

IUS COMMUNE

Zeitschrift für Europäische Rechtsgeschichte

Veröffentlichungen des Max-Planck-Instituts
für Europäische Rechtsgeschichte
Frankfurt am Main

XXVIII

Herausgegeben von DIETER SIMON
und MICHAEL STOLLEIS



Vittorio Klostermann Frankfurt am Main
2001

HEIKKI PIHLAJAMÄKI

On the Verge of Modern Law? Mitigation of Sentence in Nineteenth-Century Finland*

“Neque enim omnes factorum & criminum qualitates certis legibus definire licet: sed accurato iudicio singulae quaeque circumstantiae rerum, personarum, temporum perpendendae, & ex iisdem pro arbitrio iudicio poena remittenda ac mitiganda est.”

Benedict Carpzov: *Practica Nova Imperialis Saxoniae Rerum Criminalium*¹

It has become almost a cliché to claim that, as a result of the Enlightenment and the complex socio-political transformations that followed it, a system of modern law emerged during the course of the nineteenth century.² During the Century of the Bourgeoisie, positive law – and above all, the enacted statute – became superior to all other sources of law in most parts of the Western world. In the positivistic legal ideology that crystallized towards the end of the century, law became detached from competing normative orders such as religion or morals.

The value of the pre-modern / modern distinction is, however, limited in practical historical research. Many modernizing features actually began to take shape before the nineteenth century³ or remained far from complete at the turn of this.⁴ The “rationalization” or “modern-

* I wish to express my gratitude to Toomas Kotkas for efficient research assistance and to various colleagues for the comments I received on the draft versions of this article.

¹ Pars III, quaestio 150, n. 7 (8. edition, Witteb. 1684).

² Cf. H. BERMAN, *Law and Revolution: The Formation of Western Legal Tradition*, Cambridge 1983. According to Berman, the distinctive features of modern law took shape in the thirteenth century when, with the help of canonical jurisprudence, the hierarchical administrative structure of the Catholic Church was created.

³ An example is the rise of the so-called *Policey-Ordnungen*, *Policeywissenschaft*, and *Policeyrecht* in seventeenth and eighteenth-century Germany. See M. STOLLEIS, *Geschichte des öffentlichen Rechts in Deutschland*. Erster Band: 1600–1800, Munich 1988, pp. 369–393.

ization" of nineteenth-century society did not "require" indispensable, abrupt, or simultaneous changes in all branches of law. Modernization needs therefore to be scrutinized as concrete historical processes which do not always match scholarly categories.⁵

Content sometimes precedes form. The central idea of this article is to show, in the light of nineteenth-century Finnish punishment mitigation practice, that changing social, political, and ideological constraints outside of legal systems could cause pre-modern forms of law to be filled with new meanings. After the 1850s, the mitigation practice coincided with the modernization of society and with modernizing criminal law in that the content, although not the form of mitigation changed. For the reasons which will be explained below, the change in the form of statutory law could only come later, in the last decade of the century.⁶

I will concentrate on the mitigation practice of the three Finnish courts of appeals (the Courts of Appeals at Turku, Vaasa, and Viipuri) in the years 1809–1894. For most of the century, mitigation no longer applied to Sweden⁷ where it was abolished in 1835.⁸ The practice continued in Finland after her annexation to the Russian Empire in

⁴ The Finnish judicial apparatus remained basically pre-modern in its structure until a reform in 1993. See K. NOUSIAINEN, *Prosessin herruus: Länsimaisen oikeudenkäytön 'modernille' ominaisten piirteiden tarkastelua ja alueellista vertailua* [Rule(s) of law: typical features of 'modern' western procedure and regional comparison], Helsinki 1993, p. 575.

⁵ See David Sugarman's critique on the usefulness of distinctions of the type "pre-modern / modern." Calling for "more open-ended studies," Sugarman claims that "the characterisations of 'pre-modern' and 'modern' are caricatures. Methodologically, they have sustained and have been sustained by a unitary conception of 'society' as a systematic totality; and a highly teleological approach to history, law and sociology." D. SUGARMAN, In the Spirit of Weber: Law, Modernity and the 'Peculiarities of the English', in: *History and European Private Law, Development of Common Methods & Principles*, Stockholm 1997, p. 218.

⁶ This theme has not so far produced studies of its own. The earlier Swedish-Finnish practice of sentence mitigation has likewise remained almost untouched by legal historiography, although some authors have briefly touched upon the subject in their works on other questions. See B. H. LINDBERG, *Praemia et Poenae: Etik och straffrätt i Sverige i tidig ny tid* [Praemia et poenae: ethics and criminal law in the early modern period], Uppsala 1992; R. THUNANDER, *Hovrätt i funktion: Göta hovrätt och brottmålen* [The appeals court at work: The appeals court of Göta and criminal cases], Stockholm 1993, pp. 195–203; G. INGER, *Institutet "insättande på bekännelse" i svensk processrätts-historia* [Confessional imprisonment in the history of Swedish procedural law], Stockholm 1976, pp. 48–50.

⁷ Finland was part of Sweden until 1809.

⁸ J. FORSMAN, *Sananen tekeillä olevasta Rikoslaiosta, etenkin rangaistuksen punnitsemiseen nähden* [A word on the criminal code under preparation, especially insofar as it comes to the measuring of punishment], Helsinki 1884, p. 9.

1809, until it was abolished by the Finnish Criminal Code of 1889, which came into force in 1894.

I will first briefly compare the Continental and Swedish early modern practices of mitigation. I will then approach the business of mitigation in the light of the case material, drawn from the lists of the mitigated sentences that the appeals courts were obliged to remit to the Judicial Department of the Senate⁹ every sixth months. The problem will then be viewed in the light of the nineteenth-century Finnish legal literature. I will close the study by concluding remarks which hopefully will help place nineteenth-century Finnish sentence mitigation in a larger penal context.

Poena extraordinaria in Early Modern European Law

Pre-modern criminal law, insofar as circumstantial factors were considered, was based on so-called absolute punishments and it was *casuistic* in the way *Jean-Marie Carbasse* and *Stig Jägerskiöld* have described. The reasons for departing from the ordinary punishment were not, as in modern law, deducible from an "autonomous" legal order. They were rather drawn from a wider variety of possibilities that did not depend on a narrowly defined choice of legal sources. Many of the grounds for avoiding a statutory punishment were closely related to the modern categories of defense and guilt. Abstract categories *per se* were, however, foreign to pre-modern thinking.¹⁰

Early European legal literature adopted the idea of judicial discretion, *arbitrio*, in the writings of the glossators and the commentators. If there were grounds to mitigate or to increase a punishment, the court was allowed to depart from the legal text or customary law according to the principle of *omnes poenae sunt arbitrarie*. Through *arbitrio*, the

⁹ A supreme court had been established in Sweden in 1789. Although not formally an independent court of law, the Judicial Department of the Senate (the JDS) acted as Finland's highest court during the imperial era.

¹⁰ The pre-modern jurist conceived of punishment in a more concrete and all-encompassing way, attempting to take the circumstances of the particular case into consideration. In the writings of Farinacius, Tiraquellus, and Julius Clarus, diminished punishment is justified by factors such as a large family, physical weakness, and the convict's services to the state. See J.-M. CARBASSE, *Introduction historique au droit pénal*, Paris 1990, p. 174; S. JÄGERSKIÖLD, *Hovrätten under den karolinska tiden och till 1734 års lag (1654–1734)*, in: *Svea hovrätt, Studier till 350-årsminnet* [The Svea Appeals Court: 350th anniversary studies], Stockholm 1964, p. 275. See also LINDBERG, *Praemia* (note 6), pp. 352–353; and, for pre-modern legal casuism in general, V. TAU ANZOÁTEGUI, *Casuismo y sistema*, Buenos Aires 1994.

judiciary obtained the right to convict even in cases where no statutory text or established customary norm was at their disposal.¹¹ The growth of *arbitrio* from the late Middle Ages onwards stands in obvious relation to the reception of Roman law and the consolidation of central power, which had started in France in the thirteenth century and in the German princely states at the end of the fifteenth century. The legal safeguards that had been built to protect the estates against arbitrary decisions were essentially reduced.¹²

The extent of judicial discretion varied considerably from region to region.¹³ Regardless of the differences in the tricky relations between the judiciary, jurisprudence, and legal practice in various parts of Europe, the basic nature of premodern criminal law was the same all over early modern Europe. Sentencing options were not limited to statutory texts. If *circumstantiae* called for a deviation, courts had recourse to *poenae extraordinariae*.¹⁴

¹¹ See, especially for France, B. SCHNAPPER, *Les peines arbitraires du XIIIe au XVIIIe siècle* (doctrines savantes et usages français), in: *Tijdschrift voor rechtsgeschiedenis* XLI/2 (1973) and XLII/1 (1974); for Spain, F. TOMÁS Y VALIENTE, *El Derecho penal de la monarquía absoluta* (siglos XVI, XVII, XVIII), Madrid 1992, p. 379; and for Germany, E. SCHMIDT, *Einführung in die Geschichte der deutschen Strafrechtspflege*, Göttingen 1983, p. 167.

¹² See SCHNAPPER, *peines arbitraires* (note 11), especially pp. 247–258. This development is, not surprisingly, parallel to the growth of *poena extraordinaria* in matters of evidence. John Langbein has shown that *poena extraordinaria* came increasingly to be employed in cases where no statutory “full proof” was available. See J. LANGBEIN, *Torture and the Law of Proof: Europe and England in the Ancien Régime*, Chicago 1977, p. 47.

¹³ In France, the position of statutory criminal law was traditionally weak, and French jurisprudence did little to unify a heterogenous legal practice. See J. P. DAWSON, *Oracles of the Law*, Ann Arbor 1968, pp. 339, 371; CARBASSE, Introduction (note 10), p. 371.

In the Holy Roman Empire, Emperor Charles V's *Constitutio Criminalis Carolina* (CCC) of 1532 and the various pieces of territorial legislation modeled on it had established a clearer framework. The CCC itself was based on absolute punishments, although its interpretations and influence changed considerably during the centuries it continued in force. SCHMIDT, *Einführung* (note 11), p. 167. The binding effect of *Carolina's* rules ought not, however, to be over-emphasized. It was not considered binding like modern statutes and it had to compete for authority with other legal sources. See DAWSON, *Oracles* (note 13), p. 212; G. KLEINHEYER, *Tradition and Reform in der Constitutio Criminalis Carolina*, in: *Strafrecht, Strafprozeß und Rezeption: Grundlagen, Entwicklung und Wirkung der Constitutio Criminalis Carolina*, ed. by P. LANDAU and F.-C. SCHROEDER, Frankfurt am Main 1984, pp. 7–27: pp. 9, 25–26; H. RÜPING, *Die Carolina in der strafrechtlichen Kommentarliteratur: Zum Verhältnis von Gesetz und Wissenschaft im gemeinen deutschen Strafrecht*, in: *ibid.*, pp. 161–176: p. 161.

¹⁴ Judicial discretion was, of course, one of the targets that the Enlightenment critique hit hardest. Informed by the *principle of proportionality*, Beccaria claimed

The logic of sentencing changed in the modern law of the nineteenth century. In modern continental criminal law, absolute punishments were increasingly replaced by *sentencing scales*. The scales suited the fact that imprisonment became the main punishment for serious crimes in most parts of the Western world during the nineteenth century. The length of the prison sentence could be assessed proportionately to the "objective" and "subjective" elements of crime. The criteria by which punishments had been mitigated and aggravated in pre-modern law were now cast into a legal mold based in modern criminal law on the legality principle.

The Early Stages of Sentence Mitigation in Sweden

The history of Swedish-Finnish criminal law does not, as far as grand lineages are concerned, essentially deviate from the common European pattern. King Christopher's Law of the Land of 1442, together with important statutes on criminal law from the late sixteenth and early seventeenth centuries, formed a fairly detailed statutory framework for Swedish courts dealing with criminal cases.¹⁵ As in the more southerly parts of the Continent, Sweden's first criminal statutes relied on absolute punishments which were then mitigated in the courts, beginning in the fifteenth century.¹⁶

It is commonly assumed, however, that the practice gained greater significance as royal power began to tighten its grip on criminal law as one of its instruments towards a more efficient, centralized power structure. The mitigation of punishments in Swedish-Finnish courts of the sixteenth and the beginning seventeenth centuries cannot be understood without setting the development in context with the centralization of royal power, usually placed in the sixteenth and seventeenth centuries by the Swedish and Finnish historians.¹⁷

punishment should be proportionate to the harmfulness of the crime. BECCARIA, *On Crimes and Punishments and Other Writings*, Cambridge 1995, p. 19.

¹⁵ A thorough review of early modern Swedish jurisprudence (as well as Nordic in general) is L. BJÖRNE, *Patrioter och institutionalister: Den nordiska rättsvetenskapens historia*, Del I, *Tiden före 1815* [Patriots and institutionalists: The history of Nordic jurisprudence, Part I, The period before 1815], Stockholm 1995.

¹⁶ See, e.g., the infanticide case against Cristine Benct clensmidz dottir in Stockholm on June 14, 1484. Instead of the statutory death sentence, Cristine was fined 20 marks and banished from the town. *Stockholms stads tänkeböcker 1483-1492* [The courts records of the city of Stockholm 1483-1492], Stockholm 1921, p. 5.

¹⁷ A good survey article on the Nordic research is E. ÖSTERBERG, *Brott och rättspraxis i det förindustriella samhället: Tendenser och tolkningar i skandinavisk forskning*

Once the Swedish-Finnish lower courts fell under the supervision of the appeals courts during the first half of the seventeenth century,¹⁸ the lower courts were rapidly forced to observe statutory law. It was the appeals courts themselves that now began to exercise the privilege of *arbitrio*, although the power of mitigation was not expressly conferred on them until 1641. Mitigation was, however, only allowed in cases where a precedent was available, *i.e.*, whenever the King had previously pardoned in a similar case. When "the circumstances [were] different, then the case [had to be] referred to His Royal Majesty," said the law.¹⁹

Arbitrio was a practical necessity because statutory law was old and full of *lacunae*.²⁰ When the King criticized the Svea Appeals Court in 1672 for its excessive use of *arbitrio*, the Court, in its response to the King, stated that it would never be possible to take into consideration all the circumstances emerging in criminal cases. A complete prohibition of *arbitrio* would therefore be untenable. The Court also referred to "foreign law," which supposedly guaranteed courts extensive use of *arbitrio*.²¹

[Crime and legal practice in pre-industrial society: Tendencies and interpretations in Scandinavian research], in: *Historisk Tidskrift* 2 (1993), pp. 201–224.

¹⁸ The first court of appeal, that of Svea, was founded in 1614.

¹⁹ J. SCHMEDEMAN, *Justitiæwerket* [The judiciary], Uppsala 1706, p. 238. A similar Letter was issued in 1647 when Queen Christina became of age. *Ibid.*, p. 269.

Punishments were not only mitigated through *arbitrio*, but also by pardon. According to the Trial Order of 1614 the right to pardon belonged to the Crown exclusively, but according to the new Trial Order of 1615 the appeals court should, in the King's absence, decide whether a death sentence would be carried out. It should be mentioned, however, that *arbitrio* and pardon were not separated clearly in the contemporary legal language. See P. MYHRBERG, *Hovioikeudet lain lieventäjinä 1600-luvulla* [Appeals courts as mitigators of sentences in the seventeenth century], in: *Lakimies* 75 (1977), pp. 850–864; THUNANDER, *Hovrätt* (note 6), p. 196.

²⁰ JÄGERSKIÖLD, *Hovrätten* (note 10), p. 275. See also B. H. LINDBERG, *Brott och straff enligt more geometrico* [Crime and punishment according to the *more geometrico*], in: *Den svenska juridikens uppblomstring i 1600-talets politiska, kulturella och religiösa stormaktssamhälle* [The flourishing jurisprudence in the political, cultural and religious seventeenth century society, Sweden's age of greatness; translation in the original], ed. by G. INGER, Stockholm 1984, pp. 275–302.

²¹ JÄGERSKIÖLD, *Hovrätten* (note 10), pp. 278–279. Following Carpzov and Farinacius, David Nehrman, the most influential Swedish legal scholar in the eighteenth century, also held that it was impossible to draft a comprehensive code with no *lacunae*, even if general concepts were used. All cases were different, and it was impossible for a law-giver to think in advance of all the possible *circumstantiae* that might require either mitigating or increasing the punishment in a particular case. D. NEHRMAN, *Inledning til Then Swenska Processum Criminalem*, Stockholm 1759, p. 248.

Were the tough criminal statutes really meant to be observed as such? Obviously this was not automatically the case, for the logic of premodern punishment, as I have shown, was different. *Bo H. Lindberg* has asserted that the Swedish criminal adjudication reflected the Protestant *theocentric* world-view of the early modern period. Lower courts were to sentence *stricte*, according to the letter of the statute, as in the law of the Old Testament. The appeals courts and the Crown, however, were allowed to practice a kind of evangelical mercy: if circumstances required, they could implement *ius arbitrandi* and depart from the statute. Let Lindberg explain:

"[T]he instance order corresponded thus to the hierarchical structure of the cosmos and the gospel, because the divine qualities of both of these were the unifying force. Legalism, severity, the law's coercion – '*vis coactiva*' – were situated at the lower instance. The higher courts, then, were the instance for equity, in connection with which circumstances lying outside the lower judges' competence could be taken into consideration. For contemporaries, it was self-evident that this wider discretion, left at the disposal of the higher courts, also included and represented the basic ontological distinction between law and the gospel..."²²

In Sweden-Finland, as elsewhere, punishment mitigation was a sensitive question and one clearly bound to the degree of political centralization. At the beginning of the seventeenth century, the right to mitigate had been taken away from the lower courts; at the end of the seventeenth century, the appeals courts experienced the same fate. They were forbidden to mitigate sentences in 1684, at the height of Swedish absolutism.²³ The appeals courts were now bound to the statutory text like the lower courts and the use of mitigation was reserved to the King and his Judicial Revision (a body in charge of administering the royal judicial power). It is apparent, however, that the change had little practical influence, because the appeals courts

²² LINDBERG, *Praemia* (note 6), p. 369 (translation HP).

²³ The prohibition is included in the Letter issued by the King as a response to the Svea Court of Appeals, which had asked the King for permission to adjudicate according to "the circumstances and conscience" in an infanticide case. The King held that the appeals courts should "*stricte* keep to the law, and to the statutes and decrees of Royal Majesty." *Ibid.*, pp. 876–877. The nobility had already demanded in the 1660s that the prerogative of the appeals courts to mitigate sentences be limited, in addition to which the King had prohibited the Svea Appeals Court in 1672 from deviating from the statutory punishment, whenever the facts and the law were clear. See JÄGERSKIÖLD, *Hovrätten* (note 10), pp. 278–279; MYHRBERG, *Hovioikeudet* (note 19), pp. 858–859.

continued to "recommend" mitigation at their discretion when they referred death sentences to the Judicial Revision as they were obliged to. The Revision normally followed the recommendations.²⁴ It thus seems that the reform was only of significance in principle to the Crown and that it was not intended to change the appeals court practice. It may be assumed that it was more important to the Crown to show the subordinate authorities and the subjects where the power resided, with the possibility of interfering if necessary, than to actually alter the course of criminal adjudication.

Since the Swedish Law of 1734, the first major Swedish piece of legislation after the Law of King Christopher of 1442, does not mention either punishment mitigation or *arbitrio*, the Appeals Court of Turku, after the Law had come into force, inquired of the King whether it was intended that the courts continue with the practice of mitigation. In his Letter of 15 December 1736 the King replied affirmatively. New Decrees on sentence mitigation were issued in 1753 and 1756 only in order to unify the varying practice of the appeals courts.²⁵ Apparently with poor results, however, for the same need inspired the Decree of 1803.

Sentence Mitigation in Nineteenth-Century Finnish Legal Practice

The Sentence Mitigation Decree of 1803

The normative basis of the Finnish criminal law of the early nineteenth century was the Swedish Law of 1734,²⁶ an embodiment of seventeenth-century legal thought.²⁷ The decisive steps toward moderniza-

²⁴ LINDBERG, *Praemia* (note 6), p. 357.

²⁵ INGER, *Institutet* (note 6), p. 48. Little research has been done on the eighteenth-century practice of mitigation. It has been shown, however, that at least the policy of the Turku Court of Appeals grew more lenient during that century. See L. KOSKELAINEN, *Turun hovioikeuden tuomiokäytäntö 1700-luvulla* [The practice of the Turku court of appeals in the eighteenth century], in: *Tie tulkintaan: juhla kirja akatemiaprofessori Heikki Ylikankaalle 6. marraskuuta 1997*, ed. by A. KOSKIVIRTA, Porvoo 1997, pp. 86–105; p. 99.

²⁶ The Swedish legislation continued in force when Finland was annexed to the Russian Empire as a Grand Duchy 1809.

²⁷ On the development of the Swedish jurisprudence in the seventeenth century, see A. PYLKKÄNEN and H. PIHLAJAMÄKI, *Suomalainen oikeustiede eurooppalaisessa traditiiossa: Luentoja oikeustieteen historiasta* [Finnish jurisprudence in the European tradition: Lectures on the history of jurisprudence], Helsinki 1996; and on the law of proof especially, H. PIHLAJAMÄKI, *Evidence, Crime, and the Legal Profession: The Emergence of Free Evaluation of Evidence in the Finnish Nineteenth-Century Criminal Procedure*, Lund 1997, pp. 67–73.

tion were the partial reforms of 1866²⁸ and the Criminal Code of 1889.²⁹ Punishment mitigation was governed by the Decree of 1803 which, like the statutes of 1753 and 1756 before it, was designed from the point of view of providing an alternative to death sentences. As before, in cases in which an appeals court would not abstain from using the death sentence, the King (or in post-1809 Finland, the Emperor) might still pardon the offender.

What is more important, however, is that the statute of 1803 aimed to unify the mitigation practice by bringing it more directly under statutory control. Before 1803, the statutes had attached no relevance to the crime for which the death sentence had been imposed. The statute of 1803 forbade mitigation when the death sentence had ensued from murder, manslaughter, poisoning, arson, mail robbery, battery of parents, incest (in some cases), and some other crimes. The appeals courts had the right to commute death sentences resulting from all other types of crime.³⁰

There was, however, a loophole in the statute that diminished the importance of the restriction. If an appeals court considered that there was reason to have recourse to mitigation in a case to which the restriction applied, the court had the opportunity of referring the case to the Emperor. The court then had to propose how it thought the sentence ought to be adjusted.³¹ Technically, the appeals court drafted a completed decision which, although not handed down was referred to the Crown. Only when the ruler had taken his decision and informed the appeals court of its result was the decision made public in the form of an appeals court decision.

²⁸ On January 1st 1870, five new statutes came into force in Finland. They abolished the death penalty for certain crimes, including infanticide and voluntary manslaughter. The death penalty was replaced by imprisonment measured on sentencing scales.

²⁹ The Code of 1889 is considered one of the last Classicist criminal codes in Europe. See E. BACKMAN, *Oliko vuoden 1889 rikoslainsäädäntö syntyessään vanhentunut?* [Was the criminal legislation of 1889 outmoded at birth?], in: *Rikosoikeuden juhluvuonna 1989* [The jubilee of criminal law 1889], ed. by R. Lahti, Helsinki 1989, pp. 83–89: pp. 84–85.

³⁰ "Öfwer-Domaren deremot tillåtes leuterations-rätt i alla öfrige lifssaker, då synnerligen mildrande omständigheter förekomma." In 1827, the Judicial Department of the Senate was invested with the same right of *arbitrio* as the appeals courts.

³¹ The third paragraph of the Decree stated in Swedish: "Då i sådane mål, hvilka ej få leutereras, omständigheter af särdeles wigt sig förete, i anseende hwartill den brottslige tyckes kunna få behålla lifwet eller äran, eller straffet lindras eller förwandlas, äger Öfwer-Domaren, att jemte Utslagets insändande, som emedlertid ej må utgifwas, sådant wårt wälbegag hemställa samt tillika i undernådighet föreslå annan lämplig bestraffning."

Göran Inger presumes that, because of the exception clause, the statute of 1803 did not significantly alter mitigation practice.³² The nineteenth-century Finnish material does not, however, support this argument, for there are no cases where the courts would have had recourse to the exception clause. This may partly be explained by the general use of the pardon after 1826. The appeals courts' responsibility for the wrong-doer's life diminished decisively after 21 April 1826, when Czar Nicholas I announced that that he would thenceforth pardon all those sentenced to death. Instead of capital punishment, the wrong-doer would suffer a public church penance, flogging, and a life term in the Siberian mines or, in less serious cases, in a Finnish fortress.³³ The systematic pardoning of convicts sentenced to death presumably lessened the pressure to extend the mitigation practice in the direction that the exception clause allowed.

Another theoretical provision, better explained by a continuing legal tradition than as a practical necessity, was added to the statute as well. The statute held that "when there is reason to strengthen the punishment above the law, and when no written law exists on the crime, the appeals courts judge shall refer such cases to the Royal Majesty and await his statement." This provision, alas, permitted not only a strengthening of the punishment, but punishment without statute as well – both possibilities in line with the centuries-old common European tradition. But the appeals court was not allowed to take the decision alone – the case had to be referred to the Crown. Again, no examples of this exist in the case material.

The Number of Mitigated Sentences

The Decree of 1803 held that the appeals courts were to report the sentences mitigated to the Judicial Department of the Senate every six months.³⁴ To meet this obligation, the appeals courts sent a so-called

³² INGER, Institutet (note 6), p. 49.

³³ Crimes against the security of the state and the royal majesty were an exception. Death penalties were not carried out in practice after 1825; see J. LINDSTEDT, *Kuolemaan tuomitut: Kuolemanrangaistukset Suomessa toisen maailmansodan aikana* [Under sentence of death: capital punishment in Finland during world war II], Helsinki 1999, p. 41.

³⁴ The same kind of clause had been included in the Decrees of 1753 and 1756. According to Inger, similar lists had in practice been sent every six months before 1753. INGER, Institutet (note 6), p. 50.

mitigation list (*leuterationsförteckning*) to the highest court instance twice a year. The lists contain basic information on the sentences mitigated: the decision of the lower court, the reasons for the mitigation, and its outcome.

In 1809–1894 the Appeal Courts of Turku, Vaasa, and Viipuri mitigated a total of 630 sentences.³⁵ Of these, the Appeals Court of Turku (ACT) handled 331, the Court at Vaasa (ACV) 184, and the Viipuri Court (ACW) 115 cases. Local variations as to the courts' propensity to mitigate are virtually non-existent as the number of criminal cases that each court dealt with stand in roughly the same proportion to each other as the numbers of mitigated sentences.³⁶

The number of mitigations grew from 1809 to the 1830s at a steady pace. After that, mitigation somewhat diminished and evened out for two decades, until it increased again in the 1860s. Again, no major differences appear between the different appeals courts. (Table 1).

Table 1. Cases of Sentence Mitigation by Appeals Courts

Year	ACW	ACV	ACT	TOTAL
1809–1819	–	15	23	38
1820–1829	–	14	36	50
1830–1839	1	38	51	90
1840–1849	29	19	23	71
1850–1859	14	23	33	70
1860–1869	18	24	33	75
1870–1879	21	22	44	87
1880–1889	23	21	62	106
1890–1894	9	8	26	43
Total	115	184	331	630

It is obvious that the changes in the number of serious criminal cases handled by the courts would have affected the number of mitigated sentences. The statistics provide sufficient information to validate this. From 1842 to the 1860s the number of those sentenced to prison for

³⁵ The Appeals Court of Viipuri was only founded in 1839.

³⁶ For example, in 1860 the ACT decided 220 criminal cases, the ACV 147, and the ACW 162. *Tilastotiedot tuomioistuinten käsittelemistä rikos- ja riitajutuista*, Prokuratuurin toimituskunnan arkisto, Kansallisarkisto [Statistics concerning civil and criminal cases: The archive of the procurator, National Archives of Finland].

serious crimes diminished and then rose steeply until 1870. A moderate decline then ensued until 1875, after which the number of convictions again clearly increased until the end of the period under examination in this study.³⁷

As we shall see later, an overwhelming majority of the mitigation cases concerned the crime of robbery. The statistical appendix to the Annual Reports of the Procurator's Office reveals that 113 persons were convicted of robbery in 1850–1859, whereas the corresponding figures in 1860–1869, 1870–1879, and 1880–1889 were 149, 139, and 176 respectively.³⁸ The quantitative trend in the robbery convictions corresponds then to that of other serious crimes in the nineteenth century.

To sum up, no surprising elements are involved in the way sentence mitigation evolved statistically in the nineteenth century. The changes followed those of the serious crime convictions, and more specifically, the number of robbery convictions. The more potential mitigation cases came before appeals courts, the more sentences were mitigated.³⁹

Since court records reflect the actual level of crime notoriously poorly,⁴⁰ one might want to ask whether changes in actual criminality had anything to do with the courts' propensity to mitigate. I do not, however, see any reason to extend the study in that direction, given the fact that the number of mitigated punishments so closely follows that of serious crime cases before the appeals courts. It seems safe enough to

³⁷ The information on the number of serious criminal cases brought before the courts during the first half of the nineteenth century needs to be based on changes in the number of prisoners since the statistics concerning those convicted for various crimes prepared by the Procurator's Office only begin in 1842. The number of inmates did, indeed, clearly rise from 1814 to 1831. V. VIRTANEN, *Suomen vankeinhoito I 1808–1831* [Finnish prison administration I 1808–1831], Helsinki 1944, p. 400; T. LAPPI-SEPPÄLÄ, *Teilipyörästä terapiaan* [From the rack to therapy], Helsinki 1982, pp. 115, 137.

³⁸ *Prokuraattorin kertomusten tilastoliitteet 1843–1889*. Prokuraattorin toimituskunnan arkisto, Kansallisarkisto [The statistical appendix of the Procurator's Reports 1843–1889. The Archive of the Procurator, the National Archives of Finland]. The figure on those condemned by the city courts in 1873 is missing in the statistics. Unfortunately, no detailed statistics exist on the appeals courts.

³⁹ The major difference between the development of sentence mitigation as compared to the number of convictions for robberies and other serious crime is that no bent in the number of mitigations, unlike in that of serious crime convictions, is observed in the 1870 s. Statistically, the differences are too modest, however, to allow conclusions to be drawn from this.

⁴⁰ See E. A. JOHNSON, *Urbanization and Crime: Germany 1871–1914*, Cambridge 1995, p. 121.

conclude that the “actual” crime rates, whatever they were, played no independent role here.

What Kind of Crime Led to Sentence Mitigation?

Table 2. Mitigation of Sentence by Type of Crime and by Appeals Court as Percentage of All Appeals Court Mitigation Decisions.

	ACV	ACW	ACT
Robbery ⁴¹	81.2	60.3	75.8
Larceny, committed during fires ⁴²	7.9	14.6	10.3
Bestiality ⁴³	3.8	7.6	3.6
Postal theft ⁴⁴	1.5	9.5	6.0
Other crimes ⁴⁵	5.6	8.0	4.3
Total	100	100	100

The statistics provide little help as to the relative frequency of the different crimes in Table 2; the appeals court decisions were not registered by the type of crime, and larceny committed during fires and postal theft were not registered as separate categories even in the lower court statistics. It is, however, clear that all crimes subjected to mitigation were rare and that punishment mitigation was mainly used for mitigating death sentences for robbery. For instance, in the years 1850–59, the total of robbery convictions in the Finnish lower courts was 198, varying yearly from 17 to 26. The corresponding figure for

⁴¹ Misgärningsbalk [The code of misbehavior, CM] 20:9: “Rånar man, och med fullt våld tager af annan, i hans gård, skiep, å gato, eller å väg, något, hvad det helst vara kan, mer eller mindre; miste lif sitt.”

