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## Legal Cultures in Europe: Brakes, Motors, and the Rise of EU Criminal Justice

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### The Rise of EU Criminal Justice

The way communities address what they consider to be ‘wrong’ varies between different societies. European legal practices have common medieval roots,<sup>1</sup> but they have taken distinct and particular forms in different regions under the influence of a variety of cultural and social factors. For centuries, the regal mission of dispensing criminal justice was guarded jealously within the jurisdiction of the sovereign state, and as modern states sought to harness criminal justice to their laws, judicial styles became national. Over time, considerable changes have occurred in the development of legal forms and penal practices. Certain common evolutionary patterns and broad similarities can be observed in the way criminological ideas and penal institutions have evolved in European states.<sup>2</sup> But not every country has followed the same trajectory: criminal justice systems have been moulded by diverse national histories and state cultures. Independent and separate from each other, criminal justice systems implement legal rules formally established by the state according to a procedural framework defined at the national level. Yet since the nineteenth century, the states’ monopoly of criminal matters has not precluded international cooperation between penal systems, especially through extradition mechanisms and transnational policing networks.<sup>3</sup> Nor, after the Second World War, did it prevent the establishment of transnational

<sup>1</sup> R. C. van Caenegem, ‘Reflexions on Rational and Irrational Modes of Proof in Medieval Europe’, *Tijdschrift voor Rechtsgeschiedenis / Revue d’histoire du droit / The Legal History Review*, 58–3 (1990), 263–279.

<sup>2</sup> C. Emsley, *Crime, Police and Penal Policy: European Experiences, 1750–1940* (Oxford University Press, 2007).

<sup>3</sup> P. Andreas and E. Nadelmann, *Policing the Globe: Criminalization and Crime Control in International Relations* (Oxford University Press, 2006), esp. chapter 2 on the ‘European Origins of International Crime Control’.

standards of fair procedure through the ratification of international conventions protecting fundamental rights.<sup>4</sup> For many years, these developments took place under the aegis of sovereign states and remained under their firm control. They did not seem to challenge that cornerstone of the modern state: the assumption that criminal justice is national in character. Yet the rapidly evolving nature of the European Union calls for a reassessment of this key tenet of the Westphalian system. For in Europe, criminal policy is no longer a preserve of nation-states.

*From National Criminal Justice Systems to a European Criminal Policy*

The EU now has a criminal law competence in its own right. Whereas the founding treaties foresaw no interaction between domestic criminal law and European Community (EC) law, this is no longer the case. The evolution has been quite remarkable, from a EC seen as a primarily economic organization in no way destined to shape national criminal policy, to an EU seen as a fully fledged penal actor.<sup>5</sup> It started with early forays by the European Court of Justice into the realm of criminal law. Frequently in its case law the Court required domestic authorities to ignore national criminal law for the sake of uniform application of European law.<sup>6</sup> Thereafter, inter-institutional battles necessitating the intervention of the Court led to the recognition of (implied) powers vested in the EC to require domestic criminal law measures.<sup>7</sup> This power slowly expanded through incremental treaty revisions, starting in the mid-1980s with the signing of the Schengen Agreement (1985). Although this was a treaty only loosely connected to the EC, it paved the way for new cooperation among Member States in the field of criminal justice. Initially presented as a necessary reaction to the security deficit that arose from the abolition of internal borders within an integrated union,<sup>8</sup> policy justifications for EU criminal justice have gradually developed over the last twenty years with the advent of a discourse around the ‘citizenship of the Union.’

<sup>4</sup> A. Cassese, *International Law* (Oxford University Press, 2001), 349–374.

<sup>5</sup> E. Baker, ‘The Emerging Role of the EU as a Penal Actor’, in T. Daems, S. Snacken, and D. van Zyl Smit (eds.), *European Penology?* (Oxford/Portland: Hart, 2013), 77–111.

<sup>6</sup> For example, Case 8/74, *Procureur du Roi v Benoît and Gustave Dassonville*, 11 July 1974, involving community law as a defence against prosecution.

<sup>7</sup> Case C 176/03, *Commission v Council (Environmental Legislation Litigation)*, 13 September 2005.

<sup>8</sup> On the spill-over theory, see M. Fletcher, R. Löf, and B. Gilmore, *EU Criminal Law and Justice* (Cheltenham/Northampton: Edward Elgar, 2008), 22–31.

This is seen as empowering the EU as a guarantor of the security and the freedom of the nationals of the Member States.<sup>9</sup> From the Maastricht Treaty (1993), which constructed a formal intergovernmental ‘pillar’ covering justice and home affairs, to the Amsterdam Treaty (1997), which provided for the creation of a transnational Area of Freedom, Security and Justice (AFSJ), criminal policy has become a competence of the EU. The steady development of a new legal corpus can be traced through some highly visible achievements, such as the establishment of the European Arrest Warrant (EAW) and the creation of new agencies (Europol, Eurojust), but also through other less noticeable yet far-reaching judicial developments<sup>10</sup> and multiannual programmes.<sup>11</sup>

Such developments are gathering momentum now that the Treaty of Lisbon has entered in force. The Union explicitly shares a law-making competence with the Member States in the European AFSJ<sup>12</sup> and there is a clear legal basis for the adoption of EU criminal legislation to combat and prevent crime and to achieve efficient regulation. Article 82(2) of the Treaty on the Functioning of the European Union (TFEU) confers on the European institutions the power to adopt minimum rules in relation to certain aspects of criminal procedures ‘to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension’. Furthermore, Article 83 (TFEU) allows the Union to establish ‘minimum rules’ to define ‘criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension’ and to ‘ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures’. In addition, the Treaty provides for some crucial institutional innovations. The framework for criminal law making, long entrenched in a formal intergovernmental structure, is now closely aligned with the rules generally applied to the rest of EU law. The introduction of qualified majority voting in the Council, a co-decision power for the European Parliament and normal jurisdiction for the European Court of Justice in relation to policing and criminal law, now make the institutional framework for EU criminal law essentially transnational (as opposed to

<sup>9</sup> S. Coutts, ‘Citizenship of the European Union’, in D. A. Arcarazo and C. C. Murphy (eds.), *EU Security and Justice Law* (Oxford/Portland: Hart, 2014), 92–109.

<sup>10</sup> Case C 105/03, *Criminal Proceedings against Maria Pupino*, 16 June 2005.

<sup>11</sup> The Tampere Programme adopted by the European Council in October 1999 was the first multiannual programme to set priorities for an AFSJ. It was then followed by the Hague Programme of 2004 and the Stockholm Programme of 2009.

<sup>12</sup> Art. 4(2) of the Treaty on the Functioning of the European Union.

intergovernmental). In practice, this revised institutional framework has been accompanied by the proposal and adoption of an increasing number of Directives in the field of criminal law and criminal procedure. And it is expected that in the coming years the impact of EU law's harmonizing measures on national criminal justice systems will be increasingly felt.

Potentially affecting most aspects of domestic criminal justice systems, these new developments in European law take place in a domain where distinctive legal characteristics are deeply entrenched. Rooted in history and tradition, penal justice should not be viewed as a mere set of technical arrangements. It emerges within a cultural context which overwhelmingly determines its character. The criminal process is the articulation in legal form of the political and cultural constructs that are the norms governing the proper relationships between the state and the individual, the safeguards to be expected from a fair trial, and the nature of judicial truth.<sup>13</sup> Converging national trends can be perceived under the influence of international legal instruments (most notably the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the case law of the European Court of Human Rights [ECtHR]). Furthermore, similar administrative evolutions are evident in a number of countries (mainly the development of managerialism in criminal justice systems).<sup>14</sup> But in spite of these widely shared tendencies, and the consequent diminishing of the differences between jurisdictions primarily shaped by adversarial and inquisitorial procedural traditions,<sup>15</sup> the existence of distinctive, long-standing national features must be acknowledged: one can observe a variety of very different regimes when it comes to penal processes in Europe.<sup>16</sup>

*Dealing with National Diversity in the Area of Freedom,  
Security and Justice*

The inextricable link between sovereign state, national culture, and criminal justice makes it an area politically sensitive to governance at the

<sup>13</sup> On the cultural dimension of penal procedure, see the landmark M. Damaska, *The Faces of Justice and State Authority* (New Haven: Yale University Press, 1986).

<sup>14</sup> R. Colson and S. Field, 'La fabrique des procédures pénales', *Revue de science criminelle et de droit pénal comparé*, 65–2 (2010), 13–41.

<sup>15</sup> N. Jörg, S. Field and C. Brants, 'Are Adversarial and Inquisitorial Systems Converging?', in C. Harding *et al.* (eds.), *Criminal Justice in Europe: A Comparative Study* (Oxford, UK: Clarendon Press, 1995), 41.

