The Ethics of Criminal Justice

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"Of all the features of social organization, criminal justice has proved the most resistant to the effect of reasoned deliberation and discussion about the nature of the good society and the good polity."

Philip Pettit[1]

1 Introduction

The saying is that criminal procedure is a "seismograph" or "barometer" of the constitution of a state.[2] This is true indeed. When the former socialist countries joined the Council of Europe during the 1990s, criminal procedure broadly understood was a key issue meriting a lot of attention and work. The socialist legal practices did not satisfactorily guarantee the procedural rights of the accused. Many deficiencies were related to problematic institutional arrangements, such as the extensive powers of the investigating authorities, the lack of independence of many of the key actors in the state machinery, and deficient organization of defence. All these features made the necessary reforms rather deep-going. For many years this was a central issue for ECHR as well. The West quite literally learned that the human rights law had implications for the constitutional design of a state, not merely for minor details of procedural arrangements.

By starting with the problems of transition from socialist criminal justice to a western human-rights inspired and constitutionally anchored conception, I wish to draw attention to the fact that criminal justice is indeed an important defining factor when we look at certain general characteristics of polities and how individuals and groups are being treated in them. The legally guaranteed freedom of the citizens of these then socialist countries was very different from what we expect in a country that supposedly offers its citizens full protection vis-á-vis the state itself. Measured by socialist yardsticks, the human rights situation was perhaps not all that detrimental, because the underlying understanding of individual rights was different. The interests of society generally counted for more than the rights of the individual. Law was more a matter of needs than of rights. As long as the state was regarded as good by definition, there was no need to worry about legal safeguards. The "goodness" of a polity thus depends on the yardsticks chosen. Since the collapse of socialist law, the western view of what a good polity should look like has fewer alternatives, but we should keep in mind that the yardsticks are not fixed beforehand. We need to look at the issue of yardsticks as part of our exercise.

If we look at substantive criminal laws instead of criminal procedure, the differences between socialist laws and western laws were probably less eye-catching. Surely the socialist criminal laws had characteristics of their own, including a different understanding of what was actually wrong with criminal offences. The emphasis on "social dangerousness" or "social harmfulness" of the

1 Philip Pettit, *Is Criminal Justice Politically Feasible?*, 5 Buff. Crim. L. Rev 427 p. 427.

2 *See, e.g.*, Claus Roxin, *Strafverfahrensrecht*. 20. Auflage. C.H. Beck: München 1987 p. 9.

act led to offences such as hooliganism being regarded as severe.[3] The rating of the severity of offences was different. The attitudes of the offenders counted for more than in the liberal west. Such features certainly had some impact on the exercise of rights under such circumstances.

I do not wish to turn this presentation into a general comparison of various kinds of actual criminal justice systems and their implications for the rights of the citizens. Instead, I wish to say something about how the legitimacy of criminal justice builds on democracy and respect for human rights. I also wish to say a few words on why democracy and human rights are perhaps not enough in themselves, when we discuss the premises of good criminal justice. The missing pieces I will try to abstract out of something that could be called social and historical experience concerning criminal justice. The rise and fall of *Rechtsstaat* has recently been depicted by Vagn Greve among others.[4] I believe that problems related to repressive law are very useful when we wish to understand general issues related to polities, citizenship, etc. We might learn important things as regards normative political theory by bringing these historically more limited criminal justice issues onto the table of political thinking.

2 Reconstructing a Democratic *Rechtsstaat*

In a Hobbesian world, it would be enough for the people that they were able to predict the actions of the authorities sufficiently to plan their lives. Legislation needs to be put in place, and it is the duty of the sovereign to do what is needed.

It is true that this stage already means a significant step forward from conditions of anarchy. In a Hobbesian Leviathan, the institutionalisation of rights of the individual is only partial. An individual would have no say as far as the content of laws is concerned. According to this model, political rights of the citizens are not part of the social contract.

