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Criminal Justice beyond National Sovereignty. An Alternative Perspective on the Europeanisation of Criminal Law

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Abstract

Over the past few decades the competences of the EU to enact legislation in criminal matters have significantly increased. Member States and criminal law experts have raised concerns: to what extent can national sovereignty and domestic interests regarding criminal justice be preserved? This paper argues that the perspective of national sovereignty should not be the primary concern in criminal justice affairs in the EU. It is proposed that EU legal measures in this area are primarily judged on whether they in their entirety contribute to a reasonable balance between effective law enforcement and adequate judicial protection of individuals. From this perspective, recent developments potentially contribute to redressing the balance in EU criminal law.

Keywords

EU criminal law – europeanisation of criminal law – criminal policy – national sovereignty

1 Introduction

Amongst criminal law scholars and practitioners supranational influences on national criminal law are traditionally regarded with suspicion. Since criminal law systems are considered to be closely linked to national cultural values — one can think of euthanasia legislation, drug policies, sentencing

policies, etc. — supranational interferences have always been considered potential threats to national values and liberties. It explains why in the EU context a competence to enact legislation in the area of criminal law was introduced only in 1992 (Maastricht Treaty) and, besides, why the significant expansion of competences since then unremittingly encounters resistance.

The fear that EU legislation in the area of criminal law would result in too much of a loss of national values and beliefs on how to approach crime and criminals reflects a very fundamental question: What will remain of the sovereign nation-state? But should (the preservation of) national sovereignty really be the primary source of concern when considering the EU's influence on criminal law? And if not, what should be the leading standard to assess EU criminal law? The position I take in this paper amounts to a negative answer to the first question. It will be argued that concerning matters of criminal law in the European Union, the pursuit of national interests have to an important extent faded into irrelevance. What is more, in the very field of criminal justice, the question 'what will remain of the sovereign nation-state?' is a hazardous question that ignores the heart of the matter.

I will therefore propose an alternative standard to assess the EU's influence on national criminal law and argue that the primary concern in criminal justice affairs in the EU should be the pursuit of finding a reasonable balance between crime control and judicial protection; EU action should primarily be judged from this perspective.

First, this paper presents a few cases in which Member States have expressed resistance against EU interference on national criminal law (Section 2), followed by a reflection on how criminal law evolved into a mature field of EU competence (Section 3). Subsequently, I will present the key reasons underlying my plea for an alternative standard to assess the EU's influence on national criminal law (Section 4). Thereupon, the current state of play in EU criminal law will be measured against the proposed standard; it will be argued that some recent developments may counterbalance the widespread sceptical approach on the national level (Section 5). The paper will close with some final remarks (Section 6).

2 Sovereignty Concerns in Several Member States

In order to illustrate the topic of this paper, the following gives a few examples of EU proposals and acts in the field of criminal justice that over the past few years have raised sovereignty concerns in the Member States.

First of all, no one will have missed the 2009 ruling of the German Constitutional Court on the ratification of the Lisbon Treaty by Germany.¹ According to the Court, Germany would only be allowed to ratify the Treaty after sufficient powers for the national parliament would have been established. It was done thus and the Treaty was ratified. Particularly relevant in the framework of this paper is the Court's listing of some areas, including the area of criminal law, which are 'especially sensitive with a view to the capacity of democratic self-determination'. According to the Court, both substantive and procedural criminal law are rooted in culturally and historically developed views and beliefs of the majority of German people. The EU's powers with regard to criminal justice affairs should therefore be strictly construed; Member States should be left with sufficient powers to act freely in this field.²

The fear to lose national control over criminal justice has also driven the UK government's decisions from December 2009 to date to partially opt out from EU cooperation in criminal affairs.³ The government only wished to opt back in to individual measures provided that rejoining would serve national interests.⁴ Recently, newly proposed individual measures aiming at the harmonisation of procedural rights (such as the presumption of innocence and procedural safeguards for juvenile suspects) have been rejected by UK members of parliament for several reasons, *inter alia* because signing up to these measures would be against national interest.⁵

1 Bundesverfassungsgericht, judgement of 30 June 2009, BVerfG, 2 BvE 2/08. A press release in English is available online at <http://www.bverfg.de/pressemitteilungen/bvg09-072en.html> (accessed 21 August 2014).

2 Bundesverfassungsgericht, judgement of 30 June 2009, BVerfG, 2 BvE 2/08, paras 252–253. See for an elaborate analysis of this judgement for instance A. Steinbach, 'The Lisbon Judgment and the German Constitutional Court — New Guidance on the Limits of European Integration?', 11 *German Law Journal* (2010) pp. 367–390.

3 As enshrined in Article 10 of Protocol No. 36 to the Treaty on European Union (OJ 2010, C83/325), the UK government had to decide before June 2014 whether or not it wants to remain bound by cooperation instruments adopted prior to the entry into force of the Treaty of Lisbon, which would include accepting the jurisdiction of the European Court of Justice of the European Union.

4 The viewpoint of the UK has been described by the House of Lords' European Union Committee in its reports on the matter, the 13th Report of Session 2012–13, *EU police and criminal justice measures: The UK's 2014 opt-out decision*, HL paper 159 and the 5th Report of Session 2013–14, *Follow-up report on EU police and criminal justice measures: The UK's 2014 opt-out decision*, HL paper 69. For an overview of the UK government's opt-in and opt-out decisions, see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/320589/OptInUpdateMay2014.pdf.

5 House of Commons 18 March 2014, *BBC Democracy Live*, available online at <http://www.bbc.co.uk/democracylive/house-of-commons-26630349> (accessed 16 May 2014).

