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# BALANCING BETWEEN EFFECTIVE REALIZATION OF CRIMINAL LIABILITY AND EFFECTIVE DEFENCE RIGHTS: THE TASKS AND THE ROLES OF PROSECUTOR AND DEFENCE LAWYER IN FINNISH CRIMINAL PROCEDURE

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**Abstract.** *Prior to the extensive reform of the Finnish criminal procedure in 1997, the roles of the prosecutor and the defence attorney were passive compared to the role of the judge. The main task of the prosecutor was to read the written indictment and to help the judge to find the truth. The judge could procure evidence ex officio, although it may have been detrimental to the suspect.*

*The roles of the judge, the attorneys and the prosecutor changed dramatically when the reform concerning criminal matters was enacted. The prosecutor is now an active party to the case, ensuring the implementation of criminal liability and actively promoting the progress of the proceedings. It is the duty of the prosecutor to prove the charge by procuring sufficient evidence in support of the charge and by presenting it to the court. The court itself is neutral; it does not support or assist the prosecutor. The judge cannot hear a witness ex officio if the hearing is to be detrimental to the suspect.*

*One may say that the main tasks of the judge in a criminal case are to (formally) safeguard a fair trial and to decide the case by reflecting the evidence that the prosecutor and the attorneys have procured and presented to the court. Communication, cooperation, interaction and a fair trial as a whole are the main features of Finnish criminal procedure.*

**Keywords:** *prosecutor, defence attorney, defence rights, the roles in criminal procedure, legal aid.*

## Introduction

Previously, it has been said that the purpose of criminal proceedings is to find the material truth. In practice, this has in many ways proven to be an unrealistic and even misleading definition of the purpose of pre-trial investigation and criminal proceedings, although it is quite often claimed to be the case, particularly in criminal procedure.<sup>1</sup> Of course, the police and the prosecutor are striving to find the relevant facts of a given case as effectively as is both possible and reasonable. The suspect or the accused, however, never has an obligation to contribute to this purpose. He/she has no obligation to give a statement in his/her matter, and even has no obligation to give true statements (if they give statements at all).

In the pre-trial investigation, the police have an obligation to take into account facts and evidence both against and in favour of the accused. The prosecutor is bound by the principle of objectivity and must act in an impartial and unprejudiced manner. The value of rights affected naturally raises the level of legal requirements. The more valuable the rights affected, the more detailed the pre-investigation and proceedings in court.

In this article, an attempt is made to find out if it is possible to guarantee effective realization of criminal liability and at the same time take seriously the rights of a person suspected or accused of a criminal act.

### 1. The Organization of the Prosecutors

The Finnish Prosecution Service is organized into two tiers. The central administrative authority of the Prosecution Service is the Office of the Prosecutor-General headed by the Prosecutor-General. The Office of the Prosecutor-General falls within the purview of the Ministry of Justice.<sup>2</sup> At the decentralized level, there is a local prosecution unit in each administrative district. Local units constitute so-called joint operational areas. Prosecutors acting within the same joint operational area can provide mutual support and assistance<sup>3</sup>.

1 See, for example, Jokela, A. *Rikosprosessi* [Criminal Procedure]. Helsinki, 2008, p. 12–13.

2 Act on Public Prosecutors, Section 5 subsections 1 and 3.

3 *The Finnish Prosecution Service*. Brochure of the Office of the Prosecutor-General. Helsinki, 2009, p. 6.

There are three types of public prosecutors in the Finnish Prosecution Service: 1) the Prosecutor-General and the Deputy Prosecutor-General, 2) State Prosecutors and 3) District Prosecutors and a Prosecutor for the Åland Islands which is an autonomous part of Finland.<sup>4</sup>

*The Prosecutor-General* is the superior of all public prosecutors<sup>5</sup>. The Prosecutor-General is independent in the assessment of the charge being considered by him/her, unless otherwise provided by an Act<sup>6</sup>. His/her duties consist of 1) the general management and development of prosecution operations and the supervision of the prosecutors; 2) prosecution in cases that by law belong to him or her or that he or she takes up for consideration; 3) the issuance of prosecution orders referred to in chapter 1 of the Penal Code or in another Act; and 4) the representation of prosecutors before the Supreme Court<sup>7</sup>.

The Prosecutor-General may also issue general instructions and guidelines on prosecution operations<sup>8</sup>. Before publishing prosecution guidelines, the Minister of Justice has to be informed according to law. If necessary, the contents of the guidelines are discussed with the Minister of Justice. However, the Prosecutor-General is the sole authority who decides on the contents of the guidelines. The guidelines are soft-law type of regulation which the prosecutors *de facto* take into account while considering charges. The guidelines are a measure of hierarchical control: the Prosecutor General standardizes prosecution practices by giving guidelines. If a prosecutor does not follow the guidelines, it may cause disciplinary consequences to him/her.<sup>9</sup>

*State Prosecutors* are working in the Office of the Prosecutor-General and their jurisdiction as prosecutors covers the State<sup>10</sup>. State Prosecutors primarily work on criminal matters of the greatest significance to the society as a whole. In addition, a State Prosecutor pursues a charge that has been decided on by the Parliament<sup>11</sup>, the Ministry of Justice, the Chancellor of Justice or the Parliamentary Ombudsman. A State Prosecu-

4 There also exist *Special Prosecutors* in the Finnish Prosecution Service: the Chancellor of Justice of the Government and the Parliamentary Ombudsman. A decision to bring charges against a judge for an unlawful conduct in office is made by the Chancellor of Justice or the Ombudsman. The Chancellor of Justice and the Ombudsman may also prosecute or order charges to be brought in other matters falling within the purview of their supervision of legality. (Finnish Constitution, Section 110).

5 Act on Public Prosecutors, Section 10.

6 *Ibid.*, Section 3 subsection 1.

7 *Ibid.*, Section 4.

8 *Ibid.*, Section 3 subsection 2.

9 The Ministry of Justice or any other authority cannot give binding orders concerning the solution of a case to prosecutors. The Parliamentary Ombudsman indirectly supervises prosecutors, but he/she does not have responsibility against them. Supervision is carried out by supervision visits to the prosecutors' offices. A person may also complain about the decision made by a prosecutor to the Ombudsman. The Ombudsman is entitled to decide to bring charges if he/she considers that the prosecutor has waived charges without legal grounds.

10 Act on Public Prosecutors, Section 7 subsection 1.

11 The Parliament may decide that a Minister shall be prosecuted for a serious offence in public office.

tor prosecutes cases that are tried before a Court of Appeal in the first instance, unless otherwise provided in an Act or otherwise ordered.<sup>12</sup>

The local prosecution service is organized by the State Local District<sup>13</sup>. A *District Prosecutor* operates in a District Prosecution Office. The Office also fall within the purview of the Ministry of Justice. The District Prosecution Office is headed by the District Prosecutor-in-charge.<sup>14</sup> District Prosecutors operating within the jurisdiction of a District Court are competent to prosecute cases in which the District Court is competent<sup>15</sup>. This applies to both *venue* and *jurisdiction ratione materiae*.

At the decentralized level, there also are special prosecutors, ‘key prosecutors’, who specialize in certain types of crimes. The specialities of key prosecutors are, for example: economic offences, environmental offences, employment offences, computer crime, drug-related crime, international affairs, offences against women and children, offences in public office and military offences, procedural law. A key prosecutor has the authority to prosecute cases within his/her speciality anywhere in the country. He/she can also be consulted by the other local prosecutors.

