

The Constitutional Dimension of European Criminal Law

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Thank you very much for the introduction and kind invitation. I hope you can hear me. It is a pleasure to address you. I think this is a great initiative. I know it is challenging and complicated but congratulations to you and your team for sustaining this journal, this serves as a forum for change. I am very pleased because I have met some of you before and I have been really impressed by the level and quality of the student body at all levels. It is amazing that so many people are here today.

You assigned me the brief to speak about European Criminal Law. I chose to speak about European criminal law in broad terms, so I will focus on the intersection between European criminal law and constitutional law. The aim of my talk today is to cover the three main aspects of the previously mentioned relationship. First of all, the aspect of power: what can the EU do? What is its competence in the criminal sphere? How is this field evolving? The second aspect will be about principles: what are the principles of EU law as of now in the field of criminal law? And does criminal law in that sense transform the meaning and content of the constitutional principles of EU law or vice versa? And lastly, something which is very important in this context are rights: what is the impact of the integration in the European Criminal Justice on the protection of fundamental rights? And what, if any, role does the integration of the Charter play in the reconfiguration of this landscape?

I will focus on these topics, but first I want to start by giving you a more defined context, especially for those of you who have not been following closely the development of European criminal law. This is an area of European integration which is very young compared to the others. The EU has defined express competence in the complex Maastricht Treaty in 1992, but the fact is that EU law has been influencing national criminal law in a number of ways. There have been a lot of discussions on how criminal law is at the heart of state sovereignty and at the heart of our modern understanding of state and state power so obviously the ceding of powers to organizations which lie beyond the state is always a challenge.

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The second aspect which I forgot to highlight earlier is that questions on criminal enforcement and the extent and content of European integration in criminal matters become questions of constitutional law. This is the case when one studies a number of recent landmark judgments of the Court of Justice of the European Union. These rulings aim to address the potential and real conflict between criminal law and constitutional law principles and they have resulted in the development of constitutional principles in EU criminal law.

The third aspect, that is worth to be mentioned is that the development of European criminal law goes beyond traditional 'zero-sum' assumptions by scholars and politicians on the adverse impact of Europeanization on national sovereignty. European criminal law is not unified criminal law. We do not have a European criminal court and neither do we have a European criminal code. European criminal law is actually a system of continuous interaction and integration between EU law and each national law. Judicial co-operation takes place within the framework of mutual recognition, which requires the interaction between national systems. Criminalisation takes place in the form of Directives, which provide a leeway for member states in terms of implementation—criminalisation thus occurs under national law. Even the most 'avant-garde' instrument of European criminal law, the Regulation establishing a European Public Prosecutor's Office, establishes not a centralised, top-down system of investigation and prosecution, but rather a system based on the interaction between EU law and national law.

So bearing this in mind, European integration in criminal matters is a complex process involving the interaction between the EU and national law in a field which is highly politicised. This is what makes the field of European criminal law an exciting field for people like me and for some of the PhD scholars today in this room.

First of all, in terms of competence, what did the EU do in the field of criminal law? I would focus mostly on the production of substantive criminal law and on the organisation of criminal law and criminal

sanctions. What are the compromises necessary for the evolution of European integration in this sensitive field? We have witnessed a major constitutional change from the inter-governmental third pillar to the entry into force of the Lisbon Treaty.

The EU has traditionally had the competence to adopt rules on all serious crimes for example on the big areas as terrorism, organized crimes and so on. There could be a case for supranational criminal law and for essential policies where the EU was involved. This was tested in two very important cases by the Court of Justice in the 1990s whose concern was about the protection of environment. So the member states came up with a framework decision on harmonizing criminal law and environment law (previously mentioned third pillar) and the Commission challenged this in the Court of Justice as this was a matter under normal community law because these cases did not only involved criminal or criminality but they also involved the protection of environment. The Court of Justice agreed. It treated criminal law not as a self-standing EU policy, but rather as a means to an end used to achieve the objectives of the Union. These rulings have been translated into Treaty provisions under 'functional criminalisation' which is the legal basis of Article 83(2) TFEU.

The Lisbon Treaty explains the constitutionalisation of the European criminal law in different ways: first of all, it aims to clarify and strengthen the European Parliament's legislative power in criminal matters. Secondly, it supranationalizes the EU criminal law in terms of the powers of EU institutions and the applicability of EU law principles such as primacy and, where applicable, direct effect. What is also important is that the Charter of Fundamental Rights is applicable in EU criminal law. The Lisbon Treaty also attempted to clarify EU competence to harmonise criminal offences and sanctions, via the introduction of 'securitised' criminalisation (competence on major areas of crime) in Article 83(1) TFEU, and, as said above, 'functional criminalisation' in Article 83(2) TFEU.

In spite of the attempt to clarify the Union's criminalisation competence in Article 83 TFEU, there are still a number of questions regarding its scope. Article 83(1) requires criminalisation for areas of crime having a 'cross-border dimension.' The meaning of 'cross-border' in this context is contested. There is a view treating this term as synonymous with cross-border crime, limiting the Union's competence in criminality which involves more than one jurisdictions. A different view, with which I would subscribe, interprets the scope of Article 83(1) TFEU more extensively to include areas of crime with a cross-border dimension even if these occur in a single jurisdiction. The extent of the 'functional criminalisation' competence of the EU in Article 83(2) TFEU is also contested with the provision granting competence to the EU to legislate when this is essential to ensure the effectiveness of EU policies which have already been implemented. It is unclear what constitutes 'essential' and what the implementation requirements are for the provision to apply. Moreover, Article 83(2) TFEU raises the question of the relationship between criminal law and administrative law in cases where dual instruments have been adopted- such as in the case of market abuse. One can consider in these cases that the adoption of administrative sanctions could lead to decriminalisation, by precluding Member States from treating conducts sanctioned by administrative law as criminal in the national legal orders.

Another key development post-Lisbon has been the establishment of a European Public Prosecutor's office. The idea had a long gestation since the days of the *Corpus Juris* and stems from the distrust of European institutions- in particular the Commission – on the political will and capacity of Member States to protect effectively the EU budget. The logic behind this was that national prosecutors are either unwilling or unable to prosecute effectively against the EU budget and this would thus require a European response in the form of a European prosecutor. The logic here is that a European body is needed to effectively protect European interests. However, the project of a European prosecutor was contested in

a number of European states in view of its potentially adverse impact on state sovereignty and the state monopoly on prosecution in criminal matters. This is why the Lisbon Treaty has introduced in Article 86 TFEU possibilities for establishing a European Public Prosecutor's Office (EPPO) through enhanced co-operation. This has led to the adoption of the EPPO Regulation, and at the time of writing the vast majority of EU Member States are participating. However, the current non-participation of states which are significant recipients of EU funds, such as Hungary and Poland, is a matter of concern.

In terms of the structure and powers of the EPPO, we have moved from a Commission- proposed centralised model to a multi-level system involving multiple layers of EPPO offices and officers- with day to day work handled by the European Delegated Prosecutors based in Member States. From the point of view of the citizen and from the point of view of legal certainty, this multi-layered system is problematic. Jurisdiction of the Court of Justice is limited and applicable law (national or EU law) is contested and unclear at times. The absence of harmonisation and the over-reliance on national law, as well as the legal uncertainty can have considerable negative consequences for the protection of fundamental rights and for the position of individuals investigated or prosecuted by the EPPO. However, this was the price to pay for a political compromise. For the first time we have an EU criminal justice agency with direct powers on the national criminal justice systems, and the EPPO is a system which can serve as a laboratory for further integration in European criminal law.

In terms of the applicability of constitutional principles of EU law, it is important to see how European criminal law is testing the Court's approach with regard to key constitutional principles. I think there are two key cases that show how difficult it is sometimes to explain the relationship between EU law and national laws.

The first case is the Taricco case, Taricco I and Taricco II as we EU lawyers say – or the Taricco saga as it has been called by some scholars. I will analyse Taricco from an EU perspective. In Taricco I, we get the

reference by a lower Italian court by a judge who said that he cannot prosecute in Italy – it is difficult to do so because of the Italian statute of limitations applies – so the Italian judge asked Luxembourg what could he do to give effectiveness to EU Law. The Court of Justice answered that this situation is incompatible with the principle of effectiveness of EU law – the national judge is under an obligation to disapply the national law if he thinks that EU law would be breached. *Taricco I* was also important as a successful example of the preliminary reference procedure, whereby a judge from a lower court can send a question on interpretation directly to the Court of Justice in Luxembourg.

The beauty of *Taricco* was that first of all it comes from a lower judge and secondly, it involves a true question of effectiveness of the EU. The question can be seen as a cry for help. The national judge was concerned about the potential of national law to lead to impunity as far as fraud against the EU budget is concerned. Subsequent litigation in Italian courts and in the Court of Justice in ‘*Taricco II*’ centered on the compatibility of the Court’s judgment in *Taricco I* with the principle of legality. This generated an inconclusive judicial dialogue as to the legal meaning and extent of the principle of legality. The Court of Justice in *Taricco II* attempted to accommodate the Italian courts even if this meant legal inconsistencies in its ruling. However, the response in Italy was not so accommodating with one of the key concerns from the perspective of EU law being attempts by the Italian higher judiciary to limit the avenues of preliminary references from Italian lower courts to Luxembourg – undermining thus this bottom-up collaborative mechanism on the interpretation of EU law.

A further constitutional aspect concerns the protection of fundamental rights in Europe’s area of freedom, security and justice. Key questions arise here from the operation of the system of mutual recognition in criminal matters, and most notably on the operation of the European Arrest Warrant system. The system is based on mutual trust. I accept your request as a judge of another EU member state because I trust

your system and I do not ask many questions about what lies behind your decision, I comply because we are all located in an Area of Freedom, Security and Justice and we do not want criminals to take advantage of the abolition of borders. Initially the European Arrest Warrant system based on uncritical mutual trust did not include a ground of refusal to execute on grounds relating to fundamental rights concerns. We are all 'good guys', we have signed the ECHR at the end of the day. In its initial case-law, the Court of Justice defended this approach, linking it to the effectiveness of EU law and EU criminal enforcement. A key judgment in this context has been *Melloni*, whereby the Court of Justice found that EU secondary law has primacy over national constitutional law, even if the latter provides a higher level of human rights protection. In view of reactions by national courts since, the Court of Justice has revised its case-law to move from a model of blind trust to a model of earned trust: in the case of *Aranyosi*, the Court of Justice established a model of judicial dialogue between the issuing and the executing authority; if the latter has doubts on the adequacy of the human rights protection of the requested individual after the execution of the warrant, and stated for the first time that if human rights concerns persist, the execution of the warrant can be suspended. In the subsequent case of *LM*, the Court of Justice extended this reasoning in cases where concerns relate to the rule of law, when the judicial authorities of the issuing member state are not deemed to be independent. Thus, the Court of Justice made a decisive step towards taking meaningful account of human rights, through a system of dialogue both between national courts and between national courts and the Luxembourg Court.

It is through this process of evolution and learning that the constitutionalisation of European criminal law will take flesh.

Thank you very much for your attention.