

Crime and Punishment in the Europe of Tomorrow

Hearing in European Parliament

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Hosted by Heidi Hautala and Jan Philipp Albrecht

Professor Helmut Satzger, University of Munich

Satzger talked about the status quo and further steps of European Criminal Law. He stated that European Criminal Law is on its way. Even before the enforcement of the Lisbon Treaty there have been many **framework decisions**, which were mainly based on the **principle of mutual recognition**. He mentioned the decision on the European Arrest Warrant as probably the most prominent one. Furthermore, he stated that the harmonisation of substantive criminal law would be very important, since it would improve the judicial cooperation in criminal matters in general.

Although there already are many framework decisions created on the basis of the Treaty of Nice, up to now there is no general coherent European Criminal Law, the rules taken into force are rather pieces than a coherent systematic criminal law. However, the **emergence of a European Criminal Law** is already reflected by the national legal systems.

The entry into force of the Treaty of Lisbon now brings even more opportunities to create real **supranational criminal law** in certain fields, i.e. due to Art. 325 TFEU. Moreover, Art. 83 I TFEU gives further competences to contribute to European criminal law in certain fields. Finally, Art. 83 II TFEU even gives **omni-competence** to the Union if actions are criminal law actions are necessary in order to effectively enforce European policies in all fields where the Union has a competence.

These opportunities are however limited by the so-called **emergency brake** named in Art. 83 III TFEU. If a member state considers that **fundamental aspects of its criminal justice system** would be affected, the legislative process can be stopped. Nevertheless, a small group of member states is able to proceed with the initiative and may take it into force for their territories.

But the most important change the Treaty of Lisbon brought is the strengthening of the **co-decision procedure**, which makes the confirmation of the parliament regarding all initiatives in the field compulsory. This brings much more opportunities to influence the legal process as well as a raised responsibility for its members.

Satzger then named the reasons for the **lack of a consistent European criminal policy**. According to him, the reason for that mainly lies in the fact that European legislation concerning criminal law was not made by experts in the field but by experts in other fields like agriculture, common market etc. This again is due to the fact that in the past the competence of the EU in the field of criminal law was just an annexe-competence. In consequence, this led to inconsistencies in the development of a coherent European criminal law. In the opinion of Satzger the outcome was more or less symbolic legislation. As an example he named the method of imposing only maximum penalties in European acts, which would mean that member states were able to choose a much softer punishment instead. Consequently there are often acts that introduce norms as part of a European criminal law, but in fact the differences between the member states were not eliminated. Furthermore, European legislation concerning criminal law often does not deliver exact definitions of crimes but rather nebulous descriptions which can be interpreted in different ways by the member states, which also

hinders a real harmonization of national criminal law. Satzger called the whole process “**harmonization by wording, but not in reality**”.

In the second part of his speech Satzger talked about the “**European Criminal Policy Initiative**”, which he is the head of. They published a manifesto on the need for a coherent European Criminal Policy based on general principles derived from European Law directly (European Convention on Human Rights, common principles etc.). These principles would be necessary in order to avoid conflicts between different member states and would therefore facilitate the harmonization of criminal law. After finding these principles the authors applied them to contemporary European legislation in order to find out if they comply to them or not.

Satzger pointed out three out of six principles named in the manifesto:

- **Requirement of a legitimate purpose**

This means that every norm that punishes a certain behavior must aim at preserving a certain legal asset. Only this legitimizes criminal norms. This results out of the principle of proportionality.

By applying the principle on the directive on child pornography Satzger pointed out that it would not be concerned by this initiative.

- **The principle of legality**

Norms must be as precise as possible in order to give clear advice to the citizens regarding what is allowed and what not. Again Satzger named the directive on child pornography as a negative example, because it punishes persons for watching movies with actors “appearing to be minors”, which leaves much space for interpretation and does therefore not comply to the principle of legality.

- **The principle of coherence**

Coherence is necessary in the interest of citizens, coherence needs to be established not only within European Criminal Law but also between European and national criminal law.

Hitherto, coherence is missing. Satzger gave the example of Finland, where the highest punishment is equal to 12 years of arrest, whereas a certain European directive demanded up to fifteen years of arrest as a punishment for certain offences. This would destroy the Finnish national legal system.

In the following discussion Satzger also underlined the need for **high common standards** in procedural law in order to strengthen the principle of mutual recognition, which needs to be adopted before a European prosecutor will be created.

Nadja Long, EIPA

Long mainly talked about the legal basis of harmonization in the field of criminal law after on grounds of the Treaty of Lisbon.

She pointed out right from the beginning that the new treaty only allows **partial harmonization**, not unification. According to her, this would be important to say in order to appease frightened member states.

She then mentioned the Treaty of Amsterdam, which had already brought possibilities to harmonize criminal law for the first time (Art. 31), i.e. it included the competence to create definitions of offences as well as penalties. However, the treaty’s description on what was already possible then was very limited. For example, it did not mention measures concerning criminal procedural law explicitly. Before the enforcement of the Lisbon Treaty measures in the field of criminal law

were in the hands of the member states. But although, according to the treaty, the opportunities to take measures in this field seemed to be very limited, many framework decisions even in additional areas, which were not mentioned (the mentioned areas were **organized crime, terrorism and illicit drug trafficking**) were adopted, so in conclusion the member states went far beyond what the treaty explicitly allowed.

Before the Lisbon Treaty these measures were adopted by a very specific procedure. Initiatives could be proposed either by the Commission or the member states, the Council could only decide by unanimity and the European Parliament merely needed to be consulted, its approval was not compulsory.

What has changed with the **Treaty of Lisbon** then? From now on there is the official opportunity to **harmonize procedural law** (nevertheless on grounds of Amsterdam there was already one framework decision concerning procedural law) through European directives. Furthermore, the listing of certain fields of substantive law which may be harmonized is extended from 3 to 10 (Art. 83 TFEU). This is necessary, since there are very big differences in terms of penalties and definitions among the member states; the EU can now harmonize them. But according to Long, the main change the Lisbon Treaty brought is the **empowerment of the co-decision procedure**, which is now applicable in the field of criminal law. This will accelerate future legislation, since one does not need unanimity but a qualified majority in the Council to take measures in the field.

Nadja Long then explained the possibility to even enlarge the list of the fields of substantive law, which can be object of harmonization. However, she criticized that unanimity is still necessary to do so, but at least it is kind of revolutionary that it is possible to enlarge that list at all.

Finally, Long demanded for a vision of a future common European substantive and criminal law. The EU needs to find out where its interests lie and what the interests of the majority of member states are. We need to define a common interest, for example by creating a definition of what a serious crime in the sense of the contract is. In many framework decisions and directives, certain crimes are named again and again which seem to fall under such a definition, which we still do not have agreed upon officially. This needs to be done in order to create an effective European Criminal law. To do so, after having found a good definition for serious crimes we need to enlarge the list of Art. 83 TFEU, too.

In the discussion afterwards Long agreed upon the creation of a minimum standard on procedural rights in criminal matters, since otherwise the principle of mutual recognition could not function effectively due to different national legal systems. She pointed out again the need for the fight against grave crimes, which is why the list of crimes which can be object by EU-legislation would need to be enlarged. She finally criticised the list as a whole, since there are obviously certain principles which constitute serious crimes, so the EU should rather find an abstract definition for that than creating a limited list naming only specific crimes that fall within that category.

Dr. Yves Bot, Advocate General , European Court of Justice

Bot first gave a brief overview of the development of European Criminal law and stated that it came into European Law „through the small door“. Before the Treaty of Maastricht there was no reference to criminal law in the treaties at all, which then changed with the enforcement of the Maastricht Treaty. Legislation in the field of criminal law on European level then gained importance after the Amsterdam Treaty came into effect and the Tampere Program was adopted. However, EU legislation in the field of criminal law did not play a big role then. This was due to the fact that criminal law exceedingly touches state **sovereignty**.

The principle of mutual recognition, which, with the adoption of the Lisbon treaty, has become the basis for establishing a common European criminal system, forces the member states to cooperate with each other as well as to strengthen confidence in other national criminal legal systems.

Up to now, the principle of mutual recognition proves to be quite successful, since it makes the whole system more flexible than the principle of harmonization.

Bot pointed out that it is important for the future to develop a criminal judicial concept that fits to the further creation of a common space on freedom, security and justice.

Bot then shortly mentioned a decision the ECJ will come to on the 8th of July 2010 concerning a **European Arrest Warrant** issued by Italian authorities, demanding German Authorities to execute it, while German authorities refuse to do so. In short, he stated that in this case Italian sovereignty would clash with the principle of mutual recognition as part of a European judicial system.

In general, the principle of mutual recognition appears to be a strong mechanism to handle crimes with cross-border dimensions. In fact, it is limited due to its „**brutality**“. The main problem concerning the instrument of mutual recognition is the **principle of proportionality**, which is endangered. Bot gave an example to illustrate the issue: What, if a Polish authority demands German or Italian authorities to execute a European Arrest Warrant concerning a case where a bike was stolen? Are German or Italian authorities obliged to execute the decision without verifying it or do they have the right to do the latter, because fundamental aspects of their national legal systems could be affected? Another problem in this case would be posed by the fact that according to the legal systems of all three states authorities are obliged to prosecute such offences. The only way to solve these problems is to strengthen confidence in foreign criminal legal systems by establishing common standards concerning procedural rights for instance.

In this respect Bot also named the **European Charter of Human Rights** as well as the **Charter of Fundamental Rights**, which need to be considered in this context as well. However, they only deliver a kind of „impressionistic“ system that needs to be completed by a coherent criminal policy.

Bot also talked about the function of **Eurojust** and proposed a co-operation between national prosecutors in order to establish common standards in treating perpetrators.

In his conclusion he pointed out again **the need for common standards in criminal procedural law** in order to facilitate the establishment of the principle of mutual recognition. However, this causes serious problems, which was obvious when the German EU-Presidency tried to adopt legislation concerning minimum standards in procedural rights. Many countries rejected the proposal since they were afraid of losing their higher standards guaranteed by their national constitutions. Therefore the EU should aim at setting high common standards in procedural rights right from the beginning.

Dr. Martin Selmayr, Head of Cabinet of Commissioner Viviane Reding

Selmayr first pointed out that European Criminal Law is not a new thing. There are already many framework decisions for instance, which were adopted by unanimity by the Council of Ministers in the past. Many of them have not come into effect yet, others, i.e. framework decisions concerning European Criminal Procedural Law, have failed as a whole.

However, the old decision procedure was ineffective, since framework decisions could only be made within the third pillar, where unanimity was needed in order to proceed with legislation in the field. Fortunately, the Lisbon Treaty now brings new opportunities to start a new era.

First of all, it provides a much clearer basis than the jurisdiction of the ECJ based on the old treaties.

Secondly, decisions can be taken by qualified majority voting now, the European Parliament is fully involved and national parliaments have a say here, too. The new Commission even contains a Commissioner who is exclusively responsible for the field of justice.

According to the treaties, besides the Commission, a quarter of member states can take initiatives in field, too. This tempts the member states having the EU-presidency to create such initiatives in order to make it successful. Normally, such initiatives would take about 3 years approximately to come into effect. However, EU-presidency is limited to only six months, which leads, according to Selmayr, to the “need for speed”.

Commissioner Reding tries to develop the field of European Criminal and Procedural Law according to **certain principles**:

1. Emphasis on a high standard of procedural rights

This principle follows from the imperative of the Lisbon Treaty, which the European Charter of Fundamental Rights is a part of, as well as of the obligation of the treaty to accede to the European Convention of Human Rights

Commissioner Reding is worried about the principle of mutual recognition. Therefore she wants to strengthen the trust of the member states in their national systems. Consequently, procedural rights will be strengthened. Currently the Commission is working on a new proposal for a directive on the right of interpretation in criminal proceedings. There was already a former proposal, which, according to Reding, was not satisfying. Fortunately even Great Britain and Ireland support the proposal.

2. No rush in criminal legislation until a need arises

The Commission wants to take it's time to prepare proposals in the field which are well thought-out and comply to the principles Prof. Satzger was talking about for example. This strategy is better than the above mentioned “need for speed” because of the difficulties arising from the harmonization of national legal systems. Selmayr especially named the European Protection Order, which, in the interest of the victim, would need to be revised again. He even questioned the need for such a proposal as a whole. Therefore, further effort needs to be put on that subject.

3. Prudence concerning the harmonization of substantive criminal law

The harmonization of substantive criminal contains more than just converting old framework decisions into new directives. Old proposals have to be checked to see if they still fit to contemporary legal systems. Moreover, substantive criminal law is very closely linked to national sovereignty and therefore needs time to be created.

4. Clear value must be added

A clear value must be added for the functioning of the European Union, which namely means the need of cross-border dimensions wherever harmonization shall take place. This is far from clear concerning procedural rights. Selmayr questions if there can be assumed a cross-border dimension if a Frenchman is arrested in France. And if that is so, does that mean that the EU has an omnipotence in the field? These are questions which need to be answered.

In conclusion, Selmayr pointed out that coherence within the European and between the European and the national levels is needed for a successful and effective harmonization of criminal and procedural law. In order to solve all the problems mentioned above, the Commission will hold an orientation debate concerning a roadmap during the next months.

In the discussion afterwards Selmayr spoke again about the plan of the Commission to create a judicial area governed by mutual trust which is the precondition for all steps to follow in creating European criminal law. Furthermore, according to him, the Commission examines the opportunity to create a **European prosecutor**. However, this would only make sense if it can add a clear value to the fight against crimes on the European level.