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Criminalization of Helping

EU Facilitators' package in Finland and Italy

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This bachelor's thesis is a work of comparative legal research where I compare the implementation of an EU directive in Finland and Italy. I focus on the Facilitators' package, a directive that criminalizes the facilitation of unauthorised entry, transit and residence in the European Union. As a theoretical framework I use Rodolfo Sacco's theory on legal formants combined comparative criminal justice. To attain a realist outlook on the effects of the directive I study example cases and the legal formants of compare laws, cases, legal doctrines, criminal justice, and criminal procedure. In the study I find that the punishment for facilitation of illegal entry are very different between Finland and Italy and I try to explain this difference.

With the example cases I show that human smuggling is a multi-faceted phenomenon. I use the term humanitarian smuggling for involving no or little financial gain, where people help their family members, act out of solidarity, or collaborate with professional human smugglers in exchange for a reduced fee. The Facilitators' package lacks the requirement of financial gain in the definition of the crime, and it leads to convictions for many humanitarian smugglers. The humanitarian exception it allows for is interpreted too narrowly to prevent this. I conclude that humanitarian smuggling is understudied, necessitating further empirical research on the directive's effects.

Keywords: comparative law, EU criminal law, criminal justice, human smuggling

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Tämä notaarintyö edustaa vertailevaa oikeustiedettä. Tutkimuksessa vertailen EU: avustamisdirektiivin täytäntöönpanoa Suomessa ja Italiassa. Keskityn avustamisdirektiiviin, joka kriminalisoi luvattoman maahantulon, kauttakulun ja oleskelun helpottamisen Euroopan unionissa, Suomessa rikoslain 17 luvun 8 §:n mukaisena laittoman maahantulon järjestämisenä. Teoreettisena viitekehyksenä käytän Rodolfo Saccon teoriaa oikeudellisista formanteista yhdistettynä vertailevaan kriminaalipolitiikkaan. Realistisen näkemyksen saamiseksi direktiivin vaikutuksista tutkin esimerkkitapauksia ja vertailen lakeja, oikeustapauksia, oikeusdoktriineja, rikosoikeutta ja rikosprosessia. Tutkimuksessa havaitsen, että rangaistukset direktiivin säätämästä rikoksesta eroavat suuresti Suomen ja Italian välillä ja pyrin selittämään eroa.

Esimerkkitapausten avulla osoitan, että ihmissalakuljetus on monimuotoinen ilmiö. Käytän termiä humanitaarinen salakuljetus tapauksissa, joissa pääasiallisena motiivina ei ole taloudellisen hyödyn tavoittelu, vaan esimerkiksi perheenjäsenten auttaminen, solidaarisuus tai ammattimaisten ihmissalakuljettajien auttaminen alennettua maksua vastaan. Avustamisdirektiivissä ei ole taloudellisen hyödyn vaatimusta rikoksen määritelmässä, mikä johtaa monien humanitaaristen salakuljettajien tuomitsemiseen. Lisäksi direktiivin jäsenmaille sallimaa humanitaarista poikkeusta tulkitaan Suomessa niin kapeasti, ettei se estä humanitaaristen salakuljettajien tuomioita. Humanitaarinen salakuljetus on alituttu ilmiö, joka vaatii lisää empiiristä tutkimusta direktiivin vaikutuksista.

Avainsanat: vertaileva oikeustiede, EU-rikosoikeus, kriminaalipolitiikka, ihmissalakuljetus

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Annexes

Annex 1. Changes to the specialization course essay

This bachelor's thesis is based on an essay I wrote with Emma Kemppainen on the specialization course Comparative Legal Research. In the essay I wrote chapters 1, 2, 4 and 6 while she wrote chapters 3 and 5. The comparison and conclusions we wrote together.

In this thesis I have somewhat changed the structure and added comparative criminal justice as a new element. I have also added new cases and new secondary sources. I have rewritten everything that was written by Emma. Because of the new theoretical framework, the comparison structurally different from the original essay and conclusions of the study are new and more refined.

1 Introduction

According to PICUM (Platform for International Cooperation on Undocumented Migrants), in 2023 in the EU 117 people were criminalized for acting in solidarity with irregular migrants and 76 were criminalized for crossing borders.¹ Often the reason is the EU directive 2002/90/EC on facilitation of unauthorised entry, transit and residence, part of the so-called Facilitators' package, that was enacted in 2002. The purpose was to prevent human smuggling by criminalizing assistance to irregular immigrants in the EU. In this bachelor's thesis I will compare the implementation of the directive in Finland and Italy.

The Facilitators' package has received criticism because unlike in the Smuggling Protocol of the UN Palermo Convention the criminalization is not linked to financial benefit. For example Valsamis Mitsilegas and Javier Veas both argue that it makes the limits of the criminalization unclear and wide.² This study aims to show that this can have implications to irregular immigrants or people who help their family members. Also, the controversial article 1(2) of the directive gives the member states freedom to decide whether to exempt facilitation of illegal entry with humanitarian motives from the criminalization which leads to differences between member states, as Finland and Italy have chosen to implement it in different ways.

The directive has lately gained attention because the EU Commission gave its proposal for a revised directive in November 2023.³ The proposal includes the requirement of financial gain and according to the preamble (7), assistance to family members would not be criminalized. Still, for example criticizes the proposal to be unclear.⁴ Additionally, the proportionality of the Facilitators' package is currently under investigation by the Court of Justice of the European Union in the Kinsa case⁵, with a response to the referral from an Italian court expected in 2025.

In chapter 2 I present the theoretical framework of the study which combines Rodolfo Sacco's theory of legal formants with comparative criminal justice to find structural differences and to

¹ Carta and Gionco 2024, p. 4.

² Mitsilegas, 2019; Veas, 2019.

³ European Commission: Proposal for a directive of the European Parliament and of the Council, laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA. Brussels, 28.11.2023, 2023/0439(COD)

⁴ Mitsilegas, 2024.

⁵ C-460/23 [Kinsa], ECLI:EU:C:2024:941

explain the varying outcomes of the directive. My research questions are: how has the directive been implemented in Finland and Italy? What are the differences in the application of the directive in actual court cases between the two countries? and What factors explain the differences in punishments?

In chapter 3 I present my data and methods. Besides the national laws implementing the directive in Finland and Italy I compare actual court cases in the two countries. In chapter 4 I present human smuggling as an international crime and the Facilitators' package. The study is based on the perception that human smuggling is a multi-faceted phenomenon.⁶ I use the term humanitarian smuggling for the cases where no or very little financial benefit is involved. There is much previous literature on the effects of the Facilitators' package on humanitarian assistance to immigrants⁷, but there is a research gap on the effects on humanitarian smuggling. Flavia Patané, Maarten Bolhuis, Joris van Wijk and Helena Kreiensiek have made an empirical study on the criminalization of migrant *scafisti* or boat drivers in Italy.⁸ Building on their distinction of professional and occasional *scafisti* I will show that the cases studied can be placed on a continuum of humanitarian smuggling, ranging from a person forced to operate a boat to an opportunist who can cross the border for free in exchange for helping the smugglers.

