

# FINLAND

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## I. INTRODUCTION

The Finnish legal system is unitary and applicable for the whole territory of Finland with some minor exceptions concerning the Ahvenanmaa area ; these are, however, not very important from the point of view of criminal law <sup>1</sup>. The Finnish legal system belongs to the continental tradition and has, for centuries, developed with close contacts to the Scandinavian countries. The legalistic tradition stresses the significance of written law. On the other hand, the flexible attitudes towards law reforms stress the democratic form of government and a dynamic perspective as regards the development of the legal system through reforms. Main contents of criminal law are included in a single code, the Finnish Penal Code (hereinafter FPC), originally from the year 1889. Besides specific provisions on criminalisations the FPC contains provisions on the so-called general doctrines of penal liability as well as on the penal sanctions. In addition to that, the legislative framework includes quite an appreciable amount of “*Nebenstrafrecht*”, independent legislation on criminalisations of minor importance and legislation concerning specific forms of sanctions as well as the enforcement of sanctions.

The Finnish criminal legislation has undergone several extensive restructurings, the latest of which was started in the early 1970s. The aim of that reform work was to rethink in a comprehensive manner the limits of punishability. This reform work has progressed in several phases. Today, almost all of the contents of criminal law have in one way or another been put under scrutiny. Within a couple of years time that massive reform project will be finished. Of course, this will not mean that reform work

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<sup>1</sup> On the Finnish legal system generally, see, e.g., J. PÖYHÖNEN (ed.), *An Introduction to Finnish Law*. 2<sup>nd</sup> ed., Helsinki 2002.

should come to an end. Reforms of Finnish criminal law have in most cases been motivated by domestic reasons and they have been based on relatively long-term planning. Only in a few cases have the “daily politics” directly influenced the long-term politics of reforms. The emergence of a European dimension of penal law is now changing the routines for preparing law reforms.

The Nordic approach to crime has been, at least since 1970s, somewhat less repression oriented than what has been the general trend inside and outside of Europe<sup>2</sup>. The reforms of the Finnish system of sanctions have been, in many instances, informed by a conscious effort to reduce the number of people who are locked up, and a continuous search for options other than just custodial sanctions. This effort has, in general terms, been quite successful<sup>3</sup>. The need for a rational and humane criminal policy has been emphasised in numerous writings. In general terms the Finnish criminal policy could be considered as a typically Nordic one, at least as far as the level of repression is concerned. The prison rate of c. 60 — 70 / 100,000 counts as very close to the Nordic average which is, again, far below the average in Europe. Due to some recent changes of legislation and the worsening of the drug situation, the prison rate is at the moment rising again.

The Finnish law on sentencing could be called neo-classical : fines and imprisonment are the most important general punishments. The law on the choice of punishment and sentencing is, since the reform of Ch. 6 FPC on sentencing in 1976, based on a relatively simple system of principal punishments<sup>4</sup>.

The Ch. 6 on sentencing was adopted in 1976 at the heyday of the rule-of-law ideology stressing the act-proportionality principle in measuring a punishment. This ideology had originally grown out of a critique of the previous “medicalisation” in the criminal law ideology in which a strong emphasis was put on treatment and non-determinate sentences of imprisonment. This line of thinking had led in Finland to a significant growth of the use of custodial sentences without any clear impact on the crime rates. Therefore, the whole idea of individual prevention as the main aim of punishments was strongly cast into doubt. What followed was a more modest general prevention-oriented approach to sentencing<sup>5</sup>.

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<sup>2</sup> T. LAPPI-SEPPÄLÄ, Sentencing and Punishment in Finland : The Decline of the Repressive Ideal, in M. TONRY and R. FRASE (ed.), *Punishment and Penal Systems in Western Countries*. New York 2001, p. 92.

<sup>3</sup> P. TÖRNUDD, *Fifteen years of decreasing prisoner rates in Finland*. National Research Institute of Legal Policy. Research Communications. Helsinki 1993. T. LAPPI-SEPPÄLÄ, *Regulating the prison population*. Experiences from a Long-Term Policy in Finland. National Research Institute of Legal Policy. Research Communications. Helsinki 1998.

<sup>4</sup> See, e.g., T. LAPPI-SEPPÄLÄ, *Rikosten seuraamukset*, Porvoo 2000 and *ibid.*, various chapters in O. HEINONEN et al, *Rikosoikeus*, Juva 2002.

<sup>5</sup> Cf. the articles included in A. ESER / K. CORNILS (eds.), *Neuere Tendenzen der Kriminalpolitik. Beiträge zu einem deutsch-skandinavischen Strafrechtskolloquium*. Freiburg i. Br. 1987.

During recent years the simple and clear-cut system of penal sanctions has been renewed as the community service was introduced as a new "communitarian" sanction. In addition to that, some elements of care and treatment are reappearing in the system of sanctions. This all means that the principles and values behind the system of sanctions have been readjusted and new foundational ideas introduced. Mediation, started during the 1980s, challenged some of the traditional legal-institutional models of dealing with crime problems. The mediation practice tries to respond to the social conflict aspect of a crime by seeking a reconciliation through voluntary meeting and agreement on reparation. This kind of non-institutionalised or semi-institutionalised approach to crime plays a growing role in the area of juvenile delinquency<sup>6</sup>. Also the use of summary penal fees is a new phenomenon. We could also mention the wide discretionary powers of prosecutors and courts for diversion (= to drop cases).

