

EDITORIAL

THE CONSTITUTIONAL SIGNIFICANCE OF EU CRIMINAL LAW

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Since the past decade, EU criminal law attracts all the more attention from EU law scholars. Initially confined to an intergovernmental institutional setting, EU involvement in criminal matters now occurs within the traditional “former first pillar” framework. This implies the application of the community method, including qualified majority in the Council, and full involvement of the Parliament and of the Court of Justice. This communitarisation, or “normalisation” of EU criminal law -at least to a great extent- has arguably contributed to an increased attention towards the field. Interestingly enough, on top of the existing monographs dealing specifically with the topic,¹ chapters on EU criminal law are now also included in general textbooks on EU law, next to chapters on more traditional fields of EU integration, such as the internal market.²

In this editorial, we contend that EU criminal law rightly deserves this increased interest by EU law scholarship because it represents a field of high constitutional significance for the EU, and it can potentially act as an intriguing laboratory for EU constitutionalism. The papers collected in this issue, all drafted by young researchers in the field of EU criminal law, show the growing importance of the field and highlight in particular its constitutional significance. They address a number of pressing issues that not only underpin the field of EU criminal law, but also transcend it by hinting at broader EU constitutional issues.

The contribution by Ines Armada on the European Investigation Order highlights the existing tension between establishing a framework for effective cooperation in criminal matters and the need to respect fundamental rights at the same time. Ermioni Xanthopoulou similarly addresses the topic of effective judicial cooperation. She underlines the need to embrace a principled approach in the Area of Freedom,

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¹ To mention some: Maria Fletcher, Robin Loof and Bill Gilmore, *EU Criminal Law and Justice* (Edward Elgar Pub 2008), Valsamis Mitsilegas, *EU Criminal Law* (2009 Hart), André Klip, *EU Criminal Law. An Integrative Approach* (2012 Intersentia).

² See the chapters on EU Criminal law in Paul Craig and Grannie de Búrca, *EU Law, Texts Cases and Materials* (OUP 2011), Damien Chalmers, Gareth Davies, Giorgio Monti, *European Union Law* (CUP 2014), Catherine Barnard and Steve Peers (OUP 2014).

Security and Justice (AFSJ), in particular by relying on the principle of proportionality when dealing with judicial cooperation. Both articles touch upon the broad topic of the needed balance within the AFSJ between the objectives of freedom and justice, which can be achieved through safeguarding full respect of fundamental rights and general principles, and the objective of security, which can be achieved by ensuring crime repression through effective judicial cooperation. The debate on the equilibrium between liberty and security is longstanding in the context of the AFSJ,³ and well known in scholarly circles specifically addressing EU criminal law subjects. Yet, its significance is much broader: what is at stake is a balance between coexisting EU objectives and sources of legitimacy.

On the one hand, the EU pursues the objective of delivering effective outputs, which in the case of criminal law can mean effective judicial cooperation in criminal matters. Such an achievement brings *output* legitimacy to the EU. Results-based legitimacy has been a longstanding source of legitimacy for supranational action.⁴ On the other hand, the EU also aims at establishing itself as a community of values and rights, as exemplified by the binding force attributed to the Charter of Fundamental Rights – and in our case by efforts to insert fundamental rights provisions in criminal law legislation. This approach would bring value-based, or constitutional legitimacy to the EU. Striking a balance between these two objectives, effectiveness of EU action, and promotion of shared values and rights, thus implies a wider constitutional question on finding a balance between different sources of legitimacy. In our field of interest the stakes are obviously higher in light of the impact that criminal investigations may have on the protection of fundamental rights, which can be stronger than any other sort of public intervention. As a consequence, EU criminal law can be an interesting forum for developing a balance between the aforementioned EU constitutional objectives.

Furthermore, the contributions by Leandro Mancano and to a certain extent by Nathalie Isabelle Thorhauer illustrate how the enforcement of domestic criminal law within and outside national borders can influence the enjoyment of the fundamental status of EU citizen. In particular, Mancano sheds light on the interplay between criminal law and citizenship and he raises concerns regarding the CJEU's attempts to enhance the legitimacy of EU criminal law by imposing limits to rights attached to EU citizenship. Thorhauer argues that the EU cannot ignore the crucial link between criminal law and a key constitutional concept such as EU citizenship, and that the EU

³ On the unbalance between security and liberty see, among the others, Bigo D., *Liberty, whose liberty? The Hague program and the conception of freedom*, p. 35–44, in Balzacq T. and Carrera S., *Security vs Freedom? A challenge for Europe's future*, Ashgate, 2006, as well as the criticism advanced by Fair Trial International, outlined in Jakobi et al., “Achieving Balance among Liberty, Security and Justice: An Agenda for Europe”, in *ERA Forum*, Vol. 33, 2002, p. 87.

⁴ On the importance of output legitimacy for the EU the reference is to the liberal intergovernmentalism of Andrew Moravcsik. See Moravcsik A., *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (1998, Cornell University Press).

must equip itself with adequate norms to regulate conflicts of jurisdiction accordingly. These contributions recall the important role that criminal law plays in the relation between the individual and the State.⁵ As a consequence, they highlight that if the EU wants to be considered as a community founded on the concept and the value of citizenship, criminal law can neither be neglected nor marginalised. The crucial role of addressing criminal matters in the overall constitutional architecture of the EU is elevated as of profound importance.

Finally, the contributions of Johanna Göhler and Anna Damaskou point out that constitutional challenges can derive not only from the enforcement of national criminal law in an EU integrated system, but also from the operation of EU supranational bodies established to facilitate this imposition. In particular, both papers deal with the future setting up of the European Public Prosecutor Office (EPPO). Damaskou provides an up-to-date outline of the thorny negotiations regarding the EPPO mandate and reveals the tensions between the EU and its Member States, while Göhler focuses specifically on the limits to the EPPO's powers by scrutinising the reviewability of the legality of the EPPO's dismissal decisions. They thus address the very sensitive constitutional theme of repartition of competences between Member States and the EU. The allocation of powers across these levels is naturally a transversal EU constitutional question.⁶ The EPPO case is a special case, because in this context the legitimacy of EU action (or inaction in the case of EPPO's dismissal decisions) is really put to the test: Member States are asked to partially give up a power which is a traditional expression of their sovereignty, namely their *ius puniendi*.⁷

Overall, EU criminal law is an intricate policy area for the EU where important constitutional questions come into play. These include the challenge for the EU to effectively combat crime while establishing itself as a polity of rights and values -where EU citizenship is recognised as fundamental – and respecting Member States' diversities and prerogatives. Thus, EU criminal law seems like fertile ground for the discovery of – more or less – hidden EU constitutional tensions and stakes. The young scholars who have contributed to this special issue unveil some important aspects of this discovery.

⁵ On the role of criminal law within the relation between the individual and the State see Fletcher G.P., *Political Theory and Criminal Law, Justice and Ethics*, 2006.

⁶ See Paul Craig who says that the need to find a balance between centralisation and decentralisation is 'endemic' to any polity in which power is divided between various levels of power. P. Craig, 'Subsidiarity: A Political and Legal Analysis', *JCMS*, 2012, Vol. 50, N. S1, p. 73.

⁷ See *supra*, n. 7.