In chapters 5 and 6 I will present about the implementation of the directive, relevant laws and court cases in Finland and Italy respectively. I have chosen to compare the implementation of the directive in these two countries, because they are two very different legal systems. Finland is part of the Nordic countries, and its criminal law and criminal justice system are heavily influenced by Nordic cooperation that emphasizes pragmatism and alternatives to prison sentences⁹ as well as the values of justice and humaneness.¹⁰ Italy on the other hand has traditionally had a low level of punitiveness in its criminal justice system, characterized by the combination of Catholic heritage and left-wing ideologies¹¹, but since the 90s the criminal law and especially laws on immigration have become politicized in Italy.¹² They have also chosen to implement the humanitarian exception of the article 1(2) in a different way. Finland has

⁶ Aziani 2023.

⁷ Alagna 2024; Allsopp – Vosyliūtė – Smialowski 2021; Gordon – Larsen 2022; Pusterla 2021.

⁸ Patané et al. 2020.

⁹ Lappi-Seppälä 2012, p. 216.

¹⁰ Lahti 2020, p. 11.

¹¹ Nelken 2009, p. 300.

¹² Minetti 2020.

implemented the exception fully and Italy partly. This creates a possibility study if the humanitarian exception of the directive manages to live up to the spirit of the Smuggling protocol of the Palermo Convention, which is meant not to criminalize “the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties”.¹³

In chapter 7 I will do the comparison between the two countries and in chapter 8 I present my conclusions. My main conclusion is that the directive also criminalizes many actions that aren't meant to be criminalized in the convention, such as helping family members. Even the humanitarian exception is not enough to fulfill the aim of the Palermo Convention as it is given differing interpretations by different legal formants. With this study I hope to highlight the problems of the current directive by showing how the outcomes of the directive vary in different legal systems, how the and how it ends up criminalizing people acting out of solidarity, family relations or compassion.

¹³ Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, para 88.

2 Theoretical Framework

2.1 Comparative Legal Research

In comparative legal research different legal systems are studied to find differences and similarities. Comparative legal research is closely related to socio-legal studies in the sense that it aims to look at legal systems from the outside.¹⁴ According to Rodolfo Sacco, the aim of comparative legal research is to create better knowledge of legal rules and institutions.¹⁵ Also Jaakko Husa writes that of the distinctive features of a legal system are only seen when examined from outside.¹⁶ I personally think that the added value of comparative research is the possibility of critical thinking: comparison shows that a law doesn't have to be the way it is. As Sacco writes, it shows that lawyers "must cast aside any belief they might have that law is invariable".¹⁷

One of the big debates in comparative law is whether the functionality of laws can be compared without all the cultural context surrounding them¹⁸, or does a legal rule receive its meaning only through social and cultural factors¹⁹. David Nelken defines legal culture as "relatively stable patterns of legally-oriented social behaviour and attitudes".²⁰ In this study I try to study the effect of legal cultures on actual outcomes of the national implementations of the directive on facilitation of illegal entry. Husa writes comparative legal research shows that the same external influences – such as a directive from EU – "may cause different results in different receiver systems as the systems operate in different ways".²¹

2.2 Legal culture and legal formants

This study is based on the dynamic structuralist approach outlined by the Italian comparative legal researcher Rodolfo Sacco. It is an approach that makes it possible to study the effects of a legal culture on the interpretation and application of law. Sacco aims for a realist approach to law: the law is not only written law, but it is "a mirror of the thoughts and languages of the jurists of that country; it reflects recent case law fully rooted in local legal practice and gives

¹⁴ Husa 2015, p. 27–30.

¹⁵ Sacco 1991a, p. 5.

¹⁶ Husa 2015, p. 59.

¹⁷ Sacco 2001, p. 178.

¹⁸ Graziadei 2003, p. 101–3.

¹⁹ Legrand 1997, p. 111–16.

²⁰ Nelken 2010, p. 49.

²¹ Husa 2015, p. 171–72.

voice to the solutions invoked by well-known and well-broadcasted social demands within the country.”²²

Sacco’s theory on legal formants is both an alternative and a supplement to the functionalist methodology of comparative legal research.²³ In traditional functionalism there is an assumption that it is possible to find the core of a legal rule by removing cultural factors. The goal of the functionalist research is to find similarities and functional equivalences between legal systems.²⁴ According to Sacco this is not possible, because there is no single core to a legal rule. Instead, there are many different interpretations to a legal rule within a legal system.²⁵ Sacco’s approach concentrates on structural elements that affect the interpretation and use of the law, that he calls *legal formants*.²⁶ The background of the theory is in the study of private law and it has been also used to study EU law.²⁷ In this study I combine it with the added elements of criminal procedure and criminal justice to study criminal law and punishments.

According to Nelken culture is not unchanging. Instead, it is better seen as a “matter of struggle and disagreement”.²⁸ Also in Sacco’s theory a legal system is dynamic, it is in constant change as the different actors in the system compete to advance their interests.²⁹ The theory on legal formants is a way to study these different elements of the legal system. It also adds a critical perspective to comparative legal research³⁰ as it studies the contradictions and power relations in a legal system and highlights how – as Pierre Legrand writes – “an interpretation is the outcome of an unequal distribution of social and cultural power within society as a whole”.³¹

These interpretations are formed by different legal formants, different parts of the legal system that are often contradictory. According to Sacco the main legal formants are laws, case-law and legal doctrine, though they vary between legal cultures, and it is impossible to make an exhaustive list.³² Because this study expands the theory of legal formants to the area

²² Sacco 2001, p. 178.

²³ Graziadei 2003, p. 125–26.

²⁴ Graziadei 2003, p. 108–13.

²⁵ Sacco 1991a, p. 21–23.

²⁶ Husa 2015, p. 132.

²⁷ Bergomi 2024; Ioriatti 2023.

²⁸ Nelken 2010, p. 50.

²⁹ Gambaro – Graziadei 2023, p. 455.

³⁰ Gambaro – Graziadei 2023, p. 456.

³¹ Legrand 1997, p. 115.

³² Sacco 1991a, p.30–39.

of criminal law and is also focused on comparative criminal justice, I have added the legal formants of criminal justice systems and criminal procedure. They help to study the structural elements that influence the outcomes in cases concerning facilitation of illegal entry.

Some of the legal formants are what Sacco calls cryptotypes: informal or hidden, non-verbalized rules that affect the outcome of legal interpretation. Sacco considers that these cryptotypes can be uncovered through comparative research. They can be seen in situations where a decision is made differently from the written rule³³, for example when a judge decides to mitigate a punishment below the minimum established in the law or when an irregular immigrant is denied traits of criminal procedure that are available to citizens. In line with Sacco's theory, besides laws I pay attention to actual cases from Finland and Italy and tries to analyse the different elements that influence the outcomes.

2.3 Comparative Criminal Justice

Comparative criminal justice is the study of the institutions and procedures through which societies react to crime problems. It looks for the link between crime, social order, and punishment.³⁴ It requires detailed understanding of criminal procedure, actors involved in it and the social context.³⁵ The harmonization of criminal law in the EU focuses on legislative measure, leaving out many aspects of criminal justice at the national level. The diversity of national criminal justice systems creates unpredictability, as the outcomes can be different even if the member states implemented the directive equally.³⁶ In order to acquire a more realistic picture of the effects of the directive, I also consider the criminal justice systems in Finland and Italy and actual cases. The role of comparative criminal justice is to supplement Sacco's theory with additional legal formants and to help understand the differences in punishments (both *de lege* and *de facto*) between the two countries and how differences in criminal procedures and criminal justice systems shape the outcomes.

