Confession of crimes from the point of view of criminal law, criminal policy and theories of punishment

– timely issues of just and expedient punishment

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Introduction

Nordic criminal policy, criminology and criminal law have been admired worldwide. One key characteristic of Nordic criminal policy and criminal justice is their close relation to research. This can be seen to have contributed to the fact that crime and its control systems in the Nordic countries are not as prevalent as in many other countries. For example, in some countries harsh punitive penal policies derive from populist and canvassing promises regarding criminal policy. However, these tendencies have failed to reduce crime or the harm it causes to the society as a whole – ultimately leading to unjustified and harmful criminal policies which have been criticized by researchers. The strong link between criminal policy and research on criminal justice tends to reduce these harms (Lappi-Seppälä & Tonry, 2011, pp. 20-29; Lappi-Seppälä, 2007, pp. 276-278; Hinkkanen & Lappi-Seppälä, 2011, pp. 350, 374-376).

Rational and humane Nordic criminal policy dates back to around the 1960s, and similarly with this anniversary publication, it can thus be considered to be celebrating its 60th anniversary. However, if the 60-year success story of criminological research and humane and rational criminal policy has taught us something, it is that the research on criminal justice policy should be able to keep up to date. The world and societies are constantly developing, which has significant effects on criminal policies and crime itself. If research on criminal policies fails to keep up with the topical challenges, it is possible these changes will be responded by suboptimal and irrational criminal policies. That is to say, the role of critical and forward-looking research is emphasized as societies evolve. Research on criminal justice should respond to timely issues in order to reach and impact societies and politicians which are affected by these very same trends. Hence, in order to continue the 60-year success story of rational and humane criminal policy, research on criminal justice should look ahead and ask: How should the next 60 years of successful criminal policy and criminal law look like (Lappi-Seppälä, 2007, pp. 230-233; Lappi-Seppälä & Tonry, 2011, pp. 20-29)?

1. Novel phenomena in the Nordic criminal justice systems

In my dissertation research, I seek to take part in this debate by highlighting the latest phenomena in the Nordic criminal justice systems and their relationship to prevailing theories of punishment and criminal policies. My intention is to draw attention to the fact that the latest trends in punishing and the timely pressures for change in the criminal justice system are not, in my view, fully consistent with the prevailing theories of punishment that justify and guide the use of punishment. In other words, Nordic legal systems are under pressure to adopt new ways and purposes of punishing that do not fit well into the prevailing punitive ideology based on indirect general prevention and neoclassicism. In addition to this, the prevailing theories of punishment have been criticized in themselves. This illustrates, in my view, that there are certain ambiguities and uncertainties in the current theory of punishment (and criminal policy), since the aims and methods of punishment are ultimately derived from these very same theoretical views on punishment.

As these ambiguities can potentially be very devastating from the point of view of effective and legitimate criminal policy, the aim of my research is to present how the different interests and values of punishment could be integrated to one another in the realm of criminal law. In short, my aim is to determine how the novel phenomena in our penal system ought to be reconciled with the prevailing theories of punishment and at the same time examine the (possible) issues regarding the prevailing theories of punishment per se. The goal is to elaborate contemporary outlines for a criminal justice system that ought to serve humane and rational criminal policy in a moral-philosophically sustainable manner.

My research focuses primarily on the role of post-delict actions of the offender such as confession of crimes and its other close »relatives« (e.g. mediation and reconciliation between the offender and the injured person and other attempts of the offender to prevent or remove the effects of the offense). Above all, my dissertation focuses on confessions and plea bargaining, which is a fairly novel concept in the Nordic context. Plea bargaining has been possible in Finland only since 2015 and is currently under scrutiny, inter alia, in Sweden. The growing significance of post-delict actions indicates, among other things, the rise of consequentialist arguments in the application of law. That is to say, process economy, special prevention, conflict resolution and other similar consequentialist arguments have strengthened their position in legal argumentation even in individual cases. In other words, the application of law is tied very closely to pragmatic reasons (and reasoning) such as cost-effectiveness and other kinds of expediency even in individual cases. The use of punishment is hence required to fulfil simultaneously multiple new diverse goals that do not fit well into the traditional notion of assessment of punishment (act-focused proportionality). These contradictions and develop-

