Articles

What Principles Drive (or Should Drive) European Criminal Law?

By Ester Herlin-Karnell[*]

A. Introduction

The entry into force of the Lisbon Treaty[1] has changed the framework and possibilities of the development of European Union (EU) criminal law. Gone is the long-lived and awkward cross-pillar character of EU criminal law, as mainly a third pillar EU 'intergovernmental' issue but also partly a first (EC) pillar question.[2] The Lisbon Treaty marks a new era for the criminal law as it brings it within the core of the EU law project. Nevertheless, Article 10 of the transitional protocol as attached to the Lisbon Treaty stipulates a five-year transition period before former third pillar instruments will be treated in the same way as EU acts.[3] This paper will focus on two issues in particular. The first question that will be addressed concerns what EU law principles drive or decide the EU's involvement in criminal law. After having identified these principles the second question is whether they should drive it and if so what implications will it have for the criminal law in the future.

There are many axioms that are crucial in criminal law such as the notion of fair trial (the presumption of innocence, etc.) in a broad meaning, the establishment of *actus reus* (the objective element of a crime) and *mens rea* (the subjective element of a crime), proportionality of sanctions and so on. The assumption is that the criminal law is hugely sensitive as it concerns the right to punish and the governing of dangerous behaviour. After all, the German Constitutional Court (BVerfG) has recently stated that criminal law (or the right to 'punish') is in principle not amenable to EU integration.[4] It also stated that

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[1] Treaty of Lisbon, Dec. 13, 2007**,** 2007 *O.J. (C 306) (amending the Treaty on European Union and establishing the European Community) [hereinafter Lisbon Treaty].*

[2] *E.g.* Naguel Neagu, *Entrapment between Two Pillars: The European Court of Justice Rulings in Criminal Law*, 15 EUR. L. J. 536 (2009).

[3] Protocol on Transitional Provisions Attached to the Lisbon Treaty, art. 9-10.

[4] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvE 02/08, June 30, 2009, http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html. *See* 10 GERM. L.J.

the principle of guilt or the subjective element of an offence is not reconcilable with a supranational legislator. Nonetheless, the entry into force of the Lisbon Treaty and the supranationalization of the criminal law in Title V of the Treaty of the Functioning of the European Union (TFEU) confirms the rapid development and furthering of the criminal law at the EU level. It also confirms the need for, if not common principles, at the very least a common understanding of these principles. For this reason, as noted, I will try to identify what principles drive or should drive the development of EU criminal law. The purpose of doing so is to examine to what extent the same principles are applicable in EU law and criminal law respectively.

This paper will examine four principles that are reflected, and albeit sometimes contested, in EU law and criminal law. More specifically, the principles in question are legality/attribution of powers, the principle of effectiveness, subsidiarity (and proportionality) and the principle of non-discrimination. It will be shown that each of these principles play an important role in EU law and criminal law doctrine respectively. It will also be shown that in spite of their importance they are sometimes undermined by other concerns and trends such as a strong focus on efficiency and risk prevention in law making.

B. European Criminal Law: Before and After the Lisbon Treaty

Today it seems natural to speak about EU criminal law as a subject as good as any other EU law topic. This has not always been the case. After all, and to give a short recap, criminal law as a European topic entered the EU scene as part of the creation of the third pillar in connection with the entry into force of the Maastricht Treaty in 1993. Subsequently, the Amsterdam Treaty in 1999 clarified the Union's objectives in the Justice and Home Affairs area and created the concept of *freedom, security and justice*.[5] In addition, the important Justice and Home Affairs Tampere Council of 1999 and the subsequent Hague programme[6] took the notion of European criminal law one step further by leading to the adoption of the established internal market formula of *mutual recognition* and *mutual trust* of judicial decisions and judgements in criminal law matters.[7] This concept has remained the main engine of development. However, in principle, EU criminal law has been a matter of judicial cooperation within the third pillar (EU Treaty). Consequently, the Lisbon Treaty has dramatically

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1169, 1169-1354 (2009), at http://www.germanlawjournal.com/index.php?pageID=2&vol=10&no=8.

[5] However, it also further 'intergovernmentalized' the criminal law when it moved the former third pillar area of immigration and asylum and civil law to the first pillar sphere.

[6] *See* European Council Tampere 1999; *The Hague Programme: Strengthening Freedom, Security and Justice in the EU*, 2005 OJ (C 53/1).

[7] *See* VALSAMIS MITSILEGAS, EU CRIMINAL LAW (2009); STEVE PEERS, EU JUSTICE AND HOME AFFAIRS (2006). *See also* Case C-120/78, Cassis de Dijon, 1979 E.C.R. 649.

'supranationalized' the criminal law by abolishing the pillar structure and thereby 'constitutionalized' the criminal law. The recent Stockholm programme could be added here as advancing the EU's mission for the future in the AFSJ sphere further by stipulating a justice and home affairs agenda for the next few years.[8] This means not only that the European Court of Justice will now have jurisdiction to review this area[9] but also that there is a new dimension for the fight against crime at the EU level. Hence, EU criminal law now forms part of Title V of the Area of Freedom, Security and Justice (AFSJ) chapter in the TFEU with particularly Articles 82 and 83 TFEU setting out the agenda of the EU's crime fighting mission road.

While Article 82 TFEU deals with procedural criminal law and stipulates that judicial cooperation in criminal matters shall be based on the principle of mutual recognition, Article 83(1) TFEU deals with substantive criminal law. Therefore, Article 83 TFEU puts an end to the previous dispute of whether there was a competence in the former first pillar, the EC, to legislate in criminal law in the absence of an explicit mandate in the Treaty. More specifically, this provision stipulates that the European Parliament and the Council may establish minimum rules concerning the definition of criminal law offences and sanctions in the area of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. Furthermore, Article 83 TFEU sets out a list of crimes in which the EU shall have legislative competence such as terrorism, organized crime and money laundering. Accordingly, it also states that the Council may identify other possible areas of crime, which meet the cross-border and seriousness criteria. Moreover, and interestingly, paragraph 2 of this article provides that the possibility exists for approximation if that proves essential to ensure the effective implementation of a Union policy in an area which has already been subject to harmonization measures.

In any case, a major innovation of the Lisbon Treaty is the emergency brakes procedures. More specifically, Articles 82(2) and 83(1) and (2) also provide in their respective third paragraph for the possibility of applying a so-called emergency brake if the law in question would affect fundamental aspects of a Member State's criminal justice system.[10] Plainly, the notion of an emergency brake looks attractive to Member States with a strong relationship between the criminal law and the nation state, and hence remedies Member

[8] *See* Council Note, *The Stockholm Programme* (2009) at http://www.se2009.eu/polopoly_fs/1.26419!menu/standard/file/Klar_Stockholmsprogram.pdf.

[9] The Court of Justice was largely excluded from this prior to the entry into force of the Lisbon Treaty. Article 35 TEU (which is now abolished) was based on a voluntary declaration by the Member States to confer such jurisdiction in the former third pillar.

[10] If such an emergency brake scenario occurs, a Member State may request that the measure be referred to the European Council. In that case, the ordinary legislative procedure is suspended, and after discussion and ". . . in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure. . . ."

State anxiety about the loss of their national sovereignty in criminal law matters. Nevertheless, as argued elsewhere by the author, one could also readily make the statement that the emergency brake is too much of a smooth solution as remaining Member States can move on regardless of the emergency brake by establishing enhanced cooperation.[11] Specifically, Articles 82 and 83 TFEU of Lisbon respectively state:

> In case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329 of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

This means that, despite the emergency brake provisions as provided for in the Lisbon Treaty, there will be a possibility for remaining Member States to move forward without showing the last resort requirement as provided in Article 20 (2) TEU. Therefore, the question arises whether there are any common principles in EU criminal law which are readily reflected in EU law and criminal law? This appears particularly important as regards the prospect and feasibility of developing an EU criminal law space. More to the point, it will be argued there is an acute need to identify these principles for the emergence of EU criminal law regardless of whether such development takes place within the approximation possibilities granted by Articles 82-83 TFEU or through mutual recognition or via the framework of enhanced cooperation. In other words, the contention is that there is a need to identify the relevant framework for the development of European criminal law.

C. Basic Principles: the EU and Criminal Law Perspective

I am going to start this section by discussing the principle of attribution of powers in EU law and how it is reflected in the axiom of legality in criminal law. Thereafter, I will endeavour to explore how the Court of Justice has manipulated the conferred powers of the Union by an extensive reading of the principle of effectiveness. I will contrast this with the notion of effectiveness in criminal law as a principle of criminalization. In addition, I will explore why the principle of subsidiarity ought to be reflected in a minimalistic approach to criminalization. I will also briefly consider the impact of proportionality as regards the function of penalties in this regard. Finally, I will look at the recent *Wolzenburg*

[11] Ester Herlin-Karnell, *The Lisbon Treaty and the Criminal Law: Anything New Under the Sun*, 10 EUR. J. L. REFORM 321 (2008).

case[12] and the principle of non-discrimination in EU criminal law and more specifically in the context of the European Arrest Warrant (EAW). In doing so, I will also examine the phenomenon of citizenship in the AFSJ.[13]

