The Characteristics of Nordic Criminal Law in the Setting of EU Criminal Law

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Abstract:

A Nordic approach is usually distinguished in European criminal law. Although not exactly pointing out specifics, the Nordic approach is characterised as humane, rational and balanced. In this article the author analyses and examines what characterises Nordic criminal law in the EU criminal law setting. The author starts by presenting some general remarks in relation to the Nordic approach towards the EU and towards EU criminal law. Different approaches are then studied in relation to EU criminal law instruments and their implementation in the Nordic Member States. This is done by examining the three different parts of EU criminal law; substantive criminal law, procedural criminal law and institutional cooperation. Certain Nordic characteristics will then be identified.

I. Introduction

The topic of this article is fairly broad. It could more or less encompass anything within Nordic criminal law that somehow is connected to EU criminal law. Nevertheless, the Nordic approach is often seen as having a particular approach or characteristics.[1] These will be addressed in this article. The Nordic countries (Finland, Sweden, Denmark, Norway and Iceland) have co-operated in criminal matters for quite some time. This has been a result of geographical and cultural proximity and a like-minded approach towards common problems. The Nordic system of cooperation in criminal matters can be said to mainly build upon informal agreements on introducing similar provisions in the domestic laws. There is a lesser need for international agreements that are binding upon the signatory states, than in the EU setting. Cooperation could be described as a sort of Nordic legislative process or a system of cooperation in the enforcement of Nordic judgments and decisions, with a common legal culture. This form of cooperation, largely based on direct contact between the judicial authorities and mutual trust, enables flexible and functional cooperation between the Nordic states.[2]

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[1] See e. g. *G. Mathisen*, Nordic Cooperation and the European Arrest Warrant: Intra-Nordic Extradition, the Nordic Arrest Warrant and Beyond, Nordic Journal of International Law 79 (2010) pp. 1–33, *A. Weyembergh*, Le rapprochement des législations, condition de l'espace pénal européen et révélateur de ses tensions (Harmonisation of legislation, conditions for a European legal area and uncovering its tension, French), Bruxelles 2004 pp. 191-198 and *P. Asp*, The Nordic "System" for Mutual Recognition in Criminal Matters, in de Kerchove and Weyembergh (eds.), La reconnaissance mutuelle des decisions judiciaries pénales dans l'Union européenne/ Mutual Recognition of Judicial Decisions in the Penal Field within the European Union, Bruxelles 2001 pp. 223-226. The Nordic cooperation has been regarded by the Commission as a forerunner for the mutual recognition regime in the EU, see the Proposal for the Council Framework decision on the European arrest warrant and surrender procedures between the Member States COM (2001) 522 final/2, 25. 9. 2001.

This article has been divided up into three main parts. The first part will focus on the Nordic position in relation to the European Union more generally. This part will be brief but at the same time provide a necessary introduction to the Nordic states' approach towards the EU. The second part will focus upon the approach of the Nordic states in EU criminal law. This part also includes a brief overview on the development of EU criminal law. Focus is on the former third pillar in this part. Thirdly, this article will present some examples of typical Nordic characteristics in EU criminal law. In this third part, the different approaches and specific solutions that characterise Nordic criminal law in EU criminal law will be focused upon. This part is further divided into three separate parts, which represent the different components of EU criminal law. These are substantive criminal law, criminal procedural law and institutional cooperation. In each of these parts, focus is on two EU legal instruments and their implementation in the Nordic states. From here, certain aspects on the characteristics of Nordic criminal law will be considered.

II. The Nordic approach towards the EU

Denmark was the first Nordic state to enter the, at the time, European Community. Since 1973, Denmark has been a part of EC. The Danish membership is nevertheless somewhat exceptional and since 1992 and the Maastricht Treaty that established the European Union, has had four opt-outs which cover four important areas of European co-operation. An opt-out means that that particular state does not participate in EU cooperation in a particular field of law. For Denmark's part, these are the economic and monetary union, common defence, Union citizenship and justice and home affairs. Denmark therefore only participates in EU criminal law cooperation, which is part of justice and home affairs, at an intergovernmental level. Although Denmark was the first of the Nordic states to join the EU, its approach seems to have been sceptical as regards relinquishing control over matters closely related to state sovereignty.[3]

Finland and Sweden joined the European Union in 1995, which was significantly later than when Denmark joined. These both states represented a somewhat more

[2] For a presentation of the Nordic cooperation generally, see *F. Wendt*, Cooperation in the Nordic countries, Stockholm 1981 pp. 11-30, *F. Sejersted*, Nordisk rettssamarbeid og europeisk integrasjon (Nordic cooperation in legal matters and European integration, Norwegian), in Olsen and Sverdrup (eds.) Europa i Norden, Europeisering av nordisk samarbeid, Oslo 1998 pp. 214-247 and *U. Bernitz*, Nordiskt lagstiftningssamarbete i den nya Europa – utmaningar för Norden i ett unionsperspektiv (Nordic cooperation in legislation in a new Europe, Swedish), in Bernitz and Wiklund (eds.) Nordiskt lagstiftningssamarbete i det nya Europa, Stockholm 1996 pp. 9-24. On Nordic criminal law cooperation see *A. Suominen*, The principle of mutual recognition in cooperation in criminal matters, A study of the principle in four framework decisions and in the implementation legislation in the Nordic Member States, PhD dissertation at the University of Bergen, 2011 pp. 39-42 and 64-66 and *K. Cornils and V. Greve*, Die nordische Zusammenarbeit in Strafsachen (Nordic cooperation in criminal matters, German), in Sieber, Wade and Meyer (eds.), Überlegung zu einer europäischen Strafrechtspflege (Eurojustice), Prinzipien- und praxisorienterter Entwurf zu einer gemensaim europäischen Strafrechtspflege, under publication by the Max Planck institute Max-Planck Instituts für ausländisches und internationales Strafrecht.

[3] *P. Cramér*, EU och Europatanken. Ett rättsligt och historiskt perspektiv (EU and the Europe-thought, Swedish), Stockholm 1994, p. 176.

restricted approach towards the EU. This can be seen as a result of the political situation, especially in the East. Traditionally, these states prefer intergovernmental before supranational cooperation.[4] Although both Finland and Sweden had a restrictive attitude towards EU cooperation in general, no significant opt-outs were made applicable. In the beginning, criminal law was considered an area of national competences which was not considered to be largely influenced by the EU.[5]

Norway and Iceland are not Member States of the EU. These states are party to the EEA-agreement, which enables them to participate in the internal market on the basis of their application of internal market relevant acquis. This agreement does not concern EU criminal law. Although the Schengen agreement, which both states have ratified, to some extent regulates certain matters of cooperation in criminal law, EU criminal law does not as a principal rule apply to these states. Therefore, Norway and Iceland will not be encompassed in this article.

III. The Nordic approach towards EU criminal law

1. EU criminal law

What makes EU criminal law an area, where the Nordic states have a specific approach then? To those with a national criminal law background, this is obvious. For those with an EU law background, this is not as clear. Criminal law is closely connected to the sovereignty of states and could in fact be argued to constitute one of the basic elements of a sovereign state.[6] Several states, including the Nordic states have considered this area, closely linked to state sovereignty and the protection of civil liberties, as an area where the state is the main actor. This has complicated EU criminal law.

Before the EU, criminal law cooperation in Europe was governed by conventions or other international instruments between states, especially under the Council of Europe.[7] The EU took over European criminal law little by little. EU criminal law then mainly took place within the third pillar.[8] The division into pillars was established with the Maastricht Treaty. After the Amsterdam Treaty, the remaining third pillar consisted of cooperation in criminal, police and customs matters due to

[4] *U. Bernitz and A. Kjellgren*, Europarättsliga grunder (Foundations of European law, Swedish), Stockholm 2007, pp. 198-200.

[5] *F. Wersäll*, Politik och juridik – vad är vad i tredje pelaren? (Politics and law – which is which in the third pillar? Swedish), in p. 660.

[6] *Suominen* (n. 2), pp. 292-297 and *M. Kimpimäki*, Kansainvälistyvä rikosoikeus (Internationalising criminal law, Finnish), in Kansainvälistyvä oikeus, juhlakirja professori Kari Hakapää, Rovaniemi 2005, p. 125.

[7] *T. Konstadinides*, The perils of "Europeanization" of extradition procedures in the EU, mutuality, fundamental rights and constitutional guarantees, Maastricht Journal of European and Comparative Law (MJ) 14, 2007:2 pp. 180 et seq., *H.Nilsson*, From classical judicial cooperation to mutual recognition, in International Review of Penal Law, 1er/2e trimestres 2006, pp. 53-58 and *G. Vermeulen*, EU Conventions enhancing and updating traditional mechanisms for judicial cooperation in criminal matters, International Review of Penal Law, 1er/2e trimestres 2006, pp. 59-68.

[8] On the history for the formation of the third pillar, see *M. Fletcher, R. Lööfand B. Gilmore*, EU criminal law and justice, Cheltenham 2008 pp. 32-37 and *E. Denza*, The intergovernmental pillars of the European Union, Oxford 2002 pp. 63-84.

the Member States' reluctance to bring these areas into the competences of the Community.[9] Cooperation was therefore intergovernmental in its nature and has been characterised by the perseverance of the sovereign powers within the Member States. There were some indications of a move towards supranationalism, and this led to European criminal law constituting both the former first and third pillar criminal law.

Criminal law was to some extent considered necessary in first pillar issues, such as combating fraud or offences against the financial interests of the EU. These EC matters were not considered efficiently safeguarded without the application of criminal law sanctions. The differentiation of the competences of the Union when it came to criminal law was unfortunate and problematic. There are two rulings on cases between the Commission and the Council relating to this competence shift.[10]

The first case, from 2005, concerned the proposed framework decision on the protection of the environment. The latter case, from 2007, concerned the proposed framework decision on ship-source pollution.[11] In both cases, the European Court of Justice decided in favour of the Commission, which forespoke of EC criminal law competence, which meant supranational competence of the Union, on these legislative areas. Although these rulings on former EC and EU competences in criminal law matters can be seen as an attempt to clarify the situation and establish some basic rules regarding criminal law competences in the Union, the situation was far from clear until the entry into force of the Lisbon Treaty.

2. How is this seen in the Nordic states?

The distinction between competences and the form of decision-making is essential, especially for Denmark's part. Denmark was involved prior to the Lisbon Treaty, having taken part in all Justice and Home Affairs matters, as long as these were dealt with in the third pillar. The policy area of Justice and Home Affairs covered the third pillar during the Maastricht era. In addition to EU criminal law, this area also covers asylum, migration and border control matters and cooperation in civil matters. The Danish position therefore was not only specific as regards EU criminal law, but in relation to all these areas as well.

The opt-out therefore concerned EU criminal law, when *not* dealt with in the third pillar. For Denmark, the format for decision-making was essential and it did not consider it appropriate to deal with Justice and Home Affairs matters in the former first pillar.[12] In accordance with this, Denmark could choose whether to

[9] *Denza* (n. 8), pp. 63-64. Through this intergovernmental cooperation the agreements would not occupy the field and the national laws and procedures were better preserved. See further *V. Mitsilegas*, EU criminal law, Oxford 2009 pp. 9-11 on the third pillar under the Maastricht Treaty and pp. 11-23 on the third pillar under the Amsterdam Treaty.

[10] EuropeanCourtofJustice(ECJ) 13. 9. 2005, case C-176/03 (*Commission vs Council)*, [2005] ECR I-07879 and European Court of Justice (ECJ), 23. 10. 2007, case C-440/05 (*Commission vs Council)*, [2007] ECR I-09097.

[11] On these cases see *R.Ooik*, Cross-pillar litigation before the ECJ: Demarcation of Community and Union competences, European Constitutional Law Review, 4, 2008 pp. 400-406 and especially pp. 406-407 in relation to the changes of the Lisbon Treaty.

apply the relevant Schengen rules which were dealt with in the former first pillar.[13] Denmark had not approved of the European Court of Justice's jurisdiction in criminal matters. In the third pillar, this had to be done separately, pursuant to former article 35 in the Treaty of the European Union. This rather restrictive approach pursued by Denmark is in line with prioritising national sovereignty in these matters. This approach was also maintained by Denmark after the Lisbon Treaty.

Denmark has opted out of EU criminal law cooperation under the Lisbon Treaty.[14] None of the criminal law measures adopted under the rules on judicial cooperation in criminal matters, which means those set out in articles 82-86 TFEU, are binding or applicable for Denmark. The opt-out further excludes the application of any provision of any international agreement concluded by the Union in relation to these or any decision of the European Court of Justice interpreting such a provision of measures. The same applies for measures amended or amendable pursuant to those articles.[15] Therefore Denmark still considers the decision-making process as the relevant factor in whether to take part in EU criminal law cooperation or not.

For Finland and Sweden, the decision-making process was also of importance, but they did not pursue a similar approach to Denmark. Finland and Sweden have favoured cooperation in the third pillar and usually applied a slightly restrictive approach on new instruments, when these have included heavy criminalisations.[16] In Finland, a scholarly scepticism can be seen at the start of the EU taking over the field of criminal law. This was motivated by state sovereignty aspects and led to a negative approach towards EU criminal law, especially in relation to harmonisation of substantive criminal law. This negative approach ceased with a change of generation. The same scholarly approach cannot be seen in Sweden.

Both Finland and Sweden accepted the European Court of Justice's jurisdiction in criminal matters. Further still, neither Finland nor Sweden has any special arrangements in relation to criminal law after the Lisbon treaty. A shift therefore towards increased acceptance of EU criminal law can perhaps be seen in these two Nordic states.

All Nordic Member States have taken a restrictive approach in relation to the former European Community's increased competence in criminal law. This can be seen as Denmark, Finland and Sweden all supported the Council's view in the above

[12] *I. Gade, R. Laulund, K. Schjønning and L. Sørensen,* Det politimæssige og strafferetlige samarbejde i Den Europæiska Union (Police and criminal cooperation in the EU, Danish), Copenhagen 2005, pp. 98-99.

[13] *B. Daniel, T. Elholm, P. Starup and M. Steinicke*, Grundlæggende EU-ret (Basic EU law, Danish), Copenhagen 2009 p. 88 and Protocol (No 5) on the position of Denmark (1997), O.J. 2006 C 321/ 201.

[14] Art. 1 of Protocol 22 on the position of Denmark O.J. 2010 C 83/299 (hereafter Protocol 22 on the position on Denmark).

[15] Art. 2 of the Protocol 22 on the position on Denmark.

[16] *T. Elholm*, Does EU criminal cooperation necessarily mean increase repression? European Journal of Crime, Criminal Law and Criminal Justice 17 (2009), pp. 191-226 and *K. Nuotio*, The rationale of the Nordic penal policy compared with the European approach, in Nuotio (ed.) Festschrift in honour of Raimo Lahti, Helsinki 2007 pp. 157-174.

mentioned ECJ cases between the Commission and the Council. These states considered the extension of the criminal law competence of the EC to be contrary to the idea of the third pillar and the fact that Member States possess the power to regulate criminal law. A restrictive approach can be considered to characterise the Nordic criminal law approach in the EU criminal law setting.

For the Nordic states, this is not just a question of increasing competences and not being able to influence EU criminal law. What is more, it is a question of having a coherent criminal policy. Although criminal policy to a certain extent is national, the Nordic states can be considered to share rather similar thoughts on criminal justice policy.[17] The same applies for the practical realisation of problems in criminal justice. In this sense, it is perhaps possible to consider a common Nordic approach.

A like-minded approach towards criminality and criminal policy founded on similarities between Nordic societies can be distinguished.[18] Nordic criminal policy is usually characterised as rational and humane. The *ultima ratio* principle would be typical of such a view.[19] For the Nordic Member States, a reasoned and systematic criminal policy is important. These adjectives cannot perhaps be used to describe EU criminal law.[20] The Nordic states have feared that the main values and aims characteristic to their legal culture and criminal policy would be jeopardised if EU competence stretches too far.[21]

IV. Different characteristics of Nordic criminal law in EU criminal law

1. Substantive criminal law

Harmonising substantive criminal law is considered important for the Union. This is the area which was first addressed by the EU in criminal law. In this field, harmonisation has mainly been directed at crime with a cross-border dimension, such as terrorism, crimes against the financial interest of the Union and trafficking human beings. The previous competence, according to former article 29 TEU, particularly related to the fields of organised crime, terrorism and illicit drug trafficking. These forms of crimes were not considered to constitute an exhaustive list of the competences of the Union.[22]

Most of the framework decisions relating to substantive criminal law concern definitions of offences and criminalisations of offences. This applies both to related

[17] *Suominen* (n. 2) p. 40 and *S. Melander*, Nordic criminal justice policy – single path or separate ways? In Husa, Nuotio and Pihlajamäki (eds.) Nordic law – between tradition and dynamism, Antwerp-Oxford 2007 p. 109.

[18] See further *R. Lahti*, Towards a Rational and Humane Criminal Policy? Trends in Scandinavian Penal Thinking, Journal of Scandinavian Studies in Criminology and Crime Prevention 2/2000 pp. 141-155 and *K. Nuotio*, The emerging European dimension of criminal law, in Asp, Herlitz and Holmqvist (n. 5), pp. 535-539 on the international dimension of criminal policy and pp. 539-547 on the European dimension.

[19] *Melander* (n. 17) p. 116 and *Nuotio* (n. 16) p. 159, see also *P.O Träskman and B. Kyvsgaard*, Vem eller vad styr straffrättspolitiken? (Who or what is directing the criminal law policy? Swedish), in Asp, Herlitz and Holmqvist (n. 5) pp. 609-611.

[20] *Wersäll* (n. 5) p. 661 on the Swedish approach.

[21] *Lahti* (n. 18) p. 152.

[22] *S. Peers*, EU Justice and Home Affairs Law, Oxford 2006 p. 387.

and inchoate (preparatory) offences. In addition, these instruments can include provisions on sentencing. These usually require a minimum maximum sentence to be applied, which means, for example, that a sentence of at least 10-years imprisonment should be prescribed. These can also include obligations requiring criminal or other sanctions prescribed for legal persons if in breach of relevant rules. The framework decisions usually lead, especially in the Nordic Member States, to the upward adjustment of penalties and penalty-scales, new criminalisations, as well as the criminalisation of more acts.[23]

We can look at two different instruments of EU substantive criminal law and the implementation of these, and distinguish different characteristics.

a) Terrorism

The framework decision on terrorism from 2002 was already under preparation before 9/11. These events speeded up its adoption. This framework decision defines and criminalises terrorism.[24] Offences with a terrorism motive, so-called terrorism intent, are to be criminalised more severely in national criminal law than offences without this motive. This framework decision defines offences relating to terrorism, such as participating in terrorist groups and offences linked to terrorist activities. The framework decision requires that the direction of a terrorist group shall be punishable with at least 15 years of imprisonment, while participating in such a group should be punishable with at least 8 years imprisonment. It has rules on aiding and abetting, incitement or attempt in relation to terrorist offences. This means that this framework decision also requires the Member States to criminalise these forms in relation to terrorist offences. The framework decision does not, however, define those parts which are considered as belonging to the general part of criminal law. These are to be criminalised in their respective forms in the Member States' legislation.

In Denmark, this framework decision resulted *inter alia* in the introduction of a special provision: section 114 of the Danish Criminal Code on terrorism. This offence has no maximum penalty, which means that life sentence is applicable for a terrorist offence in Denmark.[25] Several other sentences were adjusted upward due to the framework decision.

In Sweden, an Act on punishment for terrorism offences was issued.[26] This Act prescribes life imprisonment for some offences.[27] This act also led to upward adjustment of penalties in relation to some offences committed with a terrorism motive.[28]

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[23] Elholm (n. 16), p. 193.

[24] Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, O.J. 2002 L 164/3. See also Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, O.J. 2008 L 330/21.

[25] See further the Danish Government Bill 2001/2 LSF 35 point 2.3.3 (available on www.retsinformation.dk, in Danish).

[26] Lag (2003:148) om straff för terroristbrott.

[27] Section 2(2) of the Swedish Act.

Similar effects can be seen in Finnish legislation. A new chapter on terrorism offences, chapter 34 a, was introduced into the Finnish Criminal Code.[29] The penalties are extended when a crime is committed with a terrorist aim and the framework decision also led to upward adjustment of penalties in relation to direction of a terrorist group. A person who is sentenced for direction of a terrorist group shall, in addition, be sentenced for an offence which the person has committed or that has been committed in the activity of a terrorist group under the person's direction.[30] This specific constellation was needed as the maximum penalty in Finland is 12 years imprisonment (which in fact is a life sentence). Article 5(3) of the terrorist framework decision imposed an obligation on the Member States of having a maximum sentence of at least 15 years, which was not, as such, considered possible. Due to the fact that the leader is sentenced to a joint sentence, the obligation of 15 years if fulfilled.

b) Trafficking in Human Beings

Another relevant EU framework decision in relation to substantive criminal law is the framework decision on trafficking in human beings (THB).[31] Having an integral European approach against serious crimes of trafficking in human beings was considered to be necessary, which resulted in this framework decision of 2002. The framework decision requires that the Member States criminalise several acts, which are to be considered as trafficking in human beings. It requires that instigation, aiding, abetting and attempt is punishable, but again, it leaves the definition of these forms up to the Member States. The framework decision requires that the offences are punishable with a maximum of 8 years imprisonment. This applies when the offence has deliberately or by gross negligence endangered the life of the victim, or the offence has been committed against a particularly vulnerable victim. This also applies when the offence has been committed by use of serious violence or the offence has been committed within a criminal organisation.[32]

In Finland, a special provision on trafficking inhuman beings was inserted into the Criminal Code.[33] In addition to this, the maximum penalties were increased to meet with the requirements of the framework decision. At the same time, the liability for legal persons for trafficking in human beings was introduced into the Criminal Code.[34]

In Sweden, the preparation for having a provision on trafficking in human beings was begun even before the framework decision, back in 1998. The Swedish provi-

[28] Swedish Government Bill Prop. 2002/03:38 pp. 50-51 and 56-58 (available on www.regeringen.se, in Swedish).
[29] Finnish Criminal Code 1889/23, Strafflag.
[30] Section 3(1) of chapter 34 a, Finnish Criminal Code.
[31] Council framework decision 2002/629/JHA of 19th July, 2002, on combating trafficking in human beings O. J. 2002 L 203/1. See however the newly agreed Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, PE-CONS 69/10, not yet published in the O. J.
[32] Art. 3(2) of the framework decision.
[33] Section 8, chapter 17 and section 8(a) chapter 17 on the aggravated form.
[34] Section 24, chapter 17 of the Finnish Criminal Code.

sion on trafficking in human beings was extended due to the framework decision. In the preparatory works for amending the legislation, extended penalties were favoured.[35] This was in line with the Swedish EU presidency at the moment of negotiations. The maximum penalty punishment was adjusted to 10 years imprisonment.[36]

For Denmark's part, trafficking in human beings was inserted as an offence in the Criminal Code.[37] In the Government bill, it was pointed out that this is not actually a newly created crime, but inserting trafficking as an own offence was considered appropriate. The punishment for such an offence was raised to 8 years imprisonment, in line with the framework decision.[38]

The new directive on trafficking in human beings will apply, and replace the framework decision for Finland and Sweden. The directive requires that certain trafficking offences are punishable by a maximum penalty of at least ten years of imprisonment. As with the previous framework decision, this applies in the same situations, that is when the offence has deliberately or by gross negligence endangered the life of the victim, or when it has been committed against a particularly vulnerable victim. This also applies when the offence has been committed by use of serious violence or the offence has been committed within a criminal organisation.[39] As Sweden already applies a 10-year prison sentence for these offences, this will only affect the Finnish legislation. As mentioned earlier, Denmark does not participate in post-Lisbon Treaty EU criminal law cooperation. The directive will therefore not have any effect on Danish legislation, unless the opt-out is dropped.

c) Some concluding remarks

What characterises Nordic criminal law in EU substantive criminal law is that new offences are usually criminalised. This does not mean, however, that the punishable behaviour was not previously criminalised in the Nordic states, but that it was not criminalised explicitly as that offence. EU framework decisions lead to the upward adjustment of penalties in most situations. This is a direct result of EU criminal law. The Nordic Member States try to adjust the EU obligations to the national system. This is not always free of problems, as shown by the Finnish example.[40]

This could more generally be attached to a common Nordic approach in EU criminal law. The Nordic approach can be seen as trying to maintain the specifics that characterise their own systems. It is not considered appropriate to increase penalties for some offences to a considerably higher degree than that which is considered rational under the national system. This could disturb the balance of the national legal system. This does not mean that the Nordic states in any way under-

[35] Swedish Government bill Prop. 2003/04:111 pp. 42-43 and 48-49.
[36] Section 1(a), chapter 4 of the Swedish Criminal Code 1962:700, Brottsbalk.
[37] Section 262(a) of the Danish Criminal Code.
[38] Danish Government bill 2001/02 L 118, point 7.5.
[39] Art. 4(2) of the directive.
[40] *Elholm* (n. 16), p. 204 has also pointed this out.

estimate the common fight against crime in the EU. It is perhaps more a question of how to achieve the goal and being reasonable about the means through which this is done. European ambitions should not lead to a constantly more repressive approach with increasingly severe punishments.[41] There are very few empirical studies on how efficient EU criminal law is or becomes when increasing its repressive character. Perhaps the scepticism of the Nordic Member States is therefore understandable.

2. Procedural criminal law

As regards EU procedural criminal law, focus has been on the principle of mutual recognition. This principle regulates the cooperation in criminal matters between the Member States. Mutual recognition does not aim to harmonise the laws of the Member States, but to regulate the cooperation between them. This could be considered as harmonising the rules on cooperation between the Member States. That said, it is not essential that the underlying legal rules are harmonised. Mutual trust is relevant in this aspect; as the starting point, cooperation is possible as it is based on a mutual trust.[42]

a) Mutual recognition

Let us first take a look at the mutual recognition flagship, the European Arrest Warrant.[43] This framework decision introduced the new system of surrender, which replaced the previous, traditional system of extradition. The new term of surrender was introduced to denote the mutual recognition of a foreign-issued warrant as opposed to the centrally controlled, essentially discretionary request for extradition. The European Arrest Warrant is the first instrument introduced in the sphere of criminal cooperation based on mutual recognition. A European arrest warrant can be issued in cases where a person is wanted for a trial or where a person has been sentenced but has escaped from the application of the sentence. A European Arrest Warrant is to be complied with, unless a ground for refusal listed in the framework decision, is applicable. The framework decision has then listed several applicable grounds for refusal, such as the nationality of the person involved and the *ne bis in idem* principle, and it further regulates cooperation with a partial abolition of the double criminality requirement.

That which characterises the Nordic implementation of this framework decision can be divided into three characteristics. First**,** inserting the framework decision into the national system is done by preserving the coherence and systematic approach of their own legal system. Both Denmark and Finland still apply the traditional

[41] *Wersäll* (n. 5) pp. 666-667.

[42] See e. g. *F. Zimmermann, S. Glaser and A. Motz,* Mutual recognition and its implications for the gathering of evidence in criminal proceedings: a critical analysis of the initiative for a European Investigation Order, EuCLR 1/2011 p. 61.

[43] Council Framework Decision 2002/584/JHA of 13th June, 2002, on the European arrest warrant and the surrender procedures between Member States, O.J. 2002 L 190/1.

extradition terminology, although the European Arrest Warrant introduced the new term *surrender*. In the implementation solutions it can be seen that all Nordic Member States chose to apply the grounds for refusal rather extensively. The possibilities to refuse recognition of arrest warrants are therefore maintained as far as possible. What can be further distinguished is a thorough evaluation of the European Arrest Warrant and rather extensive considerations on how best to implement the arrest warrant rules in the national system.

This aspect is not as strictly maintained in later Finnish implementation of mutual recognition instruments. Later implementing legislation in Denmark and Sweden are also not as strict in preserving the national legal order either, but the Finnish example is the most prominent. In Finland, later mutual recognition framework decisions are implemented by reference. This resembles incorporation that is usually applied when implementing international law treaties. The national law mainly states that the framework decisions apply as such in Finland. Although the Danish and Swedish implementation of other framework decisions takes the national system into account, perhaps a shift can be seen. This can derive either from the fact that surrender or extradition is a rather serious form of cooperation, or the fact that this was the first instrument where the EU legislated on criminal procedural law.

Secondly**,** mutual trust is especially relevant for the Nordic Member States. The grounds for refusal relating to the respect for state sovereignty, which relate to the core of a state's criminal law competence, are largely preserved. Grounds for refusal, such as the double criminality requirement, for offences not on the list, and territorial limitations are expressions of situations where the sovereignty of Member States is in conflict with efficient cooperation. There are almost no concessions made in relation to such grounds for refusal under the Nordic implementation.

However, the matter of trust is dealt with differently in the Nordic Arrest Warrant.[44] This international convention is in many ways similar to the European Arrest Warrant and can be considered as the Nordic answer to it. The Nordic Arrest Warrant does not include all of the grounds for refusal based on respect for the core of state sovereignty found in the European Arrest Warrant. This is a result of a regional extradition system based on similar criminal law and a mutual trust which has developed over time. The mutual trust between the Nordic Member States is greater than that between the EU Member States.[45] Although ceasing to apply such grounds in the wider European context would signify a higher degree of mutual recognition, this does not seem possible in the current climate due to the lack of trust between the Member States.

Thirdly**,** safeguarding human rights is considered important in the Nordic states and it is common for them to insert human rights provisions when implementing legislation. This is done regardless of whether the EU instrument includes such

[44] Konventionen av 15. 12. 2005 om överlämnande mellan de nordiska staterna på grund av brott (Nordisk arresteringsorder) (Convention on surrender on the basis of an offence between the Nordic States (The Nordic Arrest Warrant)).

[45] *Mathisen* (n. 1), pp. 32-33 is of the same opinion.

provisions. Such provisions are even inserted into inter-Nordic cooperation instruments. However, these provisions do not seem to be applied very often, as most of the case law indicates that the threshold for applying these is rather high. It is typical for the Nordic Member States to preserve discretion in relation to safeguarding human rights. Due to the strong role of the European Convention of Human Rights in the Nordic Member States, these states have felt a need to also maintain a certain level of control as an executing state. This is not, however, extraordinary in the EU context.[46]

b) Procedural rights

Another aspect of EU procedural criminal law is the improvement of the procedural safeguards of the individual. Common minimum rights are an area which has long been neglected by the EU. A step-by-step approach has been chosen by the EU, which means that different instruments regulate different matters.[47] The approach is therefore somewhat similar to mutual recognition, where different legal instruments regulate different cooperation forms.

A proposal for a Directive on the right to information in criminal proceedings is under negotiations between the Council and the European Parliament at this present moment.[48] Therefore, what is said in relation to this is not yet applicable law in the EU or in the Nordic Member States, but is nevertheless of interest here. The main idea with this directive is to harmonise a number of minimum rules in relation to what information concerning procedural rights an arrested person should have the right to receive in all Member States. The proposed directive builds upon the European Convention of Human Rights and the European Charter of Fundamental Rights. The directive would be applicable in situations where a person is suspected or accused of having committed a criminal offence or when executing a European Arrest Warrant.

The arrested person is to be provided with a letter of rights, which is similar to the English bill of rights. In this letter of rights, the national law should be explained in relation to the person's access to a lawyer, his/her entitlement to legal advice, his/her right to interpretation and translation and, lastly, his/her right to remain silent. This information is to be given when they become applicable and in due time so that they can be effectively exercised. There are some further rules on information that are to be given to a person subjected to arrest due to a European Arrest Warrant.

This directive will have an impact on the Nordic Member States' legislation. The Finnish Act on coercive measures is currently under revision. The biggest amendment here, in relation to the procedural rights discussed in the Directive, is the

[46] *Suominen* (n. 2), p. 222.

[47] See the Resolution of the Council of 30th November, 2009, on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, O.J. 2009 C 295/01.

[48] The proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings, 17503/10 of 6. 12. 2010.

insertion of a provision relating to the arrested person's right to be silent.[49] This has not been previously regulated in Finnish legislation. The same applies for Swedish legislation.[50] As the Directive indicates, this is part of the information that should be given to the arrested person in the letter of rights. This is an improvement, as there has previously been no obligation under Finnish or Swedish law to state the arrested person's rights in writing.

According to the Danish Act on Administration of Justice,[51] the arrested person is to be informed of his/her right to be silent before he/she is questioned by the police.[52] This information is also to be indicated in the police report. The situation is already thus at present, and therefore the Directive on information in criminal proceedings will have a lesser effect in Denmark, if Denmark decides to opt-in in respect of this instrument. As already mentioned, Denmark has not been involved in EU criminal law cooperation since the Lisbon Treaty. At the moment, Danish participation and adoption of the proposed directive is not foreseen.

If the provisions of the proposed directive in relation to a European Arrest Warrant do not become applicable on Denmark's part, this could become problematic. A Member State should not only apply instruments making cooperation more efficient. Instruments regulating procedural rights, thus balancing the criminal procedure overall, should be applied as well. This is nevertheless not the situation in which Denmark finds itself after the Lisbon Treaty.

c) Some concluding remarks

What is characteristic for EU procedural criminal law and especially mutual recognition is that most of the instruments apply a specific form, which functions as the basis for cooperation. This form is practical for efficient cooperation, but it is problematic from a Nordic point of view. The Nordic states have inserted human rights provisions in their implementing legislation.[53] These are not, however, in any way visible in the forms and this can produce problems. It is not possible, therefore, to evaluate the human rights perspectives specifically in a European Arrest Warrant. In relation to mutual trust in the other Member States' systems, this can prove particularly problematic.

In practice, the person subject to a European Arrest Warrant needs to raise the question of protecting human rights himself/herself. This is, at least in Finland,

[49] Finnish Government bill HE 222/2010 pp. 192-193 (available on www.finlex.fi, in Swedish and Finnish).

[50] *C. Diesen*, Utevarohandläggning och bevisprövning i brottmål (Trials in absence of the defendant and general methods for evalutation of ecidence in criminal cases, Swedish), Stockholm 1994 pp. 47-48. See also *Ø. Øyen*, Vernet mot selvinkriminering i straffeprosessen (The protection against self-incrimination in criminal proceedings, Norwegian), Bergen 2010 pp. 290-292.

[51] Retsplejeloven, newest modification 1237/2010.

[52] Section 752, chapter 68 of the Danish Act on Administration of Justice.

[53] Section 5(1)(6) of the Finnish Extradition Act 2003/1286, Lag om utlämning för brott mellan Finland och de övriga medlemsstaterna i Europeiska unionen, section 4(1) of chapter 2 of the Swedish Surrender Act 2003:1156, Lag om överlämnande från Sverige enligt en europeisk arresteringsorder and section 10(h)(1) of the Danish Extradition Act 433/2003, Lov om ændring af lov om udlevering af lovovertrædere og lov om udlevering af lovovertrædere til Finland, Island, Norge og Sverige.

done either in a hearing before the surrender issue is decided on. In such a situation, the prosecutor has the possibility of requesting further information from the issuing state. The question of surrender contradicting human rights can be further raised at the surrender hearing in the court, which then complicates matters. If it is possible to individualise the claim, the court can request further information. Nevertheless, the form which constitutes the European Arrest Warrant does not include any possibility for contemplation on these matters. This leads to an intolerable situation.[54]

The assumption that procedural rights are highly safeguarded in the Nordic states and that new EU instruments in this area would not have an effect on existing legislation is, as was shown, not always correct. With the procedural rights protected, the Nordic states may consider themselves somewhat forerunners in this area. This is not to say, however, that a European instrument cannot add some forms of protection that have not previously been either regulated or practised in the Nordic states. As long as EU instruments in the step-by-step approach in minimum procedural rights concern minor issues, the impact on Nordic legislation is essentially minor.

3. Institutional cooperation

Institutional cooperation in criminal matters in the EU is a further form for cooperation. In this, one could include institutional or operative cooperation, such as Eurojust, Europol, and the European Judicial Network, or OLAF (the European Anti-Fraud Office) or measures such as the Joint Investigation teams. Characteristic of institutional cooperation is that these are cooperation forms based on coordinating institutions. These institutions do not replace any national institutions. These aim at reconciling an intergovernmental method with efficiency and Member States' sovereignty in a European setting of fighting crime.[55] The idea is that through these institutions, an added value is gained in combating crime.

a) Eurojust

Eurojust was established in 2002 to strengthen the fight against serious, cross-border crime.[56] Its objective is to improve and facilitate co-ordination in criminal matters between competent authorities of the Member States. Eurojust consists of 27 national members and these members all operate according to homeland legisla-

[54] See further on the application of the Finnish section *A. Suominen*, Perus- ja ihmisoikeusnäkökohtia Suomen kansainvälisessä yhteistyössä rikosasioissa (Fundamental rights perspectives in Finnish legislation on cooperation in criminal matters, Finnish), in Defensor Legis 1/2011, pp. 44-49.

[55] *J. Vlastník*, Eurojust – a cornerstone of the federal criminal justice system in the EU? in Guild and Geyer (eds.) Security versus Justice? Police and Judicial Cooperation in the European Union, Aldershot 2008 p. 35.

[56] Council decision of 28th February, 2002, setting up Eurojust with a view to reinforcing the fight against serious crime, O.J. 2002 L 63/1. See also Council Decision 2009/426/JHA of 16th December, 2008, on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, O.J. 2009 L 138/14. For information on Eurojust, see e. g. *A. Suominen*, The past, the present and the future of Eurojust, Maastricht Journal for European and Comparative Law 2/2008 pp. 217-234 including references.

tion. Eurojust functions either through the national members or together as a college. Eurojust shall stimulate coordination between the competent authorities of the Member States in investigations and prosecutions. It shall also improve the co-operation between the competent authorities of the Member States. Eurojust shall, in addition, support these authorities in making their investigations and prosecutions more efficient. This means that this institution currently functions in a cooperative manner, without any own supranational competence.

The Lisbon Treaty has amended the functions of Eurojust. The new article 85 of the TFEU further enhances Eurojust competence. This new competence includes, *inter alia*, strengthening judicial cooperation and proposing and initiating criminal prosecutions. This does not, however, seem to be a supranational competence as such.

It is furthermore possible to develop a European Public Prosecutors Office (EPPO) from Eurojust, based on article 86. This European Public Prosecutor would be responsible for investigating, prosecuting and bringing to judgment, perpetrators and accomplices in offences against the Union's financial interests. This would have a character of a supranational prosecutor's office, if carried out. The European Public Prosecutor is nevertheless not a reality at present.

All the Nordic Member States are members of Eurojust. In Finland, the Finnish national member's position was not at first regulated by law. The Eurojust cooperation was considered adequately covered by other, general legislation. This changed, however, and in relation to the increased competences of Eurojust, a new Act on Eurojust was enacted.[57] This act entered into force in June, 2011.[58] In Sweden and Denmark, a need for explicit legislation in relation to regulating the position of the national member at Eurojust has not been considered.[59] The current legislation is considered sufficient to regulate the national members' position, as all competences are national.

If the European Public Prosecutors Office were to be established from Eurojust, it is unlikely that the Nordic Member States would apply this. As it stands, there are no indications of these states supporting its creation. If the EPPO were, however, to be created through enhanced cooperation, which is possible pursuant to article 86 TFEU, these states could, in principle, join in later. Apparently, Denmark's current opt-out, however, covers the participation in a possible EPPO.

b) Joint Investigation Teams

The basis for setting up such investigations teams is originally found in the 2000 Mutual Legal Assistance Convention. A framework decision, containing the same provisions, was enacted in 2002, to make ratification quicker.[60] The idea with this

[57] Act on implementing certain provisions of the Eurojust decision, 742/2010, Lag om genomförande av vissa bestämmelser i beslutet om Eurojust.

[58] See Government bill HE 61/2008 pp. 6-11 on the former Eurojust decision and Government bill HE 18/2010 pp. 6-9 on the new act. This new act enters into force 4. 6. 2011.

[59] *Gade et al.* (n. 12) p. 624 and the Swedish Government bill Prop. 2001/02:86 on the Swedish acceptance of the Eurojust decision.

framework decision is to allow the setting up of joint investigations teams composed of competent authorities from two or more Member States. These are to be set up for a specific purpose, for example when several Member States have parallel investigations in offences which need coordination. Joint investigation teams are to be set up for a limited period and cannot, therefore, be established on a permanent basis. A joint investigation team is to be led by a competent representative of that Member State where the team operates. The law of that Member State applies to the team's operations. The agreement on setting up joint investigations teams is, nevertheless, always conducted between the Member States involved, so that the framework decision does not, as such, impose any obligation on the Member States, other than enabling joint investigation teams.

All Nordic Member States have amended their legislation, or enacted new legislation in order to comply with the framework decision. In Denmark, the relevant provisions of several acts on mutual legal assistance were amended.[61] In Finland and Sweden, new acts were enacted.[62] The Finnish Act contains a specific provision stating that the Finnish member of Eurojust is always to be included in a joint investigation team when Finland is involved.[63] This amendment was made in context with the above mentioned legislation on Eurojust. In general, the provisions in the Nordic Member States' legislation are comparable and as there is no obligation to form a joint investigation team, merely the possibility of doing so, the legislation has not been considered problematic.[64]

There are surprisingly many Joint Investigation Teams coordinated between Finnish and Swedish authorities. In 2010 there were two, which concerned international fraud and arrangement of illegal entry. It is significant that the Joint Investigation Teams are favoured as opposed to traditional Nordic cooperation and mutual legal assistance between authorities in these states. The EU forms for cooperation are considered more efficient and the informality possibilities in Joint Investigation Teams have led to prioritising such teams before other, Nordic forms of cooperation. An added advantage of applying joint investigation teams is that the financial burden is allocated beforehand and this makes applying this form of cooperation more appealing.

c) Some concluding remarks

Institutional cooperation does not, as such, infringe upon state sovereignty, as the starting point has been to build on existing national competences. EU institutional

[60] Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams, O.J. 2002 L 162/1.

[61] Act on amending several acts due to the EU MLA Convention, the second protocol of the Council of Europe's MLA Convention and the EU framework decision on JIT:s 258/2002, Lov om ændring af straffeloven, retsplejeloven, lov om konkurrence- og forbrugerforhold på telemarkedet og lov om international fuldbyrdelse af straf m. v.

[62] In Finland, the Act on Joint Investigation Teams 2002/1313, Lag om gemensamma utredningsgrupper and in Sweden, the Act on certain forms of international cooperation in criminal investigations 2003:1174, Lag om vissa former av internationellt samarbete i brottsutredningar.

[63] Section 2 of the Finnish JIT Act.

[64] See the Finnish Government bill HE 186/2002, the Swedish Government bill Prop. 2003/04:4 and the Danish Government bill 2001/2 SF. L 141.

cooperation in criminal matters focuses on enhancing cooperation between the national authorities. This has not, therefore, been considered problematic from the Nordic Member States' position. Having common institutions has been considered beneficial for cooperation in criminal matters. As long as this form of cooperation does not infringe upon the states' sovereignty, the Nordic Member States are positively disposed towards it. The institutional form of cooperation does not impose anything, as such, on the legal systems of the Member States.

As this form of cooperation is different to substantive or procedural criminal law, it is less complicated for the Nordic Member States to participate in this. There does not seem to be any opposition, as such, towards institutional cooperation. At the same time, there does not appear to be any particular Nordic characteristics in EU institutional cooperation in criminal matters.

V. General concluding remarks and some aspects on the future

The characteristics of Nordic criminal law in relation to EU criminal law can be seen in light of the development of EU criminal law. A sceptical starting point was a given at the beginning, from a state sovereignty perspective and due to a strong will to preserve the national criminal law system. As EU criminal law developed, the attitude in the Nordic Member States also developed. Denmark is exceptional in its position, which to a large extent follows the UK approach. For Finland and Sweden, the main criticism seems to have lessened to some degree. This can best be seen in the Finnish implementation of mutual recognition framework decisions. As implementation by reference is used, it is not considered necessary to enact their own, substantive legislation. While this may not be perceived as a very sceptical approach, it was perhaps primarily chosen due to its time consuming procedure.

That which characterises Nordic criminal law in the setting of EU criminal law can be summed up in the following. First, the Nordic Member States safeguard the national legal order as far as possible. This is not, however, uniform throughout the Nordic Member States. Based on mutual recognition instruments, the Finnish position seems to have adopted the most approving position in relation to EU criminal law. This seems to be a rather abrupt conclusion, in the light of EU substantive criminal law instruments, where the national legal order is clearly prioritised. Safeguarding the national legal order can, therefore, have different characteristics and approaches, even within a single Nordic state.

Secondly, the preservation of the national legal culture and especially aspects related to the core of state sovereignty is of importance for the Nordic Member States. This is not to say that the Nordic states are the only ones which consider state sovereignty important in EU criminal law. There are, however, similar characteristics that the Nordic States consider to be important: preserving the national criminal justice system, having a coherent criminal policy, and maintaining human rights grounds for refusal in cooperation. Out of all of the Nordic Member States, it is Denmark that has taken these points the furthest.

Thirdly, the Nordic Member States maintain a Nordic approach that allows further cooperation between these states. The Nordic Arrest Warrant is an example of this. The Nordic states are willing to enter into greater cooperation with one other than with the EU. This is a point which they want to stress when legislating new instruments of EU criminal law. However, in some situations the Nordic Member States might prefer applying a European instrument or form for cooperation. It seems that they adopt whichever leads to a more practical solution. How the Danish position in respect of EU criminal law will impact on this remains to be seen. Nordic cooperation might, due to its non-compulsory nature, be favoured from a Danish point of view.

The Nordic criminal policy, with its rational and humane approach can be problematic in the EU criminal law setting. This is not to say, however, that it always is problematic. As can be seen by some of the examples in relation to substantive criminal law, there is not one Nordic criminal policy and the Nordic states can choose different approaches in relation to severity of punishment and criminalisations. The criminal policy of the Nordic states and their effective co-operation based on mutual trust should perhaps function as a model for the EU. This has been seen to take place previously, as with the preparations of the European Arrest Warrant. The Nordic states seem to have something to offer to the EU setting.[65] This applies especially in relation to having a balanced approach in criminal law, applying a rational and human criminal policy and some leading, fundamental principles.[66] Nevertheless, this parallel is not so easy to establish in practice, due to the lack of mutual trust and differing legal cultures at the EU level.

[65] *Nuotio* (n. 16) p. 172 of the same opinion.

[66] See further ECPI (European Criminal Policy Initiative, (www.crimpol.eu) A Manifesto on European Criminal Policy, ZIS 2009 pp. 707-716 (English version).