In the early 1990s juveniles were recognised to deserve special protection in relation to custodial sentences. For juveniles, several separate sanctioning principles apply. The whole sentencing ideology differs : adolescents will usually be sent to prison only for grave reasons. The personal history and living conditions of a juvenile will normally have to be researched upon much more thoroughly than what is the case when adults are being tried. In most situations, thus, sanctions other than custodial ones must be chosen. There are several signs today that the neo-classical values are no longer as dominant as before.

Originally, the main principal punishments included only fines, conditional imprisonment (suspended sentence), and unconditional imprisonment. Since the 1970s the courts have more options to choose between. A summary penal fee has been introduced for minor violations. Moreover, community service has been the success story of the 1990s : a great proportion of short-term "hard" imprisonment sentences will be converted nowadays into a community service sentence, backed up by a threat of being converted back to imprisonment in case the rules are not lived up to. Additionally, a special juvenile sentence is now being tested : it draws on the experiences that have been gained concerning community service sentences. Juvenile sentence entails some elements of education, supervision and support in addition to the work for the benefit of the community.

## II. THE FINNISH SYSTEM OF PUNISHMENTS

The principal punishments are unconditional imprisonment, conditional imprisonment (suspended sentence), community service, fines (the day-fine, relative to income, etc.) and a summary penal fee (a fixed amount specified for the offence in question). Imprisonment is the only truly custodial punishment. A special security measure, the incarceration of

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<sup>6</sup> Cf. J.-P. TAKALA, *Moraalitunteet rikosten sovittelussa*. Oikeuspoliittinen tutkimuslaitos, Helsinki 1998 ; I. MIELITYINEN, *Rikos ja sovittelu*. Oikeuspoliittinen tutkimuslaitos, Helsinki 1999.

dangerous recidivists, is provided for some relatively exceptional cases of recidivism of severely violent criminality. Otherwise the custodial punishments are not differentiated. An imprisonment sentence is actually an important point of reference when the concrete “penal value” of the act in question is assessed.

The suspended sentence (conditional imprisonment) is a specific non-custodial punishment which can be mainly understood as a specific form of warning : a suspended sentence can be converted into one to be served, if the convicted person during a certain fixed period of time, expressed in the previous judgement, is found guilty of a new crime which leads to an imprisonment sentence. A suspended sentence is the rule rather than an exception for first time offenders, but its sphere of application is restricted to sentences of imprisonment not exceeding two years. The suspended sentence leads to no particular consequences if the convicted person will not be prosecuted again for a crime committed during the period of time (“test period”) fixed in the judgement.

The general scales (latitudes) of punishments, when the court convicts a person for one crime only, are the following : *Imprisonment* : 14 days — 12 years, life sentence ; *Community service* : 20 — 200 hours (of regular, unpaid work under supervision) ; *Fine* (day-fine) : 1 — 120 units ; *Summary penal fee* : an amount fixed for offences individually, general maximum 200 euros.

The special penalties for public officials are dismissal and warning. The disciplinary penalties for soldiers and other persons subject to chapter 45 FPC are detention, confinement to barracks, a disciplinary fine and warning. In the following the focus will be on the principal penalties only.

A separate act has been enacted on community service. Community service is an alternative to a custodial sentence, in most cases a short unconditional one. A short-term custodial sentence up to 8 months can, under certain conditions, be converted into a community service order. In some cases, however, a community service can now, after the latest reform of 2001, be ordered as a supplementary element in a suspended sentence as well. It is thus no longer used only as an alternative to a custodial sentence.

When a person is sentenced to a fixed-term custodial sentence (= all other sentences of imprisonment except for the life sentence), this punishment, as already indicated, under certain requirements can be given as a suspended sentence. The most important of such requirements is that the concrete punishment may not exceed two years. Also the gravity of the offence, the guilt of the offender, as indicated by the committing of the act, and the previous criminal record of the person will be taken into account when deciding between a suspended (conditional) and an unconditional sentence of imprisonment.

Due to the character of the crimes selected here for closer examination, questions concerning fines as a punishment will be set aside. Specific attention will be given to the system of custodial sentences. Specific aspects of juvenile sanctions will also be touched upon only in passing.

Basically, the legal rules on imprisonment for life are relatively simple. The clearest requirement for such a sentence is that the criminalisation for a specific crime expressly opens such an option. In the current FPC this option is provided concerning only a very few crimes. A life sentence includes all other possible sentences and can not be aggravated on any grounds. No obligatory rules on conditional release apply : one is freed only through pardoning. A sentence for life is the only option in the case of a murder which brings some terrorist activities into this domain. Otherwise, a sentence for life is a rather rare option if we think about the whole list of crimes. The death sentence has been fully abolished and cannot be resorted to under any circumstances, including war.

