1. Introduction

The constitutional aspects of criminal law and criminal procedure only began to receive serious attention in Finland in the 1990s. The remarkable change in legal thinking and practice in this respect was connected to two major legislative reforms: firstly, Finland ratified the European Convention on Human Rights and Fundamental Freedoms (ECHR) in 1990 and, secondly, new provisions on fundamental (basic) rights were incorporated in the Finnish Constitution in 1995. A fully revised new Constitution of Finland was enacted in 1999 (to be entered into force on 1 March 2000), but the substance of fundamental rights and freedoms was confirmed already in the constitutional reform of 1995.

Those aspects had not, however, been completely overlooked before. Most of the relevant human rights treaties were eventually ratified in Finland (e.g., the International Covenant on Civil and Political Rights, CCPR) and, when ratified, they were incorporated into the domestic legal order. Nevertheless, courts or administrative authorities very seldom referred to human rights treaties or constitutional rights before the late 1980s; a tradition of invoking constitutional rights in the courts was lacking. Instead, human rights treaties and constitutional rights were primarily regarded as binding the legislator. The first references to human and constitutional rights were made in decisions of the Parliamentary Ombudsman and the Supreme Administrative Court.

Theoretical discussion was necessary for creating a sound basis for an alternative understanding of the role of human and constitutional rights and, accordingly, for a change in legal thinking and practice. An emphasis on general doctrines and principles was typical for Finnish legal literature in the 1980s and early 1990s. Two authors were often cited: Ronald Dworkin and Robert Alexy,¹ whose distinction between

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rules and principles as two categories of legal norms was frequently analyzed and utilized in Finnish legal theory. Concepts and theories of human rights law were developed; an influential theoretical conception was based on the distinction between the rule effect, the principle effect and the standard effect of human rights norms; it was further based on an analysis of how human rights provisions operate in concrete decisions. The political decisions of the Finnish government in the late 1980s to apply for the membership of the Council of Europe (and join the ECHR) and to begin the revision of the Constitution affected also the theoretical discussion about the status of human and constitutional rights. Basic human values, principles and rights were increasingly seen not only as requirements of justice, humaneness, or other dimensions of morality but also as judicially relevant phenomena.

The Finnish legal system has, since the enactment of the Constitutional laws of 1919, followed a model of democratic Rechtsstaat where democracy and fundamental rights are regarded as complementary principles in a strong sense: there is no judicial review, nor is there a constitutional court for the review of the constitutionality of laws. Instead, the conformity of a bill to the Constitution is only assessed during the legislative process. Therefore, the ratification of the ECHR and the reform of constitutional rights in the 1990s were remarkable in that they implied the direct applicability of individuals’ fundamental rights in the courts. It may be mentioned here that there is a strong legalistic tradition in Finland. The steadfast reliance on the rule of law goes back to the “Russification period” before Finland’s independence (1917), when its autonomous status as the Grand Duchy under the Russian regime and the special constitutional position once secured for it, were threatened.


4 See, e.g., Yrjo Blomstedt, “A Historical Background of the Finnish Legal System”, in J. Uotila, ed., The Finnish Legal System (Helsinki, 1966) 7-23, at 19. Finland was annexed by the Russian Empire during the Napoleonic wars, but the Russian Emperor promised to uphold Norway’s own Constitution and laws (inherited from Sweden, to which Finland belonged as an integral part until 1809).
2. Finland and the Ratification of the ECHR in 1990

In May 1990, Finland ratified the European Convention on Human Rights and Fundamental Freedoms (ECHR), accepted the jurisdiction of the European Court of Human Rights and recognized the right of individual petition. Before that, an in-depth study on the compliance of Finnish legislation with the ECHR and Strasbourg case law was carried out. Several Acts of Parliament were amended, for example, with respect to criminal investigations and the rights of aliens.\(^5\)

