Harmonisation and harmonising measures in criminal law

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Harmonisation and harmonising measures in criminal law

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Preface

Harmonisation of criminal law is a subject which engenders fierce debate among proponents and adversaries. Within the European context, the discussion has until recently been subdued due to the assurance of the European institutions that criminal law does not enter the Community's sphere of competence. It should remain within the province of the Member States.

Obviously, this point of view did not fully correspond with legal reality. However, the debate has gathered momentum by the EU Treaty of Amsterdam, which squarely addresses the harmonisation issue Article 31 of the Treaty urges the Member States to approximate their criminal law provisions with a view to improving the mutual co-operation in criminal affairs.

The provision sheds light on several major questions that have dominated the debate on harmonisation. The first is: What is harmonisation?

The language of the provision is carefully chosen. Member States are left discretionary power to choose methods and means in order to accomplish the goal. Complete unification of criminal law is not pursued, nor is the transfer of competence to European institutions. The *Corpus Juris* project, enacted to fight EC fraud, shows how both aspects are inter-related. The project invites Member States to agree on common criminal law provisions and common methods of obtaining evidence. It provides for a European Prosecution Office that is competent to commence criminal proceedings. To a certain extent, the Corpus Juris project exemplifies a more advanced stage of the harmonisation process.

Then the question: Why is harmonisation necessary?

Article 31 of the Amsterdam Treaty explicitly links up harmonisation efforts with the aim of improving international criminal co-operation. Increasingly faced with the challenge of organised crime, national states are poorly equipped to confront the menace on their own. Some argue that inter-governmental cooperation is seriously hampered – especially in view of the prerequisite of double criminality – by diverging systems of criminal law.

Harmonisation sceptics, on the other hand, tend to emphasize the value of national sovereignty and cultural identity in relation to criminal law and warn against adverse consequences in the field of human rights protection.

Of importance is the problem: What parts of criminal law qualify for harmonisation?

Obviously, the question of what parts of criminal law should be harmonised is closely related to the former question ('why is harmonisation necessary?'). Emphasis

has been put on the harmonisation of substantive criminal law, mainly in order to overcome the double criminality obstacle. Currently, the harmonisation of methods of obtaining evidence is propagated with equal vigour, in view of the process of intensified mutual legal assistance.

And finally: What methods are employed?

The Amsterdam Treaty reveals a preference for the time worn method of harmonisation by treaty or convention. On the supra-national level, Member States agree on the adoption of common definitions and concepts and they are supposed to comply with their international obligations by incorporating those definitions and concepts in national (criminal) law. It seems legitimate to question whether these implementation procedures will not, at least partly, defeat the purpose of harmonisation, as implementation almost by definition implies adaptation to the national legal order, and thus different treatment of the same provisions.

This has led to a collection of papers that deal with various aspects of harmonisation of criminal law. We have decided to follow a more academic approach in 'dismantling' the elements of harmonisation of criminal law. Therefore, the first contributions deal with the question of how harmonisation of criminal law can be defined. The contributions of Tadić, Klip and Nelles approach harmonisation in a more theoretical way. Spencer and Vogel deal with the essential question of the necessity of harmonisation. In his contribution, Vermeulen presents the current state of affairs in Europe, thereby gradually focusing on concrete efforts of the European Union regarding harmonisation. This is followed by papers by van der Wilt and Spinellis on the disadvantages of harmonisation. Alternatives to harmonisation are discussed by Vander Beken and de Roos, whereas Stapert forces us to have a look at the United States. What can we learn from the overseas experiences? Is it an appropriate example for Europe, or should we follow otherpaths?

The contributions have not been harmonised by the editors in the sense that style and referencing has remained the 'individual sovereignty' of each author. However, we did harmonise to some extent. The contributions of those whose native language is not English have, where necessary, been corrected. Steven Freeland of the University of Western Sydney, Australia has carefully assisted with the English. We are greatly indebted to him.

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Felicitas M. Tadić

How harmonious can harmonisation be? A theoretical approach towards harmonisation of (criminal) law

> 'Harmony: 1a. a combination of simultaneously sounded musical notes to produce chords and chord progressions, esp. as having a pleasing effect. b. the study of this. 2 a. an apt or aesthetic arrangement of parts. b. the pleasing effect of this. 3 agreement, concord. (From: The Concise Oxford Dictionary of Current English, 9th edition, Oxford 1995)'

> 'Harmonisation and unification are complementary rather than antagonistic processes. This is primarily due to the fact that harmonisation is often a precondition for unification (…) Harmonisation need not necessarily lead to unification, but may exist alongside it (…)' (From: M. Delmas-Marty, 'The European Union and Penal Law', (1998) E.L.J., 106)

> 'Recent experience suggests that unification does not always produce harmonization, and that codification can be the enemy of reform and substantive improvement in the quality of justice.' (From: A. Rosett, 'Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law', The American Journal of Comparative Law (Vol. 40 1992), 683)

Introduction

Harmonisation is an increasingly important phenomenon in the field of criminal law[1], where the term is used to describe the various influences, especially during the past decade, of European and international developments with respect to criminal justice. Yet harmonisation is not a new phenomenon and is not exclusively confined to the area of criminal law. In other branches of the law it has been a familiar feature for much longer, as, for example, in the areas of trade or civil law.

Although national criminal justice systems have never been totally free of interna-

[1] For the purpose of this article, I confine myself to a very abstract and broad definition of criminal law, which approaches the criminal law from a normative perspective and remains on the theoretical level: 'The criminal law can be conceived as a set of norms backed up by the threat and imposition of sanctions, the function of which is to protect the autonomy and welfare of individuals and groups in society with respect to a set of basic goods, both individual and collective.' (from: Lacey, State Punishment, p. 104-5, as cited in A. Ashworth, *Principles of Criminal Law*, Clarendon Law Series, 2nd edition, Oxford, 1995, p. 28). I use the term 'criminal justice' to refer to the criminal justice system in its entirety, thus including the application and enforcement of the criminal law and the institutions involved in this process.

tional influences (if only because of numerous treaties dealing with co-operation in criminal matters), developments over the last decade have taken on quite a different tone. Compared to the quiet drizzle of treaty-based influences, it is now literally pouring down on national criminal law. Moreover, the influences have become more diverse. It is no longer just a question of international treaties, but also the direct and indirect influence from the supranational level of the European Union, which play a decisive part in the shaping of national criminal law.[2] Today, therefore, one can no longer maintain the position that criminal law is a matter of national sovereignty. Closely related to this, the last decade has seen the emergence of what is referred to as 'European criminal law'. This phrase is used as a working title[3], referring to an emerging field of law which is under construction in the European Union.

With respect to all of these developments the term harmonisation is used in various ways.

It seems to be a *passe-partout* for everything even vaguely connected to the development of criminal justice in Europe and can be found alongside such terms as co-operation, unification, assimilation, approximation and convergence. It is unclear what the relationship between these terms is, since they are sometimes used as synonyms or examples of harmonisation, while in other cases they refer to something distinctly different. At the outset it must be made clear that there is no legal definition of the term harmonisation in the sphere of criminal justice in Europe. The term is not even mentioned in those parts of the Treaty on European Union that deal with co-operation in criminal matters.[4] In spite of this, 'harmonisation' has become a regular term in contemporary literature dealing with European criminal law and it is very often regarded as self-explanatory, as if it does not need clarification because of its self-evident nature. However, an analysis of the literature shows that this is not the case. Quite to the contrary; the term is used indiscriminately: in different contexts, with various implicit scopes and very often its exact meaning is left to the reader's imagination. Writers in the field seem to have a general sense of what is being expressed through the term itself, but their understanding of its precise meaning differs greatly when it is applied to concrete situations. Apparently, 'harmonisation' is not as objective as it seems.

Why then is it important to know what is meant by the term?

First of all, since there is no common definition of the term in the European crimi-

[2] For an excellent overview of the complexity of European (criminal) law see C. Harding, 'Exploring the intersection of European law and national criminal law', (2000) 25 *E.L.Rev*., 374-390 and 'The Identity of European Law: Mapping Out the European Legal Space', *E.L.J*., Vol.6, No.2, June 2000, 128-147, 129.

[3] See Albrecht, P.A., Braum, S., 'Deficiencies in the Development of European Criminal Law', (1999) *E.L.J*., 293: 'European criminal law is not a legal concept. European criminal law is, above all, a working title under which the European criminal law developments which affect national criminal law are gathered.'

[4] It is mentioned in title VI, chapter 3 of the Treaty establishing the European Community, which is about the approximation of laws. In Article 95 the phrase 'harmonisation measure' is used, giving the impression that here 'harmonisation' and 'approximation' are seen as synonyms. Article 94 confers upon the Council the power to adopt 'harmonisation measures' by way of a directive with respect to 'such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market'.

nal justice context, it is extremely difficult to talk about harmonisation without running the risk of miscommunication. In my opinion, miscommunication is already taking place. Just like the vocabulary of European law, which Harding[5] calls a 'terminological quagmire', the meaning of the term in the area of European criminal law is, at best, obscure. This is partly due to the fact that European criminal law is still in the process of evolution, which means that its terminology is also evolving and not fixed. Yet, especially in a process where things are subject to debate and may change, some clarity and consistency in the choice of words is of the utmost importance.

The literature shows that writers have not been purposefully negligent in this respect. Any confusion surrounding the term is not primarily caused by the conscious omission of a definition, but more by the general assumption that the term does not need to be defined. Maybe, therefore, the main reason for the indiscriminate use of the term harmonisation lies in the nature of the term itself, a nature that is not obvious enough at the present moment.

Secondly, a general definition, or at least a more precise idea of the meaning of the term, may serve as a touchstone for the evaluation of efforts directed at harmonisation. It enables us to judge in a more formal way the numerous plans and efforts at harmonisation within the European Union. In the present situation, a large part of the meaning of the term is implicit. There is a hidden dimension, which, however, still influences the context in which it is used. This 'blind spot' must be made visible; it must be laid bare in order to be able to deal with 'harmonisation' in a meaningful way. Only then will it be possible to fully determine the consequences of 'harmonisation' and to assess its usefulness as a mechanism for bringing about the goals it is intended to realise.

Third, a clear understanding of the meaning and nature of 'harmonisation' makes it possible to judge the implications of harmonisation efforts in relation to other goals and processes in the field of criminal justice and to determine its desirability in the light of these related areas. As long as there is no knowledge of the implicit and explicit meaning of the term, a determination of the side-effects of 'harmonisation' is impossible. How can one examine the side-effects of something when that is not defined properly?

In short, knowledge of the exact nature and meaning of the term may profit the quality of overall discussion of the topic. Therefore, it is important to define harmonisation on a theoretical level. In this paper I will attempt to unveil the hidden aspects of harmonisation and to describe what it can and cannot mean.

Based on these conclusions I will try to establish a theory of harmonisation of (criminal) law, which will hopefully enhance understanding of the complex developments which are at present gathered under the umbrella of harmonisation. Since harmonisation is not limited to the field of criminal law, any theory of harmonisation must first be established for the law in general, before it can be applied to a special

[5] See C. Harding, 'The Identity of European Law: Mapping Out the European Legal Space', *E.L.J.*, Vol.6, No.2, June 2000, 128-147, 129.

part of the law, although it may have specific implications for that field.

In the second part of this paper I will first be looking at the term itself and try to uncover its nature and meaning. To discover the meaning of a word one must invariably start with language. Thus, an excursion into the realm of the natural language will be necessary before moving on to legal language. I will be demonstrating that the nature of the term makes it impossible to define it conclusively in an abstract sense. Nevertheless, as will be shown, it is possible to develop a general notion of the term and to infer from it some general characteristics of, and criteria for harmonisation. Moreover, I will be discussing the different conceptions of the term in natural and in legal language. Part of the obscurity surrounding harmonisation is connected to these different conceptions.

In the third part of this paper I will try to establish a theory of harmonisation of law, using existing models from other fields of law as well as my own insights into the nature of harmonisation. Where possible I will relate back to my own field, the criminal law, and note the implications of the theory for that field.

What is harmonisation?

In its most elemental and bare sense, harmonisation means nothing more than 'a process in which diverse elements are combined or adapted to each other so as to form a coherent whole while retaining their individuality'.[6] This definition does not really tell us much, except that harmonisation is a process, not a definite state of affairs. Yet, it does not tell us what the elements are that must be combined, nor does it prescribe just how they should be combined or what a 'coherent whole' is. So what is harmonisation? And what is harmony? First impressions of these terms are invariably positive. People use expressions such as 'cosmic harmony', 'peace and harmony', 'a harmonious family'. So, harmony has a positive connotation. A little informal survey among my colleagues at the university confirmed this impression. They came up with such terms as 'smooth' and 'easy' to describe their feeling of the term harmony. Harmony seems to denote the absence of conflict or friction and points to a state of general well-being and happiness. The same colleagues regarded the term 'uniformity' as a contrasting notion, in the sense that harmony is not uniformity, which they perceived as something negative. Uniformity was associated with making everything identical and leaving no room for difference or individuality. Apparently, it is thought that harmonisation is a mechanism by which things can be made to run smoothly and free from conflict, while leaving differences intact and individual preferences untouched!

[6] Boodman, 'The Myth of Harmonization of Laws', *The American Journal of Comparative Law*, Vol. 39 1991, 699-724, 702. In this article Boodman intends to expose the mythical qualities of harmonization of law as a concept, method and goal for law reform. Moreover he intends to provide a methodological model for determining whether harmonization is an intelligible goal as regards a particular area of law. As a paradigm for generating the methodoligical model he uses the harmonization of personal property security laws in Canada.

Open Term

The perception of 'harmonisation' as being a mechanism that enables one to combine the 'good stuff' while leaving out the 'bad stuff', and thus limit or even eliminate friction, is made possible by the very nature of the term itself. 'Harmonisation' (like its other grammatical forms 'harmony' and 'harmonious') is an open term. This means that it cannot be categorically defined in the abstract. Instead, its precise meaning depends on the context in which it is used as well as the personal preferences and goals of the user. Therefore, harmonisation has multiple interpretations, allowing for everyone to read into it whatever is most favoured.

Thus, whether something is harmonious is not fixed but a question of definition. For example in the field of music, harmony is defined by a set of rules. These rules stipulate whether a combination of sounds is harmonious or not. Moreover, the notion of harmony is culturally defined: Chinese and Indian harmonies sound quite strange to a western ear and vice versa. Looking up the term harmonious in a dictionary[7], one may find the following results: 'sweet-sounding', 'tuneful', 'forming a pleasing or consistent whole', and 'free from disagreement or dissent'. This makes it very difficult to have an accurate idea of what is meant. The reason for this lies in the fact that these are subjective components. 'Pleasing' and 'tuneful' are terms that depend on individual taste, background or culture. The word harmonious therefore allows for a certain amount of individual interpretation. One may assume that these interpretations will be more or less the same when people belong to the same background, but even then slight differences may occur because of the absence of a common and univocal definition of the term. If the term is used in this linguistic sense in the context of criminal law, then naturally harmonious criminal law is criminal law, which resembles the system one is most familiar with.

According to Boodman[8], who looks at harmonisation from an etymological point of view, the essential features of harmonisation are best illustrated by its meaning in the context of music: 'One attribute of harmonization is that it presupposes and preserves the diversity of the objects harmonized. According to music theory, harmony is the vertical integration of notes, while melody is the horizontal integration. Vertical integration means the simultaneous sounding of different tones or pitches. Harmony, therefore, requires diversity and eschews uniformity. Musically, uniformity, the simultaneous sounding of two identical tones, results in a monotone or silence, depending upon the phases or sequences of the sound waves. A second feature of harmony is that its components, while retaining their individuality, form a new and more complex musical richness of a melody played in multiple tones or

[7] The Concise Oxford Dictionary of Current English, 9th edition, Oxford 1995.
[8] Boodman, 'The Myth of Harmonization of Laws', *The American Journal of Comparative Law*, Vol. 39 1991, 699-724, 700.

chords as opposed to its single note form. A third feature, which has been challenged by relatively modern developments in music, is that of consonance. Harmony, as generally perceived, is the opposite of discord and produces an agreeable or pleasurable combination of sounds. (…) Modern developments indicate a growing human tolerance for dissonance, so that harmony can be objectified to refer merely to the relationship of tones considered as they sound simultaneously, without necessarily imposing the value judgements implicit in consonance and dissonance. Hence, in a modern perspective, while harmony implies a relationship ordered by certain criteria, these criteria can be relative or absolute'.[9]

From this Boodman concludes that there is a *relative* and an *absolute* conception of harmony. The relative conception focuses upon value neutral, theoretical principles, such as logic or consistency and includes consonance as well as dissonance. Absolute harmony, on the other hand, focuses upon practical criteria such as aesthetics or ethics and is constrained by assumptions as to the objective validity of some or all of these criteria, hence requiring consonance.[10] He goes on to say that 'whether taken in its absolute or relative sense, harmonization is not particularly meaningful in the abstract. It entails the creation of a relationship of accord among objects but does not as a concept limit these objects or define precisely the nature of the accord to be established.'

Based on its linguistic and musical meaning, differences are essential to harmony, because it is the relationship between several distinct elements which together form a coherent or pleasing whole. So, harmony presupposes the existence of different elements. If the elements were identical or if there was only one element, then there could be no harmony. However, since it can be defined in any number of ways, harmony, which is about the relationship between elements (which can be anything), does not limit the possibilities of *how* different the elements should be from each other.

Of course, the analogy of music, although very helpful in illustrating the nature of harmony, differs from the field of the law in one significant way. Contrary to music, the law is a normative system which cannot be ordered and reordered limitlessly. Music is free; the law, however, is not. It is a system of standards embedded in the organisational framework of a State within which it fulfils a function. Therefore, the creation of a (new) relationship of accord among objects i.e. different aspects or parts of the law is neither limitless in its possibilities nor free from external stipulations as to the nature of the accord to be established.[11] This difference between music and law must be kept in mind and will be dealt with in more detail later on.

Thus, so far we have seen that harmonisation does not have an exact or fixed meaning. It is an open term, meaning that it is not self-explanatory. Instead, the

[9] Boodman, 'The Myth of Harmonization of Laws', *The American Journal of Comparative Law*, Vol. 39 1991, 699-724, 701.
[10] Boodman, 'The Myth of Harmonization of Laws', *The American Journal of Comparative Law*, Vol. 39 1991, 699-724, 701/702.
[11] In modern States the law is influenced and limited by the requirements of democratic government and the rule of law.

meaning of the term is defined by, and in a particular context. One could also say that it is an abstract term which cannot be defined in general, but only in a concrete situation and in connection with a certain purpose. In comparison, when one looks up the meaning of the term 'uniform' in a dictionary, one can find 'the same', 'unvarying', 'conforming to the same standard, rules or pattern'. These are all things that give us a fairly accurate idea of its meaning. Uniformity is achieved by ensuring that there are no disparities, that everything is the same. Sameness is an objective criterion, since it is generally something everyone is able to agree upon. Moreover, uniformity can be ascertained by measurement and its existence can be validated. This is not to say that the term uniformity is unproblematic[12], but at least it is not open-ended like harmony. A process of unification eventually leads to a state of uniformity, which is a fairly straightforward notion. A process of harmonisation on the other hand, leads to a state of harmony, a notion that is inconclusive as to its precise content.

Plurivocal and Multi-interpretable

As a direct result of the open nature of the term harmonisation, it can be interpreted in any number of ways. Harmonisation is multi-interpretable. As if this were not confusing enough, harmonisation is also plurivocal, it has more than one meaning. To understand this, we must differentiate between the abstract and the concrete. In the abstract the term harmonisation has a certain meaning and an open nature. As a consequence it is multi-interpretable in the sense that the components of this abstract meaning can be interpreted in more than one way in a concrete situation. But the term also has more than one meaning on the abstract level itself, which is why it is plurivocal. So, in the specialised language of the law we are faced with a different conception of the term harmonisation than in natural language and music.

As stated earlier, there is no legal definition of the term harmonisation in the sphere of criminal justice in Europe. Still, when browsing through contemporary legal literature[13] concerned with harmonisation of (criminal) law, a constant element can be

[12] It is conceivable that conflicting views on the scope of uniformity may interfere with the exact definition of the term, but once it has been defined, it is a relatively clear term to work with. To give an example: in a given situation uniformity is defined as the state in which two people wear clothes and shoes of the same colour. When this uniformity was defined, there was a dispute concerning whether the clothes should also be made of the same fabric. In the end it was decided that this was not necessary. This means that henceforth, uniformity can be verified by checking whether people wear clothes and shoes of the same colour, which are characteristics that can be validated.

[13] F. Zieschang, *ZStW* 113 (2001) Heft 2, 255-270; C. Harding, 7 *MJ* 3 (2000), 224-243, (2000) 25 *E.L. Rev*., 374-390, 6 *E. L. J*. (2000), 128-147; A. Musil, *NStZ* 2000, Heft 2, 68-73; A. Wattenberg, *StV* 2/2000, 95-103; A. Albrecht, S. Braum, *E.L.J* (1999), 293; M. Dreher, *JZ* 3/1999, 105-112; E. Baker, (1998) *Crim. L. R*., 361-380; G. Dannecker, *Jura* 1998 Heft 2, 79-87; M. Delmas-Marty, 4 *E. L. J*. (1998), 87-115; J. Monar, (1998) 23 *E.L. Rev*., 320-335; U. Nelles, *ZStW* 109 (1997) Heft 4, 727-755; A. Cadoppi, *EJCCLCJ* (1996), 2-17; E.T Berkman, (1996) *Boston College Int. & Comp. L. Rev.*, 173-185; M. Pieth, *ZStW* 109 (1997) Heft 4, 767-776; U. Sieber, 2 *EJCCLCJ* (1994), 86-99; F. Rüter, *ZStW* 105 (1993) Heft 1, 30-47; T. Weigend, *ZStW* 105 (1993) Heft 4, 774-802; H. Sevenster, *CML Rev*. 29 (1992), 29-70. A. Cadoppi, (1996) *EJCCLCJ*, 2-17

deduced. This makes it possible to conclude that a common meaning of the term exists in the law context, albeit in very vague and general terms. Setting aside the numerous gradations in which the term is used, the 'elimination of disparities between the criminal justice systems of different States'[14] seems to be the closest thing to a general definition that can be found, based on the way the term is used by writers in the field of (criminal) law. So, within the context of the law harmony is achieved through the elimination of differences by making the laws and policies of different jurisdictions more similar or identical. Harmonisation is thus perceived as making more similar or alike different criminal justice systems or parts of these systems.[15]

The existence of more than one general definition rather complicates matters when it is not obvious which of the meanings is used in a certain context, especially when these meanings differ significantly. While differences are essential to the meaning of harmonisation in the natural language and in music, they are unwanted in the law context and harmonisation is directed at their elimination.

Harmonisation in the Law Context

One could argue that the way harmonisation is perceived in legal thinking is incorrect[16], since it has at its basis the elimination of diversity. Using the analogy of music, this perception of harmonisation aims not at a state of harmony (the simultaneous sounding of different tones or pitches) but rather at a state of monotone or silence (the simultaneous sounding of two identical notes). Somehow, in the legal context, harmony is thus perceived as a condition of little or no variation between different legal systems in relation to a certain topic or field. Thus, the ideal or the objective of harmonisation in the legal domain seems to be a state of partial or total uniformity, at least according to this conception of harmonisation. It is obvious that this has nothing in common with the meaning of harmony in natural language.

The question is then, how such a different perception of harmony has been able to flourish. In the legal context harmonisation is mostly seen as a mechanism of law reform.[17] Frictions and problems in legal areas are often (rightly or wrongly) blamed

[14] For example H. Sevenster, Criminal Law and EC Law, *CML Rev*. 29, 1992, 29-70, 53. From her statement that 'disparities in penal legislation can ultimately only be eliminated by harmonization', it appears that she defines harmonisation as 'the elimination of disparities between the legislation of different states'.

[15] For example Leebron, who defines harmonisation as 'making the regulatory requirements or governmental policies of different jurisdictions identical, or at least more similar', in: David W. Leebron, Lying Down with Procrustes: An Analysis of Harmonization Claims, in: Jagdish Bhagwati, Robert E. Hudec (eds.), *Fair Trade and Harmonization: Prerequisites for Free Trade? Volume 1: Economic Analysis*, The MIT Press, Cambridge, Massachusetts, 1996, 41-117, 43.

[16] For example Boodman, in: 'The Myth of Harmonization of Laws', *The American Journal of Comparative Law*, Vol. 39 1991, 699-724, 707.

[17] Boodman, 'The Myth of Harmonization of Laws', *The American Journal of Comparative Law*, Vol. 39 1991, 699-724, 703. Leebron sees harmonisation as a form of intergovernmental co-operation, in: David W. Leebron, Lying Down with Procrustes: An Analysis of Harmonization Claims, in: Jagdish Bhagwati,

on differences between legal systems. For example, in inter-state co-operation in criminal matters, those who co-operate face different criminal law systems and are often confronted with problems they perceive as being caused by the differences between these systems. The same goes for economic enterprises operating internationally. When involved in business transactions, they too face different legal regimes and thus different legal requirements. Such problems occur not only internationally, but also in States with different legal regimes existing alongside each other, for example in Federal States. These situations are viewed as disharmonious and it follows that an effort to change things is directed towards the creation of a new, improved situation in which the problems have been eliminated. Since the existence of differences has been identified as the cause of the problems, the effort to create a state of harmony, i.e. the harmonisation effort, will be directed towards the elimination of differences. Voilà: harmonisation is identified as the realisation of improvement and harmony with the absence of disparities. This train of thought leads to the conception of harmonisation that prevails in the legal context.

Although it does not conform with the meaning of harmonisation in natural language, I fear that it is something we will have to live with since it has become a customary term in legal literature, at least concerning European criminal law. However, we must be aware of the fact that it is an unfortunate conception, because the word harmonisation as such hints at the exact opposite of what it has come to mean in the legal context. Hence, there is a constant danger of terminological confusion. Moreover, the view of harmonisation in the law context is not only incorrect but is also too simple, because it focuses on but one of many possible causes for 'disharmony' in the legal domain and so distorts reality.

In this respect there is another word that would cover the conception of harmonisation in the law context much better: approximation. To approximate means to bring things closer to each other.[18] This meaning corresponds with the idea of making two different systems more similar by eliminating some of the differences between them. The term approximation could be supplemented by the term unification for those cases in which two systems are made identical by eliminating all of the differences between them. Thus, the terms approximation and unification would be more accurate in conveying the meaning attributed to harmonisation within the context of the law.

Scope and Degree

The open nature of the term harmonisation presents us with another problem. Most people, when confronted with the phrase 'harmonisation of law', struggle with the

Robert E. Hudec (eds.), *Fair Trade and Harmonization: Prerequisites for Free Trade? Volume 1: Economic Analysis*, The MIT Press, Cambridge, Massachusetts, 1996, 41-117, 43.

[18] To approximate means 'to bring or come near (esp. in quality, number, etc.) but not exactly (approximates to the truth; approximates the amount required)', from *The Concise Oxford Dictionary of Current English*, 9th edition, Oxford 1995.

scope and degree of harmonisation, because the term cannot be defined in an abstract sense. People come up with different interpretations, which are in fact differences in scope and degree, although they are suggested as being different meanings.

Why is it important to define the scope of a particular harmonisation effort and limit it to a clearly defined context? If there is no clarity regarding its scope, it cannot be assessed as to its success or failure because no one will know 'where to look'. For example, if the goal of a harmonisation effort is the elimination of differences between two sets of rules on the legislative level, then the continued existence of disparities in the execution of these rules cannot be blamed on that particular effort. It was directed at the legislative level and if it results in the elimination of differences at that level, it must be judged to have been successful. If, in hindsight, the real goal of the effort was the elimination of all disparities in all the phases of the judicial process concerning that particular set of rules, the scope of the harmonisation effort should have been extended to the executive and the judicial level.

The scope is the topical[19], geographical[20] or other delineation of the harmonisation effort. It is closely linked to the objective of harmonisation. It is the objective that determines the breadth of the harmonisation effort and thus provides clues as to its correct demarcation.

Particularly in relation to the law, limitation of the scope is also necessary for the hierarchy of legal norms and the different types of legal norms that exist. In the law we discern different levels or contexts. For example, there is the distinction between substantive law and procedural law. This is a distinction between types of norms on the same level i.e. horizontally. In a vertical sense, we distinguish between rules enacted at different levels of government. Furthermore, there are different types of rules, such as specific rules, more general rules or guidelines and abstract principles. In some cases the term harmonisation is used to connote the harmonisation of substantive criminal law only[21], while in others it includes developments with respect to the law of criminal procedure or, in an even wider sense, all of the influences of European law upon national criminal law.[22] In the latter sense, the harmonising influences deriving from co-operation of national law enforcement agencies, the jurisprudence of the Court of Justice and the influences of European policy (soft law) are also taken into account. When dealing with harmonisation, it must be made obvious which of these contexts is targeted by the harmonisation effort, in order to be able to evaluate the effort later on.

[19] Harmonisation can be undertaken with respect to isolated topics or a broad policy area of the law. For example, in the field of criminal justice, a harmonisation effort can be directed at eliminating disparities between the laws of the Member States of the European Union governing financial fraud in a particular economic sector (the agricultural or the fisheries sector). Thus, the scope of the effort would be limited to that particular area of the criminal law. It could also be directed at financial fraud as such i.e. not limited to one particular sector.

[20] In a geographical sense, the scope of harmonisation can be delineated so as to be limited to the laws of one country, for example a Federal State with differing legal systems, or different countries. In the European Union the scope of harmonisation efforts is geographically limited to its member States.

[21] For example in M. Pieth, Internationale Harmonisierung von Strafrecht als Antwort auf transnationale Wirtschaftskriminalität, *ZStW* 109 (1997) Heft 4, 760.

[22] As in A. Cadoppi, 'Towards a European Criminal Code?', (1996) *EJCCLCJ*, 2-17.

If the unfortunate conception of harmonisation in the context of the law (making laws or policies more similar) is used in a concrete situation, then it must be established *how* similar the laws or policies should become. Similarity is something that must be defined (just like harmony). This can be referred to as the degree of harmonisation or, more appropriately in my opinion, the degree of approximation. In this respect Leebron defines the degree to which a harmonisation requirement continues to tolerate difference as the *harmonization margin*: 'The degree or margin of harmonization can range from a zero margin (complete harmonization), which provides for no deviation from the specified standard, to quite broad ranges of tolerance.'[23] The unification of law is harmonisation with a zero margin. The margin must be defined within the context of a particular harmonisation effort and in view of its objective. If the objective of harmonisation is uniformity, then it is clear that the harmonisation margin must be zero.

In all other cases, where the objective is simply a certain level of similarity, the specific degree of similarity must be defined. If not, the harmonisation effort itself is not fully defined. This may hinder the adequate choice of the means to undertake harmonisation. For example, if the objective is merely a slight approximation of rules in a certain area of law, in the sense that they should reflect the same general principles, the adoption of guidelines governing that area of law may be sufficient to achieve this goal. If the degree of similarity had not been defined, the harmonisation effort might have been undertaken by the adoption of new, uniform rules, which would have been an overreaction in light of the proposed objective. This leads to the conclusion that the degree of harmonisation safeguards the proportionality of the effort in relation to its goal. A precise definition of 'how harmonious' the effort should be enables those who undertake harmonisation to choose the means which are best suited to achieve their goal.

It should be clear that the necessity to determine the degree of harmonisation only presents itself when using the conception of harmonisation that is prevalent in the law context and that is in fact approximation or unification of different systems.

With respect to the conception of harmonisation in natural language and music this necessity does not arise, because similarity or uniformity is not an issue there.

Process, Method or Goal?

In contemporary legal literature the term harmonisation not only has a deviating meaning but it also occurs with different connotations. In some instances it is seen as a method, while in others it is referred to as being a process or even a goal. So, which of the three is it?

[23] David W. Leebron, Lying Down with Procrustes: An Analysis of Harmonization Claims, in: Jagdish Bhagwati, Robert E. Hudec (eds.), *Fair Trade and Harmonization: Prerequisites for Free Trade? Volume 1: Economic Analysis*, The MIT Press, Cambridge, Massachusetts, 1996, 41-117, 47.

Method?

