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The Functions of European Criminal Law and the Criminalization Discourse: between the Harm Principle and the Protection of Legal Goods

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The aim of this study was to evaluate what the function of European Criminal Law should be, if the national paradigms could be supranationally applied, and, ultimately, to determine the parameters that could confer material legitimacy to the Criminal Law norms of the European Union.
Keywords: criminal law, material legitimacy test, legal value, European Union law.

Europos baudžiamosios teisės funkcijos ir kriminalizavimo diskursas: tarp žalos principo ir teisėtų gerovių apsaugos

Šio tyrimo tikslas – įvertinti, kokios turėtų būti Europos baudžiamosios teisės funkcijos, jei nacionalinės paradigmos galėtų būti taikomos viršnacionaliniu lygiu, o galiausiai – kokie parametrai galėtų suteikti materialinį teisėtumą Europos Sąjungos baudžiamosios teisės normoms.
Pagrindiniai žodžiai: baudžiamoji teisė, materialinio teisėtumo testas, teisinė vertybė, Europos Sąjungos teisė.

Introduction

What is the function of the European Criminal Law? What do we aim to achieve with the adoption of European Criminal Law measures? Can the paradigms of the protection of legal goods and of the harm principle be also applied to norms hailing from a supranational entity? And, if so, in what measure? These were some of the fundamental questions that prompted the investigation under analysis, and to which we seek the answer. In order to do so, the present paper was divided into three parts, in a progressively more specific order.

In the first part, we shall look at the questions that are posed in relation to Criminal Law in a more general way, and according to an essentially stately perspective – that is, which are the principles that inform, from the point of view of material legitimacy, on the adoption of criminal norms in States. Here, and after a brief mentioning of the aims of the penalty and their relationship with the function

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of the Criminal Law, we shall analyze mainly two principles originating from two different legal traditions: the principle of the exclusive protection of legal goods (from the German tradition) and the harm principle (from the Common Law tradition). At the end of this first part, the possibility of the joint application of both principles shall be evaluated.

In the second part, it shall be verified if, and how, those principles could also be applied to the reality of the European Union. That includes knowing, and will run in parallel to the conclusions of the first part: if there already are concerns about the aims of the penalty in the European scene; what the Union is (since it is not a State); if there exists an autonomous constitutional dimension in the EU, and what its characteristics are; which/what are the limits of its criminal competence (necessarily different from the ones existing in States); and in what way that influences the function to ascribe to 'its' Criminal Law. This second part ends with a specific proposal to solve that question by arguing for a differentiated approach composed of three moments of consecutive evaluation according to the (also distinct) interests involved.

Lastly, in the third part, a theorization of the practical functioning of the proposed solution is provided – can it adequately respond to the identified problems? Is it appropriate to lend meaning and true limitations (of content) to the European Criminal Law? To answer these questions, we shall use the example of migrant smuggling because of the varied problematics it raises – be it with the interests connected with it as well as with the multiple legal solutions found in the international, European, and national scenes.

The main issue

Attributing a function to the European Criminal Law, one that underpins and limits the legislator's intervention in that field, will invariably concern the question of the *legitimacy* of the criminal norms: depending on the adopted doctrine, Criminal Law will be *illegitimate* when it does not serve the purpose of protecting a legal good (worthy of criminal protection), or when it does not intend to avoid harm to others (also, when the gravity of such harm justifies the intervention of Criminal Law).

Legitimacy[1] represents the normative conviction that a certain institution or norm must be obeyed – it is therefore a "subjective notion, dependent upon the perceptions (or feelings) of an actor"[2], which means that, from the moment that a subject is convinced of the legitimacy of an institution or norm, he tends to conform his behavior with the parameters it establishes. There are multiple meanings to legitimacy: 'input legitimacy' and 'output legitimacy' (Klabbers, 2011, p. 40), 'formal legitimacy' and 'material legitimacy'. Input and output legitimacy concerns the evaluation of the criminal legislation at two different moments in time: input legitimacy evaluates if all of the interested and necessary parties actually had the chance to participate (in one form or another) in the process of adopting the norm (that is to say, an evaluation of the democratic dimension of the formal adoption process); whereas, output legitimacy is, in its turn, an *ex*

[1] Legitimacy must be distinguished from 'power' and 'authority': these can exist and be illegitimate (Klabbers, 2011, p. 37).