The ECHR and other important human rights treaties have been incorporated through Acts of Parliament in bianco. Because of the predominance of this incorporation method, Finland can be said to represent dualism in form but monism in practice, when implementing international law into the domestic legal order. The implementation method affects the application of human rights treaties. The Parliamentary Select Committee for Constitutional Law has confirmed the following principles: the hierarchical status of the domestic incorporation act of a treaty determines the formal rank of the treaty provisions in domestic law (i.e., their rank is normally that of an Act of Parliament); incorporated treaty provisions are in force in domestic law according to their content in international law; and the courts and authorities should resort to “human rights-friendly” interpretations in domestic cases, in order to avoid conflicts between domestic law and human rights law.\(^6\)

Before the Finnish ratification of the ECHR there were no references to international human rights conventions in the case law of the Finnish Supreme Court, although the Parliamentary Ombudsman had applied international human rights law in his decision-making in the years before ratification. The first cases where the Supreme Court expressed its willingness to apply international human rights norms were decided in 1990 and dealt with the extradition of persons accused of hijacking an aeroplane in the former Soviet Union. In all four cases, the Supreme Court informed the Ministry of Justice that, in its opinion, there were

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no legal obstacles to extradition in the concrete cases, while stating that a rule of non-refoulement, directly binding on Finnish authorities, could be inferred inter alia from Art. 3 of the ECHR and Art. 7 of the CCPR.\(^7\)

Since these extradition cases, the Supreme Court has most often applied human rights norms, e.g., Art. 6 of the ECHR and Art. 14 of the CCPR, in issues concerning criminal procedure. These treaty provisions have been directly applied in order to fill certain gaps in Finnish legislation on criminal procedure or, at least, references to them have been made when interpreting domestic provisions.

Two examples of the reasoning from the first years may be mentioned. In the leading case 1991:84 the Supreme Court stated that, according to the principles laid down in Art. 14(3)(e) of the CCPR and in Art. 6(3)(d) of the ECHR, anyone charged with a criminal offence has the right to examine or to have examined witnesses whose testimony has been used against them. As a person had been convicted on the basis of statements given in earlier trials, the Supreme Court remitted the case for retrial at the District Court.

In the case 1992:73 the Supreme Court referred to Art. 6(1) of the ECHR and to Art. 14(1) of the CCPR guaranteeing the right to a fair trial, and to Art. 6(3) of the ECHR and Art. 14(3) of the CCPR, the right to be informed, in detail, of the nature and cause of the accusation or charge against the person, and to have adequate time and facilities for the preparation of a defence. As the defendant had not been informed of the possibility that he could be found guilty of a more serious offence than the one mentioned in the charge, he had not been informed, in detail, of the charge against him and had not had adequate facilities for the preparation of his defence. Therefore, he could not be convicted of aggravated assault but only of assault. The Supreme Court reduced the sentence accordingly.

The approach of the Supreme Court described above is in line with the “human rights-friendly” interpretation emphasized by the Parliamentary Select Committee for Constitutional Law. The human rights treaties have also had an influence on the development of the legislation on criminal procedure since the end of the 1980s, as will be explained below (section 5).

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3. Constitutional Reform in Finland in 1995

New provisions on fundamental rights in the Finnish Constitution were enacted in 1995. The new provisions on basic rights, much more detailed than the earlier ones, for instance, in that they concern not only fundamental freedoms but also social rights, have been essentially inspired by the international human rights treaties. From the point of view of criminal law, important new provisions relate to the legality principle in criminal law (corresponding to Art. 7 of the ECHR and Art. 15 of the CCPR) and the principle according to which a punishment entailing the deprivation of liberty can only be imposed by a court of law.

Several of the enacted constitutional provisions make reference both to basic and to human rights, thus giving semi-constitutional status to human rights treaties. The travaux préparatoires of this reform emphasize the point that the constitutional provisions are also directly applicable in the administration of justice by judges and authorities; thus, their binding effect is not restricted to law-making only. In addition to the "human rights-friendly" interpretation of the law, a similar "basic rights-friendly" interpretation was recommended, although the prohibition of the courts to examine the constitutionality of Acts of Parliament was maintained.

