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## The symbolic purpose of EU criminal law

*Thomas Elholm and Renaud Colson*

“...seemingly without the criminal, the cohesiveness of society would disappear...”

Mead<sup>1</sup>

**Abstract.** Drawing on Durkheim’s sociology of law and the contribution of other authors who have emphasized the expressive dimension of punishment, this paper argues that the symbolic function of criminal law, which can be observed at the national level in European Member States, also has significance at the level of the European Union. Just as national governments, the Union may have good strategic reasons to enact criminal law with strong elements of symbolic function. But such a policy raises many problems.

### Introduction

Émile Durkheim was one of the first sociologists to construct an influential theory on the symbolic function of criminal law. In his view, punishment and criminal law cannot be regarded as merely technical tools to prevent and combat crime. They are first and foremost symbols which express certain public beliefs and common moral values.<sup>2</sup> According to Durkheim there is a causal relationship between social and moral life within a society: “if there is one thing that history has irrefutably demonstrated it is that the morality of each people is directly related to the social structure of the people practicing it”.<sup>3</sup> The relationship is visible in several ways, but a key notion for Durkheim is the *conscience collective*. In every society there must exist a set of beliefs and sentiments, which are shared by the average citizen<sup>4</sup> and constitute the *conscience collective*. To some degree the society is even held together by this common set of beliefs and sentiments. Thus,

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<sup>1</sup> G.H. Mead, “The Psychology of Punitive Justice”, *The American Journal of Sociology*, 22 (1918), 591.

<sup>2</sup> Durkheim’s theory of punishment runs through several of his works, including his famous book *De la division du travail social* (Paris, Alcan, 1893), transl. by G. Simpson: *The Division of Labour* (New York, Macmillan, 1933). It is developed at length in *L’Éducation morale* (Paris, Alcan, 1934), transl. by E. K. Wilson: *Moral Education* (New York, Dover Publications, 2011), and in the article ‘Deux lois de l’évolution pénale’ in *Année sociologique*, 4 (1899-1900), 65-95 (Repr. as chapter 4, “The Evolution of Punishment”, in S. Lukes and A. Scull (eds.), *Durkheim and the Law*, 2nd ed. (London, Palgrave Macmillan, 2013)).

<sup>3</sup> E. Durkheim, *Moral Education* (New York, Dover Publications, 2011), p. 87.

<sup>4</sup> E. Durkheim, *The Division of Labour in Society* (New York, Macmillan, 1933), p. 79.

*conscience collective* is not only a common, shared set of beliefs and sentiments, which is embodied in the social life. It is also constitutive of social solidarity.

Penal law and penal sanctions are manifestations of the *conscience collective*.<sup>5</sup> By committing a crime the offender is not only violating provisions of law, but also the moral order and the *conscience collective*. By punishing the offender, society is not only taking revenge and trying to prevent criminal behavior, but also – and primarily – reaffirming and strengthening the moral order, the shared moral beliefs and sentiments. This reaffirmation strengthens social bonds. It is worth mentioning that penal law holds a special position in the legal system, because violations of penal law are (often) associated with strong sentiments or emotions deeply rooted in society.<sup>6</sup> Core crimes violate “sacred” sentiments within society. Thus, penal law is not just any kind of law, but the kind of law which citizens are often passionate about, and punishing violations of the criminal law thus becomes an important manifestation of the *conscience collective*. It is a kind of glue holding society together. There are other kinds of glue – Durkheim points out – tort law, contract law etc. However, punishment and criminal law holds a special position, because punishment is a result of violations of strong sentiments or emotions deeply rooted and integrated in a society – at least this goes for some violations of criminal law.

Durkheim’s theory has been subject to many criticisms.<sup>7</sup> His account of penal evolution hardly fits with historical facts and his description of the relationship between social sentiments and criminal law as unilateral rather than interactive can easily be refuted: “state actions do not simply ‘express’ such sentiments – they also seek to transform and reshape them in accordance with a particular vision of society”.<sup>8</sup> The very notion of *conscience collective* has been criticized for ignoring the contradictions in collective sentiments and neglecting how dominant groups shape popular representations. Last but not least Durkheim overlooks the instrumental dimension of the criminal justice system in the restraint of offenders and the control of crime which are central in most contemporary criminological thinking. On the contrary Durkheim emphasizes moral aspects of punishment’s meaning which are not uppermost in Western pluralistic societies and can hardly account for the development of regulatory criminal law.

Yet in spite of these problems, some core elements of Durkheim’s theory might still be valid today and provide useful conceptual resources to understand the contemporary transformation of criminal justice systems in Europe. On the one hand Durkheim points out that criminal law is a cultural fact and suggests that it rests upon determinant social factors out of reach of the legislator. In doing so, he offers a valuable explanatory framework for persistent differences between domestic criminal laws in the face of approximation efforts at the European level. On the other hand, his theory accounts for the symbolic dimension of criminal law policies, an oft-overlooked aspect of legal reforms in Europe, where criminal justice seems nowadays to be goal-oriented towards crime control and grounded in instrumental rationality. In the face of traditional theories of punishment,

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<sup>5</sup> E. Durkheim, *The Division of Labour in Society* (New York, Macmillan, 1933), p. 228.

<sup>6</sup> E. Durkheim, *The Division of Labour in Society* (New York, Macmillan, 1933), p. 64 and p. 79.

<sup>7</sup> See among others D. Garland, “Durkheim’s Theory of Punishment: A Critique”, in D. Garland and P. Young (eds), *The Power to Punish* (London, Heinemann, 1983), chap. 3.

<sup>8</sup> D. Garland, *Punishment and Modern Society: A Study in Social Theory* (The University of Chicago Press / Oxford University Press, 1990), p. 54.

which underline the need for deterrence, incapacitation or rehabilitation of offenders, Durkheim reminds us that criminal law is also a means of expressing common moral values and social solidarity. Irrespective of its legal effect and its actual implementation the enactment of new penal legislation can sometimes fulfil the function of affirming shared ideals and strengthening social bonds. Criminal law can be used to foster moral cohesion and to create some sense of collective identity. It can also be used to reinforce the legitimacy of the legal authority which channels popular punitive passions, sometimes at the expense of marginalized segments of society.

Drawing on this explanatory framework, based on Durkheim's theory and the contribution of other authors who have emphasized the expressive dimension of punishment<sup>9</sup> this chapter argues that the symbolic function of criminal law, which can be observed at the national level in European Member States (Part 1) also has significance at the level of the European Union (Part 2). Just as national governments, the Union may have good strategic reasons to enact criminal law with strong elements of symbolic function. But such a policy raises many problems (Part 3).

### **The symbolic function of national criminal law**

The landscape of European criminal justice systems has changed massively in the last three decades. In many countries there has been an increasing indignation in relation to crime in general which has led in turn to rapid transformation in institutional responses. These shifts are sufficiently profound for commentators to talk of a 'crisis in penal modernism'<sup>10</sup> affecting both substantive principles of punishment and the functioning of criminal justice systems in Western states. Fundamental differences remain though and it has been convincingly shown that the rise of 'penal populism' and increased punitiveness in criminal policy do not impact in the same way on the various European jurisdictions.<sup>11</sup> Some legal systems appear more stable than others and less affected by this apparently far-reaching transformation. Penal ideologies, procedural traditions and sentencing practices remain extremely diverse throughout Europe. Yet the following examples drawn from various European jurisdictions provide evidence that the enactment of new criminal legislation for symbolic purpose can be found in countries with very different legal cultures.

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<sup>9</sup> Among others G.H. Mead, "The Psychology of Punitive Justice", *The American Journal of Sociology*, 22 (1918), 577-602; C.E. Paliero, "Consensus sociale e diritto penale", *Rivista italiana di diritto e procedura penale*, 35 (1992), 849-922; M. van de Kerchove, "Les lois pénales sont-elles faites pour être appliquées ? Réflexions sur les phénomènes de dissociation entre la validité formelle et l'effectivité des normes juridiques" in F. Ost and M. van de Kerchove (eds.), *Jalons pour une théorie critique du droit* (Bruxelles, Publications des Faculté universitaires Saint-Louis, 1987), pp 317-351; A. Baratta, "Les fonctions instrumentales et les fonctions ymboliques du droit pénal", *Déviante et Société*, 15-1 (1991), 1-25.

<sup>10</sup> Compare, in very different styles and relative to distinct cultural domains, the collection edited by M. Massé, J.-P. Jean and A. Giudicelli, *Un droit pénal postmoderne ? Mise en perspective des évolutions et ruptures contemporaines*, Paris (Presses Universitaires de France, 2009), the work of D. Garland, *The Culture of Control, Crime and Social Order in Contemporary Society* (Oxford University Press, 2001), especially chap. 3 ('The crisis of penal modernism'). See also L. Re, *Carcere e globalizzazione. Il boom penitenziario negli Stati Uniti e in Europa* (Roma, Editori Laterza, 2011).

<sup>11</sup> M. Cavadino and J. Dignan, *Penal Systems. A Comparative Approach* (London, Sage, 2006), p. 43. See also N. Lacey, *The Prisoners' Dilemma. Political Economy and Punishment in Contemporary Democracies* (Cambridge University Press, 2008), and S. Snacken and E. Dumortier (eds.), *Resisting Punitiveness in Europe? Welfare, Human Rights and Democracy* (Oxon, Routledge, 2012).

In Denmark within the last two or three decades growing awareness of crime has been accompanied by an acknowledgement that punishment often has little or no effect on crime. Realizing this fact the Danish legislator has increasingly stressed the symbolic effect or function of punishment. A study<sup>12</sup> which examined the 40 Acts amending the Danish criminal code from 1999 to 2010 reveals that approximately half of them can be characterised as signal legislation, that is Acts whose primary purpose is to signal a certain attitude without any real interest in the legal effects of the legislation proposed. Compared to the 1990s, new criminal law legislation has often been adopted with the primary purpose of communicating certain moral values irrespective of the applicability of the law. The study went through the *travaux préparatoires* and revealed that in several cases, the legislator himself did not expect *any* effect from the new legislation in terms of the prevention or combating of crime: the signal was the only official justification for the submission of the Bill. One such example – taken from the study – is a new provision in the Danish Criminal Code introducing the crime of female mutilation. Female mutilation was at the time of the adoption of the new provision already criminalized in Denmark by the general provision on aggravated assault (Section 245 of the Danish Criminal Code) but there was no specific provision on female mutilation. The legislator introduced a new provision (Section 245(a)), but the acts criminalized and the penalty scales were identical. Hence, there were no changes in the legal position in this regard. Since it was introduced in 2003 the provision has rarely been used.

A similar development of symbolic legislation can also be observed in France where the public acknowledgement of the social reality of crime has been translated into a political dramatisation of its risks and an expansion in the range of criminal offence. This political evolution, sometimes described as a “security frenzy”<sup>13</sup>, has led to the creation of new loosely defined offences in the wake of dramatic crime stories or under the pressure of some victims’ associations. The new legal provisions often overlap with existing legislation and they are in practice very difficult to apply due to their poor drafting. The function of these Acts has been described as “declarative”<sup>14</sup> as the intention of the legislator is to have an announcement effect and to maximize its media impact, rather than to tackle actual problems or to modify legal situations. A good example is the offence of occupation of a building hallway, enacted in 2003, to crack down on youngsters who gather and hinder free movement in the lobbies of buildings. The provision (art. 126-3 of the French Construction and Housing Code) signals a problem but offers no actual legal remedies as the elements of the offence already fall within other proscribed categories (assault and battery, causing harassment, alarm or distress...). So on the rare occasions that it has been applied by the courts, a similar result could have been reached by other legal means.

Far from being exceptional, such examples are common throughout the European Union. In England and Wales, dozens of new Acts containing hundreds of provisions relating to criminal

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<sup>12</sup> T. Elholm, “The Symbolic Purpose of Criminal Law. A Danish Perspective”, in S. Reindl-Krauskopf, I. Zerbes, W. Brandstetter, P. Lewisch and A. Tipold (eds.), *Festschrift für Helmut Fuchs* (Vienna, Verlag der Österreichischen Akademie der Wissenschaften, 2014), pp. 137-152.

<sup>13</sup> See L. Mucchielli (ed.), *La frénésie sécuritaire. Retour à l’ordre et nouveau contrôle social* (Paris, La Découverte, 2008).

<sup>14</sup> C. Lazerges, “De la fonction déclarative de la loi pénale”, *Revue de science criminelle et de droit pénal comparé*, 59-1 (2004), 194-202.

justice have been enacted since the 1990s. This tidal wave of legislation has led to the creation of thousands of new offences, some of them “completely pointless”.<sup>15</sup> The idiosyncrasy of the law-making process and the tradition of statutory drafting in England and Wales partly explain the impenetrable nature of this new legislation.<sup>16</sup> Yet the political roots of English “binge law-making”<sup>17</sup> are similar to those of declarative legislation in France: both countries have been the site of a punitive turn which promotes criminal policy based on “spin” instead of on research.<sup>18</sup> In this context, penal legislation is designed as a sign of “Ministerial virility” to respond to “what was believed to be public opinion”.<sup>19</sup> Italy with its specific political culture and distinctive legal tradition has gone along the same path. The recurrent use of symbolic penal legislation serves to reaffirm some sort of ideological unity in a changing society – to stigmatize new phenomena, such as drug use, or traditional behaviours, such as sexual violence – and to signal a political willingness to confront organized criminality.<sup>20</sup> More recently, the securitization of criminal policy has led to the proliferation of new offences in the criminal code.<sup>21</sup> Just as in other European countries, this has resulted in legislative hyperinflation. This similar trend of English, French, Italian and Danish criminal policy is all the more revealing in that the political economy of punishment is very different in these four countries, ranging from an exclusionary neo-liberal model to more inclusionary policies. Despite this diversity, similar use of symbolic penal legislation has been observed in these national settings in the last two decades. It is not altogether surprising that such an evolution can also be noticed at the EU level.

### **The quest for symbolic EU criminal law**

#### *The apparent absence of symbolic EU criminal law*

From a European Community seen as a primarily economic organization not supposed to affect national criminal law, to an EU seen as a fully-fledged penal actor<sup>22</sup>, the evolution is quite remarkable. This shift in approach stands in stark contrast to the unchanging nature of justifications for European criminal law which from the beginning have been exclusively utilitarian. Initially based on the theory of “spill-over”, according to which European criminal law competence was required to ensure the functioning of the internal market<sup>23</sup>, European inroads into the field of

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<sup>15</sup> J.R. Spencer, “The Drafting of Criminal Legislation: Need it be so Impenetrable?”, *Cambridge Law Journal*, 67-3 (2008), p. 588 quoting section 47 Anti-terrorism, Crime and Disorder Act 2001 which provides that: (1) A person who (a) knowingly causes a nuclear weapon explosion (...) is guilty of an offence. (5) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for life...

<sup>16</sup> J.R. Spencer, “The Drafting of Criminal Legislation”, *Cambridge Law Journal*, 67-3 (2008), esp. pp. 594-598.

<sup>17</sup> J.R. Spencer, “The Drafting of Criminal Legislation”, *Cambridge Law Journal*, 67-3 (2008), p. 586.

<sup>18</sup> For a comparison, see R. Colson, S. Field, *The Transformation of Criminal Justice: Comparing France with England and Wales / Les transformations de la justice pénale : Une comparaison franco-anglaise* (Paris, L'Harmattan, 2011), pp. 52-55.

<sup>19</sup> J.R. Spencer, “The Drafting of Criminal Legislation”, *Cambridge Law Journal*, 67-3 (2008), p. 598.