I. The Attribution of Powers and Legality

The principle of legality is a *sine qua non* for any discussions of European criminal law.[14] Moreover, the principle of legality also forms the basis for the question of whether the EU could legislate at all. Therefore, it also forms part of the rule of law.[15] This is because the Union has only the powers that are allocated to it. This is stipulated in Articles 4 and 5 TEU and 7 TFEU, and in the principle of conferred powers. Furthermore, this principle is reflected in the axiom of legality in criminal law, that any punishment requires prior codification and thus that retroactive use of criminal law is prohibited. This is also reaffirmed by Article 49 of the Charter of Fundamental Rights, which has now become legally binding because of the entry into force of the Lisbon Treaty.

Nevertheless, looking at the history of EU competence allocation, provisions such as Articles 114 TFEU (formerly Article 95 EC, concerning the establishment and functioning of the market) and 352 TFEU (formerly 308 EC, concerning the operation of the common market) have shown that there may be very good reason to think that there are no limits to broad use of EU legislative powers.[16] As pointed out by Weatherill, "Any slippage in EU activity beyond the terms of the mandate that is found in the Treaties is illegitimate in the sense that it is devoid of the authorisation rooted in national ratification of the original Treaties and the subsequent amending texts . . . . The principle of conferral, then is tied to legality".[17] In this way, it becomes evident that legality is also connected to the deeper question of the authority of EU powers, broadly speaking.

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[12] *See* Case C-123/08, Wolzenburg (2009) (not yet reported).

[13] *See* 2002 O.J. (L 190/1) (on the EAW).

[14] *E.g.* ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW (2006).

[15] *E.g.* Armin von Bogdandy, *Founding Principles, in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 11 (Armin Von Bogdandy & Jorgen Bast eds., 2010).

[16] *See* Opinion 2/94, *Accession to the ECHR,* 1996 E.C.R. 1-1759; Case C-376/98, *Germany v. Parliament and Council,* 2000 E.C.R. 1-8419 (the classic cases on limits to broad use of EU powers). On competences in general *see, e.g.,* Stephen Weatherill, *Competence and Legitimacy, in* THE OUTER LIMITS OF EU LAW 1 (Catherine Barnard & Okede Odudo eds., 2009); Derek Wyatt, *Community Competence to Regulate the Internal Market*, Oxford Legal Working Paper, No 9/2007 (2007) at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=997863; Paul Craig, *The Lisbon Treaty, Process, Architecture and Substance*, 33 EUR. L. REV. 137 (2008); THEODORE KONSTANDINIDES, DIVISION OF POWERS IN EU LAW (2009).

[17] Stephen Weatherill, Conference Presentation at Utrecht, Legality and Concealed Mechanisms Behind the Extension of EU Powers (2009) (on file with the author).

Thus, the principle of legality is a general principle of EU law[18] and as such codified in Article 2 TEU, Article 21 TEU and in Article 49 of the Charter of Fundamental Rights. One of the first and most influential cases at the EU level was *Kent Kirk*[19] concerning the retroactive application of a regulation. The Court's message in this case was clear:

> The principle that penal provisions may not have retroactive effect is one which is common to all the legal orders of the member states and is enshrined in article 7 of the European Convention for the protection of human rights and fundamental freedoms as a fundamental right; it takes its place among the general principles of law whose observance is ensured by the Court of Justice.

Consequently, the principle of legality as a general principle of EU law and criminal law helps to control the institutions and the legislator.

Yet in the context of criminal law, the principle of legality is more complex than a simple prohibition of retroactive criminal law, as it is a conjunction of intertwined principles. The principles in brief are as follows: no crime without written law, no retroactive criminal law, maximum certainty[20] and no crime by analogy.[21] There is no doubt that the principle of legality is of great relevance for the individual at the European level, as in the context of unclear regulations or unimplemented directives, because it could operate as a basis for avoiding criminal liability. A fifth principle is often added to the four axioms of legality as stated above. This principle is the possibility to rely on a more lenient provision at the time of sentencing. This principle is common in many European legal traditions and is proclaimed in Article 49 of the Charter.[22]

In sum, the principle of legality forms the cornerstone of modern criminal law. In the context of EU legislative competence, legality interacts not only with the conferral of powers but, as

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[18] TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EU LAW 242 (2006).

[19] Case C-63/83, Kent Kirk, 1984 E.C.R. 2689.

[20] *See, e.g.,* Kokkinakis v. Greece, No. 260-A Eur. Ct. H.R. (ser. A), (1993); Cantoni v. France, Eur. Ct. H.R., Reports 1996-V; *compare* Case C-74/95 & Case C-129/95, Criminal Proceedings Against X 1996 E.C.R. I-6609; Case C-354/95, National Farmer's Union, 1997 E.C.R. I-4559.

[21] *See* DAN FRANDE, DEN STRAFFRATTSLIGA LEGALITETSPRINCIPEN (1989) (explaining legality).

[22] *See also* International Covenant of Civil and Political Rights, G.A. Res. 2200A (XXI), art. 15 (Dec. 16, 1966). *E.g.* Ester Herlin-Karnell, *Recent Developments in the Area of European Criminal Law,* 14 MAASTRICHT J. EUR. & COMP. L. 15 (2007).

examined below, also with subsidiarity and proportionality. Furthermore, as mentioned, legality enhances trust in the Union project and remedies the accusation of competence creep (the shift of power from the individual Member States to the EU). The question of the authority of the Union action goes clearly far beyond the legislative sphere in that it also concerns the overall legality of the legal architecture of the Union where also the judiciary is included.

The principle of legality is therefore of utmost importance in both EU law and criminal law and runs through all aspects of EU law. Turning once again to the notion of EU criminal law more specifically, how does the Court's case law on environmental criminal law (for example,. C-176/03, *Commission v. Council*[23]*)* fit the pattern of attributed powers and legality? In order to understand this issue, it is necessary to investigate the principle of effectiveness as crystallized within the European legal context.

II. The Magic World of Effectiveness

The principle of effectiveness has always been high on the agenda in European law and increasingly so in recent years. Since the early days, effectiveness has played a significant role in how the EU has expanded.[24] The principle of effectiveness is often held to stem from the more general loyalty obligation, Article 4(3) TEU (formerly 10 EC), and has played a crucial role in shaping the contours of the effectiveness of EU law.[25] For example, it has given birth to the doctrine of indirect effect.[26] Accordingly, 'effectiveness' as referred to by the Court is an umbrella label which requires, generally speaking, that national remedies and procedural rules must not render the enjoyment of Community rights by their beneficiaries virtually impossible or excessively difficult in practice. However, effectiveness can also constitute a governing principle for deciding whether Community action in a given area is justified at all.[27]

Again, EU criminal law serves as a test case here. There have been a couple of important cases where 'effectiveness' has constituted an important parameter in the decision on

[23] Case C-176/03 *Commission v. Council*, [2005] ECR I-7879.

[24] M. Accetto & S. Zleptnig, *The Principle of Effectiveness: Rethinking its Role in Community Law*, 11 EUR. PUB. L. 375 (2005).

[25] John Temple Lang, *The Developments of the Court of Justice on the Duties of Cooperation of National Authorities and Community Institutions Under Article 10 EC*, 31 FORDHAM INT'L L.J. 1483 (2008); Eleftheria Neframi, *The Duty of Loyalty: Rethinking its Scope Through its Application in the Field of EU External Relations,* 47 COMMON MKT. L. REV. 323 (2010).

[26] *E.g.* C-106/89, *Marleasing,* 1990 E.C.R. I-4135.

[27] *E.g.* Malcom Ross, *Effectiveness in the European legal Order(s): Beyond Supremacy to Constitutional Proportionality*, 31 EUR. L. REV. 476 (2006).

competence at the EU level. For example in the judgment of C-176/03, *Commission v. Council*[28], the Court adopted a new approach towards effectiveness by stating that the EU has the power to impose criminal law in the name of the full effectiveness of EC law when pursuing the protection of the environment. In this way, the effectiveness principle is used as a constitutional concept for the justification of legislation at the EU level. Yet the fundamentals of legality/attribution of powers as discussed above may lead to complexities, or tensions, in the context of the principle of effectiveness. Although the delimitation of competences between the pillars belongs to legal history by now, the principal question of legality and the limits of effectiveness will not go away. The reason for this is that Article 83(2) TFEU provides for a highly ambiguous competence to harmonize when necessary for the effective implementation of a Union policy that has already been subject to harmonization. This seems like a rather broadly defined competence. In conclusion, the principle of effectiveness constitutes one of the main drives of EU integration and has played, and continues to play, a particularly important role in the development of EU criminal law.

