A Model for the Weighing and Balancing of Interests in the Prosecutor's Legal Discretion[1]

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1 On the Subject Matter of Analysis

The official examination of an alleged crime can be divided into three distinct phases, *viz.* investigation by the police of whether a criminal offence has in fact taken place; discretion by the prosecutor as to whether to bring charges against the suspect in the case; and the criminal law trial at the court of justice, ending with the final verdict on the issue. According to the Finnish legislation, the prosecutor is under an obligation to raise criminal charges and bring the case to court if there are *probable grounds* of the guilt of the suspect. In the Finnish law, the required threshold of evidence for prosecution is, in other words, expressed with the criterion of there being *probable grounds*, i.e. *probable evidence*, of the guilt of the suspect.[2]

The threshold of evidence required for indictment in a case is *prima facie* lower than the threshold of evidence required for a guilty verdict at a court of justice, due to the requirement in the Finnish legislation that the occurrence of crime and the respective offender be proven *beyond reasonable doubt* in the criminal law procedure. In consequence, part of the criminal charges raised will be rejected in court, when the issue is looked upon from a purely statistical point of view.[3] In fact, it is one of the constitutive criteria of a state under the rule of law that the courts will not affirm all the indictments brought before them. If each and every criminal charge were to lead to a guilty verdict, the independence of court system would be highly suspect.

There are two reasons for the *prima facie* divergence of the threshold of evidence required for raising charges and for a guilty verdict, respectively. For the first, a guilty verdict in a criminal law case entails that potentially grave legal censure may be directed at the person convicted of crime, the intensity of censure being dependent on the gravity of crime committed. Therefore, every necessary step of precaution ought to be taken in a criminal law case to eliminate the risk of a wrong decision. As to the prosecutor's decision of indictment, on the other hand, the culpability of the suspect is not yet to be authoritatively settled, as the issue is then brought to the court of law for a more detailed examination and, ultimately, a final and authoritative verdict on the matter. For the second, since the prosecutor's decision of indictment is based exclusively on written, documented material that is collected by the police in the course of crime investigation, there are no means of reaching an equivalent degree of exactitude and reliability in the evaluation of evidence by the prosecutor as in

2 Section 6, *Criminal Procedure Act.* According to Section 7 of the Act, the prosecutor may waive the charges, despite the presence of probable grounds, if (a) the deed committed is inconsequential and the punishment would be no more than a fine, or (b) the person found guilty of crime is under 18, the punishment would not exceed 6 months of imprisonment at the maximum, and the offence is deemed to have been induced by the thoughtlessness or inconsiderateness of the person concerned. According to Section 8 of the Act, the indictment may even be waived on the ground of equitableness or process economy, if neither general nor individual interests in the matter request the raising of criminal charges.

3 The proportion of indictments that are rejected by the court amounts to no more that a few per cent. The percentage of discarded indictments varies with respect to the type of crime in question. In categories of crime where intricate issues of evidence or of legal construction are a commonplace, such percentage is higher than in the case of other crimes.

the court proceedings where an oral and immediate hearing of the accused and of the witnesses will be conducted. Therefore, when making the decision whether or not to raise charges in a case, the prosecutor needs to take into account the possibility that the existence of *probable grounds* of the guilt of the suspect that are sufficient for indictment might not satisfy the stricter requirement of *beyond reasonable doubt* that the court of justice will adopt when considering the case and reaching the final verdict in it.

Even though the victim of a crime has a supplementary right of raising a criminal charge against the offender according to the Finnish law, in actual practice it mostly depends on the prosecutors' decisions as to what kind of criminal law cases are brought before the courts. Therefore, the prosecutors have a prominent role in the general functioning of the criminal law system in Finland and in the effective protection of the legal interests of those suspected of having committed a crime.

The significance of the prosecutors' decisions *vis-à-vis* the functioning of the criminal law system, in combination with the inherent semantic vagueness and open-endedness of the criteria of evidence adopted in legislation, like the requirement that there be "probable grounds" of the guilt of the suspect as a prerequisite of indictment, have from time to time induced critical voices from the general public concerning the threshold of indictment and the amount of discretion enjoyed by the prosecutors. In public discussion, such criticism has been directed at the prosecutors' decisions in the hard cases of criminal law where some socially sensitive issues are intertwined with the evaluation of evidence and the legal construction of the facts of the crime in question. Sometimes, the threshold of indictment is asserted to be all too low; in some other times, the threshold is claimed to be all too high. That kind of public debate has been going on especially in respect to economic crime.

My own empirical research findings confirm the assertion that public debate on the prosecutors' decisions does have a statistically observable impact on their legal discretion.[4] At the turn of the 1970's and 1980's, a lot of alleged economic crime cases came to be deliberated by the prosecutors. Economic crime is exceptionally difficult for the police to investigate, and the prosecutors' decisions of indictment often had to be made under considerable legal and factual uncertainty. At the same time, the public debate on national criminal law policy greatly underscored the urgent need for resolving such cases and bringing those responsible for economic crime before the court of justice. The statistical evidence available lends fairly reliable support to the conclusion that the prosecutors and judges, as the two professional groups involved, each applied a different kind of decision-making strategy when faced with uncertainty. Judges emphasized the significance of the standard *in dubio pro reo* when dealing with

4 I refer to the empirical section of my doctoral dissertation *Syytekynnys* (*Threshold of Indictment*). Suomalainen lakimiesyhdistys, 1991, esp. p. 297–322. There is a German Summary (*Zusammenfassung*) at the end of the book. A concise presentation of my research findings can be found in my article, *Über die Entscheidungskriterien des Staatsanwalts. Eine empirische und normative Analyse der Beschlussfassung des finnischen Staatsanwalts*, in Criminal Policy and Sentencing in Transition. Finnish and Comparative Perspectives. Edited by Raimo Lahti – Kimmo Nuotio – Panu Minkkinen. Helsinki, 1992.

such cases. Prosecutors, on the other hand, seem to have shared the collective opinion that due to the changed atmosphere in the (Finnish) criminal politics, the weight given to the investigation interest has risen in economic crime cases, leading to an inclination among the prosecutors to indict more eagerly in such cases.[5]

The official reaction was soon to follow. The critique directed at the prosecutors (and partly also at the police) was initiated by the speech given by (then) President of the Republic, Mauno Koivisto, at the end of 1983. Among the prosecutors and in public media, the speech was read as a powerful critique of the prevalent indictment practice of the prosecutors. In his speech, President of the Republic, Mr. Koivisto, expressed doubts that the prosecutors might be inclined to raise charges "just for the sake of certainty", and he even pondered upon whether a prosecutor whose indictments are "all too often" rejected at the court should rather be repositioned to some other task within law-enforcement. The discussion led to a situation where the prosecutors became more cautious in raising charges in economic crime cases and to some extent in other types of crime as well. As a consequence of such criticism from the highest level of society, the threshold of indictment rose.

In general, any changes that might take place in the atmosphere of public discussion on criminal law politics has a stronger impact on the prosecutors' evaluation of evidence than on the similar evaluation of evidence by the judges. That is due to two factors.

For the first, the criterion to be applied by the prosecutors in the evaluation of evidence, i.e. presence of *probable grounds* of the guilt of the suspect, is semantically more vague and open-ended than the corresponding criterion of *beyond reasonable doubt* that the courts are required to follow in the evaluation of evidence. The presence or absence of probable grounds of guilt confers significantly more discretion to the prosecutors than the respective requirement that the guilt of the accused be proven beyond reasonable doubt at the court of justice.

For the second, the different roles of the prosecutor and the judge in the criminal law procedure, together with the different kind of impact of their decisions on the criminal law procedure, need to be taken into account in the analysis, as well. In a situation of uncertainty, the prosecutor must take a standing on the two options available, *viz.* whether to raise charges and bring the case to court or to waive the charges without seeing how the case might turn out in court. The similar options for a judge presiding a case in the court of justice are reduced to the two types of verdict available, i.e. finding the accused either guilty or not guilty of the offence as charged. Since the authoritative pronouncement of the final verdict in a case puts an end to all the investigation in it and to any subsequent court proceedings on the same issue, the judge (quite

5 As to the research methodology adopted, I refer to the sources mentioned in the previous footnote. – One can conclude that in such borderline cases the prosecutors thought it better to have the investigation continued at the court, instead of having it end it at the stage of deliberation on indictment.

unlike the prosecutor) need not take into consideration the importance of the crime investigation interest when reaching the final verdict.[6]

The public debate on the prosecutors' decisions shed light on their role as one of the key actors in the criminal law procedure. It also raised up the question of what kind of criteria should be given significance in the prosecutors' decision-making in situations of uncertainty.

In my doctoral dissertation *Syytekynnys* (*Threshold of Indictment*) in 1991 and in the subsequent articles of mine, I have worked on a *model for the weighing and balancing of interests* to be adopted in the prosecutors' evaluation of evidence in situations of uncertainty.[7] The idea of having such a model is to help the prosecutor to analyze and further elaborate the two kinds of arguments pertinent in his or her legal discretion on whether or not to raise charges in a case, *viz*. to identify the *pro* and *contra* arguments that speak for and against indictment, to determine the weight of each argument in the case under scrutiny, and to balance the relative weight of each against the other arguments in the case.

Though in my doctoral thesis I focused on the rationality and justification conditions of the prosecutor's legal discretion, the proposed model for the weighing and balancing of arguments has a wider field of application. It can be applied in a host of legal decision-making situations where a set of conflicting or at least mutually incommensurable interests, values, or principles are to be balanced against each other so as to reach an optimal outcome under some specified criteria. When applying the model in the use of legally authorized coercive measures against the crime suspect, the objectives of effective investigation of crime and the protection of other possible victims of crime, on the one hand, and the legitimate expectations of legal protection of the individual by the state, on the other, are to be weighed and balanced against each other. In collisions between various human and/or basic rights, a host of legal principles, like the right to privacy of an individual and the right to free expression enjoyed by the media, are to be weighed and balanced in the context of the concrete case at hand. As I see it, the model provides an appropriate tool for the analysis and justification of such legal decision-making situations.[8]

In this essay, I will briefly introduce the key elements of the model of weighing and balancing of arguments, especially in respect to the legal

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6 As a third factor one could mention the fact that prosecutors do not enjoy a similar kind of independence *vis-à-vis* the state that the judges enjoy by the force of law, to the effect of making the former more "responsive" to the critique issued by the highest level of state authorities.

7 *Cf*. Jonkka, *Syytekynnys*, and my recent essay *Syyttäjänrooli ja syytekynnys* (*The Role of the Prosecutor and the Threshold of Indictment*), Defensor Legis 2003, p. 976–992. See also the article in German that was referred to in note 4 above.

8 On similar comments on the model for the weighing and balancing of legal principles, *Cf*. Raimo Siltala, *Oikeudellinen tulkintateoria*. Suomalainen lakimiesyhdistys, 2004, p. 501–505. Matti Kunnas, a Finnish advocate, has written on the uses of the model in an advocate's legal discretion in Kunnas, *Jaakko Jonkan malli asianajajaoikeudessa*, Defensor Legis, 2005, p. 1292–1313. – I myself have utilized the model in several decisions I have made (formerly) as Deputy Parliamentary Ombudsman and (now) as Deputy Chancellor of Justice, when judging the legality of measures taken by officials.

discretion of the prosecutor who is required to make a decision whether to raise charges in a case. In addition, I will present comments on some concrete cases in which the model has been adopted and where its field of application has been widened outside the decision-making situation of the prosecutor.

2 Analyzing the Question of Evidence in Judicial Procedure

2.1 On the Abstract and Concrete Thresholds of Evidence in the Criminal Law Procedure

In the legal process, there are two separate issues to be considered, *viz.* the *question of fact*, in the sense of what actually took place in the case, and the *question of law*, in the sense of what kind of legal norms are to be applied to the facts of the case. Determining the facts of a case that constitute the fact premise of the legal decision to be made amounts to more than just "stating the presence" of some plain facts. Rather, the decision of what will count as the operative facts of a case is, in the last resort, a value-laden decision that ought to be made in line with certain legally specified criteria.[9] The official who is to apply the law to the proven facts of a case needs to estimate both the reliability of evidence and its sufficiency as a ground for certain legal measures. He or she in other words needs to judge whether the criteria that have been laid down in legislation have been duly met with in the case at hand.

In legislation on the criminal law procedure,[10] there are several thresholds of evidence to be observed by the law-enforcement authorities concerned. The commencement of investigation of a crime is conditional on there being "sufficient grounds to suspect" that a crime has been committed, and the use of the various coercive measures in the investigation of crime (i.e. taking the suspect into police custody, arresting the suspect, carrying out a search at the suspect's premises), indictment, and pronouncing a guilty verdict in a case each require that certain legally defined criteria are duly met with at that stage of the process. The grade of probability required for such official action is defined in using various kinds of linguistic formulations.

In legislation, there is a set of *abstract* thresholds of evidence set as conditions for the measures that may then be taken by the officials in crime investigation, prosecution, and the giving of the final verdict on the issue. Moreover, such abstract thresholds may be placed on a line of increasing probability, with blurred boundaries between the sections. No matter how seemingly exact linguistic formulations are being utilized in the law text, they are yet bound to leave some area of discretion to the official in charge of applying the law to a concrete case. There is, in other words, always some "grey area" of *semantic indeterminacy* surrounding the semantic core of certainty of

9 Yet, the questions of fact and the questions of law cannot be kept wholly apart in legal decision-making.

10 I use the term *criminal law procedure* in a wide sense here, with reference to the investigation of an alleged crime by the police, discretion of indictment by the prosecutor, and the criminal law trial proper at the court.

linguistic expressions.[11] The abstract linguistic expressions used in legislation for the description of the threshold of evidence will obtain their exact meaning content in the context of some concrete norm-application situation.

The official in charge of applying the law has to assess whether the required threshold of evidence has been duly met with in the concrete case at hand. Thus, it is the official who has to determine the exact location of the concrete threshold of evidence for the individual case at hand. The ascertaining of the concrete threshold signifies the act of interpreting the concept, or the set of concepts, utilized in legislation. The concrete threshold of evidence may be taken as a distinct point within the wider area that counts as the abstract threshold of evidence, as laid down by the legislator.

2.2 Discretion in the Borderline Cases of Legal Decision-Making

There are situations of legal decision-making in which one can without any hesitation say that the required threshold of evidence either has or has not been met with. Still, due to the semantic openness of the linguistic expressions employed in legislation, the "grey area" of legal discretion is often rather wide. In addition, the exact evidential value of the material available for the prosecutor cannot always be fully determined for the concrete case at hand, due to a lack of information of what actually took place in the alleged crime scene. Thus, there are two reasons for the existence of an area of discretionary leeway that is left for the prosecutor or other legal official to fulfil.

How should the official act in a *situation of uncertainty* when it is not clear whether the required threshold of evidence has been met with?

Three different decision-making strategies may be outlined for such a situation. I will approach the issue from the point of view of the prosecutor in specific.

a) The first alternative states that all borderline cases ought to be resolved by using one – and only one – rule of decision-making. The maxim *in dubio pro reo* neatly illustrates such an approach to the issue. For several reasons, I do not consider that kind of solution fully satisfactory in either theoretical or practical sense. For the first, the dilemmas of interpretation in other comparable hard cases of legal interpretation cannot be solved with reference to some single rule only, and the interpretation of "probable grounds" of the guilt of the suspect is in itself an instance of rather common legal construction. In general, applying the law to a concrete case frequently calls for the use of several maxims of interpretation, and in the hard cases of interpretation in specific, the *weighing and balancing* of divergent kinds of arguments is needed.[12] For the second, since the requirement of "probable grounds" entails the acknowledging of some degree of uncertainty in the decision-making situation, how could the uncertainty be levelled off by the simple maxim of *in dubio pro reo*? And for the

11 On the linguistic semantics of a *core of certainty* and *penumbra of doubt, Cf.* H. L. A. Hart, *The Concept of Law*. Oxford 1961, p. 121–132.

12 In the last resort, interpretation is based on evaluations. It has been said that only a fanatic would solve highly value-laden issues with reference to one and only one criterion. Alexy, Robert, *Theorie der Grundrechte*. Baden-Baden 1986, p. 131.

third, the maxim *in dubio pro reo* matches rather poorly with the actively inquisitorial role that is required from the prosecutor in the legal process. As a consequence, the prosecutor cannot just passively adhere to the said maxim when there is uncertainty as to the facts of the alleged crime. Rather, the prosecutor should try to remove the uncertainty in the case, if only possible.

b) In the second alternative, the inevitable existence of some margin of discretion for the prosecutor is openly acknowledged, in the sense of an allegedly "free" area of discretion to be fulfilled by the law-applying authorities in the hard cases of legal interpretation. Though the resulting array of the alternatives of law-application might be considered less than attractive as a model for legal decision-making, the common justification for it boils down to the assertion that we are now dealing with individual decisions that cannot be fully covered by any general criteria.

c) In the third alternative, though the inevitable existence of some area of discretion is openly acknowledged, the act of decision-making in such situations is still restrained by reference to some distinctively legal criteria. Moreover, even if it were not possible to defend the claim of a "one right answer" to a legal problem, some outcomes within the sphere of feasible interpretations of law may still be judged better or worse than the others in light of some such criteria adopted.

I prefer the option *c* of the three alternatives. Factual or legal uncertainty that the prosecutor encounters when deliberating a case should not be resolved by having recourse to some rigid, all-encompassing meta-level rule. Rather, he or she ought to take into account the impact of – possibly – several pertinent arguments, each with a specific degree of argumentative weight either for or against the decision to bring charges in the individual case under consideration. The seminal idea is that the prosecutor should, in accordance with his or her legal duty as a prosecutor, *weigh and balance* the values and goals acknowledged by the prevalent system of criminal law procedure so as to make the most rational use of the discretionary leeway left open by legislation.

2.3 The Decision on the Evidence of the Case as Seen from the Point of View of the Decision Theory

The decision on evidence is based on an estimation of the probability of the facts of the case. As concerns legal evidence, absolute certainty cannot be attained, not even in principle. In consequence, the evaluation of legal evidence is conditional upon the subjective probability, or rational belief, held by the decision-maker, whether it be the police, the prosecutor, or the court of justice, concerning the truth-value of some hypothesis constructed from the evidence of the case.

The varying degrees of such probability can be illustrated with a straight line where *complete uncertainty* as to the actual existence of some specific subject theme is at the one end of the line, as designated by the evidential value 0, and *complete certainty* as to its existence is at the other end of the line, as designated

by the evidential value 1.[13] Still, the evidence presented in support of the existence of some evidential theme *x* cannot be taken as at the same time providing counter-evidence for the probability value of its negation *–x* to the extent of the "residual" that is left unexplained by the hypothesis adopted. Rather, the impact of evidence goes "in one direction" only, and the probability value of the negation of the evidential theme *x* must be evaluated on a separate basis, as the sum total of the evidential value for the evidential theme *x* and its negation *–x* need not be equal to 1 (on a scale from 0 to 1) in the evaluation of legal evidence. Thus, if the probability value of 0,70 is assigned to some specific evidential theme *x*, we cannot legitimately make the conclusion that the probability value of its negation *–x* would be the residual figure of 0,30. The residual probability value of 0,30 only represents the fact of our *not knowing* the probability value of *–x*. Thus, the evidential value 0,30 only signifies the scope of uncertainty *vis-à-vis* the facts of the case.

This is an important issue I wish to underscore for the line of argument to follow: the present model for the weighing and balancing of arguments is concerned with the area of uncertainty in a hard case of legal decision-making, i.e. discretion under uncertainty; and with the help of the method of analysis proposed, we may estimate the extent to which fact-based uncertainty would be reduced if some further factual evidence were still brought to enlighten the case. From the point of view of the prevalent ideology of the legal procedure, factual evidence in a case is complete only at the final stage of the proceedings when the court gives the final verdict in the case, in the sense of finding the accused either guilty or not guilty of the alleged crime. In the earlier stages of examination, i.e. crime investigation by the police and the decision of indictment by the prosecutor, the option of collecting more evidence and sharpening the picture of what took place in the alleged crime scene still needs to be taken into consideration.

