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Is the Last Laugh on Liszt?

On the Development of the Norwegian System of Criminal Sanctions

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I. Background

To a German audience, Franz von Liszt (1851–1919) requires no introduction. His achievements and influence as a criminal law scholar are well known. However, his influence in Norway and on Norwegian criminal law may require some more elaboration. In Norway, Liszt's influence is particularly related to the penal code of 1902.[1] The passing of this code was a foundational moment for modern Norwegian criminal law. To understand why, we should start with some historical exercises.

The penal code of 1902 replaced the criminal code of 1842. The latter was a product of section 94 in the Norwegian Constitution of 1814 (which still forms the constitutional basis for the Norwegian legal order, albeit thoroughly revised in 2014). Section 94, inspired by the dominant *Rechtsstaats*-ideas prevalent in the period, required a new criminal (and also civil) code to be enacted.[2] The purpose of requiring a new criminal code was (among others) to address the problems with the fragmented character of the contemporary criminal law. The 1842 code was an ambitious project, and its eventual completion was a huge achievement for Norwegian law. It was drafted from the ideals of Feuerbach's conception of criminal law and the Bavarian criminal code of 1813, but also the French *code pénal* of 1810 and later European codes from the first part of the 19th century, such as the Hann-

1 See for instance R. Hauge, *Straffens begrunnelser* (Universitetsforlaget, Oslo 1996), pp. 207 ff. and 234 ff.

2 On this paragraph, see further H. Sandvik/D. Michalsen (eds.), *Kodifikasjon og konstitusjon – Grunnloven § 94s krav til lovbøker i norsk historie, Nye perspektiver på Grunnloven 1814–2014* (Pax, Oslo 2013).

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over code of 1840.[3] The code of 1902, for its part, was in a sense the first 'modern' code of Norwegian criminal law. It responded to the significant social changes in Norway at the turn of the 20th century, a period essentially related to the concept of modernity.[4] This is of course where Liszt and his positivism enters the scene of Norwegian criminal law.

Central to this code were the highly influential figures Bernhard Getz and Francis Hagerup. The latter, Francis Hagerup (1853–1921), was a monumental figure in Norway.[5] He was a leading politician (and two-time prime minister) but also a highly distinguished legal professor. He was particularly theoretically mined (for a Norwegian context), and formed his own intellectual programme inspired by the German doctrine—Savigny and Ihering in particular. Even though he was a kind of legal polyhistor or generalist, his professor chair at Norway's then only university in Kristiania (now Oslo) was in criminal law. He was to become the country's most important criminal law professor.[6] Bernhard Getz (1850–1901) was, for his part, first a law professor, but proceeded into other influential roles in the Norwegian criminal justice system.[7] He was Norway's first Director of Public Prosecutions and was responsible for leading the commission for reform of the criminal procedure code of 1887. Importantly for this article, Getz was also made leader of the commission responsible for drafting the Norwegian penal code of 1902. These two were close collaborators—Hagerup as the high-ranking politician *and* theorist, Getz as the high-ranking practitioner.[8]

Now, the story goes, Liszt exercised a strong influence on these two, which in turn resulted in a code that has often been called *positivistic*.[9] This is an exaggera-

3 See L. Gröning/E. J. Husabø/J. Jacobsen, *Frihet, forbrytelse og straff – En systematisk fremstilling av norsk strafferett*, 2nd edition (Fagbokforlaget, Bergen, 2019), pp. 3–4, and Hauge (1996), p. 142.

4 For perspectives on this code, see G. Heivoll/S. Flaatten (eds.), *«Straff, lov, historie» – Historiske perspektiver på straffeloven av 1902* (Pax, Oslo, 2014).

5 On Hagerup, see S. Blandhol/D. Michalsen, *Rettsforsker, politiker, internasjonalist: Perspektiver på Francis Hagerup, Oslo Studies in Legal History 2* (Unipax, Oslo 2007).

6 See further J. Jacobsen, *Hagerup og den strafferettslege ansvarslæra* (Fagbokforlaget, Bergen 2017a).

7 On Getz, see further A. Vogt, *Bernhard Getz* (Aschehoug, Oslo 1950).

8 See also Hauge (1996), p. 218. On Hagerup's view on the relation between theory and practice, see J. Jacobsen, Teori og praksis i strafferetten, K. E. Sæther/K. A. Kvande/R. Torgersen/U. Stridbeck (eds.), *Straff og frihet: Til vern om den liberale rettsstat – Festskrift til Tor-Aksel Busch* (Gyldendal, Oslo 2019), pp. 365–378.

9 As in German literature, the terms here applied varies somewhat—a variety that emphasises some different aspects of this approach to criminal law. The terms 'positivistic' and 'the positive school' – used for instance by A. Ross, Forbrydelsesbegrebets definition, *Svensk Juristtidning* (1976), pp. 241–271, p. 258 – reflect the underlying theory of science and the emphasis on facts and utility. For instance C. Häthén, *Straffrättsvetenskap och kriminalpolitik – De europeiska straffteor-*

tion, but not one without substance. Clearly, Liszt was at the time the driving force of European criminal law scholarship, and his criminal law theory was central to the ongoing discussions.[10] As specifically regards Norway, there were indeed close connections between Liszt and the Norwegian duo.[11] The latter two both participated in the first world congress of the *Internationale Kriminalistische Vereinigung* (hereinafter: *IKV*) in Amsterdam in 1889, and initiated the Norwegian branch, *Den norske kriminalistforening,* in 1892, with Hagerup as the leader. The third *IKV* world congress took place in Kristiania. Prior to this, Getz's draft for a new penal code was translated into German and commented on by Liszt, who applauded it.[12] In his lecture on *Die Aufgabe und die Methode der Strafrechtswissenschaft*, Liszt even stated: 'der steigende Einfluß unserer neuen Richtung zeigt sich am besten in den Strafgesetzentwürfen der Schweiz und Norwegens'.[13] Hagerup must have found a strong common point of reference with Liszt, a student of Ihering, in their admiration for the latter's works.[14] *Today*, however, as a new penal code has replaced the code of 1902, positivism seems to be out of fashion. As we will return to, we seldom hear about Liszt and positivism today. So, perhaps 'big impact in 1902, little known today' sums up the story of Liszt's influence in Norway.

The German literature allows for a more nuanced story to be told as regards Liszt's influence on German criminal law.[15] In this article, I will tell a different and

ierna och deras betydelse för svensk strafflagstiftning 1906–1931 – Tre studier (Lund University Press, Lund 1990), p. 71 uses the terms 'modern' school and 'sociological' school. Some even use the term 'third school', reflecting the place of the theory within its contemporary landscape of criminological theories, see Hauge (1996), pp. 207 ff.

10 Also to criminology, see for instance R. F. Wetzel, *Inventing the Criminal – A History of German Criminology 1880–1945* (The University of North Carolina Press, Chapel Hill/London 2000), pp. 31 ff.

11 See e.g., Hagerup's *Gedächtnisrede* over Getz, with an editorial note by Liszt in *ZStW* 22 (1902), pp. 481–498 (originally in Norwegian in Hagerup's own journal *TfR* 14 (1901), pp. 341–357). See also Hauge (1996), p. 217.

12 Norwegian translation published in F. von Liszt, Kritik af det norske Straffelovudkast, *TfR* 2 (1889), pp. 356–392. (Lammasch also reviewed it, see H. Lammasch, Der norwegische Strafgesetzentwurf, *ZStW* 14 (1894), pp. 505–531. Liszt was, however, at some points critical to the draft, for instance in regard to the abolishment of the death penalty, see Liszt (1889), pp. 362–363.

13 F. von Liszt, Die Aufgaben und die Methode der Strafrechtswissenschaft [1899], quoted from F. von Liszt, *Strafrechtliche Aufsätze und Vorträge, Band 2: 1892–1904* (Guttentag, Berlin, 1905), pp. 284–298, p. 294.

14 For Hagerup, see in particular F. Hagerup, Ihering – Windscheid – En litterær Karakteristik, *TfR* 6 (1893), pp. 1–26, see further Jacobsen (2017a), pp. 26–36.

