

III. REASONS FOR MAINTAINING THE DIVERSITY

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The authority to decide on crime and punishment is one of the very central features characterising the sovereign powers of an independent state. Issues on criminal policy have already, for a very long time, fallen very clearly under the competence of the individual States. This fact can probably also be referred to as one of the explanations for the prevailing diversity in approaches to crime and punishment in different domestic jurisdictions. Probably, if we look at Europe in legal cultural terms and compare it with other parts of the world, we will notice that there are some general characteristics in a European approach to criminal policy issues. This general value basis includes the recognition of human rights, it also includes a shared understanding of the fundamental contradictions of building up a rational and functional criminal justice system which would preserve and support important values in the society without lending itself to a misuse of state power against its own citizens. The general value basis is, however, still very weak.

The European legal systems have already lived through a long history and respectively there is long-term experience concerning legal responses to criminality threats. Ideologically the dominant trends in criminological and criminal policy thinking have shifted between various options (such as special prevention, general prevention, *défense sociale*, just desert, rehabilitation, abolitionism). Reflecting the actual “climate” of the dominant political ideologies and different fundamental political and legal values of the “nation states”, the domestic legal systems have, as a result of political decisions, developed into different directions. The current diversity, which can be observed when comparing domestic legal systems from the point of view of how they understand the use of penal sanctions, is a natural outcome of the diffuse forces and traditions behind the development of legal systems. The diversity is a natural point of departure rather than a specific problem. It will be regarded as a problem only if the diversity creates specific problems that cannot adequately be dealt with

without first reducing the diversity. Therefore, a critical analysis of the need for a harmonisation will require more than just a plain descriptive comparative analysis of the differences. Some principles of European Union law, such as the subsidiarity principle, are expressions of the fact that certain functions naturally fall upon the Member States. A reversal of this hypothesis requires arguments.

The idea of a radical diversity concerning domestic criminal justice systems that could be related to historical, political, and ideological reasons does not, however, give a full description of the process. Despite the fact that criminal law is very clearly "situated" on the level of domestic legal systems, the increasing mutual interdependence of societies and States has for a long time already motivated an increasing effort to enhance legal cooperation within the international community. Many such efforts have had, at least to some extent, a harmonising effect. The emergence of an international criminal law exemplifies this tendency. Partly this development deals directly with the weak legal order called international law, partly again it is visible on the level of domestic legal orders. The international treaties, however, do not usually directly address issues of harmonisation of definitions of various crimes or of penal sanctions to be applied. Often, the approach is more to define a certain common general approach in order to guarantee a smooth cooperation of officials in transnational or cross-border cases.

The international treaties on this field usually have more detailed provisions on crime definitions than of the penal sanctions to be applied domestically. Often, the problems of criminality, like terrorism, drugs trafficking, or money laundering, have been approached from a problem-oriented and sector-like point of view addressing a great many aspects of the problem field simultaneously. From the point of view of legal harmonisation or convergence, such an effect is strongest concerning the crime definitions in that sector and other legal provisions dealing with inter-state legal co-operation.

The systems of sanctions have, in turn, been much *less* influenced by such harmonising tendencies. The systems of penal sanctions have, of course, been on the agenda when drafting international conventions in the field of human rights. The question of permissibility of the death sentence is the clearest example of such an issue regulated in numerous international instruments. Along general lines, the issues of penal sanctions and sentencing have much more often been dealt with in international *soft law* instruments. This division of labour can be seen, for example, in the work of the Council of Europe.

Against this background it is easier to understand the nature of the diversity questions especially where the domestic laws on penal sanctions are concerned. The diversity, even if not total or irrevocable in all its dimensions, is still a natural starting point. A comparative study easily confirms this. In almost every possible detail of the legal system of sanctions the adopted solutions vary from one country to another. Those countries which in textbooks of comparative law are listed as belonging

to the same legal families, show a greater resemblance than such pairs of countries which do have a common "family background".

The legal systems which have developed under the condition of a legislative cooperation aiming at a greater convergence (the Nordic countries since the early 1960's, the Benelux countries, etc.) have usually been able to build up a common view on general criminal policy questions. Still, even under such conditions, the systems of sanctions have preserved much of their domestic character. Thinking in terms of gross legal families may sometimes be oversimplified: even though countries like Sweden and Finland share much of the approach, still quite many basic solutions differ (electronic surveillance is being practised in Sweden, not in Finland; mediation is being widely practised in Finland, but not in Sweden, etc.).

The diversity is underlined by the fact that a criminal justice system is a product of norms of a very different character. The legal procedural norms are closely connected to the roles given to various institutional actors in that process. As will easily be confirmed, in this respect the European legal systems are built on quite a few different models. The division of labour between the police, the prosecutor and the court may vary significantly in different legal systems. Also, if we add the layer of sentencing and execution of sentences to this setting, we again find similar features. In some countries the courts or the prosecutors are genuinely responsible for decisions concerning the execution of sentences, whereas in several legal systems such authority lies foremost within specific administrative authorities. A harmonisation of norms that have a close contact to such an institutional setting will face obvious difficulties, if that would be proposed. The restructuring of the institutional setting would, therefore, be a preliminary condition for reforms aiming at a uniform solution on such issues. Therefore some of the reasons for maintaining diversity are very real and concrete and have to do with practical difficulties in creating a greater unity.

A similar point could be made also concerning some other aspects. The current institutional framework of the law of the European Union, aiming at the further development of Europe as an Area of Freedom, Security and Justice, does not give the EU a full mandate to deal with issues relevant for combating criminality. The provisions clearly restrict the scope of action to some specific forms of serious criminality, especially to organised international criminality, and other serious forms of criminality mainly with a cross-border element. The common European concern does not cover the full substantial area of criminal justice systems. Still, the European Union is increasingly taking responsibility of the citizens' security also in these criminality issues.

Of course we might say that because the third pillar co-operation is by nature intergovernmental, no clear limitations of the measures adopted are necessary from the point of view of competence issues. But still, where we are now, the EU cannot freely address the full domain of domestic criminal law and domestic criminal policy.

For that reason the maintaining of diversity concerning the systems of penal sanctions seems a very natural thing. No binding measures could

be adopted to general issues concerning the contents of domestic penal systems. The limited competence of the EU would make an effort for a comprehensive reform in the law of sentencing fail. The only solution would be to restrict the harmonisation to such issues that can be dealt with without a risk of spill-over to such areas that do not fall into this regime. Questions such as rules on early release or the impact of foreign judgements to sentencing could possibly be dealt with without trying to abolish all of the diversity, if specific rules can be formulated that do not entail a necessity of revising the whole of the domestic norm framework.

Preserving diversity can also be looked at from the point of view of criminal policy and its rationality. Today, most of the criminality dealt with in domestic trials is still domestic in its nature. From the point of view of a general criminal policy rationality it is obvious that the institutions and legal frameworks for combating such ordinary forms of criminality must be set against the domestic experiences and draw on those experiences and traditions. The level of repression within a criminal justice system may be hard to determine, but still it is there. The level of repression of a system depends, in turn, on quite many factors determining the actual content of the sanctions. Rules on early release, for instance, shape much of the severity of the system. If the provisions of early release would be abolished or changed towards a stricter direction, the level of repression might raise or drop significantly.

If there is a need to provide more detailed rules on such issues on a European level, the impact of such changes should have to be restricted to some specific areas of severe cross-border crime only. That again might produce problems of consistency and coherence for the legal systems of individual states. The coherence could be at risk especially when seen from the point of view of the criminal political rationality of the system. In fact, such problems are frequently noticed on the level of domestic legal systems trying to live up to their international obligations and at the same time trying to protect the coherence of the own legal system. In many instances legal techniques may be developed to solve such problems, but also when a solution can be found, it will often result in an increased complexity of the norms required.

As the *opportunity of harmonisation* was discussed, the analysis led to the recognition of certain differences between sensitivity of areas of criminal law when looked at from the point of view of a possible harmonisation or unification of penal sanctions. The protection of common European interests (environment, safety of the food, the budget of the European Union, euro) was seen as calling for the widest common action. One of the problems is, however, that the harmonising of some structural elements only in the systems of sanctions would not be enough in order to guarantee a uniform sentencing practice.

The system of criminal sanctions is a *microcosmos* of the whole system of the norms of criminal law. The law of sentencing, as it has been written down in law books and as it is practised in several countries, entails references to the system of general liability rules (general legal concepts and general legal principles, definitions of general prerequisites

of penal liability). In a sentencing phase these liability issues are being looked at from another angle, from a wider perspective than as merely liability rules. In most European countries, as concerns the law of sentencing, an emphasis is placed on the crime committed, and especially, in focus are the objective dangerousness and harmfulness of the act as well as the personal guilt-aspects more connected with the perpetrator. A great variety of solutions can be pointed out, but most of the options share this as a starting point. In the field of criminal law, the general doctrines of liability are very sophisticated by nature, and interpretations given to them differ from one country to another. Here again we can refer to the legal cultural determinants behind these kind of differences. The systematic nature of the norms on both of these levels, that is on the level of general liability rules and on the level of sentencing law, makes a piecemeal approach very difficult to adopt. We noted earlier that the international legal instruments are in fact often following a piecemeal strategy targeting only one specific problem at a time. Concerning the general liability rules and the sentencing rules, such an approach is not very attractive.

Earlier we referred to institutional roles and how and why they affect the running of criminal procedure, sentencing, and execution of a sentence. In some jurisdictions the sentencing law is quite weak because the legal system takes the judge's free discretion as the starting point. A constitutional understanding which presumes an almost unlimited authority of a judge to decide on questions of punishment may in fact challenge the possibility of developing a rational law on sentencing. On the other hand, in such countries that operate with elaborated grounds and principles of sentencing the idea of free discretion has already set aside : the discretion of the court is legally regulated and the whole system presupposes that the individual actors within the system are set under a duty to motivate their decisions by reference to such elements. If no such duty exists, the system in fact entails a "black box", and the contents of that black box can be studied only indirectly. Here we have found a very fundamental aspect of how law works : if the diversity concerns not only the concrete formulations of various principles and the like, but *also the question whether such principles exist at all*, any proposals addressing this question have to go beyond merely seeking out a common ground or the common lowest denominator. Instead, constructive proposals for creating the possibility for a common ground need first to be produced.

Criminal law is highly ideological and value-laden in its contents. Also the question concerning the legitimacy of criminal law must deal with this question. A penal law is a "list of the sins" of a particular society, and the evaluations of that society are reflected in it. Not only the definitions of the "bad" actions, or crimes, in order to protect a valuable "good", or an interest, share this feature, but also the system of penal sanctions incorporates a similar dialectic of the bad and good. The prison sentences are the harshest we have nowadays ; they are meant to be restrictions of liberty and also serve as an effective prevention of future crime. The domestic innovations of how to deal with deviancy and how to punish people who have done wrong could be understood as indicators

of cultural development. The legitimacy of the legal system is dependent on the fact that the popular conscience of the people can find the contents of the system along general lines acceptable. Still, very often people have too strong expectations that a tough criminal policy can solve crime problems.

The rationality of a criminal policy is not totally a matter of political acceptance only, but criminological and other knowledge is also valuable. The diversity of approaches may thus also illustrate the point that the concrete criminal politics of a country may sometimes seem irrational if looked at from the point of view of the rationality of another system. If very much emphasis will be put on the deterrent functions of the threat of punishment, easily less repressive legal systems will be taken as “criminogenic”, as encouraging the committing of crime, as attracting criminality, as being the weakest part in the chain of the control. The talk about “jurisdiction shopping”, or “criminal paradises”, for instance, indicates such an approach. There is, however, not much general criminological evidence of such a movement of criminality. In the United States, for instance, the penal codes are still on the level of the individual states, which enables the different states to define their own approach and values for crimes that do not have a significant cross-border element. This also respects the principle of subsidiarity. A comparative study that takes a look at possible black spots in the control of criminality should choose to make use of in-depth studies of crime prevention and control.

One might say that stressing the aim of developing the European Union as an Area of Freedom, Security and Justice goes further than that : that it already presumes a cultural unity and shared basis. But is it rather not the other way round : are not the differences in cultural evaluations part of the explanation behind why we have such legal differences in the first place? We should instead formulate the question another way : is an Area of Freedom, Security and Justice viable *without* a strong unification of the cultural values related to the criminal justice systems?

The diversity in that sense is not something one should wish to get rid of, quite the opposite. An approach aiming at harmonisation or unification would, in criminal policy terms, presuppose that a rational criminal policy could be formulated for the larger “region” in question. Taking into consideration the reasons behind the current diversity in Europe, there is not much hope that one could formulate the guiding criminal policy principles, fill them with common evaluations, and be able to reform the whole of the law of penal sanctions in order to create a reasonable convergence in the area. The differences are not only random and accidental, they are also systemic.

The other direction, not the top-down model of implementing hard law, but the softer grass-root strategy of promoting “free movement of legal ideas and innovations” between the legal systems, and encouraging the inclusion of comparative aspects in law drafting processes, and the use of model legislation and other soft law, might prove more successful in the long run. It might lead to the point in which the actual harmonisation strikes a reasonable balance between the reasons for maintaining the

differences and those to abolish them. The harmonisation of the law of sanctions would progress in line with other legal-cultural harmonisation, but not be used instrumentally as the engine for promoting legal-cultural uniformity.

If we make a distinction between the *vertical* harmonisation and the *horizontal* interstate legal co-operation, we might observe that the latter way respects the diversity more effectively, even though it might entail the need to simultaneously give rules with a harmonizing effect. Still, the horizontal co-operation, and the legal measures enhancing it, can be quite powerful in producing convergence-creating results. The mutual recognition of final decisions and judgements, if fully realised and implemented, would indirectly produce a lot of interstate legal communication that would in the long run probably lead to a greater convergence. As regards the law of penal sanctions, this horizontal approach proves to be less problematic than the vertical one.

The enhanced co-operation is motivated also in light of filling legal gaps and thus increasing the rationality of the systems. This might be one of the true merits of an "Area of freedom, security and justice". For instance, if the legal systems do not consult with each other, a perpetrator who has been sentenced already in several counties may in a new process be held as a first time offender, if the horizontal co-ordination is not up to date. Such issues may, when taken notice of, motivate the domestic legislators to give more room for such forms of co-operation. This will often require a law reform.

At the moment it is hard to tell how far-reaching the consequences of the principle of mutual recognition of decisions and judgements will be. The most important of its expressions is the creation of a common European arrest warrant connected with a fast-track surrender procedure. This measure will be applied, however, for a list of specific crimes only. It remains to be seen how strong the pressures for harmonising the substantial legislation on those crimes will eventually be, caused by the mere fact that the officials no longer can refrain from action if no specific grounds are at hands.

It is clear that the principle of mutual recognition will in the near future find many other expressions as well. Several such proposals are being listed in the latest Biannual Update of the Scoreboard, presented by the Commission (COM (2002) 738 final). These include the application of mutual recognition to pre-trial orders and a feasibility study of improved cross-border co-operation on the transfer of proceedings and the enforcement of sentences.