In the context of law, factual evidence is to be judged from the point of view of whether there exist sufficient grounds for taking some official action authorized by the law on criminal law investigation and the criminal law procedure, with reference to decisions taken by the police as to the coercive measures of crime investigation, decisions taken by the prosecutor concerning the raising or waiving of charges, and the final verdict given by the court of justice as to the authoritative confirmation of the guilt or innocence of the accused. Therefore, the evaluation of the facts of a case can best be analyzed by means of general decision-making theory. To summarize, the decision as to the facts of a case entails the following sub-questions, which are in fact included in all decision-making situations: (a) an analysis of the consequences brought into effect by the available alternatives in the decision-making situation at hand, (b) an estimate concerning the probability of each of the outcomes prefigured, and (c) the act of putting the consequences in an order of mutual preference, where the relative harmfulness of each is taken as the criterion utilized. Thus, the decision as to the facts of case entails taking a stance on how great a risk of an erroneous decision in one direction or the other is still acceptable.

13 In the evaluation of legal evidence, the use of numeric probability values is, in my opinion, no more than a heuristic device.

In the legal literature, some notable efforts have been made of adapting the general decision-making theory to the evaluation of legal evidence. The most prominent example thereof is *Kaplan's evidence-theoretical formula* with the help of which the threshold of a guilty verdict may be determined, once the harm of both a wrong guilty verdict and a wrong acquitting verdict have been determined.[14] Based on Kaplan's model, Hannu Tapani Klami[15] and his research team on *Law and Truth* developed a theoretical model for the evaluation of legal evidence, where the harm caused by a wrong decision is turned into an operative criterion of legal decision-making.[16]

By means of such mathematical models, it is no doubt possible to calculate in a theoretically very precise manner the required threshold of evidence for various kinds of decision-making situations. Yet, one may question the true benefit of determining the threshold of evidence for a case with the seeming exactitude of, say, 0,98, since the evidential value of the facts of a case cannot possibly be determined with equal exactitude. At worst, having a mathematically very exact threshold of evidence may provide the official with a false and totally unrealistic illusion of the certainty that can be attained as to the factual evidence in a case.

In consequence, adopting the models of a mathematical decision-making theory in an unmodified and straightforward manner in the evaluation of legal evidence is highly problematic, due to the deceptive illusion of certainty thereby induced. On the other hand, if taken as no more than an operative, or methodological, tool for the analysis of legal evidence in a situation of uncertainty, such a model will prove to be of positive value. While the theoretical background of the present model of weighing and balancing of interests is equally based on the classical models of decision-theory, I have given it a "softer", i.e. non-numeric, reading in the current legal context.

In the legal decision-making situation, the key idea is to find the *optimum* threshold of evidence for the concrete case at hand. Under the veil of uncertainty, the legal discretion of a prosecutor entails an act of *weighing and balancing* against each other of the two alternatives that lie open for the law-applying official, i.e. whether to raise or to waive charges in the case, depending on the relative weight of the arguments in support of the two options. The legislator, on its part, has initially gone through the act of weighing and

14 Kaplan, John, *Decision Theory and the Factfinding Process*. Standford Law Review, 1968.

15 The late Hannu Tapani Klami, then Professor in Jurisprudence at the University of Helsinki, acted as the officially appointed opponent when I presented my doctoral dissertation *Syytekynnys* (*Threshold of Indictment*) for public examination in 1991.

16 On Klami's model, Klami, Hannu Tapani – Gräns, Minna – Sorvettula, Johanna, *Law and Truth. A Theory of Evidence*. Commentationes Scientiarum Socialium 56. Suomen Tiedeseura, 2000. *Cf.* also Klami, Hannu Tapani – Hatakka, Minna, *Beweissmass und Irrtumsrisiko*. Suomalainen tiedeakatemia, 1990; Klami, Hannu Tapani – Marklund, Mikael – Rahikainen, Marja – Sorvettula, Johanna, *Ett rationellt beviskrav*, Svensk Juristtidning, 1988 p. 589–605; Klami, Hannu Tapani – Sorvettula, Johanna – Hatakka, Minna, *Studies in the Theory of Evidence*. Oikeustiede, 1989, p. 61–103; Klami, Hannu Tapani – Rahikainen, Marja – Sorvettula, Johanna, *On the Rationality of Evidentiary Reasoning*. Rechtstheorie, 1988, p. 368–378.

balancing the two (or more) colliding interests that have bearing on the item of legislation concerned, i.e. the *enforcement of criminal responsibility* and the *legal protection of the individual*, when determining the specific threshold of evidence for the various legal measures entailed in the criminal law procedure (i.e. initiation of crime investigation, indictment, recourse to coercive means of crime investigation). Structurally, the legal discretion enjoyed by an individual official, whether it be the police officer, the prosecutor, or the judge, may be compared to the one enjoyed by the legislator, since the various law-applying officials in question seek to situate the *concrete* threshold of evidence in a case on the "grey area" of discretion that was initially determined by the legislator in the sense of the *abstract* threshold of evidence to be subsequently observed.

The optimal threshold of evidence is always matched for the particular case at hand, while the criteria that determine its exact location within the area of legitimate legal discretion are general, i.e. they exert similar influence on legal decision-making in any subsequent case that is essentially similar enough to the one already considered. The current model for the weighing and balancing of interests or arguments entails that the focus of analysis is to be laid on the identification of factors that are material for the exact location of the concrete threshold of evidence in the case, and on determining the relative weight of each *vis-à-vis* one another.

3 The Optimization Precepts of the Criminal Law Procedure *vis-à-vis* the Role of the Prosecutor

The law of criminal procedure is defined by a set of partly colliding social values and goals.[17] In order to utilize such value-laden or goal-oriented principles in the analysis of the various alternatives that are open to the prosecutor when making the decision of indictment in case, such arguments need to be somehow categorized and their level of abstraction needs to be raised. The decisive principles, or *optimization precepts*, that structure and configure the law of criminal procedure can be presented in the form of the following two arguments involved, i.e. the *enforcement of criminal law responsibility* and the *legal protection of the individual*.[18]

3.1 Investigation Interest of the Alleged Crime

The objective of enforcing criminal responsibility in a concrete case is closely related to the supportive function that the provisions of criminal law procedure have *vis-à-vis* those of substantive criminal law. There are two aspects that ought to be taken into consideration when pondering on the institutional goal of enforcing criminal law. For the first, it is the officially acknowledged purpose of the law of criminal procedure to provide for the enforcement of criminal liability in a concrete case, thus necessitating an as thorough an investigation of the facts

17 Peter, Karl, *Strafprozess*. Darmstadt 1981, p. 75–80.

18 In addition to the two content-bound optimization precepts mentioned, the third criterion of *procedural fairness* should be mentioned, too.

of the case as is possible. For the second, all legislation dealing with the criminal law procedure and criminal law enforcement ought to work in so effective a manner that the threat of punishment for various kinds of crime stays on a plausible level. The criminal policy objectives of substantive criminal law are given in terms of protecting certain individual or collective values and interests (*Rechtsgüter*), and it is through the criminal law procedure that those values and interests are to be given effective protection.[19]

The said *optimization precept* at the back of the criminal law system is equal to the directive, addressed to the prosecutor and other legal officials engaged in the criminal law enforcement, to see to it that criminal liability is enforced in an as certain and effective manner as is conceivable under the prevailing factual and legal constraints.[20] The essential requirements that are placed upon the criminal law process by the public interest are captured by the duty to optimize the values or interests that are inscribed in the prevailing system of criminal law.

From the point of view of the legal discretion and institutional role of the prosecutor, the goal of enforcing criminal liability signifies a duty to attend to the investigation interest in a criminal law case, which in a situation of uncertainty counts as an argument for indictment. The prosecutor's deliberation on indictment entails having to take a stance on whether it is warranted to continue the investigation of the (alleged) crime by having it still examined by the court of justice. The alternatives facing the prosecutor are as follows: whether to bring the investigation of the alleged crime to the next phase of the proceedings at the court of justice or to put an end to the proceedings by waiving the charges.

The legal process as a whole sets the legislative frame for the investigation of crime and for the inquisition for the right decision in the case. Structurally, and seen from the viewpoint of the prevalent ideology of the law procedure, the investigation of an alleged crime is a step-to-step process where the source material available for the decision-maker is not held to be complete until the final verdict is given by the court of justice. All the preceding stages in the proceedings are, in other words, no more than provisional as far as the completeness of the investigation material is concerned, and such material will become more and more complete during the proceedings. The system of criminal legal procedure is based on the idea that more light can be shed on the (alleged) crime during the criminal law proceedings, and the notion of what actually took place in the crime scene may become better elucidated up until the final verdict is given in the case by a court of justice.[21] The dynamics of the

19 The effective enforcement of the criminal responsibility is closely connected to the protection of basic values, as well. The state is under a responsibility to protect citizens against crimes, as has been defined in the national constitution. To the extent that the specific criminal law provisions have the objective of protecting the basic rights of individual, the effective functioning of the criminal law procedure is equally enhanced.

20 With the concept of an *optimization precept* (and the corresponding legal principle), I refer to a norm that puts forward an obligation to realize some value or goal *to as great an extent* as is possible. On the concept of "optimization precept", *Cf.* Alexy, Robert, *Theorie der Grundrechte*, p. 75–77.

21 With the one exception of the final verdict in a case to the effect of finding the accused either guilty or not guilty of the offence as charged, the probability judgment always has the quality

criminal law procedure may be summarized as follows: if the objective is to investigate the facts of the alleged incident of crime as thoroughly as the legal system authorizes, the entire process of, first, crime investigation by the police, then, the prosecutor's deliberation on indictment, and finally, the full-fledged trial at the court of justice all need to be gone through.

The concept of *investigation of crime* refers to the three following dimensions.

For the first, by means of the oral and immediate court proceedings more factual evidence may be produced in the case. During the court proceedings, it is possible to evaluate the factual evidence of a case in a more thorough and reliable manner than would be possible on the basis of written police investigation material only. An oral and direct court procedure is prone to sharpen the evaluation of such evidence, especially with respect to the evidence concerning homicide.

For the second, the notion of investigation in a criminal law procedure has a wider reference than simply a systematic enquiry into what actually took place in the alleged crime scene. The very concepts of *law* and *truth*, when placed in the context of the criminal law procedure, are *institutional* concepts in the sense that they are brought into effect through a process that has been determined in the legislation. The system of legal procedure has been created so as to make possible an inquiry into the truth of an individual case under scrutiny, and to serve the indispensable needs of social life in general. The legal procedure, starting from crime investigation by the police and the decision of indictment by the prosecutor and ending in the trial at the court of justice, is very much aligned with the truth in the case under scrutiny. Once a case has gone through the full-length trial at court, it is much more thoroughly examined than at the earlier stage of deliberation on indictment by the prosecutor. Judged from within the system of legal procedure, a final verdict given by the court of justice has more weight than the indictment decision made by the prosecutor.[22]

What needs to be taken into account in defining the meaning content of *investigation* is the fact that the principle of publicity in an alleged crime case cannot be attained unless the case is tried at a court of justice. Waiving the charges at the stage of the prosecutor's deliberation on indictment entails that no public hearing will be held on the proven facts and the legal issues of the case. Therefore, the public inquiry into the facts of a case may in some situations be taken as almost having value in itself.

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of being *provisional*, since it is based on less than perfect knowledge on what actually took place in the (alleged) crime scene. Some new item of knowledge might thoroughly change the character of evidence so far collected. Any judgments based on such estimates on probability should be seen as *dynamic* in kind, since the course of time or, rather, the changes that might be effected in time to come, should be taken into account as one pertinent factor in the evaluation of factual evidence. The more complete the material upon which a judgment is based, the more reliable and precise it is.

22 *Cf.* Luhmann, Niklas, *Legitimation durch Verfahren*. Darmstadt 1969, esp. p. 38–53.

3.2 The Legal Protection Interest of the Individual

The enforcement of criminal responsibility is not the only officially acknowledged objective to be pursued by means of the criminal law procedure. Rather, it has been restrained for the benefit of other values and goals equally acknowledged by the legal system. The most important of such value-laden restrictions is the set of legal provisions given in the name of legal protection of the individual. The order to optimize the legal protection of the individual is equal to an obligation, placed on the law-applying official, to pay as much respect to the legal protection interest of the individual as is possible under the prevalent legal and factual constraints of the legal process and the legal system as a whole.

The guarantees of legal protection naturally have to be at the strictest at the end stage of the legal process when the court of justice gives the final verdict on the issue, and so must be the relative weight allotted to the interests of the individual. As concerns the legal discretion of the prosecutor, the legal protection of the individual boils down to the requirement that no charges be raised against an innocent person. In a situation of uncertainty, that is an argument in favor of waiving the charges.

4 On the Weighing and Balancing of the Investigation Interest and the Legal Protection Interest

4.1 Elaborating the Theme of Inquiry

Above, the constraints placed on the prosecutor's legal deliberation in a situation of uncertainty were captured by the requirement that the official should carefully weigh and balance the two key interests involved, i.e. the investigation interest and the legal protection interest, *vis-à-vis* one another.[23] The two interests serve to focus and direct the prosecutors' legal discretion, in the sense that the concrete facets of the case at hand are to be judged in their light. Rather than conducting a straightforward search for the factors that might justify the raising or lowering of the concrete threshold of evidence in the individual case at hand,[24] along with an equally forthright method of evaluating such factors, the prosecutor should rather consider the impact of such factors on the relative weight of the two interests identified or, to put be more precise, the relative weight accorded to the distinct values and principles at the back of such seminal interests. By means of such a method, the legal deliberation of the prosecutor can be made far more analytical, and the end result of deliberation will be better controlled.

23 The concept of *investigation interest* refers to the requirement of enforcing criminal liability in the case in line with the prosecutor's role in the criminal law procedure, while the notion of *legal protection interest* refers to the requirement of taking care of the legal interests of an innocent person.

24 Scholarly discussion on the threshold of evidence has most often focused on such issues. *Cf.* Ekelöf, Per Olof, *Rättegång*. Femte häftet. Sjätte omarbetade uppl. Lund 1987, p. 120–126.

In what follows, the model for the *weighing and balancing* of interests that guide the prosecutor's legal deliberation will be further elaborated. The present analysis will proceed in three stages.

For the first, the *process* of weighing and balancing will itself be analyzed. The principles at the back of the two interests discerned will both have to be satisfied to as great a degree as is possible under the factual and legal constraints of the case at hand. In a collision situation between them, the prosecutor or other legal official involved will need to seek to strike an optimal balance between them.

For the second, the *prima facie* order of the two interests or, to be more precise, of the specific *legal principles* at the back of them will need to be specified, with an eye on determining the relative weight of each for the case at hand. Values cannot possibly be ranked in an absolute or unconditional order of preference. Rather, it is no more than a *prima facie* order that can be ascertained among them. In consequence, we need to draw a distinction between the *abstract* and the *concrete* levels of analysis in respect to the background values in question, and also in respect to the principles or interests entailed.[25] Moreover, some value-laden argument that was ranked very high in the abstract might, when switching the level of analysis so as to match with the individual characteristics of the concrete case at hand, may turn out to be weaker than some other, rivalling value consideration whose *prima facie* weight was yet ranked significantly lower in the abstract.

Finally, we need to focus the analysis on criteria that may either increase or diminish the *prima facie* weight of the interests in a concrete decision-making situation, in the sense of turning their mutual *prima facie* order of priority the other way round when judging the issue all things considered.[26]

4.2 The Formal Model for the Weighing and Balancing of Interests

4.2.1 The Law for Weighing and Balancing Interests

Robert Alexy's *law for the weighing and balancing of interests* (*Abwägungsgesetz*) provides a good starting point for the analysis of the prosecutor's legal discretion in a situation of uncertainty:[27]

25 I use the term *prima facie* weight of an interest or principle with reference to the weight it enjoyes before the act of weighing and balancing them and before taking into account any additional arguments that might have an effect on the weights initially attached to them.

26 Thus, when analyzing the decision-making situation, attention needs to be paid to both the content-related and the formal criteria, where the former refer to the factors that have bearing on the weights of the arguments utilized and the latter refer to the act of weighing and balancing itself.

27 *Cf.* Alexy, Robert, *Theorie der Grundrechte*. Baden-Baden, 1986, p. 146. *Cf.* Also Buchwald, Delf, *Der Begriff der rationalen juristischen Begründung*. Baden-Baden, 1990, p. 317; and Sieckmann, Jan-Reinhard, *Regelmodelle und Prinzipienmodelle des Rechtssystems*, Baden-Baden, 1990, p. 223–225 and 231–233.

> "The more a principle is left unfulfilled or the more it is infringed, the more important must the fulfilment of the other competing principle be."

Alexy's law for the weighing and balancing of interests cannot provide the prosecutor or other legal decision-maker with effective guidance as to the end result of legal discretion, since it is a purely formal and neutral model of legal argumentation.[28] Nonetheless, it serves to give a structure and focus to the course of rational legal argumentation, with reference to the degree of effecting the rivalling legal principles involved, on the one hand, and the relative importance of each, on the other.[29]

Following Alexy, the law for the weighing and balancing of interests as adapted to the prosecutor's legal discretion can be stated as follows:

1) The more important the continuing of investigation would be for the realization of the objective of enforcing criminal liability and the more the waiving of charges would infringe the said objective, the weightier must the legal protection interest be so as to justify the waiving of charges in a situation of uncertainty.
2) The more important the waiving of charges would be for the realization of the objective of legal protection of an individual and the more the raising of charges would infringe the said objective, the weightier must the investigation interest be so as to justify the raising of charges in a situation of uncertainty.

Alexy's law for the weighing and balancing of interests, in other words, focuses on the two criteria, i.e. the degree of infringement of the interest or, to be more precise, of the background values or objectives involved, on the one hand, and the importance of satisfying the interest in question to as great a degree as is possible, on the other. A concrete case needs to be judged in light of both of the criteria mentioned.

Though the importance of an as thorough as possible an investigation of the case might well be argued for,[30] the relative weight of the investigation interest is yet affected by the extent to which the waiving of charges is taken to interfere with the value-laden social objectives at the back of the investigation interest.

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28 Alexy, Robert, *Individuelle Rechte und Kollektive Güter*, p. 40: "Es ist allerdings festzuhalten, dass diese Strukturierung inhaltlich neutral ist und in diesem Sinne formalen Character hat."

29 Alexy, Robert, *Rechtsregeln und Rechtsprinzipien*. Arkhiv fur Rechts- und Sozialphilosophie 1985, p. 27–28: "... dennoch sagt das Abwägungsgesetz mit ihnen, was zu begründen ist, um den bedingten Präferenzsatz ... der das Ergebnis der Abwägung darstellt, zu rechtfertigen, nämlich Sätze über Beeinträchtigungs- und Wichtigkeitsgrade." – Of the curve of difference illustrative of the constitutive idea at the back of the law of weighing and balancing interests, *Cf.* Alexy, *Theorie der Grundrechte*, p. 146–154.

30 For instance: "Since we are dealing with a grave instance of crime, it has to be thoroughly investigated till the end by a neutral court of justice."

The extent to which the background values or interests of the criminal law procedure are infringed by the prosecutor's decision to indict is affected by the degree in which a prolonged examination of the case at the court of justice would be served by such a decision. The more the prosecutor's decision to indict can be expected to serve the investigation interest in the concrete case at hand, the more the contrary decision to waive the charges in the case (being itself expressive of the process values at the back of the legal protection interest) would be affected by the decision. In consequence, the decision to indict cannot be taken as an end in itself, as it certainly would be, if in a situation of uncertainty the raising of charges would be warranted on the sole ground of satisfying the crime investigation interest. By taking into account the degree to which legal protection interest would be negatively affected by the prosecutor's decision one way or the other, we may place the prosecutor's deliberation on whether to indict in a case within a wider frame of analysis that takes into account the background values and objectives of the criminal law system as a whole.[31]

The weight allotted to the legal protection interest in the prosecutor's deliberation can be analyzed in a similar manner. For the first, we may ask to what degree, in a situation of uncertainty, the prosecutor's decision to indict would infringe the legal protection interest of the individual. For the second, we may ask how important a general interest would be negatively affected by the prosecutor's decision to indict, i.e. how close to the very core of the legal protection interest the value thereby infringed is situated.