The philosophy of enlightenment introduced views that built on a stronger position for citizens vis-à-vis the sovereign power. In a democratic *Rechtsstaat*, it was thought, people could achieve a new level of legality, that of the legislation being "self-legislation". The *Rechtsstaat* of sovereign people was to be characterized by the fact that the political legitimacy of criminal justice and the corresponding penal practices flow from the general legitimacy of laws under such conditions.

The concept of a democratic *Rechtsstaat* has been discussed by Jürgen Habermas.[5] The analysis in that book builds heavily on Kantian premises. The idea is that the public reason will be made operative in the structures of a state when

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3 af Trampe, Anna, *Gärningens samhällsfarlighet. Studier i polsk straffrätt*. Iustus, Uppsala 1990 p. 270-275.

4 *Sheep or Wolves*. European Journal of Crime, Criminal Law and Criminal Justice. Vol. 13/4, 515-532, 2005.

5 *Between facts and norms: contributions to a discourse theory of law and democracy*, translated by William Rehg. Polity Press, Cambridge 1996; *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*. Suhrkamp, Frankfurt a.M. 1992.

the communicative flows from the society to the political and legal system have been secured by institutionalizing the fundamental rights and democratic principles in the constitution, the core of the legal system. In a democratic *Rechtsstaat*, the citizenship grows to its full potential, enabling a balanced exercise of rights for the individuals in both roles, the private and the public. People can make use of their liberties in social life as they participate in political decision-making.

The normative reconstruction that Habermas has carried out is useful in itself, showing how the legitimacy of modern law is based on a complex falling together of various pieces, enabling us to understand both the permanent challenges and conditions of the legitimacy of modern law as well as the "positive" nature of modern law in the changeability of its contents. The procedural aspects of modern law account for the fact that we cannot define substantially the contents of law by referring to reason or rationality, since these substantial issues have to be debated, and political decisions have to be taken.

The formal aspects of the legal system also enable legal progress in terms of further institutionalization of new types of civil rights. In human rights terminology, we usually speak of various generations of human and fundamental rights. The rights to freedom and the political rights have been supplemented by new types of social and cultural rights, not to mention environmental rights or rights of those of the next generations. As such changes happen, the social contract, the project of living under a constitution, is in fact being renegotiated.

For Habermas, the actual legal order represents a system of rights that has been manifested in the legislation and court practice. This order is constantly developing as decisions are being taken that define legal rights and obligations in practice.

Understood this way, the *Rechtsstaat* and the social welfare state are not in opposition, but are different stages of development of a state and the legal order. The formal structures of the *Rechtsstaat* have opened the way to a development towards a social welfare state as new types of rights and laws have been introduced. At the same time, however, the social welfare state which adopts new types of functions and policies still needs to accommodate its formal constitutional structures. The legitimacy of the legal system continues to build on the original structures. The welfare state also needs to be a *Rechtsstaat*.

3 Criminal Justice as Part of a Normative Reconstruction of a Democratic *Rechtsstaat*

Some words now need to be said about how criminal justice fits into this picture. Is criminal law a legitimate part of general laws? Is it alright that the public decides to fight criminality by resorting to criminal justice? And what about the move from a minimalist *Rechtsstaat* towards an interventionist welfare state? Is criminal law part of the original liberal *Rechtsstaat*, or is the criminal law of a social welfare state different? Is there something specific about criminal law and how does "*Rechtsstaatlichkeit*" connect with it?

I think that criminal justice presents a problem for the general Habermasian approach to begin with. The defence of the voice of the people, and ultimately of

the communicative reason, is so dominant in that theory that it seems to entail the risk of legitimating too much of positive law. Criminal justice could be just the area in which this might easily be the case being almost by definition based on positive law. This positiveness does not guarantee much internal quality. Additional substantial requirements need to be put in place, which is where we get started.

