2 A Backgrounder to the Criminal Justice Systems of the Region

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2.1 General observations[1]

The difficulties in comparing national crime scenes derives not only from problems of interpreting statistical data. Another source of concern lies in the differences between national criminal justice systems. Readers with a background in comparative criminal justice are well aware of the differences between the Germanic-based, the French-based and the common law criminal justice systems. The diversity of terminology reflects the fact that each country defines and deals with crime in a unique manner. After all, criminal law is perhaps the area of law that is most closely bound to national values and interests. No two countries define crimes the same way or have quite the same criminal justice systems.

And yet, all countries must deal with basically the same problems of crime and criminal justice. Most of the cases processed in every country and considered in this report are thefts, burglaries, assaults and other mass crimes. The broad outlines of the process are also much the same: the police investigates in response to a report of a crime, the prosecutor prosecutes, the court hears the case and, on conviction, imposes a sentence, which is then enforced. At the same time we are bound to notice that historical, political and economic factors explain to a large extent the structure of the criminal justice system in a given country: the balance of power between the central government and the local levels, the powers of the police, the training of judges and the basic principles of justice. They very much serve to explain changes in the day-to-day operation of the criminal justice.

During the few recent decades, the impact of demographic and social changes on crime and on crime control in the European and North American region has been a marked one. As a consequence of this there has also been a change in the structure of crime. New criminalizations have been adopted, for example in the area of environmental crime, economic crime, computer crime, traffic crime and narcotics crime. Moreover, crime has acquired a more international character. All this is seen to overburden the criminal justice systems of many European and North American countries. The responses have been more or less the same from one country to the next: some decriminalization *de facto* or *de jure*, attempts to speed up the process for petty offences (for example by granting the police

1 This passage is a modified version of "Background to European and North American criminal justice systems" by Matti Joutsen. Pp. 15-19 in Kangaspunta, K., M. Joutsen and N. Ollus (eds.) (1998).

and/or the prosecutor powers to settle the matter, or by adopting simplified court procedures), and to deal with certain serious offences (narcotics offences, in particular) more punitively. There has also been a growing interest in crime prevention programmes and in revitalizing community-based informal social control. Finally, attempts have been made to improve the position of the victim.

Two examples of increasing convergence in criminal justice systems can be noted. First, the literature commonly refers to two basic principles of prosecution, the *legality principle* and the *opportunity principle* (or expediency principle). In its extreme form, the legality principle requires that the prosecutor brings charges whenever there is sufficient evidence of the guilt of an identifiable suspect. The opportunity principle, in turn, gives the pro- secutor discretion to decide, in any individual case, whether there exists a public interest (or other overriding interest) in prosecution. In practice, however, the legality principle has been eroded by granting the prosecutor discretion in certain (often broadly defined) cases, and the opportunity principle, in turn, has been made more strict by requiring the prosecutor to bring charges in certain types of cases. These changes are often expressed in prosecutorial guidelines. More and more, prosecutorial principles in Europe and North America are sharing common features (see Tak, 1986). The second example is provided by the classic distinction between *accusatorial* and *inquisitorial* proceedings. In the former, the judge has traditionally been more passive, and it is up to the prosecutor (and the defendant) to present the case. In the latter, the judge is supposedly more active in marshalling the evidence for and against the guilt of the defendant. Again, in practice, the differences between the theoretical extremes are being increasingly eroded.

Furthermore, all European and North American criminal justice systems share fundamental principles, which have most notably been enshrined in the first articles of the European Convention on Human Rights and Fundamental Freedoms: the right to life, the prohibition of torture and of inhuman or degrading treatment or punishment, the right to liberty and security, the right to due process, the prohibition of criminalization ex post facto, and the prohibition of discrimination in the enjoyment of the rights and freedoms set forth in the Convention (Council of Europe, 1950). As the Convention has been signed by the 41 member States of the Council of Europe (as of November 1999), the work of the Council of Europe is significant in the present connection. The Council formulates conventions and recommendations that enshrine principles that can be regarded as universally respected in Europe. (These same principles are also widely enshrined in basic legislation in both Canada and the United States.) There exists a strong tendency to review national legislation to ensure that it accords with the requirements of, for example, the European Convention.

The impact of the Council of Europe does, however, vary from country to country, and issue to issue. With perhaps the exception of the criminalization of money laundering, which follows the ratification of the 1990 Convention, the Conventions and numerous resolutions adopted by the Council of Europe allow the member states considerable leeway in deciding how to adapt their criminal justice system to the requirements of these Conventions. They do not provide a detailed road map of the steps to be taken.

The role of the European Union in fostering reconciliation in the field of criminal justice within the member states, and also to some extent within the candidate states, will be discussed in chapter 2.3.

The Council of Europe and the European Union are not, however, the only intergovernmental organizations seeking to influence criminal justice reform in Europe (and, *ceteris paribus*, also in North America). Other examples include the United Nations, the World Bank, the International Monetary Fund, the Organisation for Economic Co-operation and Development, the G-7/P-8, and the European Bank for Reconstruction and Development. The Financial Action Task Force (which was set up by the G-7) has worked to improve the regulation of banking, the adoption of customer identification requirements, the retention of transaction records for at least five years, the reporting of unusual and suspicious transactions, and the need for the criminalization of money laundering.

In addition, there has been considerable bilateral activity in the development of criminal justice systems, activity that has involved almost all European and North American countries (see Joutsen, 1996).

In a world of increasing diversity, Europe and North America are thus seeking greater uniformity in fundamental principle of criminal justice.

2.2 Central and Eastern European Scene

Owing to the political and social upheavals within the former socialist states of the Central and Eastern European region at the end of the 1980's and at the beginning of the1990's, considerable restructuring efforts of the criminal justice systems can be observed throughout the region. The main features in respect of these changes are outlined below.

Prior to the political turnover in the late 80's and early 90's, the countries nowadays referred to as post-communist states, new democracies or transition countries used to be considered from the outside as a homogenous entity. This was also the case with their criminal justice systems. However, a more thorough look at the criminal justice systems of the region reveals that just as there were variations in the degree to which the political system of the states under Soviet dominance deviated from the values of liberal democracy, also the criminal justice systems were considerably different. When in some European states cautious penal reforms in the early 70's resulted in the introduction of Western type institutions, the criminal justice system of some others was shaped by the Stalinist criminal justice doctrine until the collapse of the communist political regime. Similarly, while in some of the countries the autonomy of the criminal justice system was more or less respected in the last decade of the communist regime, in others the interference of the political elite in the operation of the prosecution service and even the courts was a daily practice until the political turnover. However, it is true that certain typical "socialist" traits shaped the criminal justice systems of the countries under Soviet dominance, clearly distinguishing them from Western European models.

One of the most important differences between the "socialist" procedural law and the Western European model concerns the distribution of competence: "so-

cialist" procedural laws allowed the courts a far less significant role. This is reflected primarily in the fact that in the pre-trial phase, the court had almost no power; decisions on restricting fundamental rights by, for example, pre-trial detention, search and seizure were made by the police, investigators or the prosecutor. In addition, as the primary "guardian of legality", the prosecutor had the power to exercise supervision over court proceedings. A further characteristic of the distribution of competence in the so-called socialist procedural laws was that the police, the militia, and organs coming under the competence of the Ministry of Interior were empowered with far broader licenses than their counterparts in Western Europe. The police or other agencies subordinated to the Ministry of Interior conducted investigation and were linked to the prosecution service through the institution of prosecutorial supervision over investigation. The licenses covered by this institution included on the one hand the prosecutor's authorization to carry out acts of investigation, giving instructions on how to investigate, and on the other hand the power to review measures taken by the investigating agency on their lawfulness.

The distribution of competence affected the status and the position of the defense counsel as well. Although "socialist" procedural laws did not deny the defendant's right to a defense counsel yet the role of the latter was considerably less important than that of his/her Western European counterpart. In the most decisive phase of the "socialist" criminal procedure, the pre-trial stage, the defense lawyer's rights were considerably limited.

Further differences between "socialist" and Western models of criminal justice derive from a general refusal by socialist doctrine of formalism in criminal procedure, from an underestimation of the importance of legal professional skills and from the limited autonomy of the parties. In addition, financial considerations, the idea that limited resources should be rationally distributed were alien to "socialist" procedural doctrine. Legislators in the former "socialist" countries opted for the principle of mandatory prosecution, though the so-called material concept of the criminal offense enabled the crime control agencies to refrain from prosecuting minor offences.

Finally, socialist doctrine did not regard legal security as a value of criminal justice. The absolute priority of the duty to ascertain material truth in the criminal process resulted in an underestimation of the principle of legal security. Final court judgments could easily be annulled and altered through particular extraordinary remedies whose preconditions were vaguely defined, and which were not at the disposal of the parties but exclusively of persons holding top positions in the administration of justice, such as the General Prosecutor, the Minister of Justice or the Head of the highest judicial body.

After the political turnover, legislators in Eastern Europe and the former Soviet Union have been facing the difficult task of creating an efficient criminal justice system, which at the same time would provide for safeguards meeting international standards. The transition in all countries has been accompanied by an increase in reported crime. New forms of criminality have emerged, and criminals have become more professional and well equipped. Kidnapping, extortion, economic and organized crime, illegal trafficking in goods and people have called, among others, for adequate provisions in the criminal laws and the laws

on criminal procedure that would provide for effectively counteracting new forms of criminality. Rules on the use of undercover agents, on wire tapping, and witness protection schemes have been introduced. At the same time novel provisions on criminal organizations, economic crime or on honoring cooperating criminals have been adopted.