The law of weighing and balancing is also aligned with the *equilibrium situation* where the abstract weights attached to the process values and goals entailed in the law of criminal procedure are each taken to be of equal importance. Yet, such a situation needs to be supplemented by taking into account the diverging *prima facie* weights attached to the said interests.[32]

4.2.2 The *Prima Facie* Order of Interests

Since the protection of the legal interests of the individual is one of the seminal values of the state under the *rule of law* ideology (*Rechtsstaat*)[33] and since the principle of the protection of the innocent is solidly anchored in the most foundational human rights norms, it might even seem self-evident that the legal

31 The criterion of *importance* of an argument refers to the objective involved, and the criterion of *degree of intrusion* refers to the means available and their use for the purpose.

32 Sieckmann, *Regelmodelle und Prinzipienmodelle des Rechtssystems*, p. 236: "Hat eines der Prinzipien ein abstrakt höheres Gewicht, sind entsprechend geringere Beeinträchtigungsgrade ausreichend, um dem Prinzip im konkreten Fall ein gleiches Gewichts wie dem kollidierenden Prinzip zu verleihen."

33 The *state under the rule of law* is used here as an equivalent for the German term *Rechtsstaat*. – The term *law-state* has also been suggested as a translation for *Rechtsstaat*. *Cf.* Neil MacCormick, *Questioning Sovereignty. Law State and Nation in the European Commonwealth*. Oxford: Oxford University Press, 1999, p. 9–11; Neil MacCormick, *Rhetoric and the Rule of Law. A Theory of Legal Reasoning*. Oxford: Oxford University Press, 1999, p. 22, footnote 30.

protection interest of the individual should have a *prima facie* priority *vis-à-vis* the crime investigation interest. On the other hand, one could as well argue for the stance that collective values should rather have a *prima facie* priority with respect to individual interests, due to the importance given to the objectives of social justice or the safeguarding of the indispensable prerequisites of human life and survival. In consequence, one might come to the conclusion that, in some situations at least, collective interests do weigh more than some individual interests.

Reflecting on the priority of individual and collective interests on such a high level of abstraction will not lead us very far, though. The alleged *prima facie* priority order among the interests in question has to be considered in respect to the particular stage of the criminal law process, on the one hand, and in respect to the intended coercive measures to be taken by the official, on the other. At the final stage of the criminal law procedure when the court of justice gives an authoritative ruling on the legal issue under scrutiny, the legal protection interest of the individual enjoys the highest *prima facie* value, and it has often been recommended that the principle *in dubio pro reo* be given priority in such a situation. At the earlier stage of the prosecutor's deliberation on indictment, on the other hand, the *prima facie* value of the legal protection interest is held to be lower but still *prima facie* greater than that of the investigation interest. Thus, the social values at the back of the legal protection interest have a *prima facie* priority over the ones at the back of the investigation interest.

What is the significance of the *prima facie* order of priority of such arguments in practice? To put it quite simply, it allocates the burden of argumentation.[34] The *prima facie* priority given to the legal protection interest in the prosecutor's legal discretion signifies that in a situation of uncertainty, the prosecutor should waive the charges unless there are some strong enough counter-arguments that would warrant the raising of charges in the concrete case at hand. The *prima facie* order of the two interests may be turned the other way round by force of increased weight given to the investigation interest and/or decreased weight of the legal protection interest.

Yet, the *prima facie* order and the law of weighing and balancing of interests cannot determine no more than a general frame for legal discretion. They point out on which party the burden of argumentation lies and what it is that needs to be justified in a situation of uncertainty.[35] There is one problem related thereto, *viz.* what kind of an effect does the *prima facie* higher value of the legal protection interest *vis-à-vis* the investigation interest exert on legal discretion? As I see it, the principle of protecting the innocent that has impact at the back of the legal protection interest is "stiffer" as to its range of variation, in the sense that the weight it may enjoy in legal deliberation (in light of both of the criteria mentioned) varies less than the respective weight accorded to the investigation

34 *Cf.* Alexy, *Rechtssystem und Praktische Vernunft*, Rechtstheorie 1987, p. 415–416.

35 The law of weighing and balancing directs argumentation. As Alexy writes: "Dadurch wird die Argumentation in Bahnen geleitet, die es ohne das Abwägungsgesetz nicht gäbe." Alexy, *Individuelle Rechte und Kollektive Güter*, p. 39–40.

interest, when judging the issue in the context of a concrete case.[36] It, in other words, yields less to the counter-effect of the investigation interest than the increased weight of the latter might suggest. The relative weight of the investigation interest needs to rise significantly so as to reverse the initial *prima facie* order of preference between the two, unless the weight of the legal protection interest has at the same time diminished.

4.3 On Factors That Have Impact on the Concrete Weight Attached to the Optimization Precepts

There has been some reflection in legal literature on how the prosecutor should proceed, if there is uncertainty as to the facts of the case under scrutiny. The analysis of the issue has not been entirely satisfactory, though, still leaving much to be hoped for. The significance of several individual factors on the prosecutor's deliberation may have been considered, such as the gravity of the alleged crime, when pondering on whether the prosecutor should rather waive the charges or, on the contrary, raise the charges more easily in such a situation. What has often been forgotten in the analysis is the fact that the simultaneous impact of several factors, each with a divergent effect plus the resulting co-effect of them all on the issue, ought to be taken into consideration by the prosecutor, and focusing on only one of them will not do justice to the complexity of the decision-making situation. Moreover, one should realize that the weight of such factors might vary from one case to another. Indeed, even the very same factor may for some part count as an argument for indictment, while for some other part it may be an argument for waiving the charges in the case.

The present model for the weighing and balancing of arguments or interests aims at a more sophisticated analysis. Instead of striving to evaluate, say, the impact of the gravity of the alleged crime on the prosecutor's deliberation in a straightforward manner, one should rather ask how such a factor affects the concrete weight to be attached to the investigation interest, on the one hand, and the legal protection interest, on the other, in the context of the particular case at hand. Thereby, the analysis of the prosecutor's decision-making situation is made far more analytical and detailed, enhancing a more comprehensive reasoning *vis-à-vis* the justification of the decision made.

Here, I will not seek to enlist all of the factors that the prosecutor should take into consideration when making the decision on the raising or waiving of charges in a concrete case. Rather, I will survey some of the key factors that the prosecutor ought to be bear in mind when evaluating the concrete weight to be given to each of the interests involved.

36 It is not difficult to identify reasons for the variation of the importance given to the investigation interest, since at least reasons that have to do with criminal policy and process economy may have an effect thereupon. The reasons for the variation induced in the weight attached to breaches of the said interest are relatively easy to grasp, as well. As concerns the legal protection interest, the fluctuations of either of the two criteria mentioned are more difficult to explain or justify. How could we convincingly argue for the case that the protection of an innocent might depend on some purely contextual factors?

For the first, attention should be paid to what kind of uncertainty we are dealing with, i.e. what is the cause of uncertainty. That issue has significance when evaluating to what extent indictment can be expected to remove the prevailing uncertainty of the case. Such ambiguity can be divided into *legal* and *factual* uncertainty, respectively. Still, the crude classification into legal and factual uncertainty needs to be elaborated so as to gain a more accurate picture of the matter. Uncertainty in legal decision-making may concern the identity of the person who is guilty of the crime and/or the (other) facts of the case under scrutiny. On the other hand, it may concern the interpretation of the specific legal norm provision to be applied in the case. Yet, difficulties in matching an abstract legal norm with the concrete facts of the individual case make up all the more common reason for legal uncertainty. In such a situation, we are dealing with the proper characterization, or legal qualification, of the facts of the case, in the sense of using them as part of a deductive inference (*subsumption*). The crucial difference between those two possibly problematic situations, i.e. the problem of *interpretation* and the one of *subsumption*, lies in the fact that it is only the former that has wider applicability beyond the individual case, while the latter is (mostly) aligned with the particular facts of the individual case only.

When the uncertainty is due to difficulties in legal interpretation, the need for a novel precedent on the legal issue may raise the weight given to the investigation interest. On the one hand, it may be held as important to obtain an authoritative ruling on a thorny legal issue in question at the court of first instance and, possibly, at the Appeal Court or the Supreme Court of Justice. On the other hand, the decision of indictment and the subsequent court proceedings may be the most appropriate means of removing uncertainty as to the issues of legal interpretation. Yet, since the question of subsumption, quite unlike the question of interpretation, cannot have equally general significance, the weight given to the investigation interest will not in a similar manner rise. However, if the case entails highly value-laden elements, the weight given to the investigation interest may rise, as the trial at the court of justice is prone to bring about many-sided argumentation as to the merits of the case.[37]

The question of the facts of a case entails two separate issues of, first, *collecting*, and then, *evaluating* evidence. The oral and immediate court proceedings may have an effect on the latter issue but not (in the same degree, at least) on the former. Any feasible evidence that has not been obtained in the course of crime investigation by the police cannot be gained access to during the trial at court, either.[38] Yet, the oral and immediate character of the court proceedings greatly enhances the possibilities of evaluating any personal evidence presented during the trial.

As the other pertinent criterion of analysis, I have focused on the subject matter of uncertainty in such decision-making. The legal requirement of having *probable grounds* of the guilt of the suspect concerns both the identification of

37 I refer to my stance presented earlier to the effect that the court verdict has a stronger standing than the prosecutor's decision of indictment as to the determination of the facts and legal issues of the case under consideration.

38 Thus, the prosecutor cannot speculate upon possibly having novel evidence material at the court.

the alleged offender and the (other) material facts of the case in light of the provisions of criminal law. The uncertainty facing the prosecutor may equally affect either or the both of the two categories discerned. The prosecutor, when deliberating on indictment in a case, needs to take a stance on how much uncertainty is still acceptable *vis-à-vis* the various evidential themes in the case when the impact of the two conflicting interest, *viz.* the investigation interest and the legal protection interest, is duly taken into account. The more the prevailing uncertainty concerns the core area of the question of guilt, when placed in the context of criminal law or the law of criminal procedure, the more the decision for indictment will as a rule infringe the legal protection interest.