⁴² CM 42:2: “Stiäl man litet eller mycket, tå våldeld, skiepsbrott, våldsverkan, eller fiende åkommer och tränger, eller ock något undan sådan fahra och nöd bärgadt är; varde hängd.”

⁴³ CM 10:1: “Hvar som hafver tidelag med få, eller andra oskälige djur; then skal halshuggas, och i båle brännas, varde och samma djur tillika dödadt och brändt.”

⁴⁴ Royal Decree of 5 March 1846: “[T]hen, som olofligen bryter up annars bref och ther utur tager penningar, Banquens eller annars Sedlar, som för penningar gälla, eller annat penninge wärde, samt således stöld begår, bör dödsstraffet undergå och warda hängd.”

⁴⁵ The other crimes were manslaughter (CM 14:1), abortion (CM 16:3), battery of a judge or civil servant (CM 18:8), trespass (CM 20:1), incest with a niece (CM 59:1,2, and 4), false accusation (CM 60:1), and postal theft (the Royal Decree of March 5th, 1755).

bestiality was 67, with the annual number ranging from 0 to 12.⁴⁶ At least in the 1850s, roughly a quarter of all robbery sentences (47 cases) and less than a tenth of the bestiality convictions (5 cases) were mitigated.⁴⁷ The remaining cases in which no mitigating circumstances were to be found – the large majority – were then channeled through the system of pardon. These figures clearly show that sentence mitigation in the nineteenth century was moving into the margin of the penal system.

In practice, the capital crimes were organized into three categories: the mitigable ones, such as robbery; the pardonable ones, such as homicide; and those to which the death penalty still applied in principle although not in practice. Treason and crimes against majesty were, as before, reserved for the highest rank, with no promise of pardon or mitigation beforehand. The leveling of capital crimes into different categories nevertheless implies that not all capital crimes were alike: a murderer would be sent to Siberia whereas someone guilty of postal theft could get off with a relatively short prison sentence. The categories also reflect the fact that social values were changing. Not all serious crimes were considered as blameworthy as they had seemed to the drafters of the Law of 1734. Robbery and larceny committed during fires for instance, although harmful, no longer ranked with homicide. Bestiality was probably one of those crimes which, in secularizing and individualizing nineteenth-century society, was most rapidly losing its blameworthiness.

How Were Sentences Mitigated?

The results of punishment mitigation varied widely. At its most lenient, an appeals court would convert a death sentence into a flogging combined with public church penance. This was often the case with those convicted of larceny committed during fires.

The case of Abraham Johansson Lamberg will serve as an example of a case in which the outcome of mitigation was extremely lenient. Lamberg was charged with larceny committed during a fire. According to the prosecutor, Lamberg had stolen the merchant Fredrik Wilhelm Rautell's goods from the house of Gustaf Bergenius (also a merchant) to where the goods had been carried to protect them from the flames devouring

⁴⁶ The statistical appendix of the Procurator's Archive 1842–1889.

⁴⁷ The mitigation lists of ACT, ACV, and ACW 1850–1859.

Rautell's residence. The City of Turku did not deem the evidence sufficient to convict, but the ACT sentenced Lamberg to death and then mitigated the sentence to a brace of 30 lashes and public church penance. It is obvious, however, that the quality of the evidence had an affect on the leniency of the adjusted sentence.⁴⁸

At the most severe, the mitigated sentence would consist of forced labor or imprisonment for life. This became particularly frequent after 1870 when life imprisonment became the statutory punishment for certain homicidal crimes. The statutory change thus reflected on the practice of sentence mitigation.

In 1882, Johan Andersson Pekkala was charged at the Lower Court of Hollola, Nastola, and Kärkölä for accidental killing, robbery, larceny, and drunkenness. The Lower Court sentenced Pekkala to death. According to the Statute on Accidental Killing of 1866, this crime alone would have sufficed for a life term in prison. The Appeals Court confirmed the Lower Court's sentence and then mitigated it to a brace of 30 lashes and a life imprisonment.⁴⁹

The severity of the sentence involving loss of liberty varied, between the extremes, from six months to life. In the following, I will mention two cases which can be considered typical.

Johan Henriksson Lind had assaulted Maria Andersdotter Nahkala and her son Jeremias with an axe while the victims were asleep in their house in 1836. Lind had struck Maria and Jeremias, and then broken open a wooden box from which he had taken money. The Lower Court at Pirkkala sentenced Lind to death and referred the decision to the ACT. The Appeals Court confirmed the sentence and mitigated it to ten years forced labor.⁵⁰

In 1882, the City Court of Tampere sentenced Alfred Invenius to death for robbery and lesser violent crimes. Invenius had "violently" taken half a bottle of liquor from 12-year-old Nikolai Alenius. Having drunk half of it, Invenius had returned the bottle to the boy. The ACT confirmed the lower court decision, but mitigated the sentence to 20 days imprisonment with hard labor and four years of ordinary imprisonment.⁵¹

At the beginning of the century, a kind of a sentence scale had thus already been formed in mitigation practice. The flexible practice

⁴⁸ *Turun hovioikeuden päätökset 1832*, Turun hovioikeuden arkisto, Turun maakunta-arkisto [The Decisions of the ACT, the Archives of the ACT, Turku County Archives].

⁴⁹ The Decisions of the ACT 1882.

⁵⁰ The Decisions of the ACT 1836.

⁵¹ The Decisions of the ACT 1882.

allowed for different circumstances and degrees of seriousness to be taken into account.

There is another important sign of modernization. Flogging formed part of the mitigated sentence until the 1860s (ACT, ACV) and the 1870s (ACW); from then on, an increasing number of mitigated sentences consisted only of loss of liberty (or together with public penance).⁵² Studies have shown, interestingly enough, that penalties involving loss of liberty came to form the backbone of the Finnish penal system after the statutes of 1866 had come into force in 1870.⁵³ This study thus suggests that the "prisonization" of Finnish society had a direct effect on the practice of punishment mitigation as well. Appeals courts dealt with mitigation according to the trend which prevailed in the general sentencing policy. This trend, from the 1870s onwards, was clearly away from corporal punishment and towards loss of liberty as the back-bone of the penal system. Consequently, mitigated punishment in the 1860s and 1870s increasingly consisted of sentences involving loss of liberty, whereas the use of corporal punishment as mitigated punishment declined.

On What Grounds Were Punishments Mitigated?

If anywhere, one would expect the modernization to show in the grounds given for mitigation decisions. And it does, indeed, although it is not easy to draw conclusions from the Finnish nineteenth-century sentence mitigation lists. For one thing, the grounds had petrified by the beginning of the nineteenth century into *formulae* which often tend to conceal at least as much as they reveal. Mitigation after all had a history of more than 200 years behind it by the beginning of the century. The inclination towards *formulae* seems only to have increased as the century wore on.

The appeals court normally referred to more than one mitigation ground in the lists. Some of the reasons remained unchanged throughout the century. The courts customarily justified their decision to

⁵² Flogging was included in the mitigated sentence in 1874 for the last time by the ACW, in 1876 by the ACT, and in 1882 by the ACT.

⁵³ LAPPI-SEPPÄLÄ, *Teilipyörästä terapiaan* (note 37), pp. 114, 118, 137. The number of prisoners had in fact already risen in 1814–1831. It is probable, although no studies exist on this period, that the change corresponded to a decrease in corporal punishment. The proportion of corporal punishment nevertheless increased again from the 1850s until the end of the 1860s when their final decline began.

depart from the statutory sentence by circumstances such as the wrong-doer's youth or a kind of *ignorantia iuris*, it being assumed that the condemned had "probably not understood the seriousness of his crime and the severe punishment that would follow it."⁵⁴ As a ground for mitigation, youth seems self-evident and not particularly attributable to either premodern or modern criminal law.⁵⁵ Ignorance of the seriousness of the crime and its punishment, however, is more characteristic of the pre-modern criminal legal system. Only exceptionally can a wrong-doer in the modern Continental system evade punishment by an *ignorantia iuris* type of defense. It is basically presumed that everyone is aware of what kind of behavior leads to criminal liability. In the pre-modern world, such a presupposition

⁵⁴ Swedish was the legal language in Finland until the very last years of the nineteenth century. A typical formulation in Swedish would have been something in the line of "möjligen ej kunnat förutse det svåra ansvar, som honom för slik brottslighet enligt lag drabba borde."

⁵⁵ Because robbery was by far the most common crime in the mitigation procedure, the typical nineteenth-century mitigation case turns out to be that of a young robber. The seventeen-year-old Johan Flinck's case will serve as an example of a typical case of sentence mitigation. Flinck, who served as a shoemaker's apprentice, had stolen Fredrika Palmgren's purse with 40 thalers in it. The City Court of Turku sentenced Flinck to death for robbery. The Appeals Court confirmed the sentence, but mitigated it to 20 days of bread and water. See Johan Flinck / 12 March 1836 / Decisions 1836; and Alistusaktit [Referred Acts] Ebd 150, Turun hovioikeuden arkisto, Turun maakunta-arkisto [The Archives of the ACT, Turku County Archives].

For youth as a ground for mitigation, see e.g. Henric Hammarström and Maria Zachrisdotter / 25 April 1811 / Turun hovioikeuden leuteraatioluettelot 1809–1894, Prokuraattorin toimituskunnan arkisto, Kansallisarkisto [The mitigation lists of the ACT 1809–1894: The procurator's archive, The national archives of Finland, henceforth: ACTML]; Eric Larsson Oula / 7 September 1829 / Vaasan hovioikeuden leuteraatioluettelo 1809–1894 [The mitigation lists of the ACV 1809–1894, The procurator's archive, The National Archives of Finland, henceforth: ACVLL]; Johan Nylander / 29 August 1845 / ACTML; Ernst Rosendahl / 4 August 1887 / ACTML; and Michel Lahti / 27 January 1855 / ACVML.

For ignorance of the law and its consequences as a ground for sentence mitigation, see e.g. Johan Häggström / 18 May 1825 / ACTML; Eric Ericsson / 29 May 1837 / ACVML; Lars Jalkanen and Abel Kolehmainen / 24 November 1845 / Wiipurin hovioikeuden leuteraatioluettelo 1839–1894 [The mitigation lists of the ACW 1839–1894, The procurator's archive, The National Archives of Finland, henceforth: ACWML]; Benjamin Sjöroos / 15 July 1846 / ACTML; Matts Wähäjouppila / 13 March 1882 / ACTML; and Henrik Kukkonen and Selma Karppinen / 2 August 1890 / ACWML.

A young convict's age was often presented together with *ignorantia iuris* as a ground for mitigation, see e.g. Gustaf Taurén / 6 April 1825 / ACTML; Matts Alakortesoja and Johan Paavola / 22 March 1838 / ACTVL; Helena Parandainen / 4 June 1845 / ACWML; Johan Thomasson / 1 December 1846 / ACTML; Carl Ampiala / 11 May 1858 / ACVML; Johan Kymäläinen / 31 May 1867 / ACWML; and Emil and Walfrid Gustafsson / 17 May 1876 / ACTML.

would have been unrealistic. The frequent use of the formula in the mitigation records nevertheless reflects pre-modern legal ideology.

Henrik Bomgren, a farm-hand, was sentenced to death for robbery (Lower Court of Halikko, 3 July 1852). Bomgren had attacked glass-blower Robert Nilsson at Salo, beaten the victim into a state of unconsciousness, and taken his money. The death sentence was, however, mitigated because Bomgren was young and "possibly ignorant" of the severe punishment that his crime would entail. The court records do not, however, reveal any special circumstances, apart from Bomgren's youth, that would support the presumption of ignorance.⁵⁶

The mitigation decisions of the appeals courts were sometimes informed by circumstances that in late nineteenth-century Continental jurisprudence came to be considered under such categories as the "general conditions of criminal liability" (*allgemeine Verbrechenlehre, Strafbarkeitsvoraussetzungen*),⁵⁷ participation (*Teilnehmungslehre*), or sentencing (*Strafzumessungslehre*). The appeals courts informed the JDS that in some cases they had mitigated a death sentence because the convict was endowed with "weak spiritual talents"⁵⁸ or because he or she had taken part in the criminal act as an accessor only.⁵⁹ Stolen property of little value or lesser degree of violence, according to the mitigation lists, informed some of the appeals court decisions at the beginning of the century,⁶⁰ but their frequency increased towards the end of the century.

Some of the grounds given in the first decades of the century were, however, clearly characteristic of pre-modern criminal law. The pre-modern reasons for mitigation typically involved casuistry, and no separate consideration of the wrong-doer's guilt. In the 1810s and 1820s, the appeals courts still often referred to confession as the main reason for mitigation.⁶¹ The ACT in 1809 deemed mitigation appro-

⁵⁶ Henrik Bomgren / 6 August 1852 / ACTML, ACT / Decisions 1852.

⁵⁷ See C. ROXIN, *Strafrecht. Allgemeiner Teil*, Band I: *Grundlagen, Aufbau der Verbrechenlehre*, Munich 1997, p. 149.

⁵⁸ See David Jacobsson and Jöran Jöransson / 24 March 1813 / ACTML; Nils Mörsare / 22 April 1818 / ACVML; and Johan Styf / 8 March 1821 / ACVML.

⁵⁹ See Johan Numminen / 16 January 1890 / ACTML.

⁶⁰ For stolen property of low value, see e.g. Johan Saringo / 7 February 1820 / ACTML; Henrik Pinkas / 17 May 1822 / ACTML; and Eric Orrenmaa and others / 15 October 1832 / ACVML.

The moderate amount of violence was used as ground for punishment for instance in the case of Johan Grandell (19 February 1848 / ACWML).

⁶¹ See e.g. Henric Kakonen / 29 July 1809 / ACTML; Henric Manninen / 18 August 1809 / ACTML; and Matts Ickala and Elias Yliluoma / 14 February 1823 / ACVML.

priate in a case where insufficient evidence had been presented;⁶² and in 1835 because the convict was “not yet middle-aged” and there was “hope of betterment.”⁶³ Mitigation until the 1860s was sometimes based on the wrong-doer’s good reputation.⁶⁴ Interestingly, the ACT thought mitigation appropriate in another case because the wrong-doer had compensated for the damage he had caused to the victim – a hangover from the early modern practise.⁶⁵ In another case, the statutory death sentence did not ensue because of the length of time elapsed between the crime and the trial.⁶⁶ Grounds of this kind again reflected the pre-modern casuistic thinking, and they practically disappeared in the last decades of the century.

In the 1870s, the Courts of Appeals at Vaasa and Viipuri radically revised their technique of writing decisions. Both Courts began to limit themselves to predominantly referring to the “circumstances present in the case.” This formula, again, does not inform us of the real reasons behind the court’s willingness to depart from the statutory text, nor does it enunciate any change in the reasoning *per se*. But it was not merely the technical formulations that changed. The reasons that the ACT gave for its mitigation decisions changed in the 1860s and 1870s as well, although differently than those of the other two courts. Because the court at Turku based its decisions on more open reasons than the other courts, I believe we can draw certain general conclusions from the Turku records.

As at the Vaasa and Viipuri Courts, a trend towards the obscure “mitigating circumstances” is visible in the ACT records of the early 1860s; by the 1870s, however, the grounds had become surprisingly transparent. There are also substantial changes. More so than at the beginning of the century, recourse is had to grounds such as “modest violence”⁶⁷ and “the moderate value of goods stolen.”⁶⁸ Sentence mitigation was in some cases based on reasons such as there having been a tempting opportunity to commit the crime⁶⁹ or that the wrong-

⁶² Eva Mattsdotter / 27 October 1809 / ACTML.

⁶³ Matts Tuomola and others / 26 October 1835 / ACTML.

⁶⁴ See e.g. Nils Mörsare / 22 April 1818 / ACVML and Matts Bengtinen / 10 December 1821 / ACVML.

⁶⁵ Anders Huovinen / 21 December 1816 / ACVML.

⁶⁶ Johan Saringo / 7 February 1820 / ACTML.

⁶⁷ See e.g. Karl Hokka / 4 June 1883 / ACTML; and Johan Stenvall and Otto Gustafsson / 6 November 1884 / ACTML.

⁶⁸ See e.g. Carl Carlsson / 14 December 1870 / ACTML; Maria Hyving / 19 May 1871 / ACTML; and Filip Fremling / 14 July 1875 / ACTML.

⁶⁹ Frans Gunn / 5 June 1893 / ACTML.

doer had acted as an accessory only.⁷⁰ It is more than probable that, despite the more sparing use of words in their decisions, the practice of the Courts at Vaasa and Viipuri followed suit in this respect, and that the real reasons beyond the opaque “mitigating circumstances” were much the same as those employed by the Court at Turku, the oldest and the most prestigious.

What can we gather from these new trends? What new thinking do the changes detected represent, if any? First of all, their significance ought not to be exaggerated. The bulk of the criteria on which death sentences continued to be mitigated remained the same as for centuries. Sentence mitigation was fundamentally a pre-modern institution. If it were to exist at all, it called for acceptance such as it was. There was no way it could have been completely altered by the mere fact that the ideology of criminal law and the penal system in general were undergoing a crucial change. Sentence mitigation had a function to perform, for it was this legal institution that provided the system for the necessary flexibility. Mitigation could not be abolished before there was a viable alternative, regardless of the fact that its background ideology was withering away. A working alternative, the sentencing scale, did not completely replace it until 1894.

Far from a complete transformation, we should then speak of a slight shake-up. But the disruption, albeit small, to the institution's structure nevertheless reveals that the legal ideology of the judiciary was undergoing a change and that sentence mitigation could not completely escape the modernizing trend. The accent laid on the lesser value of stolen goods, the degree of violence employed in robberies, and on other reasons manifestly applying to the degree of a wrong-doer's guilt and the harmfulness of the criminal act reflect the transformation of criminal ideology under way in late nineteenth-century Finland. At the same time, circumstances more remote from the point of view of the crime itself and the wrong-doer's guilt gradually lost momentum. Furthermore, the nature of the mitigated sentences changed insofar as flogging became increasingly rare as part of the mitigated sentence from the 1860s onwards. These changes and changed emphases reflect the growing pressure to move from pre-modern to modern criminal law in the second half of the nineteenth century.

⁷⁰ Johan Numminen / 16 January 1890 / ACTML.

“Delegated Power of Pardon”:

Nineteenth-Century Finnish Conceptions of Sentence Mitigation

How was sentence mitigation seen through the eyes of the contemporary legal profession? As I have shown above, mitigation was intimately connected to the power of pardon: both were ways through which the pre-modern criminal system adjusted the rigid statutory texts to practical necessities. In the non-legalistic pre-modern law, no need arose to disentangle mitigation theoretically from pardon. All power to punish in the early modern state flowed from the prince. Without the legality principle, statutory law obviously did not have the weight it does in our modern law. In the classical criminal law of the nineteenth century, however, the power to pardon became clearly separated from judicial power, and Finnish jurists were at pains trying to accommodate sentence mitigation to this dichotomy. Which was it, mercy or law?

The Chair of Roman and Russian Law at the Imperial Alexander University (the present University of Helsinki) in 1844–1852 was held by *Johan Philip Palmén*, who was also responsible for the teaching of criminal law. Palmén was a follower of Savigny's Historical School and, as far as his views on criminal law were concerned, not among the most radical of his era. Sentence mitigation was, understandably, no problem of principle to Palmén. In his printed lectures on criminal law, he briefly mentions that mitigation was retained in the Swedish Law of 1734 and in the newer legislation. This showed, for Palmén, that “the undesirability of the death sentence as punishment for many crimes” had been generally accepted. Palmén was, however, in favor of the “relative punishment.” Within the limits of the minimum and maximum sentence of the sentencing scale, the judiciary could take into consideration the “strict requirements of justice” and the “differing circumstances affecting punishment.”⁷¹

Palmén was followed as Professor by *Karl Gustaf Ehrström*, who is often said to have brought modern criminal law to Finland.⁷² It is therefore understandable that Ehrström's conception of the legal nature of sentence mitigation reflects the collision of the pre-modern institution with the modernizing concept of criminal law. In his

⁷¹ J. P. PALMÉN, *Förklaring öfver Straff- och Rättegångsbalkarna i 1734 års lag* [Explanation on the sections concerning criminal and procedural law in the Swedish Law of 1734], manuscript at Helsinki University Library (Gö IV 7), pp. 18–19.

⁷² Ehrström was Professor of Criminal Law and Legal History in 1860–1878.

lectures on "general criminal law," Ehrström divided the power of pardon into two parts. The non-delegated power of pardon belonged to the emperor; sentence mitigation was delegated pardon.⁷³ For Ehrström, an institution closely related to pardon was not appropriate for situations in which statutory punishment was considered "too severe." A reform was needed, because the wrong-doer was entitled to a rightful assessment of his crime; he should not be "obliged to receive pardon instead."⁷⁴ Sentence mitigation was a *malum necessitatis*, and necessary only because of the antiquated state of the criminal statutes.⁷⁵ Ehrström's follower as the teacher of criminal law, *Jaakko Forsman* (Professor of Criminal Law and Legal History 1879–1899) also spoke of sentence mitigation as "delegated power of pardon." Forsman deemed unacceptable the fact that the law in principle allowed for harsher penalties than those prescribed by the statutory text. Fortunately, according to Forsman, this gate to arbitrariness was about to be closed by the new Code of Criminal Law,⁷⁶ which Forsman himself had fathered.⁷⁷

In his Report to the Finnish Estates of 1885, the Procurator of the Senate, *R. A. Montgomery*, criticizing the archaic state of Finnish criminal legislation, alluded to mitigation. According to Montgomery, the modernizing reforms of 1866 had only made matters worse because they showed all the more clearly how outmoded the other parts of the criminal legislation were. For the "public conception of law," the situation would have been even worse had not "sentence mitigation

⁷³ KARL GUSTAF EHRSTRÖM, *Föreläsningar öfver straffrättens allmänna läror 19.10.1863–17.11.1864* [Lectures on general criminal law 19 October 1863 to 17 November 1864], manuscript at the Helsinki University Library (Bö II 5), p. 498.

⁷⁴ In Swedish: "[E]l skyldig att taga nåd i stället.", KARL GUSTAF EHRSTRÖM, *Föreläsningar öfver Kriminalrättens allmänna del, Wärterminen 1860 – wärterminen 1861 (enligt Berner)* [Lectures on the general part of criminal law, spring semester 1860 – spring semester 1861 (according to Berner)], manuscript at Helsinki University Library (Bö II 1), p. 490.

The idea of the "right to be punished" was by no means Ehrström's. As Markus Dirk Dubber in a thought-provoking essay shows, this notion had by the 1860s well-established intellectual roots, extending back to Fichte and Kant. Also Hegel built his theory of punishment on the "right to be punished." See M. D. DUBBER, *The Right to Be Punished: Autonomy and Its Demise in Modern Penal Thought*, in: *Law and History Review* 16 (1998), pp. 113–146. Ehrström, not surprisingly, was a devout Hegelian.

⁷⁵ EHRSTRÖM, *Kriminalrättens allmänna del* (note 74), p. 502.

⁷⁶ FORSMAN, Sananen (note 8), p. 10.

⁷⁷ See H. YLIKANGAS, *Jaakko Forsman – lainlaatija ja poliitikko* [Jaakko Forsman – legislator and politician], in: *Rikosoikeuden juhluvuonna* (note 29), pp. 3–37: pp. 21–29.

and the Crown's use of pardon, converted into a rule, to a certain extent restored the balance."⁷⁸ The Procurator thought that sentence mitigation towards the end of the nineteenth century had begun to seem an "anomaly." It was both against the basic laws and the "text and the spirit" of the statutes on mitigation that both judiciary and emperor were forced to employ mitigation and pardon so widely that the sentences were not, in fact, simply mitigated but the statutes were continuously altered in practice.⁷⁹

Pre-modern legal thinking thus had no need to equate sentence mitigation and pardon, since the dividing line between judicial and administrative power was obscure in any case. For the Classicists that Ehrström and his followers represented, things were different. If statutory punishment was avoided by way of sentence mitigation, it could not, in a modern legal system, be construed as anything else than pardon, albeit "delegated." Because the right to pardon, in principle, was vested in the Emperor, the situation was intolerable. When convicted criminals were spared from statutory punishment by way of a legal institution so closely resembling mercy, the crimes were not assessed by the principles that modern criminal law had begun to value. The "subjective" structural elements of the crime had to be increasingly taken into account in imposing punishments; this, in turn, presupposed that the punishment system be organized on the basis of sentencing scales. Mitigation could then be abolished.

The fate of sentence mitigation is thus intimately connected with the emergence of sentencing scales. Scales with a minimum and a maximum sentence had in fact already been proposed by the Committee of 1875, over which K. G. Ehrström presided. Ehrström expressly justified the scales by saying that they would replace the widespread use of pardon and sentence mitigation.⁸⁰ The scales had in fact provoked heated discussion in Finland as soon as the preparations for the new codified criminal statute began.⁸¹ The Finnish Legal Association

⁷⁸ *Prokuratorns i Kejserliga Senaten i Finland Berättelse om lagskipning och lagarnes handhafvande i landet, afgifna till Finlands ständer vid 1885 års landtdag* [The report of the procurator at the imperial senate of Finland concerning the administration of justice and the application of laws in the country, given to Finland's estates at the diet of 1885], Helsinki 1885, p. 63.

⁷⁹ *Prokuratorns Berättelse* (note 78), p. 64.

⁸⁰ *Tidskrift utgifven af Juridiska Föreningen i Finland* 16 (1880), p. 80.

⁸¹ In 1862 the so-called January Committee decided, by a clear majority vote, to disapprove of C. A. Öhrnberg's proposal for a system of sentence scales. Y. BLOMSTEDT, *Rikoslakireformin ensimmäiset vaiheet vuoden 1866 osittaisuudistuksiin saakka* [The

(*Juridiska Föreningen i Finland*) discussed the matter in 1862. Despite some differences as to the practical details of the future system, a clear majority of the members was in favor of the sentencing scales.⁸²

Expert opinion thus slowly but surely turned towards accepting the sentencing scales. There was no alternative, for it was clear that the old system of sentence mitigation could not be transferred to the new criminal code based on the Classicist ideas. Neither was it realistic to abandon what was good in sentence mitigation, that is, flexibility and discretion. A minor problem was whether the new codified criminal law should provide statutory sentencing guidelines. The Finnish experts soon reached a consensus on this problem. Unlike the Ehrström Committee of 1875, the Forsman Committee of 1884 did not propose statutory guidelines.⁸³ Said Forsman:

"[T]he mutable factors that in an individual case will affect the increase or reduction of criminality are impossible to know in advance, and even less is it possible to guess in advance what weight each one of them will have when it comes to imposing a punishment in each individual case. They are no autonomous measurements, receiving their value and significance only in relation to other factors. It is thus impossible to design a formula according to which a sentence, taking into account the aggravating and mitigating factors, ought to be weighed. Only someone considering a particular case is capable of determining, by comparing and combining the factors with each other, what importance should be accorded to each circumstance aggravating or mitigating the sentence. This is the only correct way one can go about meting out sentence."⁸⁴

Forsman was thus not willing to bring sentencing under statutory regulation. I am inclined to see here a connection with the way the Finnish judiciary freed itself of the constraints of the statutory theory of proof after the middle of nineteenth century.⁸⁵ as it came to the important task of imposing punishments, the Finnish legal establishment was clearly not anxious to tie the hands of the judiciary more than

first stages of the criminal law reform up to the partial reforms of 1866], in: *Historiallinen arkisto* 59 (1964), pp. 421–517: p. 454.

⁸² *Tidskrift utgifven af Juridiska Föreningen i Finland* 1 (1865), pp. 71–76.

⁸³ The Forsman Committee also proposed narrower scales than had the Ehrström Committee. See *Alamaiset ehdotukset Suomen Suuriruhtinaanmaan Rikoslainsi ym.* [Propositions for the criminal code, etc. of the Grand Duchy of Finland], Helsinki 1884, p. 164.

⁸⁴ FORSMAN, Sananen (note 8), p. 18 (translation HP).

⁸⁵ I have suggested elsewhere that the breakthrough of free evaluation of evidence around the middle of the nineteenth century was related to the increased social and political status of the legal profession. See PIHLAJAMÄKI, Evidence (note 27), p. 236.

seemed necessary. Although sentence mitigation was thus partly accommodated to its modernizing ideological surroundings and despite the fact that the old legal institution was completely abolished with the Code of 1889, the modernization was not complete even then – if by modern we mean a system based on thorough statutory regulation. Vestiges of the old system of sentence mitigation based on broad judicial discretion thus lingered on under different labels in the new Code.

Conclusions

The development of the nineteenth-century Finnish institution of sentence mitigation can conveniently be summarized under three headings: *formalization*, *adaption*, and *marginalization*. The case material has revealed that the grounds given for sentence mitigation became increasingly standardized during the nineteenth century. Modern criminal law, bent towards *legalism* – an increased adherence to statutory law –, seemed to leave less and less space for casuistic creativity.

When mitigation grounds were formalized, the institution was at the same time partially accommodated into its modern surroundings. The pre-modern casuistic grounds were shoved ever more into the background as the century advanced, and many of them had completely vanished by mid-century. More attention was thus paid to the “objective” and “subjective” harmfulness inherent in the criminal act itself, while circumstances more remote from the point of the wrongdoer’s guilt and the *actus reus* were left in the background.

In the long run, the Swedish-Finnish sentence mitigation was marginalized. It was so in a *qualitative* sense, for the courts, at least insofar as the openly expressed grounds for mitigation show, left themselves less space for discretion than before. The marginalization was also *quantitative*, since although no startling changes in the courts’ willingness to mitigate sentences can be observed during the nineteenth century, sentence mitigation, after the reform of 1803, never came to acquire the importance it once had in its “golden age” in the seventeenth and eighteenth centuries. Sentence mitigation was now, by law, restricted to fewer crimes.

It may be said that mitigation fulfilled the same functions of *casuistic flexibility* that were in modern law attributed to sentencing scales and sentencing norms. As was noted above, sentence mitigation was not the

only pre-modern institution that provided for flexibility. The royal prerogative of pardon in this respect had great significance in Finland both during the Swedish and the Russian eras. Although the institution of pardon has been touched upon only in passing here, it is clear that sentence mitigation and pardon together formed a kind of a sentencing scale which allowed the judicial system to take individual circumstances effectively into account.

The abolishment of sentence mitigation and of a large-scale use of pardon was, considering the objective of social control, no revolutionary transformation. More than anything, mitigation grounds were transferred from one category to another. Despite this, the change reveals larger social forces at work, for it demarcated a move *from a non-judicial sphere to a judicially regulated area*. From the point of view of the nascent idea of *Rechtsstaat*, the abolition of sentence mitigation involved thus no mere change of labels. The flexibility provided by sentence mitigation and the widely employed pardon were unacceptable for those propounding a modern, positivistic concept of law. Although no statutory sentencing guidelines were given in Finland at the end of the nineteenth century, the sentencing scales at least seemingly moved sentencing into the statutorily regulated sphere. This suited the modern model of positivistic legal thinking perfectly.

The development of punishment mitigation cannot be viewed apart from the other components of the penal system. The late nineteenth-century "prisonization" that affected the Finnish punishment system at large had an effect on mitigation as well. It was also in this respect that punishment mitigation, although clearly a "pre-modern" institution as such, was accommodated into its "modern" surroundings. This modernization appeared in the grounds stated for mitigation decisions. It is also seen in the outcome of these decisions. Flogging was removed from the repertoire in the 1860s and 1870s, practically at the same time as the prison sentence replaced corporal punishment as the central element of the penal system. Mitigation thus joined in the "prisonization" of the Finnish penal system of the late nineteenth century.