In addition to the introduction of institutions likely to guarantee efficiency in law enforcement and crime prevention, the transition countries started to completely reconstruct their system of administration of justice. When reforming the system, legislators frequently turned to the pre-Soviet traditions of their country. This trend is the most obvious in reforms related to the structure of the administration of justice, particularly the court system. A number of countries have returned to their former four-level judicial system, and the role of the Supreme Court as a kind of Cassation Court has also been shaped according to pre-war patterns. Russian Federation has re-introduced juries and justices of peace, and some other countries, following their pre-war model, have subordinated the prosecution agency to the executive.

International criminal justice standards have also served as sources of the reform. The change in the political domain was accompanied by the re-assessment of the relation between international and domestic law. Several new Constitutions or amendments to the old ones explicitly pronounced the supremacy of international human rights instruments over national regulations, and in order to guarantee the compatibility of domestic law with international agreements, provisions identical with those set forth in international human rights instruments were included in the new Constitutions (or the amendments made to the old ones) and the laws on the operation of criminal justice were modified accordingly.

Today, almost all constitutions include the basic principles of fair criminal justice, such as the nullum crimen and nulla poena sine lege principle, the presumption of innocence, the rule according to which individuals may be deprived of their liberty only by a court's order, or the right to an independent and impartial tribunal. The majority of the new democracies have become members of the Council of Europe and thereby parties to the European Convention on Human Rights and Fundamental Freedoms. Pre-accession monitoring of the candidate countries' legal systems, and the jurisprudence of the European Court of Human Rights after accession have shaped the individual countries' criminal justice systems.

The structure of the laws on criminal procedure in the transition countries follows the model of the Continental mixed system, i.e. elements of an inquisitorial procedure are blended with elements of an accusatorial (adversary or party) procedure.

The pre-trial phase is dominated by inquisitorial elements (ex officio procedure; lack of strict separation of functions; secrecy) while the trial phase bears the characteristics of a party procedure (publicity; separation of the prosecution, the defense and the judicature; strict adherence to the prosecutor's charge, etc.). The fact that certain elements of the accusatorial process (e.g. participation of the defense counsel of the accused is ensured within certain limits) are present also in the pre-trial phase provides further proof for the mixed nature of the system.

On the other hand, the trial phase is not entirely free from the elements of an inquisitorial procedure: the examination of the witnesses and the interrogation of the defendant is primarily the duty of the judge and information collected in the course of the pre-trial stage can be used to a large extent. Prosecution is governed by the so-called legality principle: as a general rule all crimes reported are investigated, and the prosecutor cannot refrain from bringing the case before the court for expediency considerations. However, the number of exceptions is on the increase; prosecutors may discontinue cases with defendants' consent, and instruct them to comply with orders to undergo treatment, compensate the victim or do community service, etc.

In some countries the newly adopted laws on criminal procedure indicate a shift towards the adversary model. Parties acquire more rights to present evidence and examine witnesses. However, in all countries the court has retained its power to introduce evidence it deems important for ascertaining the facts of the case and necessary for fair adjudication. In this context it should be mentioned that constitutional courts established after the political turnover have through their decisions played an important role in a number of countries, contributed to separating the functions of prosecution and adjudication, and thereby relieved judges of part of their inquisitorial role.

2.3 Western European and North American Scene

In the Western European region and in North America it is not possible to indicate reforms comparable to those of Central and Eastern European. Powers with the aim to continue with the harmonization of the criminal justice systems can surely be observed, but the scope differs from the country-based efforts of the Central and Eastern European region in that larger geographical areas are targeted. In 2.1 above, the roles of the European Union and the Council of Europe in this field were already examined. The following discussess the issue in greater detail[2].

As already mentioned, although the EU has been traditionally oriented towards economic cooperation, it has taken over many functions related to police and judicial cooperation in criminal matters, with the emphasis on organized crime, terrorism and drug trafficking. Decisions on these matters are made by the Council of Ministers, i.e. the relevant ministers of the cabinets of the member states. Since these are matters involving the sensitive issue of national sovereignty, decisions require full consensus among the fifteen members. In addition, there are ongoing debates what could be be dealt with by the Union, and what matters should be left entirely to the individual member states.

In general, it is safe to say that particularly during the second half of the 1990's and the first years of the new millenium, the European Union has transformed the

2 Based on the article by M. Joutsen (2002).

European debate on criminal policy. Many key debates previously conducted on the national level have now moved to the European Union level, and European Union decisions have considerable influence on national law, policy and practice. Agreement has been reached on the minimum requirements when criminalizing a number of different offences, such as racism and xenophobia, trafficking in human beings and sexual exploitation of children, and participation in a criminal organization. International cooperation in criminal matters has been smoothed by the establishment of Europol and the European Judicial Network. Conventions have been adopted in order to simplify extradition and mutual assistance.

Cooperation in the police sector rests not only on Europol, but also, for example, on the Schengen arrangements. Europol can be best characterized as a coordination body that seeks to ensure that the police force in every member state has the cooperation and resources it needs to carry out its functions. The Schengen arrangements (which do not apply to the United Kingdom and Ireland) allow for extensive operational cooperation and the sharing of information. New structures for police cooperation that are being developed include the European Police Chiefs Task Force, and a European Police College.

The European Judicial Network has been up and running for several years. Its purpose is to facilitate the exchange of information between prosecutors and courts. In addition to improving general understanding of how the different criminal justice systems work, the Network has produced tools by which practitioners in one country can readily identify who is the competent authority in another country for certain cases, and what are the requirements for extradition and mutual assistance requests. Work is proceeding on a secure telecommunications system between competent prosecutors. Also, plans are well advanced for Eurojust, as a more or less parallel body to Europol to promote cooperation among prosecutors. Eurojust will not have operational powers in the sense that it could itself order prosecution or demand certain investigations. Instead, it will be a body consisting of one prosecutor from each member state. These prosecutors meet together, either in plenary to discuss over-all strategy, or in different compositions to deal with the coordination of cross-border cases.

Extradition and mutual recognition among the EU countries have to a large extent been based on two conventions worked out already in the 1950's within the framework of another European organization, the Council of Europe. Since that time, practices in respect of extradition and mutual recognition have developed considerably, including those restricting the grounds of refusal, expanding the rights of the person in question, and developing a "good practice" in processing requests. Two conventions designed to simplify extradition and supplement the 1957 Council of Europe Extradition Convention were adopted in 1995 and 1996, and in 2000, a convention designed to supplement the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters was adopted.

More complicated issues arise when the victim of, as a rule, white collar or organized crime turns out to be the European Community itself. As pointed out by Pedersen, Elholm and Kolze (1999), "traditionally, Member States have laid great store by the fact that penalties for contravening Community law are part of the general system of national penalties that are based on national traditions and

crime policies. However, significant differences in national criminal law have given rise to a legal disparity difficult to reconcile with the development within the European Community in general" (op.cit., p. 164). Thus, "in a series of cases the European Court of Justice has established that the Community (...) is empowered to impose the sanctions it considers necessary to ensure effective and uniform administration of the rules concerning (the misappropriation of subsidies affecting the Community's financial interests)" (op.cit., p. 168). This practice might indicate that in the future an intergovernmental agency, in this case the European Community/European Union will increasingly dictate the extent of the juridical independence of the national administrations of the European region, particularly in view of the Union's ongoing enlargement process.

The rapprochement of the operative efforts in the field of law enforcement and crime policy reached within the EU member states, and in the coming years also in the candidate countries, is exemplified by the already mentioned Schengen Agreement. Marc (2001) writes that already in the late 1980s "immigration control became the most important argument to justify compensatory measures for the abolition of border controls. Only the combination of policing and immigration arguments made it possible to mobilise financial resources, namely for the Schengen Information System (SIS). The practical implementation of the SIS and the intensified police controls in the border regions have shown since then that immigration control is the most important aspect under which the Schengen cooperation has had practical impacts" (op.cit., p. 105). Also in this context it can be observed that "international police cooperation has reached a major extent in a context of governance without government", since "institutions coordinating the use of force at international levels exist without the formal framework of a state" (op.cit., p. 111).

Comparing the North American scene with the European one in this respect makes it plausible to claim that the existing mechanisms of transborder cooperation in the field of crime prevention and criminal justice, particularly the systems constructed between the law enforcement bodies, are much less complicated. It has been notified that "due, in part, to the smaller number of partners involved (namely, USA, Canada and, to a lesser extent, the most important countries of Latin America) and, to a much bigger extent, to the inevitable weight of the USA, cross-border police cooperation on the American continent appears to be more straightforward than the European approach" (op.cit., p. 115). The straightforwardness of the police cooperation is not the only common feature characterizing the crime prevention and criminal justice structures of the North American region.

The legal systems of the North American countries have their roots in English criminal law and the practices (especially common law) were transplanted to those countries hundreds of years ago. Another factor having a profound effect on the form and structure of the criminal justice administration of the two countries is the federalist system of government; responsibility for the various parts of the criminal justice system is shared and divided among all levels of government: federal, state or provincial, and municipal.

2.4 Information on the national criminal justice systems

Passages 2.2 and 2.3 above delineate the recent major changes in criminal justice systems in those parts of the European and North American region where large-scale reforms have been implemented or are planned. Those readers who would like to examine details of the national systems, in which no notable reforms have taken place during the period in question, are recommended to study the relevant country reviews in Kangaspunta et al. (1999).

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