

Criminal Policy Choices and the Reform of the Estonian Criminal Law

Historical Background

During the occupation period of 1940 to 1991, major criminal policy choices for Estonia were made in Moscow.^{*1} The criminal policies for this time were similar throughout all former socialist countries. “The criminal justice systems under the socialist regime had the dual categories for application of law because the criminal justice was subjected to the socialist party. While the party leaders and officials hardly were subjected to the criminal investigation, the most of citizen was frequently subjected to harsher criminal sanctions. As a result the most of citizen lost the belief and respect for the law which functioned under socialist regime.”^{*2}

The reformation of Estonia’s criminal policy started in 1991, immediately after having regained its independence.^{*3} In 1992, the Criminal Code was subjected to major reform: the articles of criminal law which had functioned as safeguards for socialism were repealed, the sanction system was reformed towards a more human approach, and the use of capital punishment was restricted to cases involving the most aggravated violent crimes.^{*4} Unfortunately, the inadequate basic structure of the old Criminal Code was not changed by the 1992 reform. Hence, the preparation for a new, more comprehensive reform started immediately following the adoption of the 1992 version of the Criminal Code.

¹ In 1961, the Supreme Soviet of the Estonian SSR adopted Criminal Code of the Estonian Soviet Socialist Republic, but the main principles of the code were laid down already by the Foundations of the Criminal Law of the USSR and the Union Republics adopted by the Supreme Soviet of the USSR.

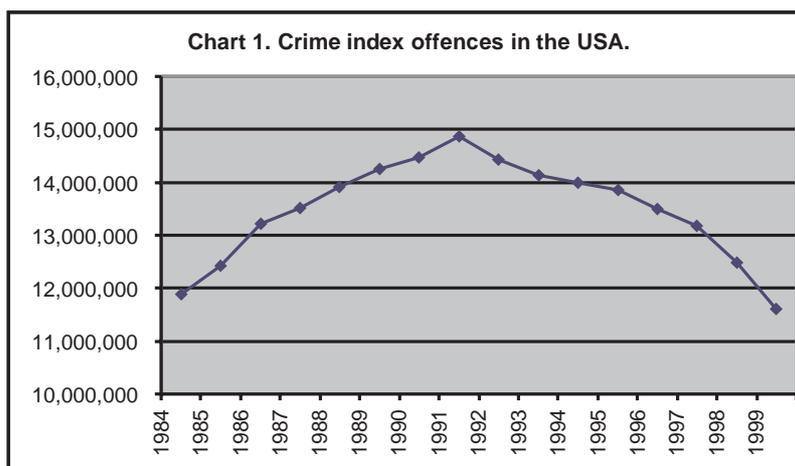
² Ki-Hun Lee, Kun-Ho Lee. *Crime Trends and Criminal Policy of Eastern European Countries in Transition to Democracy*. Available at: <http://www2.kic.re.kr/documents/abstracts/97lkh.htm> (April 9, 2000).

³ Some aspects of the criminal policy reform have been remarkably successful, even so that *e.g.* Open Society Institute and the UK Foreign and Commonwealth Office in partnership with the International Centre for Prison Studies organised a study visit for officials from Georgia to Estonia to see the effects of the transfer of the prison system from the Ministry of Interior to the Ministry of Justice (See, PRI in Central and Eastern Europe and Central Asia. Available at: <http://www.penalreform.org/english/central.htm>.)

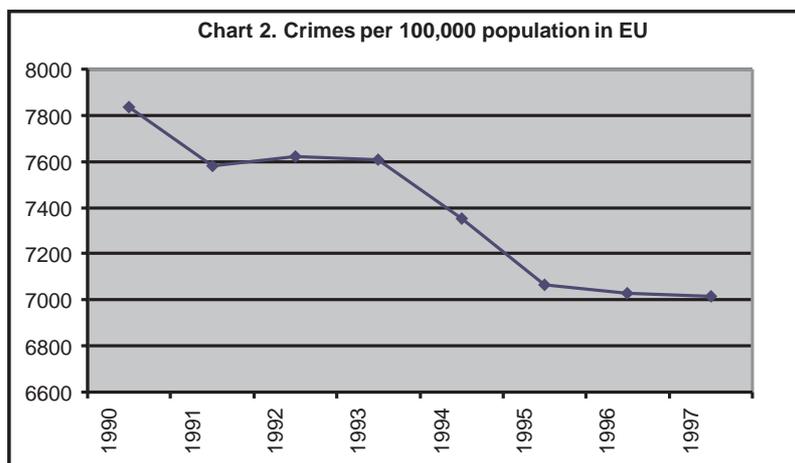
⁴ However, since 1991 none of them were executed.

External Conditions for the Criminal Law Reform of 2000

The most important external condition for the Estonian Criminal Law reform is that in the majority of the developed countries throughout the 1990s, the global crime trends have reversed. “Since the 1950s, crime has become a global problem for the majority of developed countries; the crime rate has been growing at a very high speed (even in comparatively calm Northern European countries the number of crimes has increased more than 4 times)”.⁷ In the USA the crime rate (per 100,000 population) **increased** from 1,887 in 1960 to 5,500 in 1987; in Germany the crime rate increased from 3,071 (in 1951) to 7,269 (in 1987); in the United Kingdom from 1,094 (in 1950) to 7,421 (in 1987) and in France from 3,254 (in 1972) to 5,712 (in 1987). At the same time the crime rate in Japan (not including traffic offences) **decreased** from 2,000 (in 1948) to 1,291 (in 1987).⁸



The crime trends reversed in the 1990s. The crime rate in the United States steadily decreased throughout the 1990s (see Chart 1). The initial decline can be attributed to the “get tough on criminals” policy. The United States criminal policy has increasingly become oppressive, the prison population has been steadily growing, reaching new peaks year after year. Concurrently, the crime rate has been shrinking, resulting in extremely favourable publicity for supporters of harsh criminal policies.

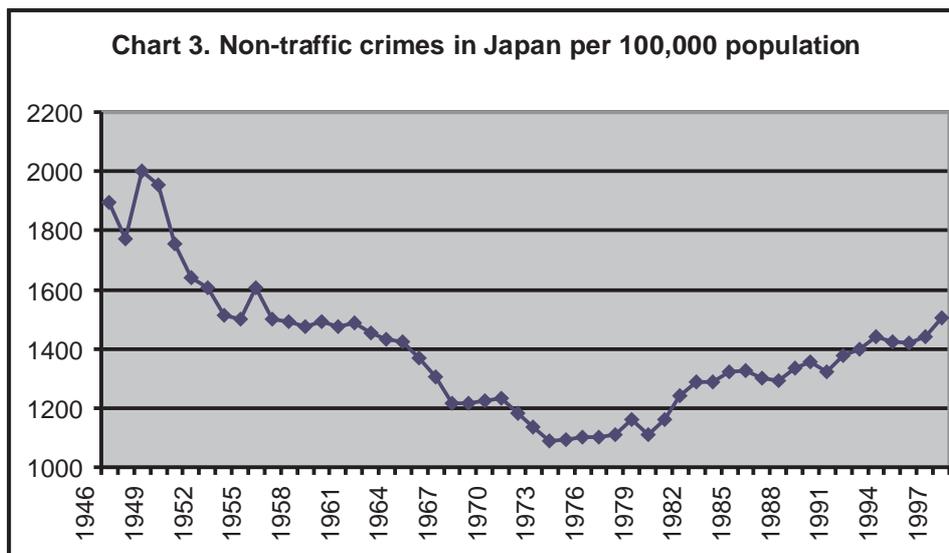


Subsequently, the 1990s have seen similar success in European Union countries, where the crime rate has decreased as well (see Chart 2).

⁷ Russian Criminal Policy in the Context of International Experience. Available at: <http://www.prison.org/English/probruss.htm> (12 April 2000).

⁸ Crime Trends. – Criminal Justice Systems at Work, 1998. Available at: <http://www.jcps.ab.psiweb.com/sc1.htm> (24 January 2000).

Furthermore, there has been no increase in prison populations or other severe criminal punishments in the EU countries. Hence, the decline in crime rates in the United States may have other causes beside harsh sentencing. The indication has not been well received by advocates of severe criminal policy.