The current Finnish law still recognises the preventive detention, an old security-measure type of punishment, adopted in the aftermath of the 1920s and 1930s ideological claims of treatment, individual prevention and protection of society against the threats presented by habitual criminals. The rules opening up this possibility are clearly complementary to the normal function of the sentencing. In some cases, the court can express the view that the case be brought to a separate body called the "Prison court" (only one for the whole country!) which should decide on the permanent preventive detention of the individual. During the 1950s and 1960s the preventive detention measure was used quite a lot even for less dangerous habitual criminals such as thieves, but in 1971 the sphere of application of this measure was heavily reduced. Still, the preventive detention is quite problematic from the point of view of criminal law ideology of today, and it has been constantly criticised in academic circles. The imprisonment committee which finished its work in 2001 proposed in its report a further integration of the preventive detention into the normal system of the custodial sentences<sup>7</sup>.

Currently, the use of preventive detention requires, first, that the person in question be now sentenced for a custodial sentence of at least two years for a gravely violent crime, such as murder, manslaughter, grave assault and battery, grave sabotage or gravely violent rape, or be sentenced for a crime otherwise manifesting significant danger for other persons' life and health. The person must either be guilty of a fully completed crime or of a punishable attempt of that crime. The person has to be convicted either as a perpetrator or as an accomplice.

The second requirement concerns previous convictions : The person must during the last ten years have committed either a gravely violent crime or a crime manifesting significant dangerousness. Besides this the legislation requires that the person must, due to the circumstances apparent in the acts committed, be held manifestly as highly dangerous for other people's life and health. If the prosecutor has, in a normal court, presented a claim of detention, and if the court regards that the requirements for passing an isolation sentence are fulfilled, then the court needs to refer

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<sup>7</sup> *Vankeusrangaistuskomitean mietintö*, Komiteanmietintö 2001 :6. Oikeusministeriö, Helsinki 2001.

the case to the Prison court, which is not a full-blown court in the sense of a human rights instrument, but rather a special administrative organ. The Prison court then decides on whether the person be preventively detained or not.

The legal consequences of passing a judgement on preventive detention are not quite as dramatic as what it sounds. The most concrete difference from a normal fixed-term sentence is that the rules of conditional release do not apply. As a consequence, the sentenced person will be kept in custody until the last day of the sentence, but then he or she must be released. The provisions actually provide for an option that the Prison court could decide on prolonging the isolation if the dangerousness would still presuppose this, but this possibility has not been resorted to since the 1970s.

Individual fixed sentences of imprisonment will have to be produced by a combined reading of several provisions. First the form of the punishment has to be selected if the criminalisation to be applied leaves such an option open. Also a combination of principal punishments is sometimes possible. The next thing is the measurement of the concrete punishment(s).

The selection of a form of punishment is not regulated by express general rules. For some specific choices guiding provisions have been given. Still, regarded as a whole, the court has to produce an understanding about the internal relationships of the different sanctions from various sources, including the legal literature. Questions concerning the choice of punishment have grown in complexity as the alternatives from which to choose are often many. Currently, the Finnish Parliament is dealing with a proposal (Gov. Bill 44/2002) which introduces a new “system” for the field. The proposed reform would alter much of the underlining principles, but it would go a bit further in guiding the discretion. There are some technical problems with the current proposal. Therefore, the parliamentary scrutiny of the proposal will probably result in some changes of it.

As regards the measurement of a punishment, the regulation is more tense. The general provisions set first the ultimate limits for various forms of punishment. The sentence of imprisonment may, i.e., never fall under 14 days. The general maximum of 12 years may be raised in case of multiplicity of offences.

Unfortunately, the system of defining the concrete punishment scale for measuring the punishment is somewhat complicated. The starting point is always the general scale of this principal form of punishment (imprisonment or fine) combined with the *specific scale of punishment* laid down in the provisions of the special part of the FPC on criminalisations. Usually these entail rules on both a specific minimum as well as on a specific maximum of the sentence.

The provision on *impairment of the environment* (FPC CH. 48, Art. 1), for instance, sets a specific upper limit of two years of imprisonment but sets no specific minimum. Besides a custodial sentence also a day-fine based pecuniary punishment is mentioned as an option. If a person

would be found guilty of two or more of such crimes, the rules concerning widening of the punishment scales upwards would apply. In such a case the person could be sentenced to imprisonment not exceeding four years.

For the severest of crimes an addition of three years is possible, which makes 15 years the ultimate upper limit for a non-life sentence. For the multiplicity issues, also another rule applies : the concrete punishment shall never exceed the sum total of the applied individual penalty scales.

Quite often the penalty scales are relatively narrow if compared with international standards. This means that from a Finnish point of view it would be advisable to follow the same logic in framework decisions and other relevant instruments. Otherwise the mere logic of progress in the law of sentencing might cause problems of unintended consequences.

Also another logical feature needs to be pointed out. In the Finnish legal system, often specific provisions concerning aggravated forms of such crimes could also apply. It is a characteristic feature of the FPC that the key criminalisations often follow a three-step model : first comes the standard definition of the crime, followed then, in a separate provision, by the definition of the grounds defining specifically the aggravated form of this crime. Often a separate provision defining the less serious forms of this crime exists as well. It is like a block house with a staircase : the rules define how one should move from one floor to another. Among reasons for such a differentiation is the legality principle, making it possible to develop fine-grained criteria for assessing the seriousness of the crime. The differentiation also enables the system to better communicate to the public the nature of the acts committed. This system leads to a need to transfer some issues of sentencing into questions of definitions of the criminal acts themselves. Therefore, when comparing Finnish law with other legal systems, this feature needs to be taken into account. Such differentiated provisions always include separate scales of punishment. In case of an *aggravated impairment of the environment* the scale of punishment reaches from a minimum of 4 months to the maximum of 6 years of imprisonment.

In the Finnish system of criminal sanctions, the meting out of a concrete punishment for one or several crimes is a process in which the general and *abstract* scale of punishment for a type of crime is, by taking into account various other relevant factors, transformed into a *concrete* scale of punishment. This determination of the individual frame of punishment restricts the choices of a court, and also forms the starting point for the choice between different sanctions and the measuring of the concrete punishment.

When proceeding from the abstract punishment scale to concrete sentencing issues also the personal circumstances of the accused play a role. For instance, if the person is found guilty of an *attempted crime* only (if the attempt of that crime has explicitly been set under the threat of punishment), the abstract punishment scale for such a crime will be reduced by one quarter : if the maximum penalty would normally have been 4 years of imprisonment, now it will be only 3 years. Similarly, the

responsibility as an *accessory* (*Gehilfe*) merits a more lenient punishment and leads to a reduced scale. Also the *young age* (15 but not yet 18) of the perpetrator at the time of committing the act has a similar impact. Such circumstances are said to be *personal*, because they affect each person's liability separately. One person can be thus sentenced as an accessory to the same crime by using a different scale of punishment than another person, who bears full liability and is being sentenced on the full scale. In addition to that, the factors leading to a transformation of the penalty scale are not only person-related, but also cumulative. Several such factors, if at hand, can lead to a significant reduction of the punishment. As the maximum of the penalty scale is reduced, so too is the minimum also reduced to the general minimum : concerning a custodial sentence this means a minimum of 14 days of imprisonment. No option is available of going under that minimum.

The main grounds and principles concerning the determination of a concrete punishment are collected in an important provision of the FPC, from 1976 (466/1976) :

Chapter 6, Section 1

(1) In sentencing, all the relevant grounds for increasing and reducing the punishment, as well as the uniformity of sentencing practice, shall be taken into consideration. The sentence shall be in just proportion to the damage and danger caused by the offence and to the culpability of the offender manifest in the offence.

(2) In addition to the relevant circumstances referred to elsewhere in law, the grounds referred to in sections 2 and 3 of this chapter shall be grounds for increasing or reducing punishment.

Among other things, the reform of the sentencing principles in 1991, concerning the *plurality of offences* cases produced important changes for the law on sentencing. The sentencing begins in so far as we determine which one of the offences would lead to the harshest punishment, and then the punishments for the other offences are related to the punishment for this severest crime. Several grounds, such as the internal relationships of these crimes, are meant to be taken into account when the court decides how much one should add to the punishment that would have followed from the gravest offence alone because the crimes in fact were several. The constellation of the crimes thus matters.

Previously, the punishment for every individual crime was assessed separately, and after that the rest were relegated to a type of applied mathematics. Today the case is different : only the end result of the measurement will be given in the judgement, but not the intermediate steps. This has as a direct consequence, for such crimes for which multiplicity of offences is the rule rather than exception, that the sentencing praxis is less transparent and often hard to be presented in the form of empirical statistics. The middle steps exist only as a thought experiment by the judge. This creates difficulties for ensuring that the sentencing practise really obeys the norms and principles that should govern such an activity.

Also legal entities may be prosecuted and fined for an offence, if the FPC entails a special provision on that. The general rules governing



corporate criminal liability are included in the Ch. 9 of the FPC. So far these provisions have been applied only very rarely. Often the corporate criminal liability runs parallel to individual penal liability of those persons who in fact acted within the frame of the corporation. Special rules have been given on the required connection between the company and the individuals acting on behalf of it : a set of general doctrines need to be taken into account.

A corporate fine shall, according to the provisions, be imposed as a lump sum. The corporate fine shall be at least EUR 850 and at most EUR 850,000. The amount of the corporate fine shall be determined in accordance with the nature and extent of the neglect and the participation of the management, and the financial standing of the corporation.

### III. SOME QUESTIONS OF GENERAL DOCTRINES

The law on sentencing is, actually, a *microcosmos* of the criminal law in general. This view is easily confirmed if we think about the many-faceted significance of general doctrines of liability on the sentencing level. Many such factors, interpreted in the studies concerning requirements of penal liability, will also play a role on the level of sentencing<sup>8</sup>.

In the Finnish legal system the inchoate offences, in this case preparation and attempt, have a clear foundation in the written norms of the FPC. Preparation is punishable only if this has been expressly stated in the penal provision itself. Law-technically criminalizations of preparation to commit a criminal act are separate and independent from criminalizations concerning an attempt or a committed full crime. Criminalizations of preparation always have punishment scales of their own, and these are lower than for attempted crimes or crimes actually committed. Punishable preparation requires not only the intent to commit the crime, but also the objective fact that the plan to commit the crime has reached a certain stage. Preparation has been defined as a criminal act only in very few situations such as, for example, preparation for genocide, preparation for high treason and preparation of endangerment. Of these, actually only the third one (Ch. 34 Art. 9 FPC) is relevant here : it would apply for many such sabotage-like forms of terrorist acts in which explosives are needed and used. On the other hand, this provision does not apply generally to all crimes listed in that chapter : hi-jackings of airplanes, etc., would fall outside such a list.

Because the preparation always needs a separate, independent provision, the discretion of the court in these cases basically follows along the usual lines. The penalty scale in Ch. 34 Art. 9 FPC, for example, consists of a fine or an imprisonment from 14 days to two years.

The Finnish doctrine of participation in a crime follows that model which makes a distinction between perpetrators and other participants in

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<sup>8</sup> T. LAPPI-SEPPÄLÄ, *Rangaistuksen määräämisestä. Teoria ja yleinen osa I*. Vammala 1987 (With an English summary).

crime. The Finnish model follows in the main along the lines of the German doctrine, whereas in the other Nordic countries the distinction has not been made quite as clearly. The classical distinctions were written down already in the original provisions of the FPC from 1889 (Ch. 5). If two or more persons have committed a crime together, each one of these accomplices shall be punished as if he or she had committed the crime alone. As a result of this ideal comparison, the sentencing problematics loses much of its specificity. From the point of view of legal interpretation, the sentencing problems change their character: the real issue is now, what this committing an act together really requires and how we can differentiate this from other situations in which people contribute to each other's actions. In the Finnish doctrine, two aspects are emphasised: the perpetrators must have performed some of the actions which are the constitutive elements of this crime description. They must thus be directly involved in the commission of this crime. Another requirement deals with the specific intent to commit the crime together, with the knowledge of the support of the others in the actual committing of it.

An instigator will, from the point of view of sentencing, be dealt with as if he or she would have been the perpetrator. If the instigator is, for instance 16 years old, but the perpetrator was already 18, the instigator enjoys the privilege connected with his or her age. In the opposite situation, if the instigator is an adult but the perpetrator is not, the latter would not get this benefit.

The punishability of instigation always requires that the actual perpetrator, who has been influenced by the instigator, either progressed so far as to complement the crime, or at least was guilty of a punishable attempt; otherwise instigation is left unpunished. The main idea content of instigation is the wilful causing of the decision by someone else to commit a specific crime. This inducing can appear in several forms, such as hiring a person to commit the crime, or giving an order to commit it.

The role as an accessory (*Gehilfe*) is regarded as a factor reducing the penalty scale by cutting away the highest quarter of it. The sentence is, respectively, lowered by one quarter. The minimum penalty, if we are talking about sentences of imprisonment, will now be 14 days. The accused can be convicted as an accessory only if this furthering of another person's crime is intentional and also if the main perpetrator acts intentionally. If a sentence for life would be the only possibility, that "penalty scale" will, for that case, be converted to a custodial sentence of from two to twelve years.

In the Finnish legal system there are actually very few examples of rules concerning participation in crime that would have been given specifically for some criminalisations only. In other cases, such as attempted crimes, these appear more often. However, it is clear that many modern situations of penal liability actually do not quite easily fit in the old schemes of criminal participation in the first place. The liability structure needed when deciding on obligations in an organisation, such as a company or even the armed forces, must recognise the specific organisational and hierarchic setting in which various actors' contribution has to be assessed.

Often this problem of “*allocating*” the individual responsibility adds additional nuances to the issues concerning forms of participation.

Also the recent more general developments of criminal law places an emphasis on the need of this kind of modernisation of the liability structures. Criminalisations based on an endangerment rather than on a harm caused, require an analysis different from those previously dominant harm-oriented ones.

Environmental crimes, for instance, are widely punishable even as non-intentional crimes, which creates the need to work on “analogical” doctrines on participation for these crimes, etc.<sup>9</sup>. All these aspects have then, again, some impact on the sentencing issues. As for the environmental crimes, one further issue to be taken into account is the corporate criminal liability. The community fine is not a general punishment, but always requires that this option be opened for the relevant criminalisation in question. The penal liability of a legal person cannot, however, be assessed without having a look at the individual decisions and actions taken within the frame of the organisation itself. The connecting principles between the individual actions and omissions and the functions of the legal person itself need to be elaborated. This is, once more, a new constellation requiring something analogous to the classical principles of participation.

#### IV. THE MARGIN OF APPRECIATION

According to a Finnish understanding, the main aims of the legal system can best be served by either giving precise rules for the judiciary to follow, or by trying to guide the legal decision-making process of the courts by giving information of the leading aims and principles of the system and by letting the court find the most rational application. The courts seem nowadays to think that being bound by “rational reasons” is not really in fact restricting their powers, rather the contrary. The discretion of the courts is not regarded as “free” in the sense of some other legal traditions, but instead as directed by criteria and principles given by the legislative authority.

The guiding principles on sentencing were already presented above. One important feature of this orientation towards act-proportionality and the uniformity of the sentencing practise is the idea that within the frames of the punishment scales (latitudes) we could define a *zone for routine application* in normal cases. The idea is that in typical cases, if no counter-arguments can be presented, the sentencing practise should concentrate on this specific zone. The significance of such zones lies in the increased predictability when measuring a punishment. The normal punishment zone

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<sup>9</sup> See, e.g., on the “simulated doctrine of participation” for negligent crimes, A.-M. NUUTILA, *Rikosoikeudellinen huolimattomuus*, Helsinki 1996, at p. 304 and p. 347.

can vaguely be located as somewhere within the lower part of the penalty scale<sup>10</sup>.

In the Finnish legal system the idea of a zone of punishment for routine cases is not explicitly backed up by any formulations in the legal text — except for the recognition of the uniformity of the sentencing practise as a goal, as was already mentioned. For custodial sentences no official sentencing guidelines have been set and there is no institutional arrangement provided for this purpose. For some crimes, such as drunken driving and other traffic crimes, relatively fixed sentencing guidelines have been developed. Especially as regards the more rare crimes, often the discretion of the court in fact remains rather free.

The grounds for reducing the punishment are listed in Ch. 6, Sect 3. These include, among others, the fact that a significant pressure, a threat or a similar influence has affected the commission of the offence, or that a strong empathy has led to the offence, or that the offender has voluntarily attempted to prevent or remove the effects of the offence or to further its being cleared up.

The provision is an open one, which means that it also refers generally to the normal principles of sentencing. The mitigating grounds are mandatory and lead to a lighter sentence than what would have been the case without it. It is relatively rare that individual provisions on the definitional elements of crime would directly speak about mitigating factors in a similar fashion. As indicated in the introduction, the Finnish approach to writing provisions on crime definitions has a specific feature: the penal code usually provides for a normal case one provision with its own title (such as “Theft”). After that follows another provision stating the grounds on which a theft could be taken to be an aggravated theft. In a similar vein, often a pettier form of an offence has been separated. The mitigating and aggravating factors can often be taken into account when deciding on the gravity of the offence in this formal sense. This, of course, depends on the criteria listed in the provisions on crime definitions as mitigating and aggravating circumstances. Especially the mitigating factors are often stated very openly, whereas aggravating factors are listed much more in detail and exclusively.

In some cases the mitigating factors are expressly referred to as grounds excluding punishability. Especially the provisions related to the decisions of a prosecutor not to charge (*waiver of prosecution*) and of a court not to sentence a guilty person (*waiver of punishment*) have a close connection with the mitigating circumstances applied in the actual sentencing.

The Finnish criminal law system does not contain detailed rules of the way in which and to what extent the mitigating or aggravating factors

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<sup>10</sup> See, e.g., T. LAPPI-SEPPÄLÄ, Sentencing Theory in Practice: Implementing the notion of normal punishments in Finland, in N. Bishop (ed.), *Scandinavian Criminal Policy & Criminology*. Scandinavian Research Council for Criminology. Stockholm 1990, pp. 123-135; *ibid.* Proportionality and other Values in the Finnish Sentencing System. *Flores juris et legum*, festskrift till Nils Jareborg. Uppsala 2002, pp. 416-418.

should be taken into account in sentencing. Mitigating or aggravating circumstances do not affect formal legal limits of a court's decision-making. Instead, they motivate a sentencing judgement which differs from a normal case. In such a case, the concrete sentencing judgement will presumably not hit the normal punishment zone meant for standard cases.

The aggravating grounds are, according to Ch. 6, Sect. 2, at the moment i.e. the following : the criminal activity has been methodical ; the offence has been committed as a member of a group organised for serious offences ; the offence has been committed for remuneration ; and the offender has a criminal history, if the relation between it and the new offence on the basis of the similarity between the offences or otherwise shows that the offender is apparently heedless of the prohibitions and commands of the law.

Currently, the Parliament is dealing with the Gov. Bill 44/2002 which will, if it leads to a law reform, change some of the formulations concerning the grounds. Perhaps the most interesting feature in the proposal is that the role of the motives for criminal acts is stressed. Racist motives would count as a new aggravating factor, and in general the guilt of the offender as manifest in the penal act would also more openly refer to the motives for action.

#### V. AMNESTY, PARDON, CONDITIONAL RELEASE

Amnesty has always required that special legislation be enacted, but this does not, however, give much guidance on the limits and principles behind such an amnesty. In Finnish history, general amnesty has been granted only a few times. In the 1920s, several years after the bloody civil war in 1918, the reds, many of whom were still held in custody, were finally released through such a general amnesty. In 1967, every prisoner had his or her sentence shortened through such a general enactment of amnesty law. After that the whole institution, which does not seem to have much significance during times of peace, has not been employed.

The pardon, that is an individual pardoning of a convicted person, is more interesting as a legal institution. In an important sense, it is an extra-legal way to do away with some ethical problems of sentencing and enforcement of legally valid sentences. The most important instance of a regular use of pardon is the conditional release of those sentenced for life. The legal system does not know of any normal procedure which could lead to a release for this group of convicted persons. However, through this long-term practise of pardoning a certain expectation has been developed that a prisoner for life be granted a pardon, usually after having served 12-14 years of the sentence. The head of the state, the president of Finland, decides on the issue after having consulted the Supreme Court of Finland. This consultation procedure is obligatory, but the president may also decide against the opinion of the Supreme Court. The pardon is not dependent on what the original crime was, and criminal sanctions also other than a life sentence can be pardoned.