A prosecutor is independent in the assessment of the charge in a case being considered by him/her.<sup>16</sup> However, the Prosecutor-General has certain possibilities to interfere in the actions of prosecutors. The Prosecutor-General has a *right of devolution*: he/she may decide to take up for consideration any matter belonging to a subordinate prosecutor. He/she may also allot a case to a subordinate prosecutor for the assessment of the charge.<sup>17</sup> Furthermore, the Prosecutor-General has a *right of substitution*: he/she may command one prosecutor to initiate a case when it would belong to another prosecutor’s authority. The Prosecutor-General has also a right to reconsider the decision made by any prosecutor (examine if the decision made by a local prosecutor is correct or not).<sup>18</sup> The Prosecutor General has neither the right to give general orders concerning the content of the consideration of charges, nor more detailed orders related to a certain case,<sup>19</sup> but, as noted before, s/he has a right to reconsider the decision made by any prosecutor.

## 2. The Duties of the Prosecutor

### 2.1. In General

The duties of the prosecutor include to see the realization of criminal liability in the consideration of a criminal case, the assessment of the charge and the trial in a manner

12 Act on Public Prosecutors, Section 7 subsection 2.

13 *Ibid.*, Section 5 subsection 1.

14 *Ibid.*, Section 2.

15 *Ibid.*, Section 6.

16 Act on Public Prosecutors, Section 1 subsection 2.

17 *Ibid.*, Section 10 subsection 2.

18 Rautio, J. Asianosaiset rikosprosessissa [Parties in the Criminal Procedure]. In *Oikeuden perusteokset. Prosessioikeus*. Lappalainen, J. et al. (eds.). Helsinki, 2003, p. 303.

19 Virolainen, J.; Pölonen, P. *Rikosprosessin osalliset – Rikosprosessioikeus II* [Parties in the Criminal Procedure – Criminal Procedure Law II]. Porvoo, 2004, p. 106.

consistent with the public interest and the legal safeguards of the parties. In his/her actions, the prosecutor must act equally, expeditiously, and economically.<sup>20</sup>

In the Finnish Prosecution Service, the main tasks of the prosecutor consist of the consideration of charges<sup>21</sup> and proceeding with a charge. The prosecutor also has a role related to criminal policy: he/she is authorized to restrict pre-trial investigation, to give a decision on sanctionative non-prosecution or to hand down a summary penal judgement.<sup>22</sup> Additionally, the prosecutor has other tasks outside the implementation of criminal liability<sup>23</sup>.

The prosecutor is responsible for the detection of a case. As stated above, it is his/her duty to ensure the realization of criminal liability. The prosecutor has a primary right to institute criminal proceedings. A plaintiff has a secondary right to institute criminal proceedings: a plaintiff may use his/her right if the prosecutor does not press charges<sup>24</sup>. On the other hand, the prosecutor is bound by compulsory prosecution: he/she has a duty to press charges if the requirements for it are met. It is possible to drop charges only in certain circumstances defined by law (sanctionative non-prosecution, see more in the next chapter)<sup>25</sup>.

## 2.2. Duties in Different Phases of Procedure

*The pre-trial investigation* is carried out by the police or other authorities authorized to act at this stage (customs or border guard authorities in certain cases defined by law). The police has a duty to inform the prosecutor of a case under investigation, when a person can be suspected for an offence (if the case is simple, informing is not needed). Prosecutor's active participation in pre-trial investigation has been seen as a conducive factor to imposing sanctions with sufficient certainty<sup>26</sup>. If there seems to be an international aspect in the offence, informing is always needed. In this situation, close cooperation between the police and the prosecutor is very important.

This interdependency is emphasized in international criminal matters: during the pre-trial investigation, the police is the prosecutor's channel to the question what has happened, the material on the grounds of which court proceedings will commence. The

20 Act on Public Prosecutors, Section 1.

21 In Finland, there is no institution of examining magistrates.

22 Virolainen, J.; Pölonen, P., *supra* note 19, p. 30.

23 These include, for example, applying for restraining order, issuing prohibitions to engage in business or declaration of death, and requests for a divorce when a marriage is contracted between the immediate family members. The prosecutor has also a right of appeal in certain matters relating to the trial and a right of plea as a representative of the State in certain matters of compensation. Rautio, J., *supra* note 6, p. 298.

24 A civil claim arising from the offence for which a charge has been brought may be heard in connection with the charge. If such a claim is made separately, the provisions on civil procedure apply, Criminal Procedure Act, Chapter 3 Section 1.

25 Rautio, J., *supra* note 18, p. 309.

26 Vuorenpää, M. *Syyttäjän tehtävät. Erityisesti silmällä pitäen rikoslain yleisestävää vaikutusta* [The Tasks of the Public Prosecutor. Especially from the Point of View of the Deterrent Effect of the Penal Code]. Vammala, 2007, p. 126–131. 'The requirement that sanctions are imposed with sufficient certainty seems to put considerable stress on the prosecutors' pre-trial duties.' (Translation by H. K., *Ibid.*, p. 271).

prosecutor receives the information necessary for the process from the police. Similarly, the police is dependent on the prosecutor: it is important that a case is investigated under the same crime definition that the prosecutor will use while pressing charges. Between the police and the prosecutor, there should be a consensus on what delict is in question and what kind of legal assistance is relevant to apply. In addition, already in this phase of the process the prosecutor should consider if the legal assistance applied will be evidenced in the court of law.<sup>27</sup>

The police has a duty to initiate pre-trial investigations or carry out additional investigations if the prosecutor advises it to do so. The prosecutor may also give orders to the police in order to guarantee the realization of the objectives of a pre-trial investigation.<sup>28</sup> In the Finnish judicial procedure, an officer in charge of the investigation is the police officer, not the prosecutor<sup>29</sup>.

The prosecutor is responsible for *the consideration of charges*. He/she may restrict pre-trial investigation or ask the police to conduct additional investigations. The prosecutor alone decides whether or not to prosecute. The public prosecutor is to bring a charge if there is a *prima facie* case against the suspect<sup>30</sup>, i.e. if there are probable grounds (in Finnish *todennäköisiä syitä*) for the culpability of the suspect. Section 6 of the Criminal Procedure Act 689/1997 has been considered to cover probable grounds both for the culpability of an accused person and for the conviction of him/her in the court<sup>31</sup>. The prosecutor is to bring a charge by delivering a written application for a summons to the registry of the District Court<sup>32</sup>. The court is bound by the order for prosecution; it may convict only for actions and/or neglects announced in the order<sup>33</sup>.

The prosecutor has independent power to decide on sanctionative non-prosecution<sup>34</sup> and to give a summary penal judgement. Sanctionative non-prosecution is a kind of criminal reprimand that does not cause any real consequences to a suspected person. It is a formal warning: a person in question has acted against the law, but in this particular case it is possible to discontinue with the pressing of the charge according to law. The limits of discretion are defined in the Criminal Procedure Act (Chapter 1, Sections 7-8). These are insignificance of the omission, young age of the offender, principles for the

27 Based on the interview (November 2005) of the Head of the International Unit, State Prosecutor Raija Toivainen from the Office of the Prosecutor-General.

28 Criminal Investigations Act, Section 15.

29 However, if a suspect is a police officer, the prosecutor will be in charge.

30 Criminal Procedure Act 689/1997, Chapter 1 Section 6.

31 *Hallituksen esitys Eduskunnalle rikosasioiden oikeudenkäyntimenettelyn uudistamista alioikeuksissa koskevaksi lainsäädännöksi* [government proposal for the parliament concerning the reform of statutory rules regulating the conduct of judicial proceedings in criminal matters in the courts of first instance] 82/1995 [detailed preamble, 1.1. criminal procedure act, chapter 1, right to bring a charge, right of the public prosecutor to bring a charge, section 6]. Also, for example, in Jokela, A., *supra* note 1, p. 220–221.

32 Criminal Procedure Act, Chapter 5 Section 1. However, the court may order, to the extent deemed necessary, that the prosecutor can bring a charge by summoning the defendant himself/herself (Criminal Procedure Act, Chapter 5 Section 1).

