Articles

Criminal Law Issues in the Case-law of the European Court of Justice: a General Overview

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First of all, I would like to extend my warmest wishes to the editors of the European Criminal Law Review for their success in the field of legal publications and for a meaningful contribution to scientific dialogue, even more so since the publication concerns an area of law which occupies a particular position in the European integration process.

The particularities of European criminal law were precisely the focal point of my brief presentation in the context of an international criminal law convention which took place in on 27th and 28th of November, 2009, just a few days before the entry into force of the Lisbon Treaty. I argued then that it was certainly no secret that the influence of Community law on the field of criminal law was greeted with scepticism by a significant part of the legal community in the Member States. Many considered that criminal law, a domain traditionally regarded as a constituent element of national sovereignty and associated, by definition, with the protection of the very core of human rights, did not, or at least should not, fall within the scope of Community law. I went as far as suggesting that this scepticism turned into downright suspicion when the issue arose in the context of the case-law of the European Court of Justice, which was accused of promoting the "Communitarisation" of criminal law as its ulterior objective. This reproach stemmed from the opinion that criminal law should fall exclusively under the third pillar of the European edifice, which was covered by the Treaty on European Union (EU Treaty), and that the application in criminal matters of procedures under the first "supranational/Community" pillar, which was governed by the Treaty establishing the European Community (EC Treaty), led to the usurpation of national powers.

The situation has changed rather radically with the entry into force of the Lisbon Treaty, on 1st December, 2009. The dual model "European Community/European Union" has been abandoned, the Community has been absorbed by the Union and "Community law" has ceased to exist, having been replaced by "EU law". Although the term "Communitarisation" is consequently no longer apt, it still essentially conveys the effects of the abandonment of the three-pillar structure for the EU-related areas of criminal law. Indeed, since the three-pillar structure has been officially abolished at the initiative of the authors of the Treaties, the "police and judicial cooperation in criminal matters", which until recently corresponded to

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Title VI of the EU Treaty (third pillar), now falls within the ambit of the consolidated Treaty on the Functioning of the European Union (TFEU) and forms part of the area of freedom, security and justice, along with the former Title IV of the EC Treaty (first pillar), which regulated matters relating to visas, asylum and immigration. As a result, all competences conferred on European institutions in the field of criminal law are subject to the same legislative procedures, are embodied in the same legal acts and produce the same legal effects.

I would like to note in this regard that, in my view, the problems in determining the limits between the first and third pillar were partially overrated, often misunderstood and viewed as a problem in the division of areas of competence between the Union and its . However, it becomes apparent from an in-depth examination that the "first or third pillar" dilemma rested solely upon the choice of the appropriate legal basis to adopt a measure. Therefore, the issue at hand was not whether a particular area of competence should remain with the Member States or could be the subject of a Community/Union policy, but whether the relevant legal act should be a directive or a framework decision. Clear examples are provided by the cases in which the ECJ examined whether the appropriate legal basis had been chosen for the adoption of the framework decision on the protection of the environment through criminal law[1], as well as the directive on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks[2]. In these cases, essentially, there could be no doubt as to the European nature of the measure in question, but only as to the legal form under which it would appear, given that, if Community competence was deemed to exist, legal acts under the first pillar were to be given absolute priority over those of the third pillar. In other words, even if criticism on this point had been valid, the outcome would not have been the reinstatement of a national competence, but the application of a different set of rules regarding the participation of the Community institutions to the decision-making process and the adoption of the relevant measure. Without intending to understate the differences in the legislative procedures of the first and the third pillar respectively, an option between European Community and European Union involved much less drama than choosing between Community or Union on the one hand, and the Member States, on the other.

In addition, it would be wrong to infer that, whenever the question of choosing the appropriate legal basis arose, the ECJ was quick to decide in favour of the recognition of Community powers and against the competences provided for under the third pillar. For example, the ECJ annulled[3] the Council Decision on the

[1] Case C-176/03 Commission v Council [2005] ECR I-7879, concerning Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law (OJ 2003 L 29, p. 55).

[2] Case C-301/06 Ireland v Parliament and Council [2009] ECR I-593, concerning Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L 105, p. 54).

[3] Joined Cases C-317/04 and C-318/04 Parliament v Council and Commission [2006] ECR I-4721.

conclusion of an Agreement between the European Community and the United States of America regarding the processing and transfer of Passenger Name Record data by Air Carriers to the United States Department of Homeland Security, as well as the Commission Decision on the adequate protection of personal data contained in the Passenger Name Record of air passengers[4]. The ECJ found that neither of these Decisions could be adopted in the framework of the first pillar and on the basis of Community competences relating to the proper functioning of the internal market, because the transfer of personal data aimed at the protection of public security and formed part of the activities of the Member States in areas of criminal law.

In this context, it should be highlighted that, rather than merely safeguarding the system of allocation of powers between Community, Union and the , the ECJ's principal aim in the field of criminal law was to guarantee the substantive protection of European citizens' fundamental rights from acts adopted in the context of the third pillar. Indeed, the ECJ was always vigilant to minimise the negative effects that these acts could have upon the rights and the obligations of particulars under the Treaties.

Two cases in point are *Gestoras pro Amnistia* and *Segi v Council*[5], where the ECJ recognised that common positions adopted by the Council in the context of the third pillar could, under certain circumstances, be the subject of an action for annulment before the ECJ or of a reference for a preliminary ruling. The Court admitted that, according to the Treaties, common positions, insofar as they defined the Union's approach to a specific matter, were, in general, instruments of a predominantly political/ declaratory character, not intended to produce legal effects in relation to third parties. However, a narrow interpretation of a provision of the EU Treaty, according to which the ECJ had no jurisdiction to give a preliminary ruling on questions concerning the interpretation of common positions, even where, contrary to their nature, they produced legal effects in relation to third parties, would run counter to the fundamental objective of the preliminary reference procedure which is to guarantee observance of the law in the interpretation and application of the Treaty. On the basis of this reasoning, the ECJ found that the right to refer a question for a preliminary ruling must cover, irrespective of their nature or form, all measures of the Council which are intended to produce legal effects in relation to third parties. Therefore, a national court should be able to ask the ECJ to find whether a common position is really intended to produce such legal effects, and then it would fall to the ECJ to classify it according to its true nature and to give a preliminary ruling to this effect. The ECJ went a step further by recalling that it is for the Member States and, in particular, their courts and tribunals,

[4] Council Decision 2004/496/EC of 17th May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection (OJ 2004 L 183, p. 83, and corrigendum at OJ 2005 L 255, p. 168), and Commission Decision 2004/535/EC of 14th May 2004 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States Bureau of Customs and Border Protection (OJ 2004 L 235, p. 11).

[5] Case C-354/04 P Gestoras Pro Amnistía and Others v Council [2007] ECR I-1579, and Case C-355/04 P Segi and Others v Council [2007] ECR I-1657.

to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge, before the courts, the lawfulness of any decision or other national measure related to the drafting or the application to these persons of an act of the European Union and to seek compensation for any corresponding loss suffered, where appropriate.

Another case that is worth mentioning is *Pupino*[6], in the context of which various Member States claimed that framework decisions did not entail direct effect and were fundamentally different from directives, in that they did not place national courts under an obligation to interpret national law in conformity with EU law. Despite any dissimilarity between these two sources of law, the ECJ stated that the binding nature of framework decisions was formulated in the EU Treaty in terms identical to those of the EC Treaty concerning Community Directives. This binding character involved an obligation of national authorities to interpret their respective laws in conformity with framework decisions. Therefore, individuals could indeed invoke framework decisions before the courts of the Member States in order to obtain an interpretation of national law in conformity with EU law.

To my mind, all the abovementioned judgments and arguments demonstrate that the criticism heaped upon the ECJ's case-law was unduly harsh and that the scene was already set for a positive re-evaluation of the relationship between criminal law, on the one hand, and Community/Union law, on the other. It should also be remembered that the ECJ always founded its reasoning on the premise that the specific characteristics of criminal law should be respected. The ECJ recognises and constantly emphasises that criminal law, in both its substantive and procedural rules, falls within the competence of the Member States. It must certainly be acknowledged that EU law does, however, impose limits on this competence. Yet when the ECJ states that the penal laws of Member States shall neither discriminate against persons who have the right to equal treatment under EU law nor introduce restrictions on the fundamental freedoms which EU law guarantees, this does not reflect a modern trend in the evolution of case-law; on the contrary, this line of reasoning can be traced back to the year 1981, when the ECJ held in *Casati*[7] that, even in the area of criminal legislation, EU law sets certain limits as regards the control measures which it permits the Member States to maintain in connection with the free movement of goods and persons. Moreover, it must be remembered that the existence of limits on the competence of the Member States, even where, in principle, there is no EU competence, can be witnessed not only in the field of criminal law, but also in other areas where Member States remain free to determine conditions concerning the relevant rights and their exercise, such as national social security systems, direct taxation and the right to strike and to impose lock-outs.[8]

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[6] Case C-105/03 Pupino [2005] ECR I-5285.

[7] Case 203/80 Casati [1981] ECR 2595, paragraph 27. See also Case 186/87 Cowan v Trésor Public [1989] ECR 195, paragraph 15, and Case C-348/96 Calfa [1999] ECR I-11, paragraph 22.

