

Conditions for a European Corpus Juris Criminalis

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Conditions for a European Corpus Juris Criminalis

by André Klip

Introduction

Recently the feasibility of an European criminal law system came up in the discussion on various levels and fora. For a long time such a discussion was impossible within the institutional framework of the European Communities or European Union. The predominant view on the basis of EC Treaty was that criminal law remains within the exclusive sovereignty of the states and that the European Communities have no competence at all in this field. With the establishment of a third pillar under the Treaty on European Union things have changed. In these times of changes I would like to evaluate what conditions must be in place in order to have a European system of criminal law. What are the issues that and the questions which must be decided? Is it necessary to have a general legal system of criminal law for all crimes, or is it more likely that a limited catalogue of European crimes will be sufficient? These are questions, among others, which will be dealt with below.¹

Given the interdisciplinary character of the topic my remarks will sometimes go beyond the field of criminal law only. Since institutional and legislative aspects play a role I will also mention a few things that relate to constitutional law, international law and human rights. This is new and perhaps even frightening for criminal lawyers. Most colleagues in criminal law seem to be very reluctant to get to know "Brussels". Such a defensive attitude does not seem to be very productive. Whether you like it or not, it is likely that Europe will have its influence on all aspects of criminal law.

¹ What I will not do: take the existing proposals for a Corpus Juris as a starting point. However, this proposal of the European Commission, of course also influenced my way of thinking. On reflection, I think that many of the conditions I have formulated relate to the fact that they have neither been fulfilled under the current European system nor envisaged under the Corpus Juris. See M. Delmas-Marty and J.A.E. Vervaele (eds.), The Implementation of the Corpus Juris in the Member States, Vols. I-IV, Intersentia 2000/ 2001.

Why Conditions ?

In my view it is necessary to raise the questions of the conditions for the establishment of such a system before the first steps in practice towards such a system are being taken. In fact this is as fundamental as the building of a house starts with the basement and subsequently ground floor and further floors will be constructed. To start off to build parts of the house without having the basement structure in place may lead to serious consequences. The house thus constructed may very soon fall into pieces or it will lean over to an unplanned direction. Similar rules apply to the establishment of a legal system, which also must be viewed in its entirety. It would, for instance, not make sense to establish a European Public Prosecutor if it has not been determined whether this institution will bring cases before a national or an European criminal court.

In this sense it cannot be denied that the European Union sometimes neglects the logical order of the steps it takes. It has created a European Police Office. However, without creating an European legal context in which it can operate. On a supranational level the collection, storage and analysis of data related to criminal activity now takes place. However, the data comes from the national police services and will be returned to it. This forms an incomplete structure which only requires additional lines of communication between national police services and the new European Police. In a situation in which the police do not have the capacity to respond to all crime, it is important to be aware of the fact that the establishment of more agencies with competencies in criminal law, as well as an additional layer of legislation, also have negative effects in the sense that it complicates co-operation and may make it even more time consuming.

A sharp division between European and national competences

A first question we will have to deal with is the question of whether it would not be better to regulate all criminal law on an European level. This would have the advantage of having an uniform system throughout Europe and thereby evade all questions of legislative competences, as well as other incompatibilities between an European and various national legal systems. It cannot be emphasised often enough that the more extreme options carry the attractiveness of a clearer structure.

If we were to make a distinction between European and national criminal law, numerous questions of division will come up. Regarding the chances of being introduced, as will be seen

below, it is already doubtful whether a limited Code of European Crimes fulfils the conditions for the introduction at the moment. This is even more the case for a general and exclusively European criminal law system. Apart from that it is politically totally unacceptable at the actual stage of the European integration.

It is necessary that a clear division will be made between the European competence in criminal law and national competence. Various questions will be raised regarding this issue. Are we envisaging a common criminal European code, as well as a common European Code of Criminal Procedure? Or do we foresee a common law in some fields,² while respecting national regulation in other? Do we want to establish an European Criminal Court?

Starting from the point that it is neither necessary nor appropriate to Europeanize all criminal law, we are immediately faced with the question: What will be European and what can be left to the Member States? I could imagine a European Criminal Code dealing with a limited number of crimes. I have tried to formulate three cumulative criteria, which I will further explain:

1. the crime is by nature of a transnational character;
2. the crime is related to European policy/ legislation (or otherwise common to all Member States) in other fields of law;³
3. the prevention, investigation and adjudication of such a crime on a national level would encounter more difficulties than prosecution on an European level.

Ad 1. The requirement of a transnational character symbolises that the locus delicti must be in more than one EU Member State. In theory, this can be the case for quite a number of crimes. A burglar may steal certain property in one country and sell it in another. However, this is not a typical characteristic of the crime of theft. This is for instance different with the crime of money laundering, which in practice almost always takes place with the use of borders between states. Money, illegally gained in the commission of a crime in one country will be transferred to another country and pop up there as legally obtained profits. It is therefore necessary to limit the number of crimes and only select for an European level those crimes

² I will use the expression “a common law” in order to indicate the law that will be common to all EU States. In doing so, I evaded the use of “community law”. It is not intended to draw any parallel with Anglosaxon common law.

³ In this respect one could think (among others) of crimes related to the European Customs Union, to EC fraud, to the illegal smuggling of immigrants, as well as to the Euro.

that are in practice by nature transnational. Another example is the trafficking in human beings.

Ad 2. The requirement of the nexus with European legislation in other fields of the law means that it facilitates a coherent system of law enforcement whereby the use of criminal law is weighed against and combined with the application of other fields of law. Thus is it possible to evade incompatibilities between for instance a generally European policy on asylum and admission of third country nationals and the national implementation and enforcement of criminal law. A criticism to this criterion is that it is not fixed in the sense that a subsequent application towards criminal law may follow from extension of powers in other fields. To complicate matters further, one can apply such criteria in two ways, by including them in the definition of the crime, or by using these in the discretion of the prosecution to prosecute or not to prosecute.

Ad 3. The third condition is linked to aspects of investigation and prosecution as well as the execution of any penalties imposed. In that sense European prosecution must facilitate and contribute to enforcement of the law. This has to do with requirements of efficiency, but can also be regarded as an expression of the principle of subsidiarity. This basically comes down to the following: if a problem can be solved on a national level, there is no need for European initiatives. Earlier I already pointed at the possible averse consequences of an additional layer of legislation. More legislation bears the risk that it may undermine the effectiveness of legislation. The more different legal texts exist, the greater the danger that it will lead to ambiguities and a situation in which practitioners do not know what instrument should be applied.⁴ In addition, one must be aware of the fact that the European Union is not the only supranational legislator in the field of criminal law. Although less productive in quantity as the European Union, the United Nations also take initiatives in the field of criminal law. It is therefore relevant for the EU Member States to take into consideration whether EU or UN legislation should be preferred.

There is reason to apply the three criteria in a cumulative way. There will be quite some crimes that will fulfil the requirement of transnationality and that of subsidiarity. In this respect one could think of crimes related to drugs, trade in weapons or cybercrimes. Drugs offences would for instance not qualify for European legislation because there is no general

⁴ Who can tell us whether a Joint Action is still a binding legal instrument?

drug policy. The crimes must also not been dealt with by another supranational criminal legal system (e.g. ICTY/ ICTY/ ICC)

More or less as negative criterion one could say that local crime does not qualify for regulation at an European level. In addition, it seems logical to leave crimes related to a perception of moral issues that differ extensively among the Member States, to the national legislator. If for instance one Member State allows under certain conditions that individuals may be assisted to commit suicide, it would be inappropriate to criminalise the matter on an European level. In other words: criminalisation on an European level may not run counter to liberalisation on a national level. Another example of what should not be an European crime is the disturbance of public order when European (or other political) summits are being held. In the past (Amsterdam 1997, Gothenburg 2001, Genua 2001) summits of the European political leadership have encountered quite some vandals, resulting in crimes related to the disturbance of the public order and to demolition of property. As such, this must be regarded as a local problem. It is not the public order of the European Union at large that is threatened. Proposals to specifically criminalise the disturbance of these summits serves no other purpose than to convey a moral message.⁵

Would the fact that one Member State decriminalised specific behaviour automatically mean that another Member State may not prosecute the same offence? Not in general, but it might be so in concrete cases of extraterritorial jurisdiction. For instance, according to German criminal law, a German woman who is having an abortion performed abroad may be prosecuted, regardless of whether the law of the state where the abortion is performed allows or criminalises that. In an European context, such imperialism and imposition of norms upon others should be ruled out. In an European Union guided by the principle of mutual recognition, unilateral means to influence the law of others should be abolished. In fact, we are discussing a different relationship, that of the State-state within the European Union. This ought to be distinguished from the State-EU relationship. However, we can learn from these experiences. Similar mechanisms may take place in a dispute about criminalisation between a Member State and the European Union.

This new division between “federal” and “state” crimes creates new legal and practical problems. On a theoretical level it will be possible to make sharp distinctions. However, it is

⁵ Proposal for a Council Framework Decision on Combating Terrorism.

unlikely that crimes and criminals will stick to this theory in practice. This may lead to additional problems. An example:

Let us imagine we have criminalised participation in a criminal organisation on an European level. The suspects in question have committed various crimes against the financial budget of the EC by falsifying customs documents in at least six member states. In addition they corrupted, threatened and intimidated some customs officials in order to achieve their goals. One custom official was even killed with the aim to intimidate the others. In sum, more than one crime has been committed.

Should all of these crimes be dealt with on a European level? I do not think so. We must be very selective in upgrading a national crime to a European crime. In my view there is no necessity to criminalise murder/ manslaughter on an European level. As such the murder is not related to anything European. That could be different with the criminal organisation as such: this organisation aims at profiting from European legislation and transnational trade. However, this may not apply to other criminal organisations active in other fields of crime. The result of this is that not only a distinction must be made on the legislative level, but also on the level of prosecution and adjudication in practice.

Various problems result from the introduction of federal crimes and state crimes: How to deal with the competences of the European prosecutor and national prosecutors? It is one thing to agree upon criteria, but it is another thing to decide whether they apply or not. Would European jurisdiction be exclusive? And if so, what mechanism/ what authority would decide that a crime belongs exclusively to European jurisdiction? Following from this is the need for the formulation of a transnational non-bis-in-idem. European prosecutions must form a bar to national prosecutions and vice versa in order to prevent two prosecutions in respect of the same case. The provisions in the Statute of International Criminal Court and the ICTY and ICTR Statutes could be used as an example here.⁶ Thus the main questions are whether there

⁶ Article 10 ICTY Statute reads: 1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.

2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if: (a) the act for which he or she was tried as an ordinary crime; or (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

is a priority of jurisdictional principles and whether an international principle of non-bis-in-idem should apply.

Whether the European jurisdiction is exclusive or not deals with legal and factual aspects. The legal aspects relate to how to divide the competences between national and European authorities, as well as to hierarchy.⁷ In the Statutes of the ICTY and ICTR this has been provided by introducing the principle of primacy. This more or less means that both states and the tribunal may initiate criminal proceedings, but that the tribunal may decide in individual cases that the case will be deferred to the competence of the tribunal and that national proceedings will be terminated. Also a complementary system of jurisdiction could be provided. In such a system the main responsibility for prosecution would first lie with the states. Only if states for whatever reason do not act, a task would come up for the European prosecutor. This example is drawn from the Statute for the ICC. The question is whether this leads to anything new for the European Union. Concerning the prosecution of crimes related to fraud against the financial interests of the EU, we have had a system in which the principle task lies with the states. However this did not lead to a substantial number of prosecutions.

The consequences of overlapping jurisdictions can be quite negative to the accused (or convicted person) as well as to the interests of a fair administration of justice. The Court of Appeal in Köln (Oberlandesgericht Köln) recently lodged the first request for a preliminary ruling with the Court of Justice on interpretation of the Schengen Executive Convention.⁸ It concerns a case in which article 54 of that Convention must be interpreted. Does that article preclude a second prosecution before a German court when according to Dutch law the matter

Article 20 of the ICC Statute reads: 1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in Article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

⁷ It is remarkable to see that the Council of Europe also experienced difficulties in determining a ranking order in the application of jurisdictional principles. See Extraterritorial criminal jurisdiction, Report of the European Committee on Crime Problems, Council of Europe, Strasbourg 1990.

⁸ Request of the Oberlandesgericht Cologne of 30 March 2001 for a preliminary ruling in the criminal proceedings against Hüseyin Gözüük, Case Number C-187/01, OJ 2001, C 212/10; Reference for a preliminary ruling by the Rechtbank van Eerste Aanleg te Veurne by Judgment of 4 May 2001 in criminal proceedings brought against Klaus Fritz Brügge; civil party: Benedikt Leliaert, Case Number C-385/01, OJ 2001, C 348/15.

can no longer be prosecuted because it is already settled? Is it relevant that the form of settlement is unknown under German law? All aspects of non bis in idem are in dispute: what exactly is prohibited; what is twice; and what is idem, what are the same facts? Especially the transnational application of non bis in idem suffers from these problems.⁹

Whenever crimes are being defined on an European level, it is not only relevant to draft definitions of specific individual crimes, but to provide for an European general part of criminal law as well. Who commits a crime, what is an accomplice, what is participation to the crime, what is an attempt? May legal entities be prosecuted? Are we going to include broad accountability: preparation of crime/ conspiracy/ criminal organisation. What kind of mens rea or intent is required? If you do not develop a general part, you will see that definitions of crimes will contain “general part elements”. Another consequence is that the determination of criminal responsibility (and finally conviction or acquittal) may depend on the forum and not on the locus delicti. In the end, this will lead to practical and dogmatical chaos.

The need for a common political discussion/ public opinion

In a democratic society the contents of the law is open for discussion in the public. At times issues will come up concerning parts of the legislation. It is astonishing to see that such a European public debate is completely absent. This is strange on the one hand because of the growing influence of European legislation on the life of the citizens of Europe. On the other hand it is logical. Issues concerning European legislation and politics are very complex. The media seem to be bluffed by its complexity and hardly pay any attention to institutional issues. The general public does not understand how the EU functions, let alone how the legislative process works or what the current political issues are. In addition, the general public will only participate in a discussion in one language.

The result is that discussion on Europe, its legislation and its future plans, if at all, takes place within one state, with some exceptions where Member States share the same language (IRL/ GB, NL/B, D/A, F/B). The general public of the European Union as a whole does not play a role. In practice, the public is excluded from participation and discussion only takes place

⁹ See J.A.W. Lensing, Ne bis in idem in strafzaken; een rechtsvergelijkende en internationaalstrafrechtelijk oriëntatie, Preadvies voor de Nederlandse Vereniging van Rechtsvergelijking 2000, No.60, see also the interventions, in No.61, 2001.

within European committees. I find participation of others than state officials in an European discussion important because that will contribute to the acceptance of European legislation and European authorities. If not, we run the risk that people will regard European initiatives as alien, intrusive or foreign and for that reason will not cooperate or support. In the field of criminal law this is essential for its legitimacy. If the European Union does not succeed in obtaining the respect of the large majority of its citizens, there is a fair chance that the norms it produces will not be respected.

Other dangers must be prevented. The two most important are the danger of static law and the danger of disharmonisation. The larger the European Union gets, the more difficult it will be to obtain a consensus on new legislation and on new policies.¹⁰ It is very likely that the consequence will be an extremely static situation, in which it is very difficult to alter whatever legislation. In addition, the more the EU regulates, the less space there is for experiments with new ways of combatting some forms of crime. The larger the EU gets, the more pressure there will be to eliminate deviating policies and legislation in specific states. If you were to allow one state to deviate, the whole idea of harmonisation will be lost, because each state will have points at which he does not agree with the prevailing European view.

A common cultural background/ similar expectations of the role of criminal law in society

Despite many ties through the centuries in religion, culture and politics, views on the place and role of criminal law in society differ tremendously in the Member States. Extreme views can be found in the European Union on the prominence of criminal law. Whereas in one country the use of criminal law in response to undesirable human conduct is only admitted if all other means have failed (the principle of *ultimum remedium*), other states may appreciate the symbolic and moral deterrence of criminal law. These differences are fundamental, because they deal with the question of whether criminal law should regulate a certain issue at all. In fact this is the key issue why it is so difficult to come to an agreement on a common European criminal law.

Similar clashes come up when we raise the question of whether minimum (or automatic) sentences make sense or not. Where in one system, the ruling view is that a standard minimum penalty will have the most deterrent effect (clear and predicatable consequences) in

¹⁰ In my opinion this is a danger that exists regardless of whether we will have a democratic system or maintain the current undemocratic European legislative process.

order to prevent people from committing a certain crime, another system may wish to leave the imposition of a sentence entirely free to the trier of the fact in order to take all relevant circumstances of the fact and the accused into account. Also the type of sanction can be in dispute. Under the current European system many directives and regulations provide for an additional sanction of exclusion for a certain period for those who have frauded against the financial interest of the community. Opinions on these points may get emotional. One party may regard the view of the other as leading to forms of injustice or as a totally inadequate or ineffective response of the state to a severe problem. To following examples may be given where opinions in Member States differ:

- abortion
- assistance to suicide
- evading military service
- prosecution of legal entities
- speed limits for motor vehicles
- use of alcohol and drugs
- whether being under influence of alcohol or drugs constitutes a defence
- possession of weaponry
- discrimination on race/ sexual preferences/ political or religious opinion
- conspiracy
- minimum sentences
- life imprisonment

These seem to be a few of the hot potatoes of the EU.

Differences on these issues can not easily be overcome by means of legislation. In order to develop common European ideas about the role, impact and expectations of criminal law it is necessary to develop a European public opinion. I must admit that the chances for such a development are small. It takes time to find compromises, develop something new that will leave earlier national ideas behind. In addition, the lack of a common language leads to the fact that no public discussions throughout Europe take place.

An European Institute for Research in Crime ought to be established. Currently EU legislation is drafted without any research into the necessity of it. One of the current characteristics of European responses to crime is that it takes place without any research and is always legislative in nature. Wherever a criminal problem seems to appear on the horizon,

immediately a legal instrument will be drafted and take binding effect.¹¹ Although the awareness of responsibilities regarding the suppression of crime must be appreciated, as well as the willingness to respond in an unbureaucratic way, quite some initiatives must be qualified as overreacting,¹² inconsistent,¹³ counterproductive,¹⁴ unnecessary,¹⁵ unfounded¹⁶ and lacking a legal basis.¹⁷ It is unpredictable what an European summit will come up with in relation to combatting crime, but is certain that they will do so. Legislation according to the principle of the Pavlov reaction ought to be prevented. Criminal law is not a simple solution to complex problems. For effective law enforcement it does for instance not make a difference that certain offences can be prosecuted as "terrorists offences".¹⁸ What is important that the behaviour can be prosecuted at all, regardless of the fact under what label that can be done.

What we need is a realistic view on crime in society and on what can be achieved in society with the use of criminal law. To convey to the public that it is possible to eradicate crime is not a realistic notion. It gives ground to high expectations on the side of the public that can never be fulfilled. It also leads to a situation that the methods and means to combat crime will never be sufficient. This is logical because if you formulate a goal which is out of reach, you will simply not reach it. We therefore need to define what we want to reach with criminal law. This would include, in my view, an acceptance of a certain level of crime in order to be able to better combat crime. Politicians ought to convey to the public the notion that there will always be a certain level of crime. Of course we would like to lower that level as much as possible. However, to think that it is possible to eliminate all crime does not demonstrate a

¹¹ A cynical remark would be that new legislation is the only response that the European Union can come up with regarding all alleged problems.

¹² A local Belgian problem (Dutroux) was transferred onto the level of the European Union, see Joint Action of 24 february 1997 concerning action to combat trafficking in human beings and sexual exploitation of children, OJ 1997, L 63/2.

¹³ It is unclear who should be in charge of combatting international fraud within the EC/ EU. First this was dedicated to Europol, subsequently it was the task for UCLAF/ OLAF, then the EU Convention emphasised the responsibility of the Member States and lastly some voices want to establish an European prosecutor who will take care of the matter, however without relieving other authorities of the task.

¹⁴ The existence of various authorities, both on an European as well on a national level, thrust with the same task, leads to additional problems. Coordination is required in order to prevent double work, conflicts of competences and jurisdiction need to be solved and there is a fair risk that no open communication takes place.

¹⁵ EU Convention on fraud against the interest of the community. This crime could already be prosecuted on the basis of existing national criminal legislation. All forms of necessary international cooperation (extradition/ judicial assistance) are applicable with regard to fraud.

¹⁶ For instance the idea of the Tampere summit that judgments should be mutually recognised throughout Europe. This is already possible on the basis of Council of Europe Conventions of 1970 and 1983, as well as an additional EC Convention of 1987.

¹⁷ There was no legal basis for the establishment of the European drugs Unit in 1993. Likewise, there is no legal basis for Eurojust under the current EU legislation.

¹⁸ See Proposal for a Council Framework decision on combating terrorism, 19.9.2001 COM (2001)521 final, 2001/0217 (CNS).

capacity to understand the realities of life. It might be relevant to observe that in general experts in criminal law expect less of the effects of criminal law than others do.

A democratic system

This seems to be self evident but in light of the experience of the European Union in the past it is certainly not a superfluous requirement. Legislation may only enter into force if approved by a freely elected and representative parliament. The current practice regarding third pillar legislation in which binding instruments may be introduced without having been approved by a parliament is unheard of. In doing so, the European Union applies standards that fall short of what is required under a natural level. Legal instruments under the third pillar may acquire binding force without the consent of the European parliament and national parliaments. This gives far too much uncontrolled power to the governments represented in European Council. This requirement coincides with the requirement of a demarcation of the competences of the European Parliament and national parliaments.

Democracy also provides for requirements in other aspects than the legislative process. The performance of the European police and the European prosecutor must be supervised by democratic procedures. This can be found under all democratic systems. Police and prosecution are accountable to the Minister of Justice. In the context of Europe, this could mean that they are accountable to the Commissioner for Justice. He or she will be held politically responsible for the functioning of police and prosecution. The Commissioner for Justice therefore must have the competence to fire officials.

This means for instance that the practice of scattered or non-existing accountability that exists regarding Europol must come to an end. Europol is only accountable to the collectivity of the Council of Ministers. Each individual minister is accountable to his own national parliament. The result is that nobody is accountable for the whole.

A system protected by human rights safeguards

After fifty years of existence of the European Convention on Human Rights it would be unthinkable of having a European criminal justice system that would lack the protection of that convention. There is a risk that rights that were already protected under the ECHR in respect of national states before the establishment of the European Union must be "won" again in order to obtain the same protection versus the European Union. It is therefore a self-

evident necessity that the ECHR or a convention with a similar level of protection as well as providing a similar efficient supervisory mechanism will be applicable to all aspects of European Criminal Law. This contains two basic elements:

1. what falls under the protection of the ECHR is determined by the ECHR and not by EU organs or legislation;
2. accountability of the European organs for their behaviour.

The first condition deals with what is the case law of the European Court of Human Rights on the question of when someone is under a “criminal charge” within the meaning of Article 6 ECHR. In *Öztürk* and other cases the European Court of Human Rights held that “criminal charge” has an autonomous meaning, and must be interpreted independent from the name tag given to the relevant field of law by its legislator.¹⁹ This requirement will have serious consequences for mainly two fields of law. Competition law under the EC Treaty must be, on the basis of the criteria formulated in the *Öztürk* decision, be considered as falling within the definition of criminal law. Also quite some administrative sanctions may qualify as criminal law in the sense of Article 6 ECHR.

The second requirement introduces the application of the ECHR to acts of organs of the EU. This is important because under the current system of the ECHR, complaints can only be declared admissible if directed against a state party. In its current text the ECHR does not provide for complaints against the EU or its organs.²⁰ This is an undesirable situation because it brings an important field of law outside the protection of the convention and would mean that citizens have less fundamental rights when confronted with the EU, than confronted with acts of each individual state. This would amount to a step back in the protection of human rights. This can be compensated by concluding a Protocol to the ECHR introducing the complaint against the European Union. The acceptance by the European Court of Human Rights of complaints directed against all EU Member States seems to be less attractive because the Member States are only indirectly responsible.

¹⁹ ECHR, 21 February 1984, *Öztürk* against Germany, Series A-73, par.53.

²⁰ A.H. Klip, *The Decrease of Protection under Human Rights Treaties in International Criminal Law*, 68 *International Review of Penal Law* 1997, p.291-310.

The necessity for one legal language

Law is inherently related to language. Legal terminology has a certain meaning because of a certain connotation in the legal system. When translated into another language, a translation that seems to be appropriate at first glance may miss the connotation of the system where the term comes from. Only in theory it is possible to have the law written in all twelve (or even twenty in a few years to come) languages and still meaning the same. Everyone who has ever studied the implementation or translation of (formally) identical legal texts into national law or other languages will have noticed that the law may change as soon as it is translated or implemented into another legal system. In this context it seems wise to provide European criminal law in one language only. Of course this is not a new idea: latin performed this function for ages under the Roman Empire and even succeeded to remain of importance until our days. Also the French legal system and French as a legal language played such a role in a much shorter period during the days of Napoleon. We therefore need to opt for a modern latin of our time. It seems logical to give the English language this role.

This certainly has negative consequences. It means that part of the law is no longer available in the mother tongue of the public. This is a serious consequence and raises questions regarding the principle of *lex certa* and the accessibility of the law to the public. However, I do not think that a defence: “I could not read the European Criminal Code, so I did not know that I was not allowed to” ought to be admissible. In my opinion the use of one legal language is limited to the use of one legally binding language. It does not mean that the law may not be translated into other languages. Still it should be translated and made available. This is a situation that is already in existence in regard of treaty law. Many multilateral conventions are binding only in a limited number of languages. For instance conventions of the Council of Europe appear in English and French only, whereas United Nations conventions are binding in Arabic, Chinese, English, French, Russian and Spanish.

What level of cooperation is necessary?

One of the alleged advantages of a common European criminal law is that international cooperation would no longer be necessary. This is not the case. It will stay in existence, however, it may obtain a different form and change its character. Due to the fact that one of the criteria to criminalise certain behaviour on a European level is its transnational character, it is logical that evidence and suspects will be found in different states. This is nothing new in comparison to the existing situation, it is unlikely that this will ever change.

The character of co-operation might change if the introduction of eurocrimes would be backed by a European Criminal Court. Then a kind of hierarchical relationship may be established. If not, there is not much difference to the existing legal situation. The fact that the definition of crimes is common to all states does neither take away the necessity of co-operation nor does it facilitate its functioning.

A common interpretation and enforcement of European Criminal Law

To start of with a negative reasoning of the necessity: A common mechanism to interpret and enforce European Criminal Law is necessary, otherwise it would not make sense to have a common system at all. Common interpretation and enforcement can be ensured by the establishment of common European institutions. It follows from this that an European police, an European prosecutor and an European Criminal Court shall exist. The European Criminal Court is exclusively competent to interpret the European criminal legislation. In cases in which national (or other) courts have to interpret European criminal legislation they are bound by the case law of the European Criminal Court.

In a harmonised system it would seem logical that the enforcement of sanctions must be ensured under the same conditions for all. This means that a common penitentiary system must be set up and that European rules on early release, parole and pardon have to be developed. The principle of equal treatment requires such measures. If the execution of sanctions would not be europeanised, everything achieved in defining the law, the prosecution and adjudication of it would have been lost, when for instance different rules on early release are being applied. A convicted person in Spain might then be released after completion of half of the sentence, whereas his “colleague” who received the same penalty but had it sentence executed in the Netherlands would face a much more severe regime and be released after completion of two thirds of the sentence. How to deal with the differences in the penitentiary institutions? One year in a Spanish prison may be much more severe than one year in a Dutch prison. Again this shows that developing a common legal system deals with many other issues than simply drafting legislation in theory and on paper.

Is criminal law different from other fields of law in the sense that it deserves special treatment?

Harmonisation or uniformisation of law took place within the European Union/ European Community in various fields of law. Fields of law in which not all conditions mentioned above had been fulfilled. This raises the question of whether criminal law is different from other fields of law in the sense that it deserves some form of special treatment. What we intend to do here has some features of harmonisation, but is entirely different: a new supranational legal system is about to be created.

More than any other field of law, criminal law goes to the emotions of people. It canalizes natural feelings of revenge to the benefit of society. It represents the morals of the society by the prohibition of what is unacceptable and by leaving freedom in other areas. In a more concrete way, whereas European community law deals with the freedoms awarded to citizens, criminal law deals with the limitations of freedom. This is an entirely different approach and this means that rules drafted in the field of the internal market under community legislation cannot be transferred to criminal law.

The method of achieving a European Corpus Juris Criminalis

In the European context with so many different views on almost all issues, nothing seems to be more difficult than to draft a common code on such a highly sensitive thing as criminal law. In order to give it a chance it is therefore absolutely necessary to establish a representative drafting commission. This commission should be representative for the Member States, but does not represent them. In my view a classical method should be followed. The nomination of a drafting commission, consisting out of professors of criminal law. The character of the members on the commission is more than a detail. What we need in such a commission is an overview of existing legal system, but also with a vision towards a new European system with the ambition that it will last for a few decades. The commission must be given a clear mission and sufficient time. To be more specific: good legislation requires more time than the current legislative process in Brussels is willing to give.

It is obvious that a new European criminal law cannot be a copy of an existing criminal law system of one of the member states. The drafting commission must be willing to enter new waters and to leave national systems behind. This will be a difficult task. However, it is important to develop a criminal law system as a whole, because only by developing an entire system one is able to put various aspects into a context. Thus a completely different method is proposed than the current European strategy, by which not an entire system is developed but

small steps are taken every 6 or 12 months, following an European summit. As a consequence of that, a certain European criminal legal system evolves, but this is more a result of a large number of uncoordinated small steps (results from compromises), than the result of what the European Union or each of the individual Member States had in mind.

Conditions must be fulfilled before implementation

This condition also seems self evident. However, on an European level various steps have been taken before there was a legal competence to do so. The European Drugs Unit was established as a forerunner of Europol, more than two years before a convention on the establishment of Europol was concluded. A “provisional judicial network” was established in 2001, anticipating the formal legal basis in 2002. This European practice, which would be unacceptable under each national legal system, must come to an end.

Why would we do it?

This is a question that more or less forms a precondition on plans for harmonisation. I have dealt with this on other occasions and expressed my doubts.²¹

Conclusion

On evaluation of the application of all these conditions for an European Corpus Juris Criminalis I seriously doubt whether Europe has already achieved the situation that such a common legal order is more than Utopia. The protection of the rights of the citizens of Europe and the need to combat crime are too precious to get lost in embarkations towards an harmonised system without having identified its goal.

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²¹ See Harmonisation and Harmonising Effects in Criminal Law, in: J.F. Nijboer and W.J.J.M. Sprangers (eds.), Harmonisation in Forensic Expertise, An Inquiry into the Desirability of International Standards for Scientific Evidence, Thela Thesis, Amsterdam 2000, p.67-78; Harmonisierung des Strafrechts - eine Idee fixe?, Neue Zeitschrift für Strafrecht 2000, p.626-630; Nederlands strafprocesrecht en Europese harmonisatie, in: C.H. Brants, P.A.M. Mevis en E.Praekken, Legitieme strafvordering, Antwerpen 2001, p.205-214.