Worth mentioning, too, is that in October 2013 the national parliaments of 11 Member States issued a protest against the European Commission's proposal to establish a European Public Prosecutor's Office.⁶ A total of 14 national parliaments and chambers submitted a reasoned opinion, stating that they found a breach of the principle of subsidiarity.⁷

This fundamental principle of EU law also underlies the Dutch opposition voiced against the Commission's proposal to adopt mandatory minimum sanctions in two draft directives, on EU fraud and on counterfeiting the euro.⁸ In the absence of a domestic system of mandatory minimum sanctions, adoption of these proposals was considered to significantly violate a fundamental principle of Dutch criminal law and is considered to 'go beyond what is necessary for the aim of combating fraud and fake money'.⁹

The examples above reflect deep concerns within several Member States about the EU's interference in matters of criminal justice. If 'Brussels' is, for instance, able to oblige the Member States to appoint against their will European Delegated Prosecutors — whose decisions to prosecute might be based on different principles — or to introduce mandatory minimum penalties — thereby establishing a paradigm shift in national criminal law — obviously the following question arises: what will remain of the sovereign nation-state? What will remain of culturally and historically

6 Proposal for a Regulation on the establishment of the European Public Prosecutor's Office COM(2013) 534 final.

7 The opinions are published on the IPEX (The platform for EU InterParliamentary exchange) website, <http://www.ipex.eu>.

8 Proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law, COM(2012) 363 final (so-called PIF-proposal); Proposal for a Directive on the protection of the euro and other currencies against counterfeiting by criminal law, COM(2013) 42 final. In the meantime the second proposal has been adopted, but the proposed mandatory minimum sentencing provisions have been deleted, see Directive 2014/62/EU (OJ 2014, L151/1). Moreover, in the negotiations regarding the PIF-proposal, Council and Parliament have already expressed their opposition against establishing mandatory minimum penalties, see Council Document 9421/13 of 13 May 2013 and Report A7-0251/2014 of the European Parliament of 25 March 2014.

9 Translated from Dutch: 'verder gaat dan nodig is om het beoogde doel van een effectieve strafrechtelijke handhaving van eurovalsemunterij te realiseren', House of Representatives, parliamentary papers 2012/2013, nr. 22112, GA, p. 4, available online at <https://zoek.officielebekendmakingen.nl/kst-22112-GA.html> (accessed 12 August 2014). It follows from Council document 7609/13 of 25 March 2013, p. 3, that the resistance against the introduction of mandatory minimum penalties by means of EU Law was broadly shared amongst other Member States.

developed ideas that are currently reflected in the national criminal justice system?¹⁰

It has been mentioned that suspicions of the EU's impact on national criminal law are rooted deeply in various Member States. Nevertheless, the EU has been quite active in the field of criminal justice, even while in many cases the precise legal basis was at the very least disputed. The following will reflect on how criminal law evolved in such a significant area of EU competence. The aim is *not* to evaluate specific policies and legislative measures, but, rather, to demonstrate how EU action over the past decades may have nourished the sovereignty concerns with regard to criminal justice matters.

3 The Birth and Growth of EU Criminal Law

3.1 *Pre-Lisbon: Controversies over Scope of Criminal Law Competences*

The competence of the EU to enact legislation in the area of criminal law was introduced only in 1992. It is obvious that the establishment of the Schengen area in 1990¹¹ significantly contributed to the wish amongst Member States to intensify cooperation in criminal affairs — in particular with regard to terrorism and illegal drug trafficking. For that aim, provisions on judicial and police cooperation in criminal matters were incorporated in the 1992 Maastricht Treaty — though carefully included in the intergovernmental so-called Third Pillar and expressly restricted to cooperation to the extent considered necessary in order to ensure the free movement of persons.¹²

With the entry into force of the 1998 Amsterdam Treaty the 'pillar structure' was maintained, but the establishment of the Area of Freedom, Security and Justice brought along broader competences to legislate in criminal matters. Not only did the Amsterdam Treaty provide a legal basis to further intensify

10 The examples I have presented in this section are obviously a selection; they reflect concerns in a number of Member States. In some other Member States, however, the EU's influence on national criminal law may be much less considered a cause for concern. For instance, in its decision of 3 November 2009, the Czech Constitutional Court rejected complaints that the Lisbon Treaty would violate Czech constitutional law and national sovereignty, English translation available online at http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=466&cHash=eedba7ca14d226b879ccaf91a6dcb276 (accessed 26 August 2014).

11 Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 [2000] OJ L239/19.

12 Maastricht Treaty on European Union, Title VI on cooperation in the fields of Justice and Home Affairs [1992] OJ C191/61-62.

cross-border cooperation, it also laid down the competence to create minimum norms with regard to the definitions of offences and sanctions — this in order to guarantee the free movement of persons throughout the European Union.¹³

The ‘Amsterdam era’ caused quite a stir amongst Member States and criminal law experts. In my opinion, the enhanced powers themselves, as laid down in the Treaty, are not primarily to blame — it is rather the way in which these powers have been used by the EU institutions that gave rise to concerns over the legitimacy of criminal law measures in the EU framework. For instance, in 1999 the proclamation of the mutual recognition principle as the future cornerstone for judicial cooperation¹⁴ was much more interfering than what the Member States had in mind when they subscribed for ‘closer cooperation between judicial and other competent authorities’ (former Article K.1). It is true that, in the wake of the 9/11 terrorist attacks, the first mutual recognition instrument (the Framework Decision on the European arrest warrant) was promptly adopted; however, the proposals for mutual recognition instruments that subsequently followed (e.g., regarding financial penalties, custodial sanctions, investigation orders) led to series of difficult negotiations, finally resulting in cooperation mechanisms that apply a much lesser degree of recognition than the Council in 1999 had wished for.¹⁵ Up until the entry into force of the Lisbon Treaty, it remained open for discussion whether the introduction of the internal market-principle of mutual recognition in the former Third Pillar context had a legal basis in the EU Treaties at all.¹⁶

13 Amsterdam Treaty on European Union, Title VI provisions on police and judicial cooperation in criminal matters [1997] *OJ* C340/162.

14 Tampere European Council, 15–16 October 1999, Presidency Conclusions, para. 33.

15 To illustrate this, I would like to refer to two 2008 Framework Decisions on the application of the mutual recognition principle to custodial sanctions (2008/909/JHA [2008] *OJ* L327/27) alternative sanctions and probation decisions (2008/947/JHA [2008] *OJ* L337/102) that allow the convicted person's home Member State to adapt a foreign sentence either in terms of its duration, or in term of its nature, if the original duration or nature is considered incompatible with national law (Articles 8 and 9, respectively).

16 *Inter alia* on this: S. Alegre and M. Leaf, ‘Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study — The European Arrest Warrant’, 10 *European Law Journal* (2004), pp. 200–217; S. Peers, ‘Mutual Recognition and Criminal Law in the European Union: has the Council got it Wrong?’, 41 *Common Market Law Review* (2004) pp. 5–36; A. Klip, ‘European Integration and Harmonisation and Criminal Law’, in D.M. Curtin, J.M. Smits, A. Klip and J.A. McCahery, eds, *European Integration and Law* (Antwerp: Intersentia, 2006) pp. 132–134 in particular. For an in depth analysis on the background and content of the principle of mutual recognition in the context of

Equally divided were the Member States on the question of whether the Amsterdam Treaty did provide a legal basis to adopt minimum norms in the field of criminal procedural law; but minimum norms were adopted nevertheless. Also, despite the fact that a legal basis did exist to adopt minimum norms with regard to definitions of offences and sanctions, it was a matter for debate what criminal conduct could be subjected to such minimum norms.¹⁷ However, in implementing the Amsterdam provisions, the Council and the Commission favoured a very broad interpretation, considering the approximation of constituent elements of offences and sanctions in the following areas of crime: ‘offences such as trafficking in human beings and sexual exploitation of children, offences against drug trafficking law, corruption, computer fraud, offences committed by terrorists, offences committed against the environment, offences committed by means of the internet and money laundering in connection with those forms of crime’.¹⁸

In the run up to the entry into force of the Lisbon Treaty, two landmark rulings given by the European Court of Justice merely reinforced the legitimacy concerns amongst Member States and criminal law experts. The Commission and the Council disagreed on whether the criminal law competence was exclusively conferred to the Union legislature (under the former Third Pillar framework) or whether the Community legislature (under the former First Pillar framework) was competent as well to prescribe criminal sanctions to the Member States — in these cases with regard to serious environmental offences. The European Court of Justice confirmed the Commission’s viewpoint that criminal law could fall within the Community’s competence and stipulated

criminal law, see J. Ouwerkerk, *Quid Pro Quo? A comparative law perspective on the mutual recognition of judicial decisions in criminal matters* (Antwerp: Intersentia, 2011).

- 17 The exact relationship between the various provisions that referred to different areas of crime was highly unclear: some were convinced that the competence to enact common provisions was limited to organised crime, terrorism and illicit drug trafficking only (Article 31(e) former EU Treaty), whereas others believed such minimum provisions could also concern trafficking in human beings, offences against children, illicit arms trafficking, corruption, fraud, racism and xenophobia (Article 29 former EU Treaty), see on this, e.g., A. Weyemberg, ‘Approximation of Criminal Laws, the Constitutional Treaty and The Hague Programme’, 42 *Common Market Law Review* (2005) pp. 1567–1597; G. Vermeulen, ‘Where do we currently stand with harmonisation in Europe?’, in A. Klip and H. van der Wilt, eds, *Harmonisation and harmonising measures in criminal law* (Amsterdam, Royal Netherlands Academy of Sciences, 2002) pp. 65–76.
- 18 Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice (Vienna Action Plan) [1998] OJ C19/12.

that the Community legislature had the power to require the introduction of penal sanctions ‘when the application of effective, proportionate and dissuasive criminal penalties is an essential measure for combating serious environmental offences’.¹⁹ The Court stipulated that in such situations, the Community’s competence limits the Council’s competence to legislate criminal law.

3.2 *EU Criminal Law Competences Post-Lisbon*

The European Court of Justice in the abovementioned 2005 and 2007 rulings²⁰ turned out to be a forerunner of the merger between the First Pillar internal market area and the Third Pillar Area of Freedom, Security and Justice, as completed with the entry into force of the Lisbon Treaty. Likewise former Community measures, legal provisions relating to criminal law matters are now enacted through directives — which have direct effect — and require qualified majority voting — instead of unanimity. Besides, the Lisbon regime has led to greater clarity on the scope of competences in the field of criminal justice.

These competences, firstly, entail the further intensification of cooperation in criminal affairs between Member States. The differences on opinion regarding whether the ‘internal market-principle’ of mutual recognition could legitimately be applied to the area of criminal law have therefore ceased; the Lisbon Treaty explicitly provides a legal basis for its application in the context of cooperation in criminal affairs (Article 82(1) Treaty on the Functioning of the European Union, hereinafter: TFEU). Based on the assumption of a high level of mutual trust in each other’s criminal justice systems, judicial decisions (such as search warrants, arrest warrants, final judgments) that are handed down in another EU Member State have to be recognised and enforced as if they would have been handed down in the domestic legal order. The most well-known example of cooperation based on the mutual recognition principle is the simplified and speeded up mechanism of extradition between EU Member States — most of the time distinctively referred to as surrender.²¹ Member States are in principle obliged to recognise warrants for the arrest and surrender of persons, with a minimum of formalities. The obligation to recognise European arrest warrants is not absolute; the 2002 Framework

19 *Commission v Council* (C-176/03) [2005], E.C.R. I-7879, para. 66; see also the follow-up decision *Commission v Council* (C-440/05) [2007], E.C.R. I-9097.

20 *Supra* footnote 14.

21 Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1.

Decision provides for several refusal grounds, some of which are even mandatory.

Furthermore, in order to enhance the application of the mutual recognition principle in practice, the Lisbon Treaty lays down the competence to adopt Union-wide procedural norms, for instance with regard to the admissibility of evidence gathered in another Member State, or with regard to procedural rights for victims of crime and persons suspected of having committed a crime (Article 82(2) TFEU). To illustrate this: only several months ago, the Council and the European Parliament have adopted Directive 2013/48/EU covering the right for suspects to have their lawyer present during police interrogations.²² The assumption is that shared minimum rules of criminal procedure will increase the level of confidence amongst Member States in each other's criminal justice systems, and, in turn, will facilitate cooperation in criminal affairs.

Outside the cooperation context the Lisbon Treaty provides an independent competence to create common minimum norms in the field of substantive criminal law (Article 83 TFEU). By means of directives the EU may stipulate: (a) which constituent elements must at least be included in the definition of an offence; (b) that inchoate types of behaviour (inciting, aiding, abetting) must be criminalised as well; and (c) which maximum penalty must at least be determined for an offence. Today, substantive criminal law provisions can be enacted with regard to many areas of crime.

Article 83(1) TFEU refers, firstly, to conduct that is commonly considered criminal and is widely acknowledged to legitimise a Union-wide approach, due to their nature or impact (e.g., terrorism, trafficking in human beings, computer crime). Though, harmonisation measures may, secondly, also be adopted with regard to policy areas that have already been subjected to harmonisation measures, but where the effective implementation of those measures turns out to require enforcement by means of criminal law. For instance, the EU's aim to achieve a high level of environmental protection has led to Union-wide standards of protection; on the basis of Article 83(2) TFEU, Member States may now be obliged to make the most serious breaches of environmental legislation punishable as a criminal offence in their national laws.²³

22 Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L294/1.

23 Article 83(2) TFEU is considered to be a 'quasi-codification' of pre-Lisbon case law of the ECJ to which I have referred earlier (*supra* footnote 14), see A. Weyembergh, 'Approximation of substantive criminal law: The new institutional and decision-making framework and

The foregoing shows that for the many enactments that were grounded on a questionable legal basis prior to Lisbon, a legal basis has now undisputedly been provided. The hot debates about the legitimacy of EU action in the area of criminal law have therefore calmed down. It is true that the application of the Community method to the creation of criminal law measures did raise several concerns, but at the same time it has been welcomed that as a consequence of this Community method, the European Parliament now has a decisive role in the legislative procedure (co-decision procedure). Now, a few years after the coming into force of the Lisbon Treaty, is the perfect time to rethink the approach towards EU criminal law.

4 Which Standard to Assess EU Criminal Law?

All in all, the developments as described above cannot but lead to the conclusion that the ability for Member States to pursue national interests in legislating EU criminal law has significantly diminished over the past decades. Therefore, to wonder if ongoing Europeanisation of national criminal law would result in a loss of too much national sovereignty seems more than obvious. After all, despite the fact that the EU Member States do accept they are no longer fully sovereign in criminal justice matters, the examples in Section 2 have shown that Member States may disagree on the maximum extent of sovereignty that should be given up. The position I take, however, is that, concerning matters of criminal law in the European Union, the pursuit of national interests has to a major extent faded into irrelevance. As I will argue below, the ongoing internationalisation of crime, accompanied by the increasing transnational approach towards procedural rights, have created a reality in which the pursuit of national interests can no longer be considered to have first priority.

4.1 *Internationalisation of Crime*

Technological developments have had a major influence on the phenomenon of crime over the past few decades. In particular the major advances in information and communications technologies have confronted states with several kinds of criminal activities that by their nature involve cross-border implications, such as cybercrime or online child pornography networks. Also, although never empirically proven, it may be assumed that the removal of

new types of interaction between EU actors', in F. Galli and A. Weyembergh, eds, *Approximation of substantive criminal law in the EU. The way forward* (Brussels: Editions de l'Université de Bruxelles, 2013) p. 16.

internal border controls throughout the European Union has contributed significantly to organised crime across the internal frontiers, most commonly for illicit drug trafficking, money laundering or human trafficking for the purpose of their sexual exploitation. It is obvious that those developments have strengthened the need for close cooperation amongst police and judicial authorities. The operation to dismantle an online child pornography network by arresting 14 suspects from 8 different Member States is much more likely to succeed if agreements are made on the date and time of arresting the suspects in their countries of residence.

However, there is more than this very practical need to cooperate intensively. In my opinion, to combat the aforementioned types of cross-border crime is definitely a matter of importance for the European Union as a whole. For example, would men and women from Romania be coerced to travel to the Netherlands and forced to carry out sex work in Amsterdam, it obviously is for the Netherlands and Romania to deal with these terrible acts and to grant each other legal assistance in the course of criminal proceedings — but what has happened is undoubtedly also a matter of importance for the European Union as a whole. After all, the pursuit of ensuring the free movement of people throughout the borderless EU area was certainly not meant to facilitate trade in humans and sexual slavery — where this happens, it must definitely be considered an EU care too. One can think of other crimes, such as counterfeiting the euro. Considering that the euro concerns a shared currency in 18 Member States, forgery of this currency cannot but being qualified as a matter of EU-wide importance.

In order to enable a common approach towards these types of crime, the necessary regulation of cooperation mechanisms in the field of criminal affairs, may benefit from the creation of Union-wide definitions of criminal offences. In this context, claiming a large degree of national sovereignty would be useless and highly unrealistic.

4.2 *International Approach to Procedural Rights in Criminal Proceedings*

In the framework of this paper, attention must also be paid to the increasing international approach to procedural rights in criminal proceedings — as part of developing a comprehensive set of universally acknowledged fundamental rights to which all human beings are entitled. By entering into several international treaties, a lot of states, including all EU Member States, have willingly surrendered a degree of national sovereignty; the binding character of most treaties obliges the joining states to secure the individuals' effective enjoyment of rights.

As said, fundamental rights for individuals in criminal proceedings have always been included in the most important and comprehensive human rights treaties, such as the European Convention of Human Rights (ECHR). It is therefore self-evident that those treaties and case-law thereof, have had quite an impact on national criminal justice — but also beyond: It follows from a landmark judgment of the European Court of Human Rights (ECtHR) in the case of *Soering* versus UK that states can also be held responsible for breaches of the ECHR that occur on the territory of another state, for instance, after the extradition of an individual to that other state. In this case, because Soering was suspected of a double murder, it was likely that extradition to the US would finally result in the imposition of the death penalty which would involve a long stay on ‘death row’. Considering that the ‘death row phenomenon’ constitutes a breach of Article 3 ECHR, extradition to the US would imply a ‘real risk’ that Article 3 ECHR would be violated. The Court concluded that the UK, being aware of this real risk, had to refuse Soering’s extradition to the USA.²⁴

That all Member States are contracting parties to the ECHR — and in due time the EU itself will join too — underlines that EU legislation in the field of criminal law must at least comply with the minimum level of protection required by the ECHR (such as the legality principle). But it might be justified to guarantee an even stronger level of protection. If only because of the aforementioned internationalisation of crime, the protection of fundamental rights of individuals who are involved in criminal cases with cross-border dimensions has become all the more relevant in the EU context: to adequately protect these rights must be considered a matter of EU responsibility. To resist the further strengthening of procedural rights for reasons of national interests only, would deny the reality of this situation.

4.3 *Criminal Justice beyond National Sovereignty: Balancing Law Enforcement and Judicial Protection*

In the preceding sections, I have argued that to oppose EU legislation in the area of criminal law principally on grounds of national sovereignty, denies the need for a common approach towards combating crime throughout the European Union and, moreover, the necessity to flank such a common approach by a Union-wide codification and supervision of fundamental rights in criminal proceedings. The increased competences of the EU to legislate in this regard, provide for the tools to realise such a common approach towards fighting transnational crime — in part throughout cooperation instruments

24 ECtHR July 7, 1989, *Soering v. UK*, appl. no. 14038/88, in particular para. 91.

and criminal proceedings in which the individual is entitled to a fair treatment. The comprehensiveness of criminal law measures that have already been adopted over the past few decades and the widespread practice of mutual cooperation in criminal affairs on the Member States' level deserve to be judged in their entirety. If sovereignty claims cannot have much priority, which alternative standard should be used to judge the whole of EU criminal law? For that aim, the essential question is whether EU criminal law measures do contribute to striking the right balance at the national level between effective crime control and adequate judicial protection.

The governmental functions with regard to criminal justice comprise both aspects. It is obvious that the government is responsible to maintain public order which includes the effective combat and prevention of crime. For that reason police and judicial authorities are entitled to arrest, detain and question citizens, as well as to search houses and other premises. But every coin has two sides. The government is equally responsible to protect citizens against arbitrary action, disproportionate sanctions, legal insecurity and inequality; therefore, criminal justice legislation should also lay down rules on the rights of individuals and the boundaries of governmental powers. Only then where attention is equally paid to both sides of the coin, optimum justice can be done to all interests at stake in the context of criminal justice. On the national level, the debate on criminal justice matters has traditionally been put as striking the right balance between both sides of the same coin: effective law enforcement and adequate judicial protection.²⁵ In this day and age, the debate on EU criminal justice should be framed the same.

This is not to say that sovereignty claims should never be made — that would be absurd. Member States remain able to oppose Brussels' legislative proposals that potentially influence national criminal law. Such an opposition will generally be framed as a breach of the subsidiarity principle as enshrined in Article 5 TEU. One of the examples I presented in para. 1 relates to the Commission's proposal to include mandatory minimum penalties in a draft

25 Or variants thereof, for instance, the American perspective on balanced criminal procedure, which is based on Herbert L. Packer's description of two competing value models: the Crime Control Model versus the Due Process Model. To keep these notions in balance has been qualified as 'one of the biggest challenges for the criminal justice system' by J.N. Ferdico, H.F. Fradella and C.D. Totten, *Criminal Procedure for the Criminal Justice Professional* (Andover: Cengage Learning, 2009), p. 4 (with references to Packer's work). See on the complementarity of both models: K.A. Findley, 'Toward a new paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process (University of Wisconsin Legal Studies Research Paper)', 41 *Texas Tech Law Review* (2009), pp. 1–41.

directive on counterfeiting the euro; this aspect has been firmly contested by the Dutch government. According to the Dutch government, by prescribing mandatory minimum penalties the EU 'goes beyond what is necessary in order to effectively protect the euro against counterfeiting by means of criminal law enforcement'.²⁶ For this strong statement, however, substantial arguments have not been given; like most sovereignty claims, it is not saying much.

More important, though, is that such unsupported statements completely disregard the main issue at stake, which is in this case whether the Commission's proposal to adopt mandatory minimum sentences would contribute to (or: not endanger) a balanced criminal justice. If the Commission's proposal would be considered from this perspective, it could be argued that the application of mandatory minimum penalties in the Netherlands would be likely to jeopardise just sentencing. In this regard, it would be relevant to draw attention to specific features of Dutch criminal justice in comparison to other Member States in which minimum penalties are applied, such as the absence of legal grounds for sentencing reductions.²⁷ This reasoning would imply that the introduction of mandatory minimum penalties would throw Dutch criminal justice off balance, focusing too heavily on the criminal law enforcement of counterfeiting the euro, at the expense of just sentencing. Compared to subsidiarity claims, such a substantial contribution to the negotiations would be much more likely to boost a profound and fundamental debate on the limits of the criminal law in the EU context.

These days we cannot do without intensive cooperation mechanisms and common norms with regard to criminal law and criminal procedure. That the scope of competences in this area has been increased over the past decades must therefore be applauded, but the sole existence of a legal basis to act does not automatically legitimise the creation of legal provisions — that is completely true. I would very much welcome an ongoing debate between EU Member States and EU actors on the precise scope of criminal law competences and the legitimacy of newly created criminal law measures. Such a debate should, however, not primarily concentrate on the question whether or not national interests are sufficiently protected; it has been argued that the preservation of national sovereignty is not the main challenge that crime on

26 Translated from Dutch: 'verder gaat dan nodig is om het beoogde doel van een effectieve strafrechtelijke handhaving van eurovalsemunterij te realiseren', House of Representatives, parliamentary papers 2012/2013, nr. 22112, GA, p. 4, available online at <https://zoek.officielebekendmakingen.nl/kst-22112-GA.html> (accessed 8 July 2014).

27 See for, instance, M.S. Groenhuijsen, T. Kooijmans and Y. Van Den Berge, *Bestrafing in Nederland en België* (Nijmegen: Wolf Legal Publishers, 2013), pp. 33–34.

the EU territory poses us to. Rather, in view of the need to optimally do justice to all interests at stake, the main challenge is to strike a balance between effective law enforcement and adequate judicial protection. It is from this perspective that the EU's use of criminal law competences has to be assessed.

It can be derived from the preceding paragraph that it is the stage of law-making on the EU level where, in my view, a fundamental debate about specific legislative initiatives can best be held and where attempts to influence proposed legislation or policy decisions are most likely to be effective. Where debates in Brussels during rounds of negotiations would continuously pay attention to the question whether the proposed legislation would contribute to a balanced criminal justice system on the Member States' level, it is much more likely that in the long run EU legislation in the field of criminal law will express a coherent criminal policy in which the traditional and most significant issues in criminal justice are brought to the forefront, and in which sovereignty issues only play a secondary role.

Obviously, this leaves unaffected that the proposed standard is also appropriate to be applied on the level of the national legislator, for example during the preparation and creation of implementation legislation. Moreover, it may well happen that the actual enforcement of implementation legislation, for instance the European arrest warrant, appears to favour a very fast and effective surrender of suspected persons indeed, yet leaves vulnerable suspects out in the cold. To apply the standard I propose would prevent us from fruitless lamentations on the terrible effects of Brussels' interference; rather, to frame such a problem as endangering the balance between effective crime control and adequate judicial protection could stimulate a reasonable and substantive debate on whether the underlying EU act should be amended or interpreted differently, and on what points.

5 A Balance between Law Enforcement and Judicial Protection in EU Criminal Law? State of Play

As shown, criminal law measures have gradually gained popularity at the EU level; despite a disputed legal basis Member States have increasingly been coerced to enforce EU legislation by means of national criminal law. As will be demonstrated in the following section, these criminal law measures were initially one-sidedly focused on catching the criminal;²⁸ the adequate protection

28 In November 2013 this was explicitly recognised by EU Justice Commissioner Viviane Reding in a speech she delivered at the Conference on the European Criminal Policy

of the rights of those (alleged) criminals was considered a matter of national law dominantly.

5.1 *Initially: One-Sided Focus on Repressive Control over Crime*

Firstly, I would like to mention the very broad definitions of crime that have been prescribed by Brussels in order to effectively combat serious types of crime. One example that is currently being followed with attention in The Netherlands concerns the common definition of money laundering and related offences, adopted in 2005.²⁹ In particular the elements 'acquisition' and 'possession' of property derived from the suspect's own criminal activity have received much criticism, mainly because in order to constitute 'money laundering' it is not required that the suspect acted with the intention to conceal or disguise the illicit origin of the property (Article 1(2)(c) of Directive 2005/60/EC). As we all know, stealing a car usually includes the acquisition of this car and in many cases also the possession of this car. If the acquisition and possession of this car would be considered 'money laundering', as the definition suggests, the offence of theft would automatically include the second offence of money laundering. This has been considered undesirable by the Dutch Supreme Court; in trying to put an end to such a broad interpretation, it has ruled that not all types of acquiring and possessing properties derived from the suspect's own criminal activity can be qualified as money laundering.³⁰

However, it has been shown convincingly that the broad interpretation does correspond to the European Commission's aim — eventually approved by the Member States — to also prohibit, in addition to money laundering *strictu sensu*, activities that are 'usually connected with this phenomenon' — thus including the acquisition and possession of property derived from 'any kind of participation in a serious crime'.³¹ As a consequence, a person who at the

Initiative, titled 'Believing in people: Balancing the Scales in European Criminal Law', *Europa.eu Press releases database*, available online at http://europa.eu/rapid/press-release_SPEECH-13-914_nl.htm (accessed 14 May 2014).

29 Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing [2005] *OJ L* 309/15.

30 See, for instance, Supreme Court of the Netherlands on January 29, 2013, ECLI:NL:HR:2013:BY8957, and on 18 June 2013, ECLI:NL:HR:2013:CA3302 (only available online in Dutch on <http://www.rechtspraak.nl>).

31 S. Buisman, 'The Influence of the European Legislator on the National Criminal Law of Member States: It Is All in the Combination Chosen', 7 *Utrecht Law Review* (2011–2013) pp. 147 and 148. Buisman refers to a Communication from which she derives the European Commission's approach, see the Communication from the Commission to the European Parliament, SEC (91)298 final — SYN 254, p. 7, no. 13.

moment of acquiring certain property knows that it is derived from criminal activity perpetrates a money laundering activity, irrespective of whether the activity was intended to conceal or disguise the illicit origin of the property. It is true. The EU legislator has indeed created a very broad definition of money laundering.

A second context in which crime control has long been dominated concerns judicial cooperation. The introduction of the principle of mutual recognition was primarily inspired by the wish to avoid safe havens for criminals trying to benefit from the removal of internal border controls in the European Union. The judicial protection of those (alleged) criminal were initially no part of the cooperation mechanisms that were developed along the lines of mutual recognition and mutual trust.

To illustrate this, the Framework Decision on the European Arrest Warrant does not provide for express grounds to refuse surrender on the basis of fundamental rights concerns. It has resulted in a variety of interpretations as to the possibility to base a refusal on fundamental rights considerations. Research shows that in several Member States (e.g., the UK, Belgium and The Netherlands), the presumption of the issuing Member State's compliance with fundamental rights is hardly rebuttable; claims that fundamental rights have been violated or are very likely to be violated must be made before the court of the issuing Member State.³² But should the protection of fundamental rights not be a shared responsibility of both Member States involved? And should the EU as such not bear responsibility either? It has been noted in Section 4.2 that the adequate protection of fundamental rights must be considered a matter of EU responsibility; this implies an affirmative answer to both questions. Particularly in the context of judicial cooperation, it is important to ensure that the Member States involved share a responsibility to guarantee the exercise of fundamental rights; it is for the EU as such to lay down rules on the matter and to provide effective legal remedies, including on the EU level. The message, however, appears to be that the protection of fundamental rights in the context of judicial cooperation is to a very large extent the issuing Member State's responsibility.

It is hardly surprising, even completely justified, that the examples given above do worry governmental authorities, criminal law experts, legal

32 A. Weyembergh, 'Critical Assessment of the Existing European Arrest Warrant Framework Decision', Annex 1 to the *European Added Value Assessment. The EU Arrest Warrant* (Research paper), Brussels, January 2014, p. 9 with references. See also: J. Ouwerkerk, 'Mutual Trust in the Area of Criminal Law', in Meijers Committee, *The Principle of Mutual Trust in European Asylum, Migration and Criminal Law* (Utrecht: Forum, 2011) pp. 38–48.

practitioners and citizens all over the European Union. Yet, it is not the transfer of national sovereignty to Brussels that causes those worries, rather the one-sided focus on criminal law enforcement that underlies too many of the criminal law measures proposed and adopted in the past few decades. In the turbulent times previous to Lisbon it has become manifest that the exact scope of competences and the correct interpretation and application of the subsidiarity principle do not matter that much as long as the political majority holds the opinion that the EU needs more repressive measures and greater punitiveness. It is this majority approach towards criminal justice — in which judicial protection of the individual is likely to receive insufficient attention — that has aroused suspicion of EU criminal law.

5.2 *Increased Attention for Judicial Protection*

In the run-up to the adoption of the Lisbon Treaty the attention for protecting the rights of the individual began to increase gradually. Moreover, the entry into force of the Lisbon Treaty in December 2009 — so that broader and less disputed criminal law competences have been effectuated — truly seems to have once more stimulated a criminal policy in which the individual's legal position receives express attention to a much larger extent than in the past.

This has become best visible in the context of procedural rights in criminal proceedings. In 2009, with a view to the step-by-step development of a set of Union-wide minimum standards for the protection of procedural rights for suspects in criminal proceedings, the Council adopted a so-called roadmap.³³ The standards in view should be clear and specific, and on some counts pass the level of protection already required by the ECHR. The step-by-step approach turns out to be successful. By now, common norms have been adopted on the right to interpretation and translation, on the right to information about charges and the right to information on procedural rights, and on the right of access to a lawyer and the right to communicate upon arrest with relatives, employers and consular authorities.³⁴ Recently, a package of proposals has been submitted on the presumption of innocence and the right to be present at trial, on procedural safeguards for children, and on legal aid.³⁵

33 Resolution on a Roadmap for strengthening procedural rights of suspects or accused persons in criminal proceedings [2009] *OJ C* 295/1.

34 Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings [2010] *OJ L* 280/1; Directive 2012/13/EU on the right to information in criminal proceedings [2012] *OJ L* 142/1; and Directive 2013/48/EU [2013] *OJ L* 294/1, *supra* note 17.

35 Proposal for a Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings COM(2013)

Efforts have also been made with regard to the standing of victims of crime. The 2012 Directive provides quite a lot of rights that victims of crime throughout the entire EU are entitled to, such as the right to respectful treatment, the right to information they understand, the right to support from victim support services, etc.³⁶

Although less visible than in the context of procedural rights, judicial protection of individuals plays a role in the context of substantive criminal law too. In various Member States, the scope of national substantive criminal law — which conduct requires a criminal prohibition? — has given much food for thought. It is commonly accepted that prohibiting conduct by means of criminal law should be a last resort; only if other means are considered inadequate alternatives to prevent or combat unwanted and unjust behaviour, it would be justified to call on the criminal law; the various sets of criminalisation criteria that over time have been developed are usually based on this last resort principle. It could be questioned whether such principles and criteria have in practice proved applicable or not. Nevertheless, to thoroughly reflect on the need for criminal law is considered to be of inestimable value, also with a view to protecting the citizen against ‘overcriminalisation’.

It follows from the previous sections that such a reflection has initially been absolutely absent in Brussels’ reality of law-making in the field of criminal law. The lack of clarity about the precise scope of criminal law competences has undoubtedly played a part, although one could argue that the binding force of the subsidiarity principle should have been enough reason to debate EU criminalisation criteria already as from the entry into force of the Amsterdam Treaty. Be that as it may, the good news is that the entry into force of the Lisbon Treaty has prompted the institutions to finally start such a debate.

It is true that the application of the Community method to the adoption of harmonisation measures in this regard would assume an increase of such harmonisation measures. This seems to be supported by the European Commission’s approach towards an EU criminal policy as displayed in a 2011 Communication; in this document, the Commission deems Union-wide

821/2; Proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings COM(2013) 822/2; Proposal for a Directive on provisional legal aid for suspected or accused persons deprived of liberty and legal aid in European arrest warrant proceedings COM(2013) 824. The package also includes two draft Recommendations, one on procedural safeguards for vulnerable persons C(2013) 8178/2, and another on the right to legal aid C(2013) 8179/2.

36 Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime [2012] OJ L 315/57.

criminal prohibitions appropriate in advance, for a multitude of reasons, and with regard to a large variety of areas of crime.³⁷ The Council and The Parliament seem to favour a more reserved approach towards calling on the criminal law.³⁸ It remains to be seen how these viewpoints will influence the creation of criminal prohibitions and sanctions in Brussels' political reality, but the express attention for the limits of the criminal law shows that, at least on paper, law enforcement is no longer the only relevant factor that is taken into account.

The increased attention for the judicial protection of the individual in EU criminal law, as illustrated above, must also be considered against the background of the EU Charter of Fundamental Rights which has binding force since the entry into force of the Lisbon Treaty.³⁹ Although nothing more than a consolidation of civil, social, political and economic rights that were already binding upon the EU and its Member States, the incorporation of these rights in one EU Charter was deemed important to contribute to their publicity amongst citizens — from this it can be deduced how important a strong protection of fundamental rights have become in the EU context. But there is more. Although the EU Charter joins the ECHR interpretations of corresponding rights, the Charter also allows for an interpretation that provides a more extensive protection (Article 52(3) EU Charter). And, finally, the EU's accession to the ECHR must be mentioned — by submitting the acts of its institutions to independent external control is another sign of how much importance the EU attaches to the judicial protection of individuals in criminal proceedings.

6 Final Remarks

I have argued that today's comprehensiveness of EU's criminal law competences requires that justice is done to all interests at stake in criminal justice: the prevention and combating of crime, the protection of the interests of victims and society, and the protection of individuals against unlawful, arbitrary and excessive action of judicial authorities. Too much a focus on the

37 Communication from the Commission, 'Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law' COM(2011) 573 final, in particular pp. 9–11.

38 Council Conclusions on model provisions, guiding the Council's criminal law deliberations, 30 November 2009, doc. nr. 15936/09; European Parliament, 'Report on an EU approach on criminal law', 24 April 2012 (2012/2310(INI)).

39 Charter of Fundamental Rights of the European Union [2010] OJ C 83/389.

preservation of national sovereignty and domestic interests must be considered obsolete, as this would deny the reality and necessity of broad EU powers to enact legislation in the field of criminal law as well as the significance of the aspects given above.

Therefore, the proposal I have presented in this paper is that EU action in the area of criminal law is primarily judged on whether this in its entirety contributes to a reasonable balance between effective law enforcement and adequate judicial protection of individuals.

It has been shown that, despite the initial one-sided focus on crime control in EU criminal justice, the balance is gradually restoring. I am aware of the fact that the increased focus on judicial protection of individuals has dominantly been theoretical up until today; it remains to be seen to what extent, for instance, the new Union-wide procedural rights will be given substance in the practice of national criminal justice as well as in the context of cooperation in criminal matters. Nevertheless, from the viewpoint that either on the national level or on the EU level, criminal law measures should contribute to a reasonable balance between crime control and judicial protection, the adoption of common minimum norms regarding procedural rights in criminal proceedings must be considered a positive step. The EU legislature and the Member States should take up the challenge to assess future initiatives regarding EU criminal justice, and their operation in practice, from this perspective.

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