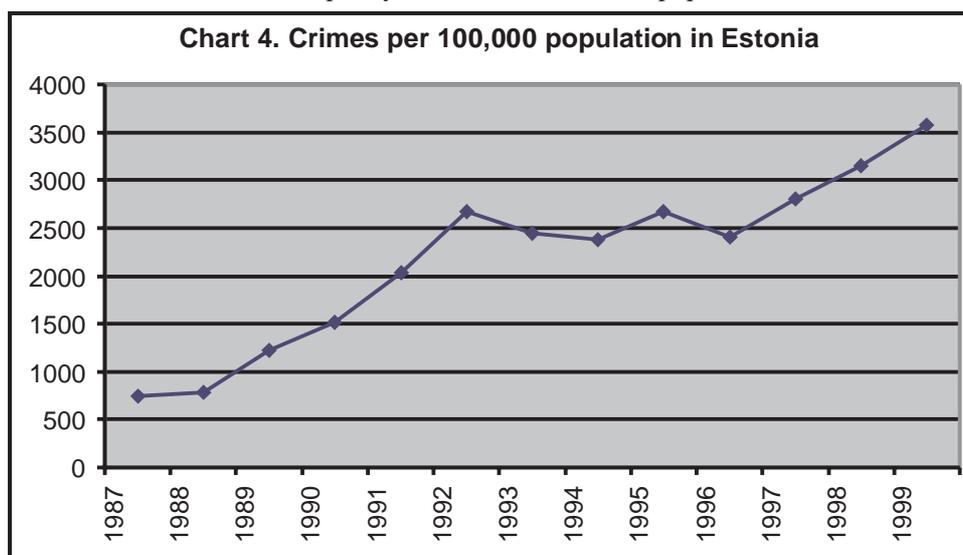


At the same time in Japan, the traditional example of a country with an unconventional decline in crime rate, crime trends have also reversed. Japan has seen an increase in criminality, which began in the later half of the 1970s and continued through the 1980s and 1990s (see Chart 3).

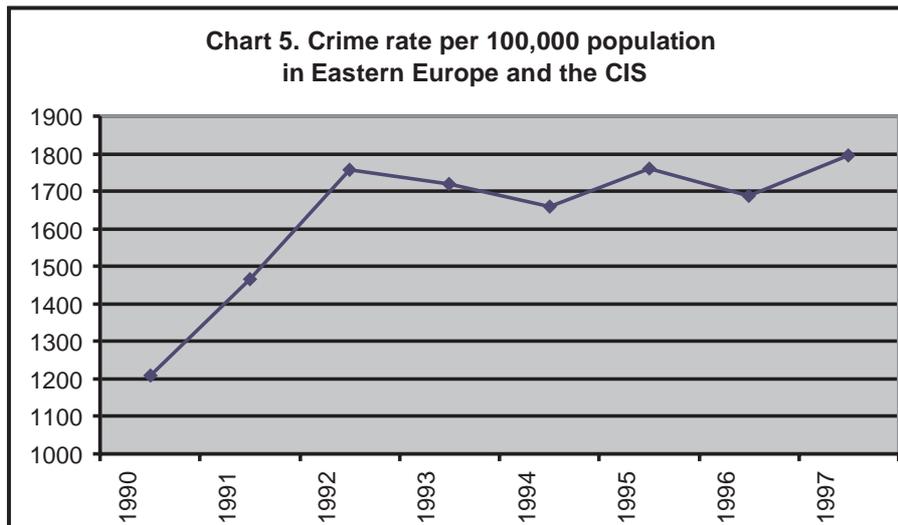
Consequently, these indicated controversial trends have hindered the emergence of a commonly agreed upon criminal policy for developed countries. There are proponents of rigid criminal policies, which refer to the story of success in the United States, as well as opponents, referring to the successes of other countries' reduced crime rates.

Internal Conditions for the Criminal Law Reform of 2000

The most important internal condition for the Criminal Law reform in Estonia is the manifest increase of crime rate that the Estonian criminal policy-makers and all of the population have observed since 1989.



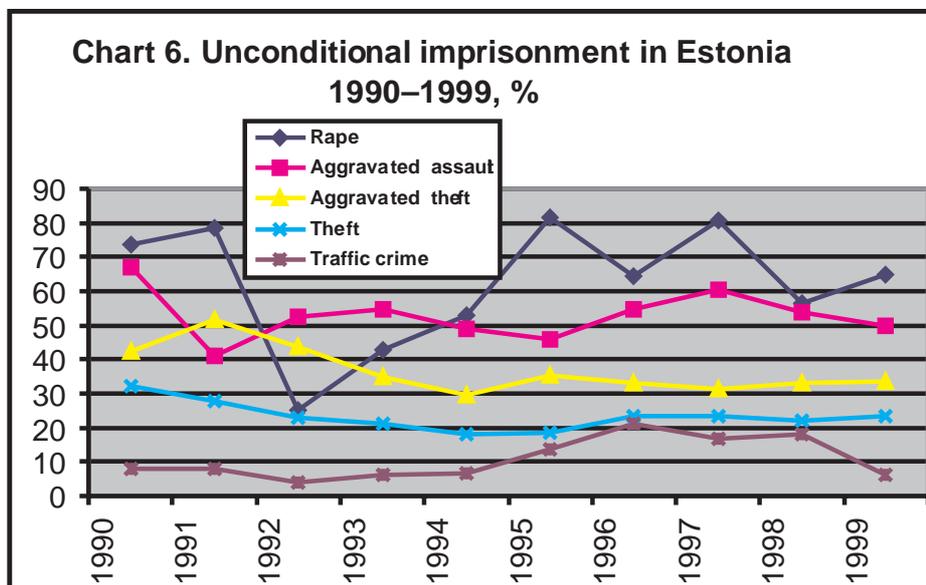
The crime rate more than tripled in the four years, period of 1989–1992. This period radical increase was followed by a four-year period, which had no clear trend, and a period of steady increase starting in 1996 (see Chart 4).



The increased crime rate in the 1990s has been common for all post-socialist countries of Central and Eastern Europe (see Chart 5).

At such a time when crime rates radically increase, people typically become more inclined to favour longer, harsher punishments. Therefore, it may not be surprising that according to public opinion surveys, the public overwhelmingly supported keeping the death penalty as a possible punishment. At the end of 1995, 72% of those surveyed wanted capital punishment to be retained.⁷ Criminal policy-makers succeeded in convincing the *Riigikogu* (the Estonian parliament) to abolish the death penalty⁸, but it would be naïve to assume that this success will be easily repeated in making the prison sentences shorter as well.

The task to elaborate the Estonian criminal policy has been assigned to the Estonian Council for Crime Prevention.⁹ The task to analyse, design, direct, coordinate and make prognoses of criminal policy for the prevention, stopping and clearing offences by the Ministry of Interior Affairs and its departments is assigned to the Ministry of Interior Affairs. Neither Council for Crime Prevention nor the Ministry of Interior Affairs has proposed a clear criminal policy to be followed.



There are not many signs suggesting the existence of a consistent penal policy in Estonia. The most common indicator, used to assess the penal policy in Estonia, has been the percentage of unconditional prison sentences. The imprisonment rates for different crimes show no unambiguous trends (see Chart 6). The

⁷ UNDP, Estonian Human Development Report, 1997. Available at: [http://www.coesin.ee/undp/nhdr97/eng/chap6.html#Penal policy](http://www.coesin.ee/undp/nhdr97/eng/chap6.html#Penal%20policy).

⁸ The death penalty was abolished in 1997.

⁹ Estonian Council for Crime Prevention is a commission assembled by and working for the Estonian Government. *Riigi Teataja* (the State Gazette) I 1994, 93, 1578 (in Estonian).

only general trend seems to be that the imprisonment for theft (both for aggravated^{*10} and simple theft) has become less often employed (the most lenient approach being in 1994^{*11}). The imprisonment rate for traffic crimes increased sharply after 1994, but as in 1999 the rate decreased to the same low as in 1994 and earlier, it is difficult to make any conclusions about the possible future trends.

The penal policies of single courts have indicated even larger sudden changes; e.g. Kohtla-Järve District Court was famous for its extremely harsh sentencing so that in 1997–1998 even convicted teenagers were mostly (60.3%) sentenced to imprisonment. In 1999, the Court changed its sentencing policies abruptly and the percentage of unconditional prison sentences for teenagers dropped by more than a half, to 27.9.

The inconsistencies in criminal policies have been so apparent that the 1996 UNDP Estonian Human Development Report concluded that in Estonia “important decisions are made relying on superficial information without any actual knowledge of the essence and scope of the problem. For example, there is insufficient information about the essence and scope of economic crime, the illegal alcohol trade, problems relating to the use of drugs and drug trafficking, and the efficiency of methods used by the police, etc. To date there has been no coordinated approach of crime prevention that combines the efforts of different social institutions.”^{*12}

Choices in the Draft Penal Code^{*13} of 2000

The draft Penal Code of 2000 is a major step forward to establishing a consistent criminal policy in Estonia. In the Criminal Code of the Soviet period and in some earlier drafts the aims of punishment have been expressed in a way suggesting that the convicted persons should be subjected to punishments that are strict enough to prevent further crimes by the convicted persons and also by other people. Fortunately no regime took these expressions as rigid as they sounded.^{*14} But, of course, these expressions served as grounds for subjecting convicted people to long prison sentences. In the new Draft there are no indications of such aims.

The Draft is slightly less oriented on relative penal theories^{*15} although the drafters of the Code suggest that the Code be elaborated based on relative penal theories.^{*16} The influence of absolute penal theories can be traced analysing the features that according to the Draft should be considered in sentencing. The most important feature determining needed punishment is guilt (*Schuld*). And only after the guilt (*Schuld*) the other features: (1) opportunities to induce the guilty person to refrain from committing further offences (*i.e.* special prevention) and (2) interests of protecting legal order (*i.e.* positive general prevention).^{*17}

If the guilt (*Schuld*) is the primary determinant of penalty, then it is impossible to assert that the Draft is founded solely on the relative penal theories.

Relying on the absolute penal theories and slight opposition to deterministic approach may be more manifestly noticed in the list of aggravating circumstances that may be taken into account on sentencing. **The list does not include such commonly recognised aggravating circumstances as committing a crime by a person who has earlier committed crime and committing a crime by a group of persons in conspiracy.**^{*18}

According to the Draft these aggravating circumstances can influence sentence only if these circumstances are recognised as aggravating in the Special Part of the Draft Penal Code. The need to punish repeat offenders more severely has been almost unequivocally recognised by criminologists. It is extremely difficult to find a criminologist that would abruptly deny the possible positive effects of selective

¹⁰ The aggravated theft is theft in the conditions that the thief knows that his (her) theft is perceived at the time of his (her) act by some other person as a theft (distinguished from robbery by the provision that no force endangering life or health or threat of use such force was utilised).

¹¹ After 1994 the imprisonment rate for theft has not decreased, but it has not substantially increased neither.

¹² UNDP, Estonian Human Development Report – 1996. Available at: [http://www.ciesin.ee/undp/nhdr96/eng/chap7html#Crime prevention](http://www.ciesin.ee/undp/nhdr96/eng/chap7html#Crime%20prevention).

¹³ Draft Penal Code is available at: <http://www.just.ee> (in Estonian).

¹⁴ It is hard to believe that any regime even could stick unequivocally to these expressions, because so long even the harshest punishments have never been able to prevent all other people from committing further crimes.

¹⁵ The Criminal Code of the Soviet period had almost no signs of recognising the contentions of the absolute penal theories.

¹⁶ M. Ermits, P. Pikamäe, E. Samson, J. Sootak. The Draft General Part of Penal Code. Foundations and reasons, Tallinn-Tartu-Kiel, 1999, p. 130.

¹⁷ *Ibid.*, pp. 129–130.

¹⁸ *Ibid.*, pp. 132–133.

incapacitation and the most common tool serving to accommodate selective incapacitation is recognising committing a repeat offence an aggravating circumstance.

Therefore, the drafters should seriously consider not moving too far in favouring absolute penal theories and the possibility to include the committing of a repeat offence in the list of aggravating circumstances.^{*19}

In the choice between more lenient and harsher penal policies the Draft more often favours the more lenient penal policies. A very welcome example of this tendency is introducing community service as a sentence for criminal offences. The only doubts that the new sanction arises are about the relative punitive effect the sanction has. According to the Draft, community service may be a substitute for imprisonment of up to two years. And **one hour of community service** has been proposed to be able to substitute **two days of imprisonment**.^{*20}

It seems to be an overestimation of the punitive effect of community service. According to the Draft three months of community service (four hours of service per day) may be substituted for two years of imprisonment. To prevent the possible risk that community service may be completely rejected, the drafters should consider possible increases of community service hours that can be substituted for imprisonment.

¹⁹ The need for more severe punishments for repeat offenders has been recognised also by the Estonian Council for Crime Prevention.

²⁰ M. Ernits *et al.*, p. 143.