymous witnesses; and a review of whether the penalties for perjury and protection of criminals can be increased, further on an investigation into introducing a system of crown witnesses can increase the incentive for suspects to participate in criminal investigations; prop. 2019/20:118 *Juvenile surveillance* enters into force on 1 January 2021. The sanction is intended for cases where neither juvenile care nor youth service is sufficiently intervening with regard to the nature of the crime and the young person's previous criminality; prop. 2019/20: 200 *A stricter view on the handling of weapons and explosive goods*, stricter penalties for weapons offenses and explosives offenses enter into force on 1 December 2020; The Ministry of Justice's draft act on abolished penalty rebates for young adults in the case of serious crime, <https://www.regeringen.se/rattsliga-dokument/lagratsremiss/2021/07/slopapad-strafrabatt-for-unga-myndiga-vid-allvarlig-brottslighet/>. SOU 2021: 46 *Faster prosecution - a fast-track procedure in criminal cases* which proposes that a fast-track procedure should be made permanent; prop. 2019/20: 145 *A simplified procedure for certain decisions on secret interception* that entered into force on 1 August 2020; prop. 2019/20: 64 *Secret data reading* that entered into force on 1 August 2020. The law gives the police the opportunity to better enforce secret coercive measures.

⁸ See for example the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* adopted by General Assembly resolution 40/34 of 29 November 1985.

⁹ Svensson, *Exploiting Justice in a Transformative Swedish Society*, 3 Nordic Journal on Law and Society (2020) pp. 1-25.

ests involved, not primarily considered as conflicting interests but an approach where the perpetrator's interests go hand in hand with the victim's/survivor's interests.¹⁰

People around the world suffer from poverty and armed conflicts that particularly affect the civilians in the sense that people have been forced to abandon their homes in order to seek safety and security for themselves and their families elsewhere, often in a completely different part of the world.¹¹ In the end of 2015, there was an exceptionally large number of people suffering from armed conflicts seeking refuge in the Nordic countries, and in Europe in general. As the journey stampede is extremely dangerous a large part of the refugees (and survivors) that arrived were young men. One effect being that a group of particularly young men has been exposed to state power, and use of intrusive investigative measures among others. The article written by Kerstin Nordlöf deals with this issue in relation to children and young men in the context of instruments of restraint in criminal procedure law, as she is scrutinising the use of body measures to decide the age of young men in the light of the rights of the child and other international obligations protecting the individual. Additionally, Annika Norée addresses questions on the most violent form of state power, and requires a clearer legal regulation of the right for the police force to use firearms in duty in her contribution to this special issue.

In recent years, through the #metoo movement which had its starting point in late 2017, we have witnessed thousands of women's testimonies of sexual harassment and abuse around the world. In a Nordic context, we have seen in late 2020 that a #metoo wave has gained momentum in Denmark – with a completely new force. In the aftermath of these protests, several aspects of criminal law have been subject to debate and in some cases political reform. Linnea Wegerstad addresses the question of criminal law as a primary tool to solve societal problems, and she takes her point of departure in the criminalisation of sexual harassment. The populist tendency to use criminalisation as the tool to handle challenges in society is also addressed in the contribution made by Malin Sjöstrand, who discusses the relation between media, policy work and criminal reforms in general terms. Going back to #metoo and debates and policy reforms that are related to the movement, we want to highlight that the legislation on rape has recently been/is at this very moment under reform in most Nordic countries, which has been thoroughly discussed in the Special issue of BJCLCJ – Rape laws

¹⁰ See for example Burman, Brottsoffer i straffrätten in *Brottsoffret och kriminalpolitiken*, eds. Lernestedt and Tham (Norstedts Juridik 2011) pp. 279-298.

¹¹ See UNHCR report *Global Trends in Forced Displacement – 2020*.

in the Nordic Countries – Definitions, Development and Discussions.¹² The autumn of 2020 has also been marked by a heated debate on pornography and prostitution. The new Swedish rape laws are sometimes overlapping the penal provision – prohibition of the purchase of sexual services, in cases of trafficking. The application of the crime of human trafficking is also scrutinised in the article written by Märta C. Johansson in which she shows that the application of the law focuses on cases that involves human trafficking and hence an international aspect, whereas the domestic cases, so called ‘lover boy’ cases, are not recognised as trafficking. Heini Kainulainen, Päivi Honkatukia & Johanna Niemi pay attention to the victim’s/survivor’s legal position in Finnish criminal policy, which they argue has been dominated by the ideal of humanity and rationality in favour for the perpetrator the last decades but that it lacks a holistic perspective as it excludes the victim/survivor.

In sum, the challenges that criminal law stands before is the balance of handling societal problems, especially in relation to vulnerable groups (as perpetrators as well as victims/survivors) but also to not become a tool in the hands of populist policy work where democratic values and the rule of law are set aside. Initially, we asked general questions. In this context we would like to remind of the importance of asking the law more specific and fundamentally questions; What are the purposes of criminal law, in what ways and for what reasons should criminal law be used? How do we punish and protect people within the framework of criminal law, and particularly vulnerable groups?

