

# OPPORTUNITÉ ET LÉGITIMITÉ DE L'HARMONISATION

## I. ISSUES FOR DISCUSSION

Donysios SPINELLIS

*Athens University*

### I. INTRODUCTION

In this report I am trying to analyse the reasons at the juridical level, theoretical and practical, which may justify the harmonisation of penal sanctions in Europe or on the contrary their diversion.

For the purposes of our discussion, I understand harmonisation as co-ordination, adaptation, approximation and even, if necessary, unification of norms and institutions concerning the penal sanctions in order to achieve the best possible result in efforts to combat criminality, while safeguarding human rights, in the particular categories of offences examined as examples, i.e. the cyber-crimes, the terrorist offences and the offences against the environment <sup>1</sup>.

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

### II. PURPOSES

A - The classical arguments advanced *against* efforts to unify criminal law in general at an international level, are that that law should not be

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<sup>1</sup> A systematic distinction of successive phases of harmonisation is provided by KLIP, *NStZ* 2000, 627. I think, however, that the degree of harmonisation should be decided each time by necessity, not in absolute categories.

harmonised or unified, because it is the product of culture and history exhibiting the deepest national convictions and values. An effort to take such a step in, for example, the European Union (EU), not only may violate pluralism of values, but would also impinge upon the nation's sovereignty.

This argument concerns first of all and mainly *the choice of conducts to be criminalised*. The criminalisation of certain forms of conduct which are closely related to morals influencing their severe disapproval, which may vary from the one country to the other, concerns mostly such offences as the abortion, the adultery, the homosexual relations between consenting adults, etc., most of which have been decriminalised in the last decades in whole or in part in most of the EU States.

Other forms of conduct however, e.g. murder, grievous bodily harm, theft, rape etc. are universally disapproved and considered as dangerous by the general public in all countries and they are more or less equally punishable in all jurisdictions.

Finally, such forms of conduct as the cyber-crimes, the terrorist offences and the offences against the environment are not connected with national systems of values, so that their criminalisation does not depend on such values.

*Sanctions* are not closely connected to the values of each country, but they are not irrelevant to them. This concerns first of all the *severity of punishment* provided. A certain conduct may be threatened with more severe punishment in one country than in the other, but it is questionable whether the discrepancy depends upon a system of values or rather on a general high level of penalties in a national penal system. Such a level of sanctions may be related not so much to its system of values as to habits in the legislation which may change gradually, without much disturbance.

Furthermore, the system of sanctions may also concern *the kind of penalties* provided. E.g. some legislations include as highest penalty the deprivation of freedom for life, while others do not. In some jurisdictions the use of custodial penalties is more frequent, while in others the custodial penalties have been replaced to a great extent by pecuniary penalties and by alternative ones. Finally, certain additional penalties such as the deprivation of civil rights are provided in some legal systems while in others they are not. These differences may be connected to the convictions and values in each country, which influence the acceptance of such forms of sanctions or may react negatively to their abolition.

B - On the other side of the coin, the main argument *in favour of* harmonisation is that differences with respect to criminal sanctions may hamper international co-operation in criminal matters, in view especially, of the *double criminality requirement* for extradition and mutual assistance or of the need to consider as limits of sanctions in one State the corresponding sanctions provided by the law of another State.

So, article 2 of the European Convention on Extradition (1957) requires, that extraditable offences should be the ones punishable under the laws of both the requesting and of the requested Party by deprivation of

liberty of at least one year or by a more severe penalty. Therefore an examination and comparison of the two relevant laws is necessary in each case, in order to check whether this requirement is met, and inevitably, in certain cases the request for extradition has to be refused.

The condition of the double criminality and punishability has been alleviated under the Convention relating to Extradition between the Member States of the European Union (1996), article 2 of which has lowered the threshold on the punishment in the requested State to six months. However, the need for a double evaluation of the punishable character of the offence remains and constitutes an obstacle to prompt decisions on extradition requests, or leads to the refusal of others.

The double criminality requirement is provided also in other multilateral conventions, such as the European Convention on Mutual Assistance in Criminal Matters (art. 5 on an optional basis),

Likewise, the UN Convention on the Transfer of Foreign Prisoners (1985), § I.3., the corresponding European Convention on the Transfer of Sentenced Persons (1983) (art. 3 § 1 (e) ) and the UN Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released (1990) article 6 and other international instruments provide the double criminality requirement.

In other cases of co-operation between two States restrictions provided may become also obstacles for the prompt function of such co-operation. So, for instance, article 11 § 1 of the UN Model Treaty on the Transfer of Proceedings in Criminal Matters (1990), which requires that when the requested State has established its jurisdiction under article 1 § 2, the sanction pronounced in that State shall not be more severe than that provided by the law of the State requesting the transfer.

Also the *paucity of possibilities of the international application of the ne bis in idem principle* is due to some extent to the diversity of the sanctions in the laws of the different countries. A lack of trust in the legislation or the justice system of other countries is the cause for which States are reluctant to subscribe to an application of the *ne bis in idem* principle in the international context. Consequently, a harmonisation of penal sanctions at the legislative level would be a first step toward achieving such an application, which should be accompanied of course by a proper administration of justice in the relevant countries.

A harmonisation of sanctions could of course be envisaged also as a way of *reconciling the different sanctioning orders* such as the penal order with the administrative and in particular the disciplinary order. If the reaction to the same obnoxious conduct in one country are criminal sanctions and in another administrative or disciplinary ones, difficult *ne bis in idem* problems may be created, which could have been avoided if the systems of sanctions were harmonised.

But even if the sanctions provided in both the State A which has previously tried and convicted a certain person and State B, where he is prosecuted again, are only penal sanctions, difficulties may arise in case the latter applies the so-called "principle of deduction" (in German :

*Anrechnungsprinzip*)<sup>2</sup>. It is possible that the different character of penal sanctions renders difficult the deduction of the penalty already imposed and served in State A from a penalty imposed by State B. e.g. a custodial penalty in State A and a pecuniary penalty in State B, a penalty converted into pecuniary penalty here, a pecuniary penalty from the outset there, a simply suspended sentence in the one case, a suspended sentence with probation in the other, etc.

C - Furthermore, in the relationship of national and supranational criminal jurisdictions, whenever questions of proceedings pending or of *ne bis in idem* arise, differences of penal sanctions provided for the case or already imposed may influence the decision, especially with respect to « sham proceedings » e.g. in the application of article 9 (ii) and 13 ICTY (1994), article 9 § 2 (b) and § 3 ICTR, article 20 § 3 (a) of the ICC Statute.

In all these cases it is probable that sanctions of different kinds and of different degrees of severity are provided in the States or the conventions involved. These eventualities may create problems in the application of the above conventions. A harmonisation of sanctions could facilitate the solution of these problems, and simplify the application of the conventions and all other similar instruments<sup>3</sup>.

D - Finally, the fact that in some States certain forms of behaviour are less severely penalised than in others obviously may and in practice does attract criminal activity and creates criminality “havens”. And if some suspect is apprehended for an offence for which the courts of more than one States have criminal jurisdiction, it gives him an incentive to make efforts to be tried by the courts of the State where the sanctions are less severe.

E - In view of the above observations, it may be concluded that harmonisation of criminal sanctions provided in various States for the same forms of conduct, especially in Member States of the EU will facilitate the application of international conventions, treaties and other instruments. Admittedly, it would not be easy to measure the degree of success of the harmonisation process by assessing the implementation of these objectives. Here I think that if obviously undesirable situations, such as the double criminality obstacle and the possible existence of criminality havens, are eliminated, it is very probable that the suppression of certain forms of criminality will improve. 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

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<sup>2</sup> Provided e.g. in art. 10 of the Greek PC.

<sup>3</sup> In this sense, also in the Resolutions of the 16<sup>th</sup> Congress of the AIDP in Budapest on September 5-11 1999, Section IV D, 1, 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”.

a reason for the failure to undertake such initiatives and also to take certain risks.

### III. MEANS : THE INSTITUTIONAL ASPECTS OF HARMONISATION

Article 29 of the European Union Treaty considers harmonisation as a tool to facilitate the apparently rather slow judicial co-operation. According to it, in order to provide citizens with a high level of safety within an area of freedom, security and justice, the European Union (EU) should develop common action in the fields of police and judicial co-operation in criminal matters. That objective shall be achieved by preventing and combating crime *inter alia* through “approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31 (e)”. That article provides, that common action on judicial co-operation in criminal matters shall include also progressively adopting measures establishing *minimum rules relating to penalties* in the fields of organised crime, terrorism and illicit drug trafficking.

The procedures and methods provided for the adoption of co-operation are (art. 34 § 2) the common positions of the EU, the framework decisions, other decisions and conventions.

Although, as we see, the area of criminal sanctions, which should be subject to harmonisation, is limited and the Union Treaty does not envisage their complete unification, it is obvious that the trend is toward harmonisation of them in certain areas and up to a certain extent. It should be noted, however, that some recently issued instruments of the EU authorities are rather problematic. As not very encouraging examples of efforts of the EU which may encroach upon the national sovereignty of the Member States one may mention certain framework decisions which have already been proposed or accepted by the European Council. Such are the ones concerning offences of unauthorised entry and residence, cyber crime, offences against the environment, the European arrest warrant and the one on combating terrorism.

I think that the areas covered by the proposed framework decisions concern interests common to all Member States and threats to such interests which have appeared rather recently. In view of this, value pluralism does not seem to be of much relevance. 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. 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 sacrifice of certain elements of national sovereignty is necessary in order to achieve the objectives declared by the EU Treaty, it is inevitable that such strategies are a necessary evil.

However, I would like to observe that, although framework decisions (FD) should leave Member States with some flexibility, binding them only as to the result to be achieved but leaving to the national authorities the choice of the form or of the methods (art. 34 § 2 (b)), these are

becoming progressively more specific, thereby restricting Member States. As examples I may mention especially the most recent FDs on the European warrant of arrest and on combating terrorism.

The legal basis of framework decisions are Articles 29, 31 (e) and 34 § 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 rather have some discretion, irrespective of the actual wording. In my opinion the latter is the right view, but the issue should be more developed and explained.

In this respect 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 §§ 1 and 6) to decide whether its course was in compliance with these provisions or not.<sup>4</sup>

#### IV. CONCLUSIONS

A combination of partial harmonisation and mutual recognition, also including a threshold concerning minor offences is, the best possible solution in my view to the problems of inter-European co-operation in criminal matters.

Common agreed definitions of criminal offences and especially 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, should be free to and often does add some specific provisions for national use.

Harmonisation and even partial unification of certain parts of the criminal law at EU level, especially those concerning criminal sanctions are inevitable, since they are mandatory under the provisions of the TEU, particularly Articles 29, 31 (e) and 34 para 2. It is important to make all

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<sup>4</sup> 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.

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.

Every effort should also be made to keep obligations to harmonise provided in framework decisions and conventions 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.