In recent years, the presidents have shown reluctance to grant the pardon for some types of criminality, such as drug-related crimes of violence. This observation was made during President Ahtisaari's term of office (1994-2000). There has been some discussion in Finland whether or not this "ancient system" actually functions optimally : the president will, actually, have to take a position on criminal policy issues, even though this was, historically, not considered relevant for decisions on pardons. The decisions on pardons are not given juridical reasons and there is no legal remedy against an unfavourable decision.

According to the Finnish law on conditional release, those serving their first custodial sentence will normally be released after having served one half of the sentence. The equivalent standard point of release for recidivists is two thirds of the sentence. Certain grounds may lead to a postponement of the release. For juveniles having served their term in a juvenile prison, the release already follows after one third has been served. The prison authorities located under the control of the Ministry of Justice have thus some discretion concerning questions of conditional release, but the frame of the course of events is legally defined and restricted. As for the case of a new crime committed after the release, a court will decide, in addition to the sentence for the new offence, the issue of whether or not the rest of the old sentence (or actually only one month of it) will be served in custody as well. Later the second conditional release will also take place. All of these rules and procedures are relatively independent of the character of the original crime itself. In that sense the system is quite neutral and does not contain any crime-specific exceptions.

Of course there is a certain degree of variation between the prison sentences. Usually the first part of a sentence has most clearly the character of being custodial. After that, the prisoner may receive a permit to participate in education or even work outside of the prison, which reduces the custodial nature of such a sentence. Different prisons have different profiles for the kinds of sentences they focus on. The management of the prison system, and many of the issues related to the specific rights and placement of the prisoners, will be decided either on the internal prison administration level or on the level of the ministerial prison authorities. The courts have basically only a very limited say in these issues. For some decisions the prisoner has the right to take the case to the court. This option is a very new one and there is very little information about whether or to what extent this possibility is being employed.

## VI. TAKING INTO ACCOUNT OF FOREIGN JUDGEMENTS

This question is a very important and interesting one, but not quite so easy to answer. For instance, the system of criminal records used in domestic courts in Finland include information of previous sentences in other Nordic countries. In such a case, the criminal past of the accused person can be taken into account under some restrictions. In a technical sense, the foreign judgements are not used in the same manner as domestic judgements would be, in, say, considering the impact that a previous

sentence should be given when a new joint sentence is given for several offences. On the other hand, all the knowledge that one can get out of official crime registers may be regarded as relevant. For instance the discretion of whether previous criminality would need to be considered as an aggravating factor according to Ch. 6, Art. 2, Point 4, of the FPC is in no way limited to domestic criminality only. One could also speculate on the possibility of deciding for a preventive detention if the former judgement was given abroad. As long as there are no specific studies available, the interpretations of valid law are uncertain.

One crucial practical element includes how a court would get reliable information, such as a crime record document, from a foreign country and whether the court really knows what to do with it, if such would be presented. The document might be from a country representing a different legal tradition and written in a language not known to the court, or otherwise in a form which makes it difficult to refer to. It might also be difficult to see from it which sentences already are definitive and which are not.

Finnish law does not create any general duty for the prosecutor to present foreign crime records for the courts. Therefore, it is likely that the court usually does not get such information at all. It is quite understandable that the defence does not present such documents because these would tend to reveal facts contrary to the interests of the defence. If the charges have been raised in connection with an extradition procedure, for instance, the court might obtain more of such information through the officially collected materials.

The Finnish legislation enabling the "transfer of a prisoner" or, actually, in more general terms, the transfer of enforcement of punishment or confiscation from one country to another, has been built on two "pillars". The internal Nordic system of deciding on a transfer of enforcement follows a very pragmatic logic. This system has already been actively practised for a long time. Quite often the prisoner can serve the sentence in his or her home country. This has been understood as significant as concerns the rehabilitative aims of the enforcement.

The international system is also of increasing importance. The main principle is that the receiving State applies its domestic rules of enforcement. Sometimes the judgement in the State of sentence contains elements foreign to the Finnish legal system. In such cases readjustments may need to be taken before the enforcement can be continued. The enforcement of a foreign final judgement in Finland requires that, among others, the following criteria are met : 1) double criminality (the act must be criminal also if it would have been committed in Finland), 2) the judgement must be final and enforceable in the country in which it was given, 3) the State in which the judgement was given shall have asked for the transfer or consented to it.

## VII. FEASIBILITY QUESTIONS

Technically, the Finnish system of penal sanctions is relatively simple and has a clear structure. Still, the problem is that even technical aspects

usually are connected to substantial issues. For instance the policy on how to regulate penalty scales is a technical matter, but the Finnish way of understanding the functions of such limits is connected to a whole structure of norms and principles governing the law of sentencing.

From the point of view of harmonising the system of sanctions on a commonly European level, some key questions might be listed. The proposed solution should be compatible with the general ideological orientation of the current Finnish law. Probably several of the currently stressed sentencing principles (guilt-proportionality, etc.) would be shared by most European legal systems. Also behind the understanding of general doctrines on what accounts as an attempt or what is the difference between intentional and negligent crime, and how these should be taken into account as part of the system of sanctions, at least some common orientation can be found. Still, we might say that it is not that easy to isolate the merely technical part of the law of sanctions, and usually under the surface we find substantial differences. A “structural” requirement, for instance, that certain penal sanctions, such as corporate criminal liability, should be made available on a national level, would in most cases present not much difficulty. Of course one might just wonder why each Member State should have to introduce a form of sanctioning into a system that could do without it. Comparative studies might support the view that functionally different principal punishment have different roles in their norm-environment. Therefore, one should know these very well before bringing in new legislation.

If one wishes not only to introduce sanctions but also to give rules as to their content, the enterprise will become more complex. The harmonisation of the substantial law in areas such as penal corporate liability would be quite a demanding task, requiring extensive comparative studies to be carried out first.

In any case, the deeper the proposals would go into concrete issues of sanctions and sentencing, the more difficult it will be to find solutions that could be adopted without rethinking the whole system of sanctions. The balance between custodial and non-custodial sentences should also be taken into account. As regards this issue, the Finnish system is somewhat complex ; this might easily produce difficulties. There is a risk that the harmonisation concentrates on the severest sanctions only, thus having a tendency of pointing towards increased repression.

We could also discuss feasibility issues from a more substantial point of view. The harmonisation of the rules of sentencing implies, if taken seriously, also a harmonisation of the criminal policy contents. For that reason, the criminal policy aspects of harmonising sentencing rules should be openly tackled, and the comparative data should be collected in order to see the concrete needs for harmonising as well as the consequences of it in the various legal systems of the member states <sup>11</sup>. If going so far,

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<sup>11</sup> See the critical remarks by P.O. TRÄSKMAN, A Good Criminal Policy is More Than Just New Law, in V. HEISKANEN & K. KULOVESI (ed.), *Function and Future of European Law*. Helsinki 1999, pp. 207-219.



the EU would have to *learn to think of crime problems in true criminal policy terms*. The deeper one proceeds into criminal law harmonisation, the more one has to take positions on criminal policy issues. The simple standard expressions of the effective sanctioning, recurring in many EU documents, do not openly tackle this issue : instead, they wipe the questions of sentencing levels, i.e., under the mat. From a point of view of rationality in criminal policy issues, the international and EU criminal policy measures should be backed up with criminal policy arguments of an equal quality compared with domestic legislation<sup>12</sup>.

The law on sentencing has traditionally been left for the domestic jurisdictions to develop and handle, and the international and regional criminal policy instruments have been focusing on other levels of harmonising. Harmonisation has not been regarded as an aim in itself, but rather as a means for promoting an enhanced interstate co-operation, such as extradition, mutual assistance in criminal matters.

The second thing, and related to the first remark, is that the sentencing law is extremely complicated, because it really concentrates or reflects all the relevant liability questions that can exist. Sentencing law recycles ideas already used for the first time when deciding liability issues. It is not that easy to have a “sector-approach” and separately treat sentencing issues related to certain criminalisations only. The harmonisation should, for that reason, be limited only to such issues that can be dealt with without a risk of spill-over to areas that do not fall into this regime<sup>13</sup>. Questions, such as rules on early release or the impact of foreign judgments on sentencing, might be dealt with without trying to abolish all of the diversity if specific rules can be formulated that do not entail a necessity of revising the whole of the domestic norm framework. One further aspect motivating a more modest approach would relate to the very different understandings behind the various European legal systems of sentencing. The Finnish tradition of operating with relatively narrow penalty scales might cause problems if the European logic would generally be based on giving minimum rules about maximum penalties.

The step by step harmonising could proceed by first harmonising the crime definition rules through a framework decision, and then choosing the next possible step. It might be easier to start with the lower-level rules on release, or the like, than beginning directly with the hard sentencing issues. If we make a distinction between the *vertical* harmonisation and the *horizontal* interstate legal co-operation, the latter way obviously respects the diversity much better, even though enhanced co-operation might

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<sup>12</sup> See, e.g., R. LAHTI, Towards an International and European Criminal Policy?, in *Liber Amicorum Bergt Broms*, ILA, Helsinki 1999, pp. 222-240 ; K. NUOTIO, The Emerging European Dimension of Criminal Law, in *Flores juris et legum, Festschrift till Nils Jareborg*, Stockholm 2002, pp. 531-558 ; K. NUOTIO, Straffrätten europeiseras, *Nordisk Tidsskrift for Kriminalvidenskab* 88 (2001), pp. 289-308.

<sup>13</sup> The question of “legal irritants” has been discussed by K. NUOTIO, “Transforming International Law and Obligations into Finnish Criminal Legislation — Dragon’s Eggs and Criminal Law Irritants”, in *Finnish Yearbook of International Law* (Vol. X, 1999), The Hague, New York, London 2002, pp. 325-350.

also serve to motivate that minimum rules with a harmonising effect be given. The horizontal co-operation, and the legal measures enhancing it, can be quite powerful in producing convergence-creating results in the long run. The mutual recognition of final decisions and judgements, if fully realised and implemented, would indirectly produce a lot of interstate legal communication that would, as time goes by, probably lead to a greater convergence. As regards the protection of the coherence of the law of penal sanctions, this horizontal approach could be regarded less problematic than the vertical one.

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