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Crime-based deportation and its compatibility with the principle of *ne bis in idem*

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Institute for Human Rights Working Paper

No. 1/2025

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1. Crime-based deportation and *ne bis in idem*?

Post-entry criminal activity of non-citizens is seldom tolerated in countries of residence. In addition to their criminal sentence, foreigner convicts often face the loss of their residence permits and deportation after serving whatever sentence they were given. In contrast to citizens, who merely serve their prison sentences, non-citizens can face significant additional legal measures that may result in banishment and total detachment and isolation from well-established lives in the country of residence. It seems contradictory to first aim to rehabilitate convicts via imprisonment, but preclude some, based on their status, from living in society as rehabilitated after release.

Crime-based deportation as a policy often seeks to fulfil two primary purposes: deter and control criminal activity in communities and sustain the credibility of national immigration policies.[1] Crime-based deportation is commonly classified as a civil law measure or an administrative law sanction, not as a punishment. Although a well-established practice and in many ways sensible repercussion for criminal activity in a country of residence, crime-based deportation does, in essence, result in two different legal proceedings and consequences for non-citizens. First, they are convicted according to criminal law and punished with a criminal sentence. Second, after serving that sentence, as a direct consequence of the criminal law process, they undergo an administrative or civil law process where they receive a decision on annulment of their residence permit and on their deportation, most often accompanied with an entry ban either to the country of residence or for example in the EU, the entire Schengen-area.

Countries, courts, and immigration officials have long approached deportation as means of regulating aliens, not punishing them.[2] Regardless of the authorities' attempts to

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[1] Daniel Kanstroom, 'Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases' (2000) 113 Harvard Law Review 1890, 1893.

[2] ibid 1894.

avoid the word punishment, the effects on the deported individual resemble punishment in many ways. An undeniable fact is that immigration law and criminal law have integrated along the attempts to control mass mobility of humans, but the legal foundations of these policies remain somewhat unquestioned, and that should raise some concern.[3] Solely because immigration law is not a part of criminal justice, the fundamental fair trial rights, and fairness and equality of treatment are somehow overlooked when deporting convicted non-citizens.[4] *Ne bis in idem* or *bis de eadem re ne sit actio* in its full expression is one of the core principles of a fair trial and means the right not to be prosecuted or punished twice for one offence.[5] The principle is protected in several international treaties, for example in Article 4 of Protocol No. 7 to the European Convention on Human Rights (hereinafter ECHR). *Ne bis in idem* is considered to be a precondition for a fair trial, an important guarantee for legal certainty and proportionality and a component of the proper administration of justice. The principle prohibits double punishment as well as double prosecution. In practice any second criminal proceedings are, due to the *ne bis in idem* principle, inapplicable once the first proceedings have become final. The finality of the first proceedings leads to the inadmissibility of any second proceedings.[6]

Ne bis in idem is an essential part of fair trial rights and is a procedural safeguard in criminal law. The principle protects individuals from suffering two punishments for one offence, regardless of whether one of the punishments is called and categorized as an administrative sanction. Usually, this criminal law principle is connected with and invoked within areas of law which include administrative decision-making and exercise of administrative powers, such as sanctioning. Primary examples are tax law and environmental law and regulations, where extensive administrative and sanctioning powers are allocated not to judicial organs but to administrative officials.

Immigration law is also an area of law where extensive administrative powers are assigned to administrative officials. Deportation is commonly classified as an administrative sanction, and thus, has quite a lot in common with other areas of law which permit administrative sanctioning. In principle, *ne bis in idem* should also apply to immigration law and administrative sanctions ordered within immigration law. Yet, *ne*

[3] Jennifer Chacón, 'Managing Migration through Crime' (2009) 109 Columbia Law Review 135, 147–148.

[4] Mary Bosworth, 'Immigration Detention, Punishment and the Transformation of Justice' (2017) 28(1) Social & Legal Studies 81, 81–82.

[5] John AE Vervaele, 'Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?' (2013) 9 Utrecht Law Review 211, 212.

[6] WB van Bockel, The Ne Bis in Idem Principle in EU Law: A Conceptual and Jurisprudential Analysis (Leiden Universiteit 2009) 29–30, 35–37.

bis in idem has not been invoked in cases concerning crime-based deportation and such an idea seems rather unfeasible in modern immigration policy. I argue that the principle of *ne bis in idem* could and should equally be explored within the context of immigration law.

Deportation is regulated under administrative immigration law, not criminal law. Classification of deportation as a regulatory measure instead of a punishment does under closer examination appear rather arbitrary and in the lack of any other proper explanation, seems to exist for the sole purpose of justifying immigration policies and immigration control. However, the classification as administrative sanction does not determine the applicability of the principle of *ne bis in idem* under the ECHR. Administrative sanctions ordered within other areas of law often amount to punishments within the meaning of *ne bis in idem,* so why not immigration control measures such as deportation?

For the purposes of this article, *ne bis in idem* is analysed with the intention of determining whether crime-based deportation could be seen as a second punishment for the same crime within the commonly accepted meaning of the principle. The compatibility of *ne bis in idem* and crime-based deportation is approached with a specific focus to Europe, the European Union and the jurisprudence of European Courts in relation to third-country nationals within the EU that have faced deportation due to criminal activity. A third-country national is any person who is not a citizen of the European Union within the meaning of Article 20 of the Treaty on the Functioning of the European Union[7] and who, through the loss of their residence permit, no longer enjoy the EU citizens' right to free movement under Union law within the Schengen area.[8]

[7] 'Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.' Consolidated version of the Treaty on the Functioning of the European Union 2012 (Official Journal of the European Union) 47, art 20 (1).

[8] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) 2004; See also the Schengen Border Code: Art 2(5) "persons enjoying the right to free movement under Union law means: a] Union citizens within the meaning of Article 20(1) TFEU, and third-country nationals who are members of the family of a Union citizen exercising his or her right to free movement to whom Directive 2004/38/EC of the European Parliament and of the Council applies; b) third-country nationals and their family members, whatever their nationality, who, under agreements between the Union and its Member States, on the one hand, and those third countries, on the other hand, enjoy rights of free movement equivalent to those of Union citizens". Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) 2016 (OJ L).

Finland and the Finnish Aliens Act are used as examples of national legislation and practice.

Many questions arise when exploring immigration law and *ne bis in idem,* many of which derive from the merger of immigration law with criminal law and selective borrowing of criminal enforcement measures without the corresponding procedural safeguards. The main intention of this article is to test how well crime-based deportation as a proceeding satisfies the criteria of applicability of *ne bis in idem* and what exactly is the legal nature of the proceeding.

2. Immigration law: administrative law, criminal law or ad hoc instrumentalism?

Policies concerning crime-based deportation have been criticized for being too broad as to the range of crimes that can constitute the basis for deportation or of lacking sufficient assessment of the individual's situation, relating both to the severity and circumstances of the crime and the personal situation of the individual and their rights to, for example, family life.[9]

Concerns over the punitiveness of deportation and the extreme circumstances the deportee is forced into, were expressed already in 1926 by an American judge Learned Hand:

> "However heinous crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples. Such, indeed, it would be to anyone, but to one already proved to be incapable of honest living, a helpless waif in a strange land, it will be utter destruction. That our reasonable efforts to rid ourselves of unassimilable immigrants should in execution be attended by such a cruel and barbarous result would be a national reproach."[10]

At the very core of this topic is a larger phenomenon, a development in immigration law in which administrative law and criminal law have grown almost indistinct. In this new system, immigration enforcement and criminal justice are being used interchangeably.

[9] 'U.S. Citizen Children Impacted by Immigration Enforcement' (American Immigration Council, 28 March 2017) accessed 5 November 2023.

[10] The case concerned an individual of Polish origin, who had been deported after two convictions over burglaries. On behalf of the Second Circuit, Judge Learned Hand, unable to block the deportation yet strongly dissatisfied with the solution, encouraged the individual to be pardoned. United States ex rel Klonis v Davis, 13 F 2d 630 (US Court of Appeals 2d Cir). As cited in David Alan Sklansky, 'Crime, Immigration, and Ad Hoc Instrumentalism' (2012) 15 New Criminal Law Review 157, 175–176.