As a result of these comprehensive legislative reforms, the significance of individuals' fundamental rights has been strengthened. A certain change in the relationship between democracy and fundamental rights, as well as between the different branches of government, has taken place. For instance, some critics of this development have been concerned about the weakening of the position of the Parliament in the hands of an emerging "Richterstaat" (judiciary state). On the other hand, proposals were made for a constitutional amendment which would expressly authorise the domestic courts to review the conformity of laws with the human rights treaty provisions and the Constitution, at least in certain respects. Such an amendment was also made when enacting

8 As for a compilation of the provisions on the basic rights, Constitutional Laws of Finland, The Parliament of Finland, et al. (Helsinki 1996).
9 So Scheinin, in International Human Rights Norms in the Nordic and Baltic Countries, supra n. 6, at 276.
11 See especially Curt Olsson, "Om lagprövning" [Judicial review], vol. 130 (1994) Tidsskrift utgiven af Juridiska Föreningen i Finland 443-503.
the new Finnish Constitution of 1999: its Sec. 106 empowers and obligates the courts to give priority to the provisions of the Constitution over an ordinary Act of Parliament in the case of an "obvious conflict". Every court shall then in casu give precedence to the Constitution but the Act of Parliament itself remains in force (until its possible repeal by the Parliament).

4. Finnish Criminal Law Reform and Constitutional Rights

The ideological change, with its greater emphasis on human and basic rights, has also had an effect on the criminal law reform in Finland. It is obvious that the rise of human and basic rights in legal thinking and practice will increasingly have an influence not only on the Finnish criminal law but also on its theoretical basis.

The preparatory work for the recodification of the Finnish Penal Code of 1889 started already in the 1970s, before the emergence of the new human and basic rights thinking. Nevertheless, two basic legal principles have governed the Finnish criminal law reform: the legality principle and the principle of culpability (Schuldprinzip). These principles are justified primarily on the basis of their compatibility with the judicial values of legal certainty and predictability. At the same time, the principles can be defended with reference to the utilitarian argument of general prevention. A necessary prerequisite for the persuasiveness of such a parallel or complementary justification is that general prevention means "positive" or "integration" prevention, in other words, the effect that criminal law has in maintaining and strengthening moral and social norms. It must be kept in mind that those basic principles are significant not only when reforming criminal law but also in its actual application.

The legality principle in criminal law can be divided into four subrules: the rule that only the law can define a criminal offence and prescribe...
a penalty (*nullum crimen sine lege scripta*); the rule that criminal law must not be applied by analogy to the disadvantage of the accused; the prohibition of retroactive application of the criminal law to the disadvantage of the accused (*nullum crimen sine lege praevia*); and the rule that a criminal offence must be clearly defined in the law (*nullum crimen sine lege certa*). This kind of classification of the main contents of the legality principle is generally accepted e.g., in the case law on Art. 7(1) of the ECHR (see, for instance, the recent case *C.R. v. The United Kingdom* 22 November 1995).14

The legality principle has been included among the new basic rights (Section 6a of the Constitution Act); it is equivalent to Art. 7(1) of the ECHR and Art. 15(1) of the CCPR:

No one may be found guilty of a criminal offence or sentenced to a penalty on account of some act for which no penalty had been prescribed by Act of Parliament at the time of its commission. No greater penalty shall be imposed for a crime than that which was prescribed by Act of Parliament at the time of its commission.

The provision in the Constitution Act has strengthened the significance of the legality principle as the most important fundamental right of an individual. As can be seen from the citation, this provision is intended to be applied more strictly than the corresponding provisions in the ECHR and CCPR, in so far as the definition of a crime and the prescription of a penalty must be based on an Act of Parliament.

The legality principle includes *inter alia* the requirement of certainty of criminal law. The aim of limiting judicial discretion is predominant in the reform work. While, for instance, the Swedish Criminal Code of 1965 has been criticized for using overly vague definitions of criminal offences, those responsible for recodifying the Finnish Criminal Code (FCC) have striven to describe the offences as clearly as possible, for example by reducing the use of value-laden or otherwise ambiguous terms in the definition of the offences. On the other hand, the objective of more precise definitions collides with another aim of the Finnish reform work, namely the effort to synthesize the definitions, in other words, to write them in a more abstract form (as in the definition on

"Imperilment")\(^{15}\) and to facilitate a progressive development of the criminal law through judicial law making. A reasonable balance between these conflicting aims needs to be sought.