[2] " 'Legitimacy', as I use the term, refers to an actor's normative belief that a rule or institution ought to be obeyed. It is a subjective quality, relational between actor and institution, and is defined by the actor's *perception* of the institution" (Hurd, 2007, p. 7). To D. Beetham, legitimacy is firstly the conformation with the determined established rules (legal validity); those rules should, in turn, correspond to shared beliefs between the one who exerts power and his subordinates, and having these somehow consented upon the exercise of that power. This is, as we can see, a definition centered rather on the formal aspect of legitimacy than on the legitimate or illegitimate material content of the norms (Beetham, 2013, p. 15 ff.).

post evaluation, bearing in mind the objectives and the actual results of that piece of legislation. As to the second binomial, formal legitimacy concerns itself with the process and the making of Criminal Law – although this aspect was, for a long time, being contested in the European Union (and it still raises some questions regarding the precise limits of that competence), it has been clear since the Treaty of Lisbon that there is indeed a competence to produce Criminal Law. Material legitimacy, however, addresses the question of the specific *content* of the criminal norm: a norm can be formally legitimate if it follows the correct procedure and respects the adoption process, and it can still be materially illegitimate if it proposes the adoption or prohibition of behavior with which the subjects do not agree[3].

The function to be attributed to the European Criminal Law thus aims to define a criterion capable of evaluating the norms already adopted or still to be adopted against the legitimacy of their content. In the light of the insufficiency, for this purpose, of the principles already existent and recognized in the European legal order (be it the principles of legality, subsidiarity, proportionality, *ultima ratio*, efficiency, non-discrimination, or respect for fundamental rights), some other criteria ought to be formulated in order to provide some guidance to the legitimacy of the EU's intervention in criminal matters.

But what should that criterion be? By analyzing the different legal traditions in the EU, two principles were selected in order to test their performance towards this goal of providing material legitimacy: the legal good and the harm principle. In a very brief, condensed fashion, the legal good can be identified with an especially relevant interest, be it from the individual or the community, which finds purchase in the Constitution of the State[4]. In turn, the harm principle states that conduct should only be criminalized when it causes, or when it is likely to cause, harm to people other than the agent; this harm must be directed towards an interest of the individual[5]. From here, we can already glean some advantages and disadvantages of both principles: the legal good has an indisputable and denser valuing dimension because it centers itself on what precisely we aim to protect with that incrimination, and it is, in this day and age, more inclusive than the harm principle, given that it allows for the protection of both individual and collective interests. The harm principle is more flexible because it does not need the precise identification of the interest that is harmed, only that there exists a harm to be prevented; and it allows us to effectively compare harms; also, it has an objective and intrinsically liberal dimension because of the 'other' that must sustain the harm.

In fact, and given the content of Articles 2 and 3 TUE, we can conclude that the general constitutional environment in which the European Criminal Law is developing is not substantially different than the one existing in Member-States with regard to the axiological fundaments of the legal entities. Therefore, the same legitimacy limits should apply to the EU: Criminal Law should serve the protection of fundamental interests, whilst protecting the citizens from the Criminal Law itself[6]. This means that the European Criminal Law should be the last resort for the protection of supranational fundamental interests (a transnational element must be present in order to justify the intervention of the EU, with a view to respecting the subsidiarity principle).

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[3] For example, if its content is 'odious' or 'something substantively unjustifiable' (Klabbers, 2011, p. 39). According to Mylonopoulos, "Eine strafrechtliche Norm, die zwar nach allen demokratischen Formalitäten eingeführt wurde, wohl aber gegen wesentiche Rechtsgrundsätze verstöβt, ist ebenso wenig legitim wie eine, die völlig willkürlich durchgesetzt wurde" (Mylonopoulos, 2011, p. 637). In the same sense, "[w]hat creates legitimacy is less the fact of having consented, but rather having consented to a certain normative reasoning, linking shared values and principles to practice type norms" (Steffek, 2003, p. 264).

[4] For a more thorough explanation, see: Dias, J. de F., 2019, p. 130 ff.

[5] As formulated by: Feinberg, 1984, p. 36.

[6] Mir Puig speaks of the "minimum indispensable protection" of the interests, guaranteeing both the adequate protection of the interest and the less burdensome state reaction for the citizen (Mir Puig, 1995, p. 29–30).

What needed to be established next was if this paradigm that exists on the national soil could be extrapolated to the EU, in order to say that **(a)** a European criminal norm would be legitimate only if and when it aimed to protect a legal good, and/or **(b)** a European criminal norm would only be legitimate when it purported to protect people from harm. However, the EU is mandated to respect the different legal traditions in the ambit of the multiculturalism of the EU: so how could it do both?

Proposed solution

There are numerous reasons why the EU needs a coherent criminal policy (Dias, A. S., 2006, p. 337 ff.): not only will the progressive legislative harmonization and unification represent an increase of the punitive power of the Union, but the creation of a common (economic, social, political) space will determine the "emergence of new supranational legal goods and practices that harm them" (Dias, A. S., 2006, p. 337). On the other hand, it hardly makes sense to continue to develop the European criminal cooperation without a corresponding substantive Criminal Law framework: this would allow the identification of a general European attitude towards criminality[7], as well as the establishment of an evaluating hierarchy, something that is now lacking. It would also contribute to the increase of trust from the MS towards the EU (Hildebrandt, 2007, p. 67), which makes its criminal decisions less questionable.

It is, however, crucial, when defining the function of the European Criminal Law, to recognize the double level of penal authority that corresponds to the double system of legal interests existent in the Union – and, consequently, it is essential to maintain this equilibrium, embrace that difference, and strive for the coherence of the multiple legal systems involved.

In the legal space of the EU, we can distinguish three types of interest that coexist. The criteria to set them apart relies, in a first approach, on its *ownership*: as an entity with its own existence, the Union has its *own interests*; as a supranational entity responsible for some aspects that are common to itself and the MS, in the EU, there are also *common interests*; and then there are (in fact not belonging to the EU, but it should be mentioned only because they exist in the same geographical space) *interests of the MS*. It should be stressed that this criterion does *not correspond* with that used in the Treaties to distinguish between different competencies of the Union: these can be exclusive, shared or accessory without it always corresponding to, respectively, a proper interest of the EU, a common one, or a national one[8]. We can draw a first conclusion now: both the ownership *and* the attribution of competencies will be relevant, *but not exclusively determinant*, in order to set apart these categories of interests.

If, however, we combine the two, we obtain a much more complete and relevant criterion for the function and legitimacy of the European Criminal Law: that of the *correct allocation of responsibility*[9] *for the protection* of the interest.

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[7] "[…] Whether a general 'tough' or 'soft' attitude towards (a certain type of) crime is adopted, what should be the role of criminal law in the resolution of social problems (keyword: decriminalization), etc." (Satzger, 2012, p. 64).

[8] For example, the conservation of marine biological resources is an exclusive competence of the EU (Art. 3, No. 1, d., TFEU), but one cannot say that it is an interest proper of the EU: either because it is an interest existent on the international scale or because only some of the MSs would be in a position to jeopardize – and, correspondingly, protect – that interest, namely, the coastal MSs. On the other hand, some of the interests that appear in the context of a shared competence can be solely attributed to the EU: in Art. 4, No. 2, j., TFEU, pertaining to the area of freedom, justice and security, one needs to think only of the Union's financial interests to see that that is an interest that cannot be considered common. In a similar vein, there are authors who distinguish these categories of interests, although not always with the same nomenclature that we have presently used: Caeiro, 2018, p. 652; Salcuni, 2011, p. 88; Pinto, 2013, p. 348–350. U. Sieber makes the distinction between interests of the EU, European policies, and rights of the European citizens (Sieber, 1995, p. 118).

[9] The idea that an entity is responsible for the protection of interests or legal goods is not new: it is really the idea subjacent to the modern Criminal Law, in the sense that the great majority of legal goods protected cannot be attributed

This conclusion, that there are different types of interest coexisting in the EU space, led to the consideration of the hypothesis that, perhaps, one principle of criminalization would not be sufficient to respond to the different necessities of all of them without it warping the specific content of the principle or the true interest behind the need for criminal protection[10]. Adding to that the fact that, given the specificities of the Union's *ius puniendi*, these interests may require a different kind of intervention (less/more harmonization, or even unification) according to the category they fall in, I suggest a legitimizing criterion evaluated in a three-step process.

1. The first step would be to identify the interests subjacent to the incrimination at hand and determine, among all possible interests identified, if they are proper interests of the EU, or rather common to the Union and the Member-States, and the level of harmonization that they require. If it is a common interest, and because of the *responsibility* for its protection, there is a further distinction to be made: whether or not that interest is subject to *preemption* on the part of the EU. If it is already so strongly harmonized that it impedes an autonomous action from the MS, the responsibility to protect it will not differ from the one that is ascribed to the interests that are proper of the EU[11].
2. Because of the different harmonization needs, the second step would be to evaluate the interests identified against the proposed criminalization principles: the interests that are proper would warrant a more unified / less diverse approach, and so they should pass the test of the principle of the protection of legal goods; the same is true for the common interests that are already preempted, because no autonomous action from the MSs is possible (or it is only possible if allowed by the EU). On the contrary, the common interests that are still truly common regarding the responsibility for their protection would be evaluated in the light of the harm principle – this ensures flexibility and allows us to maintain the advantages of both principles, as will be referred to shortly.
3. In the third and final step, all other principles relevant to the criminalization process would be assessed in order to ascertain if those norms abided by all of them (subsidiarity – both criminal and European; proportionality; legality; etc.). Only then would the criminalizing norms be considered legitimate from a substantial point of view.

This differentiated approach to criminalization depending on the category of interest subjacent to it would allow the European Criminal Law to be more coherent and also to minimize its impact on the legal order of the MS[12]. It would also allow the European Criminal Law to focus more on the citizens, by seeing that the majority of the interests in need of criminal protection would be most likely common in nature, and thus analyzed while taking into consideration the harm principle (only the ones linked

to the entity that protects them (the State). When the EU is created, this new entity will also bear some protective responsibility, either because of the new dimension that some of the interests now possess, or because there are new realities worth of protection – it is, in this sense, 'co-responsible' for that protection (see: Caeiro, 2016, p. 587–588; Jescheck, 1999, p. 14). This topic of the responsibility of an entity for the protection of an interest was extensively covered in: Caeiro, 2018, p. 648–651 ff; Caeiro, 2022, p. 2 ff.

[10] Although not referring to the EU, already Duff drew a similar conclusion: "Rather than search (in vain) for a suitable refined master principle, we should recognize something that is hardly surprising: that we have different reasons for criminalizing different types of conduct […]. The proper task for a theory of criminalization is, rather, to assemble and clarify the different kinds of consideration that should be relevant in different contexts" (Duff, 2010, p. 20).

[11] When there is already preemption on a subject, the distinction made by the ECJ between a shared and an exclusive competence appears to be non-existent (Herlin-Karnell, 2012, p. 81).

[12] To illustrate this, we can think of the anticipation to the Criminal Law protection of interests: when intervening in the protection of a common interest not subject to preemption (and thus analyzing it from the point of view of the harm principle), the European norms would seldom be legitimate if they were too anticipatory regarding the concrete harm. From this point of view, MS's legislation would only be anticipatory if they so chose, and we could therefore spare the European Criminal Law that criticism, at least in these interests.

with the very existence of the EU are really proper of it, and to affirm preemption the field in question has to be thoroughly harmonized, or it has to be solely attributed to the Union). In turn, for the other group of interests, the action on the part of the EU would have to clearly define what it is that they purport to protect, and why that is a legitimate interest in the light of the Constitution (e.g., the Treaties) of the EU, as the principle of the protection of legal goods proposes.

This legitimization process would therefore be advantageous in two fronts: it would demand a much more thorough justification on the part of the EU for the protection of its own interests (and the ones for which it bears the sole responsibility); and, at the same time, it would reinforce its constitutional dimension regarding the protection of its citizens from the Criminal Law itself, by pondering the harms of the prohibited conduct (penal norm) against the harms of that same norm for the individual.

Subsequent test

In order to test the feasibility of this criterion, it was lastly analyzed if it would be helpful in responding to the problems identified in a specific European incrimination: that of migrant smuggling. After pondering all the interests that could be protected in those norms[13] – the territory of the EU, the common market, the immigration policy, security, and the rights of the migrants[14] – it was concluded that only these last ones would be a legitimate interest for Criminal Law.

The interest *migrants' rights* does not belong to the EU as a self-interest, it is not an existential interest of the EU, so it must be classified as common, in the sense that its protection is shared between the EU and the MSs. Secondly, it also could not be deemed to be a preempted interest, since the field of the protection of a person's rights is not thoroughly harmonized by the EU: an autonomous action from the MSs is not only possible, but it is actually expected in order to protect those rights from conducts that only matter to the national sphere.

Being, as they are, common interests not subject to preemption, an evaluation in the light of the harm principle was in order, which led us to conclude that it would be adequate to correct the issues found with the legislative package (e.g., the criminalization of the migrants themselves, which would not be possible under the demands of the harm principle), and which also had the added benefit of barring seriously questionable criminalization choices in the Member States (such as the criminalization of humanitarian help, seeing as there is no 'harm to others' in these cases).

Conclusions

1. The material validity of the European criminal norms should be evaluated while bearing in mind the values explicitly or implicitly present in the European Constitution: the Treaties.
2. Both the principle of the protection of legal goods and the harm principle can confer legitimacy to the European Criminal Law. However, given the different structures of both principles (the legal good focus on the interest to protect, and the harm principle focus on the harm to others), and the

[13] Regarding the difficulty with pinning down the interest, for example: Mitsilegas, 2019, p. 83.

[14] The only ones that could lead to the consideration that they were proper interests of the EU would be the territory and the common market. The territory, however, is a more ambiguous interest, given that the EU possesses a territory, but it is effectively a shared one (with all the respective MS), despite the existence of a supranational dimension to it. Given that neither was considered to be the most salient interest behind the criminalization of migrant smuggling, and that these were therefore discarded as the reason for the criminalization of this conduct, further thoughts about the nature of the territory as an interest were not deemed needed, as it would ultimately correspond, in this matter, to the protection of the territory's security, in which case the true interest would then be this security.

different interests that exist in the EU, it is submitted that an alternative application of both principles would be beneficial.

3. This differentiated criteria would allow for a tailored approach to criminalization, in accordance with the harmonization needs of the interest at heart; it would preserve the overall coherence of the legal orders involved; and it would be flexible enough to maintain the discretionary power of the MS when transposing the criminal norms, while at the same time creating the conditions for a rational unification of the legal framework to the protection of the Union's own interests.
4. When testing this method, it was deemed appropriate to make the European Criminal Law more consistent with the constitutional dimension required by this area of the Law.

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S u m m a r y

The aim of this study was to evaluate what the function of the European Criminal Law should be, if the national paradigms could be supranationally applied, and, ultimately, to determine the parameters that could confer material legitimacy to the Criminal Law norms of the European Union.

Regarding the scope of this article, in the introduction, a general view of the thesis is provided, namely, what prompted it, and the 3-part structure it presented, alongside an account of the main topics researched in each segment. The main issue is then described, as well as a brief explanation of the proposed solution and the reasons for it. Finally, the most salient conclusions regarding this specific thematic area are summarized.

It is argued that, were the EU to adopt a material legitimacy test to its norms, it would substantially improve the quality of its Criminal Law norms, the adequacy of them regarding the societies in which they have to be implemented, the general coherency of the legal orders involved (both the supranational and the national ones), and the constitutional dimension of the EU, thereby protecting the values it considers to be fundamental through the Criminal Law and protecting its citizens from the Criminal Law itself, and thus fulfilling the two mandates of this juridical branch.

Europos baudžiamosios teisės funkcijos ir kriminalizavimo diskursas: tarp žalos principo ir teisėtų gerovių apsaugos

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S a n t r a u k a

Šio tyrimo tikslas – įvertinti, kokios turėtų būti Europos baudžiamosios teisės funkcijos, jei nacionalinės paradigmos galėtų būti taikomos viršnacionaliniu lygiu, o galiausiai – kokie parametrai galėtų suteikti materialinį teisėtumą Europos Sąjungos baudžiamosios teisės normoms.

Teikiamo straipsnio struktūra yra tokia: įvade pateikiamas bendras baigiamojo darbo tikslas, būtent tai, kas jį paskatino, o kitose trijose dalyse aptariamos pagrindinės tiriamos temos. Tada aprašoma pagrindinė problema, trumpai paaiškinamas ir pagrindžiamas siūlomas jos sprendimas. Galiausiai pateikiamos svarbiausios šios konkrečios teminės srities išvados.

Teigiama, kad ES, priėmusi savo baudžiamosios teisės normų materialinio teisėtumo testą, iš esmės pagerintų šių teisės normų kokybę, jų adekvatumą visuomenėms, kuriose jos turi būti įgyvendinamos, užtikrintų bendrą teisinių sistemų (tiek viršnacionalinės, tiek nacionalinės) teisės normų taikymo nuoseklumą ir ES konstitucinę dimensiją, saugančią vertybes, kurias ji mano esant pagrindinėmis, per baudžiamąją teisę ir saugančią savo piliečius nuo pačios baudžiamosios teisės, ir taip vykdytų du šios teisinės šakos mandatus.

Raquel Preciosa Tomás Cardoso was awarded a PhD degree in law, with doctoral studies concluded in June 2022 at Universidade de Coimbra; awarded Master's degree in Law in November 2013 at Universidade de Coimbra. Field of studies: Social Sciences, Law, with emphasis on Criminal Law. Most frequent terms contextualizing scientific production: Criminal Law; European Criminal Law; international judicial cooperation.

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