From the point of view of the legal protection of the innocent, there is a decisive difference between the two cases of, first, raising criminal charges against an innocent person and, second, having ambiguity concerning a few insignificant minutiae of the case or, alternatively, some highly value-bound elements in it. As a consequence, I regard the *theme-based* approach to the issue as the best justified. Though the abstract criterion of having *probable grounds* (of the guilt of the suspect) is the same with respect to all the specific sub-themes that are to be substantiated during the criminal law proceedings, the concrete threshold of evidence may vary *vis-à-vis* the various facets of the case and the particular phase of the proceedings. What this line of argument clearly shows is that the significance of and the weight given to the legal protection interest need to be approached in a highly analytical manner.

The evaluation of the concrete weight allotted to the investigation interest and to the legal protection interest in a case warrants shifting the focus of analysis to the individual elements of the case under scrutiny. Still, one has to bear in mind that only such arguments that count as valid arguments in the context of legal reasoning in general can now be taken into consideration.

One may say that the weight allotted to the investigation interest is determined by the criminal law policy and the demands derived from legal process economy. As a consequence, it is mainly the gravity of the crime that has the effect of raising the weight of the investigation interest. Also the nature of the crime in a wider sense and, in some exceptional cases, even the social rank and position of the suspect may gain significance, if the need for public proceedings in the matter is, for some reason or other, felt to be urgent. Such would be the case if, for instance, some high-ranking state official is suspected of crime. – For the sake of clarity, I need to underscore that I am now dealing with the weight of the investigation interest only.[39] Even the weight given to the legal protection interest may rise due to similar kinds of reasons, though.

39 To be more precise, such a judgment concerns the importance allotted to the investigation interest in the case.

5 On the Justification of the Model for Weighing and Balancing

The present model for the weighing and balancing of arguments might be thought to raise objections of a rather principled kind. For the first, it might be argued that the model makes the evaluation of evidence far more subjective, granting to the prosecutor the kind of discretionary power that really ought to belong to the legislator. Moreover, it might be argued that the weighing and balancing of interests necessitates taking a stance to a set of so value-laden viewpoints that the uniformity of the prosecution practice is jeopardized, and the door to a totally whimsical application of law is thereby opened.

Such critical voices are easy to rebuff, though. The proposed method of weighing and balancing will not increase the discretionary powers enjoyed by the prosecutors. Rather, it will have the effect of guiding their deliberation on indictment toward a more analytical direction, encouraging a more rational use of legal discretion, and improving the standard of justification of the decision on evidence. The objective of the model is to lead the prosecutors into a more self-conscious and analytical use of arguments in a situation of uncertainty, enhancing rational justification of the decision of indictment in such situations. It is far better to have the prosecutor make the decision of indictment in a fully self-reflective manner, with the effect of seeking to enforce the basic values and goals at the back of the criminal law system, instead of letting subjective intuition that is beyond the reach of public control guide the process of institutional decision-making.

> My own experience from the past decades in teaching prosecutors the skill of evaluating factual evidence lends support to the stance that the justification of a decision on the evidence of a case is regarded as a genuinely complicated issue by the prosecutors, and the same goes for other legal officials in a similar kind of situation of legal deliberation. Such a view is also supported by my personal observations in supervising the legality of the measures taken by public officials, first as Deputy Parliamentary Ombudsman and then as Deputy Chancellor of Justice. In practice, the analysis of evidence in a case would seem to cause great difficulties to officials, and the justification as to the facts of the case all too often remain at the level of quasi-argumentation only. My empirical research findings have, moreover, shown that the outcomes of legal discretion by the prosecutors may be rather uneven in character. In certain hypothetical test case situations, where the same crime investigation material was presented to a group of prosecutors, 40 % of them would have raised the charges while 60 % estimated that the evidence did not sufficiently support indictment. *Cf*. Jonkka, *Syytekynnys*, p. 324–342, and the article referred to above in footnote 4.

In addition, the "one-directional" conception of probability, as touched upon above in Chapter 2.3, clearly lends support to the present method of weighing and balancing interests. Any evidence gathered on some evidential theme gives information of the probability of that specific theme only, and no conclusions can legitimately be made as to the probability value of its negation on the basis of the "residual" probability value that is thereby left unexplained. In the legal discretion of the prosecutor, the prevalent lack of certainty concerning the culpability of the suspect cannot be taken as an argument that would lend

inferential support to the contrary claim, i.e. the probability value of the innocence of the suspect. Instead, it only designates the *lack of knowledge* in this respect.

In consequence, when considering the weight to be given to the investigation interest we are in fact faced with the issue of whether – and if so, to what extent – an oral and immediate trial at the court of justice would have the effect of diminishing the area of uncertainty in that case. When pondering on the various decision-making strategies for the prosecutor in a situation of uncertainty, the probability value of innocence of the person suspected of crime is not at stake. Instead, all efforts are made so as to estimate the resulting decline in uncertainty if the issue is taken to court. If, on the basis of weighing and balancing the two interests involved, i.e. the investigation interest and the legal protection interest, the decision of raising charges is made, it is fair to expect that the uncertainty of the case will be substantially reduced, as well.[40]

6 Some Applications to Concrete Cases of the Model of Weighing and Balancing of Interests

In what follows, I will present a few concrete applications of the method of weighing and balancing of interests. In the first example, the model is applied to the analysis of the prosecutor's discretion. Then, I will consider the use of the model in a situation where the legal protection interest of the individual is to be weighed against the crime prevention interest. In the name of crime prevention, the physical immunity and personal freedom of an individual may be lawfully breached. In a state governed by the rule of law, any intrusions of individual rights are legitimate only if authorized by an express statutory provision. Due to the semantic open-endedness of statutes, the precise preconditions for curbing individual rights in an individual case have to be constructed by means of legal interpretation. Thus, in a concrete law-application situation, various colliding interests may have to be weighed and balanced against each other. Instead of sticking fast to some rigid rule, like "in a state of uncertainty, always refrain from taking the specific (coercive) measures in question", the legal order places the officials engaged in crime investigation, prosecution, and trial at the court under the duty to weigh and balance the two interests involved, i.e. the crime prevention interest and the legal protection interest of the individual, *vis-à-vis* one another so as to strike an optimal equilibrium between them.

40 The different institutional roles of the prosecutor and the judge in the criminal law procedure, along with the different significance of their decisions, is aptly characterized by the argument in the text above. The act of giving the final verdict in a case is placed in a situation of decision-making and evaluting evidence in which the prevalent ideology of legal procedure necessitates that any uncertainty remaining as to the culpability of the accused is taken as an argument for "not guilty", i.e. innocence, on the ground of lacking incriminatory evidence. A guilty verdict, in other words, requires that the legal threshold of *beyond reasonable doubt* is duly met with in the case.

6.1 Evaluation of the Prosecutor's Decision-Making by Means of the Model of Weighing and Balancing of Interests

The *Parliamentary Ombudsman*, assisted since 1972 by one and since 1998 by two *Deputy Parliamentary Ombudsmans*, investigates any complaints he or she may receive on the alleged unlawfulness of some measures taken by officials. There are no formal requirements placed on such complaints, so they may be quite informal in character. In addition, the *Parliamentary Ombudsman* may investigate, out of his or her own initiative, any issue that has to do with the alleged unlawfulness of decisions or other measures taken by officials. The Parliamentary Ombudsman also makes regular inspection visits to prisons and other facilities where the personal freedom of the inmates has been restricted. The legal powers of the *Chancellor of Justice*, assisted by the *Deputy Chancellor of Justice*, are quite similar in this respect, though there are some differences in the legal powers of the two authorities. For instance, the supervision of prisons and the like facilities is reserved to the competence of the Parliamentary Ombudsman only.

In 1997, the Parliamentary Ombudsman received a written complaint to the effect that the prosecutor had allegedly unlawfully waived the charges against a married couple in a tax fraud case.[41] One of the spouses, i.e. the wife, had at the time of the occasion been a judge at the court of first instance, but she had later been nominated as Justice at the Supreme Court of Finland. Therefore, the case attracted wide public attention in Finland.

The married couple had sold a summer cottage they had owned. As the purchase price for the summer cottage, they had declared the tax officials the sum total of 800.000 (Finnish) Marks. The buyers of the summer cottage, however, told in their complaint to the Parliamentary Ombudsman that in addition to the officially declared sum of 800.000 Marks they had paid "unofficially" 200.000 Marks to the vendors, i.e. by evading the written form of contract that is legally required for selling and buying real estate in Finland, and only an oral agreement was made concerning the residual part of the purchase price. The ultimate motive for the vendors' alleged course of action was to evade the fiscal consequences of the transfer of property for part of the sum, i.e. 200.000 Marks. The husband admitted that the said course of action had in fact taken place. The wife, on the other hand, told in the investigation that she knew nothing of the alleged tax fraud, as she had not been present there when her husband had had the negotiations with the buyers on the purchase price and when her husband had received the actual payment, inclusive of the sum of 200.000 Marks that was allegedly paid in disregard of the legally required written form.

41 As mentioned, the Parliamentary Ombudsman's decision is from the year 1997. It is a clear indication of the fact that the model of weighing and balancing of interests has gained ground in the supervision of legality by the Parliamentary Ombudsman. I present the case in detail here, since the use of the model is neatly exemplified in it. – At the time of the Parliamentary Ombudsman's decision, I acted as the Chief Secretary in the Parliamentary Ombudsman's office, and I also presented the case for the (then) Parliamentary Ombudsman, Mr. Lauri Lehtimaja. At the time of my writing this, Lauri Lehtimaja is Justice at the Supreme Court of Finland.

In his decision on the issue, the Parliamentary Ombudsman reflected on e.g. whether the prosecutor had acted lawfully in the case as he had decided not to raise charges against the wife, on the ground that the requirement of *probable grounds* of guilt had not been satisfied on her part.[42] In the Parliamentary Ombudsman's decision, the issue under consideration was whether the wife could be shown to have been aware of the illegally paid part of the purchase price.