An accommodation may also be required between the principles of comprehensibility and certainty. Although clarity is a function of both comprehensibility and certainty of language, the maximization of the one may be detrimental to the other.\(^{16}\)

Other means of curbing judicial discretion have also been used. Thus, in many cases, existing categories of criminal offences have been split into subcategories (e.g., assault, aggravated assault and petty assault), with the definition of an aggravated offence being based on an exhaustive list of criteria (of course, a more lenient evaluation is always discretionary). In addition, the numbers and ranges of penal scales (punishment latitudes) have been generally reduced.

In accordance with the legality principle and the values underlying it, the basic concepts and principles governing the general preconditions of criminal liability will be defined in the general part of the Criminal Code to a greater extent than is the case now. It is obvious that inter alia, the concepts of intention and negligence, as well as the preconditions for criminal liability for omissions will be defined in the new Code (unlike the Code in its current form).

One way to strengthen the legality principle is the effort to reduce and specify the use of the so-called blanket (reference) provision technique. Blanket provisions are often added to legislation for the general criminalisation of violations of the act in question or of enactments given on the basis of that act. The new provision on the legality principle in the revised Constitution should oblige the legislator and the courts to take a strict course of action in this respect, because such acts must have been punishable under an Act of Parliament at the time when they were committed. A new challenge is created by Finland's membership in the European Union (EU) since 1995, because “integration by reference”, for the purpose of incorporating the European Community (EC) norms, is

\(^{15}\) See FCC 21:13: "A person who intentionally or through gross negligence places another in serious danger of losing his/her life or health, shall be sentenced, unless the same or a more severe penalty for the act is provided elsewhere in the law, for imperilment to a fine or to imprisonment for at most two years”.

extensively used by the Member States of the EU. The obligation to enforce EC-norms into the national legal orders of the Member States affects their criminal legislation, too. While the EC regulations shall be enforced as such, without any national transformation, the blanket technique must still be used in corresponding criminal provisions.

The new constitutional provision on the legality principle, taking account of its travaux préparatoires and the tradition to transform the international treaties requiring the penalising of certain acts, appears to lead to the conclusion that the Finnish courts are not allowed to pass sentence for an act which constitutes a criminal offence under international law alone. The legality principle is, of course, not the only fundamental — although it is the most important — right which is relevant for the Finnish criminal law and its reform. Many of the basic principles which were behind the reform work can, after the amendment of the Constitution Act (1995), be classified as fundamental rights. For instance, the moral and political arguments of justice and humanity, which have played an important role in Finnish criminal policy and criminal law theory, now have a strong institutional support as legal principles as well, as they are firmly attached to human rights and constitutional law.

For instance, the principle of culpability and, accordingly, the prohibition of strict liability, can, from a legal point of view, be based on express human rights norms and constitutional provisions which guarantee the inviolability of human dignity. As for the principles of criminalisation, various human and basic rights must be taken into account. In the argumentation, constitutional (and human rights) aspects may collide so that a certain aspect supports the expansion of criminalisations and another aspect restricts their scope or the methods for using criminal law; there is often a tension between contrary arguments. When dealing with some of the recent government bills concern-

18 Compare Decision 53/1993 (X.13) of the Hungarian Constitutional Court, where individual responsibility for war crimes and crimes against humanity was established irrespective of their punishability under domestic law, but was based on the general cogency of the relevant international law.
ing criminal law, the Parliamentary Select Committee for Constitutional Law has deliberated generally upon the question: there must be a considerable social need and acceptable reasons, also from the basic rights point of view, for a criminalisation, in order that it restrict fundamental freedoms in an acceptable way; the pros of criminalisation and the threat of punishment and coercive measures must also be in proportion to the cons of the restriction of fundamental freedoms. As pros for criminalisation, particularly the following argument may be mentioned: the penal provisions provide legal protection of basic rights (Rechtsgüter), such as the right to life and personal liberty, physical integrity and security of person.20

As for criminal sanctions, explicit human rights norms and constitutional provisions forbid capital punishment, torture and other degrading treatment. In traditional penal theory, the debaters rely primarily on the utilitarian arguments of social defence and/or the arguments of justice and humaneness.