33 The right to give an order for prosecution was given to the prosecutor in 1994.

34 The institution of sanctionative non-prosecution was extended in 1990.

reasons of equity and expediency, and concurrence of offences<sup>35</sup>. Summary penal judgement, on the other hand, is a pecuniary sanction (a fine).<sup>36</sup>

Nowadays, there is a possibility to solve simple (non severe) cases in a written procedure, without a trial. This has also enhanced the role of the prosecutor in the criminal process. Written summons must be carefully prepared in a very detailed way.

During *the trial*, the prosecutor proceeds with a charge before the District Court. The court is tied to the charge: it cannot convict of an act which is not included in the charge, but, naturally, it may attribute the accused person less than the prosecutor has claimed. However, the court is not bound by the prosecutor's interpretation of law or the summary penal order given by him/her. Principally, a charge cannot be modified during the trial. However, the prosecutor may extend the charge to cover other crimes committed by the same defendant. With certain limits, the prosecutor may revise and/or restrict the charge.

Usually, the same prosecutor proceeds with the charge also before the Court of Appeal. Before the Supreme Court of Finland, the prosecutor will be represented by the Prosecutor-General<sup>37</sup>. For the Supreme Court, a retrial permit is always needed.

### 3. The Role of the Prosecutor

In the Finnish Prosecution Service, the prosecutor is said to have a triangular role. At first, the prosecutor acts as an *engine*: he/she has responsibilities in carrying the case through the criminal process and taking care of the legal rights of the parties. Secondly, the prosecutor acts as a *filter*: he/she decides whether or not to prosecute. Thirdly, the prosecutor has an authority to act, in a way, *like a judge* in certain defined matters: the prosecutor decides on the appropriate sanction that he/she presents before the court; the prosecutor has also a right to give a sanctionative non-prosecution and a right to order summary fines.<sup>38</sup>

35 In addition, some other acts stipulate the possibility to impose sanctionative non-prosecution. These are the Penal Code (for example, Chapter 35 Section 2 related to malicious damage and Chapter 50 Section 7 related to drug offences) and the Road Traffic Act (for example, Section 104 related to traffic violations), Jokela, A., *supra* note 1, p. 223–230.

36 See more about sanctionative non-prosecution and summary penal judgement in Jääskeläinen, P. *Syyttäjän tuomarina. Rikosoikeudellinen tutkimus seuraamusluonteisen syyttämättä jättämisen ja rangaistusmääräysmenettelyn ehdoista Suomessa ja Ruotsissa* [The Prosecutor Acting as a Judge. A Criminal Law Research into the Conditions of Non-Prosecution and Summary Penal Proceedings in Finland and Sweden]. Helsinki, 1997.

37 Act on Public Prosecutors, Section 4 subsection 4.

38 See, for example, Virolainen, J.; Pölonen, P., *supra* note 19, p. 35; Jokela, A., *supra* note 1, p. 58–59; Jääskeläinen, P., *supra* note 36, p. 5–9; *Syyttäjän toimenkuvan kehittäminen* [The Development of Job Description of the Public Prosecutor]. Publications of the Office of the Prosecutor-General 1, Memorandum of working group. Helsinki, 2001, p. 7–8. It is important to notice that the meaning of the phrase 'like a judge' does not equate the judge or the court mentioned in the human rights or basic rights regulations, *Syyttäjän toimenkuvan kehittäminen* 2001, p. 10. It has also been stated that in the case of sanctionative non-prosecution the prosecutor does *not* act 'like a judge'—this is a part of the prosecutor's traditional duties, Jonkka, J. *Syyttäjänrooli ja syytekynnys* [The Role of the Public Prosecutor and the Threshold of Prosecution]. *Defensor Legis*. 2003, 6: 979.

The role of the public prosecutor in Finland is active, diversified, but also adversarial. The role of the prosecutor differs from the position of the other parties, because the prosecutor acts as a civil servant with official liability<sup>39</sup>. In his/her interpretation and application of the substantive provisions of law, he/she is bound by the principle of obligatory prosecution<sup>40</sup>.

Furthermore, the role and the powers of the prosecutor vary during different phases of a criminal procedure. During the pre-trial investigation and the consideration of charges, the prosecutor is an official who is subject to official liability: he/she is obliged to act in conformity to law, represent the public right of action and act for the society by ensuring its interest. He/she must consider the circumstances and pieces of evidence both against and in favour of the accused person<sup>41</sup>. During the pre-trial investigation and the consideration of charges<sup>42</sup>, the prosecutor is, in a way, an objective body: he/she must act objectively, take into account both advantages of the accused and the plaintiff.<sup>43</sup>

During the trial, the prosecutor becomes a party to the matter. However, the prosecutor is not a party to the matter as a plaintiff or an accused, but as a judicial authority<sup>44</sup>. His/her duty is to ensure the realization of criminal liability by prosecuting and providing evidence against the accused person. The prosecutor must also safeguard the fundamental rights of an accused person during the criminal procedure, although it is the duty of the defence counsel to defend the accused and invoke facts which support the viewpoints of his/her client<sup>45</sup>.

In their role as law enforcement officers, the prosecutors are a part of the Finnish judicial system. In their duties, the prosecutors have to work without bias, promptly, in an objective manner and economically. The prosecutors are independent: they alone make the decisions on cases that have been brought before them.

Responsibility to examine a suspected criminal case and the realization of criminal liability are emphasized in the role of the prosecutor. In criminal procedure, the prosecutor is an active key actor: it depends on the contribution of the prosecutor what kinds of cases and what kinds of amounts of different cases are selected to the trials and how profoundly each individual case is examined.<sup>46</sup>

39 Tolvanen, M. *Kriminaalipolitiikka vaativissa rikosasioissa* [Criminal Policy in Demanding Criminal Matters]. *Arvot ja periaatteet. Publications of the Office of the Prosecutor-General 5*. Helsinki, 2007, p. 58.

40 *Ibid.*, p. 59.

41 It has been stated that during the pre-trial investigation and the consideration of charges, the procedure cannot be described as accusatorial. *Ibid.*, p. 59.

42 In the consideration of charges, the prosecutor does not just passively estimate the probability of a conviction in the court, but actively considers different alternatives and hypotheses, and, on the grounds of this consideration, formulates a resolution (to act) which is legally justifiable. Jonkka, J., *supra* note 38, p. 987.

43 Tolvanen, M., *op cit.*, p. 59; Tolvanen, M. *Esitutinnan uusi työnjako: Poliisi johtaa, syyttäjä ohjaa* [The Reformed Distribution of Work in Pre-Trial Investigation: The Police Conducts, The Prosecutor Instructs]. *Oikeus*. 2004, 1: 65–66; Virolainen, J.; Pölonen, P., *supra* note 19, p. 29–30.

44 Virolainen, J.; Pölonen, P., *supra* note 19, p. 31.

45 An authority responsible for ensuring the rights of the accused person is the prosecutor during the pre-trial investigation and the consideration of charges; during the trial this responsibility is passed to the defence counsel and the court. Tolvanen, M., *supra* note 39, p. 60.

46 Jonkka, J., *supra* note 38, p. 982.

#### 4. The Characteristics of the Finnish Prosecution Service

The Finnish Prosecution Service is organized as a decentralized accusatorial system. Control in prosecution is assured by the principle of legality: juridical control is tight. The law strictly determines the prosecutor's actions and the prosecutor does not have as much discretionary powers as in some other European prosecution systems<sup>47</sup>. The duties of the prosecutor were extended during the reforms of the Finnish Prosecution Service in the 1990s<sup>48</sup>. Furthermore, it is characteristic to the Finnish system that there is almost no political control in the system.<sup>49</sup> In principle, however, it is possible that the Minister of Justice could be questioned about prosecution policies in the Parliament.

Certain pressures to strengthen political control over the Prosecution Service have been announced by the Ministry of Justice. According to the Ministry's report<sup>50</sup> of 2006, for improving coherent and logical criminal policy, the roles of the Parliament and the Ministry of Justice as a strategic policy planner should be reasserted. In this report, it has been suggested that the Ministry of Justice would have an authority to give binding general instructions<sup>51</sup>. However, increasing political control is not in accordance with the Finnish system and it is not likely that the Parliament would be ready to strengthen the power of the Ministry to direct and control the Prosecution Service as far as the application of law is concerned.