The Parliamentary Ombudsman pointed out that the situation was a borderline case as concerned the evaluation of evidence in the case. He continued his line of argument by the following analysis: in a borderline case of indictment where the satisfaction of the threshold of indictment is unclear, the prosecutor needs to evaluate for which kind of a decision, i.e. the decision of either raising or waiving the charges, there are stronger grounds in the evidence gathered. The prosecutor, in other words, has to estimate which of the two outcomes is better justified when taking into account the institutional objectives of the criminal law procedure. Not raising the charges signifies an end to the process at the stage of the prosecutor's legal deliberation. Taking the issue to the court, on the other hand, means that the processes of investigation and truth-inquiry will continue in the form of the oral and immediate court proceedings. Such a procedure considerably improves the possibilities of evaluating personal evidence in specific.

a) The Parliamentary Ombudsman analyzed the case with reference to the weighing and balancing of the two interests involved, *viz.* the investigation interest and the legal protection interest in the following manner.

The more important an as thorough as possible an investigation of the facts of the case is taken to be and the more probable it is that an oral and immediate hearing would shed some more light on the issue under uncertainty, the higher is the weight that is allotted to the investigation interest. In addition, the level of the investigation interest is affected by how essential a public trial is considered to be from the point of view of common interest, as compared to the alternative course of concluding the proceedings at the prosecutor's decision not to raise charges and take the issue to the court. The credibility of the legal order and, especially, the general confidence in the equality of law-enforcement is an argument that speaks in favour of the investigation interest, especially in the present case where a high-ranking judge was suspected of crime.

The alternative of waiving the charges in a situation of uncertainty, on the other hand, is backed by the legal protection interest of the suspect. One needs to take into account the risk that an innocent person might be indicted. Even if he

42 The prosecutor had waived the charges against the husband, a Doctor in Medicine, on the ground that prosecution would have been "useless and inequitable" (*Cf.* above in section 1 footnote 1 as to the grounds on which the prosecutor may waive the charges.) The Parliamentary Ombudsman took a stance on that issue as well in his decision. – Since the legal authority of the Parliamentary Ombudsman is limited to the evaluation of the lawfulness of measures taken by officials, he could not conduct consideration of charges anew in the case *vis-à-vis* the vendors' course of action. In addition, a novel consideration of charges could not have been possible, if the Parliamentary Ombudsman had such powers, since the entitlement of indictment had expired in the case.

or she might not be convicted at the court, the very fact of being indicted is prone to induce some considerable inconvenience to him or her. Like the weight given to the investigation interest, the value allotted to the legal protection interest may to some extent vary from one case to another. If an innocent or "wrong" person is mistakenly indicted for a crime he or she had nothing to do with, a far greater harm is inflicted on the legal protection interest of the individual in question than in another kind of case where someone has knowingly taken the risk of entering the borderline area of what is legally permitted and what is legally forbidden. In the latter case of conscious risk-taking, such conduct may be subject to moral blame under the criteria of social ethics. Nevertheless, the infliction of punishment on such conduct depends on the construction of criminal law provisions only.

b) The factors that have an effect on the weights given to the investigation interest and the legal protection interest were analyzed in the following manner in the Parliamentary Ombudsman's decision.

The main evidence in the case consisted of personal evidence of an internally conflicting kind. Subjecting the case to the oral and immediate court proceedings might have brought more diverse light on the issue under consideration. In the court proceedings, there are far better facilities for evaluating conflicting evidence than in the prosecutor's legal discretion based on crime investigation material only. Hearing both the vendors and the buyers in court, while also making direct observations of their reactions to the other party's story of what happened in the alleged crime scene, would have been prone to enhance the evaluation of evidence *vis-à-vis* the gaps in the stories recorded at the stage of crime investigation. Moreover, the case concerned a considerable sum of money, allegedly gained by a tax fraud. The nature of the crime, with particular reference to the status of the other suspect as Justice at the Supreme Court of Justice, underscores the importance of rather having the case thoroughly and publicly examined at the court.

Yet, the increased weight of the investigation interest in a case of uncertainty is not, as of itself, a sufficient ground for indictment. The significance of the legal protection interest has to be taken into account, too. The key issue concerns the question of how much the legal protection interest of the other suspect, i.e. wife, would have been jeopardized had she been indicted.

The wife had told during the crime investigation that she had deliberately declined to take part in the transaction negotiations, because her own conception of justice might not approve of the methods of transaction that her husband might adopt. According to her own testimony, she could not be taken as an outsider to the course of action that took place in the negotiations and transfer of money between the purchasers and the vendors. Rather, she had deliberately chosen to stay out of the matter. Her status as Justice at the Supreme Court of Justice naturally affects the weight to be given to the legal protection interest, too. If a member of the Supreme Court had been indicted for alleged tax fraud, it would have attracted great public attention. Moreover, she would most likely have been suspended from official duty for the time of the legal proceedings of the case. Thus, indictment for tax fraud would most probably have signified an exceptionally great amount of harm to her.

On the other hand, when considering the weight given to the legal protection interest, one needs to take into account the fact that the prosecutor's decision not to raise charges against her had been commented in rather negative light in public media. In the eyes of the public opinion, she had been labelled guilty of tax fraud, without having a proper trial and chance to publicly defend her against the charges. The truth in the case, i.e. what had in fact taken place in the occasion of the alleged tax crime, had been left in the shadows. A public trial at court may, in other words, be defended with reference to the legal protection interest of the suspect. An impartial trial at court provides the accused with an opportunity to clear him- or herself of any unjustified accusations or suspicion of crime.

In his final conclusions to the case, the Parliamentary Ombudsman pointed out that in the course of the crime investigation process, arguments had been presented both for and against indictment, and they should have been taken into due consideration in the prosecutor's legal discretion of the case. The seminal issue concerned the weighing and balancing of such reasons. A trial at the court of justice would have brought more light on the conflicting accounts of what had actually taken place in the negotiations and transfer of money, of which very different accounts had been given by the parties to the case. Since a thorough examination of the matter would have been exceptionally well justified in the case on the basis of general interest, there had been weighty arguments for indictment. Neither did the legal protection interest constitute an obstacle to indictment. The Parliamentary Ombudsman took the stance that the prosecutor had insufficiently dealt with the arguments for and against of indictment, ending up in an outcome that could not be regarded as justified.

The Parliamentary Ombudsman's decision was soon to raise debate in society. The prosecutor, whose decision not to raise charges was found inadequate by the Parliamentary Ombudsman, voiced critique against the Ombudsman's decision in public. The emergence of such a response to the Ombudsman's decision rather neatly illustrates the fact how novel and unfamiliar the proposed approach of weighing and balancing of interests must have been to the prosecutors. Jyrki Virolainen, Professor of Law of Procedure at the University of Lapland, wrote a large commentary on the case where he analyzed the prosecutor's decision-making situation in a manner highly similar to the one adopted by the Parliamentary Ombudsman.[43] Afterwards, the idea of weighing and balancing the investigation interest and the legal protection interest of the individual *vis-à-vis* one another has no doubt gained ground among the prosecutors. Especially in some of the indictment decisions made by the highest-ranking prosecutors in Finland, the deliberation situation has been analyzed by means of the method of weighing and balancing.

43 Virolainen, Jyrki, *Korkein oikeus kriisissä*. Kitee 1997, p. 40–116 and 204–226.

6.2 Weighing and Balancing of the Crime Prevention Interest and the Legal Protection Interest

6.2.1 Border Control Measures by the Customs Officials, with the Intention of Finding Illegal Drugs

In the following two cases that I decided as Deputy Parliamentary Ombudsman, the legal issue under scrutiny concerned the interpretation of Section 15 of the Finnish Customs Act.[44] According to the provision, an inspection for illegal items in the sense of an examination that exceeds the inspection of the person's luggage and clothing, i.e. an inspection of what the person is carrying attached to his or her body, may be conducted to a passenger in the customs area, if there exist probable grounds of a crime the maximum punishment of which is more than six months in prison.

In both cases, the legal issue to be considered by the (Deputy) Parliamentary Ombudsman was whether the prerequisite of *probable grounds* of crime, as referred to in the Customs Act, had been duly met with. In the first case, a woman who was arriving to Finland from India had been subjected to an inspection at the Helsinki–Vantaa Airport by having her take her clothes off so as to see if she had any drugs attached to her body under her clothing. In the other case, two men of African descent had been subjected to a similar inspection at the Port of Helsinki by having them take their clothes off. The search was based on an anonymous phone call to the customs officers, to the effect of claiming that the two men might be carrying drugs with them. No illegal items were yet found in either case.

What the two cases had in common is the fact that the suspicion of drug smuggling was based on conclusions made from rather tiny details. There had been some weak circumstantial indications but no direct evidence in support of the conclusion that the passengers might in fact be carrying drugs with them.

> In both cases, the customs officers admitted of having utilized the *method of profiling* possible drug smugglers, based on a generalized notion of what kind of passengers were often, "as a rule", guilty of drug trafficking. The observed conduct of the persons selected for closer scrutiny and the information the customs had of them was then compared to the notion of an allegedly "typical" drug-smuggling offender. – In the profiling method, a kind of *a priori* probability is made use of by the customs officials. As I see it, the method of profiling possible drug-smuggling offenders may have significance especially in directing investigation. Yet, no violation of the legally protected human and basic rights of individuals, like the right to personal immunity, may be conducted on the basis of such overly generalized reasoning only. In future, recourse to such *a priori* probabilities in profiling offenders in advance is likely to become more and more common in the surveillance work by the police, the customs, and the national border control officials. It is therefore highly important to ponder upon what kind of legal security problems the approach may entail when coupled with the use of coercive measures authorized by the law.

44 Both of the cases came to my knowledge in complaints received from individual persons, addressed to the Parliamentary Ombudsman. A brief description of the cases can be found in the Parliamentary Ombudsman's Report of Decisions given in year 2000.

The two cases were hard, borderline cases as to whether the legal prerequisites for the inspection had been duly met with. In the decision given by the Deputy Parliamentary Ombudsman, the argument was presented that in interpreting the criterion of *probable grounds* of crime, the state interest of crime prevention, i.e. the prevention of drug trafficking, on the one hand, and the legal protection interest of the individual, i.e. the requirement of protecting and respecting the integrity of an individual person, on the other, were to be weighed and balanced against each other in the context of the case at hand. The customs officials, however, did not see the situation as one where such interests should have been weighed and balanced against each other, but as one where the objective of crime prevention was the only consideration to be observed. The fact that human integrity and immunity were infringed in a rather concrete manner in the situation was left totally unnoticed by the customs officials, it seemed.