Harmonisation is often seen as a technique or method to bring about the gradual adaptation of national criminal law systems. Yet, in my opinion, harmonisation cannot be viewed as a method because of the open nature of the term, which makes it impossible to categorically define it outside a specific context. For example, Berkman in his discussion of the Dutch soft drug policy in the European Union, states that 'the most obvious route toward harmonization of drug laws within the EU would be for the Netherlands to adopt soft drug policies that other Member States presently observe. (…) Such a path would also satisfy the harmonization requirement in the Schengen Agreement.'[24] The only other option he perceives for the Netherlands is to promote Dutch policy throughout the European Union. In this case, therefore, harmonisation seems to be defined as unification, which can be achieved either by conforming to other countries' policies or getting other countries to conform to one's own policy. Luckily, this meaning of the term harmonisation can be deduced from the statement itself, but at the same time the necessity of this proves the inadequacy of harmonisation as a method.

A method should at the very least be sufficiently clear by itself, so that one can have an idea of what it can be used for. By comparison, unification can be seen as a method since it can be clearly defined as the elimination of disparities in order to achieve uniformity. Therefore, if I were told to unify two different sets of rules on the legislative level, I would know how to proceed in order to accomplish this goal: through the elimination of all existing disparities between them. A different problem is that the method of unification does not provide any clue as to *how* disparities should be eliminated: by imposing one set of rules on the other, by mixing the rules in equal parts or according to some other ratio of distribution?

However, these are choices which must be made in the concrete situation of a real unification effort. Viewing the method of unification in the abstract, it is enough to note that these choices have to be made. Here it is important to see that unification is a process with a clear and univocal end result: a state of uniformity. That is something definite and can be verified objectively. Once 'sameness' has been defined, it is simply a matter of assessing the result of a unification effort in light of that definition. However, this cannot be said for harmonisation, since its meaning is open. In abstract terms, it means either 'the combination of diverse elements so as to form a pleasing or coherent whole' or 'the making identical or more similar of different systems'. These conceptions merely hint at the general direction that harmonisation points to. It does not, however, point in any specific direction, nor does it provide any clues as to how this should be accomplished.

[24] Berkman, Sacrificed Sovereignty?: Dutch Soft Drug Policy in the Spectre of Europe Without Borders, *Boston College International & Comparative Law Review*, Vol. XIX, No. 1, 1996, 173-185, 180

From A to B

If harmonisation is not a method, then maybe it is a process?

A process is simply a course of action, the course of becoming or of something happening. It is not something static but rather leads somewhere, for example from A to B. Indeed, harmonisation is the course of action that leads to harmony. The starting point for a process of harmonisation is a situation found to be disharmonious. In order to change it, harmonisation takes place with a view to arriving at a new situation that is no longer disharmonious. In the law context harmonisation is (incorrectly) seen as the process of eliminating disparities. In natural language, it is the process of combining different components to form a coherent relationship. Be that as it may, in both instances harmonisation is about proceeding from A to B, from disharmony to harmony. The open nature of the term also applies to harmonisation as a process. This means that it is not possible to determine in the abstract exactly how such a process should be undertaken.

Harmony

Harmonisation is often seen as a goal in itself. This is not only wrong from a grammatical point of view, since the goal of harmonisation is harmony (and not harmonisation), but also in light of the nature of the term harmonisation. The term is given meaning through its definition within a particular concrete setting. To strive for harmony as such is not possible. Harmonisation is always intended to realise the harmony of something (of life, of relationships, of music, etc).

The frequent reference in legal literature to harmonisation as a goal results from the confusion of harmony with improvement, by the attribution of certain features to harmonisation that do not necessarily belong to it. In the law context problems in contact between different legal systems are (rightly or wrongly) blamed on the differences between two sets of rules. The solution is sought in the elimination of these disparities. Hence, harmonisation is undertaken in order to improve a certain situation and therefore its goal is improvement. Very often these steps are not thought through, leading to the automatic assumption that harmonisation means improvement. This assumption, together with the user's personal perception of the word harmonisation (and the positive ring it has), results in the inaccurate definition of harmonisation as a goal.

Harmony must be defined in order to function as a goal; only then can it give direction and purpose to the harmonisation process.[25] Indeed, a harmonisation process cannot be undertaken without a prior definition of harmony, or it would not be clear

[25] See also Leebron: 'Both the validity of the harmonization claim and the effectiveness of its implementation must be judged in terms of some asserted purpose, and it is the purpose that determines whether the form of harmonization adopted is suitable.', in: Lying Down with Procrustes: An Analysis of Harmonization Claims, in: Jagdish Bhagwati, Robert E. Hudec (eds.), *Fair Trade and Harmonization: Prerequisites for Free Trade? Volume 1: Economic Analysis*, The MIT Press, Cambridge, Massachusetts, 1996, 41-117, 42.

which direction the process should take: from A to B or F or Z? In other words, harmonisation would then be like starting on a journey without knowing where to go.

A theory of harmonisation

Based on the conclusions in the previous part, a rather vague and complex picture of harmonisation emerges. Harmonisation is as a concept open, plurivocal and multi-interpretable. Although the nature of the term calls for an explicit interpretation of its components every time it is used within a context, more often than not it is used on the assumption that the term does not require definition. As a result, miscommunication takes place imperceptibly, because everyone thinks that harmonisation has a clear meaning, even though no one really knows what it is.

Moreover, the general conception of harmonisation prevailing in the law context is incorrect and would be represented more adequately by the terms approximation and unification. The problem that harmonisation is very often not defined properly within a concrete setting cannot be remedied in a paper such as this, dealing with the theoretical aspects of harmonisation. What can be done, however, is to attempt a correction of the definition of harmonisation as it has evolved in the law context and to provide guidelines for the way the harmonisation process should be undertaken.

Friction, not Differences: a revised definition of harmonisation

Harmonisation is the process of bringing about harmony. As such it can be defined as a process of recognising and resolving disharmony. But what is it that causes disharmony? As we have seen, in the context of the law perceived problems in other words *disharmonies* such as the inefficiency of co-operation between law enforcement agencies are blamed on differences between legal systems, without checking whether this is really the case. This leads to the automatic assumption that the goal of harmonisation is the elimination of differences.

Yet differences are not in themselves problematic. More than that, differences are even essential to the meaning of harmony in language and music.[26]

Thus, disharmony is not caused by the existence of differences, but by the way different parts or elements function together. When they do not function in the way they were designed to do, this can lead to friction. What is friction? According to the dictionary, it means 'the action of one object rubbing against another or the resistance an object encounters in moving over another'.[27]

[26] Differences are essential to harmony, because it is the relationship between several distinct elements, which form a coherent or pleasing whole together. Harmony presupposes the existence of different elements. If the elements were identical or if there was only one element, then there could be no harmony. However, since it can be defined in any number of ways, harmony, which is about the relationship between the elements, does not limit the possibilities of how different the elements should be.

Not only does friction cause something to function less effectively, eventually it will result in so much wear and tear that something can no longer function at all.

Friction is therefore the first building block for a definition of harmonisation: harmonisation is about the elimination of friction. Harmony is a state in which there is no friction. If harmonisation is viewed in this manner, it becomes possible to reconcile the definitions of harmonisation in natural language and music on the one hand and in the law context on the other. In both instances we are dealing with diverse elements that have to be combined in a certain manner. In the conception of harmony as a state in which there is no friction, any combination of these elements must be one that avoids friction. How do we verify whether this is the case? By prefixing a standard of harmony that can serve as a touchstone and tell us what a 'frictionless' state looks like. This can be compared to writing a manual that contains a description of how something should function. With respect to the harmonisation of law, this manual must contain a description of how a harmonised system of law should function.

Of course, the next problem that arises is that the definition of harmony in natural language and in music allows for a certain amount of subjective interpretation, because it contains such elements as ' pleasing' and 'tuneful'. Even if one were to design a standard for harmonisation, this would still not provide the clarity that is needed. Our ability to define harmonisation in an objective way seems to end here, were it not for the possibility of simply taking these subjective elements out of the equation, as seen in modern developments in the field of music. The relative conception of harmony challenges the idea that 'consonance' is a condition for harmony and focuses on value neutral, theoretical principles, such as logic or consistency. Harmony need therefore no longer be 'tuneful' or 'pleasing' but it must simply be a relationship ordered by certain criteria.

Another argument in favour of such an approach comes from the historical perspective of harmonisation, which shows that the term was once defined differently and more in line with the way I propose here. In her paper (elsewhere in this volume), Nelles discusses the historic development of the terms harmony and harmonisation and comes up with the interesting result that subjective elements were not always part of the term, but only inserted later on. The Pythagoreans held harmony to be 'the regularity and order of single things as well as the regular arrangement of many things'. Originally, therefore, harmony was 'the process of ordering things in accordance with the rules of the autonomous or cosmic order'.

Subjective elements, such as beauty and elegance, were added to the definition of harmony by subsequent philosophical schools. According to Nelles, the Pythagorean understanding of harmony was not lost, but survived in the idea of 'ordo', which again represented the belief in a comprehensive cosmic order. She therefore suggests that 'we have to go back to the sense of harmony and order when we deal with harmonisation in and of the law'. Indeed by removing subjective elements, it becomes possible to define harmonisation in a general way, without running the risk that a part of its

[27] Other meanings are: 'a clash of wills, temperaments or opinions; mutual animosity arising from disagreement', from: *The Concise Oxford Dictionary of Current English*, 9th edition, Oxford 1995.

meaning is variable. Harmonisation would then simply be about the creation of a certain order according to a predefined standard of rules, irrespective of whether this order is perceived as being 'pleasing'.

So, the other building block we can use for a definition of harmonisation that may be more useful in the context of the law is not really a building block at all. It is the deletion of the subjective element in the term. This enables us to define harmonisation in an objective and verifiable manner.

Again, using the notion of friction, this would lead to the following result:

Friction leads to disharmony.

Harmonisation is the process of (re) ordering the relationship between diverse elements in accordance with a prefixed standard so as to avoid or eliminate friction.

Harmony is a state of order between different parts that form a whole, in which there is no friction.

Since we are dealing with words, it would be very difficult to really achieve objectivity, even if it could be achieved. By substituting 'beauty' and 'elegance' for 'a value neutral order', another term that might be equally tricky becomes important: 'consistency'. When we think about an order of things that functions without friction, we think about an order that is consistent. Another term that may come up in this respect is 'optimal'. A system that functions without friction between its constituent parts, functions optimally. These are words that also have to be defined, which may lead to the impression that nothing is gained from the removal of subjective elements from the definition of harmonisation. Yet, in my opinion something is gained, because the terms 'consistent' and 'optimal' can be used in an objective manner, whereas terms such as 'beauty' and 'elegance' cannot. 'Consistent' means 'constant to the same principles of thought or action' and 'not contradictory'.[28] 'Optimal' means 'best or most favourable under a particular set of circumstances'.[29] Both terms can be used in a straightforward manner, because they refer to a standard against which they can be validated. Beauty and elegance, on the contrary, are much more elusive terms.

Harmonisation of law

Having defined harmonisation as adequately as possible, it is now time to see what harmonisation of *law* should look like in theory. In this respect it is necessary to find out how the concept of law influences the way harmonisation of law can be undertaken.

The revised definition of harmonisation proposed above is more in line with the concept of law, because the law also seeks to avoid unpredictability. By its very nature it is a system that is characterised by a continual desire for internal and external consistency. The law is a set of general and univocal rules that apply in a certain area. In the sphere of criminal justice, foreseeability of what is criminalised (and what is

[28] Ironically, another meaning is 'in harmony', see *The Concise Oxford Dictionary of Current English,* 9th edition, Oxford 1995.

[29] *The Concise Oxford Dictionary of Current Englis*h, 9th edition, Oxford 1995.

not) is of paramount importance in light of the (sometimes) serious consequences an encounter with law enforcement authorities can have for individuals. In the context of the law, harmonisation cannot be directed at 'beautiful law', because that is not what the law is about. It can however be directed at the 'quality of law' and in the abstract, disharmony of the law can therefore be defined as inconsistency and lack of quality of the law in light of the requirements any system of law should meet.

Harmonisation of law is often presented as some kind of magic potion to do away with all sorts of problems. Those who believe in this magical quality forget, however, that in the legal context harmonisation is a mechanism of law reform[30] or a form of intergovernmental co-operation[31]. As such it is, like the law itself, limited in its ability to solve problems.[32] Not everything is laid down in the law and fixed by it. The law and its harmonisation are not the sole remedies for problematic situations. Elimination of problems between legal systems through the top-down intervention into (parts of) these systems is only successful in as much as the problems were caused by disparities. One must be aware of this limitation when talking about harmonisation of law.

Something else which is often overlooked is the fact that the law is a system. Yet this has consequences for the harmonisation of law when it is directed at parts of systems rather than the whole (as is mostly the case). Various parts of a system are interrelated.[33] Any modification to a part of a system has effects for the rest of the system. An alteration in one part of a system may cause unwanted changes in other parts. The ensuing chaos may outweigh the benefits of the initial harmonisation effort. Since the relationship between parts of a system is known and the way they influence each other can often be predicted, it is possible and wise to assess this 'domino-effect' beforehand.

Need for a common standard

With respect to harmonisation of parts of different legal systems or legal systems as a whole we are faced with the problem that there is no common standard. The general definition of harmonisation I use here requires a standard according to which diffe-

[30] Boodman, 'The Myth of Harmonization of Laws', *The American Journal of Comparative Law*, Vol. 39 1991, 699-724, 703.

[31] David W. Leebron, Lying Down with Procrustes: An Analysis of Harmonization Claims, in: Jagdish Bhagwati, Robert E. Hudec (eds.), *Fair Trade and Harmonization: Prerequisites for Free Trade? Volume 1: Economic Analysis*, The MIT Press, Cambridge, Massachusetts, 1996, 41-117, 43.

[32] In Boodman's opinion 'the unavoidable conclusion is that in a legal context harmonization is merely synonymous with the process of problem solving and is as infinite in its configurations as are potential problems in law.', 'The Myth of Harmonization of Laws', *The American Journal of Comparative Law*, Vol. 39 1991, 699-724, 707.

[33] 'It is intended to emphasize that harmonization as a process of modification or adaptation of diverse elements to each other or to a metastandard is system bound in that it has as variables the existing or potential relations of the elements to be harmonized.', Boodman, 'The Myth of Harmonization of Laws', *The American Journal of Comparative Law*, Vol. 39 1991, 699-724, 708.

rent parts can be arranged into a new order. States are equal and so are their systems. This means that no State can, by itself, determine what the standard of harmony should be. As we have seen, differences as such are not wrong, so in the event of a harmonisation process taking place, one State cannot simply force its legal system on another State in the name of harmonisation. This means that the different States that want to harmonise (part of) their legal systems, must together create a standard before they can actually start harmonising. As a result, harmonisation of criminal law in Europe should be preceded by the creation of a standard of harmonised criminal law: in other words, a framework or model that stipulates what European criminal law should look like.

Of course, things work differently in reality. In the European Union harmonisation is undertaken without the prior creation of a model of European criminal law. Instead, European criminal law is developing step by step, although sometimes it is hard to discern the steps, let alone the direction they are taking. The downside to this approach is that it is very difficult to judge harmonisation as to its content, since the lack of a common standard means that it is not obvious which goal is being pursued. It is also very difficult to assess whether the effort at harmonisation is undertaken with the appropriate means, again something that is determined by the objective that is pursued.

Another significant drawback of such a fragmented approach to harmonisation of criminal law is that the effects on national criminal law systems are not foreseeable. The alteration of parts of systems, without due consideration to their interrelationship with other parts, may have unintended and undesirable consequences, such as the development of friction in parts of the law where there was no friction before. This could ultimately cause the harmonisation effort to backfire and end in more chaos than the initial position.

Legitimacy of Differences

An important outcome of the revised definition of harmonisation is that its focus can no longer be on differences. Differences between legal systems are no longer 'the usual suspects' when we seek to resolve the problems occurring in 'European criminal law', making it much harder to eliminate them in the name of harmonisation. This does not mean that harmonisation excludes the elimination of differences. If a problem analysis reveals differences between legal systems to be the cause of a state of disharmony, then it is perfectly legitimate to do away with them, but only after such proof has been evindenced.[34]

[34] David W. Leebron, Lying Down with Procrustes: An Analysis of Harmonization Claims, in: Jagdish Bhagwati, Robert E. Hudec (eds.), *Fair Trade and Harmonization: Prerequisites for Free Trade? Volume 1: Economic Analysis*, The MIT Press, Cambridge, Massachusetts, 1996, 41-117, 42: 'Harmonization, of course, assumes the prior existence of differing legal regimes or policies. The sources of such differences, and how they affect the normative claims for harmonization should be considered. The costs of harmonization, and in particular the costs of enforcing 'sameness' on jurisdictions that might differ in significant ways are another important issue in this context. Furthermore, alternatives to harmonization should be

Of course, in the European Union one can no longer maintain the position that legal systems are a matter of national sovereignty and that differences are therefore legitimate. That is an extreme position which no longer reflects the truth, but neither does the position that differences are at all times illegitimate. The lack of a common standard of 'European criminal law' makes it very difficult to ascertain whether differences between national legal systems are causing disharmony. In light of this uncertainty, differences between legal systems should be regarded as legitimate until proven otherwise.

Guidelines for harmonisation

Although harmonisation is by its very nature something that can only be discussed meaningfully within a concrete situation, there are nevertheless some general notions which apply to every harmonisation effort. They can be seen as guidelines, meant to ensure the quality of a process of harmonisation. Adherence to these guidelines does not, however, guarantee the successful realisation of the aims pursued. In some cases harmonisation may simply not be the right solution to a problem or it may be that the problems are too complicated to be solved by this approach. In that case it would be wise to look for alternatives to harmonisation.

A precise analysis of problems and causes should precede any harmonisation effort.

Problems can be analysed in different ways. A very simple, yet effective approach is the following:

1. Focus on the problem area
2. Analyse the situation
3. Develop the most appropriate solution
4. Evaluate the solution afterwards

According to Boodman[35] a project of harmonisation of law is composed of four related aspects, each of which must be critically analysed:

a. The diverse elements to be harmonised
b. The rationale for, or problem to be resolved by harmonisation
c. Whether and how diversity is problematic
d. The ultimate goal of harmonisation

All of these points belong to the general notion that a thorough assessment of the situation and its problems is necessary before engaging in any modifications. Moreover,

considered before determining that harmonization is an appropriate solution to problems created by regulatory differences.'

[35] Boodman, 'The Myth of Harmonization of Laws', *The American Journal of Comparative Law*, Vol. 39 1991, 699-724, 708.

in order to ensure the effectiveness of harmonisation, there must be absolute clarity with respect to the goals that are set and the appropriate means to achieve them.

The various aspects are interrelated in that the perception of each has an impact upon the other.

In my opinion, it would be more appropriate to consider these aspects in a different order, representing the steps one has to take when thinking about harmonisation more clearly:

a. Whether and how diversity is problematic
b. The rationale for, or problem to be resolved by harmonisation
c. The ultimate goal of harmonisation
d. The diverse elements to be harmonised

I would add one more point:

e. Assessment of the possible effects of the harmonisation of certain elements on related elements in the systems that are to be harmonised.

This notion is connected to the fact that elements to be harmonised are part of a system and are therefore related to, influenced by and themselves influencing other elements in that system.

In my opinion, the way harmonisation is undertaken in the European Union with respect to the problems posed by transnational organised crime is an example of harmonisation without a preceding problem analysis. The prevalent argument in support of harmonisation is the increasing inefficiency of national law enforcement efforts in the face of transnational crime in a European Union without borders. Generally, the perceived inefficiency is blamed on differences between national criminal law systems.[36] Thus, the differences between national criminal law systems are made out to be the chief cause for inefficiencies in the European Union-wide combat of transnational crime. The call for harmonisation is mainly based on this ground[37], even though it has not been demonstrated that it is the only possible reason for inefficiencies in law enforcement in the European Union.

Hence, these calls rely on a false notion of cause and effect. There may be many other possible causes for inefficiency apart from differences between national law systems. To name but a few: the existence of a language barrier, the shortage of resources and adequately trained personnel, the lack of a transparent set of rules utilised by national law enforcement agencies, which is in turn caused by the existence of a multitude of international frameworks for the combat of all sorts of transnational crimes. It is obvious that in this case a thorough problem analysis should precede harmonisation.

[36] The preambles of European Union-proposals very often contain this argument.

Conclusion

The quest for clarity regarding the term harmonisation inevitably leads to the conclusion that it can be as 'harmonious' as we want it to be. Yet, in answering the question posed by the title of this paper, more questions are raised. That is the nature of the term harmonisation: in the abstract it raises only questions. What do we want to harmonise? How do we perceive harmony? These questions must be addressed in a concrete situation. Thus, the possibility of talking about harmonisation in an abstract way is very limited.

Although an approach to harmonisation from a theoretical viewpoint is limited by its very nature, it is nevertheless very fruitful. It has shown that the term contains several pitfalls which lead to a situation where miscommunication can take place without anyone noticing. Furthermore, looking at the term from a theoretical perspective has shown that, although harmonisation must be interpreted to give it meaning, it does contain characteristics that restrict what can be read into it. It is by no means a 'carte blanche'. That made it possible to correct the conception of harmonisation as it is prevalent in the law context. As a result, it has become clear that harmonisation cannot be about the elimination of differences between (parts of) legal systems, but instead, should be about the increase of consistency and quality between (parts of) legal systems. That is why I recommend that the terms approximation and unification be used when 'the elimination of differences between (parts of) legal systems' is meant. This would surely benefit the clarity of the terminology we use in the context of criminal justice in Europe.

The open nature of the term harmonisation and the resultant indeterminacy enables people to say something without really saying anything. In my opinion, that is the appeal of the word and the reason for why it is used so often. The resulting 'twilight zone of harmonisation' is just that in the sense that it lets people see whatever they want to see: a dream or a nightmare. In the context of the law this is an intolerable state of affairs. That is why it is vitally important to start defining the term harmonisation when we use it. Otherwise, I fear that the end result might be a twilight zone of European criminal law.

Definitions of harmonisation

In her contribution, Felicitas Tadić addressed aspects of harmonisation in a more abstract way. Building upon her contribution it is therefore necessary that more concrete theoretical aspects are also now considered. We saw that it is difficult to define harmonisation in the abstract. As a consequence, we need to deal with parts of the law that are not exclusively related to criminal law. However, after this necessary detour we will return to our precious criminal law. This will involve a consideration of the relevance of enforcement of the law, institutional aspects of harmonisation, as well as the question whether harmonisation of criminal law is different from harmonisation in other fields of law.

The importance of enforcement for harmonisation of criminal law

Harmonisation of rules focuses on what harmonisation is and to what it applies. This can be characterised as an *input orientated* aspect of harmonisation. However, in addition, it is relevant to look at the actual *output* of harmonised rules. This is the law in practice, as it evolves from actions of the executive and judicial powers. One may question whether harmonisation of rules will lead to harmonisation of enforcement, in the event that enforcement mechanisms have not also been harmonised. This of course depends to a certain extent on the contents of the legal instruments that are harmonised. If they contain particular supervisory mechanisms, duties to report on implementation or any other feedback on the effects of the rules, then the enforcement aspect has also been taken into consideration. An example of the inclusion of enforcement aspects can be found under community law, where the EC Treaty, as well as secondary legislation, provides for supervision by the Commission. In comparison, such an enforcement or supervisory mechanism has not been provided for under most of the conventions of international law that criminalise certain behaviour. Such conventions neither provide for a supervisory body nor a common enforcement mechanism. Most conventions do, however, provide for a dispute settlement mechanism, though this cannot be regarded as equating to enforcement of the entire treaty. Thus, it depends on the contents of the harmonised rules whether they will contribute towards a harmonisation of enforcement. Earlier we identified that harmonisation is a process. That being so, it is important to identify who controls the process. This aspect is related both to enforcement and to the institutions that enforce.

National law enforcement officials will interpret the new rules with national eyes and as part of an entire national system. This could explain that some rules that on paper ought to change standards in a specific country, may in practice not result in any noticeable consequence. Harmonisation which is limited to rules may therefore only lead to a formal harmonisation, which is miles away from the real law.[1] In my view enforcement is therefore an inherent element of harmonisation, because law is more than black letter law. If, for instance, a harmonising measure requires that new crimes will be inserted, nothing will change if the prosecution does not prosecute for these new crimes. It means that there must be some standard for harmonised enforcement. This could lead to a situation in which the rules are more harmonised than the enforcement. The law in practice may therefore be characterised as a lower degree of enforcement.

One may also raise the question whether it is not an element of harmonisation that there will always be something left that is not identical between particular legal systems. Using this approach, (some) differences do not matter, because you can still speak of harmonisation. Does this mean that we are discussing two extremes? In one instance, national enforcement of harmonised rules that may theoretically result in no practical deviation at all from the former national practice. The other extreme is that enforcement through national authorities is somewhat harmonised, in order to avoid the main disparaties and to obtain a certain degree of harmonisation of enforcement. Is this the decisive line between harmonisation and unification/ uniformity? And does harmonisation therefore cover the whole area between complete divergent systems and uniformity? This could certainly contribute to a definition, but means that we need to define uniformity as well.

Could we argue that the harmonisation of enforcement mechanisms almost automatically leads to a need for common institutional structures or a common legislator? Or should we instead make a distinction here? Could it be that we can do without a common legislator but must have common executive and judicial mechanisms? If so, can we also see this as a degree of harmonisation instead of unification? These questions demonstrate that we need to discuss the institutional aspects of harmonisation.

Institutional aspects of harmonisation of criminal law

What is meant by institutional aspects and common institutions? In fact this goes back to the concept of the *trias politica*, the division of powers, as presented by Montesquieu in the 18th century.[2] Modern democratic states have adopted this scheme and have separate institutions: a legislative body, an executive body and a judicial body. Within a national setting, the powers of these three bodies correspond to each other in their scope, degree and territory. This is not the case with harmonisation, which may bring in any of these three on a supranational level. For instance, we

[1] A more cynical comment would be that 'window-dressing' takes place.
[2] Charles de Secondat, *Baron de la Brède et de Montesquieu, L'esprit des lois*, 1748.

see at the European level a common legislator in the third pillar: the Council, but no common enforcement and an almost non-existent common judicial body. Three institutions are therefore relevant for our discussion:

- a common legislator;
- a common enforcement system;
- a common judiciary.

Can you harmonise law without institutional harmonisation? Before answering that question it is relevant to look at the current practice. Supranational law is adopted at a supra-state level. It means that a common rule has come into existence. Various possibilities may arise in relation to the effect of such supranational legislation in the national legal order. They will have either a direct or indirect effect. Three different categories of effects may be identified:

1. superseding law, directly applicable.
2. higher law that requires implementation in order to impose obligations on individuals, but from which citizens may derive rights.
3. prevailing law that requires implementation in order to cause any effect.

In fact the transformation into national law determines (or is equal to) a degree of harmonisation. When it comes to the first category of effects no implementation is required. This is different for the other two. Subsequently the rule must be implemented into national law and enforced on a national level by the appropriate organs. Of course the national legislator must remain within the boundaries of the supra-national law, but (secondary degree) national legislation is necessary. Both steps endanger the harmonising effect of the supranational rule. In the process of implementation all states bound by the common norm will interpret this in their own way. I cannot count the many occassions on which our Minister of Justice has said in Parliament that a certain piece of European legislation would neither alter current Dutch criminal law in the books, nor existing practice. It is unlikely that this was always the case. The consequence of individual national implementation will in any case be divergence from the harmonised rule. It cannot be expected that all states will implement in exactly the same way. Of course very significant differences in the degree of divergence will be found. This does not even include the fact that we may see *mala fide* implementation by some states. That could be because they have lost the battle to reach an agreement and take the opportunity to achieve their goals through other means. Further differences may be expected when it comes to the national enforcement of harmonised norms.

Is what we discussed before evidence of a necessary nexus between harmonisation and institutional structures? Does harmonisation require common institutional structures? This will largely depend on what you define as harmonisation. If we apply the definition given by Tadić, we still might have the problem that harmonisation is a process leading to harmony without indication when, where and whether it shall end. Is harmonisation an eternal process? In addition it seems that Tadić' definition inclu-

des harmonisation of rules only, and excludes institutional harmonisation. This presumes that the term 'rules' only refers to normative and regulative rules: essentially the outcome of a legislative process. This excludes for example rules about institutional and legislative aspects. An answer therefore depends on another question – whether you have regard to rules only or whether you also deem enforcement (i.e. the application of rules) and the way these rules have been adopted as relevant.

It is useful to have a look at a more extreme example: unification. Here again, as is the case with harmonisation, we need to define unification in order to be able to know what we are talking about. Maybe we should define unification as a situation in which states share a common legislator, enforcement system and judiciary. Anything else below this should be characterised as a harmonised system, which may create a tendency towards uniformity. Should we say that, although harmonisation is an open ended term, it can claim (Anspruch) to reach uniformity? Or does it even carry the goal of developing a new and more coherent whole, while retaining the individuality of the constituent parts? Experiences thus far show different responses. Scandinavia and the Benelux contries have uniform laws on some points. However, this did not result in any common institutional structures in the field of criminal law. In contrast, harmonisation under the regime of the 3rd pillar of the European Union has led to some common institutions, but not on all levels relevant in the field of criminal law.

Definition of and conditions for uniformity

In my view uniformity requires a common institutional structure. It requires a common legislator, a common government and a common judiciary. If we were not to have such a structure and, for instance, only require uniform (=identical) rules for uniformity, than we would not be able to distinguish uniformity from harmonisation. However, this also raises the question as to what is the function (in the sense of ultimate goal) of harmonisation, when it is limited only to rules, and what harmonisation as such is. Could it be that harmonisation is a process without a goal? Whereas harmonisation of rules without harmonisation of enforcement may in theory lead to no change whatever in the practical application of the law, uniformity may be the end of the process of harmonisation, after which discussions about harmonisation will have come to an end.

Adoption of common rules, as Tadić has said, does not say anything about the way these rules have come into existence. One could regard that as an element of the scope of harmonisation, although I would prefer to make a distinction here. It is one thing to distinguish between harmonisation of a specific crime and of the general part of criminal law, or to distinguish between norms that are directly applicable to the criminal position of individuals and the more general issue of how law is adopted and enforced. This is logical because their evolution is a separate issue and is also relevant. We may expect that the fact that legislation was made by a common legislator may have an additional harmonising (or unifying) effect. Can we presume a more general acceptance if the legislator is a common body?

I have still left unanswered the question of whether harmonisation unconditionally

requires common institutional structures. We have established that harmonisation distinguishes itself from uniformity, because of the very fact that it lacks common structures. It is clear that harmonisation does not require common institutional structures, but it will certainly profit from them. Starting from the position that the law is the law in practice as it is (not) enforced under the supervision of the judiciary, without common institutions, differences are more likely than similarities.

Something special? Is criminal law different from other fields of law?

Unlike almost all other fields of law, criminal law deals with deprivation of liberty. As a result, it neither leaves a lot of discretion in the rules nor in its application in practice. This raises a presumption that criminal law needs unification, or at least a very precisely formulated goal of harmonisation. Could that be one of the problems with harmonisation of criminal law? Harmonisation is by definition ambiguous.

Whereas community law deals with the freedoms awarded to citizens, criminal law deals with rules on the limitation of freedom. Therefore rules applicable to the internal market cannot automatically be used for harmonisation of criminal law. A free flow of evidence, arrest warrants etc. would deprive citizens of rights recognised under one system and not recognised under the other. It may also have the consequence that there is no appropriate forum that will deal with legal disputes.

Criminal law cannot afford to leave any ambiguities as to its precise contents. Can criminal law live with different systems? From the perspective of the citizen it can, as long as the application of a specific legal system on an individual criminal case is not determined by chance or at random but rather is predictable. That is basically relevant for cases of extraterritorial jurisdiction. There is a presumption that people know what is prohibited in the country where they are. In fact this lies at the foundation of the existence of various criminal justice systems in different countries. As long as each individual system carries a harmonised practice in itself, citizens will not be damaged or prejudiced.

Unlike private law, criminal law forms a closed system in the sense that neither individuals, nor the parties to a criminal trial, can develop their own criminal law. Because of this closed system character, it may be more difficult to harmonise just a few aspects of criminal law but not the whole system. You may seek to harmonise one aspect of criminal law and leave other aspects or fields unaltered. Can criminal law cope with that? The harmonisation of a specific definition of crime is influenced by the general part of criminal law. Whereas in one country it may lead to prosecutions of legal entities (which are non-existent in other states), it may lead to prosecution for conspiracy or preparation of the offence that would not be possible to commit in another. On the same level, harmonisation of the definition of a crime will have consequences in the procedural field – for instance the application of coercive measures. This basically comes down to the aspect discussed by Tadić as to the scope of the harmonisation. It depends of course on the effects on each other and the consequences for the total system – are the results desired or unwanted side effects? Two extremes may be undesirable: the disturbance of the balance between repression and guaran-

tees for the individual and a situation where effective law enforcement cannot take place. Let me give some examples in the field of substantive and procedural criminal law.

1. Let us imagine that an EU-framework decision would oblige the Member States to implement a maximum penalty for theft of at least 8 years (socalled minimum maximum penalty). Under Dutch Criminal Law this would, for instance, mean that theft then qualifies for extraordinary investigatory methods, which are not applicable to less severe crimes.
2. Let us imagine that an EU-framework decision would oblige the Member States to implement criminal liability for legal entities. For Member States that do not have such liability yet, the consequences are enormous. Their entire system will have been tailored to deal with natural persons. Consequently, they will have to legislate on penalties for legal entities which, as is obvious, cannot be imprisoned.
3. Imagine that an EU-framework decision would introduce something called a European Surrender Procedure that abolishes extradition procedures between the Member States for all categories of crimes and fugitives. It could result in the surrender of a suspect under conditions that would not qualify for an arrest in the requesting state. It would thus strengthen one form of co-operation over other forms that are alternatives to extradition, such as the transfer of proceedings.
4. Imagine that an EU-framework decision were to give executive powers to Europol. This results in a different treatment for national police officers and Europol officers in states that do not have immunities for civil servants. Where for example criminal courts in the Netherlands can summon everybody as a witness – including police officers – Europol officers in principle enjoy immunity that can only be lifted by the Europol director.

These examples show that the harmonisation of a specific element of criminal (procedural) law has contextual consequences. These will differ from state to state. A specific side effect in one state may be completely absent in another. It may therefore force states to introduce changes in other fields of the law as well, despite the fact that such a change was not intended by the drafters of the harmonising instrument.

Is criminal law more closely related to culture than other fields of law and thus less suitable for harmonisation? Very significant differences of opinion exist on questions such as whether abortion should be prohibited; the use of alcohol qualifies as a defence; the trier of the fact must be a professional judge or a lay jury (I may shortly refer to the US position concerning the absence of a jury under the Statute of the International Criminal Court); an appeal should be on facts or only on law. Does this differ according to whether we deal with substantive or procedural law? Some writers argue that substantive criminal law is more closely related to national culture. Others do the same for procedural criminal law. Neither of them have convinced me that such a distinction should be made. I regard both fields of law as linked to culture.

Harmonisation of law gives rise to certain expectations. One may expect that differences are virtually absent between various states. What constitutes a crime in one

country cannot remain an individual liberty in the other; that it will no longer be possible to see great differences in criminal policy; that one state will prosecute where another state will leave the matter unpunished. One may also expect that where mutual recognition of evidence was once difficult, no problem now arises in relation to the acceptance and use of foreign evidence.

What is the legal meaning of harmonisation for the individual? Could you argue in the field of substantive criminal law that you would expect that things (if harmonised) are more or less similar? And that this will influence the behaviour of individuals? If so, would the fact that discrepancies may, in practice, still exist give rise to any claims based on the nulla poena principle, or more precisely *lex certa* (Art. 7 ECHR)? One could also argue that this is merely a moot point in the absence of a legal definition of harmonisation. In the sense that as long as the rights and obligations vis-à-vis harmonisation have not been defined no claim deriving rights from harmonisation can be justified.

Could an individual invoke the supranational harmonised norm? If he could, does not that in practice lead to a higher degree of harmonised law? If not, what are the consequences of such action? If you do not accept such a claim, does this immediately raise the question as to the meaning/ necessity of harmonisation?

Does the principle of equality before the law require the incorporation of equal treatment of equal cases in indictment or in enforcement? If not, then the function of harmonisation is limited to state instructions and intergovernmental agreements that do not have consequences for the citizen.

Let me give one last example. Following an EU-Convention on fraud, the Netherlands has incorporated a new crime of EU fraud in its Penal Code. It requires that the fraud be committed to the detriment of the European Communities. This is an additional burden for the prosecution to prove in comparison to forgery, the provision previously used to combat EU-fraud. Article 323a Penal Code provides for a maximum penalty of 3 years. Article 225 Penal Code provides for a maximum penalty of 6 years and can be proven more easily by the prosecution. Does this entitle EU-fraudsters to an indictment on the new (and more favourable to the perpetrator!) charge because it is a *lex specialis*? As such this seems one of the major drawbacks of the method of harmonisation used.

Conclusions

Harmonisation is not limited to rules only. The enforcement of the law is an inherent aspect of harmonisation. Institutional issues have their influence on harmonisation in the sense that they facilitate a higher degree of harmonisation. As such, they are not a necessary requirement for harmonisation.

Criminal law is different from other fields of law to the extent that it deals with deprivation of liberty. It also seems different in the sense that it cannot really cope with harmonisation, but would rather opt for unification or ‘organised’ disharmony among different states, on the assumption that they each have a coherent and predictable national criminal justice system.

Ursula Nelles

Definitions of harmonisation

Let me first of all tell you the story of a researcher brooding about definitions of harmonisation while puzzling over how to comment on a paper which was to deal with the same topic. This problem and the topic itself – to speak the truth – made me sometimes wish that I had been hindered by some insurmountable scheduling difficulties which would prevent me from taking part in this colloquium. I tried to solve it by looking for an unusual way to approach the subject and started to read books about harmonisation in music and in architecture, about harmonisation of colours, about how to harmonise technical processes and even about bodily harmonisation in an esoteric sense.

I became rather curious about how my colleagues responsible for the papers would approach this topic. In fact they did it very well. It is my part now to give a comment on the very carefully composed papers of Tadić and Klip.

They both deal with the problem from different angles: Tadić takes a theoretical approach to the term 'harmonisation' as such and tries to develop a theory of harmonisation in criminal law. Klip deals with the institutional aspects of harmonisation by focusing on law enforcement and raising the question whether criminal law is different from other fields of law in respect of the theory of harmonisation.

How harmonious can harmonisation be? A theoretical approach towards harmonisation of criminal law

I would like to start my comment by referring to the main conclusions of Tadić. This is due to the fact that she tried to uncover the nature and meaning of the term 'harmonisation' by starting with language and by looking at its literal meaning as well as how it is used in different subjects' areas. Being a lawyer myself and thus assuming that language is the key to reflect and to understand what a certain term means in the context of law, I have approached the problem in the same way.

'Harmonisation' in language

Tadić starts from a definition given in a dictionary which reads:

> Harmonisation is a process in which diverse elements are combined or adapted to each other so as to form a coherent whole while retaining their individuality.

She states that harmonisation deriving from the term 'harmony' is used and understood as a term with positive connotations, such as making things run smoothly, easily and free from conflicts while leaving differences intact and individual preferences untouched. This perception of 'harmonisation' as a mechanism that enables one to combine the 'good stuff' while leaving out the 'bad stuff' is made possible by the very nature of the term which – according to her conclusions – is an open one that is not self-explanatory. Instead, the meaning of the term is defined by and in a particular context. This means that no definite abstract definition can be found for the term.

So far I totally agree with her. My research to establish the meaning of 'harmony' and 'harmonisation' in different disciplines also led me to the conclusion that the states which are 'harmonious' in, for instance, music, architecture, technical regulation and medicine are so different from each other that they can be interpreted only in a contextual way. It is the same with the process leading to these states, called 'harmonisation'.

As this result is not very satisfactory, I would prefer to use the method of inferring the term's meaning from its historical background.

The historical (linguistic and philosophical) perspective on 'Harmonisation'

The word 'harmony' is an ancient Greek term which means: 'adaptation, conjunction, combination of similar or opposite things to an ordered whole'.[1] The Greek term, however, was based on the Indo-Germanic prefix 'har' which meant 'approximation or temporal, logical or material coincidence of something'.[2]

Historically the term 'harmonia' formed part of a chain of terms which is 'harmonia – eurhythmia, ordo – concinnitas'. These terms had been in the centre of antique and Christian philosophy and cosmology.

harmonia

Whilst in Greek mythology Harmonia was the daughter of Ares, the God of wars, and Aphrodite, the Goddess of love and beauty,[3] the Pythagoreans used the union of 'Harmonia' and 'Cosmos' as a fundamental principle upon which to form an extensive philosophy.[4] In their view 'harmony' was an objective quality of all things. They thought that the Cosmos revealed itself as a comprehensive order which was based on numbers, by shaping everything in a measurable way. The Pythagoreans therefore

[1] Hüschen, Article 'Harmonie', in: *Die Musik in Geschichte und Gegenwart*, Bd. 5, 1956, 1588-1614 (1589); Hüschen, Der Harmoniebegriff im Mittelalter, in: *Studium Generale* 19/1966, 548-554 (548 f).
[2] Meyer, B., *APMONIA. Bedeutungsgeschichte des Wortes von Homer bis Aristoteles*. 1932, 7 et 57, Anm. 1.
[3] See Hüschen, (see note 1), with detailed reference to the literary sources.
[4] Burkert, *Weisheit und Wissenschaft. Studien zu Pythagoras, Philolaos und Platon.* 1962.

held harmony to be 'the regularity and order of single things as well as the regular arrangement of many things or parts.'[5]

Looking for such regularities they developed the principles of mathematics. They discovered for instance, that sounds and numbers are corresponding[6] and were thus even able to classify music as an expression of the metaphysical order.

The Greeks extended this philosophy and added the idea of harmony of the world-soul, which was depicted in the soul of every individual. This was the reason why they began to differentiate between the beauty of nature and the beauty of geometric figures.[7] Only those arts which were not only led by intuition but which also used numbers and measures were regarded as 'real' arts, because only they were able to build genuine works of art which represented the autonomous (internal) cosmic order.[8]

So far, so clear: Originally, harmony was meant as the combination of parts to an ordered whole in accordance with the autonomous order. Harmonisation then was the process of ordering things in accordance with the rules of this internal order.

eurhythmia

The problems – Tadić calls them plurivocality – with this term today result from a different philosophical school. The Peripatheticians implemented the term of 'Eurhythmia' (eurythmics) into the meaning of harmony and thus made beauty the centre of attention[9], therefore incorporating a subjective factor. Eurhythmia means the 'charming' look of a composition of parts. Figures and sounds were weighed up by the criterion of 'elegance'.[10] This school maintained its influence on the philosophical development and understanding of the term of 'harmony' up until the Middle Ages.

ordo

The original Pythagorean understanding, however, was not lost, but showed itself within the idea (and the term) of 'ordo'.[11] This idea was formed by Augustinus and had a decisive impact on medieval philosophers such as Bonaventura and St Thomas Aquinas. 'Ordo' is the acts of God that can be seen and experienced in the visible world. At the heart of this philosophy you find sentences like the following: 'Nothing is outside the divine order'[12] or: 'Nothing within the universe is disordered.'[13] This idea

5 Tatarkiewicz, Die Ästhetik der Antike (*Geschichte der Ästhetik* I) 1979, 106.
6 Swinging strings sound in musical intervals in accordance with numerical ratio. With the relation 1:2 one hears an Octave, the proportion 2:3 gives a Quinte, the proportion 3: 4 a Quarte and so on.
7 von Naredi-Rainer, *Architektur und Harmonie*, 1982, 14 ff with detailed reference to Aristoteles, Platon and further literary sources.
8 Tatarkiewicz (note 5), 150 ff
9 Tatarkiewicz (note 5), 381 ff
10 See Schlikker, *Hellenistische Vorstellungen von der Schönheit des Bauwerks nach Vitruv* (Diss. Münster) 1940, 72 ff
11 von Naredi-Rainer (note 7), 19 ff with detailed reference to Augustinus and further literary sources
12 Augustinus, De ordine II/7.24 (PL. 32, 1006).
13 Bonaventura, *Commentarii in quatuor libros sententiarum*, lib. II, dist. 6, art. 3, quaest. 1 (*S. Bonaventurae Opera omnia*, Quaracchi 1885, II, 167); Schaefer, A. OFM, Der Mensch in der Mitte der Schöpfung, in: S. Bonaventura 1274 – 1974, Bd. III: Philosophica Gottaferrata 1973, 337 – 392.

goes back to the Old Testament saying: 'You ordered everything by measure, number and weight.'[14] This quotation is again rooted in the Judaic and the Pythagorean traditions of wisdom,[15] and thus we come full circle from harmony to ordo.

concinnitas

During the 15th Century, harmony again focussed on beauty, which now was specifically named (as) 'concinnitas' – meaning the 'regular correspondence of all parts of something, whichever, so that one can neither add nor diminish nor change anything without making it less *pleasant*.'[16] In this meaning harmony is the beauty of regularity based on cosmic principles.

We have to draw a distinction between the two lines of development which the term of harmony, and thus of harmonisation, has undergone in philosophical history. Regarding harmonia and ordo on the one hand and eurhythmia and concinnitas on the other, it becomes clear that we have to return to the sense of harmony as 'ordo' when we deal with harmonisation in and of law.

Harmonisation in the context of law

Tadić states that in literal meaning and in music, harmony and harmonisation do not mean the same as in the specialised language of law. In her opinion these meanings even contradict each other and she identifies this as one of the main complicating factors. From this she concludes that the final objective of harmonisation in the legal domain is a state of uniformity and that this definition has nothing in common with harmony in its natural meaning. As a consequence, she states, in a somewhat resigned way, that we have to live with this term since it has become a customary one in legal literature – at least concerning European criminal law.

In my opinion, if one goes back to the roots of the term, harmonisation can be defined in a legal context, too, without coming into conflict with its literal meaning. If harmony is nothing but a state of order in accordance with the autonomous order, then harmonisation means *the process of bringing things in order in accordance with the peculiar autonomous order of law as such (or as a system) of which the product is an ordered arrangement of rules*.

This proposal differs from the customary definition adopted by Tadić insofar as it puts things in a positive way instead of stressing the negative side, which is the 'elimination of disparities'. In fact it is not the goal of harmonisation to eliminate *disparities* but to eliminate *frictions* which is quite a different matter, because frictions are symptoms and expressions of disorder within a system of laws.

[14] *Liber sapientiae* II, 21: 'Omnia in mesura et numero et pondere disposuisti.'
[15] von Naredi-Rainer (note 7), 20, note 68.
[16] Alberti VI/2 (1912, 293; 1966, 447): '...pulchritudo quidem certa cum ratione concinnitas universarum partium in ea, cuius sint, ita ut addi aut diminui aut immutari possit nihil quin improbabibel reddattur.'

As we do not (yet) have specific rules which could be regarded as part of a 'system' of European criminal law, I would like to expand my conclusion by finding out to which autonomous order law – as a system of laws – is bound. I take as an example any system of laws regulating traffic, because road conditions and road traffic legislation illustrate the problem clearly and neatly.

Law as conditional program; the code of 'do and do not'

Human beings are not pre-programmed to deal with markets, traffic, taxation or to act within a vast system of solidarity. Thus law can be regarded as an attempt to progress our inherited program (instincts) and our learned behaviour by using a relatively new kind of program, via rules which have been established.[17] The content of law is free in a political sense, but the instructions of law-making are universal. One of these stems from the simple proposition that rules must be able to regulate people's conduct; laws have to respond to the structure of 'if ... then…'.[18] This means that the law has to provide that a certain (abstractly) described behaviour will have certain repercussions on the addressee of the rule. I call this the 'conditional program'. This program is not satisfied when you set two rules addressing the same person and tying different consequences to the same behaviour.

In order to make clear what I mean I take the example of a traffic-light[19]. The first rule is: If the light shows red then stop. The second rule is: If the light shows green then you may go. Now, please, imagine for a moment that a legislator would weigh on a very abstract level the right of freedom of movement versus the obligation to consider others and then would stipulate that future traffic-lights should show 'red' and 'green' lights simultaneously! It is obvious that the enforcement of such a rule counteracts traffic-lights in general. They would no longer be able to rule anything. As they are double-binding they form what I like to call, a 'trap of rules'.

Thus, consistency is one of the fundamental autonomous principles of laws addressing the same (group of) people. A harmonious law system in accordance with my definition of harmony as a state of order is characterised by consistency. To put it the other way round – and negatively speaking in terms of Tadić – any inconsistency has to be avoided and if a mistake has been made, it has to be eliminated at once. It is, thus, not disparity which is to be eliminated but inconsistency, meaning ambiguous orders from the perspective of the addressees of law, or *frictions*.

To turn this into positive terms, I define the first quality of a 'harmonious' law to be *a system of consistent conditional programs*.

[17] Helsper, H., *Die Vorschriften der Evolution für das Recht*, 1989, 2
[18] Helsper, H. (note 17), 71 ff
[19] Road traffic is regarded to be the only well researched system of self-regulating process which has been induced by law; see Helsper, (note 17), 60 f.

The hierarchy of rules

A second important characteristic of law-making is the building of a system of laws in the shape of a pyramid. Even within a single system of laws of any of the member States of the European Union one will not find any two rules that are similar to each other. On the contrary, there are thousands if not millions of different rules and the 'art' of legislation or jurisdiction is nothing else but to form a consistent system of these rules free from friction.

The secret as to how to manage this problem is called hierarchy. Every rule has to go back to a certain principle. To put it the other way round: every legal norm – be it a formal rule or a verdict – has to put the principle in a more concrete form.[20] Once a legal norm or a verdict counteracts the ruling principle the result will be inconsistency.

I will try to illustrate this with traffic again as an example. You all know that on the continent we drive on the right and that people in the UK drive on the left. It is obvious that these different methods of organising road traffic demand different rules. The instructions for building cars, for example, are different not only because of a sense of individuality but because they are adapted to enable drivers to meet the demands of different types of traffic. Thus, if a legislator took one single rule out of the traffic road laws of a country where the guiding principle was to drive on the left and implemented it into the system of laws where the principle was to drive on the right, he would risk creating a system which contained conflicting rules. This means that one cannot take single legal norms from one legal system and implement them into a different one without creating friction which constitute a disharmonious law.

Therefore I complete my definition of a harmonious law by the second quality of being *a system of consistent conditional programs going back to hierarchical ordered principles*.

Harmony of laws within a legal system

Different legal systems as such do not raise any problems as long as they are kept strictly apart from each other, perhaps geographically – as demonstrated by example of different traffic systems – or by subject matter.

In relation to the latter, I want to give an example from German law that can be regarded as as good as the system of laws in any other country. In Germany the civil process is arranged as a party-controlled procedure ruled by the principle of disposition, whereas the criminal process is ruled by the principles of inquisition and official instruction. However, this difference causes no friction as long as there is no contact or overlapping between a civil and a criminal procedure. Problems – which are frictions – are only observed, where a civil and a criminal procedure deal with *the same objective*. The objective of a procedure is defined (among other things) by one identi-

[20] Helsper, (note 17), 83 ff, 94

cal *person* (party or defendant). In order to illustrate this I would like to describe a case which was brought to the German Federal Court of Constitution. An employer went bankrupt. In accordance with civil procedural law he was compelled with the threat of coercive detention to swear an oath of disclosure. Thus, he had to even disclose crimes he had committed in order to make financial gain at the expense of his firm and his creditors. The records were sent to the public prosecution office. The employer was then accused and convicted of (among other crimes) bankruptcy – the crime to which he had to confess under the civil procedure. The criminal court founded the conviction on the transcript of this 'confession', using it as evidence. The employer brought this case to the Federal Court of Constitution which held that it was legal both to force a person to disclose his crimes in the civil procedure and in general to use these documents as evidence in criminal trials. However, the Federal Court also held that it was illegitimate to use the record of the confession as evidence against the accused himself, because the two procedural laws followed different principles: the rules for the oath of disclosure are aimed at transparency in favour of the creditors whilst a fair criminal procedure obeys (among other things) the principle of 'nemo tenetur'.[21]

What we learn from this case is that friction, which I call 'traps in law', only arises when conflicting rules address the same person(s). In that situation the perspective from which one must determine 'whether and how diversity is problematic' – which in accordance with the thesis of Tadić is the first step to analyse if there is a need for harmonisation – is the perspective of the individual who is subject to the relevant laws.

I would like to complete my definition again: *Harmonious law is a system of consistent conditional programs going back to hierarchical ordered principles and addressing the same people.*

'Harmonisation'; the addressee of laws as 'tertium comparationis'

Following the autonomous order of law, the people – or to simplify, the single person – subject to a system of laws is the 'tertium comparationis' within a system of laws. From this perspective one can both detect friction and name the diverse elements which have to be harmonised. The addressee of rules, is in my opinion, also the starting point when principles are developed according to which consistency of laws is to be established.

Thus, my definition of 'harmonisation' in legal context is as follows:

> *Harmonisation is the process of establishing a system of consistent conditional programs going back to hierarchical ordered principles and addressing the same people.*

[21] BVerfGE 56, 37; for an indepth discussion, see Dingeldey, Der Schutz der strafprozessualen Aussagefreiheit durch Verwertungsverbote bei außerstrafrechtlichen Aussage- und Mitwirkungspflichten, in: *NStZ* 1984, 529 ff.

'Harmonisation' as a method?

Starting from my perception of harmonisation as a process, I came to the same conclusion as Tadić insofar as this term cannot give us any information about the techniques by which consistency of laws addressed to the same people can be accomplished. I totally agree with Tadić that 'harmonisation' is not a legal method. Based on this conclusion Tadić proposes guidelines for the precise analysis of problems, the precise definitions of goals and an adequate choice of means. In my opinion and starting from my definition of harmonisation, one can only characterise the analysis as detecting 'traps in the law' from the perspective of the people who are subject to different rules. Likewise one can only regard the goal of harmonisation as a state of order of laws, which I have defined as 'consistency'.

The methods by which consistency of laws is to be accomplished are usually fixed within a particular system of laws by rules concerning law-making. Rules can be settled by legislative initiatives, by amendments, by judgments of the common law or even by setting precedents in practice.

This is the problem at the European level: As long as criminal law is not within the limits of power of the European Community (Art. 5 ECT) but is an area of common action among the member States in accordance with Title VI (Art. 29 ff) of the EUT (third pillar), there is neither a legislator nor a basis for common law. What we face is a chaotic process on several levels and in all directions. There are developments which influence the practice of criminal procedure in Europe from the bottom-up.[22] But there are also initiatives to influence the development from the top-down by using framework decisions or even by misusing directives[23] in order to establish certain politics in the field of criminal law.

Preliminary results (scholastics versus politics)

To sum up: My first result is that the term 'harmonisation' can be defined in the context of law but this can be done only on a very formal and abstract level.

What we are thinking of when we are discussing 'harmonisation in criminal law in Europe', is in fact a political problem. It should be referred to and discussed as a political problem. In my opinion it is inadequate to approach political problems by starting with an abstract definition of 'harmonisation'. To do so means utilising scholastic methods which were appropriate to a hermetic (medieval) view of the universe, which assumed that everything could be derived from a god-given and self contained concept of terms.

First of all, it is already a political strategy to use the term 'harmonisation' in the

[22] Police cooperation is an example of this process; see Nelles, Europäisierung des Strafverfahrens – Strafprozeßrecht für Europa?, *ZStW* 1997, 727 ff; Gleß/Nelles, *Grenzenlose Strafverfolgung, Neue Kriminalpolitik* 2000, 22 ff.

[23] The 'Proposal for a Directive of the European Parliament and of the Council on the criminal law protection of the Community's financial interests' (Doc. 501PC0272) is an example of such an initiative.

context of criminal law in Europe. This strategy consists of making use of the multi-interpretable character of the term, which insinuates that there really is a problem called 'disharmony', particularly in criminal law, and that it can be isolated.

In my opinion there are several problems at different levels of law-making and also of law enforcement in Europe. Klip dealt with these aspects and I will discuss this later. These general problems are rooted in the fact that the supranational system of laws as such is not (yet) a consistent one. The process of approximation, assimilation and convergence is happening at differing speeds within the different fields of politics, including the institutions and methods of legislation in Europe. Whilst we have reached a rather unified state in the field of economics with quite clearly defined institutions and competence, the field of 'police and judicial co-operation in criminal matters' is characterised by more or less uncoordinated measures both at the European level and at the level of so called interstate 'cooperation'. In my opinion the terms 'approximation, assimilation and convergence' are also terms which do not term (legal) methods of 'harmonisation'. Instead they describe a process and a state of similarity (e. g. of structures of social life, culture, economic conditions as well as law) from an external point of view, which is in fact a political view.

The problems in general are interrelated with the fact that in criminal law we can watch a proliferation of cooperation between and among member States, particularly involving their respective police and prosecution offices, as well as on the vertical level between European institutions such as OLAF and Europol and member States offices.

Is criminal law different from other fields of law?

This leads me to the paper of André Klip, who raises the question as to whether there is something unique about criminal law.

He begins with the point that, unlike all other fields of law, criminal law deals with deprivation of liberty. Because of this, he states that criminal law does not leave a lot of discretion either in its rules or in its practical application. This brings him to the result that criminal law would rather opt either for unification or for 'disharmony'.

In short, I agree with this result with the caveat that his understanding of 'disharmony' is different from mine and – for the time being – with the reservation that this is only completely true as far as substantive criminal law is concerned. Perhaps some modifications need to be made in the field of criminal procedural law.

Substantive criminal law

Focusing on substantial criminal law, Klip states that the character of criminal law as a closed system allows neither individuals nor parties to a criminal trial to develop their own law. According to him, this makes it difficult if not impossible to only harmonise a few aspects of criminal law and not the whole system. I am not exactly sure about this, because we all know from our own criminal legal system that it is

possible to amend elements of criminal laws and to integrate them 'harmoniously' – in my terms, consistently and without friction – into the rest of it.

I want to point out an additional aspect. Criminal law as such is particularly interrelated with most of the laws forming part of a system of law. This is due to the fact that single provisions of substantive criminal law interrelate with regulations which have determined an earlier case. I call these fields of law 'primary laws'. In order to illustrate this, take (the crime of) embezzlement as an example. Questions of civil, commercial, financial and company law arise where a person has been given special authority to deal with the property of a commercial company and if he/ she has offended against his/ her duties while carrying out a transaction and has caused damage while acting for the company. This list can be continued endlessly. Think of family law and the offence of child abduction or offending against the obligation to pay maintenance, think of traffic road acts in relation to traffic offences, of medical law in relation to bodily battery by physicians and so on. These primary rules, which have to be respected when applying criminal law, are of course those which have specifically ruled the particular case. For example, a German criminal court would have to judge a case of embezzlement considering Dutch company law, if the defendant was a German who had acted as managing director of a Dutch company. In addition, the court would even have to consider English law if the particular transaction had been carried out in accordance with English commercial law.

Thus the problem of 'harmonising' criminal law cannot be isolated. From the angle of criminal law the option is indeed either total unification or 'disharmony'. Therefore, if we are talking about harmonisation in criminal law we are in fact referring to the creation of a system of law in Europe which is regarded as consistent. Yet we are (still) far away from this!

Let me briefly go back to my reservation in relation to the term 'disharmony'. As long as substantive criminal law is regarded as falling within the sovereignty of the Member States, we cannot really speak of 'disharmony' in terms of my definition of 'harmony' and 'harmonisation' of laws. The reason for this is that, from the perspective of the addressee, it is still one system of criminal law – the criminal law of one Member State – which is ruling the case. As far as this system is consistent, we do not really have a state of 'disharmony'. We just have to face the fact that the borders of the one territory form the borders of the criminal law in force. Thus I agree with Klip that, from the perspective of the citizen, criminal law can in fact cope with different systems.

Criminal procedural law/Institutional aspects

I now move to my second reservation; that perhaps some modifications are to be made in the field of criminal procedural law. Klip states that there must be some standards of law enforcement, because law is more than just rules or 'black letter law'. This leads him to the question as to whether one can harmonise law without institutional harmonising, but he does not explicitly ask this question in reverse – can we harmonise (institutions and) prosecution without harmonising law? It seems to me

that his thesis (criminal law would rather opt either for unification or for disharmony but not for harmonisation) concerns substantive criminal law as well as procedural criminal law. One could argue that within one legal system the entire procedural law has to be strictly related to the substantive law in order to ensure consistency. I would agree with this, unless there was not a practice of prosecution which has to be observed on the European level which may cause friction from the perspective of the citizens.[24]

It is a political question, and not a question of 'harmony' or 'disharmony', if we feel the need to have supranational criminal law. In my view those who demand harmonisation of criminal law in Europe really do this with the clandestine or even deliberate intention of tightening the control of citizens of the European Union. The pattern which is to be found in this context is 'fight': the fight against fraud, the fight against terrorism, the fight against corruption, the fight against drug abuse, the fight against trafficking, the fight against pornography and so on. Nobody likes or approves of these crimes, but everybody knows that the different member States already have more or less appropriate and rather similar criminal laws, due to international conventions and to the fact that the Member States have implemented corresponding rules into their criminal law. The term 'fight' against crime, however, derives from military language and is also common in police language. In fact the gist of the idea of Europeanization in criminal law has been the cooperation of the police from the very beginning (I need only mention Schengen). This formal and informal cooperation at a very individual and personal level leads to the danger of friction.

I will briefly demonstrate this. Every criminal procedural law in every Member State follows the principle of fairness and therefore includes provisions which balance out the special authorities of police, prosecution office and court on the one hand and the rights of the individual – the defendant – on the other.[25] From the perspective of a police or prosecution officer, individual rights sometimes amount to annoying restrictions on their work. From the perspective of the defendant, however, individual rights are essential just because of their function of restricting infringements of individual freedom. This balance is attained in the different procedural laws by various legal means.[26] These different approaches to balancing the rights in question open loopholes for the police when they cooperate. They do not have to, but can 'harmonise' their strategies, their information, their records, their evidence and even their legal authorities. The working mechanism is the rule which is adopted from economic law of the first pillar: mutual recognition of goods, here meaning mutual recognition of evidence. Thus influence from the supranational level has become a confusing element not for the police but for the balance of rights as such.

[24] See note 22.
[25] O'Keeffe, *Yearbook of European Law* 1991, 185, 203.
[26] Van den Wijngaert, *Criminal Procedure Systems in the European Community*, 1993.

This goes along with a lack of transparency which hinders the individual from having recourse to legal action.[27] This situation is not consistent with the principles of a fair criminal procedure. Particularly from the perspective of the individual – which in accordance with my definition of harmony of the law is the decisive perspective – we need 'harmonisation' in this field. Since harmony means consistency and since we are in fact unable to eliminate friction by returning to a strictly nationalbound criminal procedural law, we have to implement effective judicial control at the supranational level.

[27] Fijnaut, European Journal of Crime, Criminal Law and Criminal Justice 1993, 37, ff; Gleß/Nelles (note 22), Renault, *Dossiers du Journal des tribunaux* 6 (1995), 123 ff; Walker, in: *European Journal of Criminal Policy and Research* 1993, 34, 37.

John R. Spencer

Why is the harmonisation of penal law necessary?

In this paper I shall take 'harmonisation' as covering three distinct but related processes; first, making the rules of criminal law and criminal procedure in different countries similar, although not necessarily identical; secondly, making some of the rules across the different countries identical; and thirdly, replacing a portion of the different national rules by a single supra-national rule, enforced by a supra-national authority.

The question here to be examined is 'What is the point of doing any of these things?'

In addressing this question, it must be recognised that in seeking to harmonise penal law different people have different goals – and also that different reasons exist for harmonising different parts. Furthermore, the reasons for wishing to harmonise penal law include some that are ideological and some that are strictly practical. Both, I think, can be traced in the Preamble to the Treaty on European Union, which mentions the desire to 'deepen the solidarity' between the peoples of Europe, and the need, while facilitating the free movement of persons within Europe, 'to ensure the safety and security of their peoples, by establishing an area of freedom, security and justice'.

