2

Towards an Integrated European Criminal Law

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THE CREATION OF an economically integrated Europe, based on free circulation across open borders, has probably facilitated an increase in transnational crime. One response to this phenomenon has been to try to create an integrated European criminal law. But legal integration will not magically solve all the problems related to transnational crime. Indeed, it may create problems of its own. By favouring efficiency (that is, repression) over legitimacy (the protection of fundamental rights), it favours a criminal justice policy oriented towards 'security'. By imposing the same rules throughout Europe, it disturbs the internal consistency of national legal systems. Nevertheless, the phenomenon of legal integration, facilitated by new legal instruments such as framework decisions, continues to develop. We might therefore ask ourselves, as an introduction, *why* this is so.

First for political reasons: the European Union comprises countries with strong political, economic and cultural identities and legal traditions (from the Roman-Germanic and Common Law traditions to Scandinavian concepts and the emerging democracies in Central and Eastern Europe). Rather than asserting their *in*dependence, these countries are asserting their *inter*-dependence. They are not creating a unified and stable legal order but, instead, a new legal area that is open, complex, and changing. Today's European construction appears, then, as a new political form based on interdependence and solidarity.

Robert Kagan's description of the roles of the United States and Europe in the new world order is therefore inexact. He says that it is as if 'Americans and Europeans had traded places . . .', adding that '[w]hen the

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United States was weak, it practiced the strategies of indirection, the strategies of weakness; now that the United States is powerful, it behaves as powerful nations do',[1] and conversely for Europe. In other words, Europe believes in legal integration because it is weak. But these 'psychologies of power and weakness',[2] which Kagan illustrates with the saying, '[w]hen you have a hammer, all problems start to look like nails',[3] does not take into account the present situation. The roles cannot be reversed because the world has changed. If countries that fought each other for centuries are finally coming together to build a common legal area, it is for practical rather than ideological reasons, because it is related to their increased interdependence. Now, interdependence is not limited to Europe—it is increasing on a worldwide level as a result of globalisation. European legal construction, including its occasional crises, might therefore be said to prefigure a future global legal order,[4] because interdependence calls into question the autonomy of legal systems, which is the foundation of classical international law.

There are also criminological reasons behind integration: even if globalisation affects only a small percentage of crime (less than 10 percent),[5] it constitutes a real qualitative challenge. Interdependence, which can be economic, ecological or cultural, increases crime in two ways: it furthers the high adaptability of criminals, who extend their activities beyond geographical boundaries, and it highlights the low adaptability of national criminal law. For example, globalisation furthers so-called 'global crime',[6] that is, crime that is global in its scope (such as international terrorism, corruption, or trafficking), in its effects (ecological or biotechnological dangers) or in its ability to be everywhere at once (with new technologies, money and information can travel simultaneously to many different places, creating jurisdictional conflicts that are difficult to resolve). This type of crime therefore calls for new responses,[7] both global and European.

[1] R Kagan, *Of Paradise and Power: America and Europe in the New World Order* (New York,Vintage Books, 2003) 10–11.

[2] *Ibid* at 27.

[3] *Ibid*.

[4] D Calleo, *Rethinking Europe's Future* (Princeton, NJ, Princeton University Press, 2001) 283; see also J Rifkin, *The European Dream: How Europe's Vision of the Future is Quietly Eclipsing the American Dream* (Cambridge, Polity Press, 2004); also 'L'avenir du rêve européen', *Libération* (7 June 2005) 35.

[5] M Tonry, 'Politicas penales y practica en sistemas federales', intervention at the international conference *Reforma penale en Mexico, sistemas penales soberanos e integracion en la perspectiva del derecho comparado* (1 October 2004) (copy on file with author).

[6] See M Delmas-Marty, 'Global Crime Calls for Global Justice' (2002) 10 *European Journal of Crime, Criminal Law and Criminal Justice* 286; see also M Delmas-Marty 'Des crimes globalisés' in M Delmas-Marty, *Les forces imaginantes du droit–Le relatif et l'universel* (Paris, Seuil, 2004) 241–308.

