# Part I

# Foundations of European Criminal Law

# 1 European Union and Council of Europe

## Special Focus on Criminal Law

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## 1.1 Introduction: European Criminal Law as an Umbrella Term

### 1.1.1 Dual Meaning

European criminal law (ECL) has acquired a dual meaning in professional and academic discourse: first, as a generic term for the description and classification of European legal integration in the context of criminal law.[1] It is, on the one hand, used to distinguish the realm of transnational and supranational law and standards with respect to penal law from the traditional national discipline of criminal law; on the other hand, it is meant to provide a separate identifiable discipline.[2] Second, ECL constitutes a branch of criminal law, with its own (criminal) policy, legal norms (more or less accepted), principles, and interpretative rules.[3] While there are some objections to this view, particularly vis-à-vis differences to classical national criminal law systems, there is consensus when speaking of a cross-sectional area of law.[4] At the same time, we may use the concept of ECL in a broader sense, including criminal law based on the European Convention on Human Rights (ECHR) as well as the crime control activities of the Council of Europe (CoE).[5]

Notwithstanding that ECL is incorporated into national criminal justice systems, the legal framework and the legal dynamics of influencing these national systems differ substantially. As to ECL as a broad concept, it may be argued – in line with Kettunen[6] – that respect of human dignity, as

[1] K. Ambos, *European Criminal Law*, Cambridge: Cambridge University Press, 2018, p. 14.
[2] A. Klip, *European Criminal Law*, 4th edn., Cambridge: Intersentia, 2021, p. 1; B. Hecker, *Europäisches Strafrecht*, 6th edn., Berlin: Springer, 2021, p. 7.
[3] Klip, European Criminal Law, p. 1. [4] Hecker, Europäisches Strafrecht, p. 8.
[5] Ambos, European Criminal Law, p. 14.
[6] M. Kettunen, *Legitimising European Criminal Law*, Berlin: Springer, 2020, p. 247 ('the ECHR regime requires that the contracting parties use criminal law measures to protect the basic Convention value of human dignity which is protected through the other Convention rights').

the very core of the European Court of Human Rights (ECtHR), is the general justification for criminal law.

### 1.1.2 The Academic Discourse and Its Spillover

As early as 1953, at the dawn of European integration, Hans-Heinrich Jescheck stated that 'European criminal law is no longer a question for the future, but a part of the living present.'[7] He was the first to use the term, referring to the exercise of the criminal law competence conferred upon supranational bodies by the European Coal and Steel Community (ECSC) and the draft European Defence Community. In the academic debate, the subject has been a permanent feature since the late 1960s and early 1970s of the twentieth century, with ECL receiving increased attention, primarily by formulating reasons for its non-existence.[8] Thus, for example, Bridge argued that there is no 'European criminal law', and indeed its construction as a supranational criminal law system would be a disproportionate answer to the relevant problems resulting from Community integration.[9]

The further discourse has been influenced by issues regarding the regulatory and doctrinal aspects of administrative criminal law as well as the relationship between EU and national criminal law. The procedural (due process) and proportionality issues arising from the European Commission's own sanctioning powers first came to the fore in the late 1980s. And by way of its Engel judgment,[10] the ECtHR set down the criteria for criminal charges, namely, the classification of the offence under national law, the nature of unlawful acts, and the nature and degree of severity of the penalty. As to the primacy and direct effect of EU law (then 'Community law'), the Court of Justice of the European Union's (CJEU) (then 'Court of Justice of the European Communities') case law had already established that national criminal law rules could entail unjustified restrictions on the four fundamental freedoms, and that their application in specific cases could therefore be contrary to Community law.[11]

[7] H.-H. Jescheck, 'Die Strafgewalt übernationaler Gemeinschaften', (1953) 65 *ZStW*, 498.
[8] Hecker, Europäisches Strafrecht, p. 20.
[9] J. W. Bridge, 'The European Communities and the Criminal Law', (1976) 1 *CLR*, 88 at 97.
[10] ECtHR, *Engel and Others v. The Netherlands*, Appl. Nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, 8 June 1976.
[11] CJEU, *Bickel and Franz*, No. C-274/96, Judgment, ECLI:EU:C:1998:563, 24 November 1998; *Rienks*, No. 5/83, Judgment, ECLI:EU:C:1983:382, 15 December 1983; *Cowan v. Trésor public*, No. C-186/87, ECLI:EU:C:1989:47, 2 February 1989.

The Greek Maize case[12] had clarified the Member States' (MS)-specific obligations under Community law when designing their internal criminal law systems (application of effective, proportionate, and dissuasive sanctions). At that time, there was no third pillar, that is no specific cooperation framework on criminal justice.[13]

Given that certain elements of EU integration had a considerable impact on the domestic criminal law systems of the MS, it became readily apparent that this process also influenced the everyday practice of criminal law and the criminal justice system in their entirety. The CJEU's judicial law making and, of course, the significant changes to the founding treaties have led to the question of legitimacy. With the amendments to the Amsterdam Treaty (and subsequent treaties), criminal law aspects of immigration and asylum have become part of Community law. Solid competence for implementing criminal law was embedded in the third pillar (backed up by appropriate instruments). The introduction of the principle of mutual recognition anticipated a further development in procedural law;[14] Schengen law established the transnational *ne bis in idem* principle,[15] and the CJEU was given jurisdiction to interpret and examine the validity of the newly introduced framework decisions (FDs) (if the respective MS has opted in, Art. 35 Treaty on European Union (TEU [old 1999][16]).

As of 1 December 2009, ECL became part of 'normal' EU policy, giving rise to a proper European criminal policy,[17] although such a policy had

[12] CJEU, *Commission of the European Communities v. Hellenic Republic*, No. 68/88, Judgment, ECLI:EU:C:1989:339, 21 September 1989.

[13] Klip, European Criminal Law, p. 223; Ambos, European Criminal Law, p. 14.

[14] Ambos, European Criminal Law, p. 415; D. Brodowski, 'European Criminal Justice: From Mutual Recognition to Coherence', in S. Carrera, D. Curtin, and A. Geddes (eds.), *20 Years Anniversary of the Tampere Programme*, San Domenico di Fiesole: European University Institute, 2020, p. 225. On mutual recognition, see also the chapter by Phillip Ronsfeld in this volume (Chapter 6).

[15] See Ambos, European Criminal Law, pp. 146 ff.; see also Martin Böse, 'Fundamental Rights Protection', Chapter 10 in this volume.

[16] See 'Information Note on References from National Courts for a Preliminary Ruling' of the ECJ, OJ 2005 C 143/1; for more details, see S. Lorenzmaier, 'The Legal Effect of Framework Decisions – A Case-Note on the Pupino Decision of the European Court of Justice', (2006) *ZIS*, 583, 587.

[17] Towards an EU criminal policy: ensuring the effective implementation of EU policies through criminal law. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. COM/2011/0573 final.

been identified in academic discourse before.[18] Other features include the fact that elements of the EU *ius puniendi* are now clearly visible[19] and that EU criminal law standard setting can lead to legislation with primary application and direct effect.[20] The Charter of Fundamental Rights of the European Union (CFREU), which contains, inter alia, fundamental rights provisions on criminal justice, has entered into force as a binding primary source of law.[21]

### 1.1.3 European Criminal Law Today

ECL is still not the traditional criminal law in the 'domestic' sense because its function is not to establish direct individual criminal responsibility. In fact, the EU does not (yet) aim to develop a proper criminal justice system.[22] However, given that the EU has, as a supranational organisation, autonomous values and interests that go, at least partly, beyond national interests, these interests are to be protected by the national criminal justice systems as long as no supranational EU criminal justice system exists.[23] Of course, there is some supranationality at the institutional level, most impressively and recently demonstrated by the European Public Prosecutor's Office (EPPO),[24] but this institutional supranationality remains fragmentary at best.[25] Further, it is to be noted that ECL entails the harmonisation of the domestic criminal justice systems,

[18] J. Vogel, 'Europäische Kriminalpolitik – europäische Strafrechtsdogmatik', (2002) 149 *GA*, 517.

[19] See B.3.; C.2.; Art. 82, 325 TFEU; in more depth by K. Nuotio, 'Supranational Criminal Law, Harmonisation and Approximation', Chapter 5 in this volume.

[20] D. Brodowski, 'Supranationale europäische Verwaltungssanktionen. Entwicklungslinien – Dimensionen des Strafrechts – Legitimität', in K. Tiedemann, U. Sieber, H. Satzger, C. Burchard, and D. Brodowski (eds.), *Die Verfassung moderner Strafrechtspflege. Erinnerung an Joachim Vogel*, Baden-Baden: Nomos, 2016, p. 141.

[21] Treaty of Lisbon, entered into force on 1 December 2009, 2007/C 306/01. In more depth by S. Allegrezza, 'European Public Prosecutor', Chapter 17 in this volume.

[22] Hecker, Europäisches Strafrecht, pp. 9, 17.

[23] Ambos, European Criminal Law, p. 19; L. Wörner, 'Kriminalitätsphänomen Terrorismus als unlösbare Aufgabe für das nationale materielle Strafrecht – Zur Relevanz europäischer bis internationaler Tatbestandsvorgaben', in K. Höffler (ed.), *Criminal Law Discourse of the Interconnected Society (CLaDIS)*, Baden-Baden: Nomos, 2020, p. 131 at 137.

[24] See S. Allegrezza, 'European Public Prosecutor', Chapter 17 in this volume.

[25] For an overview on the institutional framework, see Ambos, European Criminal Law, pp. 560ff. (Ch. 5).

especially of their criminal law and its interpretation and application in line with EU law.[26]

In sum, ECL may be divided threefold according to the subject matter and the objective pursued: (i) the protection of separate (mainly and recently financial) EU interests, (ii) the aim of effective joint crime control (in the MS), and (iii) the sanctioning of violations of EU law. In order to better understand the relationship and intersections between the EU law and CoE (inspired) law (D.), the routes (B.) and sources (C.) of ECL need to be discussed first.

## 1.2 Routes of European Criminal Law

### 1.2.1 Criminality-Related Challenges for the MS

The dynamic development of ECL and its sometimes revolutionary milestones can be traced back to two groups of factors that have affected the MS equally over the last decades.

The first is globalisation, which has had a significant impact on crime, its structure, and transnationalisation. Fast and cheap travel has made criminals mobile; the technological revolution and access to the Internet for all has not only given rise to new types of crime but also transformed 'traditional' crime through the use of new tools for committing crimes. Traditional forms of cooperation between States became ineffective, and often even inappropriate, and have created significant impunity gaps for new types of crime, for which a unified approach is now indispensable.

Another set of reasons is created by EU integration itself: supranational interests and values have emerged, the protection of which has become a vital issue for the EU as an international organisation, even independently of the MS. These include, in particular, financial interests, such as protecting the euro as a currency against counterfeiting or the protection of EU officials against corruption, as well as the legal acquis for economic integration and, in particular, the four freedoms, which has indirectly but necessarily led to the inclusion of criminal law in the integration process.[27] Thus, legal forms had necessarily to be found that aid in avoiding impunity gaps in the MS in relevant legal matters, help

[26] Hecker, Europäisches Strafrecht, p. 243. [27] Klip, European Criminal Law, p. 25.

enforce the acquis and aims of EU legal integration, and ensure that the MS cooperate as effectively as possible in the fight against crime. With Sieber, 'paradoxical as it may sound, the only way to solve the problems caused by (incomplete) European integration is to go even further'.[28] However, the development of a supranational EU criminal justice system has not been an option either technically or politically. It is therefore critical that the EU deploys national criminal justice systems to conquer these challenges and aims.

In addition, a third factor has emerged that will continue to influence the present and future of ECL: the digital revolution. The development of new regulatory requirements in criminal justice and of a regulatory framework for cooperation between national authorities will have to reflect not only the above-mentioned general phenomena of admissible technology as such but also the social changes brought about by disruptive technologies: social media, big data, artificial intelligence, and machine learning. They give rise to new types of crime, require new types of crime control and new procedures, and thus new types of procedural rules – ones in which geographical considerations (territory, jurisdiction, and sovereignty) are less relevant.

### 1.2.2 The Rise and Fall of the Pillars

The Treaty of Lisbon, which entered into force on 1st December 2009,[29] has significantly and fundamentally changed the legal framework of the EU's justice and home affairs cooperation policy,[30] opening a new chapter in an already active area of integration. How did this come about?

In 1992, with the establishment of the European Union (Treaty of Maastricht), justice and home affairs cooperation derived as a 'matter of common interest' for the MS derived from the so-called third pillar, which provided a legal framework for intergovernmental cooperation. The TEU (in force from 1 November 1993 to 1 May 1999) did not entitle the EU to any legally relevant supranational room for manoeuvre but was significant in relation to the objectives of economic integration. It recognised other social interests and values to be protected, those that

[28] U. Sieber, 'Memorandum für ein Europäisches Modellstrafgesetzbuch', (1997) 52 *JZ*, 369 at 370.
[29] Treaty of Lisbon 2007/C 306/01. [30] Ambos, European Criminal Law, p. 15.

traditionally fall within the scope of national criminal law. The Union considered the fight against them as its own from that time onwards. The institutionalisation of the third pillar beyond the level of political cooperation was based precisely on the realisation that the development of the Common Market and European economic integration could be jeopardised by terrorism, drug trafficking, international fraud, and other crimes of an international or transnational nature, and that the fight against these crimes should therefore be tackled at a higher level, if necessary, and not at a national level. The intergovernmental model of the third pillar was a compromise between the MS, as there were States that would have preferred more dynamic integration while others would have preferred slower progress in connection with any criminal justice at all.[31]

Article K.3 TEU (old 1993) established the legal framework for introducing European conventions[32] and allowed the Council to take joint action, as the Union's objectives can be better achieved through joint action than through the MS acting individually on account of the scale or effects of the action envisaged. The historical importance of the first version of the third pillar is indisputable, as it thematised joint action against crime at the EU level, and the legitimacy gained by its enshrinement in the Treaty also paved the way for further developments.

This balance is not altered by otherwise very cumbersome intergovernmental decision-making, lack of binding legal acts, and often unproductive legislation – the reasons that led to the failure of the first version of the third pillar and the reform. The landmark changes were brought about by the Treaty of Amsterdam (signed on 2 October 1997, in force from 1 May 1999 to 30 October 2009). These reforms gave both the European Commission and the CJEU autonomous powers (preliminary ruling) in the third pillar, that is the Union's supranational bodies could act 'in their own right' as far as delegation was concerned, thus losing the purely intergovernmental character of the third pillar. Among other FDs, legally binding legislation was introduced. The common migration and asylum policy was moved to the first pillar, and some – criminal justice-related – achievements of the Schengen acquis were incorporated into the legal structure of the third pillar. In the period following its entry into

[31] See also H. G. Nilsson, 'Some Memories of the Third Pillar', (2019) *eucrim*, 253–255 at 254.

[32] For example, Europol Convention, PIF directive on the protection of financial interests of the European Communities through criminal law, EU Convention on Corruption.

force, virtually nothing substantial happened for about two years, until the adoption of the first binding FD on the protection of the euro under criminal law. Then, following the first ruling by the CJEU acting under third pillar powers, criminal law-related legislation gained a significant boost, which continues to this day.

The Treaty of Nice (signed on 26 February 2001, in force since 1 February 2003) made an impact on the third pillar by making Eurojust the leading actor of judicial cooperation in criminal matters and further refining the rules of so-called enhanced cooperation.

The new paradigm of the reform introduced by the Treaty of Lisbon, finally, abolishes the pillars and reorganises the former third pillar issues into a separate, 'normal' EU policy. The 'area of freedom, security and justice' (AFSJ) is an EU policy of shared competencies. In order to adopt this institutional change that created a new supranational EU policy from its content, replacing previous intergovernmental cooperation, the MS have also set out specific compensatory mechanisms in the reform that could help ensure that the new paradigm is accepted and lived out in practice, such as, in general, no EU regulation on substantive criminal law shall be issued, the so-called emergency brake procedure, and the enhanced cooperation linked to it.

### 1.2.3 'Hunt' for European *ius puniendi*

The earliest reference to criminal law competence appeared in Article K.1 of TEU (old 1993), but this could by no means be considered as being part of *ius puniendi*. Instead, it was a significant stage in a longer development. The provision affirmed the competence of the newly formed EU to commence joint action in the field of criminal law, surpassed the former limitations of combatting crime at the national level, and paved the way for shared interests. This was followed by a broad academic debate on the justification of rules laid down by several directives or regulations aimed at applying necessary sanctions against entities (natural persons or legal bodies) infringing upon Community law on the level of the respective national (domestic) legal order. It included the question of whether the sanctions 'expected' by the Community should be of domestic criminal law nature or if MS should be given a margin of discretion in determining the sanctioning instrument, using *ius puniendi* when obliging the MS to sanction the infringement of EU law within its own criminal law framework.