Prison rates, meaning the number of prisoners per 100 000 citizens, are used in this study to exemplify the levels of punitiveness of criminal justice systems. The numbers are from the SPACE (Statistiques Pénales Annuelles du Conseil de l'Europe) reports produced by the Council of Europe. There are several problems when doing a cross-country comparison of

³³ Sacco 1991b, p. 385.

³⁴ Nelken 2010, p. 1.

³⁵ Pakes 2010, p. 3.

³⁶ Chaves 2015, p. 546.

such statistics: the methodology by which data is collected varies from country to country³⁷, prison rates are considered to have very little to do with actual crime rates³⁸ and imprisonment may mean different things in different countries³⁹. Still the prison rates are “a product of reflexive responses by politicians and policy makers to their perceptions of where their country stands in relation to other places.”⁴⁰ Finland consciously lowered the prison rates to a Scandinavian level⁴¹ and Italy did a general amnesty in 2006 to lower the rates because of ECHR decisions.⁴² I consider that they are a meaningful part of a study of criminal justice systems even if a straightforward comparison is not possible.

³⁷ Aebi – Cocco 2024, p. 9.

³⁸ Pakes 2010, p. 131.

³⁹ Lappi-Seppälä 2011, p. 306.

⁴⁰ Nelken 2009, p. 299.

⁴¹ Lappi-Seppälä 2016, p. 20.

⁴² Nelken 2009, p. 298.

3 Data and Methods

3.1 Data

This study concentrates on the national implementations of the Facilitators' package directive in Finland and Italy. As sources I have used the Smuggling protocol of the Palermo Convention, the directive 2002/90/EC, the Finnish Criminal Code (*Rikoslaki*) and the Italian Penal Code (*Codice Penale*) and Consolidated Law on Immigration (*Decreto Legislativo 25 luglio 1998, n 286*).

The cases in this study have been retrieved from multiple sources. Two of the Finnish cases are published in the Finlex-database⁴³ and other two have been received from the Courts of Appeal of Helsinki and Turku by asking for new cases on the subject. The Italian cases have been retrieved from the SentenzaWeb-database⁴⁴, except for the case of family smuggling that is available through the Curia-database of the CJEU.

3.2 Methods and comparative framework

According to Husa, there is no clear formula to comparative research. Instead, every research project needs an individual approach to comparison. Fair treatment of foreign law and carrying out the study as honestly and accurately as possible are the keys.⁴⁵ In this study I have tried to follow the process described by Husa: description – understanding – explanation.⁴⁶ An external yardstick or *tertium comparationis* is considered to be necessary for comparison⁴⁷. Also Nelken writes of the need for an external comparative framework to avoid the risks of being ethnocentric on the one hand and too relativistic on the other hand.⁴⁸

I use the term humanitarian smuggling to mean cases that are not professional smuggling, where people help their family members cross borders illegally or where irregular migrants help each other out of compassion or necessity. Aziani depicts humanitarian smuggling as occasional and small-scale activity that is mainly driven by solidarity and not by financial gain.⁴⁹ I have outlined a continuum of humanitarian smuggling: Opportunistic smuggling –

⁴³ <http://finlex.fi/en/>

⁴⁴ <https://www.italgiure.giustizia.it/sncass/>

⁴⁵ Husa 2015, p. 142.

⁴⁶ Husa 2015, p. 60.

⁴⁷ Husa 2015, p.148–49.

⁴⁸ Nelken 2009, p. 291–92.

⁴⁹ Aziani 2023, p. 85–86.

Solidarity smuggling – Family smuggling – Forced smuggling, where opportunistic smuggling involves some financial gain and free will and forced smuggling no financial gain and no free will.

The comparison in this study is structured by the theory legal formants. I have added the comparison on criminal justice systems and criminal procedure to Sacco's list of laws, cases and legal doctrines. The comparative framework laws and cases is the definition of human smuggling in the Palermo Convention that includes the requirement of financial benefit and the continuum of humanitarian smuggling with no or very little financial benefit. For the comparison of criminal justice systems and punitiveness I use the example cases.

My research method has been what Nelken calls “virtually there” (Nelken 2010, p. 93-94), relying on online sources. I am a Finnish law student with no prior knowledge of Italian law. My understanding of Italian covers just the basics, but it is enough to understand the laws and to use online databases. I have mostly relied on English-language secondary sources and used machine translations (Microsoft Copilot) to read the case documents. I have attempted to fix the limitations by using multiple sources. I also noticed that the machine translations were of a surprisingly good quality. I have done my best to have an open mind to achieve an honest understanding of the Italian laws and criminal justice system.

4 Palermo Convention and Facilitators' package

4.1 Human smuggling as an international crime

The Palermo Convention⁵⁰ was adopted in 2000 to prevent transnational organized crime such as human trafficking. Along with it was also adopted a supplementary Smuggling protocol⁵¹ with the purpose of preventing and combating the smuggling of migrants, while protecting the rights of smuggled migrants. Article 3(a) of the Smuggling protocol defines the crime of smuggling of migrants as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident”. According to both Mitsilegas and Veas the purpose of “financial or other material benefit” is central to the protocol.⁵² Also according to the *travaux préparatoires* of the protocol, the aim was “to include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties.”⁵³

It is possible to conclude that the aim of the Smuggling protocol was to criminalize human smuggling for profit as part of the operations of organized criminal groups. Also, article 5 of the protocol states that migrants must not become liable to criminal prosecution for the fact of having been the object of human smuggling. According to article 6, states parties shall in their legislation criminalize the smuggling of migrants. In the EU the criminalization is done through the Facilitators' package, but in a very different manner.

4.2 The Facilitators Package

The Facilitators' package was adopted in 2002. It consists of the directive 2002/90/EC on the facilitation of unauthorised entry, transit and residence and the Council framework decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence. The directive had two goals at the same time: to prevent human smuggling and to prevent irregular migration.⁵⁴ The directive was adopted

⁵⁰ UN Convention on Transnational Organized Crime, UNTOC (2000)

⁵¹ Protocol Against the Smuggling of Migrants by Land, Sea and Air (2000)

⁵² Mitsilegas 2019, p. 69; Veas 2019, p. 231.

⁵³ Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, para 88.

⁵⁴ Allsopp – Vosyliūtė – Smialowski 2021, p. 66–67.

during the time of the Maastricht Treaty. It was proposed by the French Government instead of the Commission and it was adopted against the opinion of the European parliament.⁵⁵

The article 1(1)(a) of the directive states that the member states shall adopt criminal sanctions for “any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens.” Contrary to the Palermo protocol, the definition of the directive doesn’t include financial benefit, confuses the line between human smuggling and illegal immigration.⁵⁶

The article 1(2) of the directive gives the member states the freedom to exempt from criminalization the “cases where the aim of the behaviour is to provide humanitarian assistance”. Only eight member states have made such exceptions in the national legislations: Belgium, Greece, Spain, Finland, France, Croatia, Italy, and Malta.⁵⁷ Creating further confusion, the concept of “humanitarian assistance” is not defined in the directive.

The requirement of financial gain was included in the Palermo Convention with the purpose of not criminalizing the conduct of migrants themselves, family members and NGOs.⁵⁸ Without this requirement, the crime of facilitation becomes very wide and can also include the acts of NGOs that rescue migrants from the Mediterranean (humanitarian assistance), migrants that help each other or drive boats and people who help their family members to enter a member state illegally. Giulia Mentasi characterizes this effect as conscious overcriminalization that focuses more on border control than preventing human smuggling.⁵⁹

⁵⁵ Opinion A5-0315/2000 of the European parliament

⁵⁶ Veas 2019, p. 228–29.

⁵⁷ Communication from the Commission Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence 2020/C 323/01

⁵⁸ Veas 2019, p. 232.

⁵⁹ Mentasti 2022, p. 508.

5 Finland

5.1 Finnish criminal justice system in a Nordic context

According to Raimo Lahti, the development of the Finnish criminal justice system must be understood in the context of the Nordic cooperation.⁶⁰ Finland is part of the Nordic countries and the Nordic legal tradition. The Nordic countries have strong historical links, and they all are welfare states. Since the 1960s the Nordic countries have had a close cooperation in legal matters, for example through the Nordic criminal law committee.⁶¹ In criminal law the Nordic countries can be characterized by pragmatism, cost-benefit thinking and low prison rates.⁶² In addition to crime prevention, a strong emphasis is put on the values of justice and humaneness.⁶³ Prison rates are comparably low in all Nordic countries and there is a strong emphasis on alternatives to prison sentences, such as fines, suspended sentences, and community service.⁶⁴ In 2023, the prison rate for Finland was 52.3, while it was 80.0 for Sweden, 68.6 for Denmark, 55.0 for Norway and 36.4. for Iceland.⁶⁵

The Finnish Criminal Code (*Rikoslaki*) was originally adopted in 1889 but total revision started with the work of an influential Criminal law committee in 1972. The revision was completed only in 2004.⁶⁶ The harshest punishment is life imprisonment with the possibility of parole after 12 years that is used only for murder.⁶⁷ For other crimes imprisonment can range from 14 days to 12 years. A combined sentence for multiple crimes can be at most 15 years.⁶⁸

5.2 Facilitation of illegal entry

The Facilitators' package is implemented in Finland in the chapter 17 (offences against public order) of the Finnish Criminal Code. Section 8 of the chapter defines facilitation of illegal entry (*laittoman maahantulon järjestäminen*, Rikoslaki 17:8) as 1) bringing or attempting to bring a foreigner to Finland without a travel document, 2) bringing or attempting to bring a foreigner to Finland with a false travel document, 3) arranging or brokering transportation or

⁶⁰ Lahti 2020, p. 7.

⁶¹ Lahti 2020, p. 9.

⁶² Lappi-Seppälä 2012, p. 216.

⁶³ Lahti 2020, p. 11.

⁶⁴ Lappi-Seppälä 2016, p. 24.

⁶⁵ Aebi – Cocco 2024, p. 31.

⁶⁶ Nuotio 2024, p. 390.

⁶⁷ Rikoslaki 2c:10

⁶⁸ Rikoslaki 2c:2

4) giving another person a false travel document. The punishment for facilitation of illegal entry is a fine or imprisonment for maximum two years.

Aggravated facilitation of illegal entry (*törkeä laittoman maahantulon järjestäminen*, Rikoslaki 17:8a) is defined in section 8a. If the facilitation of illegal entry 1) causes bodily injury or mortal danger to another person or 2) is committed as part of the activities of an organised criminal group, and the offence is aggravated when assessed as a whole, the punishment is imprisonment for from four months to six years.

Finland has implemented the humanitarian exception from article 1(2) of the directive. According to the Finnish Criminal Code, an action is not considered to be criminal if it is acceptable as a whole when considering a motivation stemming from humanitarian reasons or close family ties and the foreigner's safety in their country of origin.⁶⁹ In the original law from 2004, an action was exempted if the motivation was considered acceptable. The wording was changed in 2014 to include the possible acceptable motivations. According to the government bill, the exception was considered too open and leading to too many acquittals.⁷⁰ Importantly, the government bill made a suggestion for the definition of close family ties as including a married spouse and underaged children.⁷¹

5.3 Criminal justice system

The sentencing criteria of the Finnish Criminal Code reflect humane neo-classicism, a sentencing theory developed in the 1970s that stresses the principles of proportionality, predictability and equality.⁷² According to chapter 6 section 4 of the Finnish Criminal Code, a punishment must be in a just proportion (*oikeudenmukaisessa suhteessa*) to the harm and danger caused by the action, the intention of the act and other culpability.

The judges enjoy wide discretion when deciding on punishments, but they are also bound by the principle of uniformity of sentencing.⁷³ One way to achieve this uniformity are *typical punishments*, statistical averages for punishments of a “typical case”.⁷⁴ Possible aggravating

⁶⁹ Rikoslaki 17:8.3: *Laittoman maahantulon järjestämisenä ei pidetä tekoa, jota erityisesti huomioon ottaen tekijän humanitaariset tai läheisiin perhesuhteisiin liittyvät vaikuttimet sekä ulkomaalaisen turvallisuuteen vaikuttavat olot hänen kotimaassaan tai vakinaisessa asuinmaassaan on pidettävä kokonaisuutena ottaen hyväksyttävistä syistä tehtynä.*

⁷⁰ HE 164/2013, p. 12.

⁷¹ HE 164/2013, p. 27

⁷² Lappi-Seppälä 2012, p. 230.

⁷³ Lappi-Seppälä 2012, p. 230–31.

⁷⁴ Tapani – Tolvanen – Kemppinen 2022, p. 30–35.

circumstances are deliberateness of the act, organized criminality, committing the crime for a reward, racist or other discriminatory motives and prior criminality.⁷⁵ Possible mitigating circumstances are for example acting under duress, strong human compassion or other such motivation, and the cooperation of the suspected.⁷⁶ Unlike the list of aggravating circumstances, the list of mitigating circumstances is not exhaustive, and the court has more liberty when interpreting it in favour of the suspected.⁷⁷ The courts are considered to have the freedom to differ from the requirements of strict proportionality on the basis of pragmatic considerations and values such as humaneness, equity, and mercy.⁷⁸

The punishment for facilitation of illegal entry is the same as for assault (*pahoinpitely*, Rikoslaki 21:5) and drug offence (*huumausainerikos*, Rikoslaki 50:1), fines or maximum two years of prison. A prison of less than two years is normally given as a suspended sentence, unless the gravity of the crime, culpability of the act or prior criminality of the offender demand an unconditional sentence.⁷⁹ Other options that are in between of a suspended sentence and an unconditional sentence are community service and electronic surveillance sentence.⁸⁰

5.4 Cases

5.4.1 Solidarity Smuggler 1

The decision KKO 2016:66 of the Finnish Supreme Court from 2016 is a case of humanitarian smuggling and the only decision to this day of the Supreme Court concerning the humanitarian exception of the law. The decision is referred to in all the other cases in this study when the humanitarian exception is being considered. In the case an Indian national had crossed the border from Russia with a car. It was not allowed to walk over border, crossing was only allowed with a vehicle such as a car or a bicycle. The accused had let five other people, who were Indian, Pakistani and Sri Lankan nationals, travel in his car. None of them had visas and they all applied for asylum after crossing the border. The accused told that the

⁷⁵ Rikoslaki 6:5

⁷⁶ Rikoslaki 6:6

⁷⁷ Tapani – Tolvanen – Kemppinen 2022, p. 84–85.