1. "Effectiveness" in Criminal Law is Tricky

The principle of effectiveness in criminal law is a matter with deep philosophical underpinnings.[29] It encompasses a restrictive policy stating that the criminal law should not be used if it cannot be effective in controlling conduct, and an expansive policy stating that the criminal law should be used if it is the most efficient and cost-effective means of controlling conduct.[30] Generally, effectiveness is discussed in terms of positive or negative legitimacy. In this way, effectiveness is viewed as a presumed filter where the limiter claims that no criminalization can be justified if it cannot be expected to be effective.[31] Nevertheless, the very notion of effectiveness as a template for criminalization is generally considered as a difficult parameter when justifying legislation. First, and in extremely general terms, it is often stated that an ineffective provision would undermine the respect for the criminal law system as the prevention in question would lose much of its function. Secondly, if a criminal law is too severe, as noted, it would render itself ineffective as the citizens would find it unfair (fair labelling).[32] Another argument is of course the symbolically influenced idea of the state itself (in the era of secularization): criminalizing certain conduct demonstrates what ought to be

[28] Case C-176/03, Comm'n v. Council, 2005 E.C.R. I-7879. *See also* Case C-440/05, Comm'n v Council, 2007 E.C.R. I-9097.

[29] *See* Ester Herlin-Karnell, *Commission v. Council: Some Reflection on Criminal Law in the First Pillar*, 13 EUR. PUB. L. 69 (2007) (provides a more detailed account with more references).

[30] *See, e.g.*, JONATHAN SCHONSHECK, ON CRIMINALISATION (1994).

[31] *See id.*

[32] *See* James Chalmers & Fiona Leverick, *Fair Labelling in Criminal Law*,71 MODERN LAW REVIEW 217(2008).

regarded as morally wrong.[33] More importantly, the present paper submits that the EU is not yet sufficiently fully formed to take on this symbolic mission because the definition and use of the criminal law—the issue of competence aside—is a role of another calibre than, for example, the creation of citizenship. In other words, there is an apparent 'light' approach by the EU legislator here, evident in Court of Justice cases such as C-176/03, *Commission v Council*, which simply assume that the imposition of criminal law guarantees its effectiveness when investigating the real meaning of 'effectiveness'. This probably stems from the fact that there is a real deficit in the knowledge of these questions at the EU level. Put differently, there is an over-reliance on the magic of the criminal law.[34]

In conclusion, the principle of effectiveness drives the development of EU criminal law but such an exercise in effectiveness is highly ambiguous as it is far from clear what the EU is aiming for. There is a danger when applying the effectiveness criteria as part of the attribution of powers test. Yet, as noted, the new Article 83(2) grants a competence for a more general harmonization if it would be necessary for the effective implementation of a Union policy. It seems clear that this is a very blurry threshold to be crossed by the legislature. Nonetheless, as all students in EU law know, there are two other hurdles to pass here: subsidiarity and proportionality.

This paper will focus next on the subsidiarity principle as being especially relevant to criminal law.

III. The Principle of Subsidiarity Should be Reflected in Criminal Law as the Ultima Ratio

The intention here is not to embark on any grand tour of subsidiarity, as this principle has already been extremely well dissected in the legal doctrine.[35] Suffice it to note that it is generally considered that the principle of subsidiarity ought to play a bigger role in the EU legislative process and hence that it should be considered more often in the EU's institutions.[36] The Lisbon Treaty embraces this by imposing a number of obligations. Most significantly, the Lisbon Treaty increases the national parliaments' participation in the monitoring process of subsidiarity in imposing an obligation to consult widely before proposing legislative acts (Article 2 of the Protocol on subsidiarity and proportionality). Moreover, the Commission must send all legislative proposals to the national parliaments

[33] *See* Douglas Husak, *Applying* Ultima Ratio*: A Skeptical Assessment,* 2 OHIO ST. J. CRIM. L. 535 (2005).

[34] *See* Case C-440/05, Commission v. Council, Opinion of AG Mazak (2007) (a more nuanced approach).

[35] *See* Gareth Davies, *Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time,* 43 COMMON MKT. L. REV. 63 (2006).

[36] *See* Stephen Weatherill, *Competence and Legitimacy, in* THE OUTER LIMITS OF EUROPEAN LAW 1 (C. Barnard & O. Odudo eds., 2009).

at the same time as to the Union institutions and the time limit for doing so has been increased from six to eight weeks (Art 4). In addition, Article 5 TEU refers to the Protocol on subsidiarity and proportionality as attached to this Treaty.