I believe that there is indeed a sense in which criminal law needs to preserve more of its *Rechtsstaatlichkeit* than do other branches of law. The core values and principles of criminal law continue to be limiting and protective, because we are dealing with repressive law. The principle of legality with its various dimensions, the principle of culpability, and the *ultima ratio* principle are all part of the *Rechtsstaat* tradition, and all have a close connection with the constitution since they all represent constitutional values in some sense. A strictly and legally limited system of criminal law is actually a condition for effective protection of fundamental rights. Without strict legality, many of our rights could be endangered. *Rechtsstaatlichkeit* is a matter of culture, a matter of doing things.

Criminal justice also has its aims and policies, and needs to justify itself by the promise of some functionality. Criminal law needs to deliver goods; it needs to grant protection to various rights and interests. It needs to be socially relevant. The German key word is *Rechtsgüterschutz*, protection of legal interests. The defensive aspects of *Rechtsstaatlichkeit* are related to some sort of offensive goal. Criminal law needs to satisfy expectations both as regards its substantive content as well as its form.

The tension between the form and substance, between defensive and offensive also manifests itself in the two aspects of criminal law norms as rules of behavior. Criminal law norms on setting some forms of conduct under the threat of punishment can be regarded either as intervention on the part of legislature, or as expressions of certain fundamental values. Quite often, both of these understandings are possible. Having provisions on theft or murder in the penal code can be regarded as an expression of shared values in the community. Since it is very unlikely that practices such as theft and murder could be publicly defended politically, we do not take such regulations to be of interventionist nature. It is really not a matter of communicating censure. Rather, the polity can be seen as defining itself by deciding on questions of right and wrong. No sharp distinction between these two types of law is possible, being more a matter of degree, and a matter of perspective.

In multicultural societies, different groups could look at the criminalisations differently. One group might regard the issue as already settled, whereas another might wish to contest the views adopted. The criminalization of the use of drugs would hit the community of the Indians deep, if they were longer entitled to smoke their peyote-pipes during ritual ceremonies.

The adoption of a rights perspective might also raise new issues and conflicts. Many practices that have not been regarded as legally relevant, such as the circumcision of boys, might suddenly appear as topics to be discussed. The rights perspective forces us to rethink traditional practices which, according to the new perspective, might become problematic. It is clear that the fact of multiculturalism presents new kinds of challenges from the point of view of reaching political

agreements on how to deal with various kinds of issues.[6] It might often be best not to enter the field at all with criminal justice.[7]

4 From *Rechtsstaat* to *Rechtsstaatlichkeit*

The tradition-boundness of criminal justice suggests that there is something specific about criminal law that merits attention. Our way of thinking about criminal law and issues of legitimate punishment always needs to be brought back to this *Rechtsstaat* context. We cannot adopt fully instrumentalist positions as regards criminal justice, because this would in some important sense be contrary to our presuppositions about the nature of our mutual relationships as members of the political and legal community.

As participants and members of the polity, we are all political people basically possessing the ability to participate. The concept of citizenship summarizes these presuppositions. As members of the legal community, we are legal persons who share the ability to possess rights and have duties. As legal persons we are the addressees of legal norms, and we can be held accountable for our failures to act according to them. In fact, the criminal justice presupposes that issues of guilt and responsibility can be dealt with adequately within this context of legal personhood. It cannot be doubted that this double back-up of criminal justice is absolutely fundamental, because theorizing about issues such as civil disobedience requires that we be able to distinguish between these two person-roles, but simultaneously bring them into contact with each other. For political reasons, sometimes we have to understand civilly disobedient behavior, which at the surface level looks like ordinary law-breaking. Both of these roles imply that we as persons are rational, that is, that we can be moved by reasons. Both of these roles imply certain ability to deliberate, to give reasons, and to get involved in arguments.[8]

This ability to reason and to give reasons is indeed needed, when issues of criminal justice are on the agenda. *Rechtsstaatlichkeit* generally summarizes certain ethical principles, and this applies specifically in a criminal justice context. Nils Jareborg, for instance, mentions that the *ultima ratio* principle, the idea of resorting to criminal justice only when no other alternative is at hand, is an important principle of legislative ethics rather than a constitutional principle.[9] I be-

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6 Some of these I have discussed in the paper *Between Denial and Recognition: Criminal Law and Cultural Sensitivity*, presented at the workshop "Criminal Law and Cultural Diversity", University of Columbia, N.Y., March 10-12, 2006. To be published in *Retfaerd* 1/2008 (forthcoming).

7 "Communication and punishment just do not sit comfortably together", writes Duncan Ivison in his *Justifying Punishment in Intercultural Contexts*, in Matravers, Punishment and Political Theory. Hart Publishing, Oxford 1999, 88-107 p. 106.

8 On the issue of the two roles of the deliberative person, see Klaus Günther, *Schuld und kommunikative Freiheit. Studien zur personalen Zurechnung strafbaren Unrechts im demokratischen Rechtsstaat.* Vittorio Klostermann, Frankfurt am Main 2005, 248 ff.

9 Nils Jareborg, *Criminalization as Last Resort (Ultima Ratio)*, 2 Ohio St. J. Crim. L. 2005, 521 ff.

lieve that we could read into such principles of legislative ethics a view of constitutionality which is crucial for our topic. The polity which takes the principle of *ultima ratio* seriously is at the same time one which respects certain specific ethical requirements for criminal justice.

The discussion of a good polity needs, in my view, to start by recognizing that criminal justice is different, that criminal justice is in need of good reasons, and that it is a matter of an ethical discussion in general. The ethical context is also indicated by the internal links between the criminal justice and the moral and ethical as well as political reasoning.

Some abolitionists might take this ethical requirement so seriously that they would not accept the use of criminal justice at all. I think this makes sense. A good polity might be one which manages to do without criminal law and punishment in the first place. A community which could arrange its internal affairs without repressive law would be ideal in some sense. As long as there are other alternatives, criminal justice is unethical, says the principle. Panu Minkkinen's view is not much less radical. He speaks in favor of a reversal of the logic of argumentation: the last resort principle, understood as a binding legal principle, forces all criminal law argument to be critical. The justification of a sentence is always conditional, because it requires the satisfaction of this very demanding principle.[10]

We might also continue the search for the ethical path further, and ask whether we really need the enforcement of punishment in order to achieve the goals we have set for criminal justice. Why is it not enough that we carry out the procedure and pass a guilty verdict on those who deserve it? It would certainly be easier to justify the use of criminal justice if this did not have to include infliction of pain. A criminal procedure would be able to perform most of the tasks that are necessary also without formal enforcement of sanctions, and without sentencing. It would allocate responsibilities and draw lines between right and wrong, it would communicate blameworthiness, give the victims of crime an opportunity to present their views and be heard, restitution could be ordered, etc. The question of "why punish" should be dealt with sophistically enough, and it clearly has consequences as concerns the issue of a good polity. In fact, Klaus Günther has proceeded in this direction, questioning the legitimacy of inflicting punishment and defending the sufficiency of attribution of responsibility.[11] Certainly, in a good polity, the attribution of responsibility is the main task of criminal justice, not the enforcement of punishment entailing hard treatment.

We might here also refer to the experiences that have been gathered from court proceedings for international war crimes and crimes against humanity. Many traditional legal principles lose their meaning when we shift to dealing with massive human disasters. It is almost macabre to try to meet out sentences

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10 Panu Minkkinen, *"If Taken in Earnest". Criminal Law Doctrine and the Last Resort*, 45 Howard J. of Crim. J.5, 2006, p. 521-536.

