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**Towards a European
Ius Commune in Legal
Education and Research**

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WHAT SHOULD BE THE CONDITIONS FOR A EUROPEAN *CORPUS JURIS CRIMINALIS*?

1. Introduction – Discussion of A. Klip's 'Conditions for a European *Corpus Juris Criminalis*'

In the debate surrounding 'European Criminal Law,' two extreme points of view mark the scale of opinions:

One extreme position – let us fix it on the very right of the scale – asks for a repatriation to the national level of all powers related to criminal law.¹ All EC-regulations and directives that have the effect of harmonizing criminal law should be abolished; conceivably even the third pillar of the European Union, the close co-operation in Justice and Home Affairs, should be (at the very least) reduced.

Advocates of the other extreme point of view – on the very left of our scale – think only a common European Judicial Area can give an adequate answer to crime nowadays.² For them, the question of whether this common European legal space should be created on the basis of European Community Law or on the grounds of strong common measures taken in the third pillar of the European Union seems merely a question of taste.

In between these two extreme positions we find all sorts of approaches, including closer co-operation, harmonization and even a model penal code for economic or 'euro-'crime.

The early André Klip, i.e., the work of André Klip that I read when venturing into the discussion on a European criminal law a few years ago, leaned very much

¹ E.g. P.-A. Albrecht and. S. Braum, 'Deficiencies in the Development of European Criminal Law', *European Law Journal*, 1999, p. 293 *et seq.*; M. Köhler, 'Rechtsstaatliches Strafrecht und Rechtsangleichung' in G. Bemann and D. Spinellis (eds.), *Festschrift für Mangakis*, Athens, Sakkulas, 1999, p. 751 *et seq.*

² E.g. U. Sieber, 'European Unification and European Criminal Law', *European Journal of Crime, Criminal Law and Criminal Justice*, 1994, p. 86 *et seq.*; K. Tiedemann, 'Europäisierung des Strafrechts', in K.-F. Kreuzer, D.-H. Scheuing and U. Sieber (eds.), *Die Europäisierung der mitgliedstaatlichen Rechtsordnungen*, Baden-Baden, Nomos, 1997, p. 133, 134 *et seq.*, 143 *et seq.*

to the right side of our scale, harshly criticizing the European influence on criminal law.³

Thus, when I received the invitation to discuss André Klip's presentation on 'Conditions for a European Corpus Juris Criminalis'. I was very honoured, but on second thought, I became somewhat suspicious. Knowing his position, I asked myself: Why was I chosen to discuss his presentation. Was I a 'Europeanist' or seen as one?

And in fact, writing my comment I realized that I find myself more to the left side of our scale, I am of the opinion that (national) criminal law cannot and should not be immune to European law. European Community law and - naturally - third pillar acts should have an influence on all national law. Such an impact is the consequence of the - commonly accepted - concept of the EU after the Amsterdam Treaty.

The André Klip of today can be located a bit more towards the middle of our scale, too - accepting the idea that there could be a 'federal European Penal Code'.

However - according to his view - provisions of a European Penal Code would have to meet strict requirements, and 'negative criteria' should be developed to disqualify certain 'crimes' from being regulated on the European level - in other words - from being harmonized.

2. Crimes not to be Regulated on the EU-Level

As one example for disqualification he proposes 'crimes related to a perception of moral issues', namely assisted suicide.

But this very example already shows the difficulty or rather the impossibility of negative criteria (with the effect of fighting off harmonization), because of the (dynamic) influence of European Community law on national criminal law:

If one Member State legalizes assisted suicide for the incurably ill when performed by a physician, the Member State has created a new medical service, which, in principle, must be protected by the EC-freedom to provide services. Such a service is - in general - allowed to move freely in the EC. Thus it will be available in all other States. We have already experienced this scenario in the context of abortion, which can be legally obtained everywhere in the European Union except for Ireland. When a number of organizations provided information to Irish teenagers on legal abortions abroad (namely in England and in the Netherlands), the Irish state banned their activities. Thereupon, the organizations challenged the ban in Luxembourg before the ECJ, arguing that the ban violated the freedom to provide services in the EU. The same would, or rather could, happen to assisted suicide, too.

Legal harmonization forms - even in the area of criminal law, a necessary part of the EU. It has never been disputed that EC rules in private or commercial law also affect criminal law - to the extent necessary to ensure that economic freedoms are guaranteed uniformly in all Member States. We have seen this effect in cases such as the 'Auer' case, where Community law prevented the prosecution of an

³ See A. Klip, 'Uniestrafrecht is op hol geslagen', *Nederlands Juristenblad*, 1997, p. 663 *et seq.*

Austrian veterinary practising his profession with an Italian diploma in France without prior consent of the local veterinarian association.⁴

As ties within the Union have grown closer, the influence on national criminal law has grown stronger, especially after the ECJ held in the 'Greek Maize' case⁵ that Member States have an obligation to protect the Community's financial interests, even by means of criminal law - and then, as we all know, the real debate started.