Ideological reasons

Among the possible ideological reasons for harmonisation is the symbolic one. This is the desire to have a new and unified law as the symbol of a new and unified Statehood. Historically this (as well as obvious practical considerations) was one of the factors that lay behind the national codifications of the nineteenth century. And it may be that, for some people, it is also a factor in the desire to harmonise criminal procedure and evidence in Europe now. 'After the Euro, next the unified criminal justice system.' This thought was certainly not in the minds of the team that drafted the Corpus Juris project – as, being one of them, I know. For us, it was intended simply as a practical response to fraud on the Community finances. But some critics of the Corpus Juris project have accused us of having a wider federalist agenda in mind (and it is possible that this is indeed in the minds of some of those who support it). However, this kind of ideological motive can hardly lie behind the move towards the more limited forms of harmonisation. No one in their right minds, I imagine, would see this motive as justifying a harmonising measure like (say) ensuring all the crimi-

nal justice systems in the EU were able to receive as evidence testimony by live video link from witnesses who live abroad, or common penalties for fraud!

A different ideological reason in the desire to impose a particular set of rules on everyone is the train of thought that goes as follows: 'This set of rules is the best. So you must have it, because it will be good for you. And what is good for you is something we decide.' Historically, this (as well as obvious practical considerations) was one of the reasons why France imposed the Napoleonic codifications when it conquered most of Europe during the Napoleonic wars. More recently, it was part of the reason why colonial powers commonly introduced, for use in their empires, codes based on or even identical to the ones they had at home. Arrogant as the various colonisers may have been, to some extent at least they seem to have been right. When the French occupation of western Europe ended with the fall of Napoleon, the countries that were keen to see his soldiers go were content to keep his *Code d'instruction criminelle*, at least initially. Once again, however, this particular brand of ideological thinking seems to have little relevance to the question of harmonising penal law in Europe now.

However, there is a third form of ideological reason behind harmonising penal law which is highly relevant to what is happening in Europe today. This is the line of argument that goes 'In a democracy, where the rights of individuals are recognised, there are certain basic rules that penal law must respect and certain unacceptable rules and features that it must avoid. For each country to keep its own separate criminal justice system, formed according to its national traditions, is right and proper. But if these systems do not conform to these minimum standards they must be modified so that they do.'

This, of course, is the thinking behind the European Convention on Human Rights. It was not intended, obviously, as an instrument of harmonisation. But some degree of harmonisation has resulted from it. If the criminal procedure of one State permits something to happen which in most other countries is not permitted to happen, and that State suffers a condemnation, it will probably amend its criminal procedure code, which will then resemble more closely that of other countries. More subtly, some reforms in penal law are designed to ward off the perceived risk of condemnations in advance – and others are motivated by a positive desire to embrace the values of the Convention.

Among the harmonising changes that the European Convention has wrought in the criminal procedure of the contracting States, the following are the most important.

First, it has led to more rigorous regulation of invasive forms of evidence-gathering, particularly telephone-tapping. The United Kingdom was condemned in the *Malone* case[1] because the absence of any proper controls on telephone-tapping by the authorities was incompatible with the right to privacy as protected by Article 8 of the Convention, in consequence of which it was obliged to pass the Interception of Communications Act 1985. The same thing happened in France soon afterwards[2] –

1 Malone v UK (1984) 7 *EHRR* 14.
2 Huvig and Kruslin v France (1990) 12 *EHRR* 528, 547.

and these decisions eventually led to legislation in Belgium too. Further concern about the implications of Article 8 later led to legislation in the United Kingdom designed to provide a legal basis for certain other types of invasive evidence gathering, notably the planting of hidden microphones.[3]

Secondly, it has given the defence greater rights to participate in the conduct of the pre-trial phase of criminal procedure, particularly in countries where the pre-trial phase is in the hands of a *juge d'instruction* acting inquisitorially. Certain Strasbourg decisions have held that the guarantees contained in Article 6, though mainly relevant to the trial phase, are potentially applicable to the pre-trial phase as well.[4] In consequence, France and Belgium have given the defence greater rights to be informed, during the course of the *instruction*, about the nature of the materials that have found their way into the dossier, plus greater rights to influence the authorities in the search for further evidence. In English law, the pre-trial phase has traditionally been seen as an adversarial affair where neither side is expected to do anything to help the other – but in recent years there has been a shift of attitude. English case law and legislation now requires the prosecution to help the defence by sharing information with them, even requires the authorities to conduct the search for evidence, as the French would say, *à charge et à décharge*[5]. These particular changes are not the direct result of condemnations from the court at Strasbourg, but awareness of the Convention and its case-law certainly helped to make them happen.

Thirdly, the Convention has had to a greater degree of orality at trial in those countries where, as in the Netherlands, trial proceedings have traditionally made heavy use of written evidence. Under Article 6(3) of the Convention, one of the defendant's minimum rights is 'to examine or have examined witnesses against him.' The Strasbourg Court has interpreted this to mean that the defendant is in principle entitled to put questions to the prosecution witnesses at some stage in the proceedings. Thus unless the defence were able to question the prosecution witnesses during the pre-trial phase, it is necessary for them to attend the trial so that it can be done there. This has increased the amount of oral evidence that is heard in countries where, following the French tradition, the courts were previously able to treat as evidence the written Statements of witnesses contained in the dossier, and so avoiding the need for them to testify orally at trial. *Verhoor getuigen AH-overval doet rechtbank zelf* proclaimed a headline in the *NRC Handelsblad* on 8 September 1993 – so reporting a fact sufficiently unusual to be newsworthy in Holland, namely that a trial court proposed to examine the key witnesses to a robbery itself, instead of making do with the written depositions they had earlier made.

[3] Police Act 1997 Part III; *Regulation of Investigatory Powers Act* 2000.

[4] S v Switzerland (1991) 14 *EHRR* 670, holding that article 6(3) had been infringed when during the pre-trial phase the police continually intercepted a defendant's communications with his lawyer; c.f. Murray v UK (1996) 22 *EHRR* 29; see Van Den Wyngaert, C., *Strafrecht en strafprocesrecht in hoofdlijnen* (1998) 639 et seq.

[5] 'In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect.' *Disclosure: Criminal Procedure and Investigations Act 1996: Code of Practice under Part II*, §3.4.

The Convention has also had an impact on sentencing and the execution of sentences. In the United Kingdom, the Strasbourg case-law has led to the abandonment of various forms of indeterminate detention which amount, in effect, to the court sentencing an offender to be locked up until the Government decides to release him. The Strasbourg case-law is based on Article 5(4), which provides that 'everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.' Where an offender has been sentenced to be detained indefinitely because he is dangerous, the Strasbourg Court has said that Article 5(4) entitles him to have the question of whether he is still dangerous reviewed at intervals, and that this must be done by a court, not a member of the Executive. In the light of this the United Kingdom has had to amend the law on the detention of mentally disordered offenders,[6] discretionary life sentences[7] and the detention of juvenile murders 'during Her Majesty's pleasure'.[8] However, where the basis for imposing indeterminate detention is solely to punish, this line of argument does not apply. So in England it is still the Home Secretary who decides when (if ever) to release those who have received mandatory life sentences for murder.[9]

More generally, a further effect of the ECHR and the Strasbourg case-law has been to produce a greater separation within criminal procedure of the functions of investigating and judging. The impact has been particularly important in the countries of the inquisitorial tradition, where in principle the courts have an active duty to investigate the facts, and where – at least in some of them – public prosecutors and judges are two branches of a common profession. Thus the Strasbourg court has condemned the practice of allowing the public prosecutor to take part in the deliberations of the appellate court[10] – which it found inconsistent with the basic ingredients of 'fair trial' as prescribed by Article 6 (1). Similarly, it has declared it to be improper for a person who at some point acted in the case as public prosecutor to sit as a judge when the case comes to court[11], and also for the judge who investigated the case as *juge d'instruction* to be a member of the trial court.[12]

Finally, the Convention has had at least some impact on the speed with which the legal systems of the contracting States try to process criminal cases through the courts.

Article 6 (1) of the Convention gives the defendant the right to have his case heard 'within a reasonable time'. On this the Strasbourg case law establishes some general principles. It provides, in effect, that whether a case has been heard 'within a reasonable time' involves consideration of three factors: first, how complicated the facts are; secondly, whether the defendant has been co-operative or deliberately obstructive,

6 X v UK (1981) 4 *EHRR* 88.
7 Thynne, Wilson and Gunnell v UK (1990) 13 *EHRR* 666.
8 Hussain v UK (1996) 22 *EHRR* 1; T and V v UK. (2000) 30 *EHRR* 121.
9 Wynne v UK (1994) 19 *EHRR* 333.
10 Borgers v Belgium (1991) 15 *EHRR* 92.
11 Piersack v Belgium (1982) 5 *EHRR* 169
12 De Cubber v Belgium (1984) 7 *EHRR* 236.

and thirdly, whether the authorities have handled the case efficiently.[13] The Strasbourg court, however, has not sought to lay down, in terms of months or years, the maximum period that it is reasonable for any properly-regulated legal system to take in processing a given type of case. As Jean Pradel and Geert Corstens put it, the case-law 'demonstrates great firmness in stating principles but great flexibility in applying them.'[14] However, if the Convention and the Strasbourg case-law have not solved this problem overnight, they have certainly made the contracting States more conscious of the problem of delay, and stimulated its legislators to find ways to overcome it.

In England, a delicate point is that, according to the Strasbourg case-law, one ingredient in the contents of 'fair trial' under Article 6 is that the courts should give reasons for their decisions.[15] This has already led to a change in practice in the magistrates' courts, where JPs now routinely give reasons when they decide a case – and at the time of writing, there is serious debate about whether it will be necessary to do something about the 'inscrutable verdict' that is returned by a jury at a Crown Court trial.[16]

Pragmatic reasons

The other reasons for wanting to harmonise penal law are practical and pragmatic ones. They all relate to the difficulties that arise where people plan crimes in one country and execute them in another, or commit them in one country and then run away to another. Underlying the various practical and pragmatic reasons for harmonisation there is this thought: 'Irrespective of whether rule X is better than rule Y, a uniform rule is needed.'

To some extent, the drive for this sort of 'pragmatic harmonisation' is the desire of a group of States to combat crime committed primarily against its own national legal system and within its own national borders. Harmonisation may be sought in order to make it easier to extradite persons from the countries where they have fled after committing crimes, or to make it easier for the countries whither they have fled to prosecute them as an alternative to extraditing them. In this spirit, the law of England was changed in the nineteenth century to make it possible for English courts to punish a conspiracy to commit a murder, even where the intended murder would take place abroad, and even where the intended victim was a foreign national.[17] More recently,

[13] J.Pradel and G.Corstens, *Droit pénal européen* (Paris 1999) p.386

[14] Pradel and Corstens, 387.

[15] Hadjianastassiou v Greece (1993) 16 *EHRR* 219; Van de Hurk v the Netherlands, (1994) 18 *EHRR* 481, §61; Ruiz Torija v Spain (1994) 19 *EHRR* 553; Hiro Balani v Spain, (1994) 19 *EHRR* 566; Georgiadis v Greece (1997) 24 *EHRR* 606, §42; Helle v Finland (1998) 26 *EHRR* 159; Higgins v France (1999) 27 *EHRR* 703; Garcia Ruiz v Spain, 21 January 1999; Quadrelli v Italy, 11.1. 2000.

[16] Spencer, 'Inscrutible verdicts, the duty to give reasons and article 6 of the ECHR' [2001] *Archbold News* 5. See also the 'Auld Review' (Review of the Criminal Courts of England and Wales, Report by the Rt. Hon. Lord Justice Auld, London, October 2001) ch. 11.

[17] Offences Against the Person Act 1861 s. 4. The provision was enacted in response to the attempt by Orsini to assassinate Napoleon III in 1858 – an attempt that had been planned in England. So unpopular was the idea of cooperation on criminal justice matters that the Government's first attempt to persuade Parliament to pass this law was defeated, with the result that the Government was forced to resign!

English law was changed to make it punishable in England to conspire in England to perform any act abroad which would constitute an offence against the law of the foreign country, and also be a criminal offence if it were committed in England.[18]

In recent years, however, there has been a shift of emphasis away from concern about the need for States to help their neighbours fighting their own national crime and towards the need for States to cooperate in countering forms of behaviour that are perceived to be a common threat to all, and which can only be effectively countered by joint effort. This movement has gained momentum rapidly as travel and communications have become easier, and as the march of science has made it comparatively easy for small numbers of people to do a huge amount of damage.

In her collection of documents on international criminal law,[19] Professor Van den Wyngaert groups the main international instruments in this area according to subject matter. Many attempt to deal with terrorism in its various forms, including hi-jacking, hostage-taking, bombing and endangering marine safety. Others cover threats to the environment: for example, the 1980 Convention on the Physical Protection of Nuclear Material. A further important group of instruments are concerned with the trade in illegal drugs. Another group – rapidly expanding – are concerned with various forms of economic crime, such as fraud, corruption and insider dealing. But this is not all, because in her new edition, large as it is, considerations of space required Professor Van den Wyngaert to leave out instruments on 'aggression, counterfeiting, slavery, trade in human beings, obscene publications and theft of archaeological treasures'.

When we look at these international instruments, a number of broad points emerge.

First, the range and scope of international instruments designed to create new offences is now enormous. As Professor Van den Wyngaert says in the preface to her book, 'it has become difficult to find one's way in the labyrinth of international criminal law treaties.'

Secondly, their birth-rate is exceptionally high in Europe. This is partly because of the wide range of European instruments now possible: EC Directives, Third Pillar instruments of different types, including Framework Decisions, Joint Actions and Conventions, and outside the EU, Conventions prepared in Strasbourg under the aegis of the Council of Europe. And it is also, of course, a consequence of the economic integration in Europe and the pursuit of common economic policy. Thus, for example, the so-called 'PIF Convention',[20] aims to require the contracting States to create criminal offences punishing the fraudulent evasion of taxes from which the revenue of the EC depends, and the fraudulent obtaining of benefits from it.

Thirdly, these instruments increasingly aim to spread the net of criminal liability by making punishable not only the unwanted behaviour, but also acts of preparation for it, and acts done in order to enjoy the proceeds. Thus, for example, the 1998 EU Joint

[18] Criminal Justice (Terrorism and Conspiracy) Act 1998 s.5.
[19] International Criminal Law, a collection of International and European Instruments (Kluwer 2000).
[20] Convention on the Protection of the European Communities' Financial Interests (1995), *OJ* No C316, 27.11.1995, p.48.

Action aimed at organised crime requires Member States to criminalise (inter alia) conspiring with another person 'that an activity should be pursued' which involves offences are punishable with four years' imprisonment or more, or which involves improperly influencing the operation of public authorities.[21] Similarly, the 2000 UN Convention against terrorism requires the contracting States to criminalise those who provide or collect funds 'with the intention that they should be used or in the knowledge that they are to be used, in full or in part' to finance terrorism[22], and the recent EU Council Framework Decision on combating terrorism aims to criminalise the 'promoting of, supporting of or participating in a terrorist group.'[23] Moving to the aftermath of the unwanted behaviour rather than its preparation, money-laundering has been the subject of both an EC Directive (1991)[24] and Council of Europe Convention.[25] (1990). These require a range of criminal offences to be created aimed at those who knowingly handle the proceeds of other people's crimes.

Fourthly, these instruments increasingly require the contracting States (or Member States), when criminalising the behaviour in question, to adopt extra-territorial jurisdiction. This is particularly so with the more recent EU instruments. As a minimum, they usually require a State to assume jurisdiction over offences committed 'in whole or in part within its territory' and where 'the offender is one of its nationals.' For good measure, they often require jurisdiction to be assumed in other circumstances as well. Thus the 1997 EU anti-corruption convention[26] also requires States to try the offences prescribed by the Convention wherever the victim was one of a range of specified persons or bodies, and wherever the offender was one of a range of specified officials, and the 1998 Joint Action on Corruption in the Private Sector[27] requires Member States to assume jurisdiction where the offence was committed 'for the benefit of a legal person operating in the private sector that has its head office in the territory of that Member State.'

Fifthly, these instruments are increasingly prescriptive in the requirements that they make of the criminal justice systems of the contracting (or Member) States. A number of the modern European instruments go beyond telling States to render certain forms of unwanted behaviour punishable, but also try to tell them in some detail how. Thus the 1995 PIF Convention requires Member States to see that frauds on the Community budget 'are punishable by effective, proportionate and dissuasive criminal penalties, including, at least in cases of serious fraud, penalties involving deprivation of liberty.' A number of instruments require Member States to ensure that legal as well as natural persons can be punished if they commit the offences that the instrument in question requires them to create.

[21] Joint Action on making it a Criminal Offence to Participate in a Criminal Organization in the Members States of the EU, *OJ* No L 351, 29.12 1998, p.1.
[22] International Convention for the Suppression of the Financing of Terrorism (Van den Wyngaert, 543).
[23] COM (2001) 521 final, Brussels, 19.9.2001.
[24] EC Directive No 91/308 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering (1991), *OJ* No L 166, 28.06.1991, p. 77 (Van den Wyngaert, 649).
[25] Van den Wyngaert, p.635.
[26] Convention on the Fight against Corruption involving Ofdficials of the European Communities or Officials of Member States of the EU, *OJ* No C 195, 25.06.1997, p. 2 (Van den Wyngaert 677).
[27] *OJ* L 358, 31/12.1998, p.2.

In this context, a number of the recent European instruments that require the creation of new criminal offences also attempt to ensure that the Member States apply certain rules of evidence when the new offences come to court. Thus the 1995 PIF Convention aims to make certain types of fraudulent behaviour punishable when done intentionally, and Article 1(4) provides that 'The intentional nature of an act or omission... may be inferred from objective, factual circumstances.' A similar provision is to be found in Article 1 of the 1991 EC Directive on money-laundering. Further examples are to be found in certain Council Regulations, which attempt to ensure that official reports made by Community authorities are treated as admissible evidence in the legal systems of the Member States. These are paragraph 8 (3) of Regulation No 2185/96 (on the spot checks) and paragraph 9 (2) of Regulation 1073/99 (OLAF). These provisions require reports made under the Regulations to be given the same effect in judicial proceedings in Member States as reports drawn up by national inspectors.

(In connection with harmonising the rules about admissible evidence, an important general provision is now contained in the recent EU convention on mutual legal assistance[28]. Article 11 requires a Member States, where another Member State requests, to arrange for a witness or expert who is present in the requested State to give evidence in a criminal case in the requesting State by means of video conferencing.)

Is there really any justification for the harmonisation that these measures aim to produce?

If the behaviour aimed at needs to be prevented, if criminal sanctions are needed to do this, and if the measures the instruments require go no further than is necessary to achieve this aim, I believe the answer to this question must be 'Yes'.

To me it seems clear that the behaviours that the current group of international instruments aim to repress do fully justify the use of criminal proceedings, and that the harmonising measures proposed in the instruments represent the minimum that is necessary in order to make criminal proceedings effective.

In saying this, I am aware that for some people, fraud on the Community budget might appear as an exception. For those who are opposed to the EU, or oppose Community policies on tax and subsidies, the obvious solution is to reverse the policies, or to abolish the EU. But for those who accept the EU and its policies, the case for a harmonised approach to frauds on the Community budget must surely be unanswerable.

The subject of fraud on the Community budget leads to the Corpus Juris project.[29]

As previously mentioned, this is not a proposal to harmonise the laws of the different Member States, in the sense of requiring each State to adopt a similar rule. It is a proposal to superimpose on the national penal laws of the Member States a new and single body of European rules, which would operate alongside the national ones. To remind us, the Corpus Juris proposes, first, a new set of criminal offences aimed at the most damaging kinds of frauds against the Community budget, which would apply

[28] EU Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, Brussels, 29 May 2000.

[29] Corpus Juris – introducing penal provisions for the purpose of the financial interests of the European Union; *Economica*, 1997.

evenly throughout the territory of all Member States, and over which the criminal courts of all Member States would have jurisdiction, even if the offence or part of it had been committed in a different Member State. Secondly, it proposes a uniform set of procedural rules which would apply when these offences are being investigated and prosecuted; thus for these offences the same rules about evidence-gathering would apply throughout all Member States, and a common body of rules would govern the admissibility of the evidence when the offences came to trial. Thirdly, and most controversially, it proposes a new agency, the European Public Prosecutor, who would be in charge of investigating these offences and of prosecuting them before the courts of the Member States.

These proposals have received a good deal of support at EU level. The team of experts who drafted them were later commissioned by the European Parliament and the European Commission to conduct a further study, which (perhaps not surprisingly!) concluded that their original proposals were – with certain modifications – both workable and necessary[30]. The Commission, spurred on by OLAF, has now published a Green Paper to stimulate further debate in Europe about the idea of a European Public Prosecutor.[31]

In the Member States, however, the Corpus Juris proposal has been received with a good deal of hostility. This is particularly so in the United Kingdom. In the UK the nationalistic newspapers have represented it as a 'Brussels plot' to force the UK to repeal Magna Carta, to abolish *habeas corpus*, and to replace our treasured common law with a bogey called the 'Napoleonic System' under which all persons accused are presumed guilty unless they are able to prove their innocence. More soberly, the respected House of Lords Committee on the European Communities examined it, and pronounced against it. Whilst recognising that it was a genuine attempt to deal with a difficult problem, it thought that it involved an unacceptable invasion of national sovereignty, and said that the proper way to tackle frauds on the Community budget was by trying to improve cooperation between the national criminal justice systems.[32] This is now the approach that has been endorsed by the British Government. The UK government has backed Eurojust, and is also thought to be in favour of current proposals for a European arrest warrant,[33] and for the mutual recognition of judgments in criminal cases.[34] In December 2001, it persuaded a rather reluctant Parliament to pass legislation that empowers Ministers to give effect to Third Pillar instruments by Regulation – i.e. by decree, and without the need for an Act of Parliament.[35]

As one of the authors of the Corpus Juris proposal, I can be expected to tell you that

[30] Necessity, legitimacy and feasibility of the Corpus Juris; *Intersentia*, 2000 (ISBN 90-5095-097-3); www.law.uu.nl/wiarda/corpus/index1.htm
[31] http://europa.eu.int/comm/anti_fraud/livre_vert/document/en.htm
[32] Prosecuting Fraud on the Communities' Finances – the Corpus Juris, Report of the House of Lords Select Committee on the European Communities, *HL Paper* 62 (1999).
[33] Proposal for a Council Framework Decision on the European Arrest Warrant, *COM* (2001) 522 final, 19.9.2001.
[34] Proposal for a Council Framework Decision on Combatting Terrorism, *COM* (2001) 521 final, 19.9.2001.
[35] *Anti-terrorism, Crime and Security Act* 2001 ss. 111 and 112.

I think Corpus Juris represents a sounder approach to certain types of trans-national crime than conventional attempts to harmonise, coupled with enhanced measures for mutual legal assistance. My reasons are as follows.

1. One of the big problems of EU budgetary fraud is persuading national authorities to take it seriously. From the national perspective, there is the risk that a national prosecuting or investigating agency sees a big trans-national fraud against the EU budget as a small fraud against the national budget, and for this reason gives it a low level of priority. As the saying goes, 'What's everybody's job is nobody's job.' What is needed to deal effectively with trans-national crimes, I believe, is a trans-national agency. (It was considerations of this sort, of course, that led to the creation of a Federal criminal jurisdiction in the USA, in order to deal effectively with inter-State frauds in relation to commerce and trade.)
2. Where offences cross national boundaries, one set of rules applicable throughout all 15 Member States would be immeasurably simpler to understand and operate than 15 different ones, even if they have been harmonised so that they roughly resemble one another.
3. The Corpus Juris proposal would, of course, involve a loss of national sovereignty in that each State would lose a measure of control over the conduct of prosecutions on its territory. As against this, however, I believe it would involve no greater interference with national traditions than attempts to harmonise parts of national law, and arguably a smaller one. The Corpus Juris does not require national systems to amend the rules that are generally applicable. It proposes a *separate* system of rules, to govern *certain cases only*, and which would apply *alongside* national rules. (To draw an analogy from the UK, England and Scotland have criminal justice systems that are independent and separate. Superimposed upon that system, one single body of law relating to customs and excise is applicable to both, and one single Customs and Excise enforces it.[36] But as far as I know, Scotsmen do not regard this as undermining the independence of their criminal justice system.)
4. At the start of this paper, I explained that the reasons for harmonising penal law were both ideological (European Convention on Human Rights) and practical (the need for efficiency in dealing with trans-national crime). One of the challenges we face at the moment is how, if at all, these two different reasons can be tied together. How do we build a system for dealing with trans-national crime that is effective, but also respects human rights as guaranteed in the European Convention? In my view, there is a case for saying that one of the essential requirements for human rights to be respected in transnational criminal proceedings is for there to be a single agency in charge of them – provided that its rules comply with the Convention, provided it is staffed by people of appropriate quality, and

[36] Although it should be said that in Scotland, unlike in England, the Customs and Excise do not carry out their own prosecutions.

provided the means exist to call it to account if things go wrong. Such a system could provide better safeguards, in my view, that an arrangement for enhanced cooperation, under which, instead of extradition, warrants for arrest issued in one country are automatically executed in another.

Joachim Vogel

Why is the harmonisation of penal law necessary? A comment

Ideological or utilitarian approach to harmonisation?

First of all, I am very grateful to Spencer since, by identifying 'ideological' goals of harmonisation of criminal law, he has introduced the important keyword 'ideology'. Indeed, the debate about harmonisation of criminal law is significantly influenced by what seem to me to be ideologically distorted views. There are – if some oversimplification may be permitted – two antagonistic parties:

The party of 'harmonisation sceptics' unites Eurosceptics and also quite a few criminal law academics of varying origin and posture. They hold that criminal law has national and cultural roots and is part of the identity of a nation, its society and its culture.[1] It follows that the field of criminal law cannot, and must not, be completely transferred to a supra- or international level. Further, many 'harmonisation sceptics' argue that supra- or international institutions (including the European Union [EU] and European Community [EC]) lack democratic legitimacy and parliamentary or judicial control.[2] They fear that the level of human rights protection established in national criminal justice systems cannot be upheld in supra- or international institutions. An additional and quite recent line of thought stresses the necessity of a 'free competition of legal systems'[3] – clearly borrowing from a free market ideology and applying to legal norms and values a concept created for economic goods, which is a rather fundamentalist version of the economic analysis of law. Finally, arguments in favour of diversity are drawn from post-modernist philosophical and legal theory (deconstructionism, Critical Legal Studies) and also from certain political understandings ('let a thousand flowers blossom').

In contrast, there is a party of 'harmonisation fanatics' who can be found in international or supranational institutions – in Europe mainly in the European Commission, Europol and Eurojust – but also in national ministries (of justice or interior) or in national police administrations. Their ideology has a name which is also derived from an economic background: globalisation. The argument runs that globalised crime can

1 See, e.g., Rüter, *Zeitschrift für die gesamte Strafrechtswissenschaft* vol. 105 (1993), p. 30 (33 seq.).
2 See, e.g., Sieber, *Zeitschrift für die gesamte Strafrechtswissenschaft* vol. 103 (1991), p. 957 (969 seq.).
3 It is certainly questionable whether the concept, which was developed in international commercial law where parties are free to choose the applicable law, is transferred to criminal law where no such freedom exists.

only be countered by globalised criminal law enforcement, for which harmonisation of criminal law is a major prerequisite.[4] The tendency is to combine overestimated statistical figures on transnational crime and exaggerated risk or damage scenarios with a derogatory view of states as underfinanced, poorly equipped and powerless institutions which, acting on their own, will not only lose the battles, but also the war against transnational crime.

In my opinion, neither position is convincing. I doubt whether 'criminal law cultures' which go beyond very general notions like 'punitivity' or 'fairness' and beyond very general attitudes like those in relation to the death penalty or juvenile offenders exist. I am very sure that the harmonisation of, say, criminal law provisions regarding fraud against the financial interests of the EC has no reference at all to national cultural identities. I am also convinced that supra- or international organisations are, as a rule, more sensitive to human rights questions than many national states. On the other hand I feel that, although transnational crime may have increased in quantity and quality, the focus must be on international co-operation and not on harmonisation of criminal law. The catchword 'think globally, act locally' also applies to criminal law enforcement.

Even more fundamentally, I doubt whether we should take an ideological approach towards harmonisation of criminal law. Harmonisation is not a value or goal in itself (as opposed to goodness, virtue, peace). Therefore, the question whether to harmonise or not must be decided on utilitarian grounds – which is, in my understanding, clearly indicated by the general subject matter at stake here: The search for 'goals of harmonisation' is the search for positive consequences of harmonisation measures which may legitimise them on utilitarian grounds. The first step must be to identify the real, or at least the intended or possible, consequences of harmonisation measures. The second step is then to evaluate and balance positive and negative consequences, that is to say costs and benefits, damages and advantages of harmonisation measures. Sober perception and utilitarian evaluation of facts should be our criteria for deciding whether and why harmonisation of criminal law is wise or unwise or necessary or unnecessary. It is overwhelmingly probable that our answer will not be 'yes' or 'no' but will vary from case to case, from sector to sector, from goal to goal, and also from harmonisation 'type' to harmonisation 'type'. I would like to start with the latter aspect.

'Expansive' v. 'restrictive' harmonisation

When I started to read Spencer's paper, I was surprised to find that a considerable part of it deals with the European Convention on Human Rights (ECHR). Spencer himself cautiously indicates that the ECHR 'was not intended … as an instrument of harmonisation. But some degree of harmonisation has been its practical effect.' Having

[4] Basically, such arguments are backing the 'Corpus Juris' proposal of harmonised (or even unified) rules on fraud against the financial interests of the EC; see (ed.) Delmas-Marty, *Corpus Juris portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne*, 1997.

thought about it, I feel that the idea of integrating human rights instruments into the field of investigation is brilliant, and that there is no need for cautious reservations.

'Expansive' or 'minimum' harmonisation

When we speak about harmonisation of criminal law, what we normally have in mind is what I call 'expansive' or 'minimum' harmonisation. Criminal law harmonisation instruments – conventions, directives, framework decisions – usually provide for:

- 'minimum incrimination' – i.e. a set of behaviour which must be criminalized by national law[5] – not excluding further-reaching incrimination;
- 'minimum sanctions'- i.e. a level of penalties which must not be undercut by national legislation[6] – not excluding more severe penalties;
- 'minimum cooperation'- i.e. a set of rules concerning international co-operation in criminal matters which must be implemented in national law[7] – not excluding even closer cooperation; and
- 'minimum evidence'- i.e. rules on evidence which must be, at any rate, admissible[8] – not excluding further evidence.

The idea behind such harmonisation – its immediate 'goal' – is to establish a level of 'minimum protection' by criminal law. Criminal law is seen here as a protection mechanism – mainly by deterring potential criminals – which is indispensable, also with a view to alternative protection mechanisms, and must therefore be made mandatory. On a normative level, such harmonisation is based on an alleged human right to safety and security and a correspondent duty of states 'to ensure the safety and security of their peoples by establishing an area of freedom, security and justice' (Art. 29 Treaty on European Union (EUT)).

'Restrictive' or 'maximum' harmonisation

Of course, there is antagonism between safety and security on the one hand and freedom and liberty on the other. Criminal law is not only an instrument to protect safety and security but also a repressive instrument that infringes upon freedom and liberty, at least if there are no strict safeguards as to its use. In other words, we must provide for restrictions to the use of criminal law, and even for decriminalisation of over-criminalised fields. If such restrictions are imposed by inter- or supranational instruments, I

[5] See, e.g., Art. 1, 1a, 2 (2) and 3 Proposal for a Council Framework Decision on combating terrorism as agreed upon on 6 December 2001, Doc. 14845/1/01 REV 1 of 7 December 2001.
[6] See, e.g., Art. 4 Proposal (note 5).
[7] See, e.g., Art. 9-15 Common Position on combating terrorism of 27 December 2001, *OJEC* no. L 344 of 28 December 2001 p. 90.
[8] See, e.g., Art. 13 (10) EU Convention on mutual assistance in criminal matters of 29 May 2000, *OJEC* no. C 197 of 12 July 2000 p. 1.

would refer to this as 'restrictive' or 'maximum' harmonisation of criminal law.

The most important instruments of restrictive or maximum harmonisation of criminal law are human rights instruments like the ECHR and its additional protocols, other regional human rights instruments and the universal International Covenant on Civil and Political Rights (ICCPR) and its additional protocols. These instruments provide for

- 'maximum incriminations' in the sense that behaviour which is protected by human rights (such as religious worship) must not be prohibited, all the more not incriminated;
- 'maximum sanctions' in the sense that certain penalties – e.g. cruel, inhuman or degrading punishment or the death penalty – are prohibited.

Further, human rights instruments recognize, as a rule, specific rights related to criminal law and criminal process such as the legality principle, the prohibition of ex post facto laws and fair trial guarantees.

In theory, it is also possible to provide for restrictive or maximum harmonisation of criminal law by instruments specifically tailored to criminal law. For instance, it is theoretically possible to decriminalize specific areas – e.g. drug consumption – by a decriminalisation convention or directive. Supra- or international criminal law instruments could also easily provide for maximum sanctions which must not be exceeded by state legislation. However, in practice such instruments do not seem to exist. At most we find areas which are explicitly exempt from the duty to incriminate and sanction certain behaviour.[9]

The idea behind restrictive or maximum harmonisation is that we cannot accept a level of incrimination which is in conflict with human rights. In other words, we refrain from criminal law being enforced 'at any price'. Criminal law is seen here as a mechanism which, at least potentially, infringes on human rights, so that we need protection not *by* but *against* criminal law. The normative background is human rights insofar as it limits state action, including repressive legislation.

Evidently, the question is *not* whether harmonisation should be extensive or restrictive and whether we should establish minimum or maximum incriminations. Rather, it is decisive to strike a fair balance. In the aftermath of the heinous terrorist offences committed on 11 September 2001, the balance has clearly shifted towards very extensive, not minimum incriminations and to rules that are not easily compatible with human rights. However, there are also signs of a more balanced approach. For instance, the recent framework decisions agreed upon by the Council of the EU on the European arrest warrant[10] and combating terrorism[11] explicitly state that the obli-

[9] See, e.g., Art. 2 (2) Draft Proposal for a Council Framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of drug trafficking, Doc. 5733/02 of 30 January 2002: Each Member State may choose not to punish the conduct described in 1 (b) and (c)' – i.e. drug cultivation and possession – 'where committed for personal consumption as defined by national law'.

[10] Doc. 14867/1/01 REV 1 of 10 December 2001.

[11] See note 5.

gation to respect fundamental rights and legal principles as enshrined in Art. 6 EUT is not amended by them.

Political and normative goals of harmonisation

Spencer develops a system of possible goals of or – as he chooses to say – reasons for harmonisation of criminal law by distinguishing between 'ideological' and 'pragmatic' reasons. Let me add two more categories which are partly overlapping but partly introduce new aspects: 'political' and 'normative' goals.

Political goals

The goals which are called 'ideological' by Spencer are, to my understanding, of a political nature and might also be called 'political' goals (which I would prefer, also because I would hesitate to call human rights considerations 'ideological'). In substance, I agree with what John Spencer says, only adding some further remarks:

I would not underestimate the 'symbolic' goal: to show that a supra- or international institution such as the European Union is competent to take action in the field of criminal law that is a traditional domain of national sovereignty. In a way, criminal law is the 'Holy Grail' of sovereignty, and it is not surprising that supra- or international institutions try to get a foot in the door of criminal legislation. It is also no coincidence that supra- or international institutions are particularly active in high profile fields of criminal policy such as terrorism, organised crime, trafficking in human beings or child pornography.

Further, I would not underestimate the 'colonial' goal: to sell particular rules to the rest of the world. It has often been noted that the Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 imposes the U.S. 'war on drugs', including its harsh and repressive criminal law approach, on the rest of the world. In the European context, we have seen initiatives from presidencies which happen to be very much modelled on the law of the presiding Member State. For instance, Germany tried to introduce its legislation on collusive tendering to the Union by making it mandatory through a proposed framework decision.[12]

Finally, a 'hidden' – or even 'dirty' – goal of harmonisation by inter- or supranational instruments is to evade national parliamentary scrutiny and control.[13] As a rule, inter- and supranational harmonisation instruments are negotiated and decided upon by governments, not by parliaments. Of course, national parliaments are involved

[12] *OJEC* no. C 253 of 4 September 2000 p. 3.

[13] An extreme case which is not purely theoretical: A national government has failed in getting a criminal law initiative through parliament. Subsequently, the government negotiates an inter- or supranational harmonisation instrument which requires state parties to implement exactly what was provided for in the original law initiative. The government then presents the binding inter- or supranational instrument for ratification in parliament.

when it comes to ratification. However, there is often considerable political pressure to ratify an instrument which – as such – cannot be amended and, as a rule, can only be accepted or declined as a whole. The tendency to evade parliamentary control is particularly clear in the European context. The 'classical' instruments used to harmonize criminal law under European law are directives within the framework of the 'first pillar', the Treaty establishing the European Community (ECT) and conventions within the framework of the 'third pillar'(Art. 29 seq. EUT). Both require parliamentary scrutiny and control since the European Parliament co-decides on directives and the national parliaments must ratify conventions. But recently, governments have discovered a way to effectively reduce parliamentary scrutiny and control: the framework decision under Art. 34 (1) (b) EUT. Framework decisions can be adopted by the Council of the EU – i.e. the governments of Member States acting on their own. Further, framework decisions are binding on Member States, and even if they are not self-executing but must be transformed into national law, there is no need for a formal ratification procedure in parliament.[14] Although the European Parliament must be 'heard' (Art. 39 [1] EUT), there is no requirement of consent – as opposed to the co-decision procedures under the ECT. Indeed, practically all of the recent initiatives to harmonise criminal law in Europe rely on framework decisions.

Normative goals

Spencer also identifies 'pragmatic' reasons for wanting to harmonise criminal law. They relate to the difficulties that arise whenever transnational crime is prosecuted. From this perspective, the goal of harmonisation is to facilitate transnational criminal law enforcement. However, we might ask *why* transnational criminal law enforcement should be facilitated. The answer implies what I call the 'normative' goals of harmonisation, which in the European context are:

- equality and justice as 'transpositive goal';
- establishment and functioning of the common market as 'first pillar goal'; and
- an area of freedom, security and justice as 'third pillar goal'.

Equality and justice

Equality is an essential part of justice and at first glance it seems manifestly unjust to apply different criminal law rules to identical behaviour so that such behaviour – for example possession and consumption of certain drugs – is punishable in one State and

[14] Although many national parliaments in the EU do have strong reservations against extradition of its own nationals, I am quite confident that the European arrest warrant, as agreed upon in Brussels, (note 10) will be implemented union-wide before 2004, even if it does not recognize an exemption for a Member State's own nationals.

goes unpunished in another. However, the example clearly demonstrates the problem: There are many different opinions on what is just, or at least on what is advisable, suitable or proportional, and formal equality arguments will never be stronger than material justice arguments.

But we must also take into account the fact that criminal law is a secondary legal area. What I mean by 'secondary' is that there are primary rules on how to behave and secondary rules on how to punish deviant behaviour.[15] If and insofar as a common set of primary rules has been developed, formal equality will be a strong argument for a common set of secondary rules. In the European context, we do have a common set of primary rules: the body of communitarian law. It is also well known that Member States are obliged to guarantee these primary rules by secondary sanctioning rules which must be dissuasive, proportionate and effective and must grant equal protection to national and EC interests.[16]

Establishment and functioning of the common market

The classical normative goal which justifies harmonisation measures by the EC is 'the establishment and functioning of the common market', including equal conditions of competition (Art. 96, 97 ECT). But how should different criminal laws affect the establishment and functioning of the common market? Criminologists often refer to the so-called 'Delaware effect':[17] Extreme deregulation of commercial law, including far-reaching impunity for economic offences like fraud, tax fraud and money-laundering, may result in unfair competitive advantages. However, such a 'Delaware test' would be far too restrictive under current EC law. The common market is nothing more nor less than the 'quintessence' of the common policies laid down in the ECT. Establishment and functioning of the common market means nothing more nor less than establishment and functioning of the common policies. Assuming that a common policy will not work out without enforcement mechanisms and that criminal law is a powerful enforcement mechanism, we come to an 'annex competence' to harmonize criminal law insofar as it touches a common policy under EC law, including issues involving visas, asylum and immigration, culture, public health, consumer protection, or the environment. This line of thought is not theoretical. In 2001, the European Commission presented a proposal for a directive on the protection of the environment through criminal law.[18] It is based on Articles 174 and 175 ECT, under which a high level of protection of the environment must be guaranteed. The European Commission points out that there is a considerable body of communitarian environmental law, and that Member States are obliged to provide for effective, dissuasive and proportionate sanctions. Further, it is noted that 'experience has shown that the sanctions currently

[15] See H.L.A. Hart, The concept of law, 6th ed. 1972.
[16] ECJ of 21 September 1989, case 68/88, Cases 1989 p. 2965; see Art. 280 (1), (2) ECT.
[17] Named after the U.S. State of Delaware, where an extremely lenient corporate law attracted investors; see, e.g., Sevenster, *Common Market Law Review* 1992, p. 29 (59 seq.).
[18] COM (2001)139 final of 13 March 2001, OJEC no. C 280 of 26 June 2001 p. 238.

established by the member States are not always sufficient to achieve full compliance with Community law'. The Commission also demands that criminal sanctions be enacted which send a 'strong signal' to offenders and that criminal proceedings take place which are 'more powerful than tools of administrative or civil law'.

An area of freedom, security and justice

As indicated above, the bulk of European harmonisation measures has been developed in the 'third pillar' framework, i.e. under Art. 29 seq. EUT. Its general goal is outlined in Art. 29 (1) EUT: to establish an area of freedom, security and justice. Evidently, such a very general goal will, as case may be, overlap with the goal of establishment and functioning of the common market, i.e. the common policies. In such cases, the interesting question arises which goal – and which normative framework – should prevail.[19]

However, the establishment of an area of freedom, security and justice legitimises harmonisation measures only 'where necessary' (Art. 29 [2] last indent EUT). There is an important link between harmonisation and European co-operation in criminal matters, which has already been worked out in detail by Spencer and, prior to that, by the introductory paper issued by the organisers. Let me simplify the arguments:

- Harmonisation of substantive criminal law is necessary to improve co-operation, because otherwise problems of double criminality would arise.
- Harmonisation of procedural law is necessary to improve co-operation because otherwise problems of admissibility of evidence gathered abroad would arise.

Of course, there is a logical fault here. It is neither compelling nor convincing that, in order to improve European co-operation in criminal matters, national criminal law must be harmonised. Rather, the natural way of improving co-operation is to amend the law of cooperation by

- pushing back the double criminality requirement, and
- accepting evidence gathered abroad even if the foreign proceeding does not comply with national law.

[19] An interesting example is the harmonisation of environmental offences (see note 18). The original initiative was a proposal by the Kingdom of Denmark of 28 January 2000 of a Council Framework Decision on combating serious environmental crimes, OJEC no. C 39 of 11 February 2000 p. 4. It is not clear why a 'third pillar' instrument was proposed; anyhow, recital (4) refers to an effective co-operation in criminal matters. The European Commission admitted that the matter concerns both the protection of the environment and judicial co-operation in criminal matters. However, the Commission took the position that an *acquis communautaire* on environmental crime can and must be established by Community law. The Commission argued that environmental criminal law aims at the protection of the environment and falls into the Community's competence under Art. 175 ECT. It was even held that there is 'no room' for a 'third pillar' instrument because Articles 29, 47 EUT confer 'clear priority' to Community law. It is not surprising that the Council does not agree at all with this position.

For example, the 1998 Joint Action criminalising participation in a criminal organisation[20] was not necessary to improve co-operation and facilitate extradition because the respective double criminality requirement had, in principle, been abolished by Art. 3 1996 E.U. Extradition Convention.[21] Indeed, progress in the field of co-operation law renders harmonisation superfluous to a wide extent. For instance, the 2000 E.U. Mutual Assistance in Criminal Matters Convention[22] makes it much easier to accept evidence gathered abroad, because the requested state will, in principle, comply with the procedures of the requesting state. The Framework Decision on the European arrest warrant abolishes the requirement of double criminality for a wide list of offences.

However, I feel that the 'third pillar goal' can justify harmonisation measures independently of the co-operation issue. In particular, fields of common interest like the protection of the Euro currency[23] are, to some extent, 'natural' candidates for Union-wide harmonisation. Further, I would say that any field where transnational crime is a substantial factor can be legally – and legitimately – harmonised under Articles 29, 31 EUT. Therefore, I would not doubt the legality – and legitimacy – of current harmonisation initiatives, which range from terrorism[24] to cyber crime.[25]

Harmonisation and mutual recognition

The final point I would like to raise has not been developed in depth by Spencer because, in a way, it goes beyond the question of the goals of harmonisation. I am referring to the relationship between harmonisation and mutual recognition.

It is well known that the mutual recognition principle, adopted by the 1999 Tampere European Council, plays a central role in the establishment of the area of freedom, security and justice under Art. 29 EUT. Member States, so it is said, are to place mutual trust in each other, and shall automatically i.e. unconditionally and without further examination recognise and execute foreign decisions in criminal matters, even arrest warrants. I will not enter into a discussion of the mutual recognition principle as such – and if I understood the last sentence of John Spencer's paper correctly, he is not convinced that mutual recognition is the ideal solution. However, it must be pointed out that mutual recognition is a functional alternative, and even a substitute, to harmonisation. If we mutually recognise decisions produced by foreign, and possibly different, criminal law systems, we necessarily accept the differences between these systems and our system. Then, harmonisation becomes superfluous:

[20] *OJEC* no. L 351 of 29 December 1998 p. 1.
[21] *OJEC* no. C 191 of 23 June 1997 p. 13.
[22] *OJEC* no. C 197 of 12 July 2000 p. 1.
[23] See Vogel, *Zeitschrift für Rechtspolitik* 2002, p. 7 with references to the European instruments.
[24] See notes 5, 7.
[25] Following its Communication of 26 January 2001 'Creating a Safer Information Society by Improving the Security of Information Infrastructure and Combating Computer-related Crime' (COM[2000]890 final), the European Commission has been preparing a proposal for a Council Framework Decision on combating serious attacks against information systems.

'Live and let live, and mutually recognise'.

But the mutual recognition strategy is not unlimited. The climate of mutual trust necessary for mutual recognition will not arise if the differences are too fundamental. For example, the 1998 E.U. Convention on Driving Disqualifications, which requires mutual recognition of driving disqualifications has, until now, failed because the substantive rules in Member States are not really compatible. I would therefore conclude that mutual recognition calls for a certain measure of harmonisation, in particular concerning the respect for human rights and the fair trial principle.[26] Therefore, we have found a last goal of harmonisation: to facilitate mutual recognition.

[26] It is well worth considering whether the European arrest warrant (see note 10) should be accompanied by some harmonisation of the law on arrest and detention in Member States.

Gert Vermeulen

Where do we currently stand with harmonisation in Europe?

Introduction

The Treaty of Maastricht[1] and more importantly the Treaty of Amsterdam[2] have significantly increased the influence of the European Union on internal decision-making and autonomy of Member States concerning co-operation in criminal matters and the fight against (organized) crime. Article K.1 read in conjunction with Article K.3 of the Treaty of Maastricht, provides that for the purposes of achieving the objectives of the EU, in particular the free movement of persons, the EU (Justice and Home Affairs) Council may adopt *joint positions, joint actions and conventions* in the area of judicial co-operation in criminal matters.[3] Since the entry into force of the Treaty of Amsterdam, Article 29 read in conjunction with Articles 31 and 34 of the Treaty on European Union (TEU) specifies that in order to provide citizens with a high level of safety within an area of freedom, security and justice, the JHA Council may adopt *common positions, framework decisions, decisions and conventions* in the area of judicial co-operation in criminal matters.[4] This implies that in addition to the power to negotiate on important conventions, the EU is also authorized, through the treaties mentioned above, to adopt legal instruments of a *directly binding* nature – joint actions (according to the Treaty of Maastricht) and framework decisions or decisions (according to the TEU as amended by the Treaty of Amsterdam) – with respect to co-operation in criminal matters.[5] Contrary to conventions – which only become binding

[1] Council of the European Union, Treaty on European Union (Treaty of Maastricht) of 7 February 1992, *O.J.* 29 July 1992, No. C 191/1. The Treaty of Maastricht took effect on 1 November 1993.

[2] Council of the European Union, Consolidated version of the Treaty on European Union (Treaty of Amsterdam) of 2 October 1997, *O.J.* 10 November 1997, No. C 340/1. The Treaty of Amsterdam took effect on 1 May 1999.

[3] According to the Treaty of Maastricht, the Council of the EU can only adopt joint positions, joint actions and conventions in the area of judicial co-operation in criminal matters on the initiative of any EU Member State.

[4] According to the Treaty of Amsterdam, the Council of the EU can adopt common positions, framework decisions, decisions and conventions in the area of judicial co-operation in criminal matters, not only at the initiative of any EU Member State, but also on the initiative of the European Commission.

[5] According to the Treaty of Maastricht, these binding legal instruments are *joint actions* which are only binding upon the Governments of the EU Member States. Since the entry into force of the Treaty of Amsterdam, the Council of the EU can no longer adopt joint actions. They have been replaced by *framework decisions and decisions* which are binding upon the Governments of the EU Member States. The framework decisions and decisions differ in two ways. While framework decisions are only binding as to

upon ratification by the national governments after having been approved by the national parliament or citizens via a referendum – framework decisions and decisions (like joint actions under the Maastricht regime) no longer need to be approved or ratified at the national level, even if they may require implementation into, or amendment of national law.[6] They are therefore considered to be established in a largely undemocratic and non-transparent way. The competence of the JHA Council to adopt such directly binding legal instruments increases enormously the influence of the EU over national criminal policy making.

These legal instruments are particularly intended to be used as tools to prevent and combat organized crime. Article 29 TEU provides that a *so-called area of freedom, security and justice, shall be achieved by preventing and combating racism and xenophobia and (organized) crime, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud.* This idea was further elaborated in a series of EU policy documents that have since been issued.

At the European Council Meeting in Vienna on 3 December 1998, the Council and the Commission submitted an action plan on 'how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice'.[7] This plan calls for the Member States to strengthen EU action against organized crime in the light of the new possibilities arising from the Treaty of Amsterdam.

At a special European Council Meeting in Tampere on 15 and 16 October 1999, the European Council reaffirmed the importance of developing the Union as an area of freedom, security and justice and its determination to do so. It again noted that *it was deeply committed to reinforcing the fight against serious organized and transnational crime*. In this context, the Council agreed on a number of policy orientations and priorities which would quickly make this area a reality and can therefore be considered as 'milestones'.[8]

In response to the European Council Meetings in Vienna and Tampere, an integrated EU strategy to prevent and control organised crime was elaborated in March 2000.

the result to be achieved and leave the choice of form and methods to achieve the result to the national authorities, the decisions are binding in whole. The second difference concerns the fact that framework decisions can only be adopted for the purpose of approximation of the laws and regulations of the EU Member States. Decisions, on the contrary, can be adopted for any purpose consistent with the objective to provide a so-called area of freedom, security and justice, apart from any approximation of the laws and regulations of the EU Member States. Neither framework decisions nor decisions entail direct effect. For more information regarding the third pillar legal instruments in the Treaty of Maastricht and the Treaty of Amsterdam see: M. den Boer, *Taming the third pillar. Improving the management of justice and home affairs cooperation in the EU*, European Institute of Public Administration, Maastricht, 1998, 29-34 and S. Peers, *EU justice and home affairs law*, Pearson Education Limited, Essex, 2000, 8-62.

6 The competence of the JHA Council to adopt framework decisions which are binding on national legislators also conflicts with the traditional prohibition on the Executive's power to incriminate, and the *Trias Politica* doctrine of Montesquie.

7 Vienna European Council, Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice. Text adopted by the Justice and Home Affairs Council of 3 December 1998, *O.J.* 23 January 1999, No. C 19/1.

8 Tampere European Council, Presidency Conclusions, 15-16 October 1999. URL: www.presidency.finland.fi/frame.asp, 29 January 2002.

This so-called 'Millenium Strategy' sets priorities and clear target dates for the conclusion of action points, and allocates responsibilities for their implementation.[9]

The most explicit example of increasing EU influence over national matters is the recently established adoption process of framework decisions, aimed at the approximation[10] of national substantive (and procedural) criminal law of Member States with regard to certain areas considered to be crucial in the fight against organized crime.[11]

[9] Council of the European Union, The prevention and control of organized crime: A European Union Strategy for the beginning of the new Millenium, *O.J.* 3 March 2000, No. C 124/1.

[10] Although the Treaties of Maastricht and Amsterdam give the impression that approximation is a completely new concept, the idea to approximate or harmonize the criminal legislations of several countries had already been incorporated in earlier legal instruments of the EU and even of the Council of Europe and the United Nations. These include, for example, the EU Joint Action of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children (*O.J.* 4 March 1997, No. L 63/2), the European Convention on the Suppression of Terrorism (ETS No. 90, Strasbourg, 27 January 1977, URL: www.conventions.coe.int/Treaty/EN/cadreprincipal/.htm, 31 January 2002), and the United Nations Convention on the Rights of the Child, 20 November 1989 (URL: www.hrweb.org/legal/child.html, 31 January 2002).

[11] Council of the European Union, Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, *O.J.* 22 March 2001, No. L 082/1; Council of the European Union, 10372/01 DROIPEN 60 CORDROGUE 45 COMIX 494, Brussels, 28 June 2001 – Proposal for a Council Framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of drug trafficking; Council of the European Union, Initiative of the United Kingdom, the French Republic and the Kingdom of Sweden with a view to adopting a Council Framework Decision on the application of the principle of mutual recognition to financial penalties, *O.J.* 2 October 2001, No. C 278/4; Council of the European Union, 14867/1/01 REV 1 LIMITE COPEN 79 CATS 50, Brussels, 10 December 2001, Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between Member States; Council of the European Union, Initiative of the Kingdom of Belgium, the French Republic, the Kingdom of Spain and the United Kingdom with a view to adopting a Council Framework Decision on joint investigation teams, *O.J.* 20 October 2001, No. C 295/9; Council of the European Union, 14242/01 COPEN 71, Brussels, 28 November 2001, Council Framework Decision on joint investigation teams; COMMISSION OF THE EUROPEAN COMMUNITIES, COM (2000) 845 final/2, Brussels, 22 January 2001 – Communication from the Commission to the Council and the European Parliament on combating trafficking in human beings and combating the sexual exploitation of children and child pornography; Council of the European Union, 14216/01 LIMITE DROIPEN 97 MIGR 90, Brussels, 3 December 2001 – Proposal for a Council Framework Decision on combating trafficking in human beings; Council of the European Union, 10854/01 LIMITE DROIPEN 68 MIGR 61, Brussels, 13 July 2001 – Proposal for a Council Framework Decision on combating the sexual exploitation of children and child pornography; Council of the European Union, Council Framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, *O.J.* 14 June 2000, No. L 140/1; Council of the European Union, Council Framework Decision of 6 December 2001 amending Framework Decision 2000/383/jha on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, *O.J.* 14 December 2001, No. L 329/3; Council of the European Union, Council Framework Decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment, *O.J.* 2 June 2001, No. L 149/1; Council of the European Union, Initiative of the Federal Republic of Germany with a view to the adoption of a Council Framework Decision on criminal law protection against fraudulent or other unfair anti-competitive conduct in relation to the award of public contracts in the common market, *O.J.* 4 September 2000, C 253/3; Council of the European Union, Initiative of the French Republic with a view to the adoption of a Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence, *O.J.* 4 September 2000, No. C 253/6; Council of the European Union, Council Framework Decision of 28 May 2001 on combating fraud and counterfeiting of non-cash means of payment, *O.J.* 2 June 2001, No. L 149/1; Council of the European Union, Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, *O.J.* 5 July 2001, No. L

All three EU policy documents referred to above consider in particular the following areas of crime as priority areas for the approximation of the Member States' *substantive criminal law*: racism and xenophobia, high-tech crimes (computer fraud and offences committed through the Internet), drug trafficking related offences, trafficking in human beings (in particular exploitation of women), terrorism related offences, financial crime (money laundering, corruption, Euro counterfeiting), tax fraud, sexual exploitation of children, and environmental crimes.

With regard to *procedural criminal law*, the following issues are concerned *inter alia* in the 'Millennium Strategy': the mutual recognition of judicial decisions to freeze assets; the possibility of mitigating the onus of proof regarding the source of assets of a person convicted for organized crime related offences; the possibility of confiscating assets regardless of the presence of the offender; the approximation of national legislation on criminal procedure governing investigative techniques so as to make their use more compatible and render investigations into organized crime more efficient, and the approximation of national legislation on the position and protection of witnesses and persons co-operating with the judicial system (including the adoption of an EU model agreement on the matter to be used on a bilateral basis).

Scope and degree of approximation

Article 29 TEU, last para, provides that the so-called 'area of freedom, security and justice' shall be achieved through closer police co-operation (1st indent), judicial co-operation (2nd indent) and, where necessary, through *approximation* of rules on criminal matters in the Member States (3rd indent), the latter in accordance with Article 31 (e) TEU. According to Article 31 (e) TEU, *approximation* shall be achieved by progressively adopting measures establishing *minimum rules* relating to the constituent elements of *criminal acts* and to *penalties* in the fields of organized crime, terrorism and illicit drug trafficking. In this context, Article 34.2 (b) TEU provides that the Council may adopt *framework decisions* for the purpose of *approximation* of the laws and regulations of the Member States.[12]

182/1; Council of the European Union, Initiative by the Governments of the French Republic, the Kingdom of Sweden and the Kingdom of Belgium for the adoption by the Council of a Framework Decision on the execution in the European Union of orders freezing assets or evidence, *O.J.* 7 March 2001, No. C 075/3; Council of the European Union, 15525/01 DROIPEN 113 ENV 678, Brussels, 20 December 2001, Draft Framework Decision on the protection of the environment through criminal law; Commission of the European Communities, COM(2001) 521 final, Brussels, 19 September 2001, Proposal for a Council Framework Decision on combating terrorism (presented by the Commission); Council of the European Union, 14845/1/01 REV 1 LIMITE DROIPEN 103 CATS 49, Brussels, 7 December 2001, Proposal for a Council Framework Decision on combating terrorism; Commission of the European Communities, COM(2001) 664 final, Brussels, 28 November 2001, Proposal for a Council Framework Decision on combating racism and xenophobia (presented by the Commission).

[12] With regard to Council decisions, Article 34. 2 (c) TEU explicitly provides that they cannot be adopted for the purpose of approximation of the laws and regulations of the Member States. According to Article 34. 2 (a) TEU, the adoption of common positions is meant to define the approach of the EU to a particular matter. With regard to the competence of the Council to adopt conventions, nothing has been specified.

Reading Article 29 TEU in conjunction with Articles 31 (e) and 34.2 (b) TEU, there is little doubt that framework decisions cannot be used for the purpose of approximation of the laws and regulations of the Member States in view of reaching goals *other* than the progressive adoption of measures establishing minimum rules relating to the constituent elements of criminal acts and penalties, which are the two aspects of substantive criminal law[13] mentioned in Article 31 (e). Since 'approximation' of substantive criminal law has – with the Amsterdam Treaty – for the first time been introduced in the TEU as one of the new ways for the EU to move forward, it is obvious that the Treaty should be interpreted in a strict way. A strict interpretation certainly does not allow for approximation in the area of jurisdiction law[14] or procedural criminal law, nor for establishing a new framework for international co-operation in criminal matters.[15]

In practice, however, the JHA Council has recourse to framework decisions not only for the setting of minimum rules relating to the constituent elements of criminal acts and to penalties, but also for regulating matters of jurisdiction law, procedural criminal law and/or international co-operation in criminal matters. Clearly, the approximation process is not limited to the establishment of minimum rules relating to the constituent elements of criminal acts and to penalties, and therefore extends beyond the boundaries set by the TEU itself.

Furthermore, Article 31 (e) TEU only provides for the possibility to adopt measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of *organized crime, terrorism and illicit drug trafficking*.[16]

[13] It should be noted that national criminal law must clearly be distinguished from international co-operation in criminal matters. National criminal law consists of substantive criminal law and procedural criminal law. Substantive criminal law, in turn, includes general principles of criminal law and the specific offences, i.e. specific incriminations and specific sanctions.

[14] For the purposes of this commentary, the author considers jurisdiction law as part of substantive criminal law, as it touches upon the scope ratione loci of the incrimination.

[15] This is the case with the Draft Framework Decision on the European arrest warrant which is intended to replace all the former instruments concerning extradition between the Member States. As soon as this framework decision enters into force, the existing treaty framework in the area of extradition, together with the extremely important concept of double criminality, will no longer be applicable for the 32 offences enumerated in Article 2 of the Framework Decision; See Council of the European Union, 14867/1/01 REV 1 LIMITE COPEN 79 CATS 50, Brussels, 10 December 2001, Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between Member States.

[16] These subject areas for which approximation is possible, were subsequently extended by the Tampere Presidency Conclusions and the Millenium Strategy on organized crime. In the Tampere Presidency Conclusions (point 48), the European Council considered that, *with regard to national criminal law, efforts to agree on common definitions, incriminations and sanctions should be focused on financial crime, such as money laundering, corruption and Euro counterfeiting, drugs trafficking, trafficking in human beings, particularly exploitation of women, sexual exploitation of children, high tech crime and environmental crime.* The Millennium Strategy on organized crime also provides that *the Council should, where found necessary, adopt instruments with a view to approximate the legislation of Member States. These instruments should take into account minimum standards of the constituent elements of offences and penalties related to organized crime, terrorism and drug trafficking*. The Millenium Strategy further specifies that *at least high technology crime (computer fraud and offences committed by means of the Internet), drug trafficking related offences, trafficking in human beings (particularly exploitation of women), terrorism related offences, financial crime (money laundering, corruption, Euro counterfeiting), tax fraud, sexual exploitation of children, and environmental crime will be considered:* See: Council of the

Again, there is little doubt that a strict interpretation of the Treaty does not allow the approximation process to extend to other areas or types of crime. In practice, however, the number of subject areas in which approximation has been completed or is underway has quietly been extended beyond the limits indicated in the TEU, and even beyond the limits of the list of subject areas indicated in the Tampere conclusions or the Millennium Strategy on organised crime, which itself was already significantly extended in order to remain compatible with the Treaty (terrorism, illicit drug trafficking and organised crime itself).

Apart from crimes in relation to terrorism and illicit drug trafficking, a wide range of offences such as racism/xenophobia, high-tech crime, trafficking in human beings, financial crime, tax fraud, sexual exploitation of children, environmental crime and even unauthorized entry, transit and residence are the subject of the EU's harmonisation efforts. As such, it can hardly be denied that the approximation process is neither in line with TEU provisions nor with the principal EU policy documents. The JHA Council and the Commission – the latter being the principal initiator of framework decisions aimed at approximation – seem to deliberately disregard the essentially limited mandate that the TEU has given them – i.e. to adopt measures establishing minimum rules relating to *substantive* criminal law in only a *limited* number of subject areas.

A key factor is also that, since the entry into force of the Amsterdam Treaty, the JHA Council has not had any recourse to the 'convention' as a traditional legal instrument preferring to rely exclusively on framework decisions and decisions to regulate what traditionally could be regulated only by means of a 'convention'.[17] The mere fact that the 'convention' is foreseen as one of the possible third pillar legal instruments (Article 34. 2 (d) TEU) clearly shows *a contrario* that not everything can be decided by either framework decision or decision. It should therefore be concluded that legal instruments are, to an increasing extent, being misused by the JHA Council, with considera-

European Union, The prevention and control of organized crime: A European Union Strategy for the beginning of the new Millenium, *O.J.* 3 March 2000, No. C 124/1, Recommendation No. 7.

[17] The latest convention dates from 26 July 1995 and established a European police office, referred to as Europol. See: Council of the European Union, Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention), *O.J.* 27 November 1995, C 316/2; Since the European Council in Tampere, all important EU decisions in the area of judicial and police co-operation in criminal matters have been taken by means of a 'simple' Council Decision of the JHA Council, apart from the harmonisation of criminal law which has to occur through framework decisions. Eurojust, the judicial counterpart of Europol is, for example, currently being established by means of a Council Decision. See: Council of the European Union, 14766/1/01 REV 1 LIMITE EUROJUST 14, Brussels, 7 December 2001, Proposal for a Council Decision setting up Eurojust. The establishment of joint investigation teams with the possible support of Europol representatives and the substitution of extradition by the European arrest warrant on the other hand, are being realized by means of framework decisions. See: Council of the European Union, 14242/01 COPEN 71, Brussels, 28 November 2001, Council Framework Decision on joint investigation teams; Council of the European Union, 14867/1/01 REV 1 LIMITE COPEN 79 CATS 50, Brussels, 10 December 2001, Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between Member States. Apparently, European leaders and the European Commission consider these issues as so important for the freedom and security of and justice for European citizens, that the latter no longer has to approve of the decision-making regarding these issues via his or her national parliament.

ble consequences in terms of undemocratic decision-making concerning a number of matters that should be subject to democratic review in national parliaments.

Goals of approximation

Further analysis of the ongoing EU approximation process leads to the conclusion that proper analysis is usually lacking before decisions are made on the need for approximation in the respective subject areas. Often, the actual goal that approximation is supposed to serve for a given type of crime is not sufficiently specified. Moreover, the proclaimed added value of approximation at the EU level is often dubious, especially when the Member States are already bound in the area concerned by a non-EU treaty acquis. In a number of areas, approximation efforts can be perceived as a 'goal in itself', resulting from an ideological choice rather than being prompted by actual needs or to solve identified problems.[18]

Mutual recognition of criminal judgments is far from a new concept. The principle of mutual recognition was already established in a (large) number of international agreements such as the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders of 30 November 1964[19], the European Convention on the Punishment of Road Traffic Offences of 30 November 1964[20], the European Convention on the International Validity of Criminal Judgments of 28 May 1970[21], the European Convention on the International Effects of Deprivation of the Right to Drive a Motor Vehicle of 3 June 1976[22] as well as the Convention between the

[18] This also seems apparent in relation to several new and forthcoming framework decisions. Particularly with regard to the proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between Member States, the question arises whether it is really necessary to abolish the formerly existing and relatively well functioning instruments concerning extradition, including the provisions of Title III of the Convention implementing the Schengen Agreement which concern extradition. Regarding the issue of terrorism, doubts exist whether the envisaged Framework Decision on combating terrorism will add anything extra to the fight against terrorism, taking into account the whole arsenal of legal instruments of the EU, the Council of Europe and the United Nations which aim at combating terrorism, such as *inter alia* the agreement of 4 December 1979 regarding the application of the European Convention on Combating Terrorism between the Member States of the European Communities (Dublin, B.S. 5 February 1986), the European Convention on the Suppression of Terrorism (ETS No. 90, Strasbourg, 27 January 1977), the UN Convention on the Suppression of Unlawful Seizure of Aircraft of 16 December 1970 (The Hague, UNTS 1973, No. 12325), the International Convention on the Suppression of Terrorist Bombings of 15 December 1997 and the International Convention on the Suppression of the Financing of Terrorism of 9 December 1999. The question remains whether it is perhaps not more preferable to unify, and use to the maximum extent possible, the existing EU and other legal instruments.

[19] Council of Europe, European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, ETS No. 051, Strasbourg, 30 November 1964. URL: www.conventions.coe.int/treaty /EN/ cadreprincipal.htm, 1 February 2002.

[20] Council of Europe, European Convention on the Punishment of Road Traffic Offences, ETS No. 052, Strasbourg, 30 November 1964. URL: conventions.coe.int/Treaty/EN/cadreprincipal.htm, 1 February 2002.

[21] Council of Europe, European Convention on the International Validity of Criminal Judgments, ETS No. 070, Strasbourg, 28 May 1970. URL: conventions.coe.int/Treaty/EN/cadreprincipal.htm, 1 February 2002.

[22] Council of Europe, European Convention on the International Effects of Deprivation of the Right to Drive a Motor Vehicle of 3 June 1976, ETS No. 088, Strasbourg, 3 June 1976. URL: conventions.coe.int/Treaty/EN/cadreprincipal.htm, 1 February 2002.

Member States of the European Communities on the Enforcement of Foreign Criminal Sentences of 13 November 1991.[23] Due to a lack of ratification however, these conventions did not achieve the success that was hoped for. Mutual recognition of criminal judgments in the EU was nevertheless considered as an important priority which should be realized within due time. Frustration with the slowness and formalities of traditional judicial co-operation in criminal matters paved the way for the decision to construct 'a European legal area' based on the 'cornerstone' of mutual recognition of judicial decisions in criminal matters.[24] This also arose from the European Council in Cardiff of 15 and 16 June 1998, where the importance of mutual recognition was reaffirmed and the EU Council was called upon *to identify the scope for greater mutual recognition of decisions of each others courts.* Following the European Council of Vienna in December of the same year, the Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice then called upon the Council to *initiate a process with a view to facilitating mutual recognition of decisions and enforcement of judgements in criminal matters* within two years of the Treaty of Amsterdam. At the occasion of the European Council in Tampere on 15 and 16 October 1999 it was again repeated '*that enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights.*' The European Council therefore endorsed the principle of mutual recognition, which in its view should become the cornerstone of judicial co-operation in criminal matters within the Union, and set a deadline of December 2000 for the adoption of a 'programme of measures to implement the principle of mutual recognition'. Eventually, the JHA Council of 30 November 2000 adopted this highly ambitious plan.[25]

It should be emphasized that approximation was originally to be pursued only to the extent that mutual recognition of judicial decisions in criminal matters would not be feasible without a certain degree of approximation. In other words, the approximation of certain criminal offences was intended to facilitate the implementation of the 'new' mutual recognition concept, the latter being the prevailing EU option. A fundamental choice was made in favour of mutual respect for the diverging criminal law approaches of the Member States, and approximation was only needed where, because very significant differences, it would not have been acceptable to Member States to give effect to foreign judicial decisions in criminal matters. Today, the original aims of approximation seem almost irrelevant.

As such, approximation should not be seen as an interim scenario for unification, which is being promoted in *corpus juris* circles and must be viewed as an ideological

[23] Council of the European Union, Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences, *Trb*. 1992, No. 39.
[24] See also: Statewatch, *The mutual recognition of criminal judgments in the EU: will the free movement of prosecutions create barriers to genuine criminal justice*, URL:
www. Statewatch.org/news/ jun00/05mutual, htm, 28 June 2001.
[25] Council of the European Union, Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, *O.J.* 15 January 2001, No. C 12/1.

option rather than a need.[26] The goal of approximation is not to unify the criminal legislation of the EU Member States, but to reduce current differences between the various penal legislation, in order not to frustrate the willingness of EU Member States to mutually recognize judicial decisions in criminal matters. The principle of approximation builds on mutual respect and tolerance of diversity, on the basis of mutual confidence and trust in the different legal system of the Member States, and is therefore preferable to unification. Too many efforts aimed at considerably improving traditional interstate co-operation have been undertaken in recent years without giving it sufficient time in practice. A new step towards unification or adoption of genuine federal criminal law should only be implemented in the event that previous and current attempts (e.g. in the context of the 'Mutual Recognition Plan') to improve inter-state or trans-national co-operation do not succeed in effectively preventing and combating organised or serious crime at EU level.

Potential added value of approximation

Constituent elements of criminal acts

Although the approximation process is subject to a lot of criticism, the approximation of the constituent elements of criminal acts can potentially have three positive effects.

Firstly, the approximation of constituent elements of criminal acts can assure that all EU Member States make certain behaviour a criminal offence, in order to avoid safe havens or loopholes within the Union for the behaviour concerned, in as far as the subject areas concerned are EU priority areas or relate to the so-called EU core crimes.[27] The idea is then to respect national autonomy in criminal law making and to

[26] Adherents of the unification idea which underlies the *Corpus Juris* concept aspire to a greater uniformity of legal systems than those who promote the approximation process as a tool to facilitate mutual recognition of criminal judgments within the EU. The concept of *Corpus Juris* implies the creation of a single body of law and procedure to be applied in all EU Member States. This was the subject of a legal study commissioned by the European Parliament in 1997 to investigate ways of making the mosaic of criminal law systems more equitable, more efficient and less complex. The study was confined to a specific element of criminal law: fraud against the EU budget. The report found that the only effective solution would be to unify the EU's criminal systems in this narrow area, introducing a single definition of the elements of a crime and of the penalties, and a uniform judicial procedure. Unification would require a European Public Prosecution Service to direct investigations and prosecutions. Cases would be heard in special national courts but, according to EU law, sceptics consider the unification idea and the concept of the *Corpus Juris* as 'another brick in the building of a single, centralised European State, robbing nations of their ancient freedoms'; B. Hall and A. Bhatt *Policing Europe: EU justice and home affairs co-operation*, London, Centre for European Reform (CER), 1999, 34-35. For a more detailled review of the Corpus Juris see: M. Delmas-Marty (red.), *Corpus Juris houdende strafbepalingen ter bescherming van de financiële belangen van de Europese Unie*, Antwerpen-Groningen, Intersentia, 1998, 1-50.

[27] According to Article 29 TEU, EU core crimes include terrorism, trafficking in persons and offences against children, illicit drug trafficking, illicit arms trafficking, corruption and fraud. In practice however, as referred to earlier, a large range of criminal offences, including crimes other than EU core crimes, are the subject of the harmonization process.

restrict this autonomy only in as far as required to effectively combat crime that necessitate a common EU strategy.[28]

A second potential positive effect of approximation is that it facilitates forms of international co-operation that traditionally require double criminality. Approximation or harmonisation of EU core crimes is intended to have the result that, for the crimes concerned, the double criminality requirement is fulfilled. It must be stressed in this context that the current EU approach is extremely incoherent, as the recent Framework Decision on the European arrest warrant and the surrender procedures between the Member States provides for an abolishment of the double criminality rule *for a much wider range of offences than those for which approximation is underway*, based on the assumption that the offences concerned have been criminalized throughout the EU.[29] If that would indeed be the case, the question arises why approximation was deemed necessary in the first place and why the requirement of double criminality could not have been retained as a precondition for co-operation, since dual criminality would be addressed automatically.

Finally, the approximation of the constituent elements of criminal acts could bring coherence in the definition of those crimes which are considered a priority by the EU. It would obviously make sense to rely on uniform legal definitions for so-called EU core crimes that (will) also fall within the competence *ratione materiae* of bodies such as Europol and Eurojust and to make sure that these defined crimes are punishable throughout the EU. At present, it is often left to the discretion of the individual Member States to assess the crimes within the mandate of the bodies concerned in accordance with national law[30], which creates difficulties in practical co-operation.

[28] This idea is also better known as the so-called subsidiarity principle which implies, as Article 29 TEU points out, that the rules on criminal matters of the EU Member States will only be approximated where necessary.

[29] According to the Framework Decision, the existing EU treaty framework on extradition is being replaced by a generalized and simplified surrender procedure of suspected and convicted persons based on the 'mutual recognition' by the EU Member States of arrest warrants. At the same time, the double criminality requirement is omitted. This was also the main reason why Italy was originally reluctant to agree with the European arrest warrant. It would have been logical if the scope of the European arrest warrant had been limited to only those criminal offences which are to be proscribed in all EU Member States and which are the subject of the ongoing harmonisation process. Clearly, this is not the case: the European arrest warrant can be issued for a list of over 30 offences that do not need to be proscribed (in the same way) throughout the EU, including *inter alia* swindling, racketeering and extortion, motor vehicle crime, arson, sabotage. See: Council of the European Union, 14867/1/01 REV 1 LIMITE COPEN 79 CATS 50, Brussels, 10 December 2000, Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between Member States.

[30] In the final paragraph of Annex to the Europol Convention, it has explicitly been provided '*that the forms of crime referred to in Article 2 and in this Annex shall be assessed by the competent national authorities in accordance with the national law of the Member States to which they belong*'. This means that every EU Member State may interpret the criminal offences for which Europol is competent in accordance with their own national law. This often means that the mandate of Europol is being interpreted in different ways throughout EU; See: Council of the European Union, Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention), *O.J.* 27 November 1995, C 316/2. The same occurs with regard to the mandate of Eurojust; See: Council of the European Union, 14766/1/01 REV 1 LIMITE EUROJUST 14, Brussels, 7 December 2001, Proposal for a Council Decision setting up Eurojust.

So far, however, no single effort has been made – the idea has not even come up – to formally recognize the new criminal law definitions that have been negotiated recently or are currently being negotiated for certain crimes as binding in terms of interpreting/assessing the same crimes referred to in other EU legal instruments, such as the Europol Convention or the Decision setting up Eurojust. Hence, an extremely important opportunity for creating coherence in tackling certain forms of crimes is being missed.

Penalties

In general, the EU's (future) framework decisions only set minima for the maximum penalties that offences can incur.[31] The overall effect is potentially[32] more severe punishment for a number of offences, without ruling out the possibility of even stricter national approaches than required by the EU. In doing so, the EU does not actually bring national penalties closer to each other, as the term 'approximation' would presuppose, but only calls for harsher punishment. The question arises whether efforts should not be focused on reducing diversity in penalty levels, in order as to ensure (e.g. by also setting maxima to the maximum penalties) at least 'formal' legal equity for the EU citizen, and whether that would not be required as an essential element in the development of the 'area of freedom, security and justice'.[33] The risk is

[31] In addition, the approximation of penalties only relates to the penalties *in abstracto*, the penalties as provided for in the criminal code. In other words , the ongoing approximation process has no influence on the penalties *in concreto*, the penalties which are actually being pronounced by the competent judge. In that way, penalties will continue to differ depending on the country and the judge who is competent to sentence. Moreover, the currently adopted approach of a minimum level of a fixed maximum sentence can easily jeopardise the coherence of national criminal systems. For example, if in Belgium the minimum maximum sentence for an offence is raised from 5 years to 6 years, this has enormous consequences with regard to the question as to which court is competent to take note of the case, or the possibility of an extra-judicial settlement.

[32] This will depend on the use of the expediency principle and the actual sentencing.

[33] The appropriate methodology for the approximation of sanctions is currently being examined and discussed. Several concrete technical options are proposed. A majority of delegations favours the approach adopted to date as regards the approximation of sanctions in the context of framework decisions which consist of an obligation for all crimes covered by the instrument to provide for penalties giving rise to extradition and an obligation for certain offences, in cases where aggravating circumstances apply, to provide for more severe custodial sentences where the minimum level of the maximum sentence may not be less than the number of years of imprisonment laid down in the instrument. Although those delegations consider that this approach is fairly simple to apply and leads to a certain degree of approximation of the levels of sanctions that are legally possible in all Member States, they are well aware of the fact that it does not guarantee any harmonisation at the level of sanctions actually served by convicted persons. These are the result of differences in the application of general principles of criminal law, differences between criminal law policies, differences in the methods of delivering sentences and differences between the rules and practices for the enforcement of sanctions. In this spirit, the delegations consider that the first harmonisation stage can only occur at a legislative level. Given that the approach of a minimum level of fixed maximum sentences can potentially jeopardise national systems of sanctions, the delegations expressed their willingness to study possibilities to make this approach more flexible. Denmark's proposal on the other hand consists of putting levels of custodial sentences into three categories: penalties giving rise to extradition (I), long sentences (II) and sentences of the longest duration (III). Austria's proposal follows the same lines and specifies levels II and III. Level II consists of custodial sentences of average duration depending

now very much that EU efforts are focused primarily on attempting to enhance security (whether or not this is the effect in practice), presumably at the expense of freedom and justice. The potential added value of the current approach is therefore unclear.

on the national law, which are in any case considerably longer than required for extradition purposes and which normally lead to the imposition of substantial custodial sentences. Level III consists of custodial sentences which form part of the group of longest sentences applied under national law. Under this system, the Council would only have to agree on the level corresponding to a particular offence covered by the framework decision. The content of levels II and III would be left to the individual Member States' discretion. This option guarantees maximum flexibility for national law and considerably simplifies discussions at the EU level by restricting them to a determination of the degree of seriousness for criminal offences. In terms of approximation, however, this option only has a very limited effect in the way that it only ensures a minimum level of convergence, while maintaining the cohesion of national systems. The underlying idea here is that the public perception of the general level of sanctions leads to sufficient approximation without any indication of a specific sentence at EU level. Greater harmonisation was not required, as other factors such as maximising profit or the risk of being arrested or prosecuted are more decisive in the criminal's choice of location of criminal activity. A combined option starts from the premise that the above two approaches are not incompatible: both options have advantages and drawbacks. A realistic approach therefore consists in developing the ideas contained in both options so as to achieve convergence on the level of penalties. This would enable a balance to be struck between simply referring to national law and determining a minimum threshold for a single Europe-wide maximum penalty. The combined option stresses the need to specify particular common penalties provided for under law which reflect the seriousness of offences in all Member States. That is why a limited range of penalties could be introduced so as to preserve the flexibility of the national law of the Member States. This range would include neither absolute minimum nor maximum levels for the penalties to be applied: it would indicate that the level of possible maximum penalties for a specific category of offences should at least be between the figures indicated for each level. By way of example, the following levels are proposed: level 1: penalties giving rise to extradition, level 2: penalties whose upper limit would at least range from 1 to 5 years, level 3: penalties whose upper limit would at least range from 5 to 10 years and level 4: penalties whose upper limit would exceed 10 years. Under this system for a specific offence referred to in a framework decision, the Council should only have to agree on the choice of level. The content of the levels would, however, be determined at the EU level. Under this option, level 1 would be the rule for all areas where criminal charges are harmonised. In order to apply levels 2, 3 and 4, criteria would have to be developed justifying more severe penalties. This option guarantees flexibility for national law within the limits of this range and simplifies discussions at the EU level on the seriousness of a particular form of crime; Council of the European Union, 13789/01 LIMITE DROIPEN 95, Brussels, 9 November 2001, Method for approximating sanctions – proposed technical option and Raad van de Europese Unie 13957/01 LIMITE DROIPEN 96, Brussel, 14 november 2001, Methode voor de harmonisatie van de straffen-voorstel voor technische opties.

Harmen van der Wilt

Some critical reflections on the process of harmonisation of criminal law within the European Union

Introduction

The congress committee has invited me to express some critical observations on the process of harmonisation of criminal law in Europe. This may imply different assumptions on their part. For one thing, they may consider me as a staunch opponent of the process of harmonisation and are kind enough to offer me an opportunity to vent my indignation. On the other hand, they may think of me as a person with a moderate view on the topic who, for the sake of the argument, is willing to play the devil's advocate.

I will be perfectly candid with you in submitting that I am critical of the process of harmonisation. Not, I would like to emphasise, as a matter of principle, but I have my misgivings as to the way harmonisation currently takes shape within the context of the European Union (EU). In my view, the EU-propelled harmonisation process is (still) an ill-considered venture which exhibits too much confidence in the criminal law as a remedy to cure all societal ills and which might end up encouraging the proliferation of (bad) criminal law.

In order to support my argument, I will first, very briefly, address the mainstream objections to harmonisation. Next, I will dwell upon the main object and purpose of harmonisation of criminal law, as advanced by its European proponents. Then, I will deal with the institutional framework of harmonisation, its (intended) scope and its legal ramifications. Finally, I would like to reflect on the question of whether the presupposed objects and purposes are well served or likely to be achieved by harmonisation. At this juncture, I would like to emphasise that my aims are quite modest. In view of the limited time, I can only refer to the extent to which the harmonisation process has influenced Dutch criminal law, with which I am, obviously, more familiar.

Objections to harmonisation of criminal law

The main arguments against harmonisation of criminal law are well known. It is widely assumed that criminal law is a product of culture. It is rooted in history and exhibits a nation's deepest convictions and values. Each endeavour to harmonise or even unify criminal law within a community of States like the EU impinges upon a nation's sovereignty and may violate value pluralism.

Although I still sympathise with this argument to a certain extent, I no longer fully

endorse it. In its crudest form, it seems to ignore the fact that States may be inclined to sacrifice some of their uniqueness for the common good. After all, this is the essence of the whole process of economic, political and cultural integration in Europe. It is by no means self-evident that this process should stop at the door of criminal law.[1]

A more serious objection is that this essentially conservative approach may obstruct the necessary measures which would enable the European States to face the challenges raised by organised crime.

Object and purpose of the harmonisation process

The main argument advanced in favour of harmonisation has always been that fugitives from justice may take advantage of existing differences between systems of criminal law. Impunity, or at least a relatively mild penal climate, may attract offenders and even technical differences in substantive law may hamper international co-operation in criminal affairs in view of the double incrimination requirement. Obviously, this hypothesis requires further research as to the extent that international co-operation is actually obstructed by differences between criminal law systems. I will return to this issue later on.

The second rationale of harmonisation arises from the fact that Member States of the EU increasingly share common – financial – interests. It has been asserted that Member States frequently are reluctant – or even unwilling – to protect those common interests vigorously, because this might jeopardise their competitive position.[2] Ideally, law enforcement should rest in the hands of the European institutions themselves, a goal that has gathered momentum since the establishment of UCLAF and OLAF. However, as long as the complete transfer of enforcement powers has not fully materialised, Member States should take common efforts to protect the financial interests of the Community. This entails consensus as to the behaviour which threatens the (financial) interests of the European Community (fraud, corruption etc). Such conduct should be countered by appropriate sanctions that are effective, proportional and have a deterrent effect, which almost implies the application of criminal law. Furthermore, Member States are required to protect the interests of the Community with the same vigour and diligence as similar national interests. This so called assimilation principle was introduced by the European Court of Justice in the famous Greek maze-case and has since been incorporated in numerous legal instruments.[3]

[1] Prof. Cadoppi, though recognising the importance of the congruence between legal norms and the morality of the community, asserts that moral and social values in Europe are converging. Besides, so he argues, the acknowledgement of a common denominator as to harmful behaviour which should be the subject of criminal law may contribute to a reduction of its scope. Although I could not agree more, legal practice disavows his optimistic point of view. A. Cadoppi, Towards a European Criminal Code?, *European Journal of Crime, Criminal Law and Criminal Justice*, 1996-1, p. 4-7

[2] On this so called 'Delaware effect', see Christopher Harding, Models of Enforcement: Direct and Delegated Enforcement and the Emergence of a 'Joint Action' Model, in: Chr. Harding and B. Swart, *Enforcing European Community Rules*, Aldershot 1996, p. 31

[3] Case 68/88, Commission v. Greece [1989] E.C.R. 2965

In short: the common plight to protect the financial interests of the European Community involves the harmonisation of criminal law.

The crucial question is whether the harmonisation process will contribute to the accomplishment of these objectives and whether it will, by doing so, live up to the great expectations. It is my contention that it will be quite difficult, in the short run, to measure the success of the harmonisation project in this respect. After all, the project has only just started. What can be done, however, is to investigate Member States' reactions to the harmonisation drive. What choices have been made in the selection of conduct which should be penalised by Member States? Have they already enacted legislation in order to comply with their international obligations? Or have they rather resisted certain proposals? Does the new legislation fit the European standards or perhaps even exceed international obligations? To what extent do Member States' legal solutions relate to the stated objectives?

Such highly relevant questions require extended and profound legal comparative research. This may shed a light on the quality and the dynamics of the harmonisation process and it may give some guidance for future proposals. By way of example, I will deal with some recent legal initiatives by the Dutch authorities in order to find answers to the questions raised above. But before I embark on this enterprise, I will discuss the institutional aspects of the harmonisation process.

Institutional aspects of the harmonisation process

As is well known, the harmonisation process is embedded in the inter-governmental framework of the Third Pillar of the Treaty of the EU. The intention of the EU to interfere with the criminal law of Member States comes to the fore in Article 29 of the Treaty. The prevention and repression of organised or other crime is a major part of the overall objective, to provide the European citizens with a high level of safety in an area of freedom, security and justice. The crimes which are particularly mentioned – terrorism, trade in human beings, crimes against children, illegal trade in drugs and arms, corruption and fraud – do not surprise. Most of these crimes are by their very nature trans-boundary and therefore require international co-operation. Moreover, these crimes tend to affect the interests of several States. The addition of fraud and corruption should be considered in the light of the efforts to improve protection of the financial interests of the Community.

One of the means to achieve the objectives of the Union is the improvement of judicial co-operation (Article 31). Article 31 sub e expressly refers to harmonisation by enjoining Member States

> to adopt progressively measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.

The incorporation of the harmonisation provision within the Article on judicial co-operation reinforces the impression that, in the eyes of the Union, harmonisation

serves primarily as a tool to 'grease' supposedly stiff judicial co-operation.

Article 34 specifies the legal instruments which should be used for the different purposes outlined in Title VI. Of particular relevance is the framework decision, which has been defined in Article 34(2) (b). Acting unanimously on the initiative of any Member State or of the Commission, the Council may:

> adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect

Obviously, the framework decision represents the good old EC-directive in the field of criminal law.

At first sight, the claims of the EU seem rather modest. For one thing, the area of substantive criminal law which should be the subject of harmonisation is quite limited. As witnessed by Article 29, the EU encroaches upon the entire field of criminal law, but is more selective in imposing an obligation on Member States to mutually adapt their respective legislation.

In the second place, the Union Treaty does not envisage complete unification of criminal law in Europe. Neither definitions nor sanctions are imposed from above. In addition, the Third Pillar does not provide for the transfer of enforcement powers to the European institutions.[4]

The term 'approximation of the laws and regulations of the Member States' does not imply a rigid approach in which fixed standards are concocted for Member States to accept. Rather it suggests an open intellectual discourse in which each State is free to advance the fine details of its own solution. Moreover, the principle of unanimity seems to warrant that Member States are not forced to comply with international standards against their own will.

However, we should be careful not to take things at face value. The unassuming enumeration of those forms of criminality which should be the subject of harmonisation is slightly deceptive, as the open-ended concept of 'organised crime' enables the Union to strengthen its grip on practically all criminal law of Member States. Recently, framework decisions have been proposed which bear upon widely divergent topics, such as the facilitation of unauthorised entry and residence, cyber-crime and crimes against the environment. The summit of the European Council at Tampere in 1999 seems to confirm that the scope of the harmonisation process is progressively widening.[5]

[4] This assertion should be qualified as far as the Corpus Juris project is concerned. This thought-provoking project favours a structured and more comprehensive solution by defining in close detail criminal law provisions, the mutual recognition of methods of evidence gathering and the establishment of a European Prosecution Office, with its far reaching powers. However, the project has limited scope as it only deals with the criminal repression of fraud against the financial interests of the EC. Compare M. Delmas-Marty & J.A.E. Vervaele (eds.) *The Implementation of the Corpus Juris in the Member States*, Antwerpen-Groningen-Oxford 2000

[5] The Conclusions of the Presidency mention limited areas of special importance, such as financial

Secondly, one should not underestimate the amount of pressure exerted on Member States (by their peers) to accept certain proposals for framework decisions or other legal instruments. A case in point is the prescription of minimal sanctions which has been fiercely opposed by the Netherlands and which has even been outlawed by an amendment to the Treaty of Amsterdam. Increasingly, the Dutch posture is under attack and it is doubtful whether it will stand firm rather than succumb to the pressure to give in on this point.

Last but not least, the inter-governmental structure also has its shortcomings. Traditionally, lack of transparency, deficient judicial control and poor democratic legitimacy have been the weak spots of the Third Pillar. The position of the European Court of Justice has been formalised and has certainly improved, compared with the Maastricht Treaty. Still, its power to take preliminary decisions is dependant on the consent of Member States and it is not permitted to verify the validity and proportionality of police operations. Furthermore, the European Parliament only has the right to be consulted; it lacks any co-decision powers.

From this perspective, the transfer of TitleVI to the First Pillar five years after the Amsterdam Treaty entered in force – as provided in the procedure of Article 67 of the EC treaty – may not be such a bad idea after all, even though this obviously entails further erosion of national sovereignty in the field of criminal law.

I believe that deficiencies in the creative process of criminal law at the European level affect subsequent legislative initiatives by Member States and may even, at least to a certain extent, undermine their legitimacy. This takes me to the core of my argument.

To implement or not to implement. Is that the question?

The principle of *pacta sunt servanda* dictates that States have to comply with the obligations they have entered into on an international level. By their very nature, framework decisions leave Member States of the European Union a margin of discretion in this respect. The extent of this obviously depends on the measure of detail in which the provisions are drafted. It is my impression that the provisions of framework decisions are progressively becoming more specific, concomitantly restricting room for Member States to implement them in a way that best suits their national legal culture.

It should be noted that Treaties or conventions usually contain more clear cut and specific provisions. Of course, States may qualify their obligations by making reservations, but conventions generally allow less flexibility as to their observance.

The distinction is of relevance because most Member States, amongst them the Netherlands, have hardly incorporated any framework decisions into national law, while they have implemented international conventions deriving both from the

crime, illicit trade in human beings, in particular the exploitation of women and sexual exploitation of children, high-tech crime and crimes against the environment. Moreover the Council stresses the importance of adopting measures against money laundering. Conclusions of the Presidency – Tampere, 15/ 16 October 1999, § 48 and §§ 51-58

framework of the EU and other institutional sources. Only this year, the Dutch government has enacted criminal legislation which has expressly been presented as the implementation of international obligations. I am referring to legislation in the field of corruption and money laundering. I will show that only a small part of this legislation can be imputed to (the compliance of) international obligations.

Starting with the (anti-) corruption legislation, there is no point in denying that recently adopted European instruments urge Member States to adapt their legislation accordingly. The very purpose of both the Protocol to the Convention on the Protection of the European Communities' Financial Interests ('anti-corruption Protocol') and the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union, is to assure that Member States' criminal legislation also extends to corruption of foreign civil servants.[6] In the newly enacted legislation, the Dutch government faithfully complies with its international obligations by protecting foreign civil servants in the same way as Dutch officials.

A second obligation does not derive from legal instruments of the EU but from the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[7] This convention compels the State parties not only to penalise the bribing of civil servants in an attempt to induce them to perform activities contrary to their official duties, but also the offering of bribes to encourage activities in conformity with official duties. In response, new legislation introduces Article 177a of the Penal Code, which brings Dutch criminal law into conformity with the treaty obligations. The provision serves as a counterpart to Article 362 Dutch Penal Code on passive corruption and plugs a loophole in Dutch criminal law.

However, the Dutch government has taken the opportunity to reshuffle the present provisions in a way that vastly exceeds the underlying international obligations. The new legislation also makes it a criminal offence for the civil servant to receive any goods or services *after* he has conducted his activities, even if he has not exceeded the limits of his official duties. The Minister of Justice has defended this provision by pointing to evidentiary problems. Practice shows that the Public Prosecutor has a hard job in proving that arrangements were made beforehand, especially because neither the person who is bribing, nor the civil servant, have something to gain by confession. Although the argument is not completely pointless, one may be wary of the consequences, as any reward for loyal service may be tainted. The main point I would like to make, however, is that this new provision in no way stems from existing international obligations.

The same applies to other adaptations of anti-corruption law in the Netherlands.

For one thing, Article 362 of the Dutch Penal Code in its new version extends criminal responsibility to negligent behaviour. Initially, the civil servant could only

[6] Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests, Dublin, 27 September 1996, 1996 *OJ* C 313/1; Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union, 26 May 1997, *OJ* 1997 C 195

[7] Paris, 17 December 1997, (Dutch:) Trb. 1998, 54

incur criminal liability if he acted intentionally. Case law had already watered down the element of 'knowledge' to recklessness, but the current extension to negligence implies a further widening of the scope of criminal law.

Secondly, the revised provision applies to former civil servants who accept rewards for the activities performed during his tenure. Active corruption of the former civil servant has also been made a criminal offence.

Finally, maximum penalties for some of corruption offences have been increased considerably. I stress again that none of these measures have been taken in order to comply with treaty obligations.[8]

The same holds true for the introduction of anti-money laundering legislation.[9] The Dutch Minister of Justice has advanced several reasons for putting this Bill before Parliament. First and foremost, however, he stressed the international obligations which constitute the backbone of this initiative. In this respect he referred to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the Convention on Laundering, Search , Seizure and Confiscation of the Proceeds from Crime (Council of Europe: Straatsburg, 8 November 1990), the EC Directive 91/308 on prevention of the use of the financial system for the purpose of money laundering and – most importantly for our purpose – the Joint Action on the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime.[10] This latter instrument compels Member States to comply with the Council of Europe (anti-laundering) Convention.

It cannot be denied that the fight against money laundering features at the top of the political agenda in Brussels. At the Tampere Summit, the Presidency proclaimed its solemn determination to eradicate all kinds of money laundering. Member States were exhorted not only to amend their substantive criminal law in order to apply both to money laundering and a broad gamut of related offences, but also to enact procedural legislation for the purposes of the tracing, freezing and confiscation of the instrumentalities and proceeds of crime.[11]

Presumably, our Minister of Justice is referring to this belligerent language when he argues that the introduction of a separate money laundering offence under Dutch criminal law may contribute to the qualitative improvement of international co-operation, since the offence may be more easily recognised by other States.

A specific aspect of the Bill relates to a peculiarity in Dutch criminal law. Presently, a separate money laundering offence does not exist: money laundering is covered by 'receipt of stolen goods'. Article 416 of the Dutch Criminal Code makes it a crime for a person to acquire, possess or transfer property, or to establish or transfer a contractual right or an encumbrance on such property, while at the same time being aware that such property had been obtained by means of a crime. Article 417bis covers

[8] In the same vein see J.F.L. Roording, *Corruptie in het Nederlandse strafrecht*, in: 32 Delikt en Delinkwent, Februari 2002, p. 156

[9] This new legislation came into force on December 14, 2001: Act on money laundering, 6 December 2001, Stb. 2001, 606

[10] Joint Action of 3 December 1998, 1998 *OJ* L 333

[11] European Council of Tampere, 15 and 16 October 1999, Conclusions of the Presidency, par. 51-58

negligent receipt.[12] According to case law, a person who commits an offence cannot at the same time be convicted of laundering the proceeds of that crime, because receiving has always been considered as an act facilitating the commission of crimes by *other* persons. The Bill we are currently discussing explicitly aims to abolish this restriction as far as money laundering is concerned. Money launders may thus be tried and convicted, even if they themselves procured the items by way of a crime.

Obviously, the change of legislation may facilitate international co-operation in criminal matters where other States were to request procedural assistance and the suspect of a predicate offence is also standing trial for money laundering. However, the Minister of Justice was candid enough to admit that the current legal construction has hardly ever caused any problems, in view of the double criminality provision. Moreover, the proposed change of legislation does not derive from any international obligations. On the contrary, Article 6, sub 2 under b of the European Convention explicitly allows State parties to refrain from applying money laundering provisions to persons who have committed the predicate offence.[13]

The foregoing analysis of two recent Bills allows no other conclusion than that these legislative proposals extend significantly beyond the international obligations they claim to fulfil. If national legislation does not – or only partially – serve the objectives of the international instruments it claims to implement, the legitimising powers of such instruments become slightly perfunctory. Of course one could argue that the Netherlands, like all other sovereign States, is perfectly entitled to give shape to its international obligations, as long as it abides by the minimum standards those instruments seek to proclaim and it does not violate other international obligations. Equally, one may contend that Brussels is not to blame for any overzealous implementation of its instruments.

For several reasons, I do not endorse such an opinion. First of all, the results so far of the European Union's involvement in criminal law do not stand out for their mutual coherence, nor for their thorough preparation. One cannot escape the impression that some, if not most legal initiatives serve political purposes, each Presidency striving to outdo its predecessor. Usually, one seeks in vain for a sound legal analysis as to the necessity of harmonisation of criminal law in a specific area. Are the criminal law systems of Member States indeed diverging and to what extent does this disrupt international co-operation in criminal affairs? Virtually no answers have been provided to such pressing questions.

If we agree on the weak legal foundations of most parts of European criminal law, we may equally be inclined to doubt the wisdom of relying too much on such dubious pillars as a source of legitimation. In order to avoid any misunderstanding: I do not reproach my own government for enacting new criminal legislation in the field of corruption or money laundering. There may be perfectly good reasons from a national point of view to improve the structure of criminal law in order to plug unacceptable

[12] Translation from R. Haentjens and Bert Swart, *Substantive Criminal Law*, in: B. Swart & A. Klip (eds.) International Criminal Law in the Netherlands, Freiburg im Br. 1997, p. 44
[13] Admitted by the Minister of Justice, MvT, II, 1999-2000, 27 159, p. 7

loopholes. However, it would be more appropriate if the national authorities were not to present international obligations as an unfounded justification for such actions.

Secondly, if the European Union decides to encroach upon the criminal law of Member States, as it currently does within the structure of the Third Pillar, it may be held responsible for the overall quality of this part of law. Until now, the European Union has evaded such responsibility by emphasising time and again that the provisions of conventions or framework decisions do not preclude Member States from taking protective measures which exceed those provisions. In other words: any proliferation of criminal law is none of the EU's business!

Two instruments in comparative perspective

To conclude my discourse, I would like to discuss very briefly two EU instruments which exemplify both my despair and my cautious faith respectively in the harmonisation project. The first, concerning a Draft Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence, is in my view a perfect example of 'bad' European Criminal law. This framework decision should be considered in the light of Article 27 of the Schengen Convention, which enjoins States parties to penalise persons who engage in frontier-running, provided they act out of profit motive. The present draft framework decision, initiated by the French, ignores the constituent element 'for financial gain', thus potentially penalising charitable organisations who might assist asylum seekers and refugees. Moreover, the framework decision contemplates the introduction of minimal maximum penalties up to ten years imprisonment! The Netherlands has fiercely opposed this framework decision as it currently stands. The latest compromise appears to be the incorporation of a humanitarian clause. Suspects are allowed to show that they acted out of human concern, for no financial purpose whatsoever. Obviously, this entails a reversal of the burden of proof, which is hardly an improvement. I would strongly advise against the adoption of this dismal proposal.

Finally, I would like to point to an EU instrument which, though it may not be perfect, at least takes us along the right path in our search for acceptable European criminal law. I am referring to the Joint Action on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union.[14] I shall try to explain why this instrument has my support. Its main asset is that it leaves Member States the option to choose between two concepts of criminal responsibility, thus showing respect for divergent legal traditions. Member States may choose either to make the participation in a criminal organisation a criminal offence or, if that would better suit the legal concepts with which they are familiar, 'conspiracy' to commit certain (serious) crimes. However, they are under an obligation to penalise one or both of these types of conduct if the criminal organisation intends to commit (or the agreement of the conspirators involves the commission of) crimes or other

[14] Joint Action of 21 December 1998, *OJ* L 351/1

offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty.

Of special importance is the second paragraph of Article 2 which reads as follows:

> Irrespective of whether they have elected to make the type of conduct referred to in paragraph 1 (participation in a criminal organisation) a criminal offence or that in paragraph 2 (conspiracy), Member States will afford one another the most comprehensive assistance possible in respect of the offences covered by this Article...

Member States are thus encouraged to accept other legal constructions than their own in their quest for closer co-operation. Although the condition of double criminality is not expressly abolished, there is at least the suggestion that culturally rooted differences in concepts of criminal law should not hamper mutual assistance in criminal affairs.

This provision in particular clarifies what this Joint Action is all about. Having taken seriously the attachment of Member States to their own concepts and solutions, the Joint Action seeks to improve the international co-operation in criminal affairs which is, as we have seen, the main objective of the harmonisation process.

In my opinion, this Joint Action represents a highly interesting and resourceful combination of (partial) harmonisation and mutual recognition of legal decisions, a device which has often been advanced as an alternative to harmonisation.[15] However, the scope of this mutual recognition has its limits as well. The incorporation in this Joint Action of a threshold – the objective of the criminal organisation or conspiracy should concern crimes which are threatened by a custodial sentence of at least four years – means that States will not be required to offer assistance for (participation in) minor offences. As an example, people who indulge in all kinds of unusual sexual behaviour in this libertine city should not fear that they are handed over to States with more puritan inclinations.

This Joint Action may serve as a model for future initiatives. It derives from – and may simultaneously reinforce – the notion that nations may cherish their own opinions on what constitutes criminal behaviour and what not. Tolerance, respect and mutual understanding are the twin-brothers to freedom and justice and these are, given the current emphasis on safety, in dire need of reinforcement.

[15] Summit of the European Council, Tampere 15/16 October 1999, par. 31-37. Compare in Dutch literature: C.F. Rüter, Eliminatie door harmonisatie; Nederlands strafrecht na 1990, in: *Ars Aequi* 38 (1989), p. 212-221 and (especially) A.H.J. Swart, *Een ware Europese rechtsruimte*, Gouda Quint: Deventer 2001.

Dionysios Spinellis

Harmonisation and harmonising measures in criminal law: Objections to harmonisation and future perspectives

Introduction

Van der Wilt suggested that his report was destined by the organisers of this symposium to be a 'devils advocate' presentation. If that was the case, I must admit that it has been one of the best advocacies possible in favour of the worst possible client, the devil. But the question remains: are the objections against the framework decision really a devilish case? In my view, although I do not entirely agree with some points made by Van der Wilt, I think that in some of his basic observations he is right. As a result, my role as a commentator cannot be construed otherwise than that of an amicus curiae trying to sort out what seems to me convincing from what does not.[1]

First of all, in order to be clear as to what I am talking about, may I add my own definition of the term 'harmonisation' to the ones which previous speakers have given so meticulously. For the purposes of our discussion, I understand harmonisation as co-ordination, adaptation, approximation and even, if necessary, unification of norms and institutions in order to achieve the best possible result in efforts to combat criminality in particular categories affecting the European Union (EU).[2]

The arguments in favour and against harmonisation of criminal law mainly concern their purpose and the proposed means for its implementation.

Objections mentioned by the rapporteur

As to the purpose of harmonising and/or unifying criminal law at an international level, it is interesting that Van der Wilt does not consider as irrefutable the classical arguments against such efforts: namely, that the criminal law, being the product of culture and history exhibiting the deepest national convictions and values, should not be harmonised or unified in, for example, the European Union (EU), because that

[1] This is the only objective of the present paper, which does not purport to be an overall discussion of the problem of the harmonisation of criminal law. On that issue, see other articles on this subject, particularly André Klip, Harmonisierung des Strafrechts –eine fixe Idee?, *NStZ* 2000, 626 ff., which I noted only after the symposium and which therefore has been considered only as to some isolated points.

[2] A more systematic distinction of successive phases of harmonisation is provided by Klip supra, p.627. I think that the degree of harmonisation should be decided each time by necessity, not in absolute categories.

would impinge upon the nation's sovereignty and may violate pluralism of values. On the contrary, he accepts that some of these unique principles may be sacrificed for the common good.

Furthermore, as to the purpose of harmonisation, the main argument in favour is that differences in substantive criminal law may hamper international co-operation in criminal matters, in view of the double criminality requirement for extradition and mutual assistance.[3] He believes, however, that this argument is not self-evident but requires further attention and research.

Although I agree that criminological research is both necessary and useful before legislation in criminal matters is enacted, I think that here it is rather obvious that the double criminality requirement is an obstacle to extradition and mutual assistance. Experience shows that requests for such kinds of assistance are often rejected. Furthermore, the fact that either in some States certain forms of behaviour are less severely penalised or respective legislation contains loopholes or lacunae, obviously may and in practice does attract criminal activity and creates 'havens'.

The second rational of harmonisation is that the Member States of the EU have certain common interests which should be protected in an effective way, even though Member States are often reluctant to do so. Therefore, common European institutions should be created and, until such institutions are established, Member States should make common efforts to protect these interests. This, however, entails common concepts of the relevant offences and appropriate sanctions.

The rapporteur, however, considers that it would be quite difficult to measure the success of the harmonisation process by assessing the implementation of these objectives. Here again I think that if obviously undesirable situations, such as the double criminality obstacle and the existence of criminal havens, are eliminated and detection, investigation and prosecution are performed by independent authorities common in the whole territory of the European Member States, it is very probable that the suppression of certain forms of criminality will improve. This is the rationale behind the proposed *Corpus Juris* project, which is still being discussed and considered.[4] Of course, certainty as to the results of the new institutions cannot be achieved for quite a long time. This, however, was the case with most legislative initiatives in the criminal law field, both at the national and international level, and has not been a reason for the failure to undertake such initiatives and also to take certain risks.

[3] Cf. Resolutions of the 16th Congress of the AIDP in Budapest on September 5-11 1999, Section IV D, 1, where it is stated that 'other lacunae should be resolved not by abolishing double criminality, but by harmonising definitions of crimes which states seek to make extraditable.' Klip (supra, 628, footnote 11) would prefer, if necessary to abolish the double criminality requirement. This however, would raise other serious questions.

[4] This was by no means determined by the expert group as 'the only real, finally valid document' as Klip, supra 630, ironically observes. Shortly afterwards (2000), a new revised draft was published by M. Delmas-Marty and J.A.E. Vervaele (eds.), which was the result of many comments and discussions. Of course, I agree with Klip that the results of harmonisation, as well as any legal draft or legal text which has entered into force, can never be final.

The institutional aspects of harmonisation

The rapporteur examines the institutional aspects of the harmonisation process and in particular Article 29 of the Union Treaty, which he believes classifies harmonisation as 'a tool to grease the supposedly stiff judicial co-operation'. According to the rapporteur, although the area of substantive criminal law, which should be subject to harmonisation, is quite limited and the Union Treaty does not envisage its complete unification (including definitions of offences, required sanctions and enforcement powers) he considers such restrictions as deceptive.

His first reason is that the concept of organised crime enables the EU to strengthen its grip on practically all criminal law of the Member States. Admittedly, organised crime is a concept difficult to define and the possibility already exists for the EU authorities to encroach upon wider aspects of criminal law than one would think expedient. However, I think that the fear that the EU grip may be extended to practically all criminal law is highly exaggerated. By using the criterion of 'organised crime' and the other terms in Article 29 of TEU, I think that the extension of EU competence on criminal matters could be reasonably limited. Furthermore, it should be noted that even the EU authorities would have neither reason nor interest to extend their control upon areas other than those affecting the EU as a whole.

The rapporteur mentioned, as dangerous examples of such encroachment, certain framework decisions which have already been proposed concerning offences of unauthorised entry and residence, cyber crime and offences against the environment. I think that the areas covered by the proposed framework decisions concern interests common to all Member States and threats to them which have appeared rather recently. In view of this, value pluralism does not seem to be of much relevance.

The means of harmonisation

The prescription of minimum penalties proposed by such framework decisions is inevitable, if the common interests concerning all Member States are to be protected in a reasonable way, without creating criminal havens.

Therefore, the strong pressure exerted on Member States to accept them is a strategy not unknown even in national lawmaking procedures, for example between parties represented in Parliament. To the extent that the rapporteur accepted that the sacrifice of certain elements of national sovereignty was necessary, it is inevitable that such strategies are a necessary evil.

As to the weaknesses of the intergovernmental structure of the Third Pillar, such as the lack of transparency, deficient judicial control and poor democratic legitimacy, these are points on which I cannot but agree with the rapporteur's concerns. As the rapporteur admits, the position of the ECJ has been improved. However, the fact that its power to make preliminary rulings depends firstly on the choice and declaration of the Member States as to the extent of relevant requests[5] and secondly on the initiative

[5] Art. 35 paras 2 and 3 TEU.

of national courts in each case, does not lessen the importance of this improvement. These provisions support the view that the ECJ does not interfere with the judicial systems of the Member States unless this is absolutely necessary, a condition largely left to the discretion of national authorities. Furthermore, the fact that the ECJ is not allowed to verify the validity and proportionality of police operations, which remain in the hands of the national judicial systems, is a sign of reasonable distribution of judicial power between national and European judicatures.

The consultative (i.e. not decisive role) of the European Parliament is a problem which may affect subsequent legislative initiatives by Member States by undermining their legitimacy. I think that the strengthening of this role in future is a must, if we want a proper balance of power between the European authorities.

A further important point made by Van der Wilt is that, although framework decisions should leave Member States with some flexibility, he believes they are becoming progressively more specific, thereby restricting Member States. I cannot but share his view, in view of some recent draft framework decisions – for example on the European warrant of arrest and on combating terrorism.

This symposium gives us an opportunity to consider whether the provisions of the TEU justify specific framework decisions. The legal basis of framework decisions are Articles 29, 31 (e) and 34 para 2 (b) of the TEU. Article 34 para 2 (b), which defines the limits within which decisions are binding upon the Member States, should in particular be examined more carefully, in order to determine whether Member States are strictly bound by every word of the framework decision or instead have some discretion, irrespective of the actual wording. In my opinion, the ECJ has jurisdiction to decide this question pursuant to Article 35 para 6 of the TEU. Therefore, if a Member State considers that a framework decision is too detailed and does not leave sufficient margin of appreciation for the national lawmakers to decide the form and methodology in order to achieve the required result it could bring an action before the ECJ. Another possibility is that a Member State which considers that the framework decision encroaches too much upon its national law, may risk introducing norms which differ in certain aspects from the framework decision and then leave it to the Commission or another Member State to ask the ECJ (under Art. 35 paras 1 and 6) to decide whether its course was in compliance with these provisions or not.[6]

Van der Wilt goes on to say that, although international treaties and conventions contain more clear-cut and specific provisions, most Member States have implemented them, yet have hardly incorporated any framework decisions into national law. I also think that it would be useful to investigate Member States' reactions to the harmonisation drive, which will require extended and profound legal comparative research.

Since such research has obviously not yet been done, the rapporteur cites examples from the Dutch experience, which are of course familiar to him. He describes how the Dutch government has enacted legislation amending provisions against corruption and money laundering in a way significantly in excess of underlying international obliga-

[6] Not being a specialist in European Law, I have no information as to whether the ECJ has already had occasion to rule on such problems. I have not had sufficient time to undertake this independent research.

tions both as to the behaviour criminalised and the maximum penalties provided.

My own reaction to this is firstly, that I cannot exclude that such legislation was useful and even necessary in the Netherlands. Since, however, I do not know those particular circumstances, I may mention that in Greece, with respect to corruption, the distinction between bribery for an act, past or future, constituting violation of the professional duties of a civil servant (Art. 235 of the initial text of the gr.PC) and bribery for a legal act simply pertaining to his duties (Art. 236 gr.PC) was abolished in 1972 and both offences have become variations of a common offence punishable by the same penalties. By more recent Law 2802/2000 the relevant article was amended once again, clarifying that the violation of the duty of a civil servant consists in the acceptance of bribes for an act concerning the civil service, so that it is not necessary that the act is in itself illegal.

In spite of this particular observation, however, I think that any difference in the compliance of national lawmakers with framework decisions and international treaties should be carefully studied.

The conclusions of Van der Wilt

Van der Wilt concludes that legislative proposals in the Netherlands have considerably exceeded the international obligations they claim to fulfil. He counters the hypothetical argument that Brussels is not to blame for any overzealous implementation of its instruments by national law-makers, with the following arguments: EU criminal law lacks mutual coherence and thorough preparation, especially as to the necessity for harmonisation in a specific area. If most parts of European criminal law have such weak legal foundation, it is not appropriate for national authorities to invoke international obligations as an excuse for improving their criminal law by plugging 'annoying' loopholes.

The rapporteur concluded his presentation by citing two examples of European criminal law: a bad one and a good one. The reasons why the former is bad relate to its content, which understandably attract the rapporteur's criticism. By contrast, the main reason why he regards favourably the second one is that it leaves Member States with the choice between two concepts of criminal responsibility, thus showing respect for divergent legal traditions. Furthermore, it also obligates Member States to afford each other the most comprehensive assistance possible, which means that the requested State should not be required to invoke the double criminality requirement.

This combination of partial harmonisation and mutual recognition, also including a threshold concerning minor offences is, according to the rapporteur, the best possible solution to the problems of inter-European co-operation in criminal matters. This conclusion seems to me quite reasonable. In view, however, of criticism and counter criticism being exercised, I would like to summarise my views as follows.

My own point of view

1. A primary goal of penal laws is to protect the legal interests of both the community at large and of individuals, from activities affecting them seriously and these conditions are also fulfilled with respect to such activities affecting the European Union collectively. While a murder, a robbery, a rape or a terrorist act in a certain Member State damages legal interests only in that Member State, a fraud against the budget of the EU affects the common financial interests of all Member States. The same can be said about unauthorised entry and residence in the EU, where persons are free to move, as well as cyber crime and offences against the environment in Europe.
2. Since the interests affected concern the general area of the EU, it is understandable that European authorities should be entitled to deal to a certain extent with their violations, and at least provide minimum rules and adopt framework decisions. The partial sacrifice of national sovereignty for the common good is a rational measure, supporting such powers of the EU to the necessary extent.
3. Common agreed definitions of criminal offences and minimum penalties are necessary characteristics of all international instruments, both because they are the common denominators of the views of all participating Member States and because they aim at covering all their various practical and national needs. Naturally each Member State, after ratifying them, is free to and often does add some specific provisions for national use.
4. Even if most citizens, including penalists, are understandably opposed to the proliferation of penal provisions, one has to admit that, in view of new threats to important legal interests, additional penal laws must be introduced as a necessary evil. Furthermore, certain procedural requirements which create practical obstacles to the effective suppression of crimes without being necessary as a protection of human rights, should be simplified or even abolished altogether. This is especially the case if they hamper international co-operation in such areas.
5. The fact that international instruments prepared by European authorities are deficient and yet mandatory for the Member States creates a certain reasonable diffidence towards them and the procedure by which they are produced. However, the only way out of this dilemma is to take efforts to ameliorate the procedure by which such instruments are prepared, while not restricting their production or their binding character. Apart from the impracticability of such an effort in view of the binding provisions of the TEU, it would mean emptying the baby with the bathwater.
6. Harmonisation and even unification of certain parts of the criminal law at EU level are both inevitable, since they are mandatory under the provisions of the TEU, particularly Articles 29, 31 (e) and 34 para 2 (b). It is important to take all efforts to prepare them properly with the necessary diligence corresponding to their importance, while leaving a wide discretion to Member States to opt for alternative solutions in their own national legislation. Such alternatives, however, should not create unequal situations in the various Member States.

7. Every effort should be made to keep requests for harmonisation included in framework decisions within the limits dictated by necessity. Necessity should be used as a legal criterion in order to restrict any unnecessary acts encroaching upon the criminal laws of Member States. Finally, framework decisions should limit themselves to determining the results to be achieved while not interfering with the choice of form and methods, as Article 35 para 2 (b) provides.

Tom Vander Beken

Freedom, security and justice in the European Union. A plea for alternative views on harmonisation

Criminal justice in Europe –an area of freedom, security and justice?

Within the European Union there is no unified criminal justice system (yet). This implies that State response to socially unacceptable behaviour still differs from State to State. It is clear that this has an impact on the development of free movement of goods, persons, services and capital within Europe. Therefore the idea of an *area of freedom, security of justice* has evolved.[1]

In this paper an analysis is made of the specific problems that arise in a European area with different criminal justice systems, and the possible ways to address these problems.

The central question is to what extent harmonisation can be an adequate response to achieve this area of freedom, security and justice. This question cannot simply be solved by looking at criminal law provisions alone since it relates to the quality of entire criminal justice systems. For this reason, it is necessary to consider in this paper the level of prosecution, sentencing and execution of sentences.

What is the problem?

In national criminal cases

The mere existence of differences in the various criminal justice systems throughout Europe has very few formal implications for those crimes without any link to other systems. Such crimes are defined and punished by national parliaments and dealt with only by the national law enforcement authorities. Foreign incriminations and sanctions, or other policies or possibilities of prosecution, adjudication or execution of sentences, do not have any practical impact on such cases.

However, from a moral viewpoint the situation is different, since several approaches towards the same kind of behaviour within the European Union can be percei-

[1] (Article 29 of the Treaty on European Union and the Action Plan of 3 December 1998 of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam in an area of freedom, security and justice – *O.J.*, 23 January 1999, No C 19/1).

ved as unjust and unequal. The meaning of injustice or unequal treatment can lead to a variety of reactions, according to the position of the actor involved. On the one hand, States can conclude that such a situation should lead to a strengthening of criminal justice by filling in those gaps in States with no, or more lenient approaches towards certain phenomena. On the other hand, perpetrators, or those in favour of alternative ways of handling crimes, may find such an approach even more unjust because it leads to a more repressive response.

In international criminal cases

When a crime has an impact in more than one State, the existence of different criminal justice systems in Europe can cause special problems in relation to jurisdiction and international co-operation.

Jurisdiction

Although criminal law is still national, States can extend the application of their criminal law to acts that are committed abroad (extra-territorial jurisdiction). This implies that the existence of a foreign criminal justice system can have an enormous effect on criminal cases, particularly if these also fall under the jurisdiction of a foreign State. States may see this as an attempt by foreign criminal justice systems to interfere. Both perpetrator and victim face consequences, since they are confronted with more than one criminal justice system, implying different State reactions to, and subsequent outcomes for the same kind of behaviour.[2]

From the point of view of the State willing to exert extra-territorial jurisdiction, differences between criminal justice systems can cause problems as well, since some forms of extra-territorial jurisdiction can only be exercised if the behaviour is punishable in the State where it took place (double criminality).

International co-operation

A criminal case very often has ramifications for other States, even without falling under their jurisdiction. Therefore States have to request assistance from other States in order to obtain the necessary evidence (mutual assistance) or persons (extradition) for their national criminal case.

When there are differences in incrimination between the requesting and the requested State, co-operation is sometimes obstructed (double criminality).

More advanced types of international co-operation such as the transfer of criminal

[2] T. Vander Beken, *Forumkeuze in het international strafrecht. Verdeling van misdrijven met aanknopingspunten in meerdere staten*, Antwerpen-Apeldoorn, 1999, 486 p.)

proceedings and the execution of foreign criminal sentences, also require double criminality. In these cases the requirement of double criminality is not even limited to the crime itself *(in abstracto)*, but includes the actual possibility to prosecute (*in concreto*).

Possible solutions

Incriminations

In relation to incrimination, there is no doubt that harmonisation could help to overcome some of the problems mentioned above. If all definitions of crime are the same, at least some components what might be regarded as unfair and unjust legislation could disappear and the double criminality problem would be solved in a way that extra-territorial jurisdiction could be exerted and international co-operation would be more likely.

However, harmonisation is not the only solution to problems in international criminal cases. Another option could be to abolish the requirement of double criminality, both for the purposes of jurisdiction and international co-operation. It is clear that this practical solution only guarantees the extension of the possibility of law enforcement and only multiplies problems for the individuals involved. The fact that the European Union uses the anti-double criminality *piste* (See, for example, list of offences for which double incrimination is *presumed* in Article 2 of the Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between Member States)[3], together with the idea of harmonisation[4] is not a good sign. Apart from a lack of coherency in policy, it shows a preference for a one dimensional (i.e. law enforcement) view on the area of freedom, security and justice.

If the choice is for harmonisation, it should be stressed that this should not necessarily lead to more crimes. The fact that certain behaviour is not criminalized in a State does not imply that the State is wrong. Therefore the discussion about harmonisation should be broadened to include the content of what should be the subject of harmonisation efforts. A gap analysis is to be made, and then it is to be discussed to determine if it is necessary to fill in gaps by criminal law. It is unclear whether the European Union sees harmonisation at this level in such a broad perspective, since common action on judicial cooperation in criminal matters is seen as 'progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts…' (Article 31 e of the TEU).

The idea that less criminal law could be a better solution than more criminal law also arises when the problem of jurisdictional overlap is addressed. There is no doubt that one solution for competing jurisdictional claims lies in limiting the scope of the

[3] Council of the European Union, 14867/1/01 REV 1 LIMITE COPEN 79 CATS 50, 10 December 2001.
[4] For example Council of the European Union, Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, *Official Journal*, 15 January 2001, No. C 12/1)

extra-territorial jurisdiction of the State. In that sense, the ambition of preventing conflicts of jurisdiction between States (Article 31 d of the TEU) could lead towards the evolution of harmonisation through limitation of criminal law intervention.

Sanctions

Harmonisation of incriminations does not necessarily imply harmonisation of sanctions. However, harmonisation of sanctions could contribute to the development of this European area of freedom, security and justice, both for national and international cases.

The question, however, is the direction of this harmonisation. Article 31 e of the TEU refers to *minimum rules relating to…penalties…*'. In practice, this is interpreted in a way that all sanctions should be brought above a certain minimum by introducing 'minimal maximum' sanctions or 'minimal minimum' sanctions. This last option is very difficult since the criminal justice system of States like the Netherlands does not know the concept of minimal sanctions. However, examples can be found of minimal minimum sanctions. Article 4 of the Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985[5] states:

> 1. Member States shall take the necessary measures to ensure that the penalties applicable to carriers under the provisions of Article 26(2) and (3) of the Schengen Convention are dissuasive, effective and proportionate and that … (b) the minimum amount of these penalties is not less than EUR 3000 or equivalent national currency at the rate of the exchange published in the Official Journal on 10 August 2001, for each person carrier…'

Harmonisation by introducing *minima* is not the only way to address the problem, and the use of *maxima* is at least as valuable to consider. Firstly, it would prevent a turn to more repression, which is the unavoidable outcome of the introduction of minimal maximum sentences. It would also be more compatible with balanced and previously developed solutions. In some legislation about jurisdiction (for example in Switzerland) and in legislation and international treaties on the transfer of criminal proceedings and execution of foreign judgments, the concept of the *lex mitior* has been introduced. This means that judges only apply their own criminal law or rules on crimes committed abroad in as far as it is less severe (*mitior*) than the criminal law applicable at the place where the crime is committed.

Such an approach answers the problem of the inequality between sanctions, by opting for the lowest penalty. By doing so, the jurisdiction problem of the perpetrator is less pronounced, since, while still confronted by more than one criminal justice system for the same act, he has the guarantee to be punished only in accordance with the law having the *softest* sanction.

[5] *O.J.*, L 187, 10 July 2001.

It is remarkable that these options, which were discussed and developed within the framework of the Council of Europe in the 1970s, do not seem to have found their way into the discourse of the European Union.

Prosecution

Harmonisation, in whatever sense, does not solve all problems since not all crimes are prosecuted in the same way in each State.

However, harmonising the prosecution phase is a very difficult task, because it would require clear answers to the question what prosecutorial system is to be used (expediency or legality) and who is steering and controlling the prosecution policy.

Harmonisation with the result that each state is *obliged to prosecute* (some types of) crime is therefore not the best option. Harmonisation at this level could have much more impact on the real problems if the focus is shifted to the *obligation not to prosecute.*

In a situation where several States can act against the same behaviour, it is much more useful to establish rules by which it is possible to limit the action to one State. Both States and perpetrators would benefit from such a situation. Creating strict *ne bis in idem* rules would therefore considerably help harmonisation at this level. But the establishment of a system to decide on the forum for an international criminal case at the earlier stage of prosecution is also indispensable. State negotiations on the *best forum* of a case in the framework of the transfer of criminal proceedings is therefore a good way to respond to existing problems and the need for harmonisation at the prosecutorial level.

However, such a system is not without dangers for the individuals involved, since the forum of their case may be moved from one State to another. It is crucial that the rights of individuals are observed, since it could bring them into a worse legal position than before. This assumption is not purely hypothetical. If law enforcement agencies can alone decide on the place of the forum, it is understandable that this choice will be influenced by law enforcement priorities and understandings of the 'best' place for prosecution. Moreover, practice shows that law enforcement agencies tend to be reluctant to transfer 'their' cases to countries with a more lenient criminal justice system and which are keen to take over criminal cases. This leads to a 'one way' move of cases to the State with the most severe sanctioning system.[6]

More generally, and apart from the definition of the best State for prosecution, it can be argued that the option to introduce certain *obligations not to prosecute* is a valuable track in the harmonisation discussion at the level of the prosecution. This is especially the case if the discussion is linked to the real challenges that criminal justice systems are facing, both in relation to legality and to expediency. Given the increasing case load, these challenges relate not to more prosecution, but to the means

[6] See for example the import/export rate of drug cases between Germany and the Netherlands in the eighties: 40 cases to Germany, 1 to the Netherlands – C. F. Rüter, Moet de was de deur uit?, *Delikt en Delinkwent*, 1984, 101-108).

to develop real prosecution policies in which non- prosecution and diversion are predominant.[7]

Sentencing

If a criminal case finally reaches the court, judges have a certain discretionary power to impose sanctions. States have created different approaches to sanctioning.

Harmonisation at this level is not an easy task, since it touches upon the independence of the judge. Judges have the discretion to look for the best sanction within the limits determined by the law. The idea of sentencing guidelines, first developed at national level, limits the discretion of the judge.

Since this is not categorically accepted at the national level (independence of the judge, leading to higher sanctions), it is unclear to what extent it can be applied at the international level.

However, documents like the Council Resolution of 20 December 1996 on sentencing for serious illicit drug trafficking[8] tend towards the introduction of (soft) sentencing criteria for the judges. The Resolution lists *factors which might be taken into account regarding the custodial penalties that might be applicable in relation to serious drug-trafficking*, such as the extent of the trafficking and the extent to which the person concerned had profited from the illicit traffic.

Execution of sentences

Finally, criminal justice systems differ at the level of the execution of sentences. The inequalities that may result can be solved in two ways.

One option is the harmonisation of all systems of execution of sentences. It is clear that this is very difficult, since it would require similar action on other issues and a uniform policy for systems of supervision.

Another option is to respect foreign sentences. If there really is a European space of freedom, security and justice, it should be possible to respect decisions by foreign judges and execute these decisions, even if the framework of this execution differs. With this option, which is one of mutual recognition, harmonisation at the level of the execution of sentences does not necessarily lead to unification of procedures and laws, but to the development of systems which can be respected and trusted by all Member States.

[7] See for example T. Vander Beken and M. Kilchling, The challenge of balancing the input and the output within criminal justice systems, in *The role of the public prosecutor in the European criminal justice systems*, T. Vander Beken and M. Kilchling (eds.), Brussels, Koninklijke Vlaamse Academie van België voor Wetenschappen en Kunsten, 149-150.

[8] *O.J.*, No C 010, 11 January 1997.

Conclusion

This paper has argued that the problems caused by the existence of different criminal justice systems in the European Union require a balanced answer, if a real European area of freedom, security and justice is to be established. Harmonisation, as such, does not meet this requirement since it does not set any normative standard. This could lead to a situation where harmonisation is used as an instrument mainly aimed at enhancing repression.

However, harmonisation does not have to be interpreted in that way. The problems defined sometimes require harmonisation by creating space for *less criminal law intervention* (transfer of proceedings, *lex mitior*…), rather than harmonising in a way that more is to be done. Particularly if the harmonisation discussion is not narrowed down to just the criminal law provisions, such an alternative approach can be useful.

Finally, harmonisation can also mean respect for diversity and trust. Therefore, a well established system of mutual recognition of foreign sentences without harmonisation at all levels should also have its place in an area of freedom, security and justice.

Theo de Roos

Alternative views on harmonisation

The highly inspiring paper of my colleague Vander Beken has elicited some rather diverse thoughts.

I think that his approach to the central problem is the only right one. Harmonisation of criminal law provisions alone, isolated from issues relating to prosecution, adjudication and execution of sentences, will certainly not provide an adequate answer to behaviour deemed harmful by all EU nations. Nevertheless, it gives rise to common definitions of punishable acts and omissions. The mere fact that EU-member states engage in an ongoing debate about questions of (im)morality and punishability demonstrates a common interest and a common concern. One should not be too worried about this. Of course, Vander Beken is correct when he points out that there is always the threat of increasing repression. On the other hand, fear is a bad counselor, as a well known Dutch proverb states. All member states have to be open minded as far as consideration and reconsideration of their bodies of substantive criminal law is concerned.

This open-mindedness, however, in no way implies that these states should easily give away their holy and (more or less) deeply anchored values and opinions. In matters such as euthanasia, abortion, prostitution and drugs use and trade, it has apparently been worthwhile for the Dutch to defend its position rather firmly, against storms of protest. This is not to say that the Dutch way of dealing with euthanasia, for instance, is superior to all other ways and an appropriate example for Europe. Obviously, such chauvinism would seriously impair any form of desirable European co-operation on the field of law enforcement.

To pursue this – undoubtedly naive and idealistic – view: comparative law research is generally seen as an important and effective way to reflect on national law systems. The European integration process, which had begun in the 1950s and has now reached a critical stage where excuses are increasingly unacceptable, might be a major factor in the readiness of member states to look in a critical way to their old national solutions.

In the past, it has often been justifiably argued that criminal law is rooted deeply in national cultural history and tradition. Therefore, it is not strange that the Third Pillar of the EU is structured in an intergovernmental, and not supranational way. On the other hand, there are pressing and urgent international developments and trends which do appear to make national sentiments increasingly irrelevant. Obviously, a very spectacular example of this tendency is the 11 September attack in the US. This

event put EU negotiations on terrorism under enormous pressure, and led to results that go far beyond the struggle against terrorism.

As far as I am concerned, the central question for, jurists is how to cope with these extremely difficult and puzzling challenges. It would be ideal if we had sufficient time to explore new concepts and approaches, to try best practices and so on. But reality is different, and forces us lawyers – both academic and active in day to day practice – to be very alert and creative, in order not to be condemned to a defensive attitude which amounts to a mere Cassandra-like position. Certainly, Vander Beken provides us with a number of inspiring and fruitful views spread over the whole range of criminal law and law enforcement. He is completely right in his warning against the danger of increasing repression. The big challenge for academic lawyers at this moment is to develop concepts which have the capacity to neutralize any tendency towards increasing repression, while at the same time promoting effective co-operation in law enforcement in areas of interest to all member states. From this perspective, some general points can be made from the outset.

In the EU one can discern a certain inclination towards more repression. An example is the frequently repeated proposal to introduce specific minimum sanctions or 'minimal minimum' sanctions. Vander Beken rightly points out that the introduction of minimal maximum sanctions unavoidably would result in increasing repression. Therefore, it is rather disturbing that some political parties, among them the Christian-Democrats (CDA) during the campaign for the 2002 Dutch parliamentary elections, proposed (not for the first time) exactly this concept. The incumbent Dutch government, however, has shown itself strongly and constantly opposed to the idea and indicated its view in a declaration attached to Article 31 EU Treaty (no. 8), in which it made clear that application of Article K 3 (e) should not lead to the introduction of minimum sanctions. However, this did not end the discussion. The proposal of the CDA, presented by MP Van der Camp during parliamentary debates in November 2000, focused on sexual and violent crime. Van der Camp formulated three goals

- to give a clear signal by the legislator to the judiciary that these categories of offences should be punished in a certain, and not too lenient way;
- to raise the preventive impact of the sanctions;
- to achieve some measure of European harmonisation.

The large discretion of the Dutch courts in relation to sentencing is exceptional within the EU. In theory, a perpetrator who is convicted of manslaughter may be punished with one day imprisonment, whereas he would receive at least five years in Germany.[1] Sometimes this is demonstrated by practice: in euthanasia cases, where the charge is murder, the courts repeatedly refrain from punishment although finding the accused guilty (article 9 Dutch Penal Code). There is considerable ground to assume that this issue will stay on the EU agenda for a long time to come. I agree with VanderBeeken that it is remarkable that a concept such as *lex mitior* apparently plays no role in the

[1] See P.J.P. Tak, Opportuniteitsbeginsel en minimumstraf. Problemen bij harmonisering binnen het Europese strafrecht? *Delikt en Delinkwent* 2002 (4), p. 356-366.

discourse of the EU. Against a background of increasing severity within the penal climate in the EU, which has been significantly driven by the 11 September effect, this is a matter of great concern.[2]

Recently, the Dutch government confirmed its position by its reaction to the Green Paper on criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor. It is interesting to reflect at this point on this document, as it covers virtually all aspects of harmonisation addressed by Vander Beken. It may be seen as proceeding on the basis of the Corpus Juris, and the Commission wants it to provide a basis for consultation. As the Green paper puts it 'The point is to respond to the scepticism which has all too often greeted its proposal by explaining it in practical terms and considering the possibilities for the implementation of a solution which might rightly be seen as ambitious and innovatory'.[3]

The first question concerns the structure and internal organisation of the European Public Prosecutor. The Commission proposes a decentralized model: a Chief European Prosecutor, who would provide the minimum degree of centralisation necessary at the Community level, and Deputy Prosecutors who would be integrated into national justice systems. These Deputy Prosecutors would have the competence to bring cases to trial in the national courts. The Dutch government has welcomed this option as logical, but warns that there a solution must be found to tensions between the hierarchical subordination of the Deputy Prosecutors to the Chief Prosecutor on the one hand, and their being part of the national prosecution authority on the other. In all probability, national legislation will have to be changed.

Furthermore, a choice has to be made as to the mandate of the Deputy Prosecutors: are they operating exclusively in the field of the financial interests of the Community, as real specialists, or are they expected to combine this with national tasks? The Dutch government prefers an exclusive mandate. A complication is that it will not always be completely clear whether a particular offence falls within the jurisdiction of the European Public Prosecutor. The national prosecution authorities will have to determine this. If they come to the conclusion that there actually is a violation of the financial interests of the Community which is punishable under national criminal law, they are obliged to notify the European Prosecutor. They lack the power to order the Deputy Prosecutor to initiate a prosecution; that is the exclusive power of the European Prosecutor. On the other hand they should not have the power to prosecute violations against the financial interests of the Community when the European Prosecutor refrains from prosecution. This would be a violation of the ne bis in idem-principle.

A question then arises which is quite rightly regarded as 'vital' in the Green Paper: does the European Public Prosecutor have a power or a duty to proceed? The first possibility, a discretionary regime, is known as the principle of expediency, laid down

[2] See also the critical assessment by M. Kalafa-Gbandi, The Development towards Harmonization within Criminal Law in the European Union – A Citizen's Perspective, European Journal of Crime, Criminal Law and Criminal Justice, 2001 (4), p. 239-263, and H. van der Wilt, Harmonisatie van strafrecht in Europa: gewogen en te licht bevonden, *Nederlands Juristenblad* 2002 (15), p. 747-752.

3 Green Paper on Criminal Law Protection of the Financial Interests of the Community and the Establishment of a Public Prosecutor, Brussels 11 December 2001.

for instance, in the Dutch Code of Criminal Procedure (Article 167 section 2); the second is known as the legality principle (applicable, for instance, under German law). The Commission's preference is a mandatory prosecution system (legality principle), modified by exceptions. This is a reasonable option, as uniform proceedings throughout the European law enforcement area should be guaranteed and – as the Green paper puts it – the independence of the European Prosecutor 'is neatly matched by strict application of the law'.

The Green Paper foresees three possible exceptions to the legality principle. First, the *de minimis* rule should be applicable, to avoid overburdening the European Prosecutor with cases of minor importance. Secondly, provision might allow for an exception on the basis of the potential impact of proceedings on the outcome of the case only a 'sufficient' proportion of the charges would then be brought before the court, whereas the added 'value' to the proceedings of further charges would be insignificant. Thirdly, the possibility of transaction might be considered: if the accused pays back the sum illegally obtained, he might be given the possibility of entering into an agreement with the Prosecutor to terminate the prosecution. According to the Green Paper, this possibility is only acceptable for offences relating to modest amounts of money. The Commission, quite astonishingly also argues in this context that this possibility 'might be useful where the prospect of a conviction was small'. This expresses a very instrumentalist way of thinking, even though a dutiful magistrate should not enter into such a transaction when there is no prospect of a successful prosecution! Here, the protection of the rights of the accused is deplorably neglected.

The Dutch government has briefly explained how the Dutch system of checks and balances on the basis of the expediency principle and the eventual responsibility of the Minister of Justice is working. The system is proudly characterized as a fine-tuned and balanced one. The government is conscious of the fact that on the European level, where till now satisfactory democratic and judicial controls of the Public Prosecutor have been lacking, the expediency principle would not have a comparable impact as on the national level. The government therefore agrees with the use of the legality principle. As a consequence, in all cases (except in well defined exceptional situations or categories) a (national) court will have the opportunity to assess the decisions of the Prosecutor. However, the comments of the Dutch government are rather critical (and rightly so) as to the way the Green Paper formulates these exceptions; they are too vague and broad. The following grounds are suggested as an alternative:

- the person in question is, shown to have been, wrongly taken as a suspect;
- there is insufficient evidence, or illegally obtained evidence, so that in advance it can be assumed that the proceedings will not be successful;
- in advance it can be assumed that there are formal impediments to a successful prosecuting (for example, the death of the accused, a reasonable term in the sense of Article 6 ECHR has been exceeded etc);
- the behaviour in question appears even before the trial not to be punishable;
- there is clearly no 'guilty' offender due to psychological necessity or a serious mental disease.

Obviously, there are many additional problems to be solved and obstacles to be surmounted before the institution of a European Public Prosecutor can be introduced with any chance of success. I will just mention a few difficult points: the relationship between criminal prosecution and administrative enforcement and the very sensitive question of adequate control on and accountability of such an institution. It also bears noting that the Green Paper deals with the matter of evidence rules (mutual recognition) and the. judge of freedoms in a rather puzzling way. The Dutch government, on the whole, is rather critical of this, and that is reassuring. It is to be hoped that the other member states will demonstrate the same critical attitude, but experience has shown that such is not very likely, at least not in so far as the same essential issues are concerned. The ongoing study of conditions under which the introduction of a European Public Prosecutor is feasible is a pilot study of the general conditions for a well balanced concept of harmonisation of criminal law and criminal procedure within the EU. The outcome of this pilot project will undoubtedly influence strongly the assessment of further harmonisation intitiatives in this field.

Bart Stapert

American approach to harmonization, the Model Penal Code as an example for Europe?

Introduction

When we speak about harmonization of European criminal law and the possibilities to look at the United States as an example, we will first need to define the precise topic of our analysis. Elsewhere in this publication, Tadić and Klip define harmonization, using literary and musical (jazz) history as their inspiration and guidance. However, it is just as important to define what we mean by European criminal law within the context of this colloquium, certainly when we attempt to ascertain to what extent the United States and especially its Model Penal Code (MPC) can have any guiding influence. For purposes of this article, we will differentiate between substantive, procedural, evidentiary, penitentiary and sentencing laws. Our focus will only be on the substantive criminal law and the harmonizing effects of the Model Penal Code in that area. After a reflection on the concept of federalism in the American criminal justice system, we will summarize the history of the Model Penal Code. Then, we will briefly describe its main components. Next, we will analyze the effects of the MPC and the criticism it has received. Finally, we will briefly analyze the lessons we can draw from the history of the American MPC for the European situation.

Federalism and the harmonization of criminal law

Due to the federal structure of the US, both the reach of the federal government and the extent of the need to harmonize between the states in the area of criminal law has been subject of profound discussion from the moment of independence. Criminal law was initially squarely within the jurisdiction of the states and the federal government has only gradually begun to play a growing role. Of all the federal criminal legislation passed since the Civil War, more than 40% originated after 1970.[1] Although a substantial federal role in criminal law is now widely accepted, the debate about the exact boundaries between federal and local law enforcement continues.[2] The precise legal

[1] Task Force on the Federalization of Criminal Law, American Bar Association, Criminal Justice Section, 1998. *The federalization of criminal law*. Washington D.C.
[2] Daniel C. Richman, *The Changing Boundaries Between Federal and Local law Enforcement*, Criminal Justice 2000

lines of division seem even dependent on the composition of the U.S. Supreme Court.[3]

This development towards a growing federal influence, first slowly and then accelerated in the last few decades, can also be observed in the area of criminal procedure. It was not until the 1960's that most of the guarantees afforded to criminal defendants under the U.S. Constitution were made applicable to criminal trials at the state levels.[4]

The jurisprudence of the U.S. Supreme Court has had a harmonizing effect on the criminal procedure of the different states. The Model Penal Code has played a similar role with regard to the substantive criminal law.

History of the Model Penal Code[5]

After its independence from England, the United States continued to use the system of common law to regulate criminal behavior. Although a few laws were passed to set the penalties for some criminal offenses, the definitions, defenses and the principles and doctrines measuring the scope of liability were determined by the common law.[6] The limited attempts at codification were not very successful.[7]

As a result, even at the beginning of the 20th century hardly any states had a comprehensive criminal code. As one author described the situation, criminal law at this time was an 'unmitigated mess'.[8] It was against this background that the American Law Institute (a private organization of judges, lawyers and academics devoted to the clarification and improvement of the law) decided to focus on the area of criminal law. With regard to most other areas of the law – torts, contracts, agency and partnership, property, etc. – the ALI used the method of formulating Restatements, but in the

[3] See *United States v. Lopez*, 514 U.S. 549 (1995) in which a 5-4 majority of the U.S. Supreme Court struck down a federal statute criminalizing the possession of firearms within a certain distance of a school building. On issues of federalism and state's rights, Justice O'Connor often plays a pivotal role.

[4] *Mapp v. Ohio*, 367 U.S. 643 (1961) (due process required a state to exclude from a trial all unconstitutionally obtained evidence); *Ker v. California*, 374 U.S. 23 (1963) (constitutionality of state searches judged under same standards as applied to federal searches under the Fourth Amendment); *Robinson v. California*, 370 U.S. 660 (1962) (applying the Eighth Amendment prohibition against cruel and unusual punishments); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (applying the Sixth Amendment right to counsel); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (Sixth Amendment right to a speedy trial); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (Sixth Amendment right to a trial by jury); *Pointer v. Texas*, 380 U.S. 400 (1965) (Sixth Amendment right to confront opposing witnesses), *Washington v. Texas*, 388 U.S. 14 (1967) (Sixth Amendment right to compulsory process for obtaining witnesses); *Benton v. Maryland*, 395 U.S. 784 (1969) (Fifth Amendment prohibition against double jeopardy).

[5] This history and much of the other background information has been obtained in large part from: Paul H. Robinson and Markus D. Dubber, *An Introduction to the Model Penal Code*, March 12, 1999, available at: http://wings.buffalo.edu/law/bclc/web/cover.htm. This website is a specialized source for all relevant information about the Model Penal Code and has been created by Markus Dirk Dubber, Professor of Law & Director, Buffalo Criminal Law Center at the State University of New York at Buffalo.

[6] Herbert Wechsler, The Model Penal Code and the Codification of American Criminal Law, in *Crime, Criminology and Public Policy*, Roger Hood (ed.), Heinemann, 1974, p. 419.

[7] Sanford H. Kadish, The Model Penal Code's Historical Antecedents, *Rutgers Law Journal*, Vol. 19, 521 (1988).

[8] Paul H. Robinson, *In defense of the Model Penal Code: A Reply to Professor Fletcher*, May 29, 1998.

area of criminal law not enough conceptual structure and cohesion had been developed to use this approach. Instead, what was needed was a principled reorientation and a guide for reform. The idea of designing a Model Penal Code was born.

The first attempt at drafting was made in 1931, but was halted due to the lack of money and other resources. In 1950 a large Advisory Committee was formed, which started its work on the planning and drafting of the Model Penal Code in 1952. Wechsler, the leading scholar involved in the drafting, explained the method of the committee as follows:

> In the succeeding ten years there were numerous meetings of Advisers, usually lasting three days, at which basic issues of policy were debated and resolved, studies and drafts prepared by the Reporters or Consultants were considered and revised, criticisms of the tentative drafts examined and reviewed, and the entire work subjected to a final critical revision.[9]

The Proposed Official Draft was submitted and approved by the Council of the ALI in 1962. Some twenty years later all the original drafters' commentaries were consolidated, revised and republished.[10]

The main components of the Model Penal Code

The Model Penal Code is more than just a collection of provisions of criminal law. It also covers elements of criminal procedure, charging policy (when to prosecute), some evidentiary issues and concerns itself even with the infliction of the appropriate punishment.[11]

The MPC is organized into four main components:[12]

1. General Provisions;
   This is perhaps one of the most important parts of the MPC. It is a comprehensive description of general principles applicable to all crimes, e.g. general principles for imposing liability, general principles of defense, general inchoate offenses, etc. The MPC recognized and defined only four mental states: purpose, knowledge, recklessness and negligence. Each objective element of an offense can require a different mental state.[13] This was a novel and much more rational approach to the analysis of criminal conduct.
2. Definition of Specific Crimes;
   Among the innovations of the MPC was the introduction of 'element analysis' which carefully distinguished between the various elements of an offense, inclu-

[9] Wechsler, id., at 421.
[10] Model Penal Code and Commentaries (official Draft and Revised Comments) (1985).
[11] For example, using arguments based on rationality, the Model Penal Code rejects the use of capital punishment. See e.g. Koosed, Marjory, Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt, 21 *Northern Illinois University Law Review* 41 (2001).
[12] Paul H. Robinson, *An Introduction to the Model Penal Code*
[13] Robinson, id.

ding conduct, attendant circumstances and its result. The MPC explicitly rejected common law offenses and the judicial creation of offenses.[14] It organized the offenses conceptually: offenses against the person, offenses against property, etc.

3. Treatment and Correction;
4. Organization of Correction.
   The MPC used a very individualistic, treatment oriented approach to the sentencing of offenders. Because the correction of the offender was the main goal, it gave judges great discretion within each offense grade. This approach has since been abandoned; legislators are instead trying to limit sentencing discretion to prevent disparate treatment.

The MPC was used not only to codify the common criminal law as it was in effect at the time in most of the states, it also reformed parts of it. It introduced a new way of analyzing and a new way of thinking with regard to substantive and procedural law as well as sentencing and the execution thereof. Instead of the more incremental approach of the common law, the MPC provided a comprehensive and rational framework.

Effects of the Model Penal Code

The MPC was used in many states as a model for a fundamental revision of their criminal code. Some states even started revision work before the Official Draft of the MPC was approved, underlining the great need for a model. New codes were passed in Wisconsin in 1956, Illinois in 1961, Minnesota and New Mexico in 1963. In the years thereafter many other states followed.[15] At the federal level, Congress in 1966 established a National Commission to re-examine the federal criminal law and propose a full reformulation in an integrated code. Unfortunately and despite many hearings and drafts submitted to Congress, the attempt to restructure and codify federal criminal law has even as of 2001 not yet led to its desired effect.

The MPC has also been widely used as a teaching tool at American law schools. Since it is a comprehensive code, it is more suited for legal education than even some of the codes that are based on its text. The official commentaries often provide valuable insights for students and scholars. The U.S. has less of a tradition of academic study of concepts of criminal law than most European countries[16] and the MPC filled this gap to a certain extent.

[14] MPC 1.05.

[15] New York(1967); Georgia(1969); Kansas(1970),Connecticut(1971); Colorado and Oregon(1972); New Hampshire, Pennsylvania, Utah(1973); Montana, Ohio and Texas(1974); Florida, Kentucky, North Dakota and Virginia(1975); Arkansas, Maine and Washington(1976); South Dakota and Indiana (1977); Arizona and Iowa(1978); Missouri, New Jersey and Nebraska(1979); Alabama and Alaska(1980); Wyoming (1983). Draft criminal codes in other states (California, Massachusetts, Michigan, Oklahoma, Rhode Island, Tennessee, Vermont and West Virginia) have not been passed by the legislature. [source: Paul H. Robinson, *An Introduction to the Model Penal Code*]

[16] see J.F. Nijboer, *Een verkenning in het vergelijkend straf- en strafprocesrecht*, Arnhem 1994.

Criticism of the Model Penal Code

In this paper we will not discuss all of the substantive criticism that has been lodged against the Model Penal Code. However, a few comments are in order.

The MPC reflects a utilitarian philosophical approach that was widely accepted by the drafters at the end of the 1950s and the beginning of the 1960s. Criminal law was first designed to deter criminal behavior and then to rehabilitate those that committed criminal acts anyway. Specifically, the MPC lists the following general purposes:

a. to prevent the commission of offenses;
b. to promote the correction and rehabilitation of offenders;
c. to safeguard offenders against excessive, disproportionate or arbitrary punishment;
(.) …..
g. to advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of offenders.[17]

Times have changed and so has the thinking with regard to crime and criminal law. Since the publication of the MPC, the war on crime has quadrupled the incarceration rate. There has been a tremendous shift from the rehabilitative/corrections perspective towards a more punitive/retributive/crime control point of view. This shift has been translated into the criminal laws. More than two million people are incarcerated and the number of persons under some form of penal enforcement is almost 6,5 million.[18] As such, the core concepts and the value of the MPC have been undermined. Not only have states and the federal government adopted harsher sentences for most offenses, most notably drug offenses, there has also been a definite trend towards criminalizing more types of behavior. Compared to the MPC's list of specific criminal offenses, there has been an exponential growth over the last few decades. The MPC did not have any provisions outlawing the use, distribution and production of narcotics, while inmates serving time for those cases now make up about 60% of the federal prison population in the U.S.[19] In many states statutes now contain provisions dealing with crimes like obstructing the sidewalk and loitering that are used to implement the so-called 'zero tolerance' policies. The MPC was not based on the same functional crime control approach to criminal law that is so prevalent now.

There have also been specific provisions that did not find their way into the 34 criminal statutes that used the MPC as their model. Most notable in this regard is the MPC's abandonment of the common law's distinction between the punishment for attempted and consummated offenses. The MPC's choice can be explained from its focus on treatment and rehabilitation. It is irrelevant for the specific rehabilitative

[17] MPC Section 1.02
[18] Bureau of Justice Statistics, U.S. Department of Justice, Bureau of Justice Statistics 2000: *At a Glance* 19 (2000).
[19] Bureau of Justice Statistics, Prisoners in 2000, *NCJ* 188207, August 2001.

needs of the offender whether he managed to complete his crime. The intent to commit the crime was present anyway, some actions were undertaken to actualize his intent, so he is in definite need of treatment. None of the states adopted this line of reasoning from the MPC.

An example for Europe?

In short, some of the most followed provisions of the MPC are the ones dealing with the definitions of criminal behavior and the appropriate punishment for that behavior. Given the number of states that have adopted these provisions of the MPC either in part or in whole, the MPC has definitely had a harmonizing effect. Even so, differences in the definition of some crimes and their elements remain, even between states that have adopted the MPC. They reflect the differences in history, geography, culture and other circumstances between the regions and states within the U.S.

If Europe continues to move in the direction of further law enforcement and judicial cooperation (e.g. the European arrest warrant), it may be increasingly important to coordinate and harmonize the definitions of certain common crimes and their elements, especially those that appear to have a cross-border effect. However, the decisions of which behavior to criminalize, how to enforce those laws and what level of punishment to inflict should still be made at a local (national) level. If the differences between states on these issues are obvious in more culturally integrated country like the U.S., they definitely should be in the much more historically and culturally diverse setting of Europe.

As described above, when the MPC was developed in the U.S. there were no coherent systems of criminal law. It was easier to adopt the MPC because there was a desperate need for some structure. States were ready to codify and organize their laws. There was a vacuum and the MPC filled it. It can be assumed that even if the substance of the MPC had been different, e.g. if it had not been based on the rehabilitative approach, it would still have been widely applied. In contemporary Europe, virtually all countries have a well-developed system of criminal law. Thus, a European MPC will not land on the same fruitful ground as the American version. Instead, the different countries will most likely want as many elements as possible of their own criminal code interjected in the European model. Once such a model is developed, it will be a tremendous undertaking to get the different states to adopt especially those elements that differ from their criminal codes, thus undermining the intended harmonizing effect.

As such, the conditions for harmonization of criminal law differ to such an extent from those that existed in the U.S. at the time the MPC was presented that it is virtually impossible to draw any definite conclusions on the MPC's exemplary value. Which of course is not to say that a better knowledge of the American experience is not in one way or another useful.

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Ursula Nelles was born in 1949. After studying law Professor Ursula Nelles worked in a junior academic staff position at the University of Münster. She took a doctoral degree in 1980. She took a professorial degree and was admitted to the bar as a practising lawyer in 1990. The following year she accepted teaching assignments as a substitute professor at the Universities of Münster and Hamburg and was a guest lecturer at the Catholic University of Nijmegen (NL). In 1991 she was appointed Professor of Criminal Law and Law of Criminal Procedure at the University of Bremen. Parallel to this she carried out teaching assignments at the Universities of Greifswald and Düsseldorf. In 1994 she switched to the University of Münster where she took over a professorship for Criminal Law, Law on Criminal Procedure, and Economic Criminal Law. She is Director of the Institute of Criminal Law and Criminology (Institut für Kriminalwissenschaften). In addition, Professor Ursula Nelles is former President of the German Federation of Women Lawyers and co-foun-

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Theo de Roos (1948) completed his law study (Free University Amsterdam) in 1972. Subsequently, he worked as a lawyer in Amsterdam, specializing gradually in criminal law. By now he is a partner of De Roos & Pen Advocaten Amsterdam. In 1987, he defended his doctorate on the Penalization of Economic Offences in the Law Faculty of Utrecht University, where he worked as a research assistant from 1980 to 1984. In 1990, he was appointed as a Professor in Criminal Law and Criminal Procedure at the Law faculty of Maastricht University. In 1997, he changed this chair for a full time professorship Criminal Law at the Leyden University law Faculty. His publications cover a variety of issues, like the defence in criminal cases, environmental criminal law, military law, international criminal law and topics of criminal policy in general. De Roos is a honorary judge in de Leeuwarden Court of Appeal.

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Felicitas Maria Tadić born in 1975, studied law at Utrecht University and at the University of Marburg (Germany). Her final thesis at Utrecht University dealt with the good administration of justice in the transfer of criminal proceedings between the Netherlands, Germany and France. In Marburg, her final thesis comprised an analysis of the rules applicable to the free movement of students in the EC. Since 2000 she is writing a PhD-thesis on the harmonisation of criminal law in the European Union at Utrecht University. This is a comparative study, which covers the law of the Netherlands, England and Germany.

Gert Vermeulen (Lic. Iur., Ph.D. Law) was born in 1968. Lic. Iur., Aggr. Law. Ph. D. Law (on mutual assistance in criminal matters in the EU). Professor of Criminal Law, Ghent University. Director Institute for International Research on Criminal Policy (IRCP), Ghent University. Teaching assignment Ghent University: substantive criminal law, advanced study of (substantive) criminal law, international criminal law, European institutions of criminal policy, European political development (in the area of JHA). Teaching assignment Police Academy of East-Flanders: European (criminal) law. Teaching assignment Belgian Ministry of Justice: international co-operation in criminal matters. Involvement in numerous (over 40) research projects over the past years, inter alia in the field of (international and European) criminal law, EU justice and home affairs, drug policy, trafficking in human beings and sexual exploitation of children. Publications in these (and other) areas. Consultant to/short-term expert for both the Council of Europe (Pompidou Group) and the European Commission (several TAIEX assignments and Phare projects on integration of the JHA acquis in the candidate member states).

Joachim Vogel studied law at the University of Freiburg, Germany, from 1983 tot 1988. His doctoral dissertation on *Norm und Pflicht bei den unechten Unterlassungsdelikten* (Commission by Ommission: Norms and Obligations) was published in 1993, the year of his bar exam. From 1994 to 1999, he was Assistant Professor at the Freiburg Institute of Criminology and Economic Criminal Law (Director: Professor Klaus Tiedemann). In 1999, he was appointed Professor of criminal law at the University of Munich. Since 2000, he has held the chair of criminal law and criminal procedure at the University of Tübingen and serves as parttime judge at the Stuttgart High Court of Appeal (Criminal Division). From 1998 tot 2001, he was a member of the Corpus Juris group of European criminal law experts who examined the necessity, feasibility and legitimacy of a possible European Public Prosecution Office. He is

author of many publications in the fields of economic, European and international criminal law, co-author of Grützer/Pötz, Internationaler Rechtshilfeverkehr in Strafsachen (International Cooperation in Criminal Matters) and secretary of the German National Group of the Association Internationale de Droit Pénal (A.I.D.P.).

Harmen van der Wilt is associate professor international criminal law at the University of Amsterdam. He has written a PhD-thesis on trade union freedom in Latin America. Afterward he has published extensively on topics as extradition, mutual assistance in criminal affairs, transfer of foreign judgments, European criminal law and international criminal courts. In 1999 he received an academic award (Edmond Hustinx-prijs) for his research. He is co-editor of the Commentary on Dutch law on International Co-operation in Criminal Matters.

List of abbrevations

AIDP	Association Internationale de Droit Pénal
Anm.	Anmerkung
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
CML Rev.	Common Market Law Review
COM	(European) Commission
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
EHHR	European Human Rights Reports
EJCCLCJ	European Journal of Crime, Criminal Law and Criminal Justice
ELJ	European Law Journal
ELRev.	European Law Review
EU	European Union
ETS	European Treaty Series
HL	House of Lords
JHA Council	EU Council for Justice and Home Affairs
JZ	Juristenzeitung
MJ	Maastricht Journal of European and Comparative Law
MvT	Memorie van Toelichting
NStZ	Neue Zeitschrift für Strafrecht
OECD	Organisation for Economic Cooperation and Development
OJ(EC)	Official Journal (of the EC)
OLAF	Organisation de la Lutte Anti-Fraude
PC	Penal Code
StV	Der Strafverteidiger
Trb.	Tractatenblad
UCLAF	Unité de Coordination de la Lutte Anti-Fraude
U.S.	United States Reports
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaften