Europe as Transnational Law – A Criminal Law for Europe: Between National Heritage and Transnational Necessities

By Christoph J.M. Safferling[*]

A. A Common European Criminal Justice System

Criminal law is different, it is often said, from other areas of law in that it is rooted in and thus depends on national heritage to a great extent. This uniqueness is recognized by European institutions, as expressed by General Advocat Mazák in a case concerning the protection of the environment by means of criminal law:

> "In many respects, criminal law stands out from other areas of law. Availing itself of the most severe and most dissuasive tool of social control – punishments – it delineates the outer limits of acceptable behaviour and in that way protects the values held dearest by the community at large. As an expression essentially of the common will, criminal penalties reflect particular social disapproval and are in that respect of a qualitatively different nature as compared with other punishments such as administrative sanctions.
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> Thus, more so than other fields of law, criminal law largely mirrors the particular cultural, moral, financial and other attitudes of a community and is especially sensitive to societal developments.
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> There is, however, no uniform concept of the notion of criminal law and the Member States may have very different ideas when it comes to identifying in closer detail the purposes which it should serve and the effects it may have. It is thus difficult to talk about

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> criminal law in general terms and without specific national connotations."[1]

For examples of laws with specific national connotations one is often referred to topics like drug prevention,[2] abortion,[3] or euthanasia[4]. The criminalization of the so-called holocaust denial (Auschwitzlüge) by § 130 (III) German Criminal Code is also often mentioned in this context.[5] Yet the idiosyncrasies of national criminal laws are also positioned at a much more fundamental level, as there is no definite common understanding regarding general principles of criminal law respecting inchoate offences[6], co-perpetration,[7] or even the

[1] Case C-440/05, Comm'n of the Eur. Cmtys. v. Council of the Eur. Union, 2007 E.C.R. I-09097, at para. 67-69.

[2] *See e.g.*, Council Framework Decision 2004/757/JHA of 25.10.2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, 2004 O.J. (L 335) 8 (establishing elements of serious types of drug offences and allowing Member States to regulate on personal consumption issues); Brigitte Zypries, Federal Minister of Justice, Vortrag der Bundesjustizministerin Zypries auf der Jahrestagung der Deutsch-Niederländischen Juristenkonferenz: Deutschland ist den Niederlanden in Freundschaft und Arbeit verbunden (3 Oct. 2003), http://www.bmj.bund.de/enid/0,6db3296d6f6e7468092d093132093a0979656172092d0932303033093a09706d635f6964092d09383934/Reden/Brigitte_Zypries_zc.html; Bundesverfassungsgericht [BverfG - Federal Constitutional Court], Case No. 2 BvR 2031/92, 9 Mar. 1994, 90 BVerfGE 145 (regarding the consumption of cannabis); Michael Kniesel, *Nach der Entscheidung des BVerfG zur Strafbarkeit weicher Drogen - Anfang vom Ende der Drogenpolitik durch Strafrecht*, 27 ZEITSCHRIFT FÜR RECHTSPOLITIK 352 (1994); Christoph Gusy, *Grenzen staatlicher Kriminalisierung des Umgangs mit Drogen*, 51 JURISTENZEITUNG 863 (1994).

[3] *See* 1 SCHWANGERSCHAFTSABBRUCH IM INTERNATIONALEN VERGLEICH - EUROPA (Albin Eser & Hans-Georg Koch eds., 1988); Thomas Groh & Nils Lange-Bertalot, *Der Schutz des Lebens Ungeborener nach der EMRK*, 58 NEUE JURISTISCHE WOCHENSCHRIFT 713 (2005); Stefan Trechsel, *Fristenlösung Schweizer Art*, in FESTSCHRIFT ALBIN ESER 637 (J. Arnold *et al*. eds., 2005).

[4] *See*, *e.g.*, Michael Lindemann, *Zur Rechtswirklichkeit von Euthanasie und ärztlich assistiertem Suizid in den Niederlanden*, 117 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 208 (2005); Dieter Lorenz, *Aktuelle Verfassungsfragen der Euthanasie*, 64 JURISTENZEITUNG 57 (2009); Fuat S. Oduncu & Wolfgang Eisenmenger, *Euthanasie - Sterbehilfe - Sterbebegleitung. Eine kritische Bestandsaufnahme im internationalen Vergleich*, 20 MEDIZINRECHT 327 (2002); Klaus Kutzer, *Probleme der Sterbehilfe – Entwicklung und Stand der Diskussion*, 10 FAMILIE PARTNERSCHAFT UND RECHT 683 (2004); Sebastian Weber, *Justizielle Zusammenarbeit in Strafsachen und parlamentarische Demokratie*, 42 EUROPARECHT 88, 98 (2008).