⁷⁸ Lappi-Seppälä 2016, p. 54.

⁷⁹ Rikoslaki 6:9

⁸⁰ Tapani – Tolvanen – Kemppinen 2022, p. 188–93.

action was not planned but they had acted out of humanitarian motives and “a strong human compassion”.

The Supreme Court interprets the humanitarian exception through the Palermo Convention, the directive and *travaux préparatoires* of the Finnish law. According to the Supreme Court, the humanitarian exception must be interpreted narrowly. The asylum-seekers were not in imminent danger in Russia and most of them also didn't receive asylum. The accused was considered to have acted out of compassion, but he didn't have “heavy humanitarian motives”. Therefore, he was sentenced of facilitation of illegal entry.

The court did however consider the motive when deciding on the punishment. Because the action was not planned and the accused had acted out of compassion, the action was not considered very blameworthy. Whereas the standard punishment would have been a prison sentence, the accused was sentenced to a fine of 180 euros, a very minimal punishment.

5.4.2 Solidarity Smuggler 2

The decision HelHO 24/112380 of the Helsinki Court of Appeal from 2024 is another case of solidarity smuggling. In this case the accused had helped a friend he had acquainted in Ethiopia to come from Italy to Finland to seek asylum in 2015. He had gone to Italy to meet his friend and given him money and his own passport. They had travelled together to Sweden, where the accused flew back to Finland and his friend took the boat to Finland. After the Finnish border control found out that the accused had given his passport to the friend, the accused was arrested and detained for three weeks.

The accused claimed that he had been acting under the humanitarian exception but because he had not given any specific information about the humanitarian situation, the court turned down the claim. For some reason the district court interpreted that the humanitarian exception applies only to close family ties, a claim that the Court of Appeal held because (perhaps in an example of bad lawyering) it was not challenged by the accused.

Even though the events took place in 2015, the court process was started only in 2020, just before the limitation time, which is five years for the crime. According to the court, a standard punishment would have been a prison sentence of three months. Because of the long delay, the court mitigated the sentence down to a suspended sentence of 30 days. The case was admitted to the Supreme Court in November 2024.

5.4.3 Family Smuggler 1

The decision THO 22/124680 of the Turku Court of Appeal from 2022 is a case of family smuggling. The accused had brought to Finland two children, aged 6 and 9, who were their niece and nephew. The children were Afghan nationals and had sought asylum in Greece with their parents. The accused had visited their relatives in Greece and had considered that the conditions in the refugee camps where they were living in tents were not suitable for children. The accused claimed that they had been acting under the humanitarian exception.

The district court interpreted close family ties through the *travaux préparatoires* of the Finnish law and held that nieces and nephews are not close family. Even the Turku Court of Appeal referred to the *travaux préparatoires* but decided to interpret the concept of close family ties more broadly than the government bill, also including nieces and nephews to close family. The court decided that the action had been acceptable because the accused had acted with a motivation from close family ties and acquitted the accused. Probably it was also significant, that unlike in the case of Humanitarian smuggler 1, the children were granted asylum in Finland.

5.4.4 Family Smuggler 2

The decision THO 24/140333 of the Turku Court of Appeal from 2024 is another case of family or humanitarian smuggling. The accused had with two other people helped his cousin, a Syrian national to come to Finland. They had helped him to buy train tickets from Germany to Sweden, given him a passport belonging to the brother of the accused and then taken him in their car to the boat from Sweden to Finland. The accused claimed that they had been acting under the humanitarian exception since the cousin didn't have money or a place to stay. He also claimed that his own involvement in the action was minimal.

The court held that the accused had acted out of compassion but didn't consider the humanitarian exception applicable because cousins are not close family. Also, the cousin was not in imminent danger and could have applied asylum already in Germany. The court considered that acting out of compassion and lack of planning were mitigating circumstances and mitigated the punishment down to a suspended sentence of 20 days.

6 Italy

6.1 Italian criminal justice in context: from leniency to populism

The Italian Penal Code (*Codice Penale*) was adopted in 1930 by the fascist regime of Mussolini. According to Alessandro Corda, the harsh provisions of the code reflect the ideology of the authoritarian regime.⁸¹ The *Codice Penale* is a combination of the classical and positivist theories of criminal justice. In the classical theory the focus was on the proportionality of punishments to the harm caused and the culpability of the offender. In the positivist theory the focus was on recidivism and the need to neutralize the threat to society caused by dangerous individuals.⁸² The influence of positivism is reflected particularly in the dual-track nature of the system, with special fast trials with limited rights for the defendant for certain crimes. These fast trials are used most famously for mafia cases, but also for crimes concerning immigration.⁸³

During the so-called First Republic, from 1946 to 1992, the Italian political system was characterized by consensus-based governments and strong influence of the Catholic church. The major ruling parties were the Christian Democrats and the Communists.⁸⁴ At the same time the Italian criminal justice system had a relatively low level of punitiveness, and the prison rate was under 70 in the 1980s and reached its record low 43.8 in 1990. This was achieved through recurring amnesties and general pardons.⁸⁵ Nelken explains the low level punitiveness by the combination of the Catholic emphasis of forgiveness and the solidarity and distrust of the state of the left-wing ideologies.⁸⁶

The First Republic ended in 1992 with a big bribery scandal that is known with the names of *Mani pulite* (Clean hands) or *Tangentoville* (Briberyville). It revealed the systemic bribery and illegal funding of the established political parties and replaced the era of consensus with more populist politics. This also increasingly politicized criminal policy and harsher punishments especially on crimes related to drugs and immigration.⁸⁷ Marta Minetti uses the term penal populism this phenomenon where the hardening of punishments for breaches of

⁸¹ Corda 2016, p. 136.

⁸² Corda 2016, p. 138.

⁸³ Scomparin and Torrente 2020, p. 9.

⁸⁴ Corda 2016, p. 145.

⁸⁵ Corda 2016, p. 112.

⁸⁶ Nelken 2010, p. 300.

⁸⁷ Corda 2016, p. 108–10.

immigration law is of a symbolic nature and the purpose more to communicate to the electorate than to prevent crime.⁸⁸ The prison rate in Italy increased in the 1990s and 2000s, reaching 114.5 in 2010.⁸⁹ In 2023 the prison rate was 95.4 while average of European countries was 113.3 and the median 100.2.⁹⁰

6.2 Facilitation of illegal entry

In Italy the Facilitators' package is implemented in the article 12 of the consolidated law on immigration⁹¹, called orders against illegal immigration⁹². According to article 12(1), anyone who promotes, directs, organizes, finances, or transports foreigners into Italy or any other state or carries out other acts aimed at illegally bringing them into the State, shall be punished with imprisonment of two to six years and a fine of €15,000 for each person.⁹³

Article 12(2) exempts from criminalization the rescue activities and humanitarian assistance provided to foreigners who are already in Italy.⁹⁴ Article 12(3) specifies an aggravated form of the offence, for which the punishment is from six to sixteen years of imprisonment and a fine of €15,000 for each person. Aggravating circumstances are: 1) transporting more than five people, 2) that the transported person is exposed to danger to life, 3) inhuman or degrading treatment, 4) the act is committed by three or more people in collaboration, 5) possessing weapons.

The crime of facilitation of illegal entry is seen in Italy in the context of transnational organized crime and for example in the Palermo prosecutors' district the cases are handled by the Anti-Mafia Directorship (DDA), a specialist prosecutor for mafia-related crimes.⁹⁵ Also

⁸⁸ Minetti 2020, p. 340–43.

⁸⁹ Corda 2016, p. 112.

⁹⁰ Aebi – Cocco 2024, p. 31.

⁹¹ Decreto Legislativo 25 luglio 1998, n 286-Testo Unico delle Disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero

⁹² Disposizioni contro le immigrazioni clandestine

⁹³ *”Salvo che il fatto costituisca più grave reato, chiunque, in violazione delle disposizioni del presente testo unico, promuove, dirige, organizza, finanzia o effettua il trasporto di stranieri nel territorio dello Stato ovvero compie altri atti diretti a procurarne illegalmente l'ingresso nel territorio dello Stato, ovvero di altro Stato del quale la persona non è cittadina o non ha titolo di residenza permanente, è punito con la reclusione da due a sei anni e con la multa di 15.000 euro per ogni persona.”*

⁹⁴ *“[...] non costituiscono reato le attività di soccorso e assistenza umanitaria prestate in Italia nei confronti degli stranieri in condizioni di bisogno comunque presenti nel territorio dello Stato.”*

⁹⁵ Minetti 2020, p. 345–47; Patané et al 2020, p. 139.

because of anti-mafia legislation, Italy has the possibility to prosecute for facilitation of illegal entry that has happened on international waters.⁹⁶

6.3 Criminal justice system

The Italian court system consists of many levels of courts: *giudici di pace* are the lowest level, *tribunali* are the courts of first instance for most crimes and *corti di appello* are courts of appeal on the intermediate level. For the most serious crimes *corti di assise* are the court of first instance and they have their own appeal courts (*corti di appello di assise*). *Corte di Cassazione* is the supreme court in civil and criminal matters.⁹⁷

Reflecting the neoclassical theory, the judges in Italy are given wide discretion when deciding on punishments. According to article 132 of the Codice Penale, the judge applies the penalty at their discretion within the limits of the law, but they have to give reasons for the discretion.⁹⁸ Furthermore, article 62-bis allows the judge to consider various factors that may justify a reduction in the penalty, even if they are not specifically listed in the law.⁹⁹

According to the article 133 the guiding criteria for sentencing are the seriousness of the crime (*la gravità del reato*), indicated by the nature of the action, severity of harm or danger caused and the degree of intent, and the offender's likelihood to commit future crimes (*la capacità a delinquere del colpevole*).

The most severe penalty is life imprisonment (*ergastolo*, Codice Penale art. 22) with the possibility of parole after 26 years. Ordinary prison sentences (*reclusione*, Codice Penale art. 23) range from 15 days to 24 years. According to the article 78, an aggregate punishment may not exceed the most severe single punishment by more than five times or exceed 30 years of imprisonment. Article 163 states that a prison sentence up to two years can be given as a suspended sentence, if the judge believes that offender will refrain from committing further crimes. Showing the influence of the positivist theory, article 164 states that a suspended

⁹⁶ Romano 2021, p. 45–46.

⁹⁷ Pozzo 2023, p. 317.

⁹⁸ “*Nei limiti fissati dalla legge, il giudice applica la pena discrezionalmente; esso deve indicare i motivi che giustificano l'uso di tal potere discrezionale.*”

⁹⁹ “*Il giudice, indipendentemente dalle circostanze previste nell'articolo 62, può prendere in considerazione altre circostanze diverse, qualora le ritenga tali da giustificare una diminuzione della pena.*”

sentence cannot be given if the offender has committed a previous crime or is considered socially dangerous.

The punishment for an assault with bodily harm (*lesione personale*, Codice Penale art. 582) is imprisonment from six months to three years and the punishment for a minor drug offence (*reato di lieve entità*, Decreto n. 309 art. 73.5) is imprisonment from six months to five years and a fine from 1,032 to 10,329 euros.

6.4 Cases

6.4.1 Forced Smuggler

The decision 6266/2021 of the Corte di Cassazione is a case of forced smuggling. A man of unknown nationality, who had arrived in Italy by boat with 12 other persons, was given the sentence of three years and four months of imprisonment and a fine of 120,000 euros for facilitation of illegal entry, aggravated by the number of people transported. He had been involved in refuelling and maintenance of the boat engines.

The defendant had claimed that he had acted in the state of necessity as he had been threatened and that his activity had been of minimal importance. Both claims were turned down by the courts. His punishment was mitigated with general mitigating circumstances, resulting in a lower sentence than the six years of prison that the law sets as the minimum for aggravated facilitation.

6.4.2 The Opportunistic Smuggler 1

The decision 33810/2024 of Corte di Cassazione is a case from the other end of the continuum of humanitarian smuggling, opportunistic smuggling. The accused seem have received some financial gain from their actions as they were allowed to get on the boat for a reduced fee in exchange for helping the smugglers.

In the case two men from Uzbekistan were given the sentence of four years and six months in prison for facilitation of illegal entry, aggravated by the number of migrants transported, the danger to lives, the inhumane and degrading conditions of the transport, and the number of accomplices. The defendants were also ordered expulsion from Italy after serving the sentence.

The defendants had come to Italy from Turkey on a boat set on autopilot with seventy-eight other irregular migrants. They had agreed to supervise the boat and do some organizational tasks (such as helping with boarding and handing the migrants their cell phones in Italian waters) in exchange for a reduced cost for the trip. They were acquitted by the Tribunale di Locri because they were considered to have been misled by the organizing smugglers, who also had decided the route of the boat that was pre-set on the autopilot. They also claimed to have taken control of the boat in a state of necessity. They were later convicted by the Corte di appello di Reggio Calabria and the Corte di Cassazione turned down their appeals.

6.4.3 The Opportunistic Smuggler 2

The decision 28742/2023 of Corte di Cassazione is a case of either opportunistic smuggling or low-level professional smuggling. An Egyptian man was given the sentence of eight years of imprisonment and a fine of 4,650,000 euros for aggravated facilitation. He had facilitated the illegal entry of about 186 migrants to Italy in a boat who were rescued by the Italian Coast Guard in international waters. The case different from the rest by the number of persons facilitated and the harshness of the sentence. It is also interesting because the crime happened in international waters, where the Italian authorities also have jurisdiction according to a decision by the Corte di Cassazione from 2014.¹⁰⁰

He was identified by witnesses as one of the three men that took turns steering the boat and who had a compass. The three boat drivers also had small amounts of money and mobile phones, when the other migrants were confiscated of their belongings. The accused confessed having “helped the smugglers” but claimed that his action was of minimal importance to the crime. The Corte di Cassazione found that there was no evidence that they would have been acting in a state of necessity and there were no mitigating circumstances.