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47 The principle of obligatory prosecution is a premise in Sweden as well. Instead, in Denmark, Norway, Iceland, France, Belgium, Netherlands, Great Britain and the United States, for example, relative obligation to prosecute is a premise for the prosecutor. Jokela, A., *supra* note 1, p. 212.

48 During the 1990's, an independent prosecution service was established in Finland (Act on Public Prosecutors, 199/1997) and criminal procedure was modified according to the accusatorial system, led by the prosecutor (Criminal Procedure Act, 689/1997). See, for example, Lahti, R. Syyttäjä kriminaalipoliittisena ja eettisenä toimijana [The Public Prosecutor as an Ethical and Criminal Policy Actor]. In *Consilio manue*. Ohisalo, J.; Tolvanen, M. (eds.). Yhtenäinen syyttäjälaitos 10 vuotta. University of Joensuu Publications in Law 22, Joensuu, 2008, p. 100. The prosecutor has also received new duties via the European Union legal tools during the first decade of 2000. These new duties have an effect on the role of the prosecutor in the Finnish criminal procedure.

49 In practice, the actions of the prosecutors may be steered only by passing new laws or by modifying the existing ones. Only the Parliament has the power to pass a law or modify it. As Prosecutor-General Matti Kuusimäki has written, 'an independent position of the Finnish Prosecution Service is nearly unique in the international comparison' (translation by H. K.). The prosecutors are mentioned in Chapter 9 ('Administration of Justice') of the Finnish Constitution as well as the courts of law. Thus, from the point of view of constitutional law, the prosecutor is closer to the court than the administration, even if the Prosecution Service belongs neither to the courts, nor to the administration. In his/her duties with an individual case, the prosecutor is independent. Kuusimäki, M. Uusimuotoinen syyttäjälaitos murrosiän kynnyksellä [The Reformed Prosecution Service]. In *Consilio manue*. Ohisalo, J.; Tolvanen, M. (eds.). Yhtenäinen syyttäjälaitos 10 vuotta. University of Joensuu Publications in Law 22, Joensuu, 2008, p. 23.

50 *Oikeudenmukainen ja turvallinen yhteiskunta. Oikeusministeriön tulevaisuus katsaus* [Fair and Secure Society. Review of the Ministry of Justice]. Helsinki, 2006, p. 30.

51 Government would not have a right to interfere in individual decisions related to prosecution. *Ibid*.

#### 4.1. The Relationship between the Prosecutor and the Police

After its reforms, the Finnish Prosecution Service mainly corresponds with the Prosecution Services in other Scandinavian countries<sup>52</sup>. However, there are still some major differences. The Finnish Prosecution Service displays its most unique characteristics in the relationship between the Police and the Prosecution Service. This relationship is *de jure* independent, but *de facto* it includes both independent and dependent elements.

An offence is reported to the police officer who decides if a pre-trial investigation will be initiated. The police has to inform the prosecutor of the offence, when a person can be suspected for it. If the case is simple, informing is not needed<sup>53</sup>. The prosecutor may always order the police to initiate a pre-trial investigation or to carry out additional investigations<sup>54</sup>. The prosecutor has a right to order the police to continue with pre-trial investigations even if the head of the investigations has decided to close them down. However, the prosecutor has no right to order the closing of investigations or to decide that there will be no pre-trial investigation in the case to begin with. During a pre-trial investigation, the prosecutor has a right to be present in the questioning and independently question the suspect<sup>55</sup>. In practice, however, the prosecutor is rarely present in questioning. The prosecutor has possibility to stay passive during the pre-trial investigation, even if, according to law, he/she has a possibility to attend more actively. Optimal cooperation in a pre-trial investigation can be achieved when tactical and technical competences of the police and juridical knowledge of the prosecutor are used concurrently.<sup>56</sup>

During a pre-trial investigation, the prosecutor has a right to get all the information gathered by the police, even when the investigation is still in progress. During the consideration of charges, the police is needed only if the prosecutor asks it to carry out additional investigations, or if the representative of the police is needed as a witness in the trial. Both the police and the prosecutor may ask consultation from each other. Cooperation is desirable, in many cases essential.

At the moment<sup>57</sup>, a Government proposal for the Parliament regarding an act on the imposition of a fine and a petty fine and certain further acts related to it<sup>58</sup> in par-

52 Jokela, A., *supra* note 1, p. 57.

53 Criminal Investigation Act, Section 15.1.

54 *Ibid.*, Section 15 subsection 2.

55 *Ibid.*, Section 32 subsection 2 and Section 34.

56 Tolvanen, M. Asianosaisten määräämistöimistä rikosprosessissa [The Dispositions of the Parties in the Criminal Procedure]. *Defensor Legis*. 2003, 6: 1011; Tolvanen, M., *supra* note 43, p. 55. In Finland, there is a joint consultative committee that develops the cooperation between the police and the prosecutors. There is also an exchange agreement between the Office of the Prosecutor-General and the National Bureau of Investigation which enables staff exchange between these two organizations. For investigating police officers and prosecutors acting as the head of an investigation (the prosecutor can act as the head of an investigation only when the suspect is a police officer, as stated before), an annual common training on pre-trial investigation was offered from 2001.

57 3 March 2010.

58 *Hallituksen esitys Eduskunnalle laiksi sakon ja rikesakon määräämisestä sekä eräiksi siihen liittyviksi laeiksi* 94/2009 [Government proposal for the Parliament regarding an act on the imposition of a fine and a petty fine and certain further acts related to it].

liamentary proceedings is prepared. This proposal, if accepted without modifications, would shift some of the authority of the imposition of fines and confiscation from the prosecutor to the police, the customs or border guard authorities in cases of certain lenient delicts (maximum penalty of 20 day-fines) if the accused person would not appeal against a decision.

#### 4.2. The Role of the Prosecutor in International Legal Assistance

The prosecutor has received more tasks and powers<sup>59</sup> especially via new European Union instruments concerning international legal assistance between Member States. These instruments are the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union<sup>60</sup> (hereinafter referred to as the EU Convention on Mutual Assistance), the European Arrest Warrant<sup>61</sup> (hereinafter referred to as the EAW) and the Council Framework Decision on the execution in the European Union of orders freezing property or evidence<sup>62</sup> (hereinafter referred to as the EU Decision on freezing property or evidence). For example, according to the EAW, the prosecutor is an essential actor in extradition, in which the prosecutor has not traditionally held much authority in Finland. The prosecutor is also the key actor according to the EU Decision on freezing property or evidence. Between the Scandinavian countries, the cooperation of the prosecutors has traditionally been very close and advanced. In 2008, judicial regulation<sup>63</sup> between these countries was reformed according to the EAW. However, the scope of the application of this modified Scandinavian Arrest Warrant is wider than of the EAW. In practice, the Scandinavian Arrest Warrant can be considered as the principal legal instrument in relation to the EAW.<sup>64</sup>

In the Treaty of Lisbon<sup>65</sup>, an opportunity to establish a European Prosecutor Organization on the basis of the Eurojust to prevent offences that would damage economical interests of the European Union was maintained. This new organization would have the authority to both investigate and perform consideration of charges. In the field of this

59 For example, the prosecutor can be an actor in almost every new tasks defined in the EU Convention on Mutual Assistance (Articles 1,5-7, 9 and, in some existence, Articles 3-4). See more in Kosonen, H. Syyttäjän rooli murroksessa? Syyttäjän roolin kehittyminen kansainvälisessä rikosoikeusavussa [The Role of the Public Prosecutor in Transition? The Development of the Role of the Public Prosecutor in International Legal Assistance in Criminal Matters]. In *Consilio manuae*. Ohisalo, J.; Tolvanen, M. (eds.). Yhtenäinen syyttäjälaitos 10 vuotta. University of Joensuu Publications in Law 22, Joensuu, 2008, p. 89–90.

60 OJ C 197, 12.7.2000 p. 1; see also supplementary protocol OJ C 326, 21.11.2001 p. 1.

61 OJ L 190, 18.7.2002 p. 1.

62 OJ L 196, 2.8.2003 p. 45.

63 *Laki rikoksen johdosta tapahtuvasta luovuttamisesta Suomen ja muiden Pohjoismaiden välillä* [Act on Extradition in Consequence of an Offence Between Finland and other Scandinavian Countries] 1383/2007.

64 *Hallituksen esitys Eduskunnalle rikoksen johdosta tapahtuvaa luovuttamista koskevan Pohjoismaiden välisen sopimuksen (Pohjoismainen pidätysmääräys) hyväksymiseksi ja laiksi sen lainsäädännön alaan kuuluvien määräysten voimaansaattamiseksi ja eräiksi siihen liittyviksi laeiksi* [Government proposal for the Parliament for the approval of the treaty concerning extradition in consequence of an offence between the Scandinavian countries (Scandinavian Arrest Warrant) and for passing a bill covering the provisions which belong to the scope of legislation and certain further acts related to it] 51/2007, p. 1 and 4.

65 Lisbon Treaty, Article 86.

organ, its representative could act as a prosecutor in the courts of the Member States. To combine both the investigation and the consideration of charges and assign it to one procedural organ would be a major change in the point of view of the Finnish criminal procedure. It has been noted that the prospective establishment of a European Prosecutor Organization would change the balance of powers between the European Union and its Member States. It has also been estimated that this could be a starting point for the evolution of cross-border criminal and procedural law within the European Union.<sup>66</sup>

## 5. The Defence Lawyer in the Finnish Criminal Procedure

### 5.1. The System of Legal Aid in Finland

The right to legal help regardless of one's economic situation is guaranteed by the Finnish Constitution, as well as by international human rights conventions.<sup>67</sup> The system is, in a way, bipolar. In most cases, the right to legal aid depends on the monthly salary of the suspect. However, in many cases (see footnote 73 below), the suspect is entitled to legal help regardless of his/her economic situation. The Legal Aid Act regulates the conditions upon which legal aid can be allotted as well as the organization of legal aid.<sup>68</sup>

Legal aid covers legal advice, necessary measures and representation in court or other authorities, and release from certain expenses relating to the case.<sup>69</sup> Thus, legal aid is available in all stages of legal proceedings in one way or another, depending on the help required.<sup>70</sup>

Responsibility for legal aid in Finland lies with the Public Legal Aid Office, which is under the authority of the Ministry of Justice. The head of the Public Legal Aid Office is the country's leading public legal aid attorney. There are 60 legal aid offices around the country, organized into six legal aid districts. A legal aid director is in charge of each legal aid district.<sup>71</sup>

The Finnish Legal Aid system has a so-called dual nature. This means that legal aid is provided by public legal aid offices as well as by private attorneys. However, private attorneys give legal aid only in court cases, whereas public legal aid attorneys provide legal aid in all kinds of cases.<sup>72</sup> The dual system originates from the fact that public legal

66 *Suuren valiokunnan lausunto 2/2003, Oikeus- ja sisäasiat, kohta Valiokunnan kannanotot* [Statement of the Grand Committee 2/2003, legal and internal affairs, item comments of the committee].

67 Finnish Constitution, Ch. 2, sec. 21; ECHR art. 6; ICCPR, art. 14.

68 Legal Aid Act (257/2002).

69 *Ibid.*, sec. 1

70 For example, at the first stage, the client may ask for the legal guidance phone service. Until present, the phone service has been in test use in a part of the public legal aid offices, but from the end of the year 2009 it will be expanded to cover the whole country. Through the phone service, a person receives directions how and where to find legal advice and assistance. However, direct legal advice is not given via telephone. Legal guidance phone service is free of charge (Legal Aid Act, sec. 3a).

71 Act on State Legal Aid Offices (258/2002); Ministry of Justice Decree on Legal Aid Districts and Places of Legal Aid Offices (13/2009).

72 Legal Aid Act, sec. 8.

aid offices could not cover the whole country (which still is the case).<sup>73</sup> Private attorneys are advocates or other lawyers providing legal services, while public legal aid attorneys are lawyers employed by the public legal aid offices. A public legal aid attorney must hold a Master of Law degree and have adequate experience in advocacy or adjudication.<sup>74</sup> Public legal aid attorneys are appointed by the Minister of Justice and are subject to supervision by the Finnish Bar Association and the Chancellor of Justice. In addition, many public legal aid attorneys are members of the Bar Association.

The legal aid system was reformed in 2002. Prior to this, it was estimated that legal aid would cover a little less than 80 per cent of the population.<sup>75</sup> By looking at the current average income in Finland, it seems that the estimation was correct. In 2007, the average income was 23,992 Euros per year,<sup>76</sup> which implies that an average person has monthly income of about 2000 Euros. Thus, after deducting necessary expenses from this amount, a person with an average income receives legal aid in Finland. The annual overall cost of legal aid is approximately 60 million Euros.<sup>77</sup> This amount includes civil and administrative cases, and it is not possible to indicate the amount used only for criminal cases.

## 5.2. Legal Aid for Persons Suspected or Accused of Crime

Legal aid is available for the suspect/defendant at all stages of the criminal process. Nevertheless, legal aid does not cover an attorney's services in simple criminal cases. The case must also be such, as the prevailing penal practice indicates, that the foreseeable penalty is no more severe than a fine or where, in view of the foreseeable penalty and the results of the investigation of the matter, access by the defendant to justice does not require an attorney. Although the case would be simple, the suspect is still entitled to other legal aid, which involves advice from the public legal aid attorney.<sup>78</sup> Offences regarded as simple are, for example, drunk driving and larceny.<sup>79</sup> In practice, assault has also been held to be a simple crime that may not require legal aid.<sup>80</sup>

Apart from legal aid, an important part of defence rights is access to a free public defender, who can be appointed in certain cases<sup>81</sup> independently of the financial situation.

73 Rosti, H.; Niemi, J.; Lasola, M. *Legal aid and legal services in Finland*. Helsinki, 2008, p. 64.

74 Act on State Legal Aid Offices, sec. 3.

75 Government Bill 82/2001, p. 62.

76 Statistics Finland, 2009. In 2007, the average income was 19,648 € for a woman and 28,619 € for a man.

77 Budget Proposal, 2010.

78 Legal Aid Act, Ch. 1, sec. 6.2.2. Also, legal aid is not allotted if 1) the matter is of little importance to the applicant; 2) it would be clearly pointless in proportion to the benefit that would ensue to the applicant; 3) the pursuit of the matter would constitute an abuse of process; or 4) the matter is based on an assigned right and there is reason to believe that the purpose of the assignment was the obtainment of legal aid (Legal Aid Act, Ch. 1, sec. 7).

79 Government Bill 82/2001, p. 84.

80 Supreme Court Precedent 25: 1999. However, in this case, legal aid was granted to the defendant because there were evidentiary issues that required assistance of an attorney.

81 At the request of the suspect, a defence counsel is to be appointed for him/her, if: (1) he/she is suspected of, or charged with an offence punishable by no less than imprisonment for four months, or with an attempt

on of the suspect/defendant. In these cases, a court may appoint a public defender for a suspect/defendant even if he/she does not request one.

The suspect/defendant has a right to defend him/herself at all stages of criminal proceedings. Thus, legal representation in court is not mandatory in Finland. However, the suspect/defendant has a right to legal advice/representation, and the suspect, when apprehended, arrested or remanded in custody, must be immediately informed of this right.<sup>82</sup> Furthermore, the suspect or the counsel has a right to demand the police to conduct extra interviews and other pre-trial investigative measures which may influence the outcome of the case, provided that these do not incur unreasonable costs.<sup>83</sup> Nonetheless, the advocates have been rather reluctant to assume an active role during the pre-trial investigation and cooperation with prosecutors has been quite occasional. There may be several reasons for this state of affairs. The work outside court is not so well-paid, the work load of lawyers is perhaps too heavy and the defence counsels are reluctant to 'turn up their cards' too early (they want to wait and see how the prosecutor evaluates the evidence).<sup>84</sup> This certainly is a frailty in Finnish defence system, because the absence of the counsels in the pre-trial investigation stage results in the weakness of the defence.

## 6. The Professional Culture of Defence Lawyers

In Finland, the pre-trial investigation and court work is not a question of directing, but rather of cooperation. In recent years, the role of the prosecutor in police investigations and criminal proceedings in general has been strengthened, on the basis of mutual confidence and cooperation. It is the task of a police officer to decide the investigation tactics, but at the same time, it is a task of a public prosecutor to ensure that the requirements of a fair trial are fulfilled in the pre-trial investigation phase already.

One could have some doubts as to how the division of power works in real life. Much depends on the personal capacity and readiness to cooperate of the police officers and prosecutors. There have been attempts to develop positive attitudes concerning cooperation during pre-trial investigations by arranging common training for police officers and prosecutors. The results proved to be promising: it seems that prosecutors and police officers can work together for a common goal, despite being separate organizations.

This kind of arrangement underlines the need of effective defence for the suspect. The high procedural position of the prosecution office must be balanced with the absolute right to use a lawyer on the side of the suspect. In a state governed by law, defence

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of, or participation in such an offence; or (2) he/she is under arrest or in detention. A defence counsel is to be appointed to a suspect *ex officio*, when: (1) the suspect is incapable of defending himself/herself; (2) the suspect, who has not retained a defence counsel, is under 18 years of age, unless it is obvious that he/she has no need of a defence counsel; (3) the defence counsel retained by the suspect does not meet the qualifications of a defence counsel, or is incapable of defending the suspect; or (4) there is another special reason. Criminal Procedure Act, Ch. 2, Sec. 1.

82 Criminal Investigations Act, sec. 10.1.

83 *Ibid.*, 12.

84 According to an interview of two prosecutors.

attorneys also have a central role in implementing and developing the rules of law and the administration of justice as well as in avoiding and resolving disputes. These principles are expressed in Finnish legal writing and included in the professional culture of defence counsels.

The main rule is that the suspect or the defendant has a right to choose the person to assist him/her. This person does not even have to be a lawyer. According to the rules governing good professional conduct of the members of the Finnish Bar Association (and, thus, public legal aid attorneys), the advocate has freedom to decide whether or not he/she takes the case, unless they have a legal obligation to represent the suspect (as, for example, a public defender).<sup>85</sup> If the advocate considers that he/she is biased in a particular case, he/she must deny the request.

An advocate may not, in proceedings before a court, make statements that he/she knows to be untrue, nor contest information that he/she knows to be true. An advocate does not have an obligation to verify the accuracy of information provided by the client, unless he/she has specific reasons to do so. An advocate may not contribute to the destruction or distortion of evidence. He/she is not obliged, nor entitled, to present evidence or information detrimental to the client against the client's wishes, unless provided by law.

Finnish criminal proceedings are accusatorial, which means that the prosecutor has the responsibility to prove the defendant's guilt beyond reasonable doubt, and the court remains quite passive throughout the whole proceedings. The main task of the defence counsel is to defend his/her client, not to seek the truth.

It is the duty of the prosecutor to prove the charge, by procuring sufficient evidence to support it and by presenting it to the court. At the trial stage, the defence counsel has a right (and even an obligation) to suggest alternatives to conviction. The duty of the defence counsel is, thus, to promote the best interests of the client. Nevertheless, this does not mean that advocates can present evidence that they know to be illegal or untruthful; advocates are bound by the ethics of their profession. This means, for example, adhering to all of the obligations of an advocate referred to above.

An advocate must be independent and autonomous in relation to the government and elsewhere with the exception of his client. Thus, in order to secure the task of a defence lawyer—defence of the client—advocates are also independent from other criminal justice actors. However, the court decides about the fees of the counsel,<sup>86</sup> and the members of the Finnish Bar Association are subject to the supervision of the Bar Association and the Chancellor of Justice. This does not cause any problems regarding the independence of lawyers.<sup>87</sup>

The Bar Association has approximately 1800 members. In Finland, there are no specified associations for defence lawyers. The main reason for this is that most advocates represent both complainants and suspects (though, of course, not in the same case).

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85 Finnish Bar Association, 2009b.

86 Criminal Procedure Act, Ch. 9, sec. 5.

87 Virolainen, J.; Pölonen, P., *supra* note 19, p. 395–404.

Lawyers who do not belong to the Bar Association are not subject to supervision as advocates. This has caused some problems, for example, as far as the fees or the quality of work are concerned.<sup>88</sup>

The Finnish professional legal ethics standards consist of several ordinances, specific combinations of instructions and practice.<sup>89</sup> An advocate must honestly and conscientiously fulfil the tasks entrusted to him/her and must at all times observe the rules of proper professional conduct for advocates.<sup>90</sup> The main elements of proper professional conduct for advocates have been summarized in these Rules of Conduct, although they do not constitute an exhaustive description of proper professional conduct. Therefore, what has not been specifically prohibited in the Rules of Conduct not necessarily should be considered permissible.

The decisions and other opinions of the executive bodies of the Bar Association include interpretations of proper professional conduct. In addition to legal provisions on the performance of assignments, an advocate should observe proper professional conduct.

Disciplinary proceedings relating to the professional supervision of advocates are also of importance in this respect. The basic requirements established for an advocate by the rules of professional ethics are honesty, professional secrecy regarding confidential information of the client, and the preservation of his/her confidence in general. An advocate must try to achieve a solution that is the most favourable for his/her client.

Advocates, prosecutors and judges are considered to be similarly valued legal professions. This means that being an advocate is not understood as 'a stepping stone' towards a career as a prosecutor or judge. There is a transition among the professions, but this does not occur only in one direction; advocates may become judges or prosecutors, and prosecutors and judges may become advocates.<sup>91</sup>

## 7. Political Commitment to Effective Criminal Defence

Criminal policy in Finland covers social decision making concerning crime and the discussion attached thereto. Criminal policy is a form of guidance by which it is attempted to promote the attainment of the goals of other policies accepted in a given society. Criminal political considerations, and the general principles of criminal law, may restrict the use of criminal justice as an instrument of economic policy, for example, even though all the tools would be effective as far as economic policy is concerned. The way in which criminal policy is defined has also consequences regarding defence in criminal

88 Interview with advocates 1 and 2.

89 See the web page of the Finnish Bar Association [interactive]. [accessed 15-01-10]. <[www.asianajaliitto.fi/asianajaliitto/in\\_english/ethics](http://www.asianajaliitto.fi/asianajaliitto/in_english/ethics)>.

90 Advocates Act (1958/496), sec. 5.1; Rules of the Finnish Bar Association, sec. 35.1.

91 See, for example, Ohisalo, J. J'accuse! – Kahden syyttäjän näkemyksiä syyttäjätoiminnasta [Opinions of Two Prosecutors on Operating as a Public Prosecutor]. In *Consilio manaque*. Ohisalo, J.; Tolvanen, M. (eds.). Yhtenäinen syyttäjälaitos 10 vuotta. University of Joensuu Publications in Law 22, Joensuu, 2008, p. 38–49.

matters. The Government is not attempting to reduce the crime rate as such, but rather the total cost associated with criminality. According to a generally accepted dogma, it is necessary to guarantee the legal rights of a person suspected or accused of an offence.

The goals of criminal policy can be defined as follows: 1) to minimize the harm and other costs of both crime and the control of crime; and 2) to share the costs of protecting basic rights and justice in general. The basis of this policy is the fact that behaviour deviating from the norm cannot be completely abolished at a reasonable cost. When reducing the costs, one has to consider the goal and the objectives of, for example, economic policy as well as the costs of making the economy more effective on the one hand and the costs incurred when regulations are broken on the other. Both preventive measures and the breaking of the regulations impose significant costs on society. These are the leading principles for criminal policy in Finland, not only in theory, but also in legislative and court practice.

Depending on basic human rights, the state is under an obligation to protect its citizens from violations of their rights. In the process of criminalization, the state has to respect the basic rights by refraining from imposing too extensive restrictions on the freedom to act. In a wider perspective, the state must guarantee the exercise of basic rights. The principles of criminalization must be defined on the basis of the fundamental human rights.

The starting point in Finnish criminal policy is the pragmatic and rational justification of criminal law. Criminal law is necessary to safeguard organized society, safety and people's life together in general. Criminal law can be used a) only to protect rightful advantages; b) on the assumption that no other more morally acceptable (as effective as criminal law and as effective as possible at a more moderate cost) mechanism is available; and c) the advantages obtainable by punishment are greater than the disadvantages brought by them.

These criminalization principles are political gauges by which an attempt is made to define the factual criteria of behaviour threatened by punishment. The issue regarding the criminalization principles deals with the consideration of something as punishable and the general definition of the conditions of penal responsibility. The starting point of criminalization should, thus, be the protection of rightful advantages. If it can be proved that there is no need for rightful protection, criminalization should be abandoned.

The central point is perhaps not deterrence, but trust. By imposing punishment, the state tries to tell citizens that no one can act against legal rules without consequences. Social life is crucially based on mutual trust. If someone betrays that trust, a sanctioning system is required. Punishment demonstrates that anyone acting against common rules has to pay for his/her actions.

In Finland, the constitutional protection of fundamental rights is based on a wide understanding of the rights that deserve protection, including, in addition to traditional civil and political rights, economic, social, cultural and environmental rights. Section 8 of the Constitution (731/1999), and Chapter 3, Section 1 of the Criminal Code (39/1889), define the principle of legality in criminal matters, including the prohibition against retroactive criminal laws. According to Section 22 of the Constitution, it is a

constitutional obligation of all public authorities—including the judiciary—to guarantee the observance of constitutional rights and internationally recognized human rights. The Finnish criminal justice system relies heavily on principles of equality, humanity and legality, which are based on human and constitutional rights provided in the Finnish Constitution.

According to the principle of equality, everyone should be treated in the same way, without unjustified discrimination in the face of the law, i.e. all cases falling within a specific category are dealt similarly.<sup>92</sup> Respect for humanity means that no one can be sentenced to death, tortured or otherwise treated in a manner violating human dignity.<sup>93</sup> Legality in criminal cases means that no one should be found guilty of a criminal offence, or be sentenced to a punishment, on the basis of an act that, which has not been determined punishable by law at the time of its commission.<sup>94</sup>

Under the influence of Section 21 of the Constitution and Article 6 of the European Convention on Human Rights (hereinafter referred to as the ECHR), the principle of the right to a fair trial is fully accepted in Finland. Both provisions have direct effect in Finnish court proceedings, and the case-law of the Finnish Supreme Court and the European Court of Human Rights (hereinafter referred to as the ECtHR) is an important source of the fair trial rights in criminal proceedings, in cases where domestic legislation gives room for several interpretations. The Constitution guarantees a fair trial for everybody as laid down by law.

In addition, the victim or the injured party has the right to a fair trial, which means that the Finnish Constitution goes in some respects even further than the ECHR (which only regulates the rights of the defendant). In Finland, fair trial rights extend beyond court proceedings and cover the proceedings as a whole, from the pre-trial investigation to the enforcement of punishment.

A large part of Finnish population is entitled to legal aid in criminal matters. In addition, if a person is held in custody, he/she always has a right to counsel in the pre-trial stage and in court. This right does not depend on the suspect, and the state always pays the fees of counsel. In Finland, all lawyers can act as public defenders, not only those who work in public legal aid offices. There are currently over 2000 lawyers providing public defence services, a significant number given that the total population in Finland is approximately five million inhabitants. The territorial distribution of defence lawyer services is also guaranteed. It is, therefore, reasonable to conclude that the political commitment to effective criminal defence is quite strong.

## 8. The Main Features of Effective Defence in a Criminal Case

The basic rights of individuals suspected of a crime are guaranteed and defined in an appropriate way in the legislation of Finland. The suspect has the right to a legal

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92 Finnish Constitution, sec. 6.

93 *Ibid.*, sec. 7.

94 *Ibid.*, sec. 8; Criminal Code Ch. 3, sec. 1.

counsel during the pre-trial investigation, from the very beginning. The police must inform the suspect of his/her right to a defence counsel. The accused always has the right to a legal counsel during the trial. An advocate must be independent and autonomous in relation to the government and other institutions, with the exception of his/her client.

The defence counsel has the right to attend the investigation and to be present during the questioning of any other parties, unless there are special investigative reasons for excluding him/her. The suspect's counsel also has the right to demand that the police conduct additional interviews as well as other pre-trial investigative measures that may influence the outcome of the case, provided that these do not incur unreasonable costs.

The suspect and the defence counsel have a right to be informed of the outcome of the pre-trial investigation as soon as possible, without hindering the criminal investigation. Before closing a pre-trial investigation, each of the parties shall be given the opportunity to produce a final statement on the material gathered thus far, if this would expedite or assist in the handling of the case in court. In general, final statements are written by the defence counsel.

In the new system of the Finnish criminal procedure, an emphasis is put on the prosecutor and the defence counsel. The main tasks of the judge in a criminal case are to safeguard (formally) the right to a fair trial and to decide the case by reflecting on the evidence that the prosecutor and the attorneys have procured and presented to the court. Witnesses are examined by the parties. The defence counsel has the right to present his/her own witnesses and cross-examine the witnesses called by the prosecution. The main task of the defence counsel is to defend his client, not to seek the truth. It is the duty of the prosecutor to prove the charge by procuring sufficient evidence to support it, and by presenting it to the court. At the trial stage, defence counsel has the right – and even the obligation – to suggest alternatives to conviction.

What regards very serious crimes, the court can also make a decision to allow the police to undertake technical surveillance—even at the home of the suspect. When this happens, the court nominates a defence lawyer to supervise the work of the police during surveillance. The lawyer is not allowed to be in contact with the suspect in these cases. The lawyer cannot function as a defence counsel in a case where he has been working as a supervisor of the technical surveillance.

The suspect receives details of the information procured by such technical surveillance at the very latest stages of the process, when the police send the documents to the prosecutor in order to consider the charges. It should be considered that such an arrangement is also applicable to other secret coercive methods.

In both criminal proceedings and the pre-trial investigation, the defendant is, under certain circumstances, entitled to a public defender regardless of his financial situation. A public defender is appointed on request for a suspect of an aggravated offence and for a person who has been arrested or detained. The court may, on its own initiative, appoint a public defender for a person under 18 years of age or a person incapable of seeing to his/her own defence.

There are, however, some unsatisfactory practices in the Finnish legal system that need further consideration. In general, problematic is the fact that police investigative

powers have been expanding, which has usually meant a reduction of the rights and liberties of suspects. It seems highly probable that this kind of development is still continuing. Particularly vulnerable areas are surveillance and the use of covert human intelligence sources (private informants, policemen as covert informants).

The use of covert methods also raises the question of the use of illegally obtained evidence. As a rule, relevant evidence is admissible even though it has been obtained illegally. This rule is, however, applicable only in cases involving serious crime (for example, murder, drug trafficking, money laundering). In minor cases, it is probable that the court will exclude illegally obtained evidence. Of course, the court must reflect on the importance of criminal liability in a given case and how seriously the police have breached the rules when obtaining evidence. It should be stressed that the court always has discretion, with regard to all the circumstances of a case, to exclude evidence, if it would operate unfairly against an accused.

Defence counsel cannot, according to the Finnish law, make any application for a court order in order to force a certain action (during the pre-trial investigation). He/she can, however, ask the prosecutor or higher police official to give such an order, if the leader of the investigation does not accept a request made by the defence counsel for a certain investigative measure to be taken. It is worth considering whether the court should have the powers to order the police to perform necessary investigative measures when required by the defence counsel.

Another issue that needs further consideration in the future is the so-called privilege against self-incrimination. As noted above (1.2), the suspect/accused never has an obligation to contribute to finding relevant facts in a case. He/she has no obligation to give a statement in the matter—he/she even has no obligation to give true statements if he/she decides not to be silent. There are, however, some obligations to give true statements, for example, to taxation officials during an insolvency procedure and as a debtor in bankruptcy proceedings. This obligation may cause problems if the police want to use the same facts provided under this obligation as evidence in criminal investigation. The recent case-law of the Supreme Court of Finland tends to prefer the exclusion of this kind of evidence from criminal matters.<sup>95</sup> The practice is, however, still rather vague and it remains to be seen how far the privilege against self-incrimination will develop.

The Government is already planning a further reform of law, which would make it possible for the accused person to appeal to a higher court in order to get his/her case proceeded without unreasonable delay. The state would have a responsibility to pay compensation for an unreasonably long duration of the process. The ECtHR has repeatedly criticized Finland for not guaranteeing legal remedies against unreasonable delay of criminal proceedings.<sup>96</sup>

The qualification requirements for representatives in court are not consistent and not all lawyers are subject to the same supervision as advocates and public legal aid

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95 See, for example, precedents of the Supreme Court 2009: 27 and 2002: 116.

96 See, for example, ECtHR 9 December 2008, *Danker v. Finland*, No. 39543/04, ECtHR 13 January 2009, *Sorvisto v. Finland*, No. 19348/04, ECtHR 9 December 2008, *Jussi Uoti v. Finland*, No. 43180/04, and ECtHR 9 January 2007, *Uoti v. Finland*, No. 61222/00.

attorneys, since the membership of the Finnish Bar Association is not a precondition to work in a court. This may cause problems since, according to our research (interviews),<sup>97</sup> knowledge and skills may vary as far as the ‘wild’ attorneys are concerned. The client does not always understand the difference between the members of the Bar and other lawyers. If the wild attorney does not handle the case professionally and in an appropriate manner, this may negatively tarnish the reputation of the legal profession in general and, thus, weaken the trust in the legal system as a whole.

According to procedural law, a person involved in a criminal case has a right to a free interpreter if he/she does not speak Finnish or Swedish. There have, however, been problems in cases in which the accused person speaks a very uncommon language (for example, a rare Indian dialect), and does not speak or even understand other languages. The court has little possibility to control the real skills of a person who is suggested as an interpreter and there are no written qualifications for interpreters. A foreigner as an accused person, of course, usually has a right to legal aid and a defence attorney paid by the state. It is, however, important that in criminal cases the court has a possibility to hear the statement of the accused person personally, and this is not possible if the defendant does not have proper translation services available.

As noted above, according to the Finnish law, all criminal proceedings are, as a rule, public. The court has, however, the power to exclude the public partly or totally from the hearing in cases defined by law. There has been a tendency to apply the law in a way that in fact restricts the public nature of court hearings. This is rather apparent as far as pre-trial proceedings involving coercive measures, the use of which require court approval, are concerned, but the courts have occasionally also restricted public access in main hearings, even if it was not necessary for reasons of privacy and despite the important public interest in a particular case.

Despite the existence of free legal aid and public defence, defence is perhaps the weakest part of the Finnish criminal procedure. Advocates have been rather reluctant to conceive an active role during the pre-trial investigation, and cooperation with prosecutors has taken place on an occasional basis. According to Haavisto,<sup>98</sup> it has also been difficult for some judges to understand the new role (since the beginning of 1990) of the defence counsel in the adversarial criminal procedure. Judges should always keep in mind that the defence counsel must act only in the interests of the accused.

At the same time, advocates are bound by the ethics of their profession. The defence counsel is bound by the Criminal Procedure Act and it is not his/her task to cause undue delay in the process. The situation is, however, slowly changing. Advocates are beginning to understand how crucial it is for the defence to outline alternative hypotheses from the outset (during the preliminary investigation), and judges have now realized that the main task of the defence counsel is to defend her/his client. It is the task of the

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97 Tolvanen, M.; Helminen, M. *Effective Defence Rights. Finnish Country Report* (to be published in 2010).

98 Haavisto, V. *Court Work in Transition*. Helsinki, 2002.

prosecutor to ensure that criminal liability is correctly attributed and to support the state authority in criminal cases.<sup>99</sup>

## Conclusions

In conclusion, Finland represents a system of criminal procedure based on cooperation and mutual trust. This kind of a system is flexible but rather vulnerable. Very much depends on the personal capacities and ability of actors in a given case. With united efforts, shared values and a common professional education, it is possible to have an efficient and, at the same time, fair, criminal procedure. The results of the empirical study<sup>100</sup> give quite strong support to this assumption.

It is, however, reasonable to doubt whether the situation is really so unproblematic (as stated in legal writing), or is there simply lack of sufficient facts and research data to properly evaluate the situation of defence rights as a whole. Comprehensive data collection and reliable information systems should be essential prerequisites for developing the necessary self-awareness and understanding of legal policy, criminal justice systems and procedure as well as their outcomes. All in all, there is an urgent need for a reliable empirical study regarding the realization of defence rights in the Finnish legal system.

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PUSIAUSVYRA TARP EFEKTYVAUS BAUDŽIAMOSIOS ATSAKOMYBĖS  
ĮGYVENDINIMO IR EFEKTYVIŲ GYNYBOS TEISIŲ:  
PROKURORO IR GYNYBOS ADVOKATO VEIKSMAI BEI VAIDMUO  
SUOMIJOS BAUDŽIAMAJAME PROCESSE

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**Santrauka.** Prieš Suomijos baudžiamojo proceso reformą 1997 m. prokuroro ir advokato vaidmenys, palyginti su teisėjo vaidmeniu, buvo pasyvūs. Pagrindinė prokuroro užduotis buvo perskaityti rašytinį kaltinimą ir padėti teisėjui išsiaiškinti tiesą. Teisėjas galėjo įgyti įrodymus ex officio, nors tai būtų galėję labai pakenkti įtariamajam.

*Teisėjo, prokuroro bei advokato vaidmenys iš esmės pasikeitė, kai buvo įgyvendinta baudžiamojo proceso reforma. Dabar prokuroras yra aktyvus bylos dalyvis, užtikrinantis baudžiamosios atsakomybės įgyvendinimą ir aktyviai plėtojantis proceso eigą. Prokuroro pareiga yra įrodyti kaltinimo teisingumą surenkant pakankamai įrodymų, paremiančių kaltinimą, ir pristatant juos teismui. Pats teismas yra neutralus. Jis nei paremia prokurorą, nei jam pagelbsti. Teisėjas negali išklaudyti liudytojo ex officio, jeigu tai pakenktų įtariamajam.*

*Galima teigti, jog pagrindinė teisėjo užduotis baudžiamojoje byloje yra (formaliai) užtikrinti sąžiningą teismą bei priimti sprendimą atsižvelgiant į prokuroro bei advokato surinktus ir teismui pateiktus įrodymus. Bendravimas, bendradarbiavimas, sąveika ir sąžiningas teismas apskritai yra pagrindiniai Suomijos baudžiamojo proceso bruožai.*

**Reikšminiai žodžiai:** prokuroras, advokatas, gynybos teisės, vaidmenys baudžiamajame procese, teisinė pagalba.

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