<sup>20</sup> F. Palazzo, “La politica criminale nell’Italia Repubblicana”, in L. Violante (ed.), *Storia d’Italia. Annali 12: La criminalità* (Turin, Giulio Einaudi, 1997), esp. pp. 868-873.

<sup>21</sup> F. Palazzo, “Requiem per il codice penale? (scienza penale e politica dinanzi alla ricodificazione)”, *Cassazione penale*, 40 (2011), p. 4071.

<sup>22</sup> E. Baker, “The Emerging Role of the EU as a Penal Actor”, in T. Daems, S. Snacken and D. van Zyl Smit (eds.), *European Penology?* (Oxford, Hart, 2013), pp. 77-111.

<sup>23</sup> On the spill-over theory, see M. Fletcher, R. Löf and B. Gilmore, *EU Criminal Law and Justice* (Cheltenham/Northampton, Edward Elgar, 2008), pp. 22-31.

criminal law are now based on two main strands of argument: the need to respond to global security threats on one hand, and the protection of EU interests and the effectiveness of European law on the other hand.<sup>24</sup>

EU competence over criminal matters has been evolving over time but its remit has always been justified by instrumental considerations. The official purpose of EU criminal law is to combat and prevent crime and to achieve efficient regulation. The legal basis for the adoption of criminal legislation provided by the Treaty on the Functioning of the European Union (TFEU) is determined by this dual purpose. Article 82 confers on the European institutions the power to adopt rules for “ensuring recognition throughout the Union of all forms of judgment and judicial decisions” and “to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension”. Article 83 allows the Union to establish “minimum rules” to define “criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension” and to “ensure the effective implementation of a Union policy (...) subject to harmonization measures. These Treaty provisions imply that criminal law cannot be adopted at the EU level for mere symbolic purpose. This stance is incidentally corroborated by important policy documents, for example, the European Parliament resolution on an EU approach to criminal law which makes clear that “it is not sufficient to refer to abstract notions or to symbolic effect, but that the necessity of new substantive criminal law provision must be demonstrated by the necessary factual evidence”.<sup>25</sup>

No wonder then that the symbolic function of criminal law is underplayed in the preambles of the European instruments which usually underline the pragmatic need to take legal action at the EU level to achieve effective regulation or to fight specific types of crime. To take but a few examples, a 2008 Directive *on the protection of the environment through criminal law*<sup>26</sup> states that “in order to achieve effective protection of the environment, there is a particular need for more dissuasive penalties for environmentally harmful activities” (recital 5). The preamble goes on with the observation that “the objective of this Directive, namely to ensure a more effective protection of the environment, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Directive, be better achieved at Community level” and stresses the fact that the Directive “does not go beyond what is necessary in order to achieve that objective” (recital 14). A similar phraseology can be found in Directive 2011/36/EU *on preventing and combating trafficking in human beings and protecting its victims* (recital 32) and in Directive 2011/92/EU *on combating the sexual abuse and sexual exploitation of children and child pornography* (recital 49), as well as in other European Framework Decisions<sup>27</sup>. This justification may well beg the question why EU criminal legislation rather than domestic action is needed in these cases – but the emphasis on the effectiveness of the legal response excludes on the face of things a mere symbolic purpose.

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<sup>24</sup> V. Mitsilegas, “EU Criminal Law Competence after Lisbon. From Securitized to Functional Criminalisation”, in D.A. Arcarazo and C.C. Murphy (eds.), *EU Security and Justice Law: After Lisbon and Stockholm* (Oxford / Portland, Hart, 2014), pp. 110-128.

<sup>25</sup> European Parliament resolution of 22 May 2012 *on an EU approach to criminal law* (2010/2310(INI)), paragraph Q.3.

<sup>26</sup> Directive 2008/99/EC of 19 November 2008 *on the protection of the environment through criminal law*.

<sup>27</sup> See for example 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* (recital 13).

The “added value” of criminal law harmonization is officially to ensure that “criminals can neither hide behind borders nor abuse differences between national legal systems for criminal purpose”.<sup>28</sup> However, some evidence might still point to the fact that the EU legislator is aware of and interested in the expressive function of new EU criminal law legislation.

#### *The discrete presence of symbolic EU criminal law*

Policy documents reveal that EU institutions are well aware of the expressive purpose of criminal law and conceive legal harmonization as a means to achieve objectives which are not limited to instrumental reasons. In a 2004 *Green Paper on the Approximation, Mutual Recognition and Enforcement of Criminal Sanction in the European Union*, the Commission declared that “by defining common offences and penalties in relation to certain forms of crime, the Union would be putting out a symbolic message” which “would help to give the general public a shared sense of justice”.<sup>29</sup> This is acknowledgement that European criminal law should also be seen as a statement of values and a device to express judgments of disapproval and reprobation. Proof of this is the focus of the EU legislator on certain core crimes which provoke strong sentiments or emotions that are deeply rooted in the populations throughout Europe (terrorism, trafficking in human beings and sexual exploitation of women and children, etc.). European criminal legislation tallies with the list of “Eurocrimes” established by the European treaty (TFEU Art. 83(1)) and signals a core set of common moral values across the EU.

This expressive dimension is explicitly claimed by some of the instruments adopted by the Union to highlight and protect its founding values.<sup>30</sup> A good example is the Framework Decision on combating certain forms and expressions of racism and xenophobia<sup>31</sup>, the very first paragraph of which states: “Racism and xenophobia are direct violations of the principles (...) upon which the European Union is founded and which are common to the Member States.”<sup>32</sup> More surprisingly, even European regulatory criminal law, designed “to ensure the effective implementation of a Union policy” (TFEU Art. 83(2)) is not immune from this expressive dimension as the 2008 Directive on the protection of the environment shows: “compliance can and should be strengthened by the availability of criminal penalties, which demonstrate a social disapproval of a qualitatively different nature” (recital 3).<sup>33</sup>

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<sup>28</sup> European Commission, *Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law*, COM(2011)573 final, p. 3.

<sup>29</sup> European Commission, *Green Paper on the Approximation, Mutual Recognition and Enforcement of Criminal Sanction in the European Union*, COM(2004)334 final, p. 9.

<sup>30</sup> TEU, Art. 2: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

<sup>31</sup> For a thorough examination of the symbolic dimension of this instrument, see J. Iontcheva Turner, “The Expressive Dimension of EU Criminal Law”, *American Journal of Comparative Law*, 60-2 (2012), 555-583.

<sup>32</sup> Council Framework Decision 2008/913/JHA.

<sup>33</sup> Another example is the Directive 2014/57/EU of 16 April 2014 *on criminal sanctions for market abuse* which emphasizes in its preamble that “it is essential that compliance with the rules on market abuse be strengthened by the availability of criminal sanctions which demonstrate a stronger form of social disapproval compared to administrative penalties (...), set clear boundaries for types of behaviour that are considered to be particularly unacceptable and send a message to the public...” (recital 6).



The symbolic function of criminal law is made especially apparent in cases where there is not much evidence that new legislation has any effect. Although the EU legislator is always stressing the need for new EU legislation to prevent and combat crime efficiently, in many cases there is not much (if any) empirical evidence to support the assumption that an EU Directive on criminalization has any significant effect on Member States' legislation. Member States may well adopt new special provisions to implement European law; yet the core criminalization often remains unchanged. For example Denmark and Sweden adopted new special provisions on terrorism to implement the EU Framework Decision on terrorism but the new provisions were mainly criminalizing the same acts as before, with the offences renamed and reshaped.<sup>34</sup> Sometimes no modification at all of domestic legislation is required. Thus the 2004 Framework Decision on illicit drug trafficking brings very limited added-value to the relevant UN convention already ratified and transposed in all Member States.<sup>35</sup> The content of the Framework decision is, in large parts, the lowest common denominator and this instrument eventually boils down to "moral posturing".<sup>36</sup> One could easily get the idea that the legislation is rather a "quick-fix solution that is cheap and satisfying to important groups of constituents"<sup>37</sup> and that the legislation is a convenient way for the legislator to show empowerment and to express common moral, fundamental values.

#### *The purpose of EU symbolic legislation*

The adoption of expressive measures with no practical effect is best understood as part of a larger project to give a political identity to the EU.<sup>38</sup> By the statement of common moral norms, moral solidarity and social bonds can be strengthened within the Union. This plan is made explicit with regard to the promotion of mutual trust between Member States in order to make mutual recognition of domestic rulings possible. Thus the European Council has considered "a certain level of approximation of laws is necessary to foster a common understanding of issues among judges and prosecutors"<sup>39</sup>. The advancement of mutual trust through symbolic legislation is supposed to forge a common culture among professionals but this logic also applies to ordinary people.

By imposing on Member States an obligation to criminalize specific types of offences, the Union seeks to create social consensus by identifying European shared values. The harnessing of punitive passions ("the revulsion against criminality") can also be used by the Union to reveal "a sense of solidarity with the group, as sense of being citizen"<sup>40</sup>. In this perspective the concomitance of the rise of EU Criminal law and of EU citizenship in an *area of freedom, security and justice* in the

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<sup>34</sup> Thomas Elholm, "Does EU Cooperation Necessarily Mean Increased Repression?", *European Journal of Crime, Criminal Law and Criminal Justice*, 17-3 (2009), 191-226.

<sup>35</sup> On this Directive, see R. Kert, A. Lehner, "Content and Impact of Approximation. The Case of Drug Trafficking", in F. Galli, A. Weyembergh (eds.), *Approximation of Substantive Criminal Law in the EU: The Way Forward* (Brussels, Edition de l'Université de Bruxelles, 2013), pp.169-188.

<sup>36</sup> To adopt an expression used by M. Fletcher, R. Lööf and B. Gilmore to describe the purpose of the Framework decision dealing with abuse of children and child pornography in their book *EU Criminal Law and Justice* (Cheltenham/Northampton, Edward Elgar, 2008), pp. 201-202.

<sup>37</sup> J.B. Jacobs and K. Potter, *Hate Crimes: Criminal Law & Identity Politics* (Oxford University Press, 1998), p. 52.

<sup>38</sup> M. Hildebrandt, "European Criminal Law and European Identity", *Criminal Law and Philosophy*, 1-1 (2007), 57-78.

<sup>39</sup> European Council, *The Stockholm Programme. An open and secure Europe serving and protecting citizens* (2010/C 115/01).

<sup>40</sup> G.H. Mead, "The Psychology of Punitive Justice", *The American Journal of Sociology*, 22 (1918), p. 586.

making should be seen as no surprise: by reinforcing common moral norms, the European Union take a step towards a thicker social and political notion of European citizenship.<sup>41</sup> This in turn helps build “the supranational demos” which Europe is repeatedly said to lack.<sup>42</sup>

One must also bear in mind another symbolic use of penal law, which is “telling stories about authority and stories about the identity of the superior power”.<sup>43</sup> Irrespective of the values protected by European criminal law and its ability to constitute a European *demos*, its development represents a key moment in the constitutional maturing of the Union and the redistribution of sovereignty between the European institutions and the European states. Through its criminal legislation the power of the EU is affirmed in the face of its Member States and their people. The fabric of consensus on the values protected by criminal legislation is transferred by extension to the source of these measures<sup>44</sup>, which is the European legal order. Protector of the European citizens, to whom the Union promises “a high level of security” (TFEU, Art. 67.3), penal powers enhance the European project as a whole and provide the Union with the aura of an institution endowed with the authority to use legitimate violence alongside the states (which must now share their monopoly). The symbolic use of criminal law thus gives the Union the opportunity to kill two birds with one stone: on the one hand it expresses the collective identity of the Union in the name of its people through the assertion of core values, on the other, it entrenches a belief in the indispensable nature of EU action. It remains to be seen though if this integration through criminal law is technically possible and politically safe.

### **The limits of symbolic EU criminal law**

#### *Technical obstacles*

There is clear evidence that the expressive dimension of criminal law is not absent from the plans of the European legislator. Yet there are reasons to doubt whether this symbolic function can operate in a similar way at both the national and the transnational level. Two technical obstacles oppose the transfer of this function from the domestic sphere to a European context: the lack of a legal basis to adopt a symbolic criminal policy and the inability to address European citizens directly.

Among the many questions raised by the use of symbolic legislation by the European Union, the first to spring to mind to EU lawyers is that of the legal basis. The principle of conferral means that the Union “shall act only within the limits of the competence conferred upon it by the Member States in the Treaties” (TEU, Art. 5.2). Although wide-ranging, harmonisation powers in the field of criminal law have been granted to the EU in order to fulfil instrumental functions in the fight

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<sup>41</sup> See S.Coutts, “Citizenship of the European Union”, in D.A. Arcarazo and C.C. Murphy (eds.), *EU Security and Justice Law*, (Oxford / Portland, Hart, 2014), pp. 92-109.

<sup>42</sup> J. Iontcheva Turner, “The Expressive Dimension of EU Criminal Law”, *American Journal of Comparative Law*, 60-2 (2012), p. 573. More generally, on European citizenship and the (lack of) European demos, see J. Weiler, *The Constitution of Europe* (Cambridge University Press, 1999), esp. chapter 10 : “To be a European Citizen: Eros and Civilization”.

<sup>43</sup> K. Nuotio, “On the Significance of Criminal Justice for a Europe ‘United in Diversity’”, in K. Nuotio (ed.), *Europe in Search of ‘Meaning and Purpose’* (Helsinki, Publication of the Faculty of Law, 2004), p. 193.

<sup>44</sup> C.E. Paliero, “Consenso sociale e diritto penale”, *Rivista italiana di diritto e procedura penale*, 35 (1992), esp. p. 893 and p. 905.

against crime, not to engage in symbolic engineering. In addition, both the principles of subsidiarity<sup>45</sup> and proportionality, supposed to determine the content and form of Union action, seem to be in fundamental opposition to such a development. This is especially true as they tend to be associated to the *ultima ratio* principle according to which the “European legislator may only demand that an act be criminalised if it is necessary in order to protect a fundamental interest, and if all other measures have proved insufficient to safeguard that interest”.<sup>46</sup> Although not enshrined in the treaties, the *ultima ratio* argument can be traced in EU law as a legitimizing principle of EU criminal law<sup>47</sup> and it is hardly compatible with symbolic tinkering. In theory the adoption of criminal law as a means of last resort does not exclude the enactment of expressive provisions providing that they also have another purpose which falls under a competence explicitly granted to the EU. So the expressive dimension of EU criminal law is not ruled out but it must necessarily be reduced to a mere accessory of its instrumental function – be it the fight against trans-border crime or the implementation of Union policies.

Hardly justifiable *per se* the adoption of EU criminal law for symbolic purpose proves also technically difficult to carry out as European instruments are less suitable to fulfil this function than their domestic counterparts. Whereas national criminal law is addressed directly to citizens who can be punished for its breach, this is not true of EU criminal law legislation which until now has been directed at the Member States (to the governments and parliaments), not to European citizens. Indeed so far, EU criminal law can only be adopted in the form of Directives which have to be implemented in national law if they are to serve as a basis for punishment.<sup>48</sup> In other words, European criminalisation is a two step process. First it necessitates the definition of the conduct to target, and possibly a penalty scale, by the European legislator. Secondly it requires Member States to incorporate this “conduct norm” into their domestic legal order and to issue a “repression norm”.<sup>49</sup> Although Member States are bound to transpose the “conduct norm”, they have a margin of appreciation to distort its symbolic message and can claim to have full control – if not the final say – over the criminalization process, including its expressive dimension. Does the fact that EU law is implemented through national criminal law necessarily extract all symbolic meaning from EU law leaving the Directives as empty shells (symbolically, morally)? Probably not, and there is no reason why EU criminal law legislation might not claim to convey symbolic signals, express common beliefs and denounce certain acts as morally wrong. Yet there is little doubt that the indirect process of criminalization weakens to a certain extent the symbolic power of the European law as it is mediated by national law.

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<sup>45</sup> On this principle see P. Asp, “The importance of the principles of subsidiarity and coherence in the development of EU criminal law”, *European Criminal Law Review*, 1-1 (2011), pp. 43-54. See also M. van de Kerchove, “Le principe de subsidiarité”, in G. Giudicelli-Delage, C. Lazerges (eds.), *Le droit pénal de l’Union européenne au lendemain du traité de Lisbonne* (Paris, Société de législation comparée), pp. 27-46.

<sup>46</sup> European Criminal Law Initiative, “The Manifesto on European Criminal Policy in 2011”, *European Criminal Law Review*, 1-1 (2011), p. 88.

<sup>47</sup> S. Melander, “*Ultima Ratio* in European Criminal Law”, *European Criminal Law Review*, 3-1 (2013), 45-64.

<sup>48</sup> On this paradoxical power of criminalization deprived of punitive dimension see C. Sotis, “‘Criminaliser sans punir’. Réflexion sur le pouvoir d’incrimination (directe et indirecte) de l’Union européenne prévu par le Traité de Lisbonne”, *Revue de science criminelle et de droit pénal comparé*, 65-4 (2010), 773-785.

<sup>49</sup> P. Simon, “The Criminalisation power of the European Union after Lisbon and the Principle of Democratic Legitimacy”, *New Journal of European Criminal Law*, 3-3 (2012), esp. pp. 242-246.

### *Political risks*

In spite of the technical obstacles, which make it more difficult to adopt symbolic criminal legislation at the European level than at the national level, it has been shown that the EU has been engaged in such symbolic tinkering. Beyond the questions of legality and efficacy raised by this policy, one should not underestimate the risks it brings.<sup>50</sup>

The first danger is the failure of the symbolic project itself. The affirmation of shared values through criminal legislation in order to infuse European people with some sense of community and to promote the legitimacy of the European institution may simply go wrong. In modern societies, the legal idiom is necessarily secular and moral community is fragmented so that large portions of the population are “ambivalent adherents to the dominant moral order”.<sup>51</sup> Although the rise of penal populism in the last decades has led to the enactment of much symbolic legislation at the national level, it remains to be seen if this policy has reinforced the moral cohesion of societies and enhanced the legitimacy of law-makers. This is all the more uncertain at a European level as the AFSJ covers a patchwork of almost 30 States with different social and cultural characteristics. This diversity, which is reflected in the variety of Member States’ penal cultures, makes the use of expressive legislation very hazardous as it exposes the European legislator to a possible symbolic backlash. Signal legislation opposing sentiments of large part of the European society may actually highlight the moral and cultural heterogeneity of European peoples and accentuate the perceived democratic deficit of the EU instead of creating concord.

Even if the symbolic effect of penal instruments eventually operates to reinforce moral consensus throughout the Member States and to strengthen EU legitimacy, one may question its value. For criminal law promotes a distinctive form of cohesion: “the emotional solidarity of aggression”.<sup>52</sup> Solidarity based on “functional group hostility”<sup>53</sup> may well enhance social cohesion but it comes at a cost.<sup>54</sup> It directs institutional energies towards criminalisation of conducts which raise a high degree of social alarm instead of towards the reconstruction of social condition for crime prevention. Moreover the political exploitation of punitive passions through symbolic criminal law can end up turning transgressors into scapegoat enemies with a risk of “destructive intolerance and escalating social violence”.<sup>55</sup>

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<sup>50</sup> On these risks, see S. Manacorda, “Le programme pour une politique pénale de l’Union entre mythe et réalité”, *Revue de science criminelle et de droit pénal comparé*, 66-4 (2011), 908-924, esp. Part I.

<sup>51</sup> D. Garland, *Punishment and Modern Society* (The University of Chicago Press / Oxford University Press, 1990), p. 75.

<sup>52</sup> G.H. Mead, “The Psychology of Punitive Justice”, *The American Journal of Sociology*, 22 (1918), p. 591.

<sup>53</sup> D. Garland, *Punishment and Modern Society* (The University of Chicago Press / Oxford University Press, 1990), p. 77.

<sup>54</sup> “While then the attitude of hostility (...) against the transgressor of the laws (...) gives to the group a sense of solidarity which most readily arouses like a burning flame and which consumes the differences of the individual interests, the price paid for this solidarity of feeling is great and at times disastrous”, G.H. Mead, “The Psychology of Punitive Justice”, *The American Journal of Sociology*, 22 (1918), p. 592.

<sup>55</sup> D. Garland, *Punishment and Modern Society* (The University of Chicago Press / Oxford University Press, 1990), p. 77.

At the European level, this process is made easier by the character of EU cooperation: each Member State pushes forward its values and moral beliefs in order to have them exposed and expressed on the European scene. Each chairmanship of the EU proposes to enshrine in EU criminal law its favourite moral values. Denmark proposes criminalization of environmental issues, Sweden proposes criminalization of sexual services, the United Kingdom proposes criminalization of trafficking in human beings (after a specific incident at Dover), and finally Belgium proposes criminalisation of sexual exploitation of children.

Thus the emphasis on the expressive function of criminal law, however justified it may seem, can lead to an ongoing repressive development and to penal hypertrophy.<sup>56</sup> The risk brought about by this symbolic competition between Member States is reinforced by other structural factors. On one hand the decision to signal EU interests worthy of protection through penal legislation may lead to legislative inflation with the progressive expansion of the signal beyond hard core interests in order to symbolically entrench the spill over of EU power (e.g. from the protection of EU financial interests to the criminalization of Euro counterfeiting, money laundering and eventually all organized criminality).<sup>57</sup> On the other hand, one may fear some sort of ratchet effect when European legislation symbolically requires the criminalization of conducts already prohibited by national laws, a move with seemingly no legal consequence except that of restraining the ability of Member States to engage in a policy of decriminalisation in the future.

## Conclusion

The last decades have seen an increasing use of penal policies in order to “counter increasing public distress of government competence and legitimacy”.<sup>58</sup> This governing through crime strategy, first identified in the United States of America<sup>59</sup>, has since then spread to other settings, thanks to the emergence of “insecurity” as a major political topic. There is little evidence at this point that the European Union has endorsed such a strategy with regard to crime control. It is yet possible to identify some legal developments pointing in that direction in the emergence of a European strategy of “governing through security”.<sup>60</sup> The neo-Hobbesian turn by which the EU presents itself as the guarantor of European citizens’ safety in the *area of freedom, security and justice*<sup>61</sup> has been qualified in the Stockholm programme which underlines the need to ensure respect for fundamental rights. Yet security remains a central argument in policy discourses used to legitimize the action of

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<sup>56</sup> On this penal hypertrophy hazard, see C. Sotis, “Mauvaises pensées et autres’: A propos des perspectives de création d’un droit pénal communautaire”, in G. Giudicelli-Delage, S. Manacorda (eds.), *L’intégration pénale indirecte. Interactions entre droit pénal et coopération judiciaire au sein de l’Union européenne* (Paris, Société de législation comparée, 2005), pp. 243-267.

<sup>57</sup> C. Sotis, “Mauvaises pensées et autres’”, in G. Giudicelli-Delage, S. Manacorda (eds.), *L’intégration pénale indirecte* (Paris, Société de législation comparée, 2005), pp. 247-249.

<sup>58</sup> S. Snacken, “Legitimacy of Penal Policies: Punishment between Normative and Empirical Legitimacy”, in A. Crawford, A. Huckleby (eds.), *Legitimacy and Compliance in Criminal Justice* (Oxon, Routledge, 2013), p. 60.

<sup>59</sup> J. Simon, *Governing Through Crime. How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford University Press, 2009).

<sup>60</sup> E. Baker, “Governing through Crime. The Case of the European Union”, *European Journal of Criminology*, 7-3 (2010), 187-213.

<sup>61</sup> S. Coutts, “Citizenship of the European Union”, in D.A. Arcarazo and C.C. Murphy (eds.), *EU Security and Justice Law*, (Oxford / Portland, Hart, 2014), pp. 100-101.

European institutions and to promote a sense of European citizenship. This tendency echoes our observations on the symbolic dimension of European criminal legislation, oft used to signal common moral values without having much effect on domestic criminal law.

The identification of enemies - real or imaginary - has long served the constitution of polities and there is no reason to believe that our liquid societies can avoid such catalysts to maintain their cohesion.<sup>62</sup> This is not to say that this anthropological characteristic should be exploited by the EU legislator to build the European demos and strengthen European institutions. Not only is the success of such an enterprise very uncertain. It also runs counter some of the technical features of the EU and carries important political risk.

Should the EU renounce the symbolic use of criminal law? Not necessarily, but to be faithful to its fundamental values it should rather wield its expressive power to promote penal de-escalation. The role of the EU in the abolition of the death penalty in Europe could be mentioned here.<sup>63</sup> Now the civilising force of the Union in an era of penal populism could take many other forms. For the power of harmonizing rules in the field of criminal law comes with the power to require decriminalisation of certain conducts from Member States.<sup>64</sup> To take but one example, whereas mere drug use rarely leads to imprisonment in Europe, such a sanction remains theoretically possible in several Member States.<sup>65</sup> By proscribing such a punishment, the EU would not affect seriously the legal practices in the Member States. However it would reassert some sort of European political identity by explicitly rejecting the violent treatment still imposed to drug addicts in many parts of the world and support symbolically the public health model of drug policy it promotes otherwise. Often portrayed as a recipe for increased punitiveness, symbolic European criminal legislation may thus turn into a tool of humanization of national criminal policies.

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<sup>62</sup> U. Eco, *Costruire il nemico e altri scritti occasionali* (Milan, Bompiani, 2011), esp. chap. 1: "Costruire il nemico".

<sup>63</sup> S. Snacken, "Legitimacy of Penal Policies: Punishment between Normative and Empirical Legitimacy", in A. Crawford, A. Hucklesby (eds.), *Legitimacy and Compliance in Criminal Justice* (Oxon, Routledge, 2013), p. 60.

<sup>64</sup> J. Simon, *Governing Through Crime. How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford University Press, 2009), pp. 53-54.

<sup>65</sup> V. Mitsilegas, "From Overcriminalisation to Decriminalisation: The Many Faces of Effectiveness in European Criminal Law", *New Journal of European Criminal Law*, 5-3 (2014), 415-423.

<sup>65</sup> H. Bergeron, R. Colson (eds.), *European Drug Policies: The Ways of Reform* (Oxon, Routledge, forthcoming in 2016).