In recent Finnish literature much attention has been paid to the role of constitutional rights (and human rights) in legal theory in general and in criminal law theory in particular.21 For instance, there have been demands that the aims and functions of Finnish criminal law be profoundly re-evaluated following the Constitution Act reform (1995). The discussion so far indicates that constitutional rights (and human rights) must be taken seriously in criminal law. It is still quite unclear what the relative importance of these arguments of constitutional and human rights law is or should be. On the other hand, the forum should continuously be open for balancing different types of not only legal, but also political, and moral arguments.22

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20 See, e.g., Statement No. 23 of the Parliamentary Select Committee, 1997 Parliament Session, when dealing with the Government Bill (No. 6/1997) on the offences against the judiciary, public authority and public order as well as on sexual offences.

21 See especially the doctoral theses of Ari-Matti Nuutila, Rikosoikeudellinen huolimattomuus, (Helsinki, 1996) (German Summary: Fahrl'ssigkeit als Verhaltensform und als Schuldform), and Kimmo Nuotio, Teko, vaara, seuraus (Helsinki, 1998) (German Summary: Handlung, Gefahr, Erfolg).

5. Finnish Criminal Procedural Law and Constitutional Rights

The requirements of Rechtsstaatlichkeit (the constitutionally governed State) include several criteria which shall be applied in constitutionally governed states, among them in Finland: first, anticipatory guarantees such as the general principles limiting the use of (substantive) criminal law and the principles concerning the organisation of the judiciary; second, the procedural rules regarding the different phases of criminal proceedings; and, third, the methods of appeal in criminal proceedings and the supervision of the administration of justice. Such basic elements of due process as the right of access to court, an independent and impartial tribunal, the presumption of innocence and other guarantees of fair trial have traditionally been recognized in Finnish procedural law. The ratification of the ECHR and the reform of fundamental rights in the Finnish Constitution have strengthened the importance of those principles (see sections 2 and 3 above).

Major reforms of criminal procedural law have been prepared and carried out during the past 15 years. The provisions on criminal investigations and on coercive measures in criminal proceedings were reformed in 1989; the lower court system was restructured in 1993; the public prosecution authorities were reorganised in 1996; a comprehensive reform of criminal procedure in the lower courts was carried out in 1997; and the provisions on the Court of Appeal procedure as well as on legal aid and public defence were revised in 1998.

Originally, these reforms were planned in order to modernise the civil and criminal procedure especially according to the Swedish legislative model. The purpose of the major reform of 1997 was to realise legal proceedings which are oral and immediate and in which the litigation is concentrated. The possibilities of parties (including those of the prosecutor) to present their case in writing to the court at the trial are restricted; respectively, the evidential material should be presented at the trial directly to the court. As a whole the new Finnish criminal

procedure can be characterised as a mixed system, incorporating elements both from the Anglo-American adversarial and the Continental inquisitorial procedures.

In the late 1980s and in the 1990s, the increasing awareness among the decision-makers of the importance of human rights and, later, of the constitutional rights, affected the aims and content of those reforms. Already the first remarkable reform, that concerning the provisions on coercive measures in criminal proceedings, raised a politically difficult question about the longest period of arrest and the role of the court in deciding on the possible continuation of the detention. The question was determined by adopting a regulation which was in conformity with the case law of the ECHR.

The most important of the Supreme Court decisions since the beginning of the 1990s, when they include references to human rights norms, concern criminal procedural law in general and the requirements of a fair trial in particular (see also section 2 above). The ECHR and its case law have inter alia clarified and strengthened the significance of fair trial principles, such as presumption of innocence and “equality of arms” (the parties of the criminal trial shall be equal). The constitutional reform in 1995 produced a lot of new provisions on basic rights, mostly equivalent to the corresponding articles in international human rights treaties but in some respects divergent from them. The scope of applications of these new provisions may be more extensive, and their formulation follows the Finnish style of law drafting:

Sec. 6(3) of the Constitution Act:

There shall be no interference in personal integrity, nor shall anyone be deprived of his liberty in an arbitrary manner and without grounds prescribed by Act of Parliament. All penalties entailing deprivation of liberty shall be imposed by a court of law. The lawfulness of other forms of deprivation of liberty may be submitted to judicial review. The rights of persons who have been deprived of their liberty shall be secured by Act of Parliament.