11 Klaus Günther, *Responsibility and Punishment*. Draft paper presented at the 21st IVR Congress 2003, Lund, Sweden; Special Workshop on Criminal Responsibility. See also his *Schuld und kommunikative Freiheit. Studien zur personalen Zurechnung strafbaren Unrechts im demokratischen Rechtsstaat.* Vittorio Klostermann Verlag, Frankfurt am Main 2005.

for genocide according to just desert principles. In such proceedings, the aims must be something quite else. It must be necessary to go through the process, and the main point is to clarify what has happened and who can be regarded to be responsible for it. Once again, the attribution of responsibility is the crucial point, not the punishment aspects of the sentencing.

There is also something important in the fact that the historical experience, the surrounding insecurity and the weaknesses in the legitimacy of criminal justice have probably raised the significance of the protective ethical principles as an issue specifically related to crime and punishment. I would like to maintain that this ethos is very important if we wish to read further consequences as to the nature of the polity into criminal justice context. In a good polity, criminal justice would be kept with ethical limits. This might entail a general warning and caution about resorting to criminal justice measures. We need to elaborate a bit on what this might mean.

It is an important aspect of a *Rechtsstaat* that, before entering on particular legal and political issues, people recognize each other's specific roles as subjects. First, we need to regard each other as persons capable of at least some extent rational action, action arising from understandable internal reasons, and responsible for the actions taken. This recognition establishes some sort of a community between us in which we start seeing ourselves as members of the same association. At the next step, we can say that we recognize each other as holders of rights. It would be helpful to elaborate more on this stepwise foundation of a polity to see all the nuances that being part of the same polity implies and presupposes. Of course this is not a new topic: much of the history of political thinking consists of efforts to present some sort of reconstruction of the terms for a legitimate political and legal rule.

The mutual recognition as persons and as holders of rights which is part of the normative reconstruction of a *Rechtsstaat* has important implications for the ideology of criminal justice. It entails a particular picture of human agency in moral terms. In some sense it implies, at a normative level, the presupposition that people are willing to be bound by commonly agreed laws, that people are in some sense committed to the polity they are part of. It is for this reason that so-called positive general prevention is a legitimate goal for criminal justice, but not necessarily general deterrence. The former addresses citizens as responsible people instead of sources of trouble. In a *Rechtsstaat*, we should not normatively take a position that our fellow citizens need to be deterred, at least before we get some evidence that this is indeed the fact.

The theory of positive general prevention actually has several interesting aspects: it forces the we-perspective on the system, including the political system, and shifts the emphasis from punishment to the attribution of responsibility.[12] It at least indirectly disconnects criminal politics from the mechanical dynamics of raising stakes and raising punitivity that seems to go along with the deterrence approach, according to which every crime is a proof of failed deterrence. Posi-

12 *See*, generally, *Positive Generalprävention. Kritische Analysen im deutsch-englischen Dialog*. Uppsala-Symposium 1996. Eds. Schünemann, von Hirsch und Jareborg. C.F. Müller Verlag. Heidelberg 1996.

tive general prevention theory brings to the fore the issues of self-definition through political decision-making, seeing criminal laws more from the point of view of their symbolic-normative content than as means of combating criminality. The theory of positive criminal prevention has a different kind of approach towards what it is to abide by the law, compared with its competitor(s).

This approach has a counterpart in rehabilitation as a goal of punishment, since it re-establishes full belonging to the community when the sentence has been served. A prison sentence without such, without regaining full membership of the community, would risk being inhumane and unethical. In a good polity, prisoners continue to be members of their communities, continuing to participate in public elections, etc., even during the time of servitude.

5 The Ethics of Criminal Justice

It should be clear by now that if we wish to look at what a good polity would have to be like, in some normative sense, and what we could expect of a good criminal justice of such a polity, democracy and human rights (or fundamental rights) are an elementary and necessary part of the conception. Still, in my view, democracy and human rights need to be placed in a wider context of a *rechtsstaatlich* ideology and culture, in order to give a full account of such a view.