3. 'Minimum-Incrimination-Approach'

To this debate André Klip added - with his presentation today - a very intriguing idea: I would like to call it the 'minimum-incrimination-approach': Klip's demand is for an end to national imperialism in the form of incrimination in the European Union.

Professor Klip's example is the German woman who is having a legal abortion performed abroad and who nevertheless may be prosecuted in Germany. Abortion is one of the acts that will be prosecuted if a German national (or rather: a German women) commits it abroad and then returns home. The jurisdiction is established on the basis of nationality.⁶ According to Professor Klip's view, the establishment of a jurisdiction based on nationality appears imperialistic if the act committed is legal in the territory in which it is committed.

This 'minimum-incrimination-approach' holds a lot of valuable aspects for the building of a 'European Judicial Area': If the people of one Member State decide that a certain act is not to be punished on their territory, no other Member State may prosecute its own nationals if they go there and act according to the law of that State, even if the people of the actor's home state think the act deserves punishment. Especially because of that difference of judgment (on rather sensitive areas like abortion and assisted suicide), this approach could in fact help start the building of a European criminal legal culture.

And in some respect, this is an approach aimed at a harmonization of criminal law on a minimum level - through the back door: If one Member State decides to decriminalize a certain act, all its neighbours would be bound by the decision.

4. Résumé

Calling for harmonization himself (albeit not coming from a supranational level, but from the national level), I found André Klip's and my position not too far away from each other.

I agree on most of the other aspects Professor Klip raises: He rightly points out that - after creating the third pillar - (many) criminal lawyers seem to have forgotten the concept of the criminal law as an 'ultima ratio' of the state and tend

⁴ ECR 1983, p. 2727 *et seq.*

⁵ ECR 1989, p. 2965 *et seq.*

⁶ See § 5 No. 9 German Penal Code.

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towards an 'over-activity' and - what we call - a *Breitbandkriminalisierung* in Germany.

I especially agree with his opinion on the absence of a democratic basis behind European (criminal) law and the implications of this absence for a real 'European Penal Code'. There is a dangerous lack of public discussion and democratic control over European lawmaking, a problem which will increase with the enlargement of the Union.

To me it appears that the different positions in the debate on 'European Criminal law' - on the extreme right or the extreme left side of our scale - rest on different conceptions of democracy and on rather different premises regarding the relationship of state sovereignty and the competence to make criminal law.

To the advocates of the 'national position,' the competence to adopt criminal law is at *the very core* of state sovereignty. They doubt whether this competence can be delegated at all without giving up statehood itself. However, if such an assignment to a supranational level could be done, i.e., could be done without creating a new state, the entrusting states, according to this position, would have to do so explicitly and with the explicit consent of the people. None of the existing acts that allow the EC-Commission to co-ordinate the Member States' activities against crime (such as art. 280 TEC post-Amsterdam) could be the basis for such competence.⁷

Advocates of the 'European position' take a more pragmatic view: The Member States have empowered the EC, for example, to hand out subsidies in certain areas. To them, such an empowerment also implies the power to ensure an orderly administration, i.e., the EC may also punish defrauders if necessary.⁸ This side does not see a 'democracy' or 'State-theory-problem' in a European competence to adopt criminal law. Even if a 'European Fraud Law' would in the end lead to a total harmonization of all national criminal laws, ultimately creating one European Judicial Area, the 'European side' would be happy that the job is done.

Recalling the original question: 'What should be the conditions for a European *Corpus Juris Criminalis*?', I would take a rather pragmatic stand: On the premise that we can (no longer) fight off the European influence on (national) criminal law, we should instead focus on the question of how the European system could be changed in order to ensure that the European influence on (national) criminal law is grounded in a democratic decision-making process at the European level. If this condition were fulfilled, the people of Europe could accept a European Penal code.

⁷ See *supra* footnote 1. For further information see: S. Gleß and H.E. Zeitler, 'Fair Trial Rights and the European Community's Fight against Fraud', *European Law Journal*, 2001, p. 219 *et seq.*

⁸ See K. Tiedemann, 'EG und EU als Quelle des Strafrechts', *Festschrift für Roxin*, Berlin-New York, Walter de Gruyter, p. 1412.