¹² Jacobsen & Bladini, *Rape laws in the Nordic Countries – Definitions, Development and Discussions*, 8 Special Issue of Bergen Journal of Criminal Law and Criminal Justice (2020) pp. 1-4. See also Søberg, Baumbach & Kjær Minke, *Voldtægtssagen - retssystemets akilleshæl – Teori og praksis* (DJØF 2021); Bruvik Heinskou, Skilbrei & Stefansen, *Rape in the Nordic Countries Continuity and Change*, 1:st ed. (Routledge 2019); Niemi & Jokila, *Rape law and coercive circumstances*, 1:st ed. (Routledge 2019); Anne Bitsch, *Voldtektens geografi: En studie av den rettslige forvaltningen av seksuelt medborgerskap i Norge* (Oslo, Institutt for sosiologi og samfunnsgeografi, Universitetet i Oslo, 2018); Niemi, What we talk about when we talk about buying sex, 16(2) *Violence Against women* (2010) pp. 159-172; Andersson, *Hans (ord) eller hennes? En könsteoretisk analys av straffrättsligt skydd* (Bokbox Förlag 2004). See also the ongoing legislative process on sex as a basis for increasing the severity of punishment in Finland. The Finnish government proposes that a penalty might be increased if the motive for the crime is the sex of the victim. See <https://oikeusministerio.fi/sv/-/forslag-kon-som-grund-for-straffskarpning>.

Contributions

Kainulainen, H. Honnkatukia, P. & Niemi, J are, in **The Invisible Victim in Criminal Policy**, arguing that the Finnish criminal policy, permeated by humanity and rationality ideals, by its strong focus on the aim to reduce repression in criminal law lacks a holistic victim perspective. The sensitivity towards the needs of the offenders has led to a failure to recognize the needs of the victims/survivors, especially vulnerabilities related to violence and sexual violence. The authors argue that the position of the victim still needs critical assessment and points out that improvements of the position of the victim can be done without making the criminal policy more punitive in general.

Johansson, M. Love is in the Air - Exploring recruitment into prostitution by abuse of a position of vulnerability as human trafficking. The author points at problems in the interpretation and application of the Swedish law – in cases of domestic cases of trafficking. She argues that the construction of the criminal offence of trafficking includes not only cross-border cases but also national cases where the recruitment into prostitution is made by abuse of emotional bonds. She underlines that Sweden should include domestic cases of trafficking due to international obligations. At this point Sweden fails to live up to our obligations under international laws.

Nordlöf, K. Body examinations of underage children committing crime - A Swedish perspective. She takes her point of departure in the Child Convention, but is also discussing Swedish criminal procedural rules in the light of other international obligations. She is scrutinising the effect of the use of body searches as a mean to deal with age uncertainty in cases of criminal responsibility from a gender and intersectional perspective.

Wegerstad, L. Theorising sexual harassment and criminalisation in a Swedish context. The author develops a theoretical approach to criminalisation of sexual harassment. She argues that the issue is driven by two interrelated phenomena; the first is the #metoo movement that highlights the problem of sexual harassment but also raises questions on whether criminal law can offer a proper response, the second is the growing concern that feminist arguments and struggle becomes too punitive. Swedish criminal law is used to show some of the challenges in the approach to use criminalization as a primary response to gender problems.

Norée, A. Fatal Police Shootings in Sweden – in this article the author elucidates the increase of deadly police violence and the causes behind it and suggests solutions to minimise the risk of fatal police shootings. The regulation on the use of the Police's firearms is vague and the guidance provided by the instructions are insufficient. In effect, the police officers must themselves answer for the consequences of their use of

weapons. The lack of instructions may lead to more lenient assessments, but also to the opposing situation, a harsher assessment. Norée suggests that the question of the use of firearms should be regulated by law, preferably in the Police Act and that the limit set by the principles of necessity and proportionality must be clarified.

Sjöstrand M. Serious violence – a challenge and reason for reforms. In this article Sjöstrand address one of the challenges to Nordic criminal law that is the widespread perception that our world and our societies are becoming more brutal and that violence and serious crime are increasing rapidly. The questions of law and order and public safety have become one of the most important questions to the public in recent years. This has led to an offensive criminal policy despite the lack of scientific support for the effectiveness of such a solution. The author is problematising the fact that penalties are determined in line with principles of proportionality and equivalence, but the perception of the severeness of a crime may change over time, and be affected by media reports. Sjöstrand presents research that from different angles questions the effect of offensive criminal policy and points at the lack of scientific foundation in preparatory work. She argues that the legislator rather than discussing the effect of the criminal policy reforms has started and ended in the opinion of the public and calls for harsher penalties.