ments are aptly illustrated by plea bargaining, which can be seen as a typical example of the novel pressures that the Nordic criminal policy and criminal justice systems face (Ågren, 2013, pp. 118-121, 137-139, 156-160; SOU 2019:38, pp. 36, 275; Lippke, 2011, pp. 97-117; Simons, 2003, pp. 4, 34-44; von Hirsch & Ashworth, 2005, pp. 97-105, 171-177).

2. Problems of consequentialist application of law

Why is this problematic from the point of view of criminal policy and criminal law? As stated above, the uncontrolled and uncoordinated emphasis of consequentialist arguments at the court / prosecution / preliminary investigation level may lead to a point, where the use of punishment and its set of objectives form an incoherent and inconsistent system as a whole. This can have a number of detrimental effects on the implementation of an effective and just criminal policy and the theoretical models of punishment that underpin and guide the system of sanctions. The prevailing Nordic penal model is based on neoclassicism and indirect general prevention mechanism, which are considered to foster both the aspects of justness and expediency more efficiently than, for example, simple deterrence prevention or special prevention. Punishment is therefore generally based on the hypothesis that criminal law creates, enforces, and reinforces basic moral norms. The values and moral views of individuals are expected to be influenced by the disapproval that punishments express. As a result, the norms of criminal law and the values they reflect are internalized. Hence it is presumed that people refrain from illegal behavior not (only) because it is followed by unpleasant punishment but (also) because the behavior itself is eventually considered morally blameworthy (Lappi-Seppälä, 2007, pp. 230-233; Hinkkanen & Lappi-Seppälä, 2011, pp. 373-376).

Consequentialist application of law can be detrimental for these kinds of mechanisms, as their effectiveness requires that the application of law is generally perceived as fair, just, consistent and predictable. If the aim of criminal law and its indirect general prevention mechanism is to maintain and demonstrate the moral character and blameworthiness of the criminal act, this requires a system that is enforced with »fair effectiveness« and which follows procedures that are perceived as fair and just. This necessitates amongst other things, that criminal law must be perceived as sufficiently legitimate and consistent with prevailing moral perceptions. A criminal law that is completely at odds with moral perceptions is not capable of influencing people's values and attitudes effectively. Quite the contrary, it can even face outright resistance from the people. Consequentialist application of law (such as plea bargaining in its present state) often also lacks the element of blame (»moral colour«), which is an essential ingredient in affecting peoples' intrinsic conceptions of right and wrong (values and attitudes). In addition to systemic and preventive

aspects, this is problematic also from the point of view of individual autonomy and human dignity of the offenders (see more closely on the last paragraph of this chapter). In addition, if the application of law were based in individual cases on pure consequential argumentation, punishments would be imposed on the basis of judges' expediency discretion. Punishments would then not be based on the offenses committed (act-focused proportionality) but on the presumed beneficial effects of the punishment in the current case at hand. As a result, judicial practices would become quite unpredictable and inconsistent on a larger scale, which does not facilitate the effectiveness of the indirect general prevention mechanism. How could the criminal justice system control and guide the behavior of people in advance and in a systematic way if its procedures and the use of punishment in general were perceived as unpredictable and unjust (Lappi-Seppälä, 2007, pp. 230-233; Hinkkanen & Lappi-Seppälä, 2011, pp. 373-376; Ågren, 2013, pp. 118-121, 137-139, 156-160)?

It follows from these requirements that the forward-looking and goal-oriented consequentialist arguments are generally associated to the role of the legislator whereas the concrete application of law at the court level (individual cases) is based on value-oriented considerations of act-focused proportionality and retributivist arguments. In other words, laws are *enacted* primarily on consequentialist grounds, whereas laws ought to be *applied* deontologically without paying attention to the future consequences of the judgement. This underlines the inherent role of the principle of proportionality in the Nordic criminal law. Punishments ought to be in a just and proportional relation to the crimes at hand, which is why the application of law ought to be based on deontologically binding, value-oriented, arguments instead of forward-looking, goal-oriented, consequentialist arguments. However, as the growing significance of e.g. plea bargaining has illustrated, the application of law at the court / prosecutor level has shifted from backward-looking value-oriented arguments (act-focused proportionality) towards a more consequential direction (case-by-case expediency). This development challenges the traditional notions of effective and just criminal policy and in general the justifications for the use of criminal law on both systemic (legislature) and individual case (court) level (Hinkkanen & Lappi-Seppälä, 2011, pp. 373-376; Ågren, 2013, pp. 118-121, 137-139, 156-160; SOU 2019:38, pp. 36, 275).

In addition to systemic and preventive aspects, the growing significance of consequentialist arguments in application of law is, in my view, also problematic from the point of view of individual autonomy. The moral obligation to treat persons (offenders) as autonomous agents presupposes that they should never be used *merely* as a means to achieve the interests of others. Persons must always be treated (also) as ends in themselves. In my view this condition is not satisfied in consequentialist application of law – and not always even in the prevailing theories of punishment – as it does not *emphasize* the aim to treat individuals as ends in themselves as an »uncompromising« purpose of punishment. Hence, the justifications and purposes of punishing (at the

judicial level) ought to, in my view, be reinforced with the aim to persuade the offenders to share the ends of punishing and the punishment itself. Otherwise, the moral acceptability of punishment may turn out to be problematic from the point of view of individual autonomy and human dignity (Duff, 2001, pp. 8-13, 36-37, 79-88, 117-129; Ho, 2021, pp. 41-46; Nuutila, 1991, pp. 122-124, 214-216).

3. Combining the different conditions and interests of punishing

It is noteworthy, however, that due to the development of societies and the world surrounding us, the timely challenges and pressures for change that the Nordic criminal policy and criminal justice systems face are here to stay. In addition to this, the »new trends of punishing« also have undoubtedly even several promising and desirable features. That is to say, there is no reason to fixate on the prevailing notions stubbornly. In other words, as society changes, the criminal policy and criminal law governing it must also be kept up to date. Criminal policy and criminal law ought to be able to be self-correcting and react as well as adapt to societal changes. For example, in addition to process economy, plea bargaining practices *could* (in certain forms) foster e.g. certain special preventive aims and the reconciliation between the offender and the injured person. Plea bargaining can encourage offenders to take responsibility for their crimes and to take steps to mediate and compensate them. This can serve the interests of the victim of the crime as well as the more general goals of restorative justice. Plea bargaining can also contribute to the fulfillment of special prevention by giving the offender power to influence the course of the proceedings and the assessment of punishment. This can convince the offender that his or her views and interests will be genuinely heard and that they will be effectively taken into account in the process and in the outcome of the case. Due to these considerations, offenders are generally more willing to accept the criminal liability and punishment imposed on them, which has been considered to enhance the legitimacy of the criminal justice system in the eyes of the individual and to act as a special preventive element. With these kinds of features, it could also be argued that punishing would treat offenders (also) as ends in themselves (Hedeen, 2005, pp. 275-276; Simons, 2003, pp. 4, 34-44; Ho, 2021, pp. 41-46; Duff, 2001, pp. 80-88, 107-112, 117-129, 215; Duff, 2003, pp. 296-297, 301-303; Lippke, 2011, pp. 97-117; von Hirsch & Ashworth, 2005, pp. 104-105).

The new trends thus have a lot of potential, but as I have already mentioned, they do not fit well together with the notions of act-focused proportionality (value-oriented application of law) and indirect general prevention mechanism that is dependent on the former. Furthermore, the prevailing way of punishing does not treat individuals as ends in themselves – as much as it ought to. Hence, in addition to identifying new trends in punishing and the

glitches that they bring with them, the aim of my research is to integrate the different interests of punishing. As a whole, the aim of my research is to frame outlines for a criminal justice system which is capable of giving punishing and post-delict measures such justifications and conditions that can maximize and integrate the various interests mentioned here.

I develop the model by formulating the conditions for taking post-delict measures into account from the points of view of criminal policy, legal dogmatics (in the realm of criminal law), jurisprudence and moral philosophy. With jurisprudential and philosophical examination, my intention is to frame so-called notion of extended proportionality, which enables the transformation of consequentialist arguments into retributive arguments (just deserts) in a more sustainable fashion. These conditions underline the role of act-focused proportionality, and thus enable to integrate the consideration of post-delict measures to indirect general prevention mechanism and just and predictable punishing – and to the aim to treat offenders as ends in themselves. In summary, my aim is to show how (and within what conditions) consideration of post-delict measures and consequentialist arguments can be included to the realm of act-focused criminal law. My aim, therefore, is to enable the consideration of post-delict measures and consequentialist arguments in the court / prosecution level in a way, which satisfies the condition according to which the application of law ought to be based on deontological value-oriented arguments.

In order for the consideration of confessions to be justified (and on a larger scale expedient) in individual cases, the offender ought to be able to be considered to deserve a lesser punishment on the basis of his confession. In other words, confession, mediation and other attempts of the offender to prevent or remove the effects of the offense ought to be linked to the notion of just and deserved punishment. Although confessions are regarded as post-delict actions and therefore not generally considered to affect the just desert resulting from the crime itself, they have, in my view, a concrete link to the harmful effects of the crime and to the reduction of the said effects. That is to say, the offender may, by his post-delict actions, diminish the harmful effects of the offense (in their broad or extended sense). When we connect plea bargaining to this notion, the reduction of punishment and its character as a deserved reward (which reduces the blameworthiness of the offender) communicate to both the offender and the public the blameworthiness of the criminal act and the rightness of law-abidingness and the removal of the harmful effects of the offense. By adding a »moral colouring« (the element of blame) to confessions and reductions of punishment, they can affect and appeal to offenders' (and public's) *intrinsic* values and attitudes instead of relying merely on extrinsic motivation – hence treating offenders as ends and not merely as a means (Duff, 2001, pp. 80-88, 107-112, 117-129, 215; Duff, 2003, pp. 296-297, 301-303; Ågren, 2013, pp. 118-121, 137-139, 156-160; Lippke,

2011, pp. 68-69, 71, 97-98, 107-111; Simons, 2003, pp. 4, 34-44; von Hirsch & Ashworth, 2005, pp. 100-105; Ho, 2021, pp. 41-46).

If confessions and other attempts to remove the effects of the offense are understood to affect the amount of just desert, the consideration of confessions can be justified and applied with value-oriented retributivist arguments instead of resorting only to pragmatic, goal-oriented, reasoning (cost-effectiveness). In other words, if the offender is considered to deserve a reduction in punishment and thus to be less blameworthy, plea bargaining is not merely a necessity dictated by process economy and at odds with proportional and just punishing. With such features (the element of blame), confession and other post-delict measures could be integrated (in time) into our perceptions of act-focused punishing and value-oriented application of law. With these considerations, plea bargaining is also likely to be more acceptable to the general public, which will enhance the legitimacy of the criminal justice system in the eyes of the general public. In my view this development is very much feasible, as the public already considers that one of the main objectives of the criminal sanction ought to be the compensation of the losses suffered by victims of crimes. Legitimate and controlled plea bargaining could also enhance the legitimacy of the criminal justice system by maintaining the effectiveness and credibility of the latter. Consideration of e.g. confession and mediation may therefore ultimately even foster the perceived legitimacy of the criminal justice system (Duff, 2001, pp. 107-112, 117-122, 215; Duff, 2003, p. 303; Ågren, 2013, pp. 118-121, 137-139, 156-160; Simons, 2003, pp. 4, 34-44; Lippke, 2011, pp. 68-69, 71, 97-98; Ho, 2021, p. 45).

4. Criminal justice in the next 60 years

As a whole, my research thus provides a way to understand the notion of extended proportionality, post-delict measures and the consideration of consequentialist arguments as part of value-oriented, deontological, application of law. In other words, my research seeks to integrate the timely needs of criminal policy into the realm of traditional, neoclassical, criminal law. In addition to this bridge-building, my research seeks to elaborate and enforce the moral-philosophical conditions for the use of criminal law – i.e. how and on what grounds people ought to be punished. Thus, my dissertation serves the research on criminal justice by providing new ways to understand and utilize consequentialist arguments (e.g. in the form of post-delict measures) in criminal justice system, which is based on indirect general prevention and neoclassicism. At the same time, my research strives to reinforce the justifications and purposes of punishing (at the judicial level) with the aim to persuade the offenders to share the ends of punishing and the punishment itself – i.e. with the aim to treat individuals as ends in themselves.

From the perspective of criminal policy, my research offers new ways to enhance the expediency and justness of Nordic criminal justice systems. Hence, my dissertation not only focuses on the research on criminal justice but also shows the needs and means to broaden the tools of criminal policy. As societies and the world surrounding us have changed, the goals and justifications for the use of punishment are in a state of change as well. Due to this development, the timely pressures for change in criminal policy cannot be ignored, which is why my research aims to serve criminal policy decision-making by demonstrating the need for new »forms of punishing« as well as the conditions and justifications for their use. In my view, post-delict measures and the values and goals that they represent are a considerable part of the criminal policy of the next 60 years and should therefore be integrated into a rational, justified and coherent model of the grounds for the use of punishment. With such model, criminal law can serve simultaneously several goals and justifications of punishment in a balanced manner. In my view, this kind of development is very much topical and desirable from the point of view of individuals, society as well as rational and humane criminal policy.

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References

Duff, R.A. (2001) *Punishment, Communication and Community*. New York: Oxford University Press.

Duff, R.A. (2003) 'Penance, Punishment and the Limits of Community', *Punishment & Society*, vol. 5, no. 3, pp. 295-312.

Hedeen, T. (2005) 'Coercion and Self-Determination in Court-Connected Mediation: All Mediations Are Voluntary, But Some Are More Voluntary than Others', *The Justice System Journal*, vol. 26, no. 3, pp. 273-291.

Hinkkanen, V. & Lappi-Seppälä, T. (2011) 'Sentencing Theory, Policy, and Research in the Nordic Countries', *Crime and Justice*, vol. 40, pp. 349-404.

von Hirsch, A. & Ashworth, A. (2005) *Proportionate Sentencing. Exploring the Principles*. New York: Oxford University Press.

Ho, H.L. (2021) 'Confessions in the Criminal Process', *Modern Law Review*, vol. 84, no. 1, pp. 30-60.

Lappi-Seppälä, T. (2007) 'Penal Policy in Scandinavia', *Crime and Justice*, vol. 36, pp. 217-295.

Lappi-Seppälä, T. & Tonry, M. (2011) 'Crime, Criminal Justice, and Criminology in the Nordic Countries', *Crime and Justice*, vol. 40, pp. 1-32.

Nuutila, A-M. (1991) *Syyllisyydestä vastuullisuuteen? Syyllisyysteoreettinen tutkimus*. Turku: University of Turku.

Lippke, R. (2011) *The Ethics of Plea Bargaining*. New York: Oxford University Press.

Simons, M. (2003) 'Retribution for Rats: Cooperation, Punishment and Atonement', *Vanderbilt Law Review*, vol. 56, no. 1, pp. 1-54.

Statens Offentliga Utredningar 2019:38, Stora brottmål – nya processrättsliga verktyg, Slutbetänkande av Utredningen om processrätt och stora brottmål 2019.

Ågren, J. (2013) *Billighetsskälen i BrB 29:5. Berättigande och betydelse vid påföljdstämning*. Stockholm: Jure Förlag.