Mitsilegas, Valsamis

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THE NORMATIVE FOUNDATIONS OF EUROPEAN CRIMINAL LAW

Valsamis Mitsilegas[1]
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It is really an honour for me to open the academic sessions of this conference and to examine the legal foundations of European Criminal Law. The purpose of my intervention is to provoke thinking about how European Criminal Law has evolved as a distinct field of European integration – and address the question: why European Criminal Law?

The previous speakers mentioned questions of competence, sovereignty, but also rights, so we have these two interlinked questions: firstly, how far can the European Union legislate in the field of criminal law? And, secondly: what is the impact of EU action on domestic criminal law? Does EU action lead to over-criminalisation? Does it lead to the expansion of the penal field? And what are the implications of EU-level criminalisation for the citizen?

So what I want to do now is go through with you over four major justifications for the establishment of European Criminal Law, where we see the confluence between policy and political justifications on the one hand, and constitutional justifications on the other. As you know this field is contested, its constitutional trajectory has been very contested in EU law, from an era where there was no express EU competence in criminal matters, before Maastricht, to the Maastricht three Pillars, and Amsterdam, and then to the constitutionalisation of European Criminal Law after the Treaty of Lisbon. But still today we have a very complex picture. Raquel Cardoso kindly mentioned the second edition of my book on EU Criminal Law: the first edition was in 2009, right before the Lisbon Treaty, it was about 300 pages; the second edition is over 800 pages long and this is an indication of how the field has grown over time.

[1] Professor of European and Global Law and Dean of the School of Law and Social Justice at the University of Liverpool.

So I'm going to discuss four main justifications for the evolution of European Criminal Law and remind us, really, how this field has evolved.

The first justification is the protection of European interests, with the quintessential interest in this context being the budget of the European Union. And this is where we had interventions even before the attribution of an express competence to the European Union to legislate on criminal matters. Some of you may remember in 1989 the judgment of the Court of Justice in the case of Greek Maize, where the Court of Justice introduced the principle of assimilation in the field of the protection of the budget of the EU. The Court affirmed that, although the European Community at the time did not have an express competence to legislate in criminal matters, national criminal law is limited by the requirement to respect the effectiveness of Community law. So, Community law acted as a positive obligation for States to use criminal law to protect European interests.

This case law has been translated into the Treaties, we find it currently in article 325 of TFEU which the Court of Justice used in the famous Taricco litigation, but of course the protection of the EU budget has led also to EU legislative production. There is now a Directive on criminal law on the protection of the Union's financial interests, the so-called PIF Directive; and of course, the establishment of the European Public Prosecutor's Office. This really is revolutionary in European Criminal Law, because we move away from mutual recognition – which in my view was a way for Member States to ensure cooperation while avoiding harmonisation and maintaining sovereignty – to a vertical model of European integration, where a EU body has coercive powers now in the territory of Member States. And the justification for this revolution has been the protection of EU financial interests.

And this leads to a number of questions: what is the position of the citizen who is subject to EPPO measures? What is the relationship between EU law and national law in the operation of the EPPO? In terms of transposition: what is the legal framework for an EU criminal justice body operating at the national level? What are the rules? We have the first preliminary reference from an Austrian court to the Court of Justice pending and I predict (I cannot read the future) that we will have many more cases coming now to the Court of Justice to set up the parameters of the EPPO.

So this is the first normative foundation: the protection of something that is European and the justification that Member States are not willing, or able, to afford the European interest the same protection as they offer to national interests that they protect under the criminal justice system.

The second foundation is security. We now have the area of freedom, security and justice: security is central there. Security has been the justification for the attribution to the EU of criminal law competence in the first place: in the Treaty of Maastricht, we had the Third Pillar, which was there in order to contribute

towards internal security. This can seem as a compensation for freedom: we have the Schengen area and free movement across the internal frontiers and the view was that we need better cooperation and EU integration in the field of criminal law in order to compensate for the abolition of internal borders. So security is there as a justification for EU law, and it has always been there, and we see how the European Union has legislated over it, both in terms of substantive criminal law – terrorism is the key example – but also, of course, in the field of mutual recognition and in the field of the work of EU agencies such as Europol and Eurojust.

And of course, there is a very strong external dimension in this context – the EU as a global actor, including the relationship with the United States. So, security is really prominent and I think it is for us to question how far we can have security in the EU without the protection of fundamental rights. And what was interesting, I think, in mutual recognition, was that it started when the Member States said "let's have mutual recognition so we don't have to change our laws and we can just cooperate with each other"; now we ended up with the adoption of a plethora of measures on defence rights because it has been understood that without a level playing field on protection, the EU security system will not have legitimacy. So we are at this very important stage now where both the legislator and the courts are grappling with the relationship between law enforcement objectives and the position of the citizen in Europe's area of criminal justice.

The third foundation of EU criminal law is effectiveness. This is a somewhat overlooked dimension, and the effectiveness debate brings forward the relationship between EU law and the general principles of EU law and criminal law. In the early stages of European integration, before the Treaty of Maastricht, there have been a number of cases in the Court of Justice where the Court said that national law (the autonomy of the national legislator in the field of criminal law) is limited by the requirement to uphold the effectiveness of EU law. Characteristic examples are a case involving two Greek people, driving in Germany without a German driving licence (which was punishable by criminal sanctions in Germany), where the Court of Justice found national criminal law to be disproportionate to the freedom of movement; and more recently, the case of El-Dridi, where the Court of Justice found that Italian criminal law on irregular stay of migrants is contrary to the effectiveness of EU law – but that was not an issue of rights-based effectiveness but rather effectiveness in terms of the operation of the Return Directive, so the Court used enforcement objectives in order to limit, if you like, national freedom in criminal law.

But effectiveness can also be legislated upon. And we see it now, if you look at article 83 paragraph 2 of the TFEU, which is one of the legal bases for the adoption of substantive criminal law, where the EU has competence to adopt criminal offences and sanctions in order to ensure the effective implementation of a Union

policy. I have called this in my book "functional criminalisation", to achieve the effectiveness of Union law, as opposed to the legal basis in 83 paragraph 1 of the TFEU, which I call "securitised criminalisation", where you have a legal basis to promote security interests such as the fight against terrorism, organised crime, drug trafficking, sexual exploitation and so on. I understand that many speakers today will discuss the relationship between effectiveness and criminal law and I look forward to hearing more.

The fourth foundation is a more recent one, and I find it very interesting – and I welcome reactions to that and reflections on that – and this is the development of EU Criminal Law in order to protect the values of the EU. A key development is the current Proposal by the European Commission to extend the scope of article 83 paragraph 1 TFEU in order to include hate speech as one of the areas of crime of cross border dimension for which the Union can legislate. Unlike the topic of Professor Caeiro's presentation (on the criminalisation of sanction violations) which will follow mine, this is something the Member States have not agreed on currently. As you know, 83(1) TFEU does not expressly cover hate speech. But I think it is a very important development because it raises the question: how can you fit within the securitised criminalisation legal basis something that is much broader in a sense, something that goes on the very values of the Union, anti-discrimination, equality, anti-racism?

Similarly, the Union legislator has used creatively 83(1) TFEU in order to propose legislation on violence against women, gender-based violence. Rather than expand 83(1), they used sexual exploitation (which is referenced in 83(1)) in order to propose the measure. But again, this goes much beyond security: this is really about values. So we see a very interesting fourth trend, which transcends the existing paradigm; and we can see it as a parallel to the discussions on the relationship between the European arrest warrant and the rule of law: whether rule of law deficiencies in a Member State can act as a barrier to mutual recognition. That question goes much beyond extradition; the debate is framed really in a much broader context. And criminal law is becoming increasingly constitutional law.

My final point is that these four foundations do not operate in silos. So there are areas where there is a significant crossover effect, or where boundaries are blurred. A key issue which was mentioned earlier here is financial crime, because financial crime – or EU financial criminal law – can be both about effectiveness and about security; or it can be about none of these aims. When we saw the development of the EU regime against money laundering – which started in the 1990's, and now we have the 6th money laundering Directive, within a global context, of course – the justification was always twofold: it was security, the need to deprive organised crime of the profits of crime, of its lifeline, as it was said; and allegedly the protection of the EU financial system, because it was accepted

(something that many economists contest) that the infiltration of so called "dirty money" into banks would threaten financial stability. And this has led to a translation into free movement of capital legal basis for these measures in the Treaties, and now after Lisbon we have two separate measures: a Regulation on internal market and a criminal law Directive, but the objectives remain twofold. So I think it is very interesting to see how you justify criminal law in order to protect the market, and whether this is a good enough justification.

But you can have another dilemma, and this is my bridge to my dear friend Professor Pedro Caeiro, who will take the floor after me: where there are areas, in my view, that fall through the cracks; that are neither here nor there. And a key example is a recent example of the criminalisation of violation of sanctions, which was a key political priority for the European Union after the war in Ukraine, where the European Commission has asked – and Member States have agreed – to expand article 83 paragraph 1 TFEU to include violations of sanctions as one of the areas of serious crime. And I wonder: is this really about security as we know it? Is this really about internal security? The Council argued, the Commission argued, that it is about international peace and security: is this really an element that can be included in 83(1)? Can you use criminal law to achieve foreign policy objectives? If this is not the main aim, is it about effectiveness? If it is about effectiveness, could you have used 83 paragraph 2 as a legal basis? This may sound like a very niche discussion about competence and legal basis, but it is very important in order to set up both the parameters of EU powers to criminalise, but also the use of criminal law in a democratic society. Thank you for your attention.