Some Memories of the Third Pillar

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Article

ABSTRACT

The author gives a personal overview of how the European Union became involved in criminal law over the last 20 years. He calls to mind the main stages of the development, from the Maastricht and Amsterdam Treaties to the draft European constitution and the Lisbon Treaty. The article also outlines the challenges that have emerged and compares the Council of Europe and the EU in their ability to shape European criminal law.

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When I took office as Head of Division of Judicial Cooperation at the Council of the EU on 1 July 1996, we were three officials in the division. In the Commission Task Force, led by the late Sir *Adrian Fortescue*, there were hardly more officials dealing with judicial cooperation, first and foremost Ms *Gisèle Vernimmen*. Twenty years later, the situation would be considerably different.

Before taking office in the above-mentioned division, I had spent the previous ten years working at the Council of Europe, where I was used to two meetings a year for a working party having a specific mandate to elaborate "a product", i.e., a Recommendation, a report, or even, on rare occasions, a Convention. The experts (and the Secretariat) reigned and it was possible to do research in between the very few meetings, to make informal contacts, and to test solutions/texts. The Council of Europe adopted a considerable body of legal texts. I worked on money laundering, corruption, cybercrime, sentencing, and DNA testing, to name a few.

In 1995 and 1996, the Council of the EU adopted two Conventions on criminal law (a convention on simplified extradition and a general extradition convention). Neither ever entered into force. The Europol Convention, drafted within the strand of police cooperation under the Maastricht Treaty, was adopted in 1995, but it took until 1999 for all nine necessary, supplementary texts (for the purpose of being able to handle personal data) to be adopted before Europol could begin functioning.

Thus, on 1 July 1996, all was calm; the EU would continue to develop some Conventions or possibly Joint Actions under Maastricht (that no one except those in the Legal Service of the Council knew the legal value of) and work would go slowly forward. One month later, 300,000 people were demonstrating on the streets of Brussels. These were the "*marches blanches*" following the horrendous "Dutroux Affair" in which several underaged children had been kidnapped, raped, and died of suffocation in a cellar. Belgium tabled a Joint Action on sexual exploitation of children and trafficking in human beings at the K4 meeting in Dublin during the Irish Council Presidency in September 1996 (the Commission, at that time, had no criminal law competence under the Maastricht Treaty). I was charged with assisting the Presidency and the Belgian delegation in negotiating the Joint Action. After two to three months of intense negotiations, a political agreement was reached on a text at the December 1996 JHA Council where the last sticking point was whether an "s" should be added or not in one of the language versions (it was a question of singular or plural).

The substance of that Joint Action was later to culminate in two Framework Decisions under the Amsterdam Treaty and then be transformed into the first two Directives under the Lisbon Treaty. This became a relatively common pattern of the Third Pillar of the EU: earthshaking events (57 dead Chinese in a container, the attacks on 9/11, etc.) led politicians to feel the need to show that they were acting, to a proposal from a delegation or sometimes the Commission, to rapid negotiations, and to heavy political pressure to produce quick results. The negotiations on the European Arrest Warrant are a prime example. The Council of Europe method secured more well-considered legal texts but sometimes also more watered-down ones.

The Amsterdam Treaty changed the landscape. Decisions were still taken by unanimity, but Framework Decisions became the most important instrument of action with their binding effect on the Member States (although without direct effect). Another important advancement was that the European Court of Justice in Luxembourg was given a more direct role in adjudication. The Court used it quickly in the landmark *Pupino* Case in which the legal effect of Framework Decisions was clarified (the difference between direct effect and indirect effect, however, seems razor-thin). The Commission was also given a right of initiative in the Third Pillar and the Member States' initiatives decreased. At the end of the period governed by the Amsterdam Treaty, about 50% of the initiatives were taken by the Commission. More than 35 Framework Decisions and Decisions were adopted by unanimity under the Third Pillar, so much so that Ministry of Justice officials started to speak about legislative fatigue. All Framework Decisions and Decisions had been adopted without

the impact of the European Parliament – opinions were given but not taken into account; it was the Council that decided by unanimity.

The increase in the development in terms of financial support to the Area of Freedom, Security and Justice (AFSJ) has been staggering. I remember the days when we discussed the financial terms of the Grotius Programme – a few hundred thousand euros – whereas today we are looking at more than one million euros, if not more. Current spending on the entire AFSJ is more than 100 times larger.

In 1996, it was only the fledgling Europol that was on the verge of becoming an agency/institution/body of the Third Pillar. Since then, the development has been exponential. Some of the networks that have been set up are already operational. We started carefully by setting up judicial cooperation networks and continued doing so. The European Judicial Network (in Criminal Matters) was among the first to be set up, and it is still going strong, as there is a need for direct bilateral cooperation. It solves thousands of cases each year.

When I started to push for the setting up of Eurojust in October 1996, my superiors said that Eurojust was "fifteen Prosecutors and a Secretary". In 2018, Eurojust provided support to 6500 investigations of serious organised crime and supported over 200 Joint Investigation Teams (JITs). In addition, it supported the use of some 1000 European Investigation Orders and the execution of more than 700 European Arrest Warrants. We set up Networks on JITs, Genocide, Crime Prevention and Trafficking in human beings. In the policing field, an efficient network was set up to capture fugitive criminals. Eurojust became the platform for housing the secretariats of a number of networks. Having a functioning secretariat was previously the Achilles heel for the networks.

In spite of the relative success of the Third Pillar, it was also criticised in several quarters: the cooperation lacked democratic legitimacy, the European Parliament was *de facto* not involved in the decision-making, the rule of unanimity was used to stifle negotiations, and the Court was rarely called upon to clarify texts that had been adopted. In addition, the Third Pillar was too secretive and repressive. There was no transparency in negotiations, and no consideration was given to the individual rights of victims and suspects in criminal proceedings.

The Giscard d'Estaing Convention had already sought to remedy a number of the shortcomings through approval of the draft Constitution for Europe, but, as is well known, both France and the Netherlands voted against it. Instead, the "Reform Treaty" was drafted after a period of reflection of several years. With some minimal changes, mostly of a symbolic character, the Lisbon Treaty (in reality two treaties) was able to enter into force on 1 December 2009 during the Swedish Council Presidency. The Treaty was "accompanied" by the Stockholm Programme, which was adopted two weeks later by the European Council – in the same manner as the Tampere conclusions that had accompanied the entry into force of the Amsterdam Treaty and the Hague Programme that was supposed to "accompany" the draft Constitution.

The Lisbon Treaty revolutionised the adoption of binding texts on criminal law at the multilateral level. Nowhere in the world had 28 States ever banded together to adopt binding instruments having direct effect after negotiations, with a directly elected parliament having equal standing as the Member States (represented in the Council). In addition, the texts were liable to be interpreted by the European Court of Justice and, after a transition period of five years, the texts adopted under the Amsterdam Treaty could also be brought before the Court for interpretation, either through preliminary rulings (which was already a possibility in 18 Member States) or through infringement proceedings of the Commission.

On the one hand, some parts of the Third Pillar still remain in the Lisbon Treaty, such as the unanimity rule under very specific circumstances, but, on the other hand, the Lisbon Treaty allayed most of the previously voiced criticism. As far as the question regarding repression vs. individual rights is concerned, the Swedish

Presidency – apart from the Stockholm Programme – drafted an Action Plan on individual rights for suspects in criminal proceedings, which was a step-by-step approach to the infected, more comprehensive Framework Decision on procedural safeguards, which had previously failed during the German Council Presidency (due to the "tyranny" of the rule of unanimity). The Action Plan was followed for several years, and a number of procedural rights instruments were adopted. The Hungarian Council Presidency took the same approach to the rights of victims a few years later, with similar success.

New challenges have emerged for the Member States, the Council, the Commission, and the European Parliament. Cybercrime is still a constant threat, the implementation of adopted instruments is still not up to par, and the challenge of the UK leaving the Area of Security and Justice still has to be met. Organised crime and cross-border movements of criminal groups, trafficking in human beings, drug trafficking, and violence against women is on the rise. The Union has a lot to do (in so far as it has the competence to act).

When one looks back at the Union's involvement in criminal law, there are a number of issues that can be contemplated. First, the Council of Europe no longer has the monopoly on drafting and adopting European instruments in relation to criminal law. Nevertheless, the work of the Council of Europe, though less political, is very useful and may serve the Union when adopting instruments with greater legal force. Second, the Union does not have unlimited competence in criminal law, whereas the Council of Europe in principle does. The Council of Europe will therefore always be able to work in those areas. Third, there will always be areas of "conflict"; grey zones where both the Council of Europe and the Union will claim some form of competence. Prison rules and everything relating to prison conditions are a typical example.

Another issue is the fact that the European Union has enormous political clout in criminal law matters, much more than the Council of Europe or the United Nations. Its instruments, mostly Directives and Regulations, are very efficient compared to international conventions, particularly where the interpretative power of the European Court of Justice is brought to bear. Moreover, through its financial programmes, the European Union is able to contribute to the development of criminal law in a number of areas in several ways (seminars, expertise, training, exchange programmes, etc.). The fact that the European Court of Justice has had full competence since 2014 has been crucial for the development of a comprehensive and coherent criminal law within the European Union.

In conclusion, a lot has happened over the past 20 years, and a lot will happen in the future. It will be interesting to continue to follow the developments in this important area of law, which has enormous potential. The implementation of the European Public Prosecutor's Office will no doubt mark an important step in this direction.

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