[8] See, respectively, Case C-531/06 Commission v Italy [2009] ECR I-4103; Case C-438/05 International Transport Workers' Federation and Finnish Seamen's Union , ' Viking Line ', [2007] ECR I-10779; Case C-540/07 Commission v Italy [2009] ECR I-10983.

Having said that, the fact that the Lisbon Treaty formally resolves the "first or third pillar" dilemma is a development that must undoubtedly be welcomed, since the legal means and procedures provided for in the EU Treaty, in particular common positions and framework decisions, will make way for the legal acts commonly used and already familiar from the EC Treaty, i. e. regulations and directives. This seems to confirm the ECJ's position regarding their substantive similarity. It is a solution that will improve transparency and facilitate the supervision of European legislative activities both on the allocation of powers between the Union and the Member States and on the protection of EU citizens.

Another positive development is the unification of the ECJ's jurisdiction in the area of freedom, security and justice. This has been achieved through the abrogation of two provisions: on the one hand, article 68 (1) of the EC Treaty, which stated that matters of criminal law under the first pillar could only be raised before the ECJ in the context of a preliminary reference by courts or tribunals of the Member States against whose decisions there was no judicial remedy under the respective national law. The lower courts of Member States had no right to ask for a preliminary ruling and any questions referred were rejected as inadmissible. The abrogation of this limitation will certainly contribute to guaranteeing the full application and respect of EU law in the area of freedom, security and justice. Furthermore, the possibility for lower national courts to address the Court is consistent with the principle of procedural economy and will allow for the prompt and effective solution of EU law related questions.

On the other hand, article 35 of the EU Treaty has also been repealed. According to this provision, the ECJ's jurisdiction to give preliminary rulings on the EU system of police and judicial cooperation in criminal matters was subject to a relevant declaration by the Member States. Member States were free to accept the ECJ's jurisdiction in this area and to specify whether the right to such a preliminary reference would be granted only to national courts ruling at final instance or to all national courts. It is certainly true that most Member States had accepted the ECJ's jurisdiction and had granted the right to a preliminary reference to all national courts. However, the formal abrogation of article 35 EU Treaty now guarantees uniform interpretation and application of EU law in all Member States.

The ECJ's post-Lisbon activity in the area of criminal law is also expected to intensify due to a certain widening of the Union's substantive powers on these matters. The establishment and progressive achievement of the area of freedom, security and justice had already resulted in a proliferation of instances where the fields of EU law and criminal law overlapped. The goals laid down by the Council within the so-called "Hague Programme"[9] were meant, *inter alia*, to strengthen the common capability of the Union and its Member States to guarantee fundamental

[9] Adopted at the European Council of 4th and 5th November 2004. See also Communication from the Commission to the Council and the European Parliament of 10th May 2005 – The Hague Programme: ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice [COM(2005) 184 final – OJ 2005 C 236].

rights, minimum procedural safeguards and access to justice; to regulate migration flows and to control the external borders of the Union; to fight organised, cross-border crime and repress the threat of terrorism; to realise the potential of Europol and Eurojust; and to carry further the mutual recognition of judicial decisions and certificates both in civil and in criminal matters. Moreover, these were objectives that had to be met in the interest of EU citizens by the development of a Common Asylum System and by improving access to the courts, practical police and judicial cooperation, the approximation of laws and setting common policies. This lengthy list provides support for the view that, when the Hague Programme was devised, the European Union had at least intended to retain some powers directly linked to criminal law.

This evolution is now carried forward by the Lisbon Treaty. Article 83 TFEU deserves special mention in this context, insofar as it expands the field of application of former article 31 of the EU Treaty and provides that the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas 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. These areas expressly include terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

A final reservation that has always been expressed regarding the ECJ's jurisdiction in matters of criminal law concerned its inability to issue a decision within the pressing time constraints imposed by the delicate nature of relevant cases. In the post-Lisbon Treaty era, there is a procedural mechanism instituted by primary law (article 267 (4) of the TFEU) and already applied by the ECJ on the basis of its Rules of Procedure since 1st May 2008, which aims to ensure that cases involving individuals placed under custody or, in general, deprived of their liberty will be dealt with expeditiously. I am, of course, referring to the "urgent preliminary ruling procedure". Through a series of measures with regard to the organisation of the written and the oral procedure, the allocation of these cases to a specific chamber and the wide use of electronic means of communication, the ECJ has managed to issue a decision within three months in all the cases to which this procedure has been applied. These impressive results indicate that the delicate and urgent matters of the area of freedom, security and justice can indeed be resolved quickly and efficiently by the ECJ, without endangering the dialectic nature of the preliminary reference procedure.