Sec. 16 of the Constitution Act:

Everyone shall have the right to have his affairs considered appropriately and without undue delay by a lawfully competent court of

25 See also Träskman, supra n. 24, at 1080-1083.
law or other public authority, as well as the right to have a decision concerning his rights and obligations reviewed by a court of law or other independent judicial organ.

The publicity of proceedings and the right to be heard, to receive a decision with stated grounds and to appeal against the decision, as well as the other guarantees of a fair trial and of good public administration shall be secured by Act of Parliament.

These basic rights provisions, as the constitutional provisions in general, exert influence both on legislation and judicial practice. For instance, the provision that all custodial penalties must be handed down by courts of law soon led to a legislative amendment, making military arrest a penalty that can be imposed by a court alone. The national courts and public authorities are obviously prone to prefer domestic basic law provisions compared with treaty provisions when resorting to fundamental rights. Nevertheless, the new provisions on basic rights should if possible be interpreted in harmony with corresponding human rights provisions.

There is a peculiarity in the Finnish constitutional tradition that makes it possible to enact Acts of Parliament inconsistent with the Constitution, if they are enacted in the same way as amendments to the Constitution. According to the new Finnish Constitution of 1999, the scope of this system of exceptive enactments is more limited. In case of the absolute fundamental rights in human rights treaties those international provisions have in fact a similar limiting influence on the corresponding domestic basic law provisions and on the use of exceptive enactments.

The Finnish Constitution directs the public authorities to secure the implementation of fundamental rights and of international human rights. This duty is a new task for all public officials and obliges them to actively promote the observance of those rights. The Chancellor of Justice and Parliamentary Ombudsman, as the traditional supreme guardians of legality in the exercise of public functions, have also been mandated with the special task of supervising the implementation of fundamental and human rights. Their important role is to investigate whether these rights are being implemented in everyday practice.
6. Conclusions

Finnish experience indicates that a legalistic legal tradition may prevail as strong while its contents vary. The concept of legality and the rule of law ideology, with their emphasis on legal certainty, have been transformed to cover aspects of material legitimation or legitimacy. This transformation has been strengthened by the effective implementation of human and fundamental rights of individuals in the 1990s. The ever-increasing significance of these principles of human and fundamental rights has also had a profound influence on legal theory: as the normative deep structure of law which extends its unifying or harmonising effect between various domestic legal orders as well as, within a certain legal order, between various fields of law.

In a member State of the EU (like in Finland), it is increasingly important to take into account the ongoing harmonisation of legislation, which does concern penal law and the criminal justice system as well. For instance, there are in practice examples of EC-prompted neutralisation of domestic penal law, and the Treaty of Amsterdam (1998, entered into force on 1 May 1999) has adopted the objective of developing the EU as an "area of freedom, security and justice". This objective shall be achieved inter alia through a closer cooperation between judicial and other competent authorities of the Member States and an approximation of rules on criminal matters in these states.

When considering the relationship between the constitutional rights and criminal law and criminal procedure, the trend towards interna-

nationalisation and regional judicial space should respectively be noticed. For instance, the case law of the European Court of Justice has gradually recognised that the Member States are bound to respect human and fundamental rights as general principles of Community law. The EC has since the early 1990s also included so-called human rights clauses in its trade and cooperation agreements with third countries. Recently, the EU has decided to initiate work on an EU Charter of Fundamental Rights.30 As for the international and regional cooperation in penal matters, it still remains the question to be solved: how can the human and fundamental rights of the individuals be properly guaranteed when the existing human rights treaties and national constitutions do not offer enough protection?31 In international criminal law generally, and in extradition law specifically, the interest of the individual's human rights should be better balanced with that of law enforcement.32 Similarly, the policy-decisions of the European Union so far have been criticized for their over-emphasis on crime-suppression and the lack of attention to human rights protection.33

33 See Van den Wyngaert, supra n. 31, at 149.