[5] *See* Bundesgerichtshof [BGH - Federal Court of Justice], 1 StR 184/00, 12 Dec. 2000, 46 BGHSt212 (regarding the applicability of the German Criminal Code regarding holocaust denial through the internet). Initiatives to criminalize the holocaust denial in all EU Member States could not prevail. *See* the Statement of the Federal Government, ANTWORT DER BUNDESREGIERUNG AUF DIE KLEINE ANFRAGE DER ABGEORDNETEN SEVIM DAGDELEN, ULLA JELPKE UND DER FRAKTION DIE LINKE, BTDRUCKS 16/4689 (2007); Sebastian Weber, *Strafbarkeit der Holocaustleugnung in der Europäischen Union*, 41 ZEITSCHRIFT FÜR RECHTSPOLITIK 21 (2008).

[6] Christoph Safferling, *Die Abgrenzung von strafloser Vorbereitung und strafbarem Versuch im deutschen, europäischen und im Völkerstrafrecht*, 118 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 682 (2006); ANDRÉ KLIP, EUROPEAN CRIMINAL LAW 193 (2009).

[7] *See* KAI AMBOS, DER ALLGEMEINE TEIL DES VÖLKERSTRAFRECHTS 549-551 (2002) (for a short overview of different approaches regarding co-perpetration in Anglo-American and continental European criminal law).

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requirements of intentional behavior.[8] European national systems differ at the very heart of criminal law whether and to what extent criminal responsibility requires individual guilt. Although it is mostly accepted that a perpetrator can only be blamed for the deed and be convicted if he or she had a real alternative to behave differently, criminal law systems do not concur regarding age, the necessary mental state of the perpetrator, knowledge, or for that matter mistake of law.[9] The *Schuldprinzip* (culpability principle), is according to German law not only a prerequisite of a criminal sanction, but is generally accepted as establishing the very basis of the legitimacy of criminal law as such.[10]

On 30 June 2009, the Federal Constitutional Court has stated exactly this in its judgment on the Lisbon Treaty.[11] It has related the culpability principle for the first time in its jurisprudence explicitly to Art. 1 (1) Grundgesetz (GG - German Basic Law), the dignity of the human being, and thus put it into the context of the unalienable provisions of the Constitution according to Art. 79 (3) of the German Basic Law.[12] This decision will undoubtedly not only be relevant for generations of public and European law jurists,[13] but also for generations of criminal lawyers to come.[14]

> "Moreover, the competences of the European Union in the area of the administration of criminal law must be interpreted in a way that complies with the requirements of the principle of guilt. Criminal law is based on the principle of guilt. This principle presupposes a human being's own responsibility, it presupposes human beings who themselves determine their actions and can decide in favour of right or wrong

[8] Joachim Vogel, *Elemente der Straftat: Bemerkungen zur französischen Straftatlehre und zur Straftat des common law*, 145 GOLTDAMMER'S ARCHIV FÜR STRAFRECHT 117 (1998).

[9] *See* CHRISTOPH SAFFERLING, VORSATZ UND SCHULD 481-488 (2008).

[10] BVerfGE 25, 269 (284); BverfGE 95, 96. *See* SAFFERLING, *supra* note 9, at 100.

[11] Lisbon Case, BverfG, 2 BvE 2/08, 30 June 2009, 62 NEUE JURISTISCHE WOCHENSCHRIFT 2267 (2009) [hereinafter referred to as the "Lisbon Case"]; an English version is available at: www.bundesverfassungsgericht.de.

[12] For criticism regarding Art. 79 (3) GG, *see* Daniel Halberstam & Christoph Möllers, *The German Constitutional Court says* "Ja zu Deutschland!", 10 GERM. L.J. 1241, 1254 (2009).

[13] *See* Christian Tomuschat, *The Ruling of the German Constitutional Court and the Treaty of Lisbon*, 10 GERM. L.J. 1259 (2009).

[14] Criminal lawyers have thus far uttered respect and concurrance with the findings of the Court. *See* Kai Ambos & Peter Rackow, *Erste Überlegungen zu den Konsequenzen des Lissabon-Urteils des Bundesverfassungsgerichts für das Europäische Strafrecht*, 4 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 397 (2009). For a rather disillusioned comment, *see* Bernd Schünemann, *Spät kommt ihr, doch ihr Kommt: Glosse eines Strafrechtlers zur Lissabon-Entscheidung des BVerfG*, 4 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 393 (2009)

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> by virtue of their freedom of will. The protection of human dignity is based on the idea of Man as a spiritual and moral being which has the capabilities of determining himself, and of developing, in freedom (see BVerfGE 45, 187 <227>). In the area of the administration of criminal law, Article 1.1 of the Basic Law determines the idea of the nature of punishment and the relation between guilt and atonement (BVerfGE 95, 96 <140>). The principle that any sanction presupposes guilt thus has its foundation in the guarantee of human dignity under Article 1.1 of the Basic Law (see BVerfGE 57, 250 <275>; 80, 367 <378>; 90, 145 <173>). The principle of guilt forms part of the constitutional identity which is inalienable due to Article 79.3 of the Basic Law and which is also protected against encroachment by supranational public authority."[15]

The *Lisbon* decision deviates from the Court's previous *Maastricht* decision in that it stresses the material substance of the principle of state sovereignty.[16] It develops a *Maastricht*-Plus test, and establishes a double threshold of fulfilling the "conferred power"-requirement ("*ultra-vires*-Kontrolle"), plus the adherence to the "constitutional identity" encompassed in Art. 79 (3) of the Basic Law ("Identitätskontrolle").[17] From a criminal law perspective, this means that the Bundesverfassungsgericht (BVerfG - Federal Constitutional Court) under these auspices can review a violation of the culpability principle by EU legislation.[18]

Despite these differences, one can also find a common European denominator. All EU member states use criminal law as a means of social control, which as such is more of a historical coincidence than a natural thing. What is expected by implementing a criminal justice system is no less than a guarantee for the cohesion of the domestic society. Unalienable rights and goods are protected by the threat of severe punishment in the form of a fine, or the deprivation of liberty for a certain amount of time. Although there is but

[15] Lisbon Case, para. 364.

[16] *See*, *e.g.*, Christian Wohlfahrt, *The* Lisbon Case: *A Critical Summary*, 10 GERM. L.J. 1277, 1278-1281 (2009).

[17] *Id.* at 1282.

[18] *See also* Ambos & Rackow, *supra* note 14, at 403.

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little hard empirical proof for criminal law spreading a deterrent effect,[19] one has to admit that criminal law can help protect legal interests, as at least it discourages people from overstepping certain normative boundaries.[20] The reasonable *homo oeconomicus* (economic man) is likely to accept these limits, which are drawn by criminal law, as long as he can accept in principle the validity of the underlying moral norm.[21]

More recently, the European Court of Human Rights (ECourtHR) has buttressed this common European denominator. In several cases the Court has argued that the protection of the right to life according to Article 2 of the European Convention on Human Rights (EHCR) necessitates effective prosecution.[22] In following cases the Court has expanded this finding *mutatis mutandis* to the prohibition of torture and degrading and inhumane treatment according to Article 3 of the ECHR.[23] Protection by criminal law is thus a direct requirement based on human rights as a common European heritage.

B. Competences: Status Quo – Lisbon Treaty

I. EC Law

It does therefore no surprise that European law as an evolving transnational normative order looks jealously on criminal law as a working mechanism of societal control and power. The protection of the most important Community interests through repressive criminal laws was always on the European agenda. Yet the national states refrained from implementing a broad competence into the EC-Treaty in the field of criminal law. The common denominator, which I described above, was obviously not seen as strong enough to carry a common European criminal law. The EC was therefore dependent on national Parliaments and national judiciaries in order to protect its interests. However, the

[19] *See* Christoph Safferling, *The Justification of Punishment in International Criminal Law*, 4 AUSTRIAN REV. INT'L AND EUR. L. 126 (1999); Heidi S. Alexander, *The Theoretic and Democratic Implications of Anti-abortion Trigger Laws*, 61 RUTGERS L. REV. 381, 398 (2009); Marcelo Ferrante, *Deterrence and Crime Results*, 10 NEW CRIM. L. REV. 1 (2007).

[20] FRANZ STRENG, STRAFRECHTLICHE SANKTIONEN para. 59 (2d. ed. 2002); Helmut Kury, *Präventionskonzepte*, *in* AUF DER SUCHE NACH NEUER SICHERHEIT: FAKTEN, THEORIEN UND FOLGEN 35 (Hans-Jürgen Lange, H. Peter Ohly & Jo Reichertz eds., 2008).

[21] ARMIN ENGLÄNDER, DISKURS ALS RECHTSQUELLE (2002).

[22] Streletz v. Deutschland, 2001-II Eur. Ct. H.R., para. 86; Mastrometteo v. Italy, 2002-VIII Eur. Ct. H.R. para. 89; JENS MEYER-LADEWIG, EURPÄISCHE MENSCHENRECHTSKONVENTION – HANDKOMMENTAR,K Art. 2 Rn. 7-14 (2. ed. 2006); Otto Lagodny, *Schutz des Lebens durch Strafverfahren im Lichte von Art. 2 EMRK und Folgerungen für das Legalitätsprinzip*, *in* DIE EMRK IM PRIVAT-, STRAF- UND ÖFFENTLICHEN RECHT, p. 83 (Joachim Renzikowski ed., 2004); CHRISTOPH GRABENWARTER, EUROPÄISCHE MENSCHENRECHTSKONVENTION § 20 para. 16-19 (2d. ed. 2008).

[23] Labita v. Italy, 2000-IV Eur. Ct. H.R. para. 130-136; MEYER-LADEWIG, *supra* note 22, at Art. 3 RdNr. 2-4c; Christoph Safferling, *Die zwangsweise Verabreichung von Brechmitteln: Die StPO auf dem menschenrechtlichen Prüfstand*, JURA, 100-108 (2008).

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temptation was great to usurp competences in the field of criminal law. Slowly but constantly the European Court of Justice (ECJ) embraced the imperative for member states to establish criminal laws in order to protect Community interests.

Decisions like *Amsterdam Bulb*[24], where the ECJ held, that Member States are empowered to utilize criminal sanction in order to protect important Community goals,[25] and *Greek Corn,*[26] where the Court developed the obligation of Member States to effectively protect EC interests,[27] led to which is to date the final step in the decision *Commission v. Council* of 13 Sept. 2005:

> "As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence. However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective."[28]

Those interests which the Commission considers most important,[29] in the context of this decision Article 175 of the EC-Treaty, in combination with *effet utile* bring about a triangle of prerequisites: the member state needs to adopt "effective, proportionate and dissuasive criminal penalties" in order to protect European interests.[30]

Stating that criminal law does generally not fall within the competence of the EC, as the ECJ does in the quotation above, is finally made out as being pure lip service. It would also

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[24] Case 50/76, Amsterdam Bulb BV v. Produktschap voor Siergewassen, 1977 E.C.R. 137; *see* BERND HECKER, EUROPÄISCHES STRAFRECHT, § 7 para. 20 (2d. ed. 2007).

[25] HELMUT SATZGER, DIE EUROPÄISIERUNG DES STRAFRECHTS 210 (2001).

[26] Case 68/88, Comm'n v. Greek Republic, 1989 E.C.R. 2965

[27] KAI AMBOS, INTERNATIONALES STRAFRECHT § 11 para. 33 (2d. ed. 2007).

[28] Case C-176/03, Comm'n of the Eur. Cmtys. v. Council of the Eur. Union , 2005 E.C.R. I-7879., para. 47.

[29] It is important to note that the ECJ established a subjective test in this regard; see HELMUT SATZGER, INTERNATIONALES UND EUROPÄISCHES STRAFRECHT § 8 para. 42 (3d. ed. 2009)

[30] For a discussion of these principles in greater detail, see SATZGER, *supra* note 25, at 368.

be incorrect to declare this approach as aiming at harmonizing the legal systems of the member states.[31] This development establishes the protection of the EU law or the EU policies as the primary aim of the newly found (annex-) competence to order the implementation of criminal law by means of a directive.[32]

This ECJ triangle is directly attacked and for that matter abolished by the BVerfG:

> "Only if it is demonstrably established that a serious deficit as regards enforcement actually exists and that it can only be remedied by the threat of a sanction, this exceptional constituent element exists and the annex competence for legislation in criminal law may be deemed conferred. These conditions also apply to existence of an annex competence for criminal law that has already been assumed by the European jurisdiction."[33]

The margin of appreciation in applying criminal law competences, which the ECJ has attributed to the Commission, is being substituted by an objective test of strict necessity, which in the end will be determined by the Member States. The future will show how impressed the ECJ is by this finding.

II. EU Law

On the basis of the three-pillar structure of the EU, criminal law falls within the third pillar. Rooted in public international law, sovereignty applies at least *de jure* when a "framework decision" is adopted according to Art. 31 (2) b EU. The EU has been rather active under this rule and has negotiated a dozen framework decisions pertaining to the protection of the financial interests of the EU[34], bribery[35], money laundering[36], terrorism[37], drug

[31] *See* AMBOS, *supra* note 27, at § 11 para 30-32a.

[32] The decision meets mostly criticism. *See* Roland Hefendehl, *Europäischer Umweltschutz: Demokratiespritze für Europa oder Brüsseler Putsch?*, 1 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 161 (2006); Martin Heger, *Anmerkung zum EuGH Urteil v. 13.9.2005*, 61 JURISTENZEITUNG 310 (2006); Stefan Braum, *Europäische Strafgesetzgebung: Demokratische Strafgesetzlichkeit oder administrative Opportunität? - Besprechung des Urteils des EuGH vom 13. September 2005, Rs C-176/03*, 25 wistra 121 (2006). The decision has also been welcomed. *See* Martin Böse, *Die Zuständigkeit der Europäischen Gemeinschaft für das Strafrecht - zugleich Besprechung von EuGH, Urteil vom 13.9.2005*, 153 GOLTDAMMER'S ARCHIV 211 (2006); BERND HECKER, EUROPÄISCHES STRAFRECHT, § 8 MN 27 (2d. ed. 2007).

[33] Lisbon Case, para. 362.

[34] Convention Drawn Up on the Basis of Article K.3 of the Treaty on European Union, 1995 O.J. (C 316) 49; 1996 O.J. (C 313) 2; 1997 O.J. (C 221) 12.

trafficking[38], racism[39] and many others[40]. It has also adopted several framework decisions in the field of procedural law and cooperation in criminal matters, such as the European arrest warrant[41] and most recently the European evidence warrant[42]. Despite the wording of Art. 31 (2) b EU, which reads:

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

The ECJ has taken a step towards the abolition of the pillar structure by preserving a direct effect for framework decisions in the notorious *Maria Pupino*-decision.[43] It has

[35] Council Framework Decision 2003/568/JHA on 22 July 2003 on Combating Corruption in the Private Sector, 2003 O.J. (L 192) 54.

[36] Council Framework Decision of 26 June 2001 on Money Laundering, the Identification, Tracing, Freezing, Seizing and Confiscation of Instrumentalities and the Proceeds of Crime, 2001 O.J. (L 182) 1.

[37] Council Framework Decision of 13 June 2002 on Combating Terrorism, 2002 O.J. (L 164) 3; Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on Combating Terrorism2008 O.J. (L 330) 21.

[38] Council Framework Decision 2004/757/JHA of 25 October 2004 Laying Down Minimum Provisions on the Constituent Elements of Criminal Acts and Penalties in the Field of Illicit Drug Trafficking, 2004 O.J. (L 335) 8.

[39] Council Framework Decision 2008/913/JHA of 28 November 2008 on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, 2008 O.J. (L 328) 55.

[40] *See* SATZGER, *supra* note 29, at § 8 para. 58; ANDRÉ KLIP, EUROPEAN CRIMINAL LAW, 197 (2009).

[41] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender policies between Member States, 2002 O.J. (L 190) 1. This framework decision and its implementation into German law also has led to a decision by the BVerfG. BVerfGE 113, 237. *See* Simone Mölders, *European Arrest Warrant Act is Void – The Decision of the German Federal Constitutional Court of 18 July 2005*, 7 GERM. L.J. 45 (2005). For a broader context, *see* Oreste Pollicino, *European Arrest Warrant and Constitutional Principles of the Member States: a Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems*, 9 GERM. L.J. 1313 (2008).

[42] Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, 2008 O.J. (L 350) 72.

[43] Case C-105/03, Criminal Proceedings against Maria Pupino, 2005 E.C.R. I-5285; *see* Stefan Lorenzmeier, *The Legal Effect of Framwork Decisions – A Case-Note on the Pupino Decision of the European Court of Justice*, 1 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 583 (2006); KLIP, *supra* note 6, at 65.; Carl Lebeck, *Sliding Towards Supranationalism? The Constitutional Status of EU Framework Decisions after* Pupino, 8 GERM. L.J. 501 (2007). For a more positive view, *see* Ester Herlin-Karnell, *In the wake of Pupino: Advocaten voor der Wereld and Dell'Orto*, 8 GERM. L.J. 1147 (2007).

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underpinned this development by granting the EC priority in criminal law competences in the quoted decision of the framework decision regarding the protection of the environment.[44]

III. Lisbon Treaty

The formal abolition of the *Maastricht* pillar structure has long been contemplated.[45] The unlucky European Constitution[46] paved the way to a new and common structure. The Lisbon Treaty follows in these footsteps; indeed, it incorporates more or less the same rules as envisaged in the Draft Constitution.[47] Competences regarding criminal law will be on a totally different footing as soon as the Lisbon Treaty has entered into force compared to the status quo. Yet the Lisbon Treaty is still committed to the principle of conferral.[48] Leaving aside criminal procedure and cooperation in enforcement matters[49], competences as regards substantive criminal law will be on a twofold basis:

(1) Art. 83 § 1 AEU: harmonizing serious crime, which has "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."[50] These are: 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 organized crime.

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[44] *See also* Peter Rackow*, Verfasst der EuGH die Union,* 3 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 526, 527 (2008).

[45] Christian Calliess, EUV/EGV KOMMENTAR Art. 1 EUV para. 9 (Christian Calliess & Matthias Ruffert eds., 3d. ed. 2007).

[46] *See* ULRICH HALTERN, EUROPARECHT. DOGMATIK IM KONTEXT 60-67 (2005).

[47] SATZGER, *supra* note 29, at § 7 para. 41. It is merely a question of terminology, as argued by Matej Avbelj*, Questioning EU Constitutionalisms,* 9 GERM. L.J. 1 (2008).

[48] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing hte European Community, 13 Dec. 2007, 2007 O.J. (C 306) 1, Art 1 § 6 cl. 1. [Hereinafter the Treaty of Lisbon].

[49] The Lisbon Treaty is generally driven by the principle of "mutual recognition" in cooperation in criminal matters, *See* Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 Dec. 2007, 2007 O.J. (C 306) 1, Art. 69 A (1) [hereinafter the Lisbon Treaty]. This article is renumbered Article 82 in the amended Treaty on the Functioning of the European Union, 2008 O.J. (C 115) 1 [hereinafter the AEU]. The Draft Constitution was also based on this principle. *See* SATZGER, *supra* note 29, at § 9 para. 24. For a critical analysis see A PROGRAMME FOR EUROPREAN CRIMINAL JUSTICE, 344-413 (Bernd Schünemann ed., 2006).

[50] AEU, art. 83 § 1.

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(2) Art. 83 § 2 AEU: harmonizing other crimes, where approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures.[51]

In both fields, directives may define minimum rules concerning both the elements of crimes and the amount of sentences. Even if there is an opt-out mechanism ("Notbremse")[52] provided for in Art. 83 § 3 of the Lisbon Treaty, "enhance[d] cooperation"[53] between the "like-minded" states will continue, and member states which decline cooperation will nevertheless be obliged to support execution of these rules by virtue of the European Arrest Warrant or mutual recognition of evidence according to Art. 82 of the Lisbon Treaty.

The Federal Constitutional Court has paid particular attention to these new competences. In principle, the general competence to harmonize criminal law is irreconcilable with both the principle of "Einzelermächtigung" ("conferral") and the principle of respect for the national parliaments.[54] It could be upheld only because the Treaty can be interpreted in a restrictive way, and thus brought into conformity with the German Basic Law.

The Treaty of Lisbon thus establishes new parameters for a common European criminal law. The EU is now equipped with a genuine competence to regulate criminal law as long as it is concerned with the prosecution of trans-border serious crime or the protection of European policies.

C. An EU Criminal Law Theory

Looking at this development in EU law, and taking into account the special role of criminal law in a democratic society, the question arises, on which theoretical basis a European transnational criminal law can be based, and how it can be justified to implement criminal laws at a European level.

The jurisprudence of the ECJ reveals a rather technical attitude towards criminal law as such.[55] The triangle as of effectiveness, proportionality, and dissuasiveness of criminal penalties, which was described above, shows that the Court is of the opinion that criminal

[51] *Id.* at art. 83 § 2.

[52] Lisbon Case, para. 358.

[53] Treaty of Lisbon, Art. 326.

[54] *Id.* at para. 361; *see* Halberstam & Möllers, *supra* note 12, at 1243.

[55] *See* Franz Streng, *Probleme der Strafrechtsgeltung und -anwendung in einem Europa ohne Grenzen*, *in* STRAFRECHT UND KRIMINALITÄT IN EUROPA, 143-164 (F. Zieschang, E. Hilgendorf & K. Laubenthal eds., 2003).

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law can effectively protect a certain interest as it produces a preventive goal, i.e. deters people from perpetrating. These aspects speak of a highly repressive and punitive approach towards criminal law. Effectiveness is the driving force, as it seems, in the ECJ's reasoning. All in all I would call this a repressive-functional approach towards criminal law.

This theoretical underpinning warrants criticism from a criminal lawyer's viewpoint:

I. Moral Equivalent

Criminal law generally mirrors a moral equivalent. In other words, the basis of a criminal norm is a moral proscription generally accepted in society as such. Ideally the legal norm is congruent with the moral proscription.[56] It is mainly through this social link that punishing a perpetrator is legitimate and acceptable. The EU approach does not take heed to a social norm underlying a legal norm and does not address the social blame which is enunciated against the perpetrator.[57]

II. Proportionality in Criminal Matters

The proportionality principle is not fitting to delimit the boundaries of sanctioning.[58] Proportionality is an objective test relating the aim to the means.[59] Therefore the proportionality test is applied when the police decide whether and to what extent force should be used in order to clear a university building from students who take part in an unlawful occupation of such building. The Constitutional Court, when testing a law which allegedly violates the right to data protection, also applies it.[60] Finally proportionality has

[56] Winfried Hassemer & Ulfried Neumann, *Vor § 1*, in NOMOS KOMMENTAR STGB, para. 62 (Urs Kindhäuser, Ulfried Neumann & Hans-Ulrich Paeffgen eds., 2d. ed. 2005); Wolfgang Joecks, *Introduction*, *in* 1 MÜNCHENER KOMMENTAR STGB, para. 29 (Wolfgang Joecks & Klaus Miebach eds., 2003); JOHANNES WESSELS & WERNER BEULKE, STRAFRECHT ALLGEMEINER TEIL, § 1 para. 6 (38th ed. 2008). In English law, *see* J.C. SMITH & BRIAN HOGAN, CRIMINAL LAW, 16 (11th ed. 2005). See also the controversial decision of the German Federal Constitutional Court regarding the punishability of incest, where the majority opined that the "criminal provision is justified by the sum of the comprehensible penal objectives against the background of a societal conviction effective to date based upon cultural history regarding the fact that incest should carry criminal penalties, which is also evident in international comparison." BVerfGE 120, 224 (para. 50). This finding was heavily criticized by Judge Hassemer in his dissenting opinion. *Compare* Tatjana Hörnle, *Das Verbot des Geschwisterinzests - Verfassungsgerichtliche Bestätigung und verfassungsrechtliche Kritik*, 61 NEUE JURISTISCHE WOCHENSCHRIFT 2085 (2008).

[57] *See also* Franz Streng, *"Demokratisches Strafrecht" in einem vereinigten Europa – Zum Verhältnis von Konsens und technokratischem Oktroy im Strafrecht*, *in* OPFERSCHUTZ - RICHTERRECHT - STRAFPROZESSREFORM. 28. STRAFVERTEIDIGERTAG, 85-102 (2005).

[58] This is seen differently by ROLF-PETER CALLIES, THEORIE DES STRAFE IM DEMOKRATISCHEN UND SOZIALEN RECHTSSTAAT, 187 (1974) (of the opinion that the culpability principle is in substance a specification of the proportionality principle).

[59] MICHAEL SACHS, *Art. 20*, *in* GRUNDGESETZ KOMMENTAR, para. 154 (5th ed. 2009); HANS D. JARASS & BODO PIEROTH, *Art. 20*, *in* GRUNDGESETZ KOMMENTAR, para. 86 (10th ed. 2009).

[60] *See*, *e.g.*, BVerfGE 120, 378 (as regards so called screening of license plates).

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to be applied by an investigative judge deciding whether to deploy telephone surveillance against an individual suspect under § 100a of the German Criminal Procedural Code.[61] When a court finds a person guilty of having committed a crime, be it murder by virtue of § 211 German Criminal Code, or be it a violation of the Iran-Embargo punishable under § 34 (VI) No. 2 of the Außenwirtschaftsgesetz (AWG - Export and Foreign Trade Act), it has to convict according to the personal guilt of the offender.[62] This is not an objective but a merely subjective test recognizing the level of intent, the mental status, even the character, the previous criminal record, remorse and willingness to compensate. A just criminal sentence is not a proportionate one; a criminal sanction is generally acceptable only if it respects the blameworthiness of the individual offender.[63]

III. Acceptability

Using criminal law for the protection of minor technical issues, relevant only to few people endangers the functioning of the criminal justice system. Watering down the scope of application of criminal law reduces its moral force and social persuasiveness.[64] The social-psychological acceptability will decline.

D. Freedom and Security within the European Union

The Unification of Europe aims at establishing an area of freedom, security, and justice. This is one of the most important goals as laid down in Art. 3 (2) EU and Title V of the Lisbon Treaty, standing on the same level as the principles of free movement of goods, service and capital (Title IV Lisbon Treaty), agriculture and fisheries (Title III Lisbon Treaty). This is generally speaking a reasonable proposition, as it is quite useless to unify trade and personal liberty without granting protection at the same level.[65] In order to remain true to the idea of a freedom-oriented, democratic criminal law, I would suggest a threefold differentiation: the protection of EU institutions, the core crimes protecting the basic social values, and the protection of EU policy interests. These three areas are the pillars for an overall mixed-structured European criminal law, which is partly cooperative and partly supranational.

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[61] *See* KLAUS VOLK, GRUNDKURS STRAFPROZESSRECHT § 10 para. 41 (5th ed. 2006); *see also* Craxi (No. 2) v. Italy, App. No. Nr. 25337/9438, 38 E.H.R.R. 47, para. 67 (Eur. Ct. H.R. 2003).

[62] Christoph Safferling, *Die Gefährdung der "auswärtigen Beziehungen" der Bundesrepublik Deutschland als strafwürdiges Verhalten im Außenwirtschaftsverkehr*, 29 NEUE ZEITSCHRIFT FÜR STRAFRECHT (forthcoming 2009).

[63] *See* Bernd Schünemann, *Die Funktion des Schuldprinzips im Präventionsstrafrecht*, *in* GRUNDFRAGEN DES MODERNEN STRAFRECHTSSYSTEMS 153, 171–176 (Bernd Schünemann ed., 1984).

[64] JESÚS MARÁ SILVA-SÁNCHEZ, DIE EXPANSION DES STRAFRECHTS 87 (2003).

[65] *See* Ulrich Sieber, *Die Zukunft des Europäischens Strafrecht*, 121 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 1, 2 (2009).

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I. Protection of EU Institutions

The EU has its own institutions and its own budget and in this restricted sense a state-like structure. In order to protect these areas, e.g. against fraud, or perjury, the EU as a legal personality on its own has a genuine competence to use criminal sanctions, if it so wishes. This is attributable to the EU as possessing quasi-Statehood and thus structural sovereignty regarding its institutions.[66] It can exercise this competence by adopting a European Criminal Code, as was proposed by the *Corpus Juris*-initiative[67], and thus create a supranational criminal law,[68] or by assimilating the criminal laws of the member states.[69] Attempts have been made to argue that there needs to be a genuine European "legal interest" as a prerequisite for criminal law.[70] To transfer the (German) concept of *Rechtsgüterschutz*[71] (protection of legal interests) onto the European level cannot convince and indeed most authors have difficulties establishing collective legal interests attributable to the EU.[72] Ulrich Sieber, tries to avoid the term "Rechtsgut" and speaks of "common legal values" instead.[73] It is not quite clear how he discriminates substantially between these two terms beyond terminology. In any case, he argues that there are common interests, which warrant protection at a European level just like institutions. For the differentiation proposed here, a narrow approach is proposed, pertaining solely to the protection of institutions, i.e. the organs of the Union, the Court and the budget.

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[66] Similarly Nikolaos Bitzilekis, Maria Kaiafa-Gbandi & Elisavet Symeonidou-Kastanidou, *Theory of the Genuine European Legal Interests*, *in* A PROGRAMME FOR EUROPEAN CRIMINAL JUSTICE 467 (Bernd Schünemann ed., 2006).

[67] *See* MIREILLE DELMAS-MARTY & JOHN VERVAELE, 1 THE IMPLEMENTATION OF THE CORPUS JURIS IN THE MEMBER STATES (2000); DAS CORPUS JURIS ALS GURNDLAGE EINES EUROPÄISCHEN STRAFRECHTS (Barbara Huber ed., 2000); Stefan Braum, *Das "Corpus Juris" – Legitimität, Erforderlichkeit und Machbarkeit*, 55 JURISTENZEITUNG 493 (2000)

[68] A supranational model of criminal law is described by Sieber, *supra* note 64, at 22.

[69] AMBOS, *supra* note 27, at § 9 para. 16. *Id.* at § 11 para. 15.

[70] In particular clarity: Roland Hefendehl, *European Criminal Law: how far and no further?*, *in* A PROGRAMME FOR EUROPEAN CRIMINAL JUSTICE 450, 456 (Bernd Schünemann ed., 2006).

[71] For a general introduction, *see* CLAUS ROXIN, *Teil 1, § 2*, *in* STRAFRECHT. ALLGEMEINER, paras. 2, 123 (4th ed. 2006) (arguing that the "harm principle" as derived from John Stuart Mill "On Liberty" is a parallel phenomenon in Anglo-American legal thinking); *see also* ROLAND HEFENDEHL, KOLLEKTIVE RECHTSGÜTER IM STRAFRECHT (2002); DIE RECHTSGUTSTHEORIE – LEGITIMATIONSBASIS DES STRAFRECHTS ODER DOGMATISCHES GLASPERLENSPIEL? (Roland Hefendehl, Andrew v. Hirsch & Wolfgang Wohlers eds., 2003). The concept is not generally accepted among German scholars. Likewise the BVerfG has not adopted the theory of the "legal good"in its decision on the punishability of incest. *See supra* note 49.

[72] *See*, *e.g.*, Hefendehl, *supra* note 69, at 464.

[73] Sieber, *supra* note 64, at 17 (2009).

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II. Core Crimes Protecting Basic Social Values

Member states have their own unique social and cultural heritage. The EU has to respect these differing identities according to Art. 4 § 2 EU[74] and thus adhere to the principle of subsidiarity according to Art. 5 EU.[75] The core criminal law is part of the national heritage and is not suited to be regulated by the EU. It contains the basic principles, which guarantee the holding together of the domestic society. Violations of these fundamental norms are usually followed by deprivation of liberty, for example, imprisonment, which is why their application urges for a reliable and foreseeable procedure, the democratic legitimacy of which is impeccable. The EU as such cannot offer such a procedure for the time being; yet it can and should foster and coordinate cooperation between the member states and encourage harmonization as far as it seems necessary for cross-border issues.[76] Yet it should leave the elements of crime and the amount of sanctioning to the Member State. Individual rights will thereby be protected in the traditional way, as derived by the national laws in the different Member states.

III. Protection of EU Policy Interests

Between these two poles one can classify criminal law as a means to protect important EU interests. The protection of the purity of wine or export control for dual-use ware, (on the basis of Art. 133 EC/Art. 207 Lisbon Treaty) to give but two examples, does not seem to be a matter of importance for society as such. Such technical provisions do not necessitate the application of traditional criminal law. They should be decriminalized. It can and maybe should be executed by administrative law, and violations should be followed by a proportionate fine, which does not carry the same moral implications as imprisonment by traditional criminal law.[77] This being the case, the infliction of an effective, proportionate and dissuasive sanction does not need the same safeguards as foreseen in a traditional criminal law case.

These three, briefly sketched pillars imply a broadening of EU criminal law as regards the protection of EU institutions; it also speaks for a wide competence for the protection of policy interests, yet not by traditional criminal law, but by administrative sanctions. Lastly I suggest respecting the national identities with regard to the core criminal law, which

[74] Treaty of Lisbon, Art. 1. § 5 cl. 2.

[75] *Id.* at Art. 1 § 6 cl. 3.

[76] Several models of cooperation are analysed by Sieber, *supra* note 64, at 2.

[77] Similarly, *see* SILVA-SÁNCHEZ, *supra* note 63, at 83 (regarding national criminal law). Silva-Sánchez follows a dualistic approach to modern criminal law and differentiates between a core criminal law, which foresees imprisonment as a sanction, and a more flexible criminal law, which foresees "only" monetary or economic sanctions.

pertains to the most fundamental principles of a national society. Clearly the separation of pillars two and three need further adjustment. Yet the credibility and acceptability of European criminal law rests on a restricted deployment of criminal law in its traditional sense. The Lisbon Treaty foresees a variety of competences, which can be understood either way, to widen criminal law or to develop it in a more socially integrative way as suggested here. The Federal Constitutional Court made clear that it would prefer the second option.

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