15 See for instance W. Naucke, Die Kriminalpolitik des Marburger Programms 1882, *ZStW* 94 (1982), pp. 525–564 and in particular, T. Stäcker, *Die Franz von Liszt-Schule und ihre Auswirkungen*

perhaps distinct story for Norway, too. I will show that Liszt did *not* have such a strong impact on Norwegian criminal law in his own time as he is typically ascribed, but that recent changes in the Norwegian system of criminal sanctions may make us wonder if Liszt does not in fact have the last laugh. The ongoing recent developments conform to such an extent to positivistic ideas that the resemblance is hard to overlook.[16] Could this convergence of positivistic ideas and the recent developments in Norway also be said to be a *result* of Liszt's works? Here we should be more cautious. Rather, the Norwegian pragmatist legal culture can be said to be particularly receptive to ideas like Liszt's, and it has in recent decades lacked the principled orientation needed to properly address such ideas that gain strength from other forces in contemporary criminal policy.

One reason for this exercise is to add to the history of Liszt and his influence on Norwegian criminal law. Another important reason is to acquire a useful prism into the at first glance confusing development of the Norwegian system of criminal sanctions, a development which, similar to the critical reception of positivism from a *Rechtsstaat*-point of view, we now should be critical towards. I will present the historical background for this discussion in more detail in section 2. Here, I will outline the sanctioning system in the previous criminal codes of Norway, and discuss the positivistic influence on the code of 1902 in particular. I will proceed in section 3 to outline the contemporary system of criminal sanctions in Norway, related in particular to the current penal code of 2005. This section will hopefully be of value to readers irrespective of the broader subject of the article. Lastly, in section 4 I will provide an analysis of broader developments. Here, the Liszt-perspective is made more nuanced and applied as a critical perspective on the development in Norway. The article will concentrate on the sanctioning system as it appears in substantive criminal law. The administration of punishment will not be included. This would add important perspectives, but also significantly expand the article.[17] Even with this limitation, the article covers a lot of ground. In

auf die deutsche Strafrechtsentwicklung (Nomos, Baden-Baden 2012). The latter work adopts a German (and more thorough) perspective on several issues to be addressed concerning Norway in the following.

16 Hauge (1996) sees the development till the 1990s as a development towards a 'technical, administrative criminal policy' (p. 343), but does not capture the parallels to positivism, which perhaps are even clearer today. (The translation of this and other Norwegian sources have been done by me for the sake of this article, unless otherwise is stated.)

17 On Liszt and the administration of punishment, see in particular H. Müller-Dietz, Das Marburger Programm aus der Sicht des Strafvollzugs, *ZStW* 94 (1982), pp. 599–618. Concerning the administration of punishment in Norway, see e.g., L. Gröning, Straffgenomföring som en del av straffrättssystemet: Principförklaring av fängelsestraffets innehåll, *Tidsskrift for Rettsvitenskap* 126 (2013), pp. 145–196.

order to maintain focus on the overall perspective of the article, I will at several points simply refer to previous works of mine (and others) for a more detailed elaboration of the specific issues that are addressed.

II. The Penal Code of 1902 and the Limits of Positivism—*Then*

1. The shift from 1842 to 1902

As already stated, the penal code of 1902 was enacted to replace the criminal code of 1842. This shift was something more than just a renewed code. The titles of the codes, which differ in a significant way, illustrate this. The code of 1842 was titled *Kriminalloven*; in German, *Kriminalgesetz*; in English, *the Criminal Code*. The code of 1902, however, was called *Straffeloven*, i.e., *Strafgesetz* or *the Penal Code*. This shift of terms illustrates a certain shift from criminal law as a system of fundamental norms, i.e., more of a deontological point of view, to a focus on criminal law primarily as a system for punishment, i.e., a social instrument. In the latter lies the link to positivism.

We should be cautious not to exaggerate the difference between the codes. For instance, the code of 1842 was certainly influenced by utilitarian considerations and, in line with Feuerbach's viewpoints, general deterrence was a central aim.[18] The code of 1902, for its part, was much more embedded in classical criminal law viewpoints than is usually recognised.[19] Still, one can see a certain shift. By 1902, the utilitarian approach seems to have grown stronger, at least in the sense that Kantian and Hegelian viewpoints were now very much out of fashion. As we will return to, this reflected trends in German scholarship, including that of Liszt, who opposed Kantian and Hegelian theories.[20]

To understand why the 1902 code represents a shift in Norwegian criminal law, we should also add a broader perspective. Norway (soon to be fully inde-

18 See also e.g., H. J. Mæland, Fra Kriminalloven til straffeloven, *Tidsskrift for strafferett* 2 (2002), pp. 326–337. For an outline of the system of reactions and its motivation, see J. Jacobsen, Utsyn over utviklingstrekk i det strafferettslege reaksjonssystemet, *Kritisk Juss* 43 (2017b), pp. 118–144, pp. 121–123.

19 See J. Jacobsen, 'i selve Dybderne af den menneskelige Bevidsthed om Ret og Moral': Straffelova av 1902 og den tyske skulestriden, in G. Heivoll/S. Flaatten (eds.), *«Straff, lov, historie» – Historiske perspektiver på straffeloven av 1902* (Akademisk publisering, Oslo, 2014), pp. 44–85.

20 See further below.

pendent[21]) experienced societal problems related to modernisation, urbanisation, and industrialisation. The code of 1902 was part of a series or 'package' of codes that aimed to address such social problems. This included codes concerning delinquent children and vagrancy, which together sought to deal with such criminogenic factors within the Norwegian society.[22] This is positivistic-style thinking: different social technologies, criminal law included (although not foremost), were applied to deal with specific social problems. This broader legislative project seems also to be the reason for the penal code of 1902 being labelled 'positivistic'. Here, however, we must step cautiously. If we are to consider whether the penal code of 1902, or later the code of 2005, can be labelled as positivistic, we must start by defining this term. Given Liszt's prominent position, it is useful to start out with his theory. Thereafter we will look into the details of the two codes, and compare these to how we have defined 'positivism'.

2. Liszt's positivism—a brief outline

To investigate Liszt's own positivistic theory of criminal law is a major enterprise. Liszt wrote a large number of works, and interpretations of his viewpoints vary to some degree.[23] Exploring this body of works, and the viewpoints and development they reflect, is not possible within the limits of this article. Here, however, one very central feature of this theory, firmly embedded in the programmatic lecture *Der Zweckgedanke im Strafrecht* from 1882, will allow us to gain ground.[24] The feature I am referring to is the well-known three-track distinction between offen-

21 Norway gained independence from Denmark and a constitution in 1814, but was soon after forced into a union with Sweden which lasted until 1905. Hagerup was then prime minister and this became his political downfall. He was committed to the view that Norway should stay in the union only to discover that he lacked support for this view (in a referendum 99.5% voted against the union). He subsequently resigned as prime minister, see H. Danielsen, Francis Hagerup og norsk konservatisme, in Blandhol/Michalsen (2005), pp. 123–144.

22 See further different contributions in Heivoll/Flaatten (2014). An overview of these codes and an explanation of Getz's central role in regard to these can be found in Hauge (1996), pp. 234–236.

23 Many of his works are collected in F. von Liszt, *Strafrechtliche Aufsätze und Vorträge, Band 1: 1875–1891* (Guttentag, Berlin, 1905) and F. von Liszt, *Strafrechtliche Aufsätze und Vorträge, Band 2: 1892–1904* (Guttentag, Berlin, 1905). For expositions of Liszt's theory, see e.g., E. Schmidt, *Einführung in die Geschichte der deutschen Strafrechtspflege*, dritte Auflage (Vandenhoeck & Ruprecht, Göttingen 1995), pp. 357–386, Naucke (1982), M. Frommel, *Präventionsmodelle in der deutschen Strafzweck-Diskussion* (Dunker & Humblot, Berlin, 1987), and Häthen (1990), pp. 77–91.

24 See Der Zweckgedanke im Strafrecht (1882), quoted from F. von Liszt, *Strafrechtliche Aufsätze und Vorträge, Band 1: 1875–1891* (Guttentag, Berlin, 1905), pp. 127–179, in particular pp. 163–173.

ders with a potential for rehabilitation, offenders that should be incapacitated, and the 'normal' offenders (located between the other two types) who simply should be taught a lesson, i.e., deterred. This distinction has also been emphasised in later descriptions of Liszt's enterprise, for instance by Thomas Vormbaum.[25] It is also emphasised by leading Norwegian criminologists and criminal law theorists, such as Ragnar Hauge and Henry John Mæland.[26] It differentiates between offenders not by what act they have performed, but by how they must be treated in order to prevent further criminal acts. The performed criminal act is only an entrance point to, and empirical basis for, this prospective consideration over the individual offender.

We should note Liszt's own reservations about how the aims of incapacitation, deterrence, and rehabilitation should be concretised. Liszt was very clear about the limitations of his reasoning in this regard—for good reason. The right punishment is the necessary punishment, Liszt claimed.[27] 'Necessary' relates here to the protection of legal goods, the most basic of which, in Liszt's theory, are the individual and societal drive for survival. This 'necessity test' thus has empirical references, in line with Liszt's rejection of a normative framework for criminal law. Thereby, the forming of the sanctioning system becomes a question of what works. The tripartite division becomes so basic because it clarifies the (logically) possible ways to make citizens abstain from recidivism—apart from, of course, leaving them alone and hoping for the best, an option that Liszt seemingly did not have much faith in. How these three different approaches can be applied and concretised is thereby open to different solutions, contingent upon the time, place, and not least the social setting within which the viewpoint is operationalised. To this we should add the related epistemic challenges. Operationalisation of this theory requires (empirical) knowledge about society and the effects of different means that can be applied. Liszt himself mentions (the lack of) the needed criminal statistics. So, before embarking on the tripartite division, he underlines:

> Wenn ich es daher im folgenden versuche, eine Antwort auf die gestellten Fragen zu geben, so weiß ich so gut wie irgend jemand, daß diese Antwort nicht auf die Bedeutung einer definitiven, unzweifelhaften Feststellung Anspruch erheben kann. Dennoch dürfte der Versuch, die bisherigen Ergebnisse zusammenzufassen und zu verwerten, nach mehr als einer Richtung hin sich fruchtbringend erweisen.[28]

25 T. Vormbaum, *Einführung in die moderne Strafrechtsgeschichte* (Springer, Berlin, 2009), p. 125.
26 See Mæland (2002), pp. 328–329 and Hauge (1996), pp. 209–210.
27 Liszt (1882), p. 161.
28 Liszt (1882), p. 163.

This (de-normativised) positivism of Liszt, stripped of metaphysically contingent concepts of freedom and rights, had (for obvious reasons) less to say on questions of criminalisation and the action norms of criminal law, apart from emphasising the basic human drive towards protection of self and survival.[29] This limitation is also reflected in the ambiguous relation between Liszt's dogmatism in the *Lehrbuch* and the positivistic enterprise.[30] Liszt's limitations in this regard are also reflected in the ambivalent reception of Liszt in Norwegian criminal law theory and legislation, which sheds clear light on why we should be hesitant to describe the code of 1902 and Norwegian criminal law of the times as positivistic. This we will return to.

Before we proceed, we should underline that Liszt's intellectual enterprise developed during his intellectual career. When we speak of Liszt in the following, it is *the 1882 Liszt* that we primarily refer to as the foremost symbol or expression of what is known as *positivistic criminal law*. A comprehensive discussion of Liszt's works and development would add important nuances to the following, but also many, many more pages.

3. Positivism and the code of 1902—the sanctioning system

The positivistic programme received attention and interest in Norway and the initial reception of it was indeed positive. A notable step in the development of the Norwegian sanctioning system was, for instance, Hagerup's introduction of suspended sentences.[31] This happened back in 1894. The reasoning was clearly in line with positivistic viewpoints: certain prison sentences, even if in themselves proportional to the crime, were too short to fulfil any rehabilitative or incapacitating purposes, but long enough to have unwanted consequences.[32] Norway was one of the first countries to introduce this solution, which may indicate a distinct Norwegian cultural receptiveness for pragmatic considerations in criminal law.

29 Liszt expressed his positivistic/non-cognitivist view of science in Liszt (1899), p. 289: 'Wissenschaftliche Erkenntnis aber ist *kausale Erklärung* …', see also p. 297. See also Schmidt (1995), p. 366: '*Liszt* stand in der Tat so stark unter dem Eindruck der Naturwissenschaften seiner Zeit, daß er wissenschaftliches Denken mit naturwissenschaftlichem recht eigentlich identifizierte.' For a thorough analysis of Liszt's criminal policy in this regard, see Naucke (1982).

30 Liszt's dogmatism is discussed for instance in Naucke (1982), pp. 554 ff. and in particular E. Heinitz, Franz von Liszt als Dogmatiker, *ZStW* 94 (1982), pp. 572–596.

31 See further F. Hagerup, Om betingede Straffedomme, Forhandlingsemne ved syvende nordiske juristmøde, *Forhandlingerne paa det syvende nordiske Juristmøde i Kjøbenhavn den 28de, 29de og 30te August 1890* (Schultz, Kjøbenhavn, 1890), Bilag II pp. 1–33.

32 Hagerup (1890), pp. 3–4.

Hagerup—the main commentator on Liszt's work in Norway—seems, however, to have been sceptical towards positivism's abandonment of classical criminal law principles. Hagerup's main concern was the fundamental role of the 'ethical judgement', so deeply embedded in both law and society, but which Liszt's enterprise compromised: 'Can it be, that the positive school of criminal law will be the human spirit's final words on criminal law? I believe it not to be. One cannot detach punishment from its relation to the wrongful act without thereby at the same time abandon it as a legal institution and its ethical character.'[33] There is a telling development in Hagerup's writings, where in early texts he welcomes the empirical reorientation away from the abstract and 'speculative' Kant- and Hegel-influenced school in German legal science, only to end up endorsing natural-law-like considerations at the end of his intellectual career, and expressing himself in Kantian ways regarding the principle of right theory (*Rechtsprinzip*).[34]

This conflict between classical criminal law ideas and positivism, ending mainly in favour of the former, can also be seen reflected in the penal code of 1902. If we are to speak of the 'positivistic' code of 1902, this is in a highly watered down sense.[35] Rather, the code builds on central parts on the same criminal law ideas as the code of 1842. It is hard to locate distinct positivistic ideas in the offences and in the criteria for criminal responsibility in the 1902 code. The criteria for criminal responsibility, for instance, were still the classical principles that had followed European criminal law at least since Pufendorf's reception of Aristotle's theory of responsibility, and their application in early German criminal law theory.[36] For instance, the rule about criminal insanity was not amended. In fact, it was Sweden, inspired by Lombroso, that later abandoned this classical requirement for criminal responsibility.[37] Liszt had his own reservations in this regard. What about the other side of the penal code, the reaction or sanctioning system? As mentioned, this is the positivistic theory's main interest and emphasis. If the penal code of 1902 should deserve the label 'positivistic', this part of the code is

33 See, e.g., F. Hagerup, *Ret og kultur i det nittende aarhundrede* (Gyldendalske boghandel Nordisk forlag, Kjøbenhavn, 1919), p. 74, see further Jacobsen (2017a), pp. 97–127.

34 Compare F. Hagerup, Moderne Kriminalpolitik. En ny international kriminalistisk Forening, *TfR* (1890), pp. 224–246, pp. 226–227 with F. Hagerup, Indledning til studiet af den almindelige retslære [incomplete, posthumous published work], *TfR* (1922), pp. 179–217, pp. 199.

35 See further Jacobsen (2012).

36 See further in J. Jacobsen, Pufendorf og den europeiske strafferettsdoktrinen, in U. Andersson/C. Wong/H. Örnemark Hansen (eds.), *Festskrift till Per Ole Träskman* (Norstedts juridik, Stockholm, 2011), pp. 247–258

37 See further, e.g., S. Levander, God vilja räckte inte – ett personligt perspektiv på svensk rättspsykiatri, *Nordisk Tidsskrift for Kriminalvidenskab* (2011), pp. 59–70.

also where we should expect to see its influence most clearly. This is the case, but the influence is still not very strong.

The penal code of 1902 indeed had elements in its sanctioning system that represented a break with the code of 1842, and which can only be explained by positivistic influences. The forms of punishment originally included in the 1902 code were the classical forms of imprisonment (including a distinct and milder form of *hefte* as a less intrusive form) and fines, in addition to the possibility for removal from office as a civil servant in specific cases.[38] Furthermore, the code had a series of supplementary forms of punishment, which could only be added to the primary punishments. This included loss of rights, forfeiture of objects, publishing of the sentence, and expulsion from certain areas. The influence of positivism is most visible in the inclusion of a separate track in the sanction system for dangerous offenders, a departure from the stricter system of punishments in the code of 1842. This new track included a particular sanction called *preventive detention* (*forvaring* in Norwegian) in section 39 of the code. This sanction allowed for offenders freed from criminal responsibility due to insanity or who received a milder punishment due to diminished capacity for criminal responsibility to be detained in insane asylums, rehabilitative institutions, or workhouses. Furthermore, section 65 allowed convicted offenders to be kept in prison as long as needed, but no longer than three times the imprisonment sentence, and in no case for longer than 15 additional years. These innovations received international attention.[39] They were, however, no (immediate) success in practice, and were later amended. More on that to follow.

However, even if the 1902 system of sanctions shows traces of positivistic influence, it still seems mainly to side with classical criminal law. The code maintained a clear-cut distinction between the responsibility side and the sanctioning side of criminal law, and distinguished furthermore between punishment and other criminal sanctions, the latter including the so-called 'special reactions' for insane offenders. The sanctions designated as punishments were, for their part, clearly designed to allocate blame as a means of general deterrence, and were therefore also reactions proportional to the seriousness of the committed offence.

Ultimately, it seems most adequate to speak of the penal code of 1902 in general as a classical style code, moderately influenced by positivism, but not there-

38 See penal code of 1902, § 15. For overviews of the sanction system in the code of 1902, see F. Hagerup, *Almindelig borgerlig straffelov af 22. Mai 1902 og lov om dens ikrafttræden af samme dato – udgivet med oplysende anmærkninger og henvisninger* (H. Aschehoug & co, Kristiania 1903), pp. 17 ff. and (later) Jon Skeie, *Den norske strafferett – Første bind, Den almindelige del* (Olaf Norlis Forlag, Oslo 1937), pp. 534 ff. For a brief overview, see Jacobsen (2017b), pp. 124–125.

39 See Hauge (1996), p. 229.

by a 'positivistic' code in itself. The moderate influence that positivism had, even in this clearly sympathetic context, seems to support the common conception of positivism as a distinct school in the history of criminal law, with limited influence and now left behind. However, at least for Norwegian criminal law this opinion is unwarranted, as will be seen when we look to recent developments in Norway. Perhaps the times were not (yet) ready for Liszt's ideas. The principled approach of Hagerup, and to some extent his successor Jon Skeie (1871–1951),[40] was abandoned by, in particular, Johs. Andenæs (1912–2003). Andenæs completely dominated Norwegian criminal law in the second half of the 20th century.[41] In this period, the classical principles of criminal law were downplayed and replaced by a (stronger) pragmatist point of view, which is more compatible with Liszt's theory. As we now will see, (the drafting of) the penal code of 2005 testifies to this.

III. The Recent Development of the Norwegian System of Criminal Sanctions—Towards Positivism?

1. Liszt's absence in recent sources

Not surprisingly, Liszt and his positivism seemed not to have gained attention in the drafting of the 2005 code. When reviewing literature from this period, one quickly sees that Liszt is no central figure here either. For instance, this applies to Andenæs's book on Norwegian criminal law, *Alminnelig strafferett*, which appeared in several editions and became highly influential—the Norwegian counterpart to Liszt's *Lehrbuch*, so to speak.[42] The only edition where Liszt's positivistic theory is mentioned is the first edition.[43] Here, Andenæs makes a highly interesting remark which deserves to be quoted. After having hailed Liszt as 'the brightest

40 As a doctoral student, Skeie was in Berlin to study criminal law and international law, with Liszt as teacher.

41 See more on Andenæs in J. Jacobsen, Zur gegenwärtigen norwegischen Strafrechtsdogmatik – Andenæs und die Folgen, *ZStW* 123 (2011), pp. 609–632.

42 The book was first published in 1956, as one of four editions (also 1974, 1989 and 1979), that Andenæs himself published before he passed away in 2003. Two more editions have been published since then (2005, 2016).

43 A brief reference to Liszt on insanity 'survives' for more editions, but this is of less relevance to us here. Liszt is also briefly mentioned by Andenæs in, for instance his late book where he reflected on a series of challenges to criminal law, cfr. J. Andenæs, *Straffen som problem* (Exil, Halden 1996) at p. 27 and p. 99. Again, the questions of determinism and insanity provide the context.

name in criminal law science at the end of the last century and the beginning of this [i.e., the 20th] century', and after briefly describing Liszt's three-tracked programme, Andenæs adds:

> If one looks only at genuine punishments, it is easy to see that Norwegian law has not effected this programme. On the contrary, one can say that punishment is characterised by a certain relation to the seriousness of the crime, not by pure rehabilitative considerations. When purely rehabilitative considerations are decisive, this is in the shape of preventive measures not characterised as punishment. However, *when the system of sanctions is seen together, one comes closer to the [Liszt's] programme*. In this regard, there is a huge difference when compared to the situation 60–70 years ago.[44]

To my knowledge, Andenæs never picked up on and developed this claim, and the story in Norway seemed to be that Liszt's positivism was a historical, even if significant, event in the history of Continental and Nordic criminal law.[45] It is symptomatic that in the leader of the Penal Code Commission, Anders Bratholm's, outline of criminal law from 1980, Liszt is only briefly mentioned in a very short historical outline. Here he is grouped together with Feuerbach as a proponent of relative criminal law theories.[46]

2. A system of sanctions in change

The Norwegian system of criminal sanctions had been more or less continuously subject to change since the enactment of the code of 1902. Preventive detention, for instance, was seldom used and was reformed already in 1929.[47] Measures aimed at delinquent children, such as the so-called work-school, which was introduced in 1928, were tried out and then abandoned.[48] To a large extent this has, as in many other countries, been a process where new and well-intentioned sanctions are developed, only to prove disappointingly ineffective, and are then reversed to traditional forms of punishment. However, from the early 1980s onwards more thorough changes in the system of criminal sanctions appeared. This

44 J. Andenæs, *Alminnelig strafferett* (Akademisk forlag, Oslo 1956), p. 68 (italicised here).

45 Exceptions are specific historical comments and outlines, see e.g., Hauge (1996) and Mæland (2002).

46 A. Bratholm, *Strafferett og samfunn* (Universitetsforlaget, Oslo 1980), p. 114. Bratholm was that year appointed leader of the Penal Code Commission, but resigned after the second white paper in 1992.

47 Code of 22 February 1929, see here also Hauge (1996), pp. 238–239.

48 See e.g., Hauge (1996), pp. 239–240.

period has coincided with the drafting of the penal code of 2005, which entered into force on 1st October 2015.[49]

The fact that it took almost 40 years from when the process of developing a new penal code was put into motion in 1978 to when the code entered into force in 2015 requires in itself some explanation. During its lifespan, the code of 1902 was subject to many reforms with different parts of it being revised and modernised. The opinion was that the code had a quite functional and adaptable basic structure, allowing for partial reforms in different areas. In 1978, however, the highly controversial *Criminal Report* from the Ministry of Justice on criminal policy mentioned a new penal code as one means to develop Norwegian criminal law.[50] This idea was presented in a rather downscaled way. There seems to have been no substantial reasons for initiating this reform, nor any genuine reflection on the challenges inherent in this project.[51] In other words: this code was not the kind of programmatic project that the previous codes had been. The 1842 code was a constitutional project. The 1902 code aimed to prepare Norwegian criminal law for modern society. The project that now was sparked was first and foremost a matter of political symbolism, an early example of such symbolic legislation that we later (unfortunately) have become quite accustomed to.

The lack of reasoning on the need for a new penal code (as well as the challenges associated with drafting it) came home to roost in unfortunate ways. The Penal Code Commission was appointed by the Ministry of Justice in 1980.[52] Their first report (white paper) came in 1983, and throughout the 1980s and 1990s, several other reports were to follow (without leading to substantial progress).[53] When the commission delivered its final general report in 2002 (NOU 2002: 4), it was mainly the general provisions of the code that had been prepared. The commis-

49 The Penal Code 2005 section 411, first paragraph. For an overview and translation in German, see E. J. Husabø/K. Cornils, *Das norwegische Strafgesetz: vom 20. Mai 2005 nach dem Stand vom 1. Juni 2014; deutsche Übersetzung und Einführung* (Berlin, Duncker & Humblot 2014). An unofficial English translation can be found at https://lovdata.no/dokument/NLE/lov/2005–05–20–28 (last accessed 25.09.19).

50 St.meld. nr. 104 (1977–1978) *Om kriminalpolitikken*. For the critical reception, see e.g., J. Andenæs/G. Fr. Rieber-Mohn/L. J. Dorenfeldt/O. T. Laake, *Kommentarer til Kriminalmeldingen* (Grøndahl, Oslo 1979), see also, for instance, J. Andenæs, Developments in criminal law and penal system: Norway 1977–1978, *The Criminal Law Review* (1979), pp. 447–451. A different story is told by Minister (then) Inger Louise Valle, see her *Dette står jeg for* (Gyldendal, Oslo 1989), pp. 179–180.

51 In St.meld. nr. 104 (1977–1978), p. 168 a need for adapting the criminal legislation to the significant social changes that had taken place since 1902 was mentioned, but the frequent and significant changes in the 1902 code during the 1900's had already sought to do this.

52 On the background and mandate for the Penal Code Commission, cfr. NOU 1983: 57, pp. 27–30.

53 Cfr. NOU 1983: 57, NOU 1992: 23, NOU 1992: 23, NOU 2002: 4 and NOU 2003: 18.

sion did not deliver a draft for the part of the code concerning specific criminal acts.[54] The Ministry of Justice had to develop this part of the code mainly by itself, completing the work in 2010,[55] five years after the general provisions and the chapter on international crimes were enacted in 2005. Still, it took another five years before the code was put into force. The causes for this slow process are many. An in-depth analysis is not possible here. It is, however, of relevance to us that the first leader of the commission (there were many changes to the commission, including its leadership), was the aforementioned law professor Anders Bratholm. He was a critical legal scholar, strongly engaged in subjects of legal policy, but with less theoretical interest and competence. Generally, there was no theoretical framework for the legislative process. The final delay from 2010 to 2015 appears to have been related to a peculiar conflict with the police over the need for a new computer system. If anyone is considering drafting a new criminal code, ask us Norwegians how not to go about.

The important point for us here is that during this long process, a series of specific changes to the code of 1902 were implemented, many of which concerned the sanctioning system and thereby are of high relevance to our subject. Several of these changes were brought forward into the 2005 code.[56] This is also the time for us to bring back into focus the positivistic idea of different sanctions for the incapacitation of dangerous offenders, deterrence of 'normal' offenders, and rehabilitation of offenders with a potential for this.

One of the additions to the Norwegian criminal justice system during the process of developing the 2005 code had a typical incapacitating motivation, in line with the dangerousness-track of Liszt's system. Until then, the problem of dangerous offenders in Norway was solved by means of the so-called *sikring*-mechanism, which prolonged incapacitation after the proportional prison sentence was served. *Sikring* was mandated by the court, for instance in terms of a sentence of 21 years imprisonment and an additional 10 years of safeguarding.[57] After a long period of criticism, which emphasised for instance that this solution was unpredictable for the person serving the sentence, a reform of the system was carried

54 Later on, NOU 2003: 18 was submitted, however, concerned only questions related to national security.

55 The most important preparatory works in this regard is Ot.prp. nr. 22 (2008–2009).

56 For general outlines of the system of criminal sanctions in this code, see Gröning/Husabø/Jacobsen (2019), pp. 604–742, J. Andenæs/G. F. Rieber-Mohn/K. E. Sæther, *Alminnelig strafferett*, 6. utgave (Universitetsforlaget, Oslo 2016), pp. 376–568 and S. Eskeland/A. P. Høgberg, *Strafferett*, 5. utgave (Cappelen Damm, Oslo 2017), pp. 390–502.

57 For a review on the *sikring*-system, see H. Røstad, «Sikringsinstituttet», NOU 1974: 17 *Strafferettslig utilregnelighet og strafferettslige særreaksjoner* (attachment 3), pp. 186–273.

out in 2001.[58] This major reform had a significant impact on the Norwegian system of criminal sanctions. It (re)introduced (a renewed version of) *forvaring* or preventive detention. This time it was labelled *as a punishment* at the same time as it replaced both the traditional prison sentence *and* the additional safeguarding.[59] Thereby, this reform compromised the two-track system of punishment and safeguarding measures which even Liszt acknowledged. Punishment was now no longer limited to retrospective blame considerations, but included prospective considerations concerning danger. For the (well-meaning) critics of the previous *sikring*-system this was a Pyrrhic victory, as this solution preserved the unpredictability problem (as all indeterminate sanctions do), and also introduced what many now consider to be the harshest punishment in Norwegian criminal law.[60] The 2005 code also includes, in addition, other prospective sanctions as punishment. Loss of rights as a form of punishment includes loss of position (or the right to hold a position in the future) and also a prohibition on contacting certain persons in the future, typically the victims of crimes (particularly in cases of domestic violence or sexual abuse).[61] Recently, loss of citizenship has also been included in the list of punishments.[62]

If we turn to the opposite track in the positivistic system of sanctions, the rehabilitation track, we quickly see even more changes that have been carried out in the Norwegian system of criminal sanctions. In fact, already in the early 1980s, only a few years after the process of developing the new criminal code was set in motion, the penal sanction *community service* was tried out as a means to reduce the prison population.[63] *Community sentence*, as it later was coined, rapidly became another central piece of the Norwegian criminal sanctioning system.[64] This was an option that secured a sufficiently 'burdensome' alternative to imprisonment, compared with suspended sentencing, which was considered an insuffi-

58 For the preparatory works for the reform, see NOU 1990: 5 and Ot.prp. nr. 87 (1993–1994). A previous reform suggestion (NOU 1974: 17) stranded.

59 See sect. 40–47 and Gröning/Husabø/Jacobsen (2019), pp. 620–627, with further references.

60 B. Johnsen/H. J. Engbo, Forvaring i Norge, Danmark og Grønland – noen likheter og ulikheter, *Nordisk Tidsskrift for Kriminalvidenskab* (2015), pp. 175–194, p. 181.

61 Cfr. PC 2005 sect. 56–59. See further Gröning/Husabø/Jacobsen (2019), pp. 639–644, with further references.

62 Endringslov 25. mai 2018 nr. 19. See also on the increasing entanglement of criminal law and immigration law in N. B. Johansen/T. Ugelvik/K. F. Aas, *Krimmigasjon? Den nye kontrollen av de fremmede* (Universitetsforlaget, Oslo 2013).

63 The *community service* was put into force as a pilot project in 1984. See further NOU 1982: 4.

64 From 1991 was the *community sentence* a regular part in Norwegian criminal law, see now the penal code of 2005 sect. 48–52. See further Gröning/Husabø/Jacobsen (2019), pp. 627–633.

ciently severe reaction for many offences. Important for our current perspective is that rehabilitative considerations play a central role in the use of this sanction. First of all, 'defensive' rehabilitative considerations are central to the court's deliberation over whether to apply this reaction.[65] If imprisonment will intervene in an ongoing rehabilitation of the offender, this suggests that a less intrusive punishment shall be applied. For instance, in regard to drug offences, the reaction is used where there is a 'clear and strong rehabilitation possibility' so that imprisonment will damage the positive development that the offender is experiencing.[66] When applied—for this or for other reasons—the court sets a number of hours between 30 and 420, and leaves it to the Correctional Service to decide on how these hours are to be spent.[67] Working for society is one option, rehabilitative programmes are another.

Furthermore, the rules of *suspended sentences of imprisonment*, first introduced by Hagerup prior to the enactment of the code of 1902, have also been subject to continuous change.[68] These changes primarily concern the available conditions that the court may apply for the offender to fulfil during the period of suspension (usually two years).[69] This list has gradually increased. Today, it includes a series of alternatives, including the performance of a rehabilitative programme for alcoholism aimed at drunk drivers, and a specific court-led rehabilitative programme for drug addiction.[70] Further alternatives include bans on the use of alcohol or drugs, institutionalisation for treatment of mental illness, and specific measures aimed at children, supplementary to the more serious reaction *youth punishment* that we will address below.[71] The list is 'open-ended' so the court may apply other criteria that are considered suitable in the specific case.[72]

Together, the community sentence and the list of criteria for suspended sentences become a kind of *carte du jour*, where the court has great flexibility to find an appropriate rehabilitative sanction for the specific offender. Proportionality considerations set limits in this regard, and the use of either suspended sentences

65 On this notion, see M. Holmboe, *Fengsel eller frihet? Om teori og praksis i norsk straffutmåling, særlig i grenselandet mellom fengsel og mildere reaksjoner* (Cappelen, Oslo 2018), pp. 60–62.

66 From the Norwegian Supreme Court's decision in Rt. 2013.630, sect. 14–15.

67 Code of administration of punishment 18 May 2001 sect. 53, second paragraph.

68 The rules were amended already in 1955, but the use of conditional sentence had then already expanded in practice, see Hauge (1996), pp. 257–258. See now PC 2005 sect. 34–39, in particular sect. 37.

69 For further reading, see Gröning/Husabø/Jacobsen (2019), pp. 617–619.

70 PC 2005 sect. 37 f.).

71 PC 2005 sect. 37 j).

72 PC 2005 sect. 37 k).

or community sentences requires that the offence is not very serious.[73] This is, however, only a starting point and exceptions can be made, as stated for community sentences in section 48 second paragraph of the 2005 code. For the most serious offences, proportionality considerations remain the most important and, where necessary, will limit the use of community sentences and (in particular) suspended sentences. Nevertheless, the Supreme Court has displayed a willingness to push this limit back. One recent example concerned a woman, convicted for serious drug crimes, including a breach of section 232 second paragraph first period (which sets the punishment for such acts as imprisonment for between 3 and 15 years), as she had received ten kilos of methamphetamine. The district court sentenced her to unconditional imprisonment for seven years and six months. After appeal, the Supreme Court, which is highly influential for sentencing practices in Norway, opted for a six-year-*suspended* imprisonment provided that the defendant carried out the court-led drug programme, so that her 'extraordinarily positive development over a period for almost three years' could be continued.[74]

When it comes to youths, this system of rehabilitative options is even further extended into even more serious offences.[75] In the code of 2005, the legislator introduced a new innovation: youth punishment. This is a rehabilitative sanction, which aims to reduce the use of unconditional prison sentences for young offenders even further than community sentences allow for. The reaction is also distinct as to its content. It is a restorative-justice inspired reaction, where the convicted youth will have to take part in a meeting where a representative for the conflict council takes part, in addition to others who have a stake either in the offence (e.g., the victim) or in the offender (such as parents or school representatives). In this meeting, a youth plan is worked out, which contains strict conditions for the youth for a certain period. The youth has to accept the plan, or go to prison. Despite a large amount of discretion available to those working out the plan, there is no court supervision, a solution which has been heavily criticised.[76]

What of the middle category within the positivistic system of sanctions? In the Norwegian system, this can be said to be represented by traditional forms of pun-

73 See e.g., Rt. 2013.776: A 17-year old boy had raped an elderly woman. This was considered too serious for a community sentence to be applied. However, one of five judges dissented and voted for a community sentence.

74 HR-2019–1643-A.

75 For an analysis of the Norwegian rules and also a comparison with the German and Swedish youth justice systems, see I. Fornes, *Straff av barn. Frihetsstraffene og alternativene* (UiB, Bergen 2018).

76 See Gröning/Husabø/Jacobsen (2019), pp. 633–639, also with references to some of the critical opinions.

ishment, i.e., sanctions that are designed to communicate to the offender the wrong done. These forms of punishment, first and foremost in terms of imprisonment or fines determined by the seriousness of the offence, remain in place and are used when there are no particular rehabilitative reasons or need for incapacitation. Also at this point there is, however, a certain development to register. The use of imprisonment has for a long time been decreasing in Norway, a process in which the introduction of community service (amongst other things) played a part. However, in recent years the punishment for certain offences, violent and sexual offences in particular, has been significantly increased.[77] Here we also see an institutional change: The Norwegian sentencing practice has for a long time been (comparatively) strongly centred on the rulings of the Supreme Court, which has had the role of a kind of semi-legislator in this regard.[78] After a longstanding 'dialogue' between the legislator, who called for more severe punishment for certain offences, and the Supreme Court, which for different (in many regards good) reasons was reluctant to follow the legislator's sometimes diffuse signalling, the legislator applied stronger means. In the preparatory works to the code of 2005, the legislator went one step further to gain influence on sentencing practice. The legislator picked examples from previous court practice and stated what the (increased) punishment for such cases should now be. Thereby, the legislator took a significant step into what has previously been considered the Supreme Court's prerogative. For murder, for example, the 'normal' level of punishment was raised from 10 years to 12 years in a single stroke.[79] Even more dramatic (from a Norwegian point of view) is the increase in sentences for certain sexual offences. Concerning the punishment for rape of a sleeping victim, the level of punishment was twelve times higher in 2013 than in 2000.[80]

What we have seen so far is that we started out from a classical, retrospective blame and proportionality-centred conception of punishment in the 1842 code. However, via the somewhat more complex and partly positivism-influenced system of sanctions in the code of 1902, the developments related to the code of 2005 have ended up in a multifaceted system of punishments. The two-track system of punishment and preventive means such as preventive detention has been abandoned, by giving preventive detention the status of *punishment*. Furthermore, re-

77 For an overview, see Jacobsen (2017b), p. 127.

78 Generally on the relationship between legislator, the courts, and the administration, see Gröning/Husabø/Jacobsen (2019), pp. 608–609.

79 Ot.prp. nr. 22 (2008–2009), p. 431.

80 See M. Matningsdal, «Høyesterett som straffedomstol – straffutmåling», in G. Bergby/T. Schei/J. E. A. Skoghøy/T. M. Øie (eds.), *Lov Sannhet Rett – Norges Høyesterett 200 år* (Universitetsforlaget, Oslo 2015), pp. 548–595, p. 576.

habilitation has gained a stronger influence on other forms of punishment now available. To some extent, these preventive means are sought limited by proportionality considerations. Still, major departures from the proportionality principle can be observed. The contours of a multi-track system (of aims) within the system of punishment are thus beginning to appear.

3. Adding a broader perspective: blurring foundational distinctions

A central feature of positivism is that it downplays the normative importance of the theoretical or principled distinctions that classical criminal law theorists usually emphasise. Distinctions such as those between wrongfulness, responsibility, and sanctions can, from a positivistic point of view, only be (more or less) useful means to identify those who should be reacted against.[81] For Liszt, for instance, the very distinction between punishment and safety measures could be questioned:

> 'Auch vermag er – wie in manch anderer Stellungnahme – nicht zu unterdrücken, daß er die ganze Scheidung von Strafen und sichernden Maßnahmen unter rein wissenschaftlichem Aspekt für nicht nachvollziehbar und unsinnig halte.'[82]

Here, as shown, the *forvaring*-punishment in Norway is more faithful to the positivistic approach than Liszt himself was. That positivism downplays the importance of traditional distinctions within the criminal law system gives us reason to broaden the perspective beyond punishment in the formal sense, and also look into the distinction between the criteria of criminal responsibility and the sanctioning part of the 2005 code, and even into the so-called *other criminal sanctions* which are not defined as punishment, but still applied as reactions to offences as part of the criminal proceedings.

The distinction between the criteria of criminal responsibility and the sanctioning part of the criminal code has traditionally been drawn quite sharply. In line with the clarity requirement (*Bestimmtheitsgebot*), it is generally an important task for the legislator to clarify on what grounds one can become criminally responsible, as this is a prerequisite for the applicability of punishment.[83] This is not

81 See here also for instance Naucke (1982), pp. 545–546.

82 W. Frisch, Das Marburger Programm und die Maßregeln der Besserung und Sicherung, *ZStW* 94 (1982), pp. 565–598, p. 571 with further references.

83 Further on the clarity requirement, see J. Jacobsen, *Fragment til forståing av den rettsstatlege strafferetten* (Fagbokforlaget, Bergen 2009), pp. 320 ff.

only important to the predictability of the law, but important also for the prevention of abuse of power: if the question of criminal responsibility was a matter of court discretion, then this would allow, for instance, for the character of the specific offender to influence whether punishment shall be applied. The clarity requirement cannot be too strictly interpreted: the limitations of language, the need for a certain flexibility in the norms, and the need for certain general norms such as the rules of necessity and self-defence to apply across specific offences, are all good reasons for this. Still, the ambition of clarity is essential, and in recent years —influenced by the practice of the European Court of Human Rights—the Norwegian Supreme Court has interpreted section 96 of the Norwegian Constitution and the European Convention of Human Rights Article 7 more strictly than before.[84] However, when it comes to the distinction between criteria for criminal responsibility and the sanctions, the Norwegian legislator seems to be moving towards a less strict approach. Most notably, this has been the case in regard to corporate criminal responsibility.[85]

When the general rules for corporate criminal responsibility were enacted (again as part of the process of developing the 2005 code), a high level of discretion for the courts was applied.[86] Fulfilling the formal criteria for such responsibility does not imply that the company will be punished. In fact, there is even no general presumption that it will be. Instead, the courts are assigned to make an individual consideration, based upon a set of points enumerated in the code.[87] This list contains different points, including traditional criminal law considerations related to the seriousness of the offence and whether the company can be blamed for it, but also less familiar considerations such as whether the company has been sanctioned by others for the offence and what the company has done to avoid further offences. Even the current financial situation of the company can be taken into account. In the 2005 code, this discretionary component became even more important as the legislator removed or seriously weakened the requirement concerning intent or negligence on the part of the person who acted on behalf of the company.[88] Instead, this is of relevance only to the discretion of the court. The

84 See e.g., the Supreme Court´s decision in HR-2016–1458-A, 18. See also Gröning/Husabø/Jacobsen (2019), pp. 61–76 and especially p. 68–72, with further references, for more on this topic.

85 On the Norwegian law on corporate criminal responsibility, see Gröning/Husabø/Jacobsen (2019), pp. 743–769, with further references.

86 PC 2005 sect. 27.

87 PC 2005 sect. 28.

88 See the PC 2005 sect. 27, first paragraph that says: 'When a penal provision is violated by a person who has acted on behalf of an enterprise, the enterprise is liable to punishment. This applies even if no single person meets the culpability or the accountability requirement, see section 20' (Stiftelsen Lovtata's translation).

rules on corporate criminal responsibility have been subject to debate.[89] In particular, in light of the current development it is fair to ask whether this sanction at all belongs in criminal law.

This weakening of the demarcation line between the criteria for criminal responsibility and the sanctioning system appears also for individuals, albeit not in such a clear-cut way as for corporations. An example of this is provided by the new regulations concerning ignorance of the law. Here, the legislator has opted to consider certain instances of ignorance that in some way concern legal matters, but which had previously been considered as intent-relevant factual mistakes, as cases of ignorance of the law, which have a higher threshold for excuse of criminal responsibility.[90] This implies a shift from a requirement of intent to negligence. Already during the drafting of this rule, this was subject to critique.[91] However, the critique was downplayed by the possibility of solving unfairly and harshly treated cases by reducing the punishment or simply abstaining from applying a punishment.[92] Other examples of downplaying the distinction between criteria for criminal responsibility and sanctioning can be found in several rules that now give the court more discretion on whether the existence of certain facts should absolve one from criminal responsibility or not. Disproportionate self-defence is an example of this.[93] Previously, these rules shielded one from criminal responsibility if certain criteria were fulfilled. This has now been changed to being a part of the sanctioning system.

The other perspective we should add to our investigation is the development of the so-called 'other criminal sanctions'.[94] This covers a long series of other reactions that can be applied to an offence, in many cases even if the criteria for criminal responsibility are not fulfilled. This is for instance the case with forfeiture of criminal gains or means for criminal offences.[95] Most interestingly for us is the continuous extension of the safeguarding measures. As mentioned, in 2001 there was a reform of the safeguarding measures, which resulted in the current *forvar-*

89 See Gröning/Husabø/Jacobsen (2019), pp. 745–748, with further references. After the Norwegian Parliament requested the Government to propose a clearer and more effective anti-corruption legislation in May 2018, the lawyer and scholar Knut Høivik has been assigned to evaluate the anti-corruption rules and corporate criminal responsibility in general.

90 PC 2005 sect. 25 on factual mistakes and sect. 26 on legal mistakes.

91 See Gröning/Husabø/Jacobsen (2019), pp. 250–256, also with references to other critique of this solution.

92 Ot.prp. nr. 90 (2003–2004), p. 430.

93 PC 2005 sect. 81, letter b.

94 Listed in the Penal Code 2005 section 30. See further Gröning/Husabø/Jacobsen (2019), pp. 645–664.

95 PC 2005 sect. 66–76.

ings-punishment for dangerous offenders.[96] This reform also generated preventive means for insane offenders and persons with mental disability, both of which principally belong in the care of the mental health sector and/or social services, not in the criminal justice system.[97] For this reason, these forms of preventive detention were limited to highly serious crimes. In a reform in 2016, however, so-called 'troublesome' insane offenders were also included.[98] Thereby, the criminal law was assigned responsibility even for insane offenders who represent a danger for instance, for drug crimes or burglary.[99] Furthermore, in 2019, the insanity regulation was amended in terms of a step away from the traditional medical model applied in Norwegian criminal law, to a new, more discretionary regulation.[100]

So, on the one hand the system of criminal sanctions has been extended to go further into covering groups or individuals that do not belong within the criminal justice system in the first place. On the other hand, the system for whether and how these individuals should be sanctioned is now blurred. This adds to the development we have seen in regards to the forms of punishment and use thereof.

IV. Analysis: The Last Laugh Is on Liszt?

Let us now turn from these many different amendments in the Norwegian system of criminal sanctions in recent decades, and add an overall perspective on the development. Whereas a proportionality-based system will contain different categories for different severities of crimes, in the Norwegian criminal justice system *offender traits* seem to be increasingly central, and proportionality considerations correspondingly less so. One perspective on this development is to view it as a reorientation from the seriousness of acts to a judgement of individual *characters*.[101] However, a character orientation can be either ethical in an Aristotelian sense where our characters are what we in the end are responsible for and (hence) can be blamed for or instrumental where the character of the offender is central to the judgement of how the state should deal with this specific offender, or groups

96 PC 2005 sect. 40–47.

97 PC 2005 sect. 62–65.

98 PC 2005 sect. 62, first paragraph, second sentence and forth paragraph. See also NOU 2014: 10.

99 See further Gröning/Husabø/Jacobsen (2019), pp. 661–662.

100 PC 2005 sect. 20 is amended by Lov om endringer i straffeloven og straffeprosessloven mv. (skyldevne, samfunnsvern og sakkyndighet) 21. juni 2019 nr. 48, not yet (October 2019) in force. See here also e.g., L. Gröning, Hvordan skal vi avgjøre om alvorlig sinnslidelse innebærer utilregnelighet? Refleksjoner om lovforslaget i Prop. 154 L (2016–2017), *BJCLCJ* 5 (2017), pp. 77–85.

101 See further Jacobsen (2017b), pp. 136–141.

of such. The Norwegian development is clearly most compatible with the latter of the two alternatives. It is also here that the Liszt-perspective may help us sharpen our interpretation of the development, as this can be said to concretise this kind of instrumental approach.[102]

If we once more pick up on the three-track system of incapacitation of dangerous offenders, deterrence-like reactions for normal offenders, and rehabilitation of offenders with the need and potential for this, the article so far has shown that the Norwegian system of criminal sanctions shows signs of developing into this kind of differentiated system, with clearer instrumental 'tracks' for different kinds of offenders. There is, as we have seen, a separate, indeterminate *punishment* for dangerous offenders, while community sentences, youth punishment, and suspended sentences (with requirements of completion of rehabilitation programmes) are central alternatives for those who can be improved. Thereby, it seems as if the Norwegian system of criminal sanctions today lies closer to being a positivistic code than the code of 1902 ever was, and thereby something Liszt would have been even more sympathetic towards than he was to the code of 1902.[103] Even if Liszt did not have a strong impact on Norwegian criminal law in 1902, he may have sown a seed which now may be about to blossom.

However, other observations may dispute this. As mentioned, in Norway there has not been much talk of Liszt's ideas in recent years, and other developments in the same period may seem to contradict the aforementioned a view. In regard to some crimes at least, proportionality considerations seem to have gained a stronger influence, resulting in harsher punishment for certain crimes, violence and sexual offences in particular. However, this seems often a result of populism and bad political dynamics.[104] The perhaps best example of this is drug crimes, which from the 1970s onwards rapidly increased, leading to professional drug crimes being punished similarly to murder. This kind of development would

102 In Jacobsen (2017b), p. 139, I only indicated the relevance of the Liszt perspective, however, without exploring this as I do here.

103 The endurance and influence of Liszt's ideas are also emphasised in German, see e.g., Stäcker (2011), pp. 411: 'Die Betrachtungen der verschiedenen Abschnitte der Strafrechtsentwicklung haben gezeigt, welch weitreichenden Einfluss die Ideen Franz von Liszts über seinen Tod hinaus bis zur Gegenwart ausüben.'

104 On criminal policy populism in Norway, see e.g., R. Hauge, Populisme, politikk og straff, in E. Schaanning (ed.), *Straff i det norske samfunnet* (Humanist forlag, Oslo 2002), pp. 51–63. This populism is of course no particular Norwegian phenomenon, see for instance T. Elholm/R. Colson, The Symbolic Purpose of EU Criminal Law, R. Colson/S. Field (eds.), *EU Criminal Justice and the Challenges of Diversity: Legal Cultures in the Area of Freedom, Security and Justice* (CUP, Cambridge 2016), pp. 48–64.

most certainly be rejected by Liszt.[105] Populist penal policy contradicts much of what Liszt stood for. He was a professional criminal law reformer, committed to a policy-rational point of view.[106] Populism has little to do with the kind of (empirical) knowledge-based criminal law and the concept and role of (empirical) science that Liszt advocated. This trend in criminal policy makes the expert role that Liszt so strongly sought for obsolete.[107] From this point of view, the development is not in line with Liszt.

However, even though some of the developments certainly have their motive in populist considerations, other trends in the sanction system clearly have a more rational policy character, a character that lies much closer to Liszt's position. Examples of this development include the current (indeterminate) *forvarings*-punishment, loss of rights, for instance in terms of contact-restrictions, and perhaps most of all, the drive to keep youths out of prison by means of more constructive/rehabilitative sanctions. Furthermore, we should distinguish between the *intentions* behind the steps that are taken and the *results* of these. Even if populism may explain parts of the development, this does not in itself exclude the possibility of Liszt being able to acknowledge and sympathise with solutions following from populist motives. It may be that the positivistic development is 'blind' in this regard, i.e., that the development of the sanctioning system does not deliberately follow an overall programme, but rather consists in a series of separate changes reflecting partly overlapping, partly conflicting aims, that together result in something like a positivistic programme. Finally, even in regard to the populist drives, there may be more compatibility with Liszt's ideas than what this rational/irrational dichotomy at first may indicate. The emphasis on proportionality with regard to violence and sexual crimes may at least in part be considered as drivers towards incapacitation in disguise. The (seemingly) proportionality-driven sentence increase can, at least to some extent, be said to reflect the dangerousness-track within the sanctioning system, so too are attempts to increase the level of punishment for multiple offences.[108] Another question is, then, why does a criminal justice system which is subject to such populism end up in a positivist-like system? This we will get back to.

105 Thanks to professor Thomas Elholm (Copenhagen) for pressing me on this point.

106 See e.g., Liszt (1899), in particular pp. 293–294. See here also Stäcker (2011), pp. 362–364.

107 See further on recent criminal policy and the changing role of the criminal law expert in Jacobsen (2009), pp. 31–84.

108 A government proposal from 2016 about significantly increased punishment in cases where several crimes were to be sentenced received much criticism and was rejected, see Gröning/Husabø/Jacobsen (2019), p. 672.

So, it still seems fair to describe the development as 'positivistic', even if not in the sense of being an intentional implementation of, for instance, Liszt's (scientific) programme. The absence of this kind of programme follows clearly from the fact that in the decades up until the code of 2005, the Norwegian criminal law hardly had *any* such principled *programmes* to be developed from. Certainly, Norwegian criminal law is founded on *principles*.[109] It originates from and still belongs to the Continental family of criminal law orders, founded on two fundamental principles in particular: the formal principle of *nulla poena sine lege* and the material principle of guilt. These principles are essential to the entire Norwegian criminal law and constitutive of the system of rules that currently exists. In addition, it should be mentioned that recently, the Norwegian constitution of 1814 was revised and expanded to mirror the ECHR, which resulted in a stronger rights-basis also for criminal law.[110] Moreover, to some extent the drafting of the code of 2005 included some principled *ambitions*. Most notably, the Penal Code Commission did opt for a harm principle as the guiding principle for criminalisation, which the legislator accepted, even if it somewhat downplayed it by adopting a more watered-down version.[111] In addition, the contemporary return to the historical system of criminal law versus police law, by removing many reactions to breaches of administrative law from the sphere of criminal law, should be mentioned here. In time, this may result in something that can resemble the German system of *Ordnungswidrigkeiten*.[112] So, it would thereby be wrong to say that Norwegian criminal law lacks principles.

However, these principles reside in, and are weakened by, a pragmatic legal culture.[113] First of all, this allows for many conflicting 'principles'. For instance, the turn to the harm principle appears shallow, and illustrates how Norwegian criminal law can 'adopt' different principles alongside others and water them down into a mishmash of ideas and compromises. Nowhere is this more evident

109 See for a 'rational reconstruction', Jacobsen (2009), pp. 401 ff.

110 For an overview of the expanded catalogue of rights in the Constitution, see e.g., J. Aall, *Rettsstat og menneskerettigheter. En innføring i vernet om individets sivile og politiske rettigheter etter den norske forfatning og etter den europeiske menneskerettighetskonvensjon*, 5. utg. (Fagbokforlaget, Bergen 2018).

111 For a critical analysis, see T. Frøberg, Prinsippstyring av strafferettspolitikken, *Kritisk juss* 36 (2010), pp. 38–63 and, for instance, in regard to criminalisation of use and possession for use in J. Jacobsen/S. Taslaman, The Norwegian Criminal Regulation of Drugs: An Overview and Some Principled Challenges, *Bergen Journal of Criminal Law and Criminal Justice* 6 (2018), pp. 20–52.

112 Discussed in detail in J. Jacobsen, Gjensyn med kriminalretten?, G. Heivoll/S. Flaatten (eds.), *Rettslige overgangsformer: Politi- og kriminalrett i nordisk rettsutvikling* (Akademisk publ., Oslo 2017c), pp. 284–325.

113 See Jacobsen (2011).

than in the sentencing ideology of the Supreme Court, which is highly flexible and gives room for different and conflicting considerations, in clear contrast to, for instance, the proportionality-focused system in Sweden.[114] Another feature of this pragmatic legal culture is the influence of utility-considerations. For instance, the sanctioning system reform, where steps were taken to move the administrative offences out of criminal law into an administrative sanctioning system, was not first and foremost a principled project, but instead a response to efficiency problems. What we are speaking of here is a kind of 'surface fluidity' where the deep structural basis in Continental-style criminal law has not been a hindrance for surface solutions that are in clear tension with this basis. Thereby, the criminal law has been left open to a series of unprincipled changes, which seem to have in common that they strengthen criminal law as *an instrument of control*—which indeed the Norwegian welfare state has a tendency towards.[115]

Behind these developments lie tendencies and drivers well known to criminal law discourse, which we already have touched upon.[116] This covers tendencies such as the repressive drive and politicisation of criminal law from the 1980s onwards, economic crises, and neo-liberal economic thinking in the justice sector. It also includes 'sectoral' human rights advocates that have forged an allegiance with control-oriented political forces, for the protection of women and children in particular—both of which lack understanding of the different freedom spheres that must be taken into account for a valid and justifiable development of criminal law. Yet it is not only 'negative' forces that have been in play. The aforementioned development concerning youths, for instance, is also a product of a stronger emphasis on the rights of children. However, when we sum up the results of this unfolding of different forces and their influence on the development on the Norwegian criminal justice system, we see the emergence of different lines of development that in effect resemble positivistic-style thinking.

So, to close this article, it is fair to ask: what is the value of this Liszt analogy? First of all, we may have got closer to an explanation of why Norway was to become hailed as a beacon for positivism at the beginning of the 20th century. The explanation may very well be a certain receptiveness in the Norwegian legal cul-

114 See e.g., M. Borgeke/M. Heidenborg, *Att bestämma påföljd för brott*, 3rd ed. (Wolters Kluwer, Stockholm 2016), in particular pp. 31 ff.

115 See further e.g., the debates on the so-called 'Nordic exceptionalism' in penal policy in T. Ugelvik/J. Dullum, *Penal Exceptionalism? Nordic Prison Policy and Practice* (Routledge, London 2012).

116 Several important theoretical enterprises have put this development under scrutiny, see, for instance, the works of Markus D. Dubber, such as *The Dual Penal State – The Crisis of Criminal Law in Comparative-Historical Perspective* (Oxford, OUP 2018).

ture for ideas of the kind advocated by Liszt. In addition, I think we have become able to give more contours to what otherwise is a clearly confusing development in the Norwegian system of criminal sanctions. Such overarching perspectives have been lacking in recent decades, and the Norwegian system of criminal sanctions, in all its fluidity and complexity, is in my opinion best captured by this analogy. It also has a further benefit: it brings us back to a time where there were principled and theoretical perspectives on this development. Hagerup's growing scepticism towards the positivistic enterprise may remind us of the reasons we have for keeping a critical eye on contemporary developments. Historically, positivism challenged central criminal law principles, principles that not least were developed from the experience of abuse of power in pre-modern European societies. It might be that the Marburger Programme was the breakthrough of modern criminal law, and there is no alternative today to this kind of criminal law.[117] This does not, however, exclude the possibility of influencing the development and the concrete outcome of this process. We should use this Lisztian analogy as a basis for developing some kind of normatively more robust architecture for the Norwegian system of criminal sanctions. Finally, this Norwegian story can also be said to give some feedback to the discussion of Liszt's programme. In my opinion, it testifies to the problems with this view of criminal law that a 'blind' and so troubled development as the one in the Norwegian system of criminal sanctions so easily falls into the picture of being a positivistic system of criminal sanctions.

117 See in particular Naucke (1982), p. 563: 'Vielleicht besteht *v. Liszts* Größe darin, gesehen und ausgesprochen zu haben, daß im modernen Staat wirklich keine Alternative zum zweckmäßigen Strafrecht besteht, daß dieses Strafrecht politisch nicht zu vermeiden ist.'