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1

Foundations

History, Concept and Subject of European Criminal Law

A. The European Integration Process: From the Europe of the Six to the Lisbon Treaty

I. From the Schuman Plan (1950) to Nice (2001)

1 Following the experiences of the Second World War and the growing exacerbation of the conflict between East and West, efforts to establish greater co-operation between the (Western) European States took on a more concrete form in 1945.[1] The general opinion was that a successful European unification process was the prerequisite for a new, independent role of (Western) Europe in world politics and an improvement of economic and social conditions.[2] As early as 1946, Winston Churchill referred to 'a kind of *United States of Europe*' in his famous 'Zurich speech'.[3] Already, the **Council of Europe** had been founded on 5 May 1949.[4] Today, the Council has forty-seven Member States; its most important major agreement probably is the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1950, to be looked at more closely in Chapter 2. Admittedly, as an association of sovereign States, the Council of Europe is only able to advance the process of integration very slowly – for the most part through international law framework agreements, the implementation of which is Member States' responsibility. Thus, the Council cannot itself become a 'motor of integration'.

2 For this reason, a more efficient mechanism of integration was called for, and in 1950 the French foreign minister Robert Schuman suggested uniting the German and French coal and steel industries under a 'common High Authority'. This so-called **Schuman Plan** – which in fact was drafted by Jean Monnet, then a French civil servant – was intended as a first step towards a future European federation based not only on economic integration, but also upon common security interests: the aim was to prevent another war between the major European powers of France

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and Germany by way of tight economic co-operation in the fields of coal and steel.[5] While the Plan was well received in France, Germany, Italy and the Benelux countries (Belgium, Luxembourg, and the Netherlands),[6] the United Kingdom openly opposed it since it undermined its (alleged) leadership role in Europe.[7] Accordingly, on 18 April 1951 the said countries – without the UK – founded the **European Coal and Steel Community** (ECSC).[8] For the time being, no more was possible. The European Political Community (EPC) and the European Defence Community (EDC), **projects in the field of security policy** going beyond economic policy that would have included the creation of integrated French–German troops, never came about.[9] The French 'sacrifice of sovereignty' proved too great an obstacle to the EDC; in 1954, the French National Assembly refused to ratify the treaty, even though it had already been concluded.[10]

3 Even though efforts for integration in the field of security had thus failed for the time being, the Messina Conference (1955) of foreign ministers initiated by the Benelux States tasked a committee chaired by Belgian foreign minister *Paul-Henri Spaak* with exploring the options for further economic integration.[11] The **Spaak Report** of 1956 suggested complete economic integration, alongside special regulations for the field of nuclear power, which at that time was still seen as a technology of the future.[12] The theory behind this return to the economic sector was that a sectoral integration based upon 'inherent necessity' would set in motion further integration, culminating in the final stage of a European federal state ('spill-over effect').[13] On 25 March 1957, the recommendations of the *Spaak* Report were implemented in the **'Treaties of Rome'**, in which the six founding members of the ECSC agreed to establish the **European Economic Community** (EEC) and the **European Atomic Energy Community** (Euratom).[14]

4 During the 1960s, the process of further political integration was prevented in particular by France under *Charles de Gaulle*, who vetoed British membership in 1963,[15] and whose idea of a *Europe des Patries* ('Europe of Fatherlands') remained focused upon nation states and intergovernmental co-operation[16] – in stark contrast to the integrationist approach pursued by the European Court of Justice (ECJ) – today called Court of Justice of the European Union (CJEU)[17] – since the groundbreaking *Van Gend en Loos* judgment.[18] Only after *De Gaulle's* resignation in 1969 was the 1970 Hague Summit of the EEC Member States' heads of government able to define the realisation of a **European Union**

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as a goal for the 1980s.[19] In 1973, the 'Europe of 6' became the 'Europe of 9' following the **'Northern enlargement'**, with Great Britain, Denmark and Ireland joining the EEC.[20] The **'Southern enlargement'** of the 1980s to include Greece (1981), Spain and Portugal (1986) presented a greater challenge to the power of economic integration. However, the admission of these countries also needs to be seen within the context of the political transition process from dictatorship to democracy taking place there, a process that was to be facilitated by their integration into Europe.[21] This shows that enlargement has always been more than just geographic expansion and represented certain policy choices of the Union.[22] In 1995, Austria, Sweden and Finland joined the Union, which thus grew to **15 Members**.[23]

5 In the 1986 **'Single European Act'**, the Member States agreed upon reforms to the Communities, including in particular an expansion of the qualified majority for Council decisions[24] and a strengthening of the position of the European Parliament through the process of co-operation.[25] Furthermore, Members committed themselves to the concept of the internal market.[26] With the **Maastricht Treaty** of 7 February 1992, the EEC was finally renamed the European Community[27] and, more importantly, the **European Union** (EU) was founded.[28] It was designed not as an international organisation possessing legal personality, but as an **association of States.**[29] At this point in time, it represented an **umbrella organisation**, albeit with supranational ambitions,[30] spanning the European Communities (EC, ECSC, EAEC) as a – fundamental – 'first pillar', as well as co-operation in the areas of foreign and security policy (CFSP)[31] and police and justice in criminal matters (PJCCM) as the 'second and third pillars'.[32] This so-called **three-pillar structure** or model is shown in figure 1.

The key difference between the first and the second/third 'pillars' is that only within the former was the EC as a truly supranational organisation, thanks to the transferral of sovereign rights, able to exercise sovereign competencies over the Member States and their citizens. To this extent, one could speak of a 'communitisation' (*communautarisation, Vergemeinschaftung*). By contrast, the second and third pillars operated through intergovernmental co-operation between the Member States, responsible for implementing the decisions taken in these areas.[33] The primary Community law of the TEC took, as a matter of principle, precedence over the Union law of the TEU, since no TEU provisions shall affect the Treaties establishing the European Communities, apart from those necessary for the amendment of the TEEC (in order to

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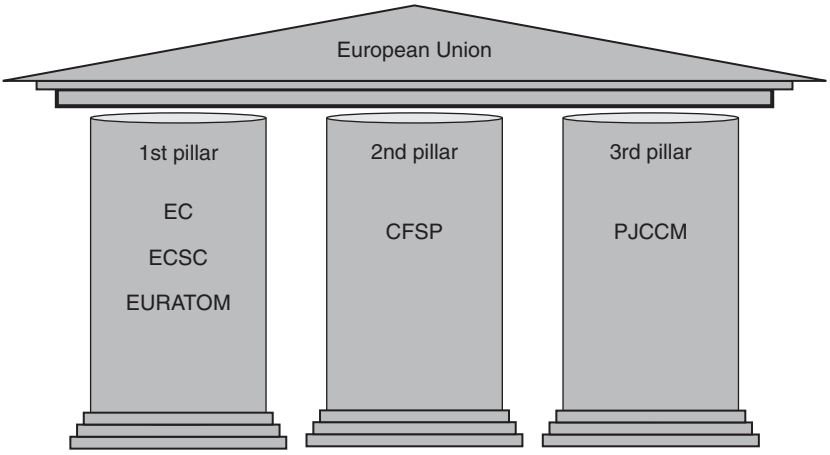

Figure 1 The (former) three-pillar structure

establish the EC) and for the amendment of the Treaties establishing the ECSC and the EAEC.[34] In other regards, however, the pillar structure proved permeable, as is evident in particular from the fact that the institutions of the European Communities (especially the Council and the Commission) were included in the co-operation taking place in the context of CFSP and PJCCM.[35]

6 The revision of the Maastricht Treaty by the **Treaty of Amsterdam** of 2 October 1997 led to a certain strengthening of the parliament's role by expanding the co-decision procedure,[36] and – of particular interest in our present context – transferred the elements of the former (intergovernmental) **co-operation on justice and home affairs** (CJHA) that were *not* related to police and judicial co-operation from the third to the first 'pillar' and thus into EC jurisdiction.[37] By contrast, police and judicial co-operation in criminal matters (PJCCM) remained in the third pillar and thus retained its character as intergovernmental co-operation – for example within the framework of Europol.[38] The so-called **Schengen *acquis***[39] was transferred into the EU framework by a specific Protocol to the Amsterdam Treaty.[40] However, three countries negotiated special regimes: The *UK and Ireland* opted out of the policies regarding visas, asylum, immigration and other matters related to the free movement of persons (Title IV of Part Three TEC),[41] including with regard to the measures necessary to progressively establish the internal market pursuant to Art. 14 TEC.[42] As to the Schengen *acquis* – regardless of its legal

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base (Title IV [first pillar] or Title VI [PJCCM, third pillar] – the UK and Ireland reserved the right to decide on a case-by-case basis if they wanted to participate in certain measures.[43] *Denmark* also opted out of Title IV of Part Three TEC,[44] but it had no explicit queries regarding the PJCCM given that it remained in the – intergovernmental – third pillar.[45] The **jurisdiction of the ECJ** was expanded to the second and third pillar (Art. 46 TEU);[46] yet the latter was dependent on an explicit acceptance of the Member States, which several, including Denmark, the UK and Ireland, did not submit.[47]

7 Against the backdrop of the Union's above-mentioned expansion,[48] the summit of December 2000 was followed by the **Treaty of Nice** in February 2001.[49] With a view to ensuring that the expanded Union was able to work effectively, a revision of the weighting of votes in the Council (from 1 November 2004[50]) and a certain expansion of the area of qualified majority votes were agreed upon, stipulating a parity of votes between the four large Member States (Germany, France, the United Kingdom and Italy).[51] Furthermore, Art. 31(2) TEU[52] created a basis for a European co-ordination unit of national prosecuting authorities with its headquarters in Brussels (**Eurojust**).[53]

8 Following the European Union's 2004 enlargement in the East and the Mediterranean to include ten further Eastern European states (Estonia, Latvia, Lithuania, Poland, Hungary, the Czech Republic, Slovakia, Slovenia) and Mediterranean states (Malta, Cyprus),[54] the accession of Bulgaria and Romania in 2007 and the accession of Croatia in 2013, the EU has now expanded to twenty-eight States and thus includes **thirty criminal justice systems**.[55] With the Brexit vote in the UK on 23 June 2016 the Union will, however, lose an important member,[56] although the procedure under Art. 50 TEU may be delayed[57] and a possible break-up of the UK may weaken the impact on the Union's composition.[58] As a result of the declarations of Bratislava and Rome, the White Paper on the Future of Europe of 1 March 2017 presents five different scenarios for the EU's political development by 2025 following Brexit.[59]

II. The Failed Constitution and the Lisbon Treaty (2007)

1. The Post-Lisbon EU and Criminal Law

9 As early as 2003, the European Convention presented the draft of a treaty establishing a **Constitution for Europe** (TCE).[60] Following

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negative referendum results in France and the Netherlands in the summer of 2005, the ratification process was, however, **suspended** and instead it was decided to embark upon **treaty reform** only.[61] Thus the ambitious plan to give Europe a constitution, which was pursued with considerable artificial (and expensive) pathos, has been consigned to history; 'the reality of Europe has brought this normative hubris back down to earth.'[62] The reform treaty was signed on 13 December 2007 in Lisbon,[63] and was last ratified by the Czech Republic on 13 November 2009, coming into effect on 1 December 2009.[64] Yet several parts, including[65] the extended enforcement powers of the Commission and of the CJEU with regard to pre-Lisbon Acts in the area of PJCCM,[66] were suspended for a transitional period of five years and thus were only activated on 1 December 2014.[67] This so-called **Lisbon Treaty** consists of the reformed **Treaty on European Union** (TEU) and the **Treaty on the Functioning of the European Union** (TFEU).[68] The Union replaces the EC as its legal successor (Art. 1, third subparagraph TEU). Its above-mentioned three-pillar structure has been replaced by *two supranational areas* (formerly EC and Justice and Home Affairs) and one *effectively supranational area* (CFSP).[69]

10 The following changes made by the Lisbon Treaty are of significance for criminal law:[70]

- Dissolution of the previous three-pillar structure and instead creation of a (supranational) **area of freedom, security and justice** (cf. Art. 67 TFEU).[71]
- Application of the **ordinary legislative procedure** to (secondary) legal Acts in the area of criminal law,[72] including qualified majority voting in Council as rule;[73] **directives** replace former framework decisions.[74]
- Standardisation of the **principle of mutual recognition** for criminal law (cf. Art. 82(1) TFEU).[75]
- Explicit competence to **approximate the procedural laws**, including the co-operation laws (Art. 82(1) TFEU),[76] of Member States in the areas of mutual admissibility of evidence, and the rights of individuals as well as victims in criminal proceedings (Art. 82(2) TFEU); further 'minimum rules' may be adopted.[77]
- Explicit competence to **approximate the substantive laws** of Member States by way of minimum rules in the areas of terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised

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Table 1 *Comparison of important rules pre- and post-Lisbon*

Nice (February 2001)	Lisbon (13 December 2007)
No legal personality of EU	Legal personality of EU (Art. 47 TEU)
European Council chaired by the president of the European Council (head of state/government of the country that has the presidency of the EU Council for 6 months)	European Council chaired by a chairperson ('president') who holds this office for two and a half years and can be re-elected once (Art. 15 TEU)
EP has the right to co-decision only in selected policy areas	The EP's right to co-decision is the rule (ordinary legislative procedure, Art. 289(1), 294 TFEU)[i]
Composition of the EP: Germany has 99 MPs (max.), followed by the UK, France and Italy with 72, Spain and Poland with 50 and Malta with 5 (min.)	Composition of the EP: 750 MPs in total, max. 96 (Germany), min. 6 (Malta); France has 74, the UK and Italy 73, Spain 54 and Poland 51; no fixed ratio of distribution (Art. 14 (2) TEU)
Four legislative procedures: co-decision procedure, assent procedure, consultation procedure, co-operation procedure	Two legislative procedures: ordinary and special legislative procedure (Art. 289(1,2) TFEU)[ii]
Unanimous voting in Council	Qualified majority voting in Council as rule (Art. 16(3)TEU, 294 TFEU)[iii]
Competences divided into exclusive and concurrent competences by CJEU and doctrine. No summarising enumeration	Competences divided into 'exclusive' and 'shared' competences, followed by a summarising enumeration and expansion (Art. 2 ff. TFEU)
There is a 'High Representative for the Common Foreign and Security Policy' who does not belong to the Commission, as well as a member of the Commission responsible for foreign policy	There is a 'High Representative of the Union for Foreign Affairs and Security Policy', who at the same time also presides over the Foreign Affairs Council and is a Vice-President of the Commission (Art. 18 TEU).
CFREU: not legally binding	CFREU: legally binding (Art. 6 TEU)
Differences between the jurisdiction of the CJEU and the ECtHR	EU may accede to the ECHR (Art. 6(2) TEU in conjunction with Prot. 14 ECHR)
Withdrawal from the EU not envisaged	Withdrawal from the EU possible (Art. 50 TEU)

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Table 1 (*cont.*)

Nice (February 2001)	Lisbon (13 December 2007)
No monitoring by national parliaments	Subsidiarity monitoring (Art. 5(3) third sentence TEU) through opinions during the legislative procedure (Parliament and Subsidiarity Protocol)[iv]

i Kaiafa-Gbandi, *EuCLR*, 1 (2011), 10, regards this as an important measure for the safeguarding of fundamental rights.

ii For more information on this development, with particular reference to criminal law, cf. Meyer, *Strafrechtsgenese* (2012), pp. 327 ff.

iii On the impact of this and other changes on the way negotiations on draft legislation are carried out, cf. Nowell-Smith, *NJECL*, 3 (2012), 381 ff. (arguing that the new rules have made secondary acts longer and more detailed since all parties – i.e., Commission, Council and EP – are interested to clarify the relevant obligations); also de Busser, *ERA Forum*, 16 (2015), 280.

iv Art. 5(3) TEU in conjunction with the Subsidiarity Protocol (Lisbon Treaty, Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, OJ C 326 of 26 October 2012, 206–9) establishes an early warning system (preventive *ex ante* monitoring, including by national parliaments; on their enhanced role see also Art. 12 TEU and Lisbon Treaty, Protocol (No 1) on the Role of National Parliaments in the EU, OJ C 326 of 26 October 2012, 203–5): first of all, the Commission forwards draft legislative acts to the national parliaments (Art. 4 Subsidiarity Protocol), who may then within eight weeks present a reasoned opinion on why they believe that the draft in question does not comply with the principle of subsidiarity (Art. 6 Subsidiarity Protocol). If this so-called subsidiarity objection ('yellow card'; on another 'orange card' mechanism, cf. Art. 7(3) Subsidiarity Protocol) is not successful, then the parliaments may take legal action on grounds of infringement of the principle of subsidiarity with the ECJ (Art. 8 Subsidiarity Protocol – repressive *ex post* monitoring). In **Germany**, this right is exercised by the respective Committee on European Matters of the Bundestag or the Bundesrat. It works essentially like this in all EU MS: for example, in **France** this control is exercised by the Commission des affaires européennes of the Assemblée nationale and by the Sénat (cf. www2.assemblee-nationale.fr/14/autres-commissions/commission-des-affaires-europeennes, last accessed 27 January 2018 and Leblois-Happe, 'Le parquet européen', in Roux-Demare, *L'européanisation de la justice pénale* (2016), 132); in **Italy** by the Camera and Senato applying different procedures (see especially regarding the former Art. 8

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Table 1 (*cont.*)

of Law 234 of 24 December 2012 ('Norme generali sulla partecipazione dell'Italia alla formazione e all'attuazione della normativa e delle politiche dell' Unione europea', available at www.politicheeuropee.it/normativa/18408/legge-24-dicembre-2012-n-234, last accessed 27 January 2018)); in **Spain** by the Comisión Mixta para la Unión Europea (it is called 'mixed' because it is composed of members of the Camara de Diputados and the Senat), cf. criticism in Matía Portilla, *ReDCE*, 9 (2012), 95 ff.; in **Sweden** by the committee in charge of the respective matter; if its evaluation is negative, the matter is sent to the plenary (Ch. 9 sect. 20 and Ch. 10 sect. 3 of the Riksdagsordning); in the **UK** by the European Scrutiny Committee of the House of Commons (www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee, last accessed 27 January 2018) and the EU Select Committee of the House of Lords (www.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee, last accessed 21 November 2017)); for **Poland** see Pudło, in *Roczniki Administracji i Prawa: Teoria i Praktyka*, 13 (2013), 27 ff.; for **Portugal** see Law 43/2006 as amended by Law 21/2012 of 17 May 2012, available in English at http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee-/, last accessed 27 January 2018). Furthermore, an infringement of the principle of subsidiarity may also be objected to as part of a nullity suit, during treaty infringement proceedings or during a preliminary ruling procedure. However, the exact extent of judicial review is debatable. The majority of literature appears to assume that the principle of subsidiarity is fully justiciable, while other opinions see the principle more as a political guideline, so that at most compliance with the obligation to state reasons can be monitored, but not content-related questions themselves; cf. Calliess, in Calliess and Ruffert, *Verfassung der EU*, i (2006), Art. 12 AEUV mn. 10 ff.; cf. also Cygan, *ERA Forum*, 12 (2012), 517 ff.; Kiiver, *ERA Forum*, 12 (2012), 535 ff.; Simon, *NJECL*, 3 (2012), 252–3; Geiger, *Auswirkungen europäischer Strafrechtsharmonisierung* (2012), pp. 49 ff.; Asp, *Substantive Criminal Law Competence* (2012), pp. 183 ff.; Turner, *AmJCompL*, 60 (2012), 580 (calling the parliamentary review a 'welcome innovation'); Esser, *Europäisches und Internationales Strafrecht* (2018), §2 mn. 152 ff.; Mitsilegas, *EU Criminal Law after Lisbon* (2016), pp. 40–1 (national parliaments cannot block); on the other ways in which national parliaments can participate, cf. Meyer, *Strafrechtsgenese* (2012), pp. 319–20, 352 ff.

crime (Art. 83(1) TFEU);[78] this security-driven criminalisation approach[79] may also be expanded.[80]

– Standardisation of an **ancillary competence** that authorises the harmonisation of criminal law if this is 'essential to ensure the effective

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implementation of a Union policy' in a policy area that has already been harmonised (Art. 83(2) TFEU);[81] this instrumental or functional approach[82] has entailed constitutional concerns, as we will see in a moment.

- Competence to legislate **supranational criminal law** on the EU level, particularly to *protect the financial interests* of the Union (Art. 325 TFEU).[83]
- Introduction of an '**emergency brake procedure**' (Art. 82(3), 83(3) TFEU) – to balance the expanded competences in the area of criminal law[84] – in cases where 'fundamental aspects' of national criminal justice systems are affected thereby, showing deference to national diversity.[85]
- The establishment of a **European Public Prosecutor's Office (EPPO)** together with the creation of a **supranational European criminal procedural law** for this new institution (Art. 86(1,3) TFEU).[86]
- Last, but not least, a strengthening of **individual rights** ('promise of rights')[87] by the explicit recognition of the CFREU (Art. 6 TEU) and a harmonisation competence ('minimum rules') with regard to procedural rights (Art. 82(2)(b) TFEU), which in fact led to the adoption of a series of rights directives as part of the Stockholm programme.[88]

2. Opt-Outs and Constitutional Concerns

11 The *implementation of the Lisbon Treaty* entailed some **conflicts with the national (constitutional) order** of some Member States. As to the PJCCM, **Denmark** negotiated a separate Protocol to the Treaties,[89] pursuant to which it fully abstained from the future Area of Freedom, Security and Justice,[90] unless it decides to opt back in to everything, in which case it will 'apply *in full* all relevant measures then in force taken'.[91] The **UK and Ireland** also negotiated a separate *Protocol (21)*,[92] which likewise gave them the right to fully abstain from any future measures in the area of Freedom, Security and Justice, but also allowed them, unlike Denmark, to *selectively* opt in regarding individual measures.[93] This, in fact, amounts to a reintroduction of the veto, abolished by the Lisbon qualified majority voting, through the back door. In addition, the UK[94] obtained through *Protocol 36* a full *opt-out* option from all (135) police and criminal justice measures adopted under the pre-Lisbon 'third pillar',[95] unless they have been amended ('Lisbonised').[96] As to the EPPO, the UK already made clear at the outset that it will not participate unless there is a national referendum in favour ('referendum lock').[97] The UK

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