In the decisions given in the two cases mentioned, I – acting in the institutional role of the Deputy Parliamentary Ombudsman – made use of e.g. the following arguments. The pursued goals of effectiveness and efficiency in the prevention and investigation of drug trafficking is commonly taken as an argument for having recourse to the legally authorized coercive measures in the customs control. The weightier and the more concrete arguments that can be presented for the legally authorized coercive measures in the customs control, when judged from the point of view of crime prevention and investigation, the more justified is a thorough examination of what some passenger might be carrying under his or her clothing, as attached to his or her body or within the body, and such an examination would be justified even if the ultimate satisfaction of the specific criteria set in law might to some degree be uncertain at the time of subjecting the individual to the coercive measures. But, on the other hand, such an inspection by necessity entails an infringement of the basic and human right enjoyed by the individual concerned, *viz.* the right to integrity and personal immunity, and that needs to be taken into due consideration by the customs officials when estimating the satisfaction of the threshold of evidence in a case.

Due to the profound impact of the basic and human rights on the legal position of individual persons and on the state officials' decision-making in situations where the use of coercive measures against an individual is being considered, the officials should as a rule refrain from taking coercive measures in a situation of uncertainty, unless there are some specific factors present that are sufficient enough to reverse the order of preference between the interests involved. Such a reason for coercive action might entail some reasonable ground for believing that an individual is carrying some highly dangerous item or substance, the entering of which into the country should be prevented at the greatest priority. In such a case, the weight accorded to the crime prevention interest increases.

The value of legal protection interest, too, may to some extent vary from one case to another. When some totally innocent person is subjected to the coercive measures of examination by e.g. the customs officer, the violation of the legal protection interest is at the greatest. The weight given to the legal protection interest may be lower, if the identity of the suspect is not in doubt, as the lack of

knowledge only concerns some minor details of the alleged incident of crime. If, for instance, it has come to be known by the customs officials that some person has been somehow involved in drug trafficking on a trip abroad but there is uncertainty as to whether he or she is carrying drugs with him or her when coming back from the trip, the weight given to the legal protection of the individual might fall. The ranking order of the two interests, *viz.* the crime prevention interest and the legal protection interest, might then be reversed.[45]

6.2.2 Contrasting the General Security Interest and the Legal Protection Interest

In the concrete police work, there frequently come up situations where the collective security interest and the individual legal protection interest are on a colliding course. Such a situation may occur in e.g. the interpretation of Section 20 of the Police Act. According to the said stipulation, the police may remove a person from a location if, from the threats expressed by him or her or from his or her external behaviour, it can be inferred that he or she would probably commit a crime against the life, physical integrity, personal freedom, domestic peace, or property of some other person. If removing the person from the location in question would apparently be an insufficient measure for the prevention of crime and the risk to other person's legally protected interests cannot otherwise be removed, the person may be taken into police custody for as long a time as the likelihood of his or her committing such a crime persists, for the maximum of 24 hours.

The assessment of the Section is made difficult by the fact that there are several thresholds of evidence to be taken into account, each connected to the probability of the occurrence of certain future events. In general, the nature of the legally protected value or interest that is being threatened has a decisive influence on the weight to be given to the legal protection interest. The taking into police custody of a person whose behaviour suggests an immediate threat to some other person's life is a lot easier to warrant than the act of having recourse to similar coercive measures if no more than property values are at risk, assuming that there can be no certainty of the future course of action of the probable offender in a situation regarded as intimidating.

In the following case to be commented upon, I – acting in the role of the Deputy Parliamentary Ombudsman – had to take a stance on the application of Section 20 of the Police Act.[46] The police had come across and taken into overnight custody three members of a certain motorbike club. The three men had been in a car, allegedly heading for a public gathering that was arranged by another, rivalling motorbike club.[47] The police warranted their decision to take

45 In neither of the two cases considered, there were sufficiently weighty and detailed grounds presented for the coercive measures of inspection taken. From the point of view of basic and human rights of an individual, it would therefore be more justified to have refrained from such action.

46 I have given the decision as the Deputy Parliamentary Ombudsman in 1999.

47 The men denied having been heading for the motorbike club gathering, and no weapons were found in their car.

the men into overnight custody with reference to a tip-off they had received by phone, to the effect that the encounter of the two motorbike clubs might induce a violent clash that might place even third parties in danger. In addition, the police referred to the well-known fact that, at the time of the occasion, the two motorbike clubs involved, i.e. the *Hell's Angels* and the *Bandidos*, had had mutual hostilities in which firearms had been used.

The police contended that the objective of ensuring common safety authorized the use of the coercive measures specified in Section 20 of the Police Act. In the Deputy Ombudman's decision given to the complaint by one of the members of the motorbike club, I put forward the argument that the situation would have necessitated the weighing and balancing of the two colliding interests, *viz.* the legal protection interest of the individuals concerned and the crime prevention interest. Thus, when making the decision concerning the use of such coercive measures, the simultaneous impact of (at least) the following two legally relevant facts should have been taken into account, i.e. the fact that having recourse to coercive measures that significantly restrained the personal freedom of the individuals concerned necessarily signified an infringement of an essential basic right, on the one hand, and the fact that the use of such coercive measures could to some extent be indeed justified by the need to protect the general safety of others, on the other. In the act of weighing and balancing, attention should have been paid to, e.g., the question of why the more lenient measures than the one now adopted by the police, i.e. overnight custody, were regarded as insufficient in the case, and the issue of how immediate and how concrete the threat against personal security of others was taken to be. The more immediate and the more concrete such a threat could be estimated to be, the more weight could have been given to the crime prevention interest and, accordingly, the more warranted would have been the taking into custody of the three members of the rivalling motorbike club.

No violent clash ever came about between the two motorbike clubs in that occasion, possibly due to the preventive measures taken by the police, as someone might point out. But, on the other hand, if the use of precautionary measures by the police for the sake of preventing a possible threat of crime is accepted in society, the weight given to the legal protection of the individual becomes remarkably weakened, and the police are *de facto* given a universal authorization to take any precautionary measures required in the name of public safety. The legal significance of the basic and human rights would be thereby watered down, as well.

The following case to be considered also deals with the interpretation of Section 20 of the Police Act and the model of weighing and balancing of a set of basic rights.[48] The case lends support to the view that the method of weighing and balancing of basic rights is gaining ground in the legal decision-making practice of officials. On a more general level, such a trend may be taken as an indication of a gradual change in the Finnish legal culture.

The police had apprehended a well-known demonstrator near the place of festivities in Helsinki at the time of Israel's national day banquet for the sake of

48 I gave the decision as the Deputy Chancellor of Justice in year 2004.

"preventing any disturbance or crime" that might be caused by him. According to the police, the person now apprehended had behaved in an "aggressive manner, agitating and inciting the other protestors" in a similar demonstration in front of the Israeli embassy a few days earlier. The police justified the use of coercion against the demonstrator with reference to the then critical political situation in the Middle East, and in asserting that "by apprehending the demonstrator, the demonstration was prevented from turning into a violent occasion where danger might have been induced to the invited guests of the national day banquet, to the demonstrators, and to third parties".

In its statement to the Deputy Chancellor of Justice, the Police Department of the Ministry of Interior Affairs, i.e. the highest-ranking police authorities in Finland, yet pointed out that the situation should rather have been seen in light of the two basic rights involved, i.e. the right to free expression and demonstration, on the one hand, and the right to general safety, on the other. The Police Department also stated that the measures taken by the police could be seen as to some extent disproportional in respect to the prerequisites of the Section 20 of the Police Act, when the issue is looked upon from the point of view of the suggested method of interpretation that aims at fostering the protection of basic rights. Though the Police Department weighed and balanced the two basic rights *vis-à-vis* each other in the *ex post facto* evaluation of the case, no reference was yet made to the one basic right that had the most legal bearing in it, *viz.* the right to personal freedom of the individual apprehended by the police.

6.2.3 The Growing Significance of the Method of Weighing and Balancing

In the recent years, there has been a growing pressure to infringe upon the legally protected rights of individuals by, e.g., tightening up criminal law legislation and the law of criminal procedure as a response to the threat of international terrorism and other crime. It even seems that in novel legislation projects and in public discourse on law, the goal of maximizing security has become widely approved as the "natural" angle of approach to legislation.[49] Such a change in the prevailing attitudes *vis-à-vis* the rights of individuals may have an indirect impact on the legal discretion enjoyed by the police, prosecutors, and customs officials when they deliberate on hard, borderline cases of law and legal interpretation.[50]

In the day-to-day police work, there is a general tendency among the police to read and construct the legal authorization norms that define the extent of their legal powers and the use of coercive measures in an extensive manner. The police, like any other authorities engaged in law-enforcement, have a tendency of fully exploiting the legal powers they are endowed with so as to best fulfil the

49 In the recent Finnish discussion, it has sometimes been suggested whether the maintenance of general security in society is on the way of becoming a some kind of "super-right", i.e. one that has decisive priority over any other rivalling considerations, like the legal protection interest of an individual, in a collision of such rights.

50 I refer to the discussion above in Chapter 1, on pressure external to the criminal legal procedure that may be exerted on the prosecutors' legal discretion on indictment.

assignment they have been given by the legislator. As a consequence, there is a constant risk of a slightly prejudiced reading of the law, which easily leads to the "stretching" of the legal powers allotted to the police.

It is therefore of vital importance to realize that in the hard cases of legal discretion, where the exercise of legally authorized powers and coercive measures by the law-enforcement officials is at stake, the impact of the *legal protection interest* of the individual person, based on the basic and human rights and the rights specified in "ordinary" legislation, always needs to be taken into account as an effective counter-balance to the coercive measures considered. The two seminal interests involved, i.e. the legal protection interest of the individual and the common safety interest of the community as a whole, are to be weighed and balanced against each other so as to reach the state of justifiable equilibrium between them in the concrete case at hand. The issue never concerns the sole maximization of the one or the other interest, but the crux of the matter lies in striking an optimal balance in-between.

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