6.4.4 The Family Smuggler 3

The case C-460/23 of the CJEU, also known as *Kinsa*, is a case of family smuggling. It is a significant case because it is the first time the CJEU will be considering the legality of the Facilitators’ package. In the case a Congolese woman had flown to Italy with two children, her daughter and niece, using false passports. Upon arrival she applied for asylum claiming that

¹⁰⁰ Patanè et al. 2020, p. 130.

she had fled because of death threats from her ex-partner and fearing for the safety of the children.

In 2023 the Tribunale di Bologna made a request to the CJEU for a preliminary ruling on whether the directive and the Italian law are compatible with the Charter of Fundamental Rights and the principle of proportionality in art 49(3) CFR, stating that "[t]he severity of penalties must not be disproportionate to the criminal offence."

The decision from CJEU is expected to come in 2025. In November 2024 advocate general Richard de la Tour gave his opinion. According to the opinion, the directive itself is not unproportionate, because it does not specify the criminal sanctions.¹⁰¹ However, a national law would be unproportionate if it didn't have an exception for persons "persons whom are shown to have acted disinterestedly, out of altruism, compassion or solidarity, for humanitarian reasons or because of family ties".¹⁰² If the CJEU takes agrees with de la Tour's opinion, it would suggest that an implementation of the directive without a full humanitarian exception would be against EU law.

¹⁰¹ Opinion of advocate general Richard de la Tour, delivered on 7 November 2024, paras. 89-96

¹⁰² *ibid.*, para 115.

7 Comparison and Analysis

I will compare Finland and Italy on the levels of five legal formants: laws, cases, legal doctrines, criminal justice systems and criminal procedure.

7.1 Legal Formant 1: the Laws

The Finnish and Italian laws on facilitation of illegal entry both lack the requirement of financial benefit, a main requirement in the Palermo Convention, which is no surprise since they implement the same directive. The main differences are the scope of the laws, the criteria for the aggravated crime, the punishments and the humanitarian exception.

The focus of the Italian law is more to combat organized crime, and the definition of the crime includes besides transportation, also the directing, organizing and financing of the entry of irregular immigrants. The aim of the Finnish law is to protect the borders and the scope is more narrowly on facilitating the actual border crossing by transporting, organizing transport, or giving false documents to irregular immigrants.

Both laws include a separate aggravated form of the crime. In the Finnish law the criteria for the aggravated crime are bodily injury or mortal danger caused to the transported person and acting as a member of an organized criminal group. The criteria in the Italian law include these, but the crime is also aggravated by the number of people transported, which is often the case in the boat driver cases, and by the number of people acting in collaboration. Also, in the Italian law the crime is automatically aggravated if one of the criteria is met, whereas in Finland it also must be aggravated *as a whole*, leaving more room for consideration for the court.

The punishments for the crime of facilitation are very different between Finland and Italy. Ranging from fines to two years of prison in Finland and from two years to six years of prison and a fixed fine in Italy. In Finland the punishment scale is exactly the same as for an assault and a minor drug offence, whereas in Italy it is considerably harder. One explaining factor is that the laws are categorized differently. In Finland the cases of facilitation are classified as general crimes, placed in the criminal code under the chapter "Offences against public order". In Italy the crime of facilitation is categorized under organized and transnational crime and often the cases are also handled by specific anti-mafia prosecutors. Second explaining factor

is that in Italy criminal law and immigration law have become politicized since the 1990s¹⁰³, whereas in Finland criminal policy is more expert-driven and characterized by committee work and slow changes¹⁰⁴.

An important difference in the laws is the humanitarian exception. The Italian humanitarian exception is very narrow, only allowing for the humanitarian assistance of foreigners who are already present in the state. The Finnish exception is wider and the consideration *as a whole* leaves more wiggle room for the courts, as is seen in the case Family Smuggler 1, where the Turku Court of Appeal differed from the definition of close family ties in the government bill and the Supreme Court decision.

7.2 Legal Formant 2: the Cases

As I have already noted before, the diversity of national criminal justice systems creates unpredictability in the outcomes of a directive.¹⁰⁵ In order to acquire a more realistic picture of the effects of the directive, I have presented four example cases from both countries. All the cases are on the continuum of humanitarian smuggling: ranging from two cases of opportunistic smuggling where some financial benefit – such as a reduced fee for crossing the border – was involved, two cases of solidarity smuggling, three cases of family smuggling and one case of forced smuggling where no financial benefit was involved. If the directive had included the standard of the Palermo protocol – direct or nondirect benefit – only the opportunistic smugglers would have been convicted.

Main differences between the cases can be explained with geography. Most irregular immigrants arrive in Italy in groups by boats, as is in all the cases except for the Italian family smuggling case, whereas they arrive to Finland in smaller groups by crossing the border from Russia or taking a ferry from Sweden. Immigrants coming to Finland are mainly helped by friends or relatives, whereas the boats coming to Italy are organized by professional smugglers, even though the smugglers do not board the boats themselves. However, they all fall on the continuum of humanitarian smuggling, possibly with the exception of Opportunistic Smuggler 2 who can also be a low-level professional. I consider that it is possible to compare the cases. The closest comparisons are the Family smuggling cases and Forced smuggler and Solidarity smuggler 1 because of the number of persons involved and

¹⁰³ Minetti 2020, p. 341.

¹⁰⁴ Lappi-Seppälä 2012, p. 224.

¹⁰⁵ Chaves 2015, p. 546.

similar motivations. In Finland Solidarity smuggler 1 received a fine of 180 € whereas in Italy the Forced smuggler received a prison sentence of three years and four months of imprisonment and a fine of 120,000 €.

All the examined cases are very straightforward in the sense that the action itself is admitted by the accused. The argumentation concentrates on the humanitarian exception in the Finnish cases and on the state of necessity in the Italian cases since the humanitarian exception is not applicable in the Italian cases. Thus, the facts of the cases are formed by the laws.

The punishments are very different because of differences in legislation and because most Italian cases are automatically aggravated by the number of people facilitated. In the Finnish cases the punishments were fines for Solidarity smuggler 1 and prison sentences of 20 or 30 days for Family Smuggler 2 and Solidarity Smuggler 2 respectively. In the Italian cases the punishments ranged from three years and four months for the Forced smuggler to 8 years of prison to Opportunistic Smuggler 2. In addition to prison sentences, the Italian law imposes fixed fines multiplied by the number of people facilitated. A fine of 4,650,000 € given to Opportunistic Smuggler 2 is a symbolic punishment and very far from the Nordic values of proportionality and pragmatism that the Finnish criminal justice system is based on.

7.3 Legal Formant 3: the legal doctrines

For the Italian cases the legal doctrine on state of necessity (*stato di necessità*) is important. According to the Codice penale, an action is not punishable if it has been done to save oneself or others from a danger not caused by oneself voluntarily and it is proportionate to the danger.¹⁰⁶ In the Finnish Criminal code the article on state of necessity (*pakkotila*) states that an action is allowed if it is justifiable as a whole when considering proportionality, the source of the danger and other circumstances.¹⁰⁷ The Finnish doctrine gives more room for the court to decide whereas the Italian doctrine is more limiting if the danger has been caused the accused himself. In the case of Forced Smuggler this was interpreted to mean that the accused

¹⁰⁶ Codice penale, art 54: *Non è punibile chi ha commesso il fatto per esservi stato costretto dalla necessità di salvare sé od altri dal pericolo attuale di un danno grave alla persona, pericolo da lui non volontariamente causato, né altrimenti evitabile, sempre che il fatto sia proporzionato al pericolo.*

¹⁰⁷ Rikoslaki 4:5: ”[...] oikeudellisesti suojattua etua uhkaavan välittömän ja pakottavan vaaran torjumiseksi tarpeellinen teko on pakkotilatekona sallittu, jos teko on kokonaisuutena arvioiden puolustettava, kun otetaan huomioon pelastettavan edun ja teolla aiheutetun vahingon ja haitan laatu ja suuruus, vaaran alkuperä sekä muut olosuhteet.”

had not acted in a state of necessity since he had decided to be smuggled and had gotten voluntarily on the boat and so caused the danger himself.

The Finnish and Italian legal doctrines on sentencing are very similar. In both countries the courts have a wide discretion when deciding on punishments. Both have an exhaustive list of aggravating factors and a non-exhaustive list of mitigating factors, leaving the courts more discretion in mitigating the punishments. The sentencing criteria of the Finnish legal doctrine concentrate on the proportionality of the punishment in a neo-classical fashion, whereas the Italian legal doctrine also includes positivist traits and aims for the incapacitation of recidivists. The Finnish legal doctrine also emphasizes the uniformity of sentencing and uses standard sentences as a starting point. For example, in the case *Solidarity smuggler 2* the court held that three months of prison would be a “just sanction” for the action, but with mitigating factors lowered it down to 30 days.

7.4 Legal Formant 4: criminal justice systems

According to Nelken, it is not possible to compare just the punishments that are mandated in law, but the whole criminal justice system must be considered.¹⁰⁸ In the same tone, Sacco notes that to understand a legal rule all the legal formants must be considered.¹⁰⁹ The structures of the Finnish and Italian criminal justice systems are similar. In both countries the judiciary (ie. the judges and the prosecutors) are civil servants that are separated from the government and enjoy relative freedom.

The agency of the prosecutors and judges is important. The Italian prosecutors have an obligation to prosecute if there is evidence for a crime, but according to an empirical study their willingness to start prosecutions on illegal immigrants varies.¹¹⁰ As noted, in some areas the cases are handled by special prosecutors that specialize on mafia-cases. The “anti-mafia-mindset” of the prosecutors is thought to be a factor that makes them prioritize smuggling cases over general crime.¹¹¹ Also in Finland the prosecutors have an obligation to prosecute but like in Italy, they have big workloads and must prioritize cases in order stay within the prescription periods of different crimes. Unfortunately, there are no empirical studies on the attitudes of Finnish prosecutors on immigration-related crimes.

¹⁰⁸ Nelken 2010, p. 64.

¹⁰⁹ Sacco 1991a, p. 21–23.

¹¹⁰ Montana – Nelken 2011, p. 288.

¹¹¹ Alagna 2024, p. 249–50.

In both countries the judges have a lot of discretion when deciding on punishments. There are also many mitigating factors for crimes in both countries and the lists are non-exhaustive. Italian judges can use this freedom to moderate the harshness of the laws¹¹², as happened in both cases Opportunistic smuggler 1 and Forced smuggler, where the minimum for an aggravated facilitation would have been six years, but only three years and four months was sentenced in the first case and four years and six months in the second case. Also in the case Solidarity smuggler 1 the Finnish Supreme court noted, that “the action cannot be held very reprehensible [...] as he acted out of compassion” and reasoned that fines instead prison were a just punishment.

7.5 Legal formant 5: criminal procedure

Nelken points to the importance of criminal procedure in understanding the criminal justice system in Italy.¹¹³ The prison rate of Italy is comparably low in the European context even though the punishments are comparably high. The harshness of the laws is mitigated by inefficiency of the criminal procedure and high rates of attrition: “many cases start out, few arrive at a conclusion”.¹¹⁴ In Italy a definitive sentence (possibly from the Corte di Cassazione) must be given during the limitation period of the crime¹¹⁵, whereas in Finland it is enough that the criminal proceedings are started during that period¹¹⁶.

It might be that many of the procedural benefits of the Italian criminal justice system that mitigate the harshness of the punishments are not available to irregular immigrants. Nelken gives two reasons: in part this is because they lack the legal competence and assistance to do so. But, in addition, official actors do not always choose to interpret the procedural possibilities that do exist in their favour.¹¹⁷ As an example, Scomparin and Torrente describe how the “double-track” procedural rules for mafia crimes in Italian law have been increasingly used for immigration crimes and alien defendants in ordinary criminal proceedings.¹¹⁸

¹¹² Corda 2016, p. 136.

¹¹³ Nelken 2010, p. 300.

¹¹⁴ Nelken 2010, p. 302.

¹¹⁵ Corda 2016, p. 113.

¹¹⁶ Rikoslaki 8:1

¹¹⁷ Nelken 2010, p. 308.

¹¹⁸ Scomparin and Torrente 2020, p. 9.

8 Conclusions

In this study I have compared the implementation and application of the Facilitators' package in Finland and Italy using Rodolfo Sacco's theory on legal formants supplemented with comparative criminal justice. I have compared the legal formants of laws, cases, legal doctrines, criminal justice and criminal procedure to attain a realist outlook on the outcomes of the directive.

I have shown in this study that human smuggling is a multi-faceted phenomenon. I use the humanitarian smuggling for cases where there is no financial motivation. The requirement of financial benefit is present in the definition of human smuggling the Palermo Convention it aims to criminalize professional human smuggling by organized criminal groups. A central problem of the directive is that because lacks this requirement, the directive also criminalizes many actions that aren't meant to be criminalized in the convention, such as helping family members. Even the humanitarian exception that the article 1(2) of the directive allows for member states is not enough prevent this. Finland has implemented the exception fully, but since the interpretation of concepts like "close family relations" and "humanitarian motives" is narrow and varies between courts, even many cases that fall on the humanitarian smuggling continuum result in a conviction.

I claimed that the structures of national criminal justice systems affect the outcomes of the directive. The punishments in Finland and Italy are very different, in Finland the harshest sentence was a suspended prison sentence of 30 days whereas in Italy the mildest sentence was three years and four months. The differences can be explained by their different traditions of criminal justice. The Finnish criminal law and criminal justice system are a product of long tradition of Nordic cooperation. In Italy criminal law is more politicized with harsh, symbolic punishments especially for breaches of immigration laws. Traditionally the harshness of the Italian laws has been mitigated by the criminal procedure, the discretion of the judges and general pardons and amnesties.

I also noticed that Rodolfo Sacco's theory on legal formants, that originates from the study of private law, can also be used to study criminal law when supplemented with the elements of comparative criminal justice. All in all, humanitarian smuggling is an understudied phenomenon. More thorough empirical research on the effects of the directive would be needed.