<sup>16</sup> M. Delmas-Marty and J. R. Spencer (eds.), *European Criminal Procedures* (Cambridge University Press, 2002).

supranational level. Unsurprisingly, the expanding ambitions of the EU on criminal matters have been met with resistance. The arrangements whereby some Member States were offered the opportunity not to participate in EU criminal law, the so-called opt-outs, are the most visible sign of national opposition to European harmonization of criminal law. But other signs of resistance are reflected in the European Treaties.<sup>17</sup> Against a background of increasing hostility to deeper European integration, and in the light of the growing potential for conflict between ever-expanding EU law on the one hand, and national legal traditions on the other, EU primary law now emphasizes the need to accommodate national diversity within the European framework. The preamble of the Charter of Fundamental Rights of the European Union (CFREU) celebrates ‘the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organization of their public authorities’. This statement echoes the preamble of the consolidated version of the Treaty on European Union (TEU) in which the signatories express the desire ‘to deepen the solidarity between their people while respecting their history, their culture and their traditions’, and article 4(2), which instructs the Union to respect the ‘national identities’ of Member States. The celebration of European diversity and the respect for Member States’ identity is made very explicit in criminal law matters. The Treaty’s common provisions require the EU to respect ‘essential State functions’ including ‘maintaining law and order’.<sup>18</sup> In addition, a specific clause states that the Union ‘shall constitute an area of freedom, security and justice with respect for (...) the different legal systems and traditions of the Member States’.<sup>19</sup>

Beyond these symbolic statements, the Treaty of Lisbon provides an institutional framework that reflects concern for the legal diversity of Member States by setting limits to the scope of EU policy on criminal law. First, the confirmation of mutual recognition as the cornerstone of cooperation in criminal matters<sup>20</sup> can be seen as a way to limit EU intrusion in national judicial traditions. The mutual recognition principle requires one Member State to accept another Member State’s decision as equivalent to its own. In theory, such an approach reduces the need for the adoption of EU

<sup>17</sup> V. Mitsilegas, ‘European Criminal Law and Resistance to Communautarisation after Lisbon’, *New Journal of European Criminal Law*, 1–4 (2010), 458–480.

<sup>18</sup> Art. 4(2) TEU.

<sup>19</sup> Art. 67(1) TFEU.

<sup>20</sup> Art. 82 TFEU.

harmonized legislation and appears less threatening to national criminal justice systems. Second, if nonetheless approximation of criminal laws and criminal procedures appears necessary to the construction of the AFSJ, it has to take place by means of Directives.<sup>21</sup> Because they only require that a particular result be achieved without dictating the means of achieving it, Member States retain a margin of appreciation as to how to implement EU law and can use this discretion to take into account and preserve their legal traditions. Last but not least, the Treaty of Lisbon provides for a power to delay and withdraw when a Member State considers that a draft Directive ‘would affect fundamental aspects of its criminal justice system.’<sup>22</sup> The so-called emergency brake allows a state to request a conciliation procedure in front of the European Council and to refuse to adopt the measure, leaving other Member States to proceed under the ‘enhanced cooperation’ procedure. It is unclear how these provisions will affect the construction of EU criminal policy in practice. They seem to announce a new phase in the construction of European criminal justice which is likely to be dominated by the tensions between harmonization and diversity. This phase will represent a challenge for the EU as the resistance of Member States, already visible in the form of governmental and judicial reluctance to accommodate European advance in this domain, may well develop in the future. It also represents a challenge for European legal scholarship which will need to develop the analytical tools to describe, explain, and possibly influence the balance of the various forces shaping EU criminal justice.

As a rapidly growing field, EU criminal law – be it substantive or procedural – receives a fair amount of academic attention. Throughout Europe, legal scholars have tended to domesticate these supranational rules by analysing them in accordance with their own national academic traditions and by reference to the legal practices within particular Member States. In addition to this fragmented EU law scholarship divided along national and linguistic lines,<sup>23</sup> a multinational community of academics is taking up the challenge of discipline building at the European level through the promotion of academic research and education on EU criminal law.<sup>24</sup> A quick glance at the number of academic publications related

<sup>21</sup> Art. 82(2), 83(1), and 83(2) TFEU.

<sup>22</sup> Art. 82(3) and 83(3) TFEU.

<sup>23</sup> B. de Witte, ‘European Union Law: A Common Core or a Fragmented Academic Discipline’, in A. W. Heringa and B. Akkermans (eds.), *Educating European Lawyers* (Antwerp: Intersentia, 2011), 19–41.

<sup>24</sup> See, among other transnational academic initiatives, the European Criminal Law Academic Network: [www.eclan.eu](http://www.eclan.eu)

to this field demonstrates that the subject is attracting increased interest. New legal journals essentially or even exclusively devoted to this area have appeared, while a number of monographs, collected works, and textbooks have been published on the subject in the last ten years. A closer look at some of these writings shows a new area of specialization is being carved out within the field of European studies. Although English language writings dominate this emerging strand of ‘Europeanized’ legal studies on EU criminal law, the intellectual paradigm and the academic style of this legal literature is very much continental. The earliest steps in the construction of the discipline were primarily descriptive, offering a technical and positivistic survey of the rapidly changing legal landscapes.<sup>25</sup> Yet very quickly this doctrinal work has gone beyond the mere ordering of raw materials to offer an overall assessment of the main instruments of the AFSJ and a critical analysis of its legal details.<sup>26</sup> Assuming their academic role of watchdog, European scholars are now turning prescriptive. The need for rigorous evaluation has been emphasized and the so-called Manifesto on European Criminal Policy<sup>27</sup> has established ‘principles and guidelines for a reasonable criminal policy on the European level’ rooted ‘in the common European enlightenment tradition.’<sup>28</sup> This welcome development of transnational doctrine on EU criminal justice is all the more necessary as the ongoing integration process affects the penal institutions that are at the core of the constitutional orders of the Member States.

### *Putting EU Criminal Justice in Context*

Compared to the area of EU constitutional law and politics, where interdisciplinary, contextual or critical approaches are thriving, one has to admit that we have not seen this surplus of theory spill over into the field of EU criminal law.<sup>29</sup> The developing discipline is bringing clarity

<sup>25</sup> See, for example, the first edition of A. Klip, *European Criminal Law: An Integrative Approach* (Antwerp: Intersentia, 2009).

<sup>26</sup> See, for example, S. Peers, *EU Justice and Home Affairs Law*, 3rd edn (Oxford University Press, 2011).

<sup>27</sup> The ‘Manifesto on European Criminal Policy’ was published in the *European Criminal Law Review*, 1–1 (2011), 86–103. With the ‘Manifesto on European Criminal Procedure Law’, it is available online on the website of the European Criminal Policy Initiative: [www.crimpol.eu](http://www.crimpol.eu)

<sup>28</sup> Preamble of the ‘Manifesto on European Criminal Policy’, 86.

<sup>29</sup> See already in the early 2000s, J. Shaw, ‘The European Union. Discipline Building Meets Polity Building’, in P. Cane and M. Tushnet (eds.), *Oxford Handbook of Legal Studies* (Oxford University Press, 2003), 346. More generally, on the challenges faced by European legal scholarship, see R. van Gestel and H.-W. Micklitz, ‘Why Methods Matter in European Legal Scholarship’, *European Law Journal*, 20–3 (2014), 292–316.

to a subject fraught with technicalities. It is engaging with the shortcomings and inconsistencies of EU construction. It is reflecting on the limits imposed to supranational interventions and stoking academic discussion of the asymmetrical focus on security at the expense of freedom and justice. It is also providing interpretative reflection and conceptual tools likely to assist lawmakers and judges in the task of refining the law in accordance with the European human rights regime. Yet this successful hybridisation of doctrinal legal analysis with a human rights based approach falls short of providing all the conceptual tools needed to explore the paradoxical quality of European aspirations for a form of harmonisation that respects legal diversity. At each step of a cross-border procedure, cultural preconceptions as to the nature of a legitimate criminal justice system (its procedures as well as its punishments) may stand in the way of mutual recognition between European criminal justice systems. Approximation of European criminal laws through harmonization may well be unavoidable. But the strength of domestic traditions may be a serious obstacle to securing political agreement for the setting of common rules (e.g. the proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the EU, eventually abandoned). National conceptions of criminal justice may also be an obstacle to domestic implementation when a measure has been adopted at the European level (for example, Germany had to overcome constitutional hurdles to transpose the Framework Decision (FD) on the EAW). Finally, European legislation may prove to be almost unworkable without national adjustments as a result of the peculiarity of some domestic procedures (for instance, it remains to be seen to what extent the Directive on the European Investigation Order<sup>30</sup> will prove workable in adversarial as well as in more inquisitorial systems of criminal justice). To understand and possibly resolve these difficulties, they need to be addressed using sharp concepts developed through doctrinal legal analysis. But such a task also requires us to take into account the cultural dimension of European criminal justice systems.

In an integration process led by law, culture may appear elusive to legal scholars. The conceptual difficulty of using this 'term of art' developed by sociologists of law is heightened by the fact that legal cultures and national identities are now used with normative intent by European and

<sup>30</sup> Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters.

national courts and legislators to mark out jurisdictional territory on which they can safely claim supremacy.<sup>31</sup> This political hijacking should not discourage analytical use of the concept. Indeed there is much to gain by a reflection on the contemporary transformations of – and the resistance to – EU criminal justice in the light of a notion that has been the primary tool used by comparative criminologists and socio-legal scholars to reflect on legal transplants and other consequences of globalization in law. In this academic literature, the term ‘legal culture’ is used in a variety of ways. Some authors use it to describe the bundle of ideas, attitudes, opinions and expectations that people have with regard to their legal system while others emphasize the practices and ideologies of legal institutions.<sup>32</sup> Indeed the use of the concept of legal cultures is itself highly contested with some leading anthropologists and sociologists of law arguing that there is a danger that talking in these terms about national (or more local) legal practices may lead to ‘oversimplification and the imposition of a general unity on what may be extremely diverse and contradictory elements of ideas, practices, values and traditions.’<sup>33</sup> Thus the notion of legal cultures may itself fail adequately to confront the challenges of legal diversity if it ascribes explanatory force to simple stereotypical labels such as French or Dutch legal culture.

We do not have the space here to enter into a fully argued defence of at least some uses of the concept of legal cultures.<sup>34</sup> In essence, we would argue that using this approach encourages comparative scholars to identify and analyse the sense of the normative that is present in particular everyday legal practices, the sense of cultural investment in this way of doing things rather than that. And in its broad emphasis on sociological

<sup>31</sup> As D. Nelken puts it, the interpretation and definition of the notion of legal culture have ‘illocutionary effects’. Its use, ‘as much prescriptive as descriptive, or prescriptive through being descriptive, can “make” the facts it purports to describe or explain’, ‘Legal Culture’, in J.M. Smits (ed.), *Elgar Encyclopedia of Comparative Law*, 2<sup>nd</sup> edn. (Cheltenham/Northampton: Edward Elgar, 2012), 480.

<sup>32</sup> On these various definitions, see S. E. Merry, ‘What Is Legal Culture? An Anthropological Perspective’, in D. Nelken (ed.), *Using Legal Culture* (London: Wildy, Simmonds & Hill Publishing, 2012), 52–85.

<sup>33</sup> S. Field, ‘Finding or Imposing Coherence? Comparing National Cultures of Youth Justice’, *Journal of Comparative Law*, 5–2 (2010), 216–231, reprinted in Nelken (ed.), *Using Legal Culture*, 306–326. The most sophisticated critiques have come from Sally Merry and Roger Cotterrell. See their chapters in Nelken (ed.), *ibid.*

<sup>34</sup> See Nelken (ed.), *ibid.* for widespread discussion from a range of perspectives. The argument briefly set out here, derived from the work of the Welsh cultural theorist Raymond Williams, is more fully presented in Field, ‘Finding or Imposing Coherence?’

and anthropological interpretation, it encourages us to anticipate that making sense of the legal ‘other’ itself requires an investment of time not just in close doctrinal analysis of rules and the formal intellectual formations used to justify them: it also requires an understanding of institutional and material contexts and implicit assumptions often rooted in a half-articulated common sense and (partly) shared history. This is precisely the kind of approach that we think is required to better understand the way EU criminal policy is implemented or resisted in Member States.

### European Legal Culture(s): Brakes and Motors

We have pointed out that the Lisbon Treaty itself exhibits the tensions between harmonisation and diversity that seem likely to dominate the next phase in the construction of European criminal justice. The TFEU provides a legal basis for the ‘approximation of criminal laws’ but this must be done with ‘respect for’ (Art. 67) or ‘taking account of’ (Art. 82) differences in legal systems and traditions of Member States. These aspirations have on the surface a certain obvious paradoxical quality. But of course criminal justice processes – and legal institutions generally – often seek to balance competing objectives. And the approximation or harmonisation of laws requires elimination or reduction of differences only insofar as that is seen as necessary to the particular objectives being pursued: promoting mutual recognition and cross-border judicial and police coordination and cooperation (and the development of mutual trust and understanding that these imply).

Nevertheless, these textual tensions do raise certain questions about the relationship between harmonisation and diversity that might be framed in terms of ‘can, ought, and how’ questions. First, *can* criminal justice cultures in Europe really be harmonised? To what extent is the diversity of legal cultures and procedural traditions in Europe likely to act as a constraint which threatens any such process? Secondly, there are ‘ought’ questions about the normativity of legal diversity: how far does a valuing of legal cultures and procedural traditions suggest that we should defend diversity and deny the desirability of any ‘coming together’ in Europe? Lastly, if some kind of harmonisation is both possible and desirable, *how* might different legal cultures come together and what difficulties can one envisage in such a process?