The need for delegation away from centralization appears particularly important in the sensitive area of criminal law. After all, criminal law has its own principle of subsidiarity embedded in the *ultima ratio* concept.[37] Briefly, this means that criminal law should be the last resort as means of control. Although it is true that the notion of *ultima ratio* is more of an ethical principle than a constitutional principle,[38] the basic idea is that criminal law should be reserved for the most serious invasion of interests since less serious misconduct is more appropriately dealt with by civil law or by administrative regulation.[39] Accordingly, when discussing criminalization one has to ask whether there is an intelligible reason to undertake action; that is, whether the consequences of legislative action in the area in question are sufficiently clear, effective and precise.[40]

Nevertheless, the Lisbon Treaty appears unclear as regards a minimalism approach to the use of criminal law (as an *ultima ratio)*. On the one hand, it intensifies the national parliaments' participation in the monitoring process[41] of subsidiarity. Moreover, Article 69 TFEU stipulates that the National Parliaments shall ensure that subsidiarity and proportionality are respected when proposing legislation in the criminal law area. It also imposes an obligation on the Commission to consult widely before proposing legislative acts (Article 2 of the Protocol) and to send all legislative proposals to the national parliaments at the same time as to the Union institutions, and the time limit for doing so has been increased from six to eight weeks (Article 4).[42] On the other hand, such emphasis on subsidiarity appears less clear, in the context of the enhanced cooperation mechanisms. According to the Lisbon Treaty framework, nine Member States can move 'forward' by establishing cooperation regardless of whether a Member State has pulled the emergency brake as mentioned above. In such a case, the authorisation to proceed with enhanced

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[37] *See* Opinion of AG Mazak in C-440/05, (June 28, 2007) (explaining that the classic liberal tradition the subsidiarity principle indicates that a minimal sanction is at the same time optimal). Ester Herlin-Karnell, *Subsidiarity in the Area of EU Justice and Home Affairs – A Lost Cause?* 15 EUR. L. J. 351 (2009) (explaining subsidiarity in EU criminal law). *See* LINDA GRÖNING, EU STATEN OCH RÄTTEN ATT STRAFFA (2008) (providing an interesting study on criminal law theory and tensions with EU integration).

[38] *See* Nils Jareborg, *Criminalization as Last Resort (Ultima Ratio),* 2 OHIO ST. J. CRIM. L. 531 (2005).

[39] *See generally*, ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW (2006).

[40] *See id.*

[41] *See* Lisbon Treaty, Protocol on the Application of the Principles of Subsidiarity and Proportionality and the Protocol on the Role of the National Parliaments, Annex (2009).

[42] Lisbon Treaty, Protocol on the Application of the Principles of Subsidiarity and Proportionality, Annex, art. 2 (2009).

cooperation (there is no need to obtain the Commission's support or the approval of the European Parliament referred to in Article 20(2) TEU and Article 329 TFEU) shall be deemed to be granted. It seems as if the new mechanisms in the Lisbon Treaty pose as many questions as it tries to answer. In other words, there is a tension between eagerness to move forward in EU criminal law cooperation and the criminal law as the last resort. In other words, the problem is that even if a competence could be established it seems as if the will to exercise that competence is bigger than the will to restrain action at the EU level. Admittedly, this is not a problem unique to the EU as the debate on criminal law as an *ultima ratio* is readily transferable to the national level.[43] Interestingly though, the Commission's recent communication on the Stockholm programme, which sets up goals to be achieved within the next five years within the AFSJ, stresses the need to respect subsidiarity.[44] More specifically, the Commission states that criminal cooperation should be pursued in close cooperation with European Parliament, national parliaments and the Council, and acknowledges that the focus will remain primarily on mutual recognition and the harmonization of offences and sanctions will be pursued for selected cases. Arguably, this is a slightly more nuanced approach in an area otherwise characterized by rushed legislation in the aftermath of September 11th, 2001. It is to be welcome because it recognizes the sensitive nature of the criminal law.

IV. Proportionate Sentencing

If the principle of subsidiarity[45] was made more visible thanks to the Protocol on the National Parliaments, their participation in the monitoring process (proportionality even if left out of this protocol) has been made a little more visible in the Treaty text as such. Article 5(4) TEU refers to the obligation for the EU's institutions to apply the principle of proportionality as stipulated in the Protocol on Subsidiarity and Proportionality.

The principle of proportionality has a multifaceted function of similar complexity to subsidiarity. Although this principle has been suggested as a better legal tool than the abstract notion of subsidiarity,[46] the Court has been criticized for not understanding what proportionality means in the framework of lawmaking.[47] More concretely, the argument is

[43] Jareborg, *supra* note 38.

[44] *See Commission Communication: Delivering an Area of Freedom, Security and Justice for Europe's Citizens*, at 5 COM (2010) 171.

[45] *See, e.g.,* PAUL CRAIG, EU ADMINISTRATIVE LAW (2006); TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EU LAW 139 (2006) (providing a more detailed account).

[46] Gareth Davies, *Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time*, 43 COMMON MKT L. REV. 63 (2006).

[47] Matthias Kumm, *Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation*, 12 EUR. L. J. 503 (2006).

that while proportionality is about the balancing of interests, jurisdictional concerns are about assessing the means/ends relationship which must be distinguished from the context of fundamental rights and the issue of a substantive policy concerns. Regardless, it is often suggested that the principle of proportionality should be regarded as a wider principle than subsidiarity, even if there is a clear overlap between them.[48] As such, proportionality is a much broader principle because it concerns not only legality of Union action but also legality of Member States action. This is the famous and extremely well documented multifaceted function of proportionality, that the principle not only balances Union action but also supervises Member State behaviour.[49] After all, this principle has a huge impact in the free movement law as Member State action may never be, tautologically put, 'unduly' disproportionate.

When it comes to sentencing, as such, it is the principle of proportionality which is of greatest importance in this area. In this sense, proportionality means that the punishment for an offence ought to be proportionate to the seriousness of the offence, taking into account the harm, wrongdoing and culpability involved. In this way, the principle of proportionality connects with the issue of a fair trial because it insists that the appropriate legal safeguards have been respected.[50]

As observed by Ashworth, the European Convention of Human Rights (ECHR) poses few constraints in this regard, except the general Article 7 ECHR and the ban on retroactive criminal law. Article 49 of the Charter of Fundamental Rights, makes it clear that the severity of a penalty must not be disproportionate to the criminal offence. Although the Charter, as stipulated in Article 51, addresses the EU institutions and the Member States when they are implementing Union law, there is good reason to believe that the Charter will have a wider impact in the area of EU criminal law as a source of inspiration.[51] This also lies in the nature of proportionality as a general principle of EU law.

The final principle I want to investigate in the present paper is that of non-discrimination, which is one of the fundamental principles of European law and more lately has owned recognition also in the context of the European Arrest Warrant (EAW).[52]

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[48] *See* Christian Timermanns, *Subsidiarity and Transparency*, 22 FORDHAM INT'L L.J. 106 (1999).

[49] *See, e.g.,* CRAIG, *supra* note 45.

[50] *See* Andrew Ashworth, *Criminal Law, Human Rights and Preventive Justice, in* REGULATING DEVIANCE (Alan Norrie, et. al., 2009)

[51] *See* M. Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts*, 45 COMMON MKT. L. REV. 617 (2008).

[52] *See* 2002 OJ (L 190/1) (on the EAW).

V. The Principle of Non-Discrimination

The principle of non-discrimination is crucial for any understanding of European law as one of the basic objectives of the Union. As the Court has frequently pointed out, the principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.[53] For example, Article 2 TEU stipulates that the Union is founded on the values of respect for human rights which are common to the Member States in a society in which non-discrimination prevails. Clearly, the EU principle of non-discrimination is too well documented for any reiteration here,[54] and it is the most fundamental principle of Union law for it accounts for the very authority of supranational law.[55] It is in many ways the driving force of European law. This principle is codified in what is now Article 18 TFEU (formerly Article 12 EC) and reaffirmed in Article 21 of the Charter. It is quite obvious that the notion of non-discrimination is of utmost importance also in criminal law as forming part of the broad concept of a fair trial. In this way, it is also connected to proportionality and the notion of fairness (and fair trial) broadly speaking.

More generally at issue here, however, is the meaning of the concept of European criminal law cooperation based on mutual recognition.[56] The question is whether it is currently feasible to adopt the mutual recognition principle to criminal law cooperation matters based on the internal market model at all while refusing to apply general principles of EU law such as non-discrimination. It is true that the Lisbon Treaty has removed all doubt of whether former first pillar principles such as non-discrimination apply to the former third pillar by merging the pillars. But as mentioned at the outset of this paper, the five-year transition period also means that the old Treaty pillar structure, with limited jurisdiction of the Court of Justice to review old third pillar instruments, will continue to apply to existing third pillar measures unless amended, repealed or annulled.

In any case, the Lisbon Treaty makes it clear that non-discrimination is now explicitly applicable in the AFSJ. Although the Pre-Lisbon Treaty era witnessed a certain "depillarization" trend (which is to say, EC law based reasoning in the third pillar) the non-discrimination principles were, in principle, a principle of the first (EC) pillar. The recent ruling in *Wolzenburg* serves as an illustrating case here.[57] This case concerned the EAW

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[53] *See, e.g.,* Case C-303/05, *Advocaten voor de Wereld*, 2007 E.C.R. I-3633.

[54] *See, e.g.,* C-186/87, Cowan v. Le Trésor Public, 1986 E.C.R. 195.

[55] ALEXANDER SOMEK, INDIVIDUALISM 215 (2008).

[56] *See, e.g.,* Markus Möstl, *Preconditions and Limits of Mutual Recognition*, COMMON MKT. L. REV. 47, 405 (2010) (on mutual recognition).

[57] Case C-123/08, *Wolzenburg*, (Oct. 6, 2009).

and the possibility of the Member States for refusal to surrender under Article 4(6) EAW. More specifically, there are mandatory and optional non-execution conditions in the EAW. Article 3 EAW provides a list for mandatory refusal, such as where there are granted amnesties, where there is a *ne bis in idem* (double jeopardy) situation or where the person in question is deemed too old to stand trial. Article 4 EAW on the other hand lists a number of so-called optional grounds for refusing to surrender. For example, there are possibilities to refuse to surrender a person where the crime in question is statute barred or does not constitute a crime in the executing state or if the EAW has been issued for the purposes of execution of a custodial sentence or a detention order and the person in question is resident in the executing state and that state undertakes to execute the sentence or detention order in accordance with its domestic law. The present case concerned Article 4 and the possibility of serving a custodial suspended sentence in the executing host state.

More specifically, in *Wolzenburg* the Netherlands had made a voluntary opt-out under Article 4(6) EAW. This means that if an arrest warrant has been issued for the purposes of executing a custodial sentence or detention order, where the requested person is staying in or is a national or a resident of the executing Member State, that State undertakes to execute the sentence or detention order in accordance with its domestic law. The question arose as to whether it constituted discrimination to distinguish between a state's own nationals and non-nationals in this regard. In other words, the core question was whether the required period of residence of the person requested for surrendering in the executing state counted as "staying" or "residing" so as to be treated in the same way as nationals. Secondly, the question presents itself as to whether an additional administrative burden—such as a residence permit—was in line with the axiom of non-discrimination in EU law.

The Court of Justice made it clear that the non-discrimination axiom was applicable in the (now former) third pillar area as there is a clear free movement dimension to the EAW. In the context of the EAW, this has important implications from the perspective of rehabilitation issues and the possibilities of integrating into society.[58] However, the Court somewhat limited the full the impact of non-discrimination and citizenship by applying the five-year residence requirement as stipulated in the Citizenship Directive 2004/38[59] before non-nationals can fully benefit from the host state. One could of course question this and ask why the Directive should have such a limiting effect at all.[60] Regardless of the answer to the question posed, it should be stressed that the recognition of non-discrimination in

[58] *See* Case C-123/08, Wolzenburg, Opinion of AG Bot (March 24, 2009).

[59] *See* 2004 O.J. (L 158/77).

[60] *See* Eleanor Spaventa**,** *Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects*, 45 COMMON MKT. L. REV. 13, 45 (2008).

the area of mutual recognition and criminal law constituted an important step for the creation of a true AFSJ space.

D. Conclusion

This paper has argued that the principles of attribution of powers/legality, effectiveness, subsidiarity/ultima ratio and the principles of non-discrimination are reflected in both EU law and criminal law. More critically, however, this paper aimed to demonstrate that these principles do not necessarily mean the same thing in EU law and criminal law, which makes it even more complex when applying it in the framework of European criminal law.

Particularly, this paper stressed the need to pay sufficient attention to the notion of legality or conferred powers in EU law. This paper pointed at the ambiguous concept of effectiveness and how it is used to drive the Unions activities in this area. This poses difficulties because effectiveness is a very slippery concept which becomes a very tricky parameter when deciding on criminalization. The next step in monitoring the competences of the EU is the principle of subsidiarity. Here, there is not sufficient attention in the EU's institutions. This is a mistake because the phenomenon of over-criminalization is not in line with the criminal law as the *ultima ratio*. The paper also stressed the importance of proportionality when deciding penalties. After all, Article 49 of the Charter of Fundamental Rights stipulates that the severity of a penalty must not be disproportionate to the criminal offence.

Thereafter, this paper looked at the notion of non-discrimination and argued that this principle should also be applicable to the former third pillar instruments (still existing law during the five years transitional period). It is simply wrong to treat a state's own nationals more favourably than non-nationals, even in the context of third pillar law. The Lisbon Treaty has removed any doubts of whether this is the case by bringing the former third pillar area into the core the Union project. Regardless, there are important decision ahead of the Union in regard to the development of an AFSJ and EU criminal law.

Thus, the main argument is that the development of European criminal law deserves critical attention, particularly with reference to how poor the EU system has been at restraining the emerging drift of EU criminal law at the supranational level. There may be important principles once recognized within the nation state that are lost in such a shift. Therefore, it is necessary to identify the general framework of EU criminal law by recognizing basic principles of EU and criminal law. The good news is that the Lisbon Treaty provides at least for a basic theoretical skeleton – in title V of TFEU – for such identification.