Sklansky has cleverly called it “ad hoc instrumentalism”, a modern application of laws in which legal institutions and measures are just interchangeable tools, from which national officials may choose the most effective one for a particular need. In such a system, law is implemented in terms of effectiveness, overlooking procedural standards and the generally accepted rules and procedural safeguards of criminal justice.[11]

The status quo of punitive immigration measures is very much restricted to the notion of state sovereignty. It has been recognized that the theoretical work on punishment has yet to properly address the strictly national standpoint and frame of analysis.[12]

The fundamental issue in deportation practices is that immigration control measures that are adopted under administrative law have criminal law implications and may even resemble a punishment. The issue of the punitive nature of deportation cannot be discussed in vacuum, and not without taking into account the underlying reason: blurredness and indistinctness of administrative and criminal law. This is especially evident in immigration law, where unarguably, the boundaries of border control, immigration control and societal control are intertwined and interconnected.

Although immigration law stems from and exists in the domestic setting and is at the core of a state’s margin of appreciation, its international dimension is undeniable. International treaties and EU law affect formulation of immigration law domestically and immigration law is very sensitive to human rights law. Decisions made in the sphere of immigration law have strong implications for the realization of basic human rights and fundamental freedoms of the person concerned. Simultaneously, immigration law is under heavy national pressure.[13]

As Kmak has argued in her article ‘Crimmigration and Othering in the Finnish Law and Pratice of Immigration Detention’, crimmigration takes the form of immigrationalisation of criminal law and criminalization of administrative law.[14] With crimmigration Kmak means the interconnectedness of immigration and punishment in societal control and

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[11] ibid 160–161.

[12] See preface of Katja Franko Aas and Mary Bosworth eds., The Borders of Punishment — Migration, Citizenship, and Social Exclusion (Oxford University Press 2013).

[13] Elina Pirjatanniemi, ‘Muukalaisia ja muita ihmisiä’ (2014) 7–8 Lakimies 953, 954.

[14] Magdalena Kmak, ‘Crimmigration and Othering in the Finnish Law and Practice of Immigration Detention’ [2018] No Foundations — An Interdisciplinary Journal of Law and Justice 1, 14. Kmak’s study focuses on the legislative and societal context of Finland and the Finnish Aliens Act as the administrative legislation increasingly being used as a criminal law source. Kmak also studies the measure of immigration detention, not deportation, but the study touches upon many of the same issues dealt with within this article and offers insight into the interconnectedness of administrative law and criminal law in the context of immigration.

that immigration control is increasingly intertwined with overall societal control. Kmak continues to argue for the existence of "the bordered" being the element of immigration and the "ordered" being the element of punishment, and that these elements are inevitably interconnected in the current state of society.[15]

In the context of Finnish immigration detention practices, Kmak notices that immigration control is increasingly being used for crime prevention and border control, confusing and blurring the line between these two distinct areas of law. Kmak's study shows that measures taken under immigration law, which falls under administrative law in most cases, are forming parts of criminal procedure or add-on to it. This becomes, according to Kmak, visible in detention practices when the mere suspicion of crime or future criminality may become permissible grounds for detention. These amount to differing treatment quite quickly, as the study shows, where a citizen could settle the issue with a fine, a foreigner might be held in detention, regardless of the fact that detention should be directly related to the severity of the crime. The low threshold for detention is seemingly permitted for the purposes of promoting and ensuring public order.[16]

The merger of immigration and criminal law has been studied by Juliet Stumpf. Stumpf has proposed that at the very heart of this merger is membership theory, which limits individual rights for the primacy of members of a social contract of government and the people. Membership theory is both inclusionary and exclusionary and manifests the sovereign states powers.[17] According to Stumpf, the convergence of immigration law is in a way unremarkable, as both areas of law serve a purpose of determining the insiders from the outsiders, the innocent from the guilty, the legal from the illegal, which is very consistent with membership theory.[18] Stumpf dates the very beginning of this membership theory and crimmigration law to a larger trend in criminal penology, where a rehabilitation model is slowly being replaced with a retributivist model.[19]

Other scholars have also noticed this way of applying law in an innovative way. Officials are increasingly using administrative law measures and criminal justice measures interchangeably, always choosing the one most suitable for a particular issue.[20] This

[15] ibid 1, 13.

[16] ibid 13–16.

[17] Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power' (2006) 56 American University Law Review 377–378.

[18] ibid 380.

[19] ibid 403–404.

[20] Sklansky (n. 10) 161.

interconnectedness is not a mishap nor an unforeseen result of legislative changes over a long period of time. Instead, the interconnectedness is, at least to some level, a choice made willingly for the purposes of efficiency. Criminal justice is not particularly flexible, yet flexible immigration control is increasingly needed to manage rapid population movement, and to answer to rising nativism and rising interest in security.[21]

Könönen has even stated that this interconnectedness is a preference of the authorities. Instead of the criminalization of immigration, Könönen would classify it as the punitive application of immigration law,[22] an innovative way of applying control measures where the criminal justice system is simply too slow or inflexible. Application of criminal law presumes exceptionally strong due process rights, an arsenal of legal protections for the individual, which are experienced cumbersome and seen as hindering the timely application of control measures to ensure public safety, national security or other imperative interest of the sovereign state.

This phenomenon could also be called the hybrid channel of applying administrative and criminal law interchangeably. This hybrid application is attractive among authorities as they mitigate the standard requirements of criminal law.[23] Zedner has connected this development with the trend towards status offences. The continuously increasing amount of immigration laws and the criminalization of immigration related acts, for example the failure to produce a passport upon request, is testing the core principles of criminal law, for example the wrongfulness criterion. Many states have criminalized conduct whose harmfulness or wrongfulness is at best minimal, and in disregard of the fact that such laws fail to satisfy the very basic principles of criminal law. Such status offences together with this administrative-criminal hybrid procedure adversely affect non-citizens and the effective exercise of their rights. Zedner characterizes this as resembling the creation of a separate, less-favourable criminal law for non-citizens.[24]

Crimmigration has not only instigated an increased number of immigration laws but also an increased number of acts defined as violations of immigration laws which can constitute criminal offences. The convergence has increased the range, severity, and frequency of criminal prosecutions of immigration offences. Crimmigration has prompted the introduction of a variety of new, punishable immigration offences, e.g.

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[21] Sklansky (n. 10) 180–221.

[22] Jukka Könönen, 'Foreigners' Crime and Punishment: Punitive Application of Immigration Law as a Substitute for Criminal Justice' [2023] Theoretical Criminology 1, 14–15.

[23] Lucia Zedner, 'Is the Criminal Law Only for Citizens? A Problem at the Borders of Punishment', Katja Franko Aas and Mary Bosworth eds. The Borders of Punishment — Migration, Citizenship, and Social Exclusion (Oxford University Press 2013) 53.

[24] ibid

marrying for the purposes of evading immigration laws, failure to provide information or documents or obstructing an immigration officer. There is also a visible increase in the number of sentences and the number of prosecutions for immigration offences. Crime has become a large point of attention in the field of immigration and states are increasingly relying on criminal enforcement as a method of control. Additionally, more attention is targeted to the post-entry conduct of foreigners.

Crimmigration law poses increased emphasis on crimes that can only be committed by non-citizens, which in its turn expands potential grounds for removals and deportations.[25] Crimmigration has also changed which authorities are permitted to impose formal sanctions. The expansion of immigration acts has entailed the expansion of authority powers of the police and immigration officials and increased the discretion among these authorities. Important decision-making concerning administrative measures similar to punishments are not imposed by judicial organs, but other officials and authorities, who would not in any other instances hold such powers.[26]

This interconnectedness is also visible in such judicial proceedings where the criminal sentencing is merged together with the immigration measure. In practice, two originally separate procedures and systems are merged in together in such a way that a criminal tribunal might resolve not only the criminal case but also implement and impose immigration laws.[27] This is not the case in many states, and deportation orders might be issued by immigration officials or perhaps the police, while offering the deportee the possibility of judicial appeal. However, it is quite staggering that some states have allocated the issuing of deportation orders to courts or specific tribunals while other states leave this responsibility to administrative authorities and only if an appeal is made, a judiciary or a court will be able to examine the case. Either way, the separation of powers and procedures has become less significant, presumably for the benefit of efficiency.

Not all scholars agree that this phenomenon is problematic. Some suggest that the emergence of strict immigration control and strict and vast immigration legislation is

[25] Removal and deportation as terms are nowadays used somewhat indistinctly in different national contexts. Most states' legislation refers to removal as a general term concerning removal of a person to their country of origin in all possible situations. The Finnish Aliens Act refers to deportation as the removal measure. The Finnish Aliens Act also refers to refusal of entry and denial of admittance or stay. Thus, deportation is used when a third-country national with legal status or expired legal status is deported, while those whose status is never recognized, who receive a negative decision or who have broken entry rules are simply denied entry or denied admittance and stay.

[26] Stumpf (n. 17) 62, 67.

[27] Lisa R Fine, 'Preventing Miscarriages of Justice: Reinstating the Use of Judicial Recommendations against Deportation Note' (1997) 12 Georgetown Immigration Law Journal 491, 493.

quite rational, as they exist for the benefit of the domestic society, and not the foreigners. From this viewpoint, pretty much any qualifications for entry or stay are permissible, as they are created by the citizenry and for the citizenry.[28]

Some might argue that the trend of increased prosecutions and sentences among foreigners is a direct consequence of the increased number of foreigners, and the increased number of foreigners is due to the global migration movement in the past decades. However, many studies confirm that although there is a shift in the general attitude, and trend towards stricter societal control and crimmigration law, immigration flows seem to have no impact on the receiving country's crime rates. In fact, immigrants seem even less likely to commit crimes than citizens.[29] Therefore, it seems that crimmigration as a trend relates to the difficulty to control and select immigrants through other means than criminal enforcement. It could even be concluded that crime-based deportation is, at least to some extent and in the lack of more secure and well-founded legal means, used intentionally as an immigration control measure.

The underlying reason for the shift in attitudes has been explained by public perceptions, stereotypes and associations of immigrants with criminals. These perceptions confuse illegal or irregular migration with legal migration and immigration related violations with criminality and terrorism. It could also be related to a correlation between an average immigrant and an average criminal: younger, less educated and male.

3. Protection of public order or punishment?

The motivations behind expulsion measures are often ambiguous. Crime prevention and punishment are seldom differentiated in domestic practices to such a level that conclusions could be drawn easily.[30] The only determinant should not be the classification of a measure in national legislation as administrative law or as criminal law. The comparability to criminal law measures is equally important as well as the overall burdening of the applied measure on the person. In deportation cases there is always

[28] Daniel I Morales, 'Transforming Crime-Based Deportation' (2017) 92 New York University Law Review i, 702–703.

[29] See for example the studies of Milo Bianchi, Paolo Buonanno and Paolo Pinotti, 'Do Immigrants Cause Crime?' (2012) 10 Journal of the European Economic Association 1318; Ran Abramitzky and others, 'Law-Abiding Immigrants: The Incarceration Gap Between Immigrants and the US-Born, 1850–2020' (National Bureau of Economic Research, July 2023) accessed 27 February 2024. The latter has even been able to prove that in the US immigrants have been up to 60 % less likely to be incarcerated than US-born citizens.

[30] Amanda Spalding, 'Revisiting the Punitiveness of Deportation' [2024] Legal Studies 1, 7.

an interest that is being protected at the expense of the individual's interest. In legal contexts this is often one of the following: public order, public interest and public safety or a punishment in the form of a foreseeable consequence for non-compliance with entry or stay -regulations. The underlying motivations and concepts, often politics and political agendas, are, however, seldom clarified on the level of single laws and bills.

Deportation is essentially a measure decided through legislative policy. Marinelli has already in 1986 in their paper discussed the conflict between protecting individual rights of criminal aliens and protecting public interest. According to Marinelli, although a third-country national (once they have acquired a legal resident status in the receiving country) is in principle entitled to the same protection of rights as a citizen, a third-country national may never be awarded a right to remain. The government will always reserve the right to deport an alien should public interest or public safety so require.[31]

Public safety and public interest are fundamental parts of a state's sovereignty and important elements of necessity and proportionality assessments when implementing immigration control measures. In order to protect the safety of others and the functioning of society, the expulsion of "dangerous" criminal aliens might be necessary. If, however, deportation is considered to entail punitive connotations or is even considered in its totality to be a punitive measure, issues arise, as *ne bis in idem* would be violated. This would force authorities to classify immigration control measures, including crime-based deportation, as protection of public interest, even when they quite evidently are not free from punitive intent.

The concepts of public safety and order, national security and public interest are, even among scholars and courts, highly ambiguous. In the context of deporting EU citizens within the Schengen area for criminal activity, one of the main instruments is the EU Citizens Rights Directive. According to the Directive, conduct of a person facing deportation must "represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society." The Directive also presumes proportionality assessments, prohibits expulsion in a preventative manner and stipulates that previous criminal convictions may not be the sole determinants behind a decision on expulsion.[32]

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[31] Marisa Marinelli, 'Crimes and Punishment of the Alien: The Judicial Recommendation Against Deportation' (1986).

[32] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) (n. 11) art 27(2).

Despite the clarity in written form, the practical interpretation and implementation of "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society", remains variable and complex. In a study by Könönen on the removals of mobile EU citizens from Finland due to supposed threat to public order and security, it was noticed that removal orders tend to presume the threat to public safety of mobile EU citizens who have been charged with or convicted of crimes. The removal decisions viewed in the study seemed to overlook individual circumstances and tautologically underline the relatedness of criminal convictions with posing a threat to public order and safety, in other words presuming future criminality due to previous criminality.[33]

Könönen has underlined the ambiguity in practice relating to the requirement that under the Citizens Rights Directive expulsion may not be ordered based solely on previous criminal convictions. Previous criminal convictions can be given weight only when they clearly indicate a tendency of the individual to criminal behaviour and likeliness to repeat offences in the future.[34] Due to the clear prohibition to rely solely on past convictions, expulsion measures of EU citizens are prone to future-oriented assessments of criminality.[35] Removal assessments rely heavily on the personal conduct of the person, and often produce and depend on conceptions of "criminal individuals".[36] These preconceptions become especially visible in cases concerning irregular migrants, as irregular entry manifests a threat to public order and safety in itself.[37]

EU-citizens enjoy, however, a higher level of protection than third-country nationals from deportation measures. For example, third-country nationals can be deported from Finland on a broader basis than EU-citizens. According to the Finnish Aliens Act, Section 149 subsection 1 paragraph 2, an alien who has resided in Finland under a residence permit or who has lost Finnish citizenship may be deported if they have been found guilty of an offence carrying a maximum sentence of imprisonment for a year or more or are found guilty of repeated offences.[38] The maximum sentence requirement is inapplicable if the person has been found guilty of repeated offences. Consequently, for

[33] Jukka Könönen, 'Removals of "Dangerous" Mobile EU Citizens: Public Order and Security as a Police Paradigm' [2023] Social & Legal Studies 09646639231207353, 12–15.

[34] As an example, see 'Finnish Aliens Act (301/2004)' s 156.

[35] Könönen (n. 33) 5–6.

[36] Leandro Mancano, 'Punishment and Rights in European Union Citizenship: Persons or Criminals?' (2018) 24 European Law Journal ch 3.2.

[37] Könönen (n. 33) 5.

[38] 'Finnish Aliens Act (301/2004)' s 149.

instance, a third-country national may be deported for one aggravated offence of driving while intoxicated as well as for several minor offences of driving while intoxicated.[39]

In practice, a decision concerning crime-based deportation should take into account the nature and number of committed crimes, and deportation should not be primarily ordered for minor offences. It follows from the formulation of section 149 subsection 1 paragraph 2 of the Finnish Aliens Act, that deportation can be ordered when an individual has been found guilty of a crime, and therefore sentencing for that or those crimes is not necessary in order to impose deportation. The section on deportation can, however, be applied even prior to sentencing and even before the judgment in the criminal law case has gained legal force.[40]

Second, a third-country national can be deported if they are deemed a threat to the safety of others due to their behaviour. Section 149 subsection 1 paragraph 3 of the Aliens Act states that deportation of a foreigner is possible if he or she has, through his or her behaviour, shown that he or she presents a danger to other people's safety.[41] In principle, the section permits deportation based solely on a risk assessment of the danger the person might inflict on public safety. Any activity or behaviour of the person that is deemed dangerous to public safety might be considered enough to issue deportation, even if the action has not yet resulted in a crime or illegal activity. In practice, the mere suspicion of danger or assessment of potential criminality are not considered sufficient grounds to issue deportation, and some previous dangerous or threatening behaviour of the person concerned must be shown in order to sufficiently fulfil the condition of 'has shown'.[42]

Third, deportation of a third-country national is possible when they pose a threat to national security. According to section 149 subsection 1 paragraph 4 a foreigner can be deported if he or she has been engaged, or on the basis of his or her previous activities or otherwise there are reasonable grounds to suspect that he or she may engage in activities that endanger Finland's national security.[43] This section can be applied to any illegal activity targeted towards the state, in other words, it is not necessary for the activity to satisfy any elements of a specific crime. Most often, illegal activity targeted towards the state is considered to be, e.g., sabotage, espionage, illegal intelligence

[39] 'Maasta poistaminen', in Heikki Kallio, Toomas Kotkas and Jaana Palander, Ulkomaalaisoikeus (1st edn, Alma Talent Oy, Lakimiesliiton Kustannus, 2018) 473.

[40] 'Finnish Aliens Act (301/2004)' s 149; See also 'Maasta poistaminen' (n 39) 473–474.

[41] 'Finnish Aliens Act (301/2004)' s 149, 1(3).

[42] 'Maasta poistaminen' (n. 39) 475.

[43] 'Finnish Aliens Act (301/2004)' s 149, 1(4).

activity or terrorism. Again, the wording of the section, 'on the basis of his or her previous activities or otherwise there are reasonable grounds to suspect', indicates that deportation measures can be applied according to this section based on assumed future criminality towards the state.[44]

Third-country nationals can be deported from Finland not only due to criminal activity and criminal sentencing in the country, which is the scenario of interest in this article, but also based on an assessment of their potential future criminality. This risk assessment can consider a number of different factors, most importantly an evaluation of the threat the person inflicts on public safety or the state, even when the activity of the person has not yet resulted in a crime.[45] It is justified to raise concern over these assessments, and how the wording of the law may render profiling and stereotyping possible in authorities' decision-making when applying these sections of the Aliens Act.

Deportation due to a previous criminal conviction and assumed future criminality on the grounds of protecting public interest is, as Stumpf argues, not free from punitive intentions. Removal of a foreign convict incapacitates them from committing crimes in the future and serves a dual purpose: punishment and deterrence.[46] Measures taken in the interest of public order and safety seem decreasingly objective and free from preconceptions.

As Kmak's study on Finnish immigration detention practices demonstrates, foreigners can be subjected to control measures on a multitude of grounds, and, indeed, in the case of Finland, legally. Detention can be ordered not only based on criminal conviction, but also the suspicion of criminal conduct or even assumed future criminality.[47] It seems that detention is used as a tool for immigration control and as a preventive measure, somehow predicting future conduct and taking measures based solely on the past and the future, not present. As Könönen has stated, "coercive measures such as immigration

[44] 'Maasta poistaminen' (n. 39) 468–469, 475.

[45] 'Finnish Aliens Act (301/2004)' s 149 (4): A refugee may be deported in the cases referred to in subsection 1, paragraph 4 (he or she has been engaged, or on the basis of his or her previous activities or otherwise there are reasonable grounds to suspect that he or she may engage in activities that endanger Finland's national security) and if he or she is dangerous to society because he or she has been convicted of a particularly serious crime by a final judgment. A refugee may not be deported to his or her home country or country of permanent residence against which he or she still needs international protection. A refugee may only be deported to a State which agrees to admit him or her.

[46] Stumpf (n. 17) 408.

[47] Government proposal for the new Aliens Act 2003 'FINLEX ® - Hallituksen esitykset: HE 28/2003' s 121 accessed 2 February 2024, Statement of the reasoning of the bill.

detention and removals operate in the security framework and aim to prevent potential disorders for society based on estimations of probable actions in the future".[48]

The concept of protecting public order against foreigners' possible future criminality poses a threat to principles such as equal treatment, equality before law and presumption of innocence. The concept of protecting public interest and national security by ordering administrative removals and deportation of criminal foreigners carries the idea of punishing dangerous foreigners based on their potential criminality instead of their actual criminal record. In this way, immigration control is employed through administrative law in a preventive manner.[49] Protection of public order through focusing on potential criminality endorses theories of incarceration and deterrence, as if foreign criminals should be contained and incarceration is the only way to manage inevitable recidivism.[50]

Continuing on the punitive nature of states' immigration control practices, an important statement on immigration detention measures was given before the ECJ by Advocate General Sharpston in *J.N. v. Staatssectretaris van Veiligheid en Justitie*.[51] In Advocate General Sharpston's view, detention under the Reception Directive cannot have the purpose of punishing the applicant for their past conduct. Thus, past criminal convictions of applicants of international protection cannot justify detention measures for the purpose of protecting public interest or safety, and past sentences cannot be considered to constitute a present threat to national safety or public order.[52] However, Advocate General Sharpston continues to state that:

> "An examination of all the relevant circumstances may lead to the suspicion, on the basis of reliable evidence, that an applicant is preparing to commit such an act and therefore represents a genuine, present and sufficiently serious threat to national security or public order."[53]

In principle, many scholars like Kmak, Sharpston and Könönen, consider that the threshold for immigration control measures must be set, according to law, relatively high. Yet, practice shows that states seem keen on keeping the threshold low and

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[48] Könönen (n. 22) 5.

[49] ibid 6.

[50] Teresa Miller, 'Blurring the Boundaries Between Immigration and Crime Control after Sept. 11th' (2005) 25 Boston College Third World Law Journal 81, 98–100.

[51] See entire judgment *J. N. v. Staatssecretaris van Veiligheid en Justitie* [2016] ECJ Case C-601/15 PPU.

[52] View of Advocate General Sharpston delivered on 26 January 2016 *J. N. v. Staatssecretaris van Veiligheid en Justitie* Request for a preliminary ruling from the Raad van State Case C-601/15 PPU (ECJ) [97–99].

[53] ibid 99.

permitting even very weighty restrictions on the individual's rights for the purposes of justifying and expanding immigration control, labelling the measures justified for the protection of a public interest.

Zedner has considered that punitiveness should be determined primarily on the burden imposed on the individual. Where such burden is akin to punishment, that is to say significantly weighty and burdensome, the basic criminal process protection and standard of proof should apply. If not, the non-citizen is inevitably denied their due criminal process rights and the effects can be detrimental and amount to differential treatment.[54]

Others have endorsed a similar approach. Bosworth has argued for the experience of the individual as a punitive dimension of administrative practices, but also the similarities of such in terms of justifications and effects. Foreign offenders are subjected to sovereign powers in ways very different from citizens, as administrative powers have implications beyond criminal sentencing and incarceration and add significant consequences only for foreigners.[55]

4. What about fair trial rights?

The overlap and interlinkage between criminal law and administrative law in the area of immigration is causing significant issues in terms of protection of the foreigners' rights. The choice of operating within administrative law instead of criminal law inevitably challenges fundamental principles of criminal justice. As a point of comparison, Legomsky argues that courts in the US have explicitly refused to invoke the criminal justice model in deportation practices to render rights related to criminal law inapplicable. These administrative sanctions possibly undermine rules on how evidence may be used, the privilege against self-incrimination, trial by jury, restrictions on bills of attainder, right to counsel, prohibition of cruel or unusual punishment, prohibition of retroactivity or ex post facto laws and importantly, the prohibition of dual punishment.[56]

The argument of protecting public safety is rather vague in situations where control practices are employed based on assumed future criminality and not actual criminal

[54] Zedner (n. 23) 53.

[55] Mary Bosworth, 'Penal Humanitarianism? Sovereign Power in an Era of Mass Migration' (2017) 20 New Criminal Law Review: An International and Interdisciplinary Journal 39, 1–4.

[56] Legomsky S, 'The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms' (2007) 64 Washington and Lee Law Review 469, 515.

convictions delivered by courts. The main argument behind these assumptions is that future criminality derives from past criminality, but in practice this is not an absolute criterion, and wide discretion powers may be used by immigration authorities in the decision-making. Basing these legally significant decisions on only assumptions would be unheard-of in any other situation or context.

Most importantly, these practices go completely against the modern concept of presumption of innocence, which is considered inherent to criminal law. Presumption of innocence is a core fair trial right. It is a core principle of criminal process, and it enjoys a central position in both domestic and international settings, also protected e.g. under the ECHR.[57] The presumption of innocence has an established scope of application within the criminal process.[58]

In an article concerning immigration law related decisions made by the Finnish Supreme Administrative Court, Pirjatanniemi has identified the interconnectedness of these two areas of law in the Finnish context. The Finnish Supreme Administrative Court has concluded that the presumption of innocence does not apply in immigration cases, and the mere suspicion of crime may trigger preventative immigration measures, as regulated in the Aliens Act. Questions concerning immigration decisions are, according to the Supreme Administrative Court, approached solely on the criteria laid down in immigration law, and the basis of legal consideration cannot be connected to principles or interpretations of criminal justice. Pirjatanniemi notes that the Finnish Supreme Administrative Court had not been particularly active in applying a fundamental rights-friendly interpretation of the Aliens Act but rather focused on the letter of the law of the Aliens Act.[59]

The Finnish Supreme Administrative Court seems to rely on criminal justice principles when assessing for example the criminality of a foreigner, yet the assessment of the actual question at hand, i.e., decision on deportation, can be made solely within immigration law, and criminal justice norms are therefore inapplicable. Authorities are permitted to make criminality assessments and act accordingly, regardless of how other authorities have assessed the identical set of facts. For example, a decision of annulment of a residence permit based on the criminal activity of the person can be made by the immigration authorities, even if the prosecutor has decided not to press charges due to

[57] "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 1950 art 6(2).

[58] Pirjatanniemi (n. 13) 960–961.

[59] ibid 960.

no probable cause in the criminal law case. The central issue is not, according to Pirjatanniemi, the fact that domestic authorities should apply the principle of presumption of innocence independently, but that the facts of the presumption under which the decision was made have not been accordingly verified. Authorities outside the criminal justice system should not be able to base their activities on the fact that a foreigner has committed a crime unless this has been ascertained by a judgment that has gained legal force.[60]

The stance taken by the Finnish Supreme Administrative Court may to some extent demonstrate how there practically exist two separate legal orders, one for citizens, and one for foreigners. Immigration law may be employed without the restrictions of the criminal justice system, no matter the contents of the immigration law. I argue it is problematic to pick and choose legal provisions in this manner. In principle, criminal assessments by administrative authorities are permissible, yet otherwise inherent principles of criminal law such as the presumption of innocence, are omitted. It is quite the contradiction to accept the applicability of some attributes of criminal law into immigration law on the one hand and simultaneously deny the applicability of criminal justice norms in immigration law on the other hand.

This selectiveness might not be an issue in another area of law, but within the ambit of immigration law the tension is clear. Criminal justice norms have been dismantled, detaching enforcement norms from the corresponding adjudication norms. Modern immigration law endorses the enforcement model of criminal justice but has, according to Legomsky, consciously rejected the respective procedural safeguards. This choice becomes problematic as the attributes of criminal law that have been imported are precisely the ones that could trigger the need for procedural safeguards normally inherent to criminal justice. Criminal justice tends to endorse punitive models like retribution, deterrence, and incapacitation over rehabilitative models, focus on the distinction of “the bad guys” from “the good”, and in general, promotes more severe penalties, preferably in the form of incarceration. Criminal justice is in general more likely to compromise personal liberty than civil regulatory models. All these aspects have been brought into immigration law without the respective adjudication features that we normally accept as inherent norms of criminal justice.[61]

[60] ibid 961, 963, 970.

[61] Legomsky (n. 56) 473–474.

Legomsky argues that broad categories of deportation processes are void of not only procedural safeguards but also decisional independence due to the asymmetry in applying criminal justice principles in deportation cases. Legomsky considers that:

> "The combination of draining the decisional independence from the administrative phase of the deportation process and stripping the federal courts of their power to review important categories of deportation orders means there now exist broad categories of deportation cases in which the entire process is bereft of decisional independence."[62]

In a normal setting of applying criminal law this could never be the case. This selectiveness and conscious asymmetry are hindering the enjoyment of fair trial rights that go hand in hand with criminal justice processes. Classification of deportation as an administrative sanction or a regulatory measure and not as a form of criminal punishment is precluding adjudication[63] and creating too foreseeable and "ready-made" results.

Not all procedural safeguards inherent to criminal law are necessary or even desirable in deportation cases. Legomsky considers for example that dual punishment might not in itself constitute an issue in deportation, as it is permissible also in some other instances like tax fraud cases. The determining factor would, according to Legomsky, be the proportionality of the two punishments with the original misconduct and not the principle of *ne bis in idem* per se. Dual punishment could be possible also in deportation cases if the second punishment is intended to target a specific objective of legislation, like deterrence or incapacitation.[64]

Legomsky considers, however, that deportation based on criminal conviction is not proportional. When determined according to the original misconduct, deportation is always excessive to a person who has already served their sentence according to criminal law. Regardless of the status of the offender, the criminal sentence they have served has been deemed sufficient for that specific crime in a court based on national legislation on criminal offences. Any further need for incapacitation of deterrence is thus by definition excessive.[65] The sole defining factor is therefore the status of the offender.

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[62] ibid 518.

[63] ibid

[64] ibid 518–519.

[65] ibid 519.

5. *Ne bis in idem* in legal practice

Historically speaking, the principle of *ne bis in idem* has been generally restricted to proceedings of criminal law, and more specifically, final decisions in criminal proceedings. Sanctions, regulatory measures or punishments relating to other areas of law, such as administrative law, have not traditionally been seen as fitting into the scope of the principle.[66] Although widely accepted status quo of interpretation, the question of the nature of the punishments eligible within the principle's scope is frequently visited by academics and lawyers.[67] Bockel has identified this difficulty in interpretation of the applicability of the principle. Indeed, while most legal traditions recognize *ne bis in idem* applicable only in the area of criminal law, it is increasingly challenging to maintain a clear distinction between administrative law and criminal law and that there may not even exist any difference in the nature of criminal and administrative law sanctions. According to Bockel:

> "In many instances the only distinction between criminal sanctions and administrative sanctions relates to the nature of the public body or agency which rendered it (the public prosecutor, or any administrative body). Even such an 'organic' distinction is not absolute. In some [EU] Member States, government agencies exist which are empowered to impose sanctions of both a criminal and an administrative law nature."[68]

There exists an undeniable grey area as to the nature of which kind of punishments are applicable to the *ne bis in idem* regime and why. This ambiguity creates unforeseeable results in legal proceedings, versatile practice as to which aspect of the principle is given emphasis in application and as some scholars suggest, even arbitrary results.[69]

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[66] John AE Vervaele, 'The Transnational Ne Bis in Idem Principle in the EU — Mutual Recognition and Equivalent Protection of Human Rights' in K Padmaja, European Union: Constitutional Conspectus (Amicus Books, The Icfai University Press 2008) 33–34.

[67] Araceli Turmo, 'Ne Bis in Idem in European Law: A Difficult Exercise in Constitutional Pluralism' (2020) 5 European Papers 1341; As for examples of the contributions in the discussion see Johan Callewaert, 'More Confusion about « ne Bis in Idem »: Judgment of the CJEU in the Case of MV – 98 | Prof. Dr. Iur. Johan Callewaert' (22 July 2023).

[68] Bockel (n. 6) 44.

[69] Lasagni, Mirandola, 'The European Ne Bis in Idem at the Crossroads of Administrative and Criminal Law' accessed 27 October 2023.

According to the ECtHR, *ne bis in idem* is invoked if 1) both of the proceedings were criminal proceedings, 2) the proceedings concerned the same offense and 3) there was a duplication of the proceedings.[70]

The limitation is, however, not restricted to the literal classification in national legislation. In other words, it is not possible to limit the principle's scope to proceedings that are strictly classified as criminal in domestic legislation, and instead, the ECtHR has held that "the notion of 'criminal procedure' in the text of Article 4 of Protocol No. 7 must be interpreted in the light of the general principles concerning corresponding words 'criminal charge' and 'penalty'".[71]

In determining whether both proceedings are criminal in nature, the ECtHR utilizes a so-called "Engel criteria", developed in the case *Engel and others v. The Netherlands*. According to the Engel criteria, the first criterion is whether the offence belongs to criminal law, disciplinary law, or both, in the domestic legal system of the state. However, this criterion should only be given formal value and should be compared with the respective domestic legislation of all the Council of Europe Member States. The second criterion is given more weight and concerns the nature of the offence. The third criterion concerns the severity of the penalty that the individual is at risk of facing.[72]

The ECtHR has not considered cases which concern deportation and the issuance of deportation proceedings as a part of criminal sentencing. The ECtHR has, on the other hand, dealt with a number of cases that have concerned applicants who have been convicted in criminal proceedings and subsequently disciplinary proceedings related to the same offence.[73]

For example, in *Kremzow v. Austria* the ECtHR held that disciplinary proceedings resulting in the loss of professional and pension rights of a retired judge who had been convicted of murder, could not be considered criminal in nature even though the two proceedings concerned the same facts. Article 4 of Protocol No. 7 was deemed non-applicable.[74]

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[70] European Court of Human Rights, 'Guide on Article 4 of Protocol No. 7 to the European Convention on Human Rights' 5.

[71] ibid 7.

[72] *Engel and Others v. The Netherlands* [1976] ECtHR 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, para 82.

[73] European Court of Human Rights (n. 70) 8.

[74] *Kremzow v. Austria* (dec) [1993] ECtHR 12350/86.

Similarly, in *Luksch v. Austria* the ECtHR considered the article non-applicable as one of the two proceedings was clearly disciplinary and did not fulfil the criteria for criminal nature set out in Engel. According to the third section of the ECtHR when deciding on the admissibility of the application, the Austrian Accountants Act does not fall within the scope of criminal law, as the offence and the penalties the applicant was at risk of incurring were disciplinary in nature and did not involve the determination of a "criminal charge". The third section stated that "consequently, the applicant was not tried or charged again in criminal proceedings for an offence on which he had already been convicted".[75]

In *Banfield v. The United Kingdom* the applicant, a police officer, was convicted under criminal law for sexual offenses. The offences had been committed while on duty. The case brought before the ECtHR related to the reduction of the applicant's pension as a direct result of the criminal conviction. According to British domestic legislation a police officer may lose pension rights if they have been convicted of offences committed while in duty or the offence has led to loss of confidence of the employer and the public. The ECtHR considered that the disciplinary and forfeiture proceedings concerned the nature of the offence and the breaching of the employer's trust as a member of law-enforcement. Again, the ECtHR was not satisfied that the disciplinary proceedings were criminal in nature.[76]

The ECtHR's interpretation seems to satisfy a morally logical approach, protecting society and social safety. The administrative disciplinary measures or sanctions are distinct from the criminal charges and often seek to address, as it were in the abovementioned cases, the impacts of the offence onto society. Here a proportionality assessment enters the picture. Even if not the most central aspect of the *ne bis in idem* assessment, a fair balance must always be struck between the interest of public safety and order and the protection of the individual's rights.[77] The more serious or gross the offence and the impacts on the public, the more the individual's rights can be limited, especially if the rights in question are not fundamental in nature.[78]

Cases concerning *ne bis in idem* and taxation law are, however, numerous and often result in similar judgments. The ECtHR has in several cases found and confirmed that

[75] *Luksch v. Austria* (dec) [2000] ECtHR, third section 37075/97.

[76] *Banfield v. the United Kingdom* (dec) [2005] ECtHR 6223/04.

[77] ibid

[78] More on proportionality assessments and the different possible tests see Julian Rivers, 'The Presumption of Proportionality' (2014) 77 The Modern Law Review 409, 412.

proceedings for imposition of tax surcharges are "criminal in nature" and therefore fall within the ambit of Article 4 of Protocol No. 7.[79]

For example, *Pirttimäki v. Finland* concerned three proceedings brought against the applicant under Finnish taxation law and penal code, classified as two administrative proceedings and a criminal proceeding, for e.g., incorrect bookkeeping and aggravated tax fraud. All parties, however, agreed that the administrative law proceedings were criminal in nature. The issue brought to the ECtHR concerned idem, the facts of the cases. A violation of Article 4 of Protocol No. 7 was found.[80]

An important case in developing the connection of punitive administrative proceedings and criminal proceedings has been *A and B v. Norway*. The case concerned two applicants who had first been imposed tax penalties by the national tax authorities and later criminally prosecuted. The ECtHR concluded that no violation was found. In the case, the ECtHR evolved its test of "sufficiently close connection in substance and in time" relating to the timespan and nature of the two proceedings.[81] The ECtHR emphasized that a defining factor is the lack of connection between the two proceedings in substance and in time, and that this test cannot be satisfied if either is lacking.[82]

If the two proceedings are, in part or completely, separate and take place irrespective of one another, it may prove the existence of duplicated criminal proceedings. However, should the proceedings be interconnected, they may be interpreted to be two different aspects of one measure.[83] Another important aspect pointing to the direction that there is only one criminal proceeding is if the administrative punitive measure was "a direct and foreseeable consequence" of the first punishment, the criminal conviction.[84]

Similarly, in *Jóhannesson and Others v. Iceland* the applicants had first been imposed tax surcharges and later charged under criminal law for aggravated tax offences. Referring to *A and B v. Norway*, the ECtHR was of the opinion that both proceedings were criminal in nature within the meaning of Article 4 of Protocol No. 7, and the parties did not dispute.[85]

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[79] European Court of Human Rights (n. 70) 8.

[80] *Pirttimäki v. Finland* [2014] ECtHR 35232/11.

[81] European Court of Human Rights (n. 70) 16.

[82] *A and B v. Norway* [2016] ECtHR [GC] 24130/11, 29758/11 [114, 125].

[83] ibid 96, 126, 130.

[84] ibid 113.

[85] *Jóhannesson and Others v. Iceland* [2017] ECtHR 22007/11.

The criminal nature of administrative punitive proceedings seems to be less disputed in taxation related cases than in other types of cases. There appears to be some level of consensus that taxation related administrative proceedings for e.g., tax evasion, are by default criminal in nature. Compared with the abovementioned general disciplinary proceedings, this consensus might seem rather odd. One could argue that the only significant difference between taxation sanctions and general disciplinary proceedings is the order in which the proceedings are being taken. Violations of *ne bis in idem* are practically never found in general disciplinary proceedings where the measure is a direct outcome of the criminal proceeding, and yet practically always found where the administrative measure was taken prior to the criminal proceeding.

In addition to taxation law related cases, insights into the *ne bis in idem* rationale of the ECtHR can also be found in cases concerning minor-offences proceedings. One of the most central cases in this category is *Sergey Zolotukhin v. Russia*. The applicant was sentenced to an administrative detention of three days for minor disorderly acts under the Russian Code of Administrative Offences. A few weeks later, the applicant was charged with three breaches of the Russian Criminal Code for the same actions. The applicant was found guilty on two charges. In the case brought before the ECtHR the main issue was whether there was in fact duplication of the proceedings concerning the same facts even if the administrative detention of the applicant was in the domestic setting considered to be an administrative and not a criminal law punishment. The ECtHR observed that as the penalty imposed on the applicant under administrative law resulted in the loss of liberty for three days, "there is a presumption that the charges against the applicant are criminal" and thus are to be considered under "the ambit of penal procedure".[86]

In *Zolotukhin*, the ECtHR evolved and clarified its interpretation of the *bis* element. *Bis*, meaning the element of the initiation of a new proceeding, was seen to also include combinations of criminal proceedings. Importantly, *bis* could include both criminal and administrative punitive measures.[87] The ECtHR gave in its reasonings a few absolutely essential and explanatory interpretations on its approach to *ne bis in idem* and what kind of restrictions these interpretations entail. The ECtHR noted that:

> "The approach which emphasizes the legal characterization of the two offences is too restrictive on the rights of the individual, for if the Court limits itself to finding that the person was prosecuted for offences having different legal classification, it

[86] *Sergey Zolotukhin v. Russia* [2009] ECtHR [GC] 14939/03 [56].

[87] Vervaele (n. 5) 214–215.

> risks undermining the guarantee enshrined in Article 4 of Protocol No. 7 rather than rendering it practical and effective as required by the Convention."[88]

The important aspect the ECtHR brought up in *Zolotukhin* was that some domestic legal systems arbitrarily define certain offences as "administrative" even though they undeniably have criminal connotations. Such definitions cannot, according to the ECtHR's reasoning, exclude an interpretation in which the administrative law offence is considered comparable with a criminal law offence. The Court also noted that "by its nature, the inclusion of the offence of 'minor disorderly acts' in the Code of Administrative Offences served to guarantee the protection of human dignity and public order, values and interests which normally fall within the sphere of protection of criminal law".[89]

Therefore, there evidently is precedent that some administrative law procedures and punishments contain certain aspects which usually, by nature, fall within the ambit of criminal law or protect interests usually protected by criminal law, that can be interpreted to fall within the scope of the requirement that the proceedings are "criminal in nature". A mere differentiation in the domestic setting between different areas of law cannot obstruct applying the principle if a connection and comparability to criminal law can be found.

The ECtHR has developed a view that the margin of appreciation of states should be somewhat limited to protect the autonomous meaning of Article 4 of Protocol No. 7 and the object and purpose of the Convention. Nevertheless, in *A and B v. Norway* the ECtHR considered that Member States should have a right to form and execute such legal responses to socially offensive conduct as they deem necessary in order to "address different aspects of the social problem involved, provided that the accumulated legal responses do not represent an excessive burden for the individual concerned" and as examples the ECtHR lists non-compliance with road-traffic regulations or tax-evasion.[90]

The ECtHR is of the opinion that Article 4 of Protocol No. 7 must not prohibit states from imposing administrative punishments for wrongfully paying taxes and in serious cases additionally raising criminal charges for conscious deceitful conduct. The ECtHR holds in *A and B v. Norway* that the object of Article 4 of Protocol No. 7 is to prevent the injustice of being prosecuted twice for the same criminalized conduct under the jurisdiction of the same Member State, but that it does not outlaw legal systems which take an

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[88] *Sergey Zolotukhin v. Russia* (n. 86) para 81.

[89] ibid 54–55.

[90] *A and B v. Norway* (n. 82) para 121.

integrated approach to a social wrongdoing in question or an approach involving parallel stages of legal response to a wrongdoing by different authorities and for different purposes.[91]

The question of dual punishment is more often than not raised in conjunction with cases where the administrative punitive proceeding precedes the criminal conviction. This approach therefore suits cases where the following criminal charge seeks to target the fraudulent conduct the administrative punitive measure could not. In crime-based deportation, the second proceeding is an administrative measure and is a direct consequence of a criminal conviction. The proceeding is based on administrative law and is a direct and foreseeable outcome of a criminal charge. In this case, the administrative law measure is the one targeting the "fraudulent conduct" as a measure of immigration policy and regulation of post-entry conduct.[92]

6. The Engel criteria and deportation

As an intriguing experiment, the applicability of crime-based deportation can be tested with the Engel criteria, which constitute the most common set of restrictions established in the *ne bis in idem* regime in Europe. The Engel criteria have been established through the ECtHR's case law and are used to determine whether or not a measure is considered to be a criminal charge.[93] It is important to remember that the Engel criteria consider the punitive and criminal nature of the so-called second measure. The criteria do not consider the criminal nature of all the employed measures, but rather seek to find balance in which kind of measures can or cannot be employed by a state against a person without it amounting to a violation of *ne bis in idem*.

The first Engel criterion concerns the placement of the offence in the domestic legislative setting. Crime-based deportation is almost exclusively regulated through administrative or civil law. I have not come across a legal system in the countries studied for the current article, where deportation would adhere to criminal law. Thus, the conclusion can be drawn that the first Engel criterion is not satisfied. However, as

[91] ibid 123.

[92] Angela M Banks, 'Proportional Deportation' (2009) 55 Wayne Law Review 1651, 1652. Banks discusses the topic in the context of the United States, but the discussion is nevertheless also beneficial to the European context.

[93] European Court of Human Rights (n. 70) 7.

established, this criterion should only be given formal value and as the ECtHR has stated in the *Engel* judgment "this provides no more than a starting point."[94]

The second Engel criterion concerns the nature of the offence. As the ECtHR has stated in the *Engel* judgment, a state indeed may employ against the defendant disciplinary law instead of criminal law. *Ne bis in idem* is an absolute principle, and the awarded state margin of appreciation is limited to permissible forms of dual punishment. Regardless of this afforded margin of appreciation to states, the ECtHR has stated that supervision of such margin of appreciation would be "illusory if it did not take into consideration the degree of severity of the penalty that the person concerned risks incurring". In the *Engel* judgment, the ECtHR clarified that: "In a society subscribing to the rule of law, there belong to the 'criminal' sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental."[95]

Bearing this in mind, the assessment should mostly concentrate on the nature of the offence, and the punitive nature of the employed measure against the defendant. The nature of the offence has in numerous judgments been the main issue of consideration. Difficulty with assessing crime-based deportation against the Engel criteria, and importantly the second criterion of the offence being criminal in nature, is the fact that deportation as a measure is often regulated rather vaguely. Deportation provisions are usually very general and leave much to the discretion of the authority ordering deportations.[96] This vagueness unarguably challenges my main hypotheses; it is extremely difficult to separate the basic offence of deportation from the proportionality assessment conducted in a certain case. At the same time, I argue that this vagueness intentionally diminishes and conceals the nature of the measure, as instead of actual and restrictive legal provisions, the provisions leave significant discretion outside written law.

There are a number of aspects that in my opinion prove that deportation is not as clearly non-punitive as it should be, for it not to be determined to be criminal in nature, as per the second Engel criterion. Firstly, deportation permanently restricts the rights of the defendant in the deporting state, e.g., the rights to continue family life and work, and is far more restrictive on the individual's rights than an administrative detention or other

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[94] *Engel and Others v. the Netherlands* (n. 72) para 82.

[95] ibid

[96] E.g. in Finland 'Finnish Aliens Act (301/2004)' s 149 Grounds for deportation: An alien who has resided in Finland under a residence permit or who has lost Finnish citizenship may be deported if: subsection 2] he or she is found guilty of an offence carrying a maximum sentence of imprisonment for a year or more, or if he or she is found guilty of repeated offences.

form of restricted loss of liberty. And, as has been stated by the ECtHR, the loss of liberty entails the presumption of criminal nature. Therefore, it can be concluded that deportation as a heavier measure than a limited detention is comparable with the loss of liberty and presumes criminal nature.

Another important aspect is that criminal penalties seek to both punish and deter unlawful conduct. By contrast, measures which merely seek to repair the damage the offence has caused are not criminal in nature. The duplication of proceedings is also permissible, when the two employed measures or proceedings seek to target different aspects of the particular wrongdoing. In crime-based deportation, the criminal charge has already served as the punishment and deterrence and the deportation measure merely is an additional deterrence method, and a harsh one at that. In some of the cases discussed above, an additional measure was permissible if it sought to target a specific aspect of the wrongdoing the first measure could not, a so-called integrated approach involving parallel legal responses for different purposes. This argument is rendered unapplicable in deportation, as clearly all aspects of the original wrongdoing have been targeted with the criminal charge according to criminal law.

The third Engel criterion concerns the severity of the penalty that the individual is at risk of facing. The individual faces a criminal charge in the form of a prison sentence which is followed by a deportation order. The accumulated penalty is weighty and has significant consequences. The level of severity was set in the abovementioned cases relatively low, at least when comparing with deportation. The loss of liberty was established to be a severe penalty, as was the duplication of tax-related sanctions. Therefore, as previously discussed, deportation is without question a severe penalty, especially as it is the measure which is imposed through administrative law and not criminal law, as the heavier penalty might be more understandable if it were the criminal law measure following a less severe administrative penalty.

The Engel criteria are then somewhat satisfied for crime-based deportation to amount to a criminal punishment within the meaning set out by the ECtHR in the *Engel* judgment. The main argument behind this conclusion is the nature of the offence, the punitiveness of deportation, and the severity of the penalties imposed on the individual in total. This would of course then result in a conclusion that deportation as the second measure is punishment and, indeed, the prohibited form of dual punishment and therefore in violation of the principle.

7. Conclusions

The question that the article set out to analyze, is whether crime-based deportation could amount to dual punishment within the meaning of the principle of *ne bis in idem* and specifically in the European judicial context. A conclusive finding on this question boils down to what constitutes a punishment or a penalty. It has been established that within the ECtHR's jurisprudence, the determination is not limited to the domestic legal classification, but that in many cases administrative proceedings in addition to criminal proceedings are acceptable. Duplication is permissible, but only when the proceedings target different objectives of the offence and do not impose an excessive burden on the individual. The duplication should serve a general interest and be limited to what is strictly necessary.

Tax law cases demonstrate that monetary penalties, or fines, as administrative penalties are roughly always considered to be criminal in nature. Especially when the proceedings are not sufficiently close in substance or in time. Additionally, penalties that include the loss of liberty entail the presumption of criminal nature. Administrative proceedings that follow criminal proceedings and seek to target the loss of trust among the community or employer of, for example, a public official, are seldom considered criminal in nature.

Crime-based deportation is most often classified as an administrative or civil law proceeding and it categorically follows a criminal conviction. Crime-based deportation as a procedure does not seek to target an aspect the criminal conviction failed to cover. Quite clearly, the criminal proceeding is in itself a sufficient method of punishment, as it is for citizens. The distinctive factor is the status of the offender. Both of the proceedings seek to ensure a general interest, mostly of safety, and entail the objective of the individual's retribution for their crimes. The criminal conviction is identical regardless of the status of the convicted and the sentences and imprisonment are alike. Yet, the administrative proceeding of deporting the convicted applies only to third-country national convicts holding a residence permit. Both the criminal sentence as well as the administrative deportation target the failure of the individual to comply with society's rules and seek to protect public safety and order.

Crime-based deportation as a measure is somewhat comparable with the loss of liberty. The deportee does not lose their right to liberty per se but does lose the right to remain in the country of residence, quite potentially accompanied by an entry ban to either the country of residence or the entire Schengen area.[97] Compared to the ECtHR *Zolotukhin*

[97] For example, in Finland 'Finnish Aliens Act (301/2004)' s 150.

ruling, one could agree that deportation is a much heavier measure than an administrative detention of three days.

Deportation measures restrict the individual's rights significantly. This does raise questions of the proportionality of deportation as a limitation to the individual's rights and freedoms, the necessity assessment of the measure and its objective purpose as well as the assessment of the seriousness of the offence and the imposed penalty. Importantly, it is a question of equality of treatment and perhaps even discrimination, as only immigrants are impacted.[98]

These definitions and determinations lead me to believe that crime-based deportation is a separate punishment targeted to third-country nationals, not specifically for their criminal activity, but for their alleged failure to comply with rules of stay and their foreignness. The failure to comply with rules of stay is in its entirety a concept regulated through administrative and immigration law, yet lends some of its provisions and norms from criminal law, as if criminalizing a certain conduct arbitrarily outside the sphere of criminal law. An additional argument in favor of this conception is the restrictions given by the ECtHR in *A and B v. Norway*, that in an integrated approach, the accumulated legal responses must not represent an excessive burden on the individual.

Deportation must by far be the most burdensome of all the measures briefly discussed in this article. Deportation unarguably crosses the threshold for being an unfair excessive burden on the individual. The necessity argument is also debatable. Although necessity and proportionality assessments are conducted in deportation decisions, domestic legislation often allows significant discretion to authorities. It is implausible to claim that all deportations are absolutely necessary in a democratic society, for example in terms of protecting public safety or national security.

Indeed, this is a topic far too large to properly address in one article and further study is necessary to draw any final conclusions. I argue, however, that the legal foundation of crime-based deportation is questionable, at the very least. Any argument entirely opposing the possibility of classifying deportation as punishment risks overlooking the actual implications of the measure and instead focuses excessively on the current legal classification at the national level. A measure of such heavy consequences and legal implications should not be as questionable as it seems to be. Any ambiguity as to the punitive or criminal nature of deportation should not be permissible and proves that the hypothesis just might be right. Furthermore, the Engel criteria are not absolute and even the ECtHR has stated that a cumulative approach to the criteria is also permissible when

[98] Bosworth (n. 4) 90–91.

an analysis of each criterion separately fails to determine the issue fairly and amount to a clear decision.[99]

Other restrictions and limitations to the application of *ne bis in idem* relate to the order of the two proceedings and their connection with one another. A violation of *ne bis in idem* has almost categorically been found in taxation cases, in which an important factor has been the order of the two proceedings. A criminal charge is a prohibited second punishment when it follows an administrative law penalty. A criminal charge is also prohibited when it follows an administrative law detention. A violation is also more likely to be found when the two proceedings lack connection in substance and in time.

Crime-based deportation categorically follows a criminal charge and sentence. The criminal charge precedes the administrative law measure, which is in general the permitted order and form of duplicated proceedings. Crime-based deportation is also a foreseeable consequence of criminal activity of third-country nationals in the deporting country and follows the preceding criminal law charge invariably. The two proceedings are therefore not only sufficiently close in substance and in time, but rather, entirely connected. Additionally, the second proceeding of crime-based deportation could not exist or take place independently.

Thus, not all evidence proves that crime-based deportation is a prohibited form of dual punishment either. In principle, it would be possible to classify crime-based deportation as an integrated approach to the criminality of foreigners, in which the duplication of proceedings would be permissible, if the two measures seek to target different aspects of the social wrongdoing. It is, however, unclear what different aspect of the wrongdoing crime-based deportation would seek to target that the criminal charge did not, which makes this argument less feasible.

Crime-based deportation has, despite its classification in national law, criminal law connotations that cannot and should not be overlooked. Crime-based deportation exceeds the threshold of a criminal punishment in many important ways. The separation and placement of deportation in administrative law instead of criminal law seems arbitrary and restricts the rights of foreigners unduly harshly and results in different treatment based solely on the status of the offender.

[99] European Court of Human Rights (n. 70) 7.

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