The role of the Nordic approach to criminal law and policy in the inter-legal world of law

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Introduction

In my doctoral thesis (Koivukari, 2020) I argue that the narrative of modern European criminal justice as a systemic whole with its very own logic and independency of other legal, normative and social orders is an illusion. Instead, the nature of criminal justice is foggy and fluid, and criminal law is necessarily and constantly in interaction with any number of other legal and social practises. Although the European Union (EU) and the rise of the human rights regime did not cause this need for interaction, they make it clear that criminal justice is not and cannot be a separate system with its intact logic and way of functioning.

I also argue (drawing from Norrie, 2001) that the idea or the narrative of criminal justice as a system based on the values of rationality, legality and individual justice participates in legitimising and justifying the use of punishment. Hence, the deconstruction of that narrative means that punishment cannot be justified in the first place. The arguments made in this paper are based on my dissertation, but the perspective is the one of Nordic criminal law and policy. I ask: What is the role of Nordic criminal law and policy, taking into account that the Nordic approach relies heavily on the systemic idea of (criminal) law? Is the Nordic 'rational and humane' approach to crimes and criminality getting redundant in the inter-legal world of law?[1]

1. The contradicting narratives related to criminal justice

It is often suggested that there is a tension between the actions of the EU in the area of criminal law and the national criminal justice systems and criminal policies, particularly in the Nordic countries. The reason for the tension is usually deemed to lie in the EU's repressive and instrumental orientation, reluctance to respect and embrace the values and principles of criminal law or reluctance to properly recognise the delicacy and integrity of criminal law.

1. By inter-legality I mean 'the existence of multiple bodies of law, which co-exist, interact and conflict in various ways' (Taekema 2019, p. 69).

The EU also seems to emphasise a certain kind of efficiency alien to criminal justice. For instance, Nuotio (2007, p. 172) argues that '[t]he challenge is how to defend the European tradition of Rechtsstaatlichkeit, rationality and humanity in the new transnational context'.

Rationality, humaneness, legitimacy and *Rechtsstaatlichkeit* are all values or features linked to Nordic criminal law and policy. Even though any of these features might bear slightly different meanings and connotations in different contexts, they all have a strong connection to an understanding of criminal law as a *system*, a system that strives for coherence, norm hierarchy, objectivity, proportionality and legality (e.g. Gröning, 2010). It seems that in particular Nordic neo-classicism commits itself to this kind of systemic understanding of criminal law by emphasising the requirements of proportionality and foreseeability or legal security as well as humanisation of the criminal justice system (Jareborg, 1988; Lahti, 2000; Nuotio, 2007; Lahti, 2015; Lappi-Seppälä, 2019). If this is the basis and the rationale for the Nordic approach and the reason for the penal moderation in the Nordic countries,[2] is there a chance to keep the Nordic systems and approach intact in the current inter-legal environment, in which, for instance, the EU and the human rights regime constantly interfere and question the system structure? If it is not possible, what follows?

By critically analysing the elements assumed to be the essential parts of the concept of criminal justice and the EU's role and approach to criminal law, the nature of them appear as something other than indicated above. The elements forming the narrative of criminal justice are ambiguous and blurred, as I argue in my thesis. Likewise, the reasons why the EU's activity in criminal law matters is not compatible with the national criminal law principles and values might not be the EU's unwillingness to adapt to the criminal law principles. Instead, it seems the reasons are the oddly limited and at the same time broad competence and political leeway of the EU in criminal law matters and its interdependent position among different legal orders and regimes as well as the EU's way of functioning.

Within the limited competence ceded to the EU in criminal law matters and because of the amount of heterogenous legal systems to be considered in preparing any legal instrument, the EU legislator simply cannot take into account the wider picture of the society or even the criminal justice system as a whole. Hence, the EU's activity appears sporadic, and designing a comprehensive criminal policy for the EU is a challenging task if not impossible. Moreover, the justification for the EU legislation appears instrumental as the competence of the EU is defined in a manner steering towards that. In particular, Article 83(2) TFEU expressly requires using criminal law as a means to an end as the EU can approximate the criminal laws of the member states in order '*to ensure the effective implementation of a Union policy* in an area which has been subject to harmonisation measures'. So, the certain kind of technocratic as well as instrumental approach is built into the competence of

2. See e.g. Lappi-Seppälä's ample work on the issue.

the EU rather than being a choice made by the EU legislator not to commit itself to the systemic principles and values of domestic criminal justice or not to understand criminal law and policy as a part of social policy. The kind of criminal political aims in accordance with the 'humane and rational' Nordic criminal policy would simply fall out of the EU's competence.

In sum, the EU's activity affects both the severity of sanctions and the coherence of the systems, whereas the human rights paradigm emphasises the more interactional nature of law in contradiction with the systemic understanding of the values and principles of criminal justice.[3] Thus, the whole criminal justice system and criminal policy are not (anymore) in the hands of one domestic legislator, but the legislators must operate in an inter-legal environment in which multiple legal orders constantly interact and conflict in different ways.

2. The possibility of one European-wide criminal justice system?

Despite the EU's interference in the national criminal justice systems and their inner coherence, would it still be possible to understand the legal orders of Europe forming together one comprehensive criminal justice system? Namely, in terms of values and principles, Enlightenment ideology seems to be the value basis for the narrative of modern European and Nordic criminal justice but also for the human rights regime. Hence, Enlightenment ideology forms a natural starting point and a common basis for any kind of pan-European criminal law thinking (e.g. The European Criminal Policy Initiative, 2011).

However, the meaning and role of Enlightenment values for modern law are not straightforward in the sense that they, first, would form a uniform and coherent set of values and, second, could be smoothly transferred from the historical and social context in which they were developed to the current legal orders. Instead, Enlightenment thinking consists of numerous ambiguous notions regarding society in general and is in many ways biased by the social problems, values and context of their own time.

Moreover, even Enlightenment values and principles, as depicted by the narrative on criminal justice, presume a system structure. Drawing from Norrie (2001), the legacy of Enlightenment for criminal justice is embodied in three intertwined and inseparable values, i.e., rationality, legality and individual justice. The idea of legality or rule of law is rather obvious, aiming at consistency, coherency and fidelity to the letter of law, hence non-arbitrariness in any criminal-law-related practises and decision making. In turn, rationality is crucial to legality in the sense that judging a criminal case should always follow rational logic instead of being based on subjective evaluations and arbitrary decision making. Moreover, rationality also has to do with the subject

3. For interactional and systemic views on legal orders, see Taekema, 2019.

of law, the individual and the ideal of individual justice presuming that we all act rationally and are equally accountable for our deeds before the (criminal) law. Although only ideals to strive for and not absolute rules in any sense, these values are embedded in the criminal law doctrines and principles, and they represent the Enlightenment narrative within the narrative on European criminal justice. The overall purpose of these values and the criminal law doctrines and principles relying on them is to guarantee objectivity, equality and non-arbitrariness within the criminal justice system that deals with the violent and intrusive state power.

But how could the EU commit itself to these values in its legislative work? The shared, overlapping and interactive competences of the different legislators and actors lead to a situation in which none of the legislators have control over the coherence of the system as a whole. For instance, the principle of proportionality undoubtfully has a significant role in the European criminal law tradition, described by Lappi-Seppälä (2019, p. 223) as follows: '[t]he principle of proportionality has its roots in the concept of the rule of law (*Rechtstaat*), legal safeguards, and citizens' guarantees against abusive treatment, arbitrariness, and excessive use of force'. Yet, the requirement of proportionality understood as using punishment as a last resort (*ultima ratio*) and as a requirement of inner coherence of the punishment scales is an oxymoron in the context of EU criminal law, although often argued to be essential if the EU is to respect criminal law doctrines and principles (e.g. The European Criminal Policy Initiative, 2011; Böse, 2011). However, as the principle bears complex meanings in the first place, but particularly so in the EU criminal law context (Herlin-Karnell, 2010), it cannot be examined thoroughly here. Instead, I will give merely a simplified example of the difficulties of some aspects of proportionality when transferred to the EU context.

In terms of absolute proportionality,[4] each member state should proportion punishments so that the offences and the punishments are in 'right' proportion to each other, i.e., the punishments are as severe as is deemed appropriate and deserved for each offence, and the punishments are also in proportion to the sanctions of other crimes and their seriousness.[5] On the other hand, the purpose of approximating substantive criminal laws of the member states is to smooth out differences between the criminal laws and even sanction levels in different member states. The EU could establish a notion of proportionality within its own legal order by making sure all the measures required by the legal instruments are in proportion to each other and to the aims pursued.

4. On (the relationship between) absolute and relative proportionality and proportionality in penal theory in general, see e.g. Tonry, 2019.
5. This can never be straightforward though, and the valuation of different interests protected by criminal justice and the burdens caused by it vary greatly even within one society or nation state over time and within different groups and individuals. However, the vagueness of proportionality and its value-bound nature only emphasises the problems the EU faces in legislating so that the choices made by all the different member states would be respected.

However, as the approximating measures are supposed to be implemented into the national legislation of each member state and to amend the national legislation of the member states somehow, they will inescapably interfere with the coherency and proportionality of the sanction scales of the national systems. Moreover, this effect is likely to be the strongest in the criminal justice systems of the Nordic countries, because the EU's approach is deemed repressive whereas the sanctions have been relatively lenient and the prison rates low in the Nordic countries, at least until recently.[6]

Insisting that the EU follow the traditional criminal law principles does not make sense, whereas the national legislators cannot obey the principles either as they are not (anymore) the sole legislators within their territory. Further, as the amount and diversity of different norms and principles to be taken into account in judging and sentencing grows, the role of principle of proportionality in the sense of guaranteeing uniformity of sentencing practises diminishes as well. The abundance of norms does not lead to a uniform application of them but, vice versa, provides opportunities to interpret the different complexes of norms in various ways. This also means that the EU measures are not being executed similarly or coherently in different jurisdictions because they are implemented to and interpreted within the contexts of the legislation of different member states. Hence, the EU-wide equality or proportionality cannot be materialised even when it comes to the norms that have been approximated or even harmonised.

Interestingly, also human rights partly support the narrative of criminal justice as a system based on Enlightenment values since, for instance, the criminal law principle of legality is a human right, too. However, at the same time human rights deconstruct the narrative by interfering with the criminal justice system(s) without necessarily following the logic of criminal law doctrines and principles. The principle of legality provides an illustrating example of the deconstructive nature of human rights. Despite the particularly strong status of the principle in the European Convention on Human Rights (article 7) and the rather clear idea of it – amongst other requirements, forbidding to punish an act that did not constitute a criminal offence under the law at the time the act was committed and forbidding to interpret law extensively to a defendant's detriment – the principle of legality has proved to be surprisingly flexible in the praxis of the European Court of Human Rights (ECtHR) (e.g. the case of S.W. v UK, App 20166/92, 22 November 1995). Moreover, the ECtHR seems to interpret the principle of legality so that it may also have relevance in the horizontal relationship between the parties and as a human right to be weighed against other human rights. So, in a criminal case, the human rights of the victim, e.g. human dignity or freedom, might outweigh the human rights of the offender, legality included, and could justify punishing even contrary to the wording of the law (Peristeridou, 2015). Thus, the principle of legality

6. The EU is not, however, the only one to blame for the slightly increasing repression in the Nordic countries (e.g. Elholm, 2009; Lappi-Seppälä, 2012; Tham, 2019).

understood as a human right erodes the system structure, coherence, traditional vertical notion of legality as a protection against the state's intrusion and in that sense the foreseeability of the criminal justice and punishing practises.

While the concept or narrative of the modern European criminal justice system is necessary to understand systemically, the systemic understanding is not realistic (anymore). However, giving up the ideal of a system structure is not simple because the legitimacy of criminal law and, in the end, the justification of punishment depends on the idea(l)s of legality, rationality and individual justice. The system structure is tightly connected to the presumed legitimacy of the system, presupposing that criminal law is able to limit and control public power to punish, is bound to rule of law and respects individual autonomy and promotes equality (Nuotio, 2007; Gröning, 2010). Criminal law principles and doctrines – hence, the narrative of criminal justice as a *system* – partly justify punishment (Minkkinen, 2006). Arguing that the systemic ideal or image of law is impossible to maintain means that the doctrines, principles and values of the narrative of modern European and, in particular, Nordic criminal law cannot guarantee non-arbitrariness nor equality, and therefore, punishment cannot be justified.

3. The legacy and future of the Nordic approach?

My main argument in this paper as well as in my dissertation is that we cannot defend and should not stick to the idea of a system as a necessary ground for legitimate criminal law, because the systemic notion of law was unrealistic in the first place but particularly so in the current very openly inter-legal environment of law. On the other hand, the Nordic approach to criminal law and policy emphasises the systemic values of legality, proportionality, predictability and equality while it has been undeniably successful in reducing the prison rates without a significant increase in criminality. Does it then follow that, as the system structure fails, we should also submit to the demands of more repressive penal policy? That does not need to be the case, because the two – the system orientation and the rather low prison rates and penal moderation – are not necessarily connected.

As the Nordic system and its ideals of coherence, proportionality and legality are impossible, building or maintaining a fair and equal criminal justice system appears impossible too, and the use of punishment remains unjustified. But exactly for that reason, we should emphatically require a less repressive approach within the EU, seek solutions other than and beyond punishment to react to and prevent unwanted behaviour instead of yielding to the repressive demands. Moreover, we should ask what would serve the victim better rather than concentrating on punishing the offender.

In the discourse on 'rational and humane' criminal policy, the values relating to rationality have been emphasised at the expense of humaneness and the

idea of criminal policy as a part of social policy. As, for example, Lappi-Seppälä (2019, p. 218) puts it, referring to Nordic penal reformists in the 20th century, '[s]upporters of the new emphasis on proportionality believed that effective crime prevention mostly takes place outside the criminal justice system'. This should be emphasised again as the humane Nordic approach. As punishment cannot be justified by aspiring to legality, proportionality, predictability and equality, the only ethical way forward is to admit the unjustifiability of punishment and to reduce the use of it until abolished entirely, which is also a part of the legacy of the Nordic approach.[7]

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References

Böse, M (2011) The Principle of Proportionality and the Protection of Legal Interests (Verhältnismäßigkeit und Rechtsgüterschutz). *European Criminal Law Review* 35(1): 35-43.

Elholm, T (2009) Does EU Criminal Cooperation Necessarily Mean Increased Repression. *European Journal of Crime, Criminal Law and Criminal Justice* 17(3): 191-226.

Gröning, L (2010) A Criminal Justice System or a System Deficit? Notes on the System Structure of the EU Criminal Law. *European Journal of Crime, Criminal Law and Criminal Justice* 18: 115-137.

Herlin-Karnell, E (2010) What Principles Drive (or Should Drive) European Criminal Law? *German Law Journal* 10(11): 1115-1129.

Jareborg, N (1988) The Coherence of the Penal System. In: Jareborg, N *Essays in Criminal Law* Uppsala: Iustus.

Koivukari, K (2020) *The Crumbling Narrative of Modern European Criminal Justice*. PhD Thesis, University of Helsinki, Finland.

Lahti, R (2000) Towards a Rational and Humane Criminal Policy – Trends in Scandinavian Penal Thinking. *Journal of Scandinavian Studies in Criminology and Crime Prevention* 1(2):141-155.

Lahti, R (2015) Straffrätten på 2020-talet – från Cesare Beccarias Om brott och straff (1764) till en allt mer internationell och europeisk straffrätt. *Nordisk Tidsskrift for Kriminalvidenskab* 102(3): 262-275.

Lappi-Seppälä, T (2012) Penal Policies in the Nordic Countries 1960-2010. *Journal of Scandinavian Studies in Criminology and Crime Prevention* 13(1): 85-111.

Lappi-Seppälä, T (2019) Humane Neoclassicism – Proportionality and Other Values in Nordic Sentencing. In: Tonry, M (ed.) *Of One-Eyed and Toothless Miscreants: Making the Punishment Fit the Crime?* New York: Oxford University Press: 209-235.

Minkkinen, P (2006) »If Taken in Earnest«: Criminal Law Doctrine and the Last Resort. *The Howard Journal of Criminal Justice* 521(45) 521-536.

Norrie, A (2001) *Crime, Reason and History, A Critical Introduction to Criminal Law* (2nd edn). London: Butterworths.

Nuotio, K (2007) The Rationale of the Nordic Penal Policy Compared with the European Approach. In: Nuotio K (ed.), *Festschrift in Honour of Raimo Lahti*. Helsinki: Forum Iuris.

Peristeridou, C (2015) *The Principle of Legality in European Criminal Law*. Antwerp: Intersentia.

7. See e.g. the work of Thomas Mathiesen, Nils Christie and Ari Hirvonen.

Taekema, S (2019) Between or Beyond Legal Orders: Questioning the Concept of Legal Order. In: Klabbers J and Palombella G (eds) *The Challenge of Inter-legality*. Cambridge: Cambridge University Press: 69-88.

Tham, H (2019) Straff-välfärdsstaten och kontrollkultur i svensk kriminalpolitik. Nordisk Tidsskrift for Kriminalvidenskab 106(1): 6-18.

The European Criminal Policy Initiative (2011) The Manifesto on European Criminal Policy *European Criminal Law Review* 86(1): 86-103.

Tonry, M (ed., 2019) *Of One-Eyed and Toothless Miscreants: Making the Punishment Fit the Crime?* Oxford: Oxford University Press.