Democracy without human rights runs the obvious risk of the tyranny of the majority, whereas human rights without democracy runs against the presupposition that the law is ours. I think we could say that both of these requirements count nowadays as some sort of minimum requirement for an ethically defensible criminal justice. But as mentioned earlier, this does not amount to full proof of the legitimacy of criminal justice. It would be valuable to go beyond them, and see if there are other relevant ethical points of view which need to be added. These additional requirements stem in one way or another from the quality of criminal justice as repressive.

The ethical principles for the use of criminal law must be normative and idealistic in nature, because it is self-evident that actual criminal justice often fails to satisfy such high ethical criteria. The *ultima ratio* principle, for instance, has been widely neglected. The death sentence is still in use in many countries, even those that have committed themselves to human rights and democracy. It would be very difficult to present a coherent philosophy of criminal justice that would fit the current systems.

The issues concerning the qualities of a good polity are probably an optimal context for deliberations concerning what a good criminal justice should be like. It is self-evident that the history of criminal justice, the brutality of which very few of us surely wish to doubt, has a lot to offer to such a normatively ethical scrutiny.

Philip Pettit has noticed the fact that not only undemocratic societies do badly by criminal justice, but even democracies have problems. There seems to be something like a general difficulty in legislating properly on issues relating to criminal justice, which could be seen as a weak point of democracy. Why so? Pettit claims that the answer is that criminal policy is so difficult to carry out.

There is a kind of an outrage dynamic which favors offensive solutions above defensive, high penalties above low ones. In the minds of the people criminal justice promises security and freedom for the good citizens, and the more we have of it the better. The paradox of humanness is that the more sensitive we become to cruelty and violence, the more harshly we wish to react to it. The vicious circle acts by the force of a kind of psychological law. The problem with democracy is that it cannot ameliorate anything. For that reason, Pettit proposes specific institutional arrangements that could leave more room for truly informed politics.[13]

I think we could relate this finding to the general ethical mentality that I have been speaking about as *Rechtsstaatlichkeit*, since the outrage logic builds on the polarization between us and them. It is not citizens who commit crime, but "the other". Criminal justice is there to protect us against them. In a polity that takes the we perspective seriously, the criminal political talk could not adopt such a polarized perspective. Criminal politics would rather be about defining our relationships with each other. Under such conditions criminal justice would amount to a self-definition of the community.

An ethics of criminal justice committed to the non-utilitarian questions, the issues of what are good rules for separating legally right from wrong, and what forms of action in the last resort should be offences, that would build on mutual recognition and mutual respect, that would let these ideas penetrate all the levels of criminal justice, would mark a good polity. It would preserve the moral contents of criminal justice without turning it into moralism. It would address people as members of their community, but would leave the legal and moral responsibility for actions to individual people.

This sounds idealistic, certainly. We should therefore say something to the critics who will immediately raise their voices. What about crimes of violence, what about habitual criminals that do not feel at all committed to the polity? Should we really neglect the interests of the society when framing the issues of good criminal justice of a good polity?

To my mind, the crucial ideological division is whether we really commit ourselves to the we-perspective and try to design criminal justice so that it respects as far as possible the fact that the offender also is part of the community, and continues to be so despite having done something wrong. For people who are, as indicated by their criminal history, really not capable of being motivated by good moral reasons, another type of system may apply. But this is not the topic here: I wish to discuss the quality of a polity in terms of how it views the ordinary issues of justice related to crime.

Human rights are universal by nature. They are also idealistic in the sense that they are not always respected. And, as we saw before, the content of human rights may develop. Human rights represent idealism is some sense. If we wish to elaborate the sources of a criminal justice ethics we could try to point out commonalities behind such an ethics and the ethics of human rights.

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13 Philip Pettit, *Is Criminal Justice Politically Feasible?* 5 Buff. Crim. L. Rev 427 ff.

I think we can clearly point out such commonalities. Both of these types of law base their rationale on some factual premises. H.L.A. Hart once spoke about the minimum content of natural law.[14] Law matters because we are all vulnerable and we need law to arrange our social life. As individuals we are not perfect; we are neither angels nor devils.

I think that the ethics needed at least partly stands on the footing of the awareness that life is full of risks, and that not even the law can guarantee full safety. We will all die anyway.

Such a basic understanding of human life adds something to the ethics of criminal justice. Even though we all possess particular capabilities, we are different in many ways. We do good things and we do bad. Some of us as are more vulnerable than others, and some of us might be more tempted to commit crime than others. My proposal is that when we reconstruct the democratic *Rechtsstaat* we should add something about this to the underlying mutual recognition structure. We should recognize certain facts of life, and not simply the rights of others. By introducing this mutual recognition of the vulnerability of life we come to understand better why repressive law faces specific challenges. Establishing an order by means of criminal justice cannot change this fundamental human condition. It cannot prevent evil from existing. Evil is part of human life irrespective of the polity in question.

This factual premise might also be phrased in terms of some sort of solidarity. Belonging to the same polity has its rationale in that our all being equal before of the challenges of life, equal in spite of our being different. Our politics need to take such relevant differences into account.

Another point in making this realistic amendment is that we will also see the facts of punishment more realistically. We should keep in mind that many forms of hard treatment, such as long-term imprisonment, have an impact on the prisoners' lives and existence that almost certainly goes much beyond what has been the original purpose of ordering such punishment. We humans are weak and vulnerable not only as offenders and victims of crime, but as objects of enforcement of sanctions as well. The criminal justice of a good polity takes all these matters into account. In general, I believe that in a good polity the public policy is reluctant to react to criminality with harsh punishment. A realistic approach does not tend towards increased punitiveness, but recognizes the somehow fundamental character of criminal justice. Repressive law thus needs to be dealt with as something special, as not quite ordinary law. The ethical context limits the possibility of seeing criminal justice in purely utilitarian terms. Criminal justice has to be measured by ethical yardsticks.

This ethical context of course causes tensions when criminal justice should be adapted to interventionist functions. A modern welfare state adopts by construing new types of offence, and liability structures need to follow. The culpability requirement may sometimes be dropped, and legal entities punished for crimes. The modernization of law has not left criminal justice untouched. My claim is, however, that bringing issues such as safety at work or environmental pollution into the core of criminal justice changes the ethical context. This has many con-

14 H.L.A. Hart, *The Concept of Law*. Second Edition. Clarendon Press, Oxford 1994, Ch. IX.

sequences. Criminal justice always needs to be built according to models that respect the specifics of this branch of law. I would say that even market phenomena become ethical when we look at them in terms of criminal justice. We are forcing the market players to adopt a common we-perspective, which may be difficult for them. But, if we do not wish to impose an ethical context on actors 'who act' on entirely other grounds, then we should resort to another way of managing the issue. In fact, I do not believe that companies, for instance, are incapable understanding issues of blameworthiness, social responsibility, and the like. They may calculate the costs and benefits of their decisions, and they may not be able to fully understand the moral communications of criminal justice, but as long as human actions are necessarily involved, the criminal justice may succeed in bringing the ethical aspects to the front.

If the picture that I have been painting is correct, the pressures that a polity faces when designing and operating criminal justice are not really easy to handle. The defensive, ethically contextualized model that I have presented can rather clearly be contrasted with other models. My claim is that a good polity should see the legitimacy of its criminal justice in this light, and that a criminal justice built on such premises would probably deserve to be called good at least in some sense.

Without a doubt, the approach remains at the level of a very general reconstruction. The difficulty is that the polity should, even after choosing some fundamentals of a criminal justice ideology, still have to turn these ethical building blocks into actual legal norms and institutions. In my understanding, the law's positivity also needs to be taken into account. This positivity will, however, be limited in many ways. The imagination of the legislature should be restricted by forcing it to regard issues of criminal justice as ethical issues that cannot be dealt with politically on the basis of interest representation only. They require political handling as ethical issues.

Put in another way, democracy and human rights thus require balancing. The most important thing is that criminal justice issues always need to put in the context of human rights, and cannot be separated from them. The connection with human rights guarantees that the context is right.

Some reflections need to follow now concerning the issue of feasibility of this normative program. I believe that we need to look at parliamentary decision-making. From my point of view, criminal law issues require deliberative forms of democracy.[15] The parliament needs to be able to discuss issues concerning the limits of criminalisation and other details of the legislation with due diligence. Issues concerning participation would merit much more attention than has been the case in this paper. We should have to include in such discussions topics such as lay participation, the specific legal culture of lawyers, the legal arguments in legal application and how they can be understood by the larger legal community, etc. The legal cultures probably have significant differences in the practices adopted. How popular participation should be arranged and taken into account in the design of the system may also vary.

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15 *Cf.* the various essays included in James Bohman and William Rehg (Eds.), *Deliberative Democracy. Essays on Reason and Politics.* The MIT Press, Cambridge 1997.

If we think specifically about the parliamentary level of participation, we see that this political level is also tight controlled by legal reason in a "good" polity. The enacted laws and norms need to be adapted to the existing body of law. An effective human rights or fundamental rights discourse might be valuable in this context, because it imposes a specific burden of argument on the side of those who require resort to criminal justice. In the Finnish context the issues of legitimate criminalisations are today viewed in terms of constitutional principles in that a doctrine has been developed that sets limits to enactment of new criminalisations on the basis of fundamental rights.

Not only does the work of legislature need to be controlled legally, but the work of the judiciary as well. In my view, the natural way is to let the fundamental rights and other relevant pieces of law have an impact on the application of criminal laws. This is natural because the fundamental rights will be manifested as an effect of legal application in any case. Freedom of speech will be partly defined when the courts decide on the limits of what is regarded as punishable as insult. Why should we not let the general legal principles and the fundamental rights guide the application of penal laws?

Another thing is that we probably also need some sort of republicanist amendments to our theory. An ombudsman, for instance, might be an important additional actor ensuring that the courts and the officials stick to their roles, and that the judges and the officials also continue to take responsibility for their actions. Even legal science has a role to play, in building bridges between different levels. It needs to elaborate on the premises of various doctrines and principles, and to assess normatively systemic premises of criminal justice. At the deepest level, criminal law theory needs to consider the roots of legitimacy of criminal justice in the more general context of a democratic *Rechtsstaat* and in the political thinking rendering the law of such a polity legitimate. Under such scrutiny, I suggest, criminal justice being of repressive character is a relevant fact.

6 Repressive Justice?

If criminal law and criminal procedure can be regarded as good indicators of the current stage of the *Rechtsstaat*, we could also say that the criminal justice cannot do much better than the overall legal order and the constitution. The erosion of the *Rechtsstaatlichkeit* of criminal justice could, as we readily apprehend, mean the erosion of the *Rechtsstaat* itself.

There is one aspect left which is especially interesting and which affects all possible efforts to "tame" the ultimate expression of a state's authority, that is, the execution of a punishment by building ethical or constitutional limits to its use. This relates to the fact that the right to punish, the ultimate original source of the right of the state to punish, has never really made its way into the written constitutions.[16] It is difficult to tame something which is of constitutional nature but which creeps into the state's powers without ever really being put on the ta-

16 This I have discussed in *Criminal law of a transnational polity*, in Müller-Dietz et al (Eds.), Festschrift für Heike Jung. Nomos, Baden-Baden 2007 p. 685-698.

ble. Probably for this reason the repressive law normatively presupposes the right to punish which is different and raises issues that go far beyond ordinary ones.