[7] See A Bernardi, 'Europe sans frontières et droit pénal' [2002] *Revue de Science Criminelle* 1 and 'Opportunité de l'harmonisation' in M Delmas-Marty, G Giudicelli-Delage and E

At the European level, transnational crime is facilitated by open borders (and the recognition of the 'four freedoms' of circulation: persons, goods, services and money). In addition, the Member States have little incentive to prosecute offences against supranational interests, such as the European budget or the Euro. When OLAF (European Anti-Fraud Office) notifies state judicial authorities of fraud, investigation and prosecution do not proceed as smoothly as in purely national cases. Lack of personnel, financial resources and European legal expertise causes considerable delays, particularly in cases of corruption within the European Institutions, which fall within the territorial jurisdiction of the Belgian or Luxembourger authorities. These authorities have thus become European common law judges, because most European institutions are located there.[8]

To deal with these problems, we have to consider that the European legal context is two-fold: bipolar and pluralist.

Bipolar implies that the European legal system deals with two issues: human rights and the single market. This became clear in 1974 when each member of the European Community ratified the European Convention on Human Rights. Since then, candidate countries have had first to subscribe to this Convention and, more generally, to its values, which the EU's Charter of Fundamental Rights has also affirmed. Thus Turkey, a candidate for entry into the European Union, recently decided to adopt its new criminal code to abolish the death penalty and not to criminalise adultery.

In addition, European legal integration is pluralist because the European construction is not the extension of a single system, but the search for a common denominator among, and cross-fertilisation of, diverse national legal systems. Though such cross-fertilisation is part of the European tradition, it has been opposed by imperialist tendencies throughout history (from the Roman to the Soviet Empire, by way of Napoleon and Hitler). The empires always failed, however, and we seem to have developed an allergy to hegemonic integration.

An integrated criminal law will therefore not be accepted unless it is pluralist enough to avoid looking like a new form of hegemony. But pluralism and integration seem somewhat contradictory. To avoid a contradiction that would render the system inoperative, a complex network has developed over the years, and the Treaty establishing a Constitution for Europe reinforces this. Allowing for diversity by superimposing European norms on the national systems, it combines both horizontal co-ordination and vertical sub-ordination. This may not create a complete 'legal order' (which

Lambert (eds), *L'harmonisation des sanctions pénales* (Paris, Société de Législation Comparée, 2003) 451.

[8] See the OLAF Supervisory Committee's annual reports in the Official Journal of the European Union.

implies autonomy and stability), but it establishes a 'legal area' of variable geography and variable geometry.[9]

This article will therefore present an analysis of how this integrated European criminal law is being created through the processes (in order of increasing integration) of co-operation, harmonisation and unification.

I. CO-OPERATION

One might think that interstate co-operation does not require modifying domestic norms. But the European experience shows that co-operation can lead to establishing similar definitions, and thus to a certain level of normative integration. The 'mutual recognition' of judicial and extrajudicial decisions will require this kind of normative integration, not only with regard to procedure, but also in substantive law.

The principle of mutual recognition was affirmed in 1999 at the Tampere summit, and it underlies the constitutional treaty provisions on judicial and police co-operation (Article III–270 to III–274 and Article III–275 to 277, respectively). Article III–270 states that 'Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions, and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article III–271'. To realise this type of co-operation, a minimum amount of normative integration is necessary. There will be no reciprocity ('mutual' recognition) unless trust is based on concepts that are at least partially shared. Mutual recognition thus indicates a shift from a horizontal, interstate process of integration to a vertical, supranational process.

The European arrest warrant (framework decision of 13 June 2002) provides a good example of this shift. The purpose is to improve co-operation by facilitating extradition between European Union Member States. To do so, the process had to be simplified both procedurally and substantively. The diplomatic phase and the requirement of double incrimination were therefore done away with, and the extradition of nationals was authorised. But the Member States do not trust each other enough to accept simplification in all areas, so they have limited the application of the warrant to a list of 32 offences[10].

[9] See M Delmas-Marty, 'Comparative Law and the Internationalisation of Law in Europe' in M Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Oxford, Hart, 2004); cf. D Calleo, *Rethinking Europe's Future,* above n 4.

[10] Art 2-2 provides for extradition 'without verification of the double criminality of the act' for participation in a criminal organisation; terrorism; trafficking in human beings; sexual exploitation of children and child pornography; illicit trafficking in narcotic drugs and psy-

The problem is that the list is very broad and includes very different kinds of offences. Some of them are explicitly harmonised by reference to a prior European instrument, such as 'fraud affecting the financial interests of the European communities', which is defined by reference to the 1995 convention (called the 'PIF' convention). But sometimes harmonisation is only implicit, such as in the areas of corruption, terrorism and environmental crime, to name only a few.[11] Some offences, such as 'crimes within the jurisdiction of the International Criminal Court', are not defined by a European provision at all. The 1998 Rome Convention requires only an implicit harmonisation as a consequence of the principle of complementarity[12]. And some offences are not defined by any common provision at all (murder or rape, for example). While national diversity may not affect the definitions of such traditional offences, it does cause a problem with sanctions.

As far as sanctions are concerned, the new European arrest warrant provides, among other things, that a warrant 'may be issued for acts punishable (by the law of the issuing state) by a custodial sentence or a detention order for a maximum period of at least twelve months' (Article 2–1). This raises the difficult issue of custodial life sentences and life-long detention (which are allowed in some Member States but not others). Article 5 therefore adds some additional guarantees, such as requiring that the issuing state 'has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency'.

Similarly, Article 5 addresses diversity in criminal procedure (such as decisions delivered *in absentia*) and in detention practices (Article 5 pro-

chotropic substances; illicit trafficking in weapons, munitions and explosives; corruption; fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests; laundering of the proceeds of crime; counterfeiting currency, including of the euro; computer-related crime; environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties; facilitation of unauthorised entry and residence; murder, grievous bodily injury; illicit trade in human organs and tissue; kidnapping, illegal restraint and hostage-taking; racism and xenophobia; organised or armed robbery; illicit trafficking in cultural goods, including antiques and works of art; swindling; racketeering and extortion; counterfeiting and piracy of products; forgery of administrative documents and trafficking therein; forgery of means of payment; illicit trafficking in nuclear or radioactive materials; trafficking in stolen vehicles; rape; arson; crimes within the jurisdiction of the International Criminal Court; unlawful seizure of aircraft/ships; and sabotage.

[11] Harmonised definitions of corruption are found in the 1997 European Union and OECD Conventions; for terrorism, see the 2002 EU Framework Decision on combating terrorism; for environmental crime, see the 2003 Framework Decision on the protection of the environment through criminal law; for sexual exploitation of children, see the 2003 Framework Decision on combating the sexual exploitation of children and child pornography; for trafficking in narcotics, see the 2004 Framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking.

[12] See A Cassese, P Gaeta, and JRWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford, Oxford University Press, 2002).

vides for detention in the place of the nationality or residence of the offender). In the first instance, the issuing judicial authority must give adequate assurances that the person concerned 'will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment'. In the second, surrender may be subject to the condition that the person, after being heard, be returned to the executing Member State to serve the custodial sentence or detention order passed in the issuing state.

But all these precautions were not sufficient for the states to accept simplified extradition in all areas, so Article 4 provides 'grounds for optional non-execution of the European arrest warrant'—in other words, for application of domestic law. And the first attempts to implement the warrant show that some national judges will not hesitate to find grounds for non-execution, such as when the conduct occurs wholly or partially within the territory of the requested state. French judges thus recently refused to execute a warrant issued in Spain based on participation in a terrorist organisation (Article 695–24 (3), French Code of Criminal Procedure), and the Supreme Court approved their decision.[13]

The European arrest warrant will probably, nonetheless, contribute to the process of integrating criminal law because all the Member States have already transposed the framework decision. In addition, in accordance with the principle of mutual recognition, other framework decisions have already been adopted,[14] such as the 2003 decision on orders freezing assets, and still others have been proposed, such as a closely related decision that would require each Member State to recognise and execute the orders of other states to confiscate the proceeds of crime. Another proposal is the 'European evidence warrant',[15] which would replace the current regime of judicial assistance with a body of unique community rules based on mutual recognition with minimal procedural guarantees.

The principle of mutual recognition thus illustrates the movement from interstate co-operation to normative integration. By stressing efficiency, these instruments have emphasised repression. Without saying so openly, this shift leads towards supranational harmonisation. In fact, in some instances, it can lead to 'forced integration'.[16]

[13] Crim, 8 July 2004 [2004] JCP (Juris-Classeur Périodique) act. 395; cf. Crim, 1 Sept 2004 [2004] JCP act. 467; J Pradel, 'Le mandat d'arrêt européen, premier pas vers une révolution copernicienne dans le droit français de l'extradition' [2004] *Dalloz* Chr. 1392 and 1462; L de Gentili-Picard, 'La mise en oeuvre du mandat d'arrêt européen en France' [2004] *JCP* I–168; D Vandermeerch, 'Le Mandat Arrêt Européen et la protection des droits de l'homme' [2005] *Revue de droit pénal comparé* 219.

[14] See S Manacorda, 'Espace de liberté, sécurité et justice' [2004] *Revue de Science Criminelle* 969.

[15] Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters, COM(2003)688 final 2003/0270 (CNS) (11 Nov 2003).

[16] G Giudicelli-Delage, 'Remarques conclusives' [2005] *Revue de Science Criminelle* 15.

II. HARMONISATION

Harmonisation is included in the Treaty on establishing a Constitution for Europe (Articles 42, 'Specific provisions relating to the area of liberty, security and justice' and III–257 *et seq*.). Unlike co-operation, harmonisation is specifically designed to harmonise national laws by reference to a supranational norm. It thus imposes a certain hierarchy: the issue is no longer *co*-ordinating national norms but *sub*-ordinating them to the European norm. Harmonisation can nevertheless be distinguished from unification because it does not impose absolutely identical rules on every state. Explicitly or implicitly, harmonisation leaves room for a 'national margin of appreciation'.[17] In terms of processes of legal integration, mutual recognition could be described as transforming the horizontal process of co-operation into a vertical one, while the national margin makes the vertical process of unification more horizontal. The result is fairly similar, but with opposite ways of getting there.

At this point it is useful to explain the national margin of appreciation, which is a key concept, and then illustrate how it could be improved. The European standard of 'proportionate, effective and dissuasive' sanctions will serve as an example.

The Strasbourg Court in interpreting the European Convention on Human Rights created the concept of 'national margin of appreciation', but the concept also underlies the various legislative techniques of Community law, as most definitions are broad and vague enough (one might call them fuzzy definitions) to enable the states to adapt integrative measures to their national traditions. In current practice, however, the criteria that determine the width of the national margin remain implicit and seem largely discretionary. For example, the PIF Convention defines offences very precisely, but allows for either criminal or administrative liability for corporations, and leaves the decision on criminal liability for directors to domestic law.

These criteria should be determined more systematically, either through comparative studies of national legal systems (depending on whether or not a common denominator is found, the margin would be wider or narrower) or through a study of economic, scientific, social and cultural practices (with the margin varying according to the degree of homogeneity or heterogeneity of these practices). Once the width of the national margin has been determined, fuzzy European standards—if they are made clearer—may be adapted to national systems more easily.

An example explains this further. The standard of 'proportionate, effective and dissuasive' sanctions was first used by the European Court of

[17] See M Delmas-Marty and M-L Izorches, 'Marge nationale d'appréciation et internationalisation du droit' [2000] *Revue internationale de droit comparé* 753 and (2001) 46 *McGill Law Journal* 5.

Justice in the so-called *Greek Maize* case.[18] It was then reproduced in one instrument after another by the European legislature, and has now become a pillar of European criminal law. This standard seems to reflect traditional theories of punishment. Proportionality refers to retribution, thus to moral gravity; and efficacy and dissuasiveness refer to the utilitarian function, which is not only dissuasion but also socialisation or re-socialisation.

Each function needs clarification, and proposals in this regard have been presented by a group of experts in the context of harmonising criminal sanctions in Europe.[19] The group found that the existing instruments seemed to favour a thematic, sector-by-sector approach but avoided the question whether or not it was necessary to provide for criminal sanctions. The group suggested going beyond these instruments and elaborating general guidelines for the harmonisation of sanctions. These guidelines should include indicators of gravity (thus proportionality) and utility (thus effectiveness or efficiency). The purpose is not to achieve uniformity among national systems, but to agree on a common approach to both issues. As a common approach to gravity, the group proposed three indicators: fault, law violated and damage. Utility can then be clarified through impact studies in each state to evaluate the means necessary to investigate offences, try offenders and assure compliance with sanctions. As for efficiency, it would require follow up studies to evaluate the effects of the application of criminal sanctions in terms of dissuasion—of criminal activity in general and of recidivism—as well as a broader social study to evaluate the socialisation, or conversely de-socialisation, resulting from the application of criminal sanctions. Moreover, it seemed desirable—the issue is in fact raised in the Green Paper on sanctions—to establish principles for determining the penalty (that is, sentencing guidelines) along the lines of the Council of Europe's work on sentencing[20] and the discussions undertaken within the European Union.[21] To avoid the repressive effect of harmonisation, it must be noted that the same indicators could also work as common guidelines for decriminalisation.

[18] Case 68/88 *Commission v Greece* [1989] ECR I–2965.

[19] *L'harmonisation des sanctions pénales*, above n 7; see also the European Commission, Green Paper of 30 Apr 2004 on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union, COM (2004) 334 final.

[20] See, in particular, Council of Europe Recommendation R(92)17 Concerning Consistency in Sentencing (1992) at http://www.prison.eu.org/article.php3?id_article=2949 (last visited 21 June 2005) and Council of Europe Recommendation R(92)16 on the European rules on Community sanctions and measures (1992) at http://www.victimology.nl/onlpub/international/ce.html (last visited 21 June 2005).

[21] On the execution of sentencing decisions, see, in particular, G Vernimmen, 'A propos de la reconnaissance mutuelle des décisions sentencielles en général' in G de Kerchove and A Weyembergh (eds), *La reconnaissance mutuelle des décisions judiciaires pénale dans l'UE* (Brussels, Université de Bruxelles, 2002).

In sum, while the harmonisation of criminal law requires fuzzy concepts that leave the states a margin of appreciation,[22] it also calls for rationalising the methodology. Criteria should be established to determine the content of these fuzzy concepts and the variations in the margin, in both directions, that is, criminalisation and decriminalisation. Moreover, harmonisation calls for European oversight to avoid re-nationalisation. The future European prosecutor, controlled by the European Court of Justice, could contribute to this process. But the creation of this prosecutor is part of a more ambitious process of at least partial unification, which will be discussed below.

III. UNIFICATION

Since unification requires not only identical rules (normative unification) but also a unified control (judicial unification), it is no doubt a utopia. Spontaneous unification requires sufficient convergence to enable the integration of identical rules into each national system with no margin of appreciation. Such convergence is rare, though the approaches to torture and the death penalty, as a result of the European Convention on Human Rights, are examples (Articles 2 and 3 and Additional Protocols 6 and 13).

In most cases, however, there is such divergence that unification can be accomplished only through hybridisation and if differences can be made compatible. This requires adopting a common language after the legal language and legal grammar of each country have been clarified.

The European prosecutor is a good example. First proposed by the *Corpus Juris* draft,[23] the idea was advanced in a Commission Green Paper and is now included in the Treaty on the Constitution. As the Treaty is not at all explicit, we will return to the experts' report to explain what hybridisation means and how the experts worked it out, getting beyond the well-known differences between accusatory and inquisitorial procedures. In all, it took three steps.

The first step consisted of comparative research. An initial series of projects launched by the European Commission (1989–93) was followed by a more academic project (1994–95) in which John Spencer, Mario Chiavario, Françoise Tulkens, Heike Jung, a few younger scholars and the present

[22] M Delmas-Marty, 'Préface' in M Delmas-Marty, *Le flou du droit*, *Du code pénal aux droits de l'homme* (2nd edn, Paris, Presses Universitaires de France, 2004).

[23] M Delmas-Marty (ed), *Corpus Juris: Introducing Penal Provisions for the Protection of the Financial Interests of the European Union* (Paris, Economica, 1997); M Delmas-Marty and J Vervaele (eds), *The Implementation of the Corpus juris in the Member States* (Antwerp, Intersentia, 2000 and 2002), I–IV.

author compared five different European systems. The project spent a long time constructing what it called the 'analysis grid',[24] which was used to analyse the criminal procedure of the different countries. This grid was the project's common language: it liberated criminal procedure from the confines of national systems, and thus allowed the project to identify the 'actors' and the 'powers' that determine how a trial unfolds. With respect to actors, the problem was describing them in terms that made sense in all five systems, so the project chose neutral terms such as 'prosecuting party' (the public prosecutor or victim), accused (the suspect, defendant or person under investigation) and judge (the investigating magistrate, the judge who supervises the investigation and orders detention, or the trial judge). Similarly, the powers were split into eight categories, each of them including several elements:

(1) reporting of the offence (recording or denunciation, with or without a partie civile);
(2) investigation (into the facts or into the person);
(3) evidence (considered under different aspects according to whether or not its gathering and production at trial are limited by legal rules);
(4) accusation (a single category);
(5) adversariality (includes being informed of the charges, consultation of the dossier, the right to legal assistance, defence on procedure and on substance, and the right to appeal);
(6) coercive measures (arrest, detention, forced appearance in court, other measures limiting freedom, and/or relating to property);
(7) disposal of the case (unilateral or multilateral, for example through mediation or plea bargaining); and finally
(8) decision-making (procedural rulings, judgment on guilt, decision on penalty).

It was then possible to identify how each system links actors and powers—their legal grammar:

— accusatory grammar, which assigns most of the powers to private parties, from reporting the offense to disposal of the case via gathering of evidence;
— inquisitorial grammar, which favours public actors, in particular the emblematic investigating magistrate who fulfills both police and

[24] See J Spencer and M Delmas-Marty (eds), *European Criminal Procedures* (2nd edn, Cambridge, Cambridge University Press, 2005).

judicial functions, from pre-trial investigation and compiling the file for the trial court to deciding whether or not to detain the accused.

Such diametrically opposed divergence would have excluded all attempts at hybridisation, had the comparative study not shown a movement toward convergence under the influence both of repeated reforms and the European Court of Human Rights (whose jurisprudence disclosed that each system has its weaknesses). Most countries on the Continent have progressively done away with the investigating magistrate and have given a more active role to the defence (such that the guilty plea was introduced in France in 2004)[25], while English procedure was evolving as well (introducing a Public Prosecution Service in 1985 and the Serious Fraud Office in 1987). As John Spencer put it very clearly,[26] this evolution has not removed all divergence, but it has weakened it, preparing the way for mixed procedures where hybridisation takes the best from each system.

Hence the third step, illustrated by the *Corpus juris*.[27] Unlike a traditional code, the *Corpus juris,* which combines six guiding principles, 34 Articles that formulate common rules and a final Article that provides for the complementarity of national law, suggests a common grammar, called *contradictoire*, defined by three principles:

(1) European territoriality, the conceptual foundation for attributing jurisdiction over the entire territory to a European prosecutor—a public prosecution office borrowed from the inquisitorial model;
(2) judicial guarantee, assured during the pre-trial phase by a national or European 'judge of freedoms' (not an investigating judge, but a judge who is sufficiently neutral to moderate between the prosecution and the defence, in the style of the accusatory model); and
(3) the principle of proceedings which are *contradictoires*, a new conception, particularly as regards evidence, which combines a written file (from the inquisitorial model) with strict exclusionary rules (from the accusatory model).

The first draft of the *Corpus juris* went through a phase of comparative critique: on the one hand, a study was undertaken for each of the 35 Articles in each Member State (15 at the time) and candidate states. The results were synthesised into a comparative table that shows quite precisely

[25] D Charvet, 'Réflexions autour du plaider coupable' [2004] *Dalloz*, Chr. 2517.
[26] See J Spencer, 'Introduction' in *European Criminal Procedures,* above n 24 at 1–75.
[27] *Corpus juris,* above n 23.

the points of agreement and disagreement with regard to procedure.[28] On the other hand, it was the subject of debates organised in various countries, particularly Germany (in Trier, organised by the Max Planck Institute) and the United Kingdom (hearings at the House of Lords).[29]

These critiques helped clarify the project's work and resulted in an amended version, which was completed during meetings at the European University Institute in Florence in 2000.[30] The debate was then reopened in 2001 when the European Commission issued a Green Paper focusing on the European prosecutor.

The final, more political phase of bringing the project to fruition is still underway. The Constitutional Treaty provides that a European law of the Council may establish a European Public Prosecutor's Office, but the Council must act unanimously after obtaining consent from the European Parliament (Constitutional Treaty, Article III–274 §1). The Treaty specifies that the law must resolve various issues raised in the *Corpus juris*, such as the general rules applicable to the prosecutor's office, the conditions governing performance of its functions, the procedural rules applicable to its activities and governing admissibility of evidence, and rules applicable to judicial review of the procedural measures taken by the prosecutor's office (Article III–274(§3)).

The question of legitimacy will no doubt be raised. It is clear that criminal procedure will not be entirely unified. Theoretically, the Constitutional Treaty limits the European Public Prosecutor's jurisdiction to the PIF Convention (Article III–274(§1)), which is understandable since the Union's financial interests are supranational by nature. However, jurisdiction may be extended to 'serious crime having a cross-border dimension', either when the European Public Prosecutor's Office is created or at a later date, upon unanimous Council approval after obtaining the consent of the European Parliament and after consulting the Commission (Article III–274(§4)).

However, unification seems to be limited by the Constitutional Treaty, as it was by the *Corpus juris*, to the preparatory phase of litigation. In the judgment phase, the European Public Prosecutor will 'exercise the functions of prosecutor in the competent courts of the Member States' (Article III–274(§2)). The precise relationship between the national and European institutions is left for a future European law, which will have to define the relationship between the Prosecutor's Office and other European offices (Eurojust, Europol, OLAF) and no doubt provide for a minimum of harmonisation of national rules. This will require new comparative studies to

[28] *The Implementation of the Corpus Juris,* above n 23, i, at 142–85.
[29] Select Committee on the European Communities, *Prosecuting fraud on the Communities finances, the Corpus juris* (9th Report, Session 1998–1999, House of Lords Paper 62).
[30] *The Implementation of the Corpus Juris,* above n 23.

determine which differences are compatible with the implementation of the *Corpus juris* and which are not.

The Constitution limits the role of the European Prosecutor's Office to protecting the EU's financial interests and it theoretically requires unanimous approval for its creation. Nonetheless, a group of states could create the Prosecutor's Office through 'enhanced co-operation', and thus lead the way to the progressive unification of pre-trial criminal procedure. However, it seems useless to unify the judgment phase because national procedures are sufficiently similar to facilitate mutual recognition of judgments without going so far as to create a true European criminal tribunal that would apply uniform rules.

The process will not end with legislation but will require fine-tuning because the creation of an integrated European criminal law that combines co-operation, harmonisation and unification is a highly complex process. This complexity is the price to pay for non-hegemonic legal integration that benefits from all available approaches: those of international law, with its share of negotiation, compromise and, at times, ambiguity; and those of comparative law that lay the groundwork for hybridisation and facilitate a harmonisation that maintains diversity while avoiding the re-nationalisation of criminal law.

IV. CONCLUSION

The issue is no longer one of being for or against creating an integrated European criminal law, but of responding to its critics. There are various responses to the two main critiques of this kind of integration.

First, that it emphasises repression. The primary response is to maintain and strengthen the bipolarity of the integrative movement where the single market and the development of fundamental rights overlap. Effective control requires that in each sector (human rights as well as community law) jurisdiction lies with both national judges (since the Human Rights Act 1998 was passed, British judges, like their continental colleagues, directly apply the European Convention[31]) and European judges (in addition to the European Court of Human Rights, the European Court of Justice should play a larger role once the Charter of Fundamental Rights enters into force).

Secondly, that integration disturbs domestic law. While the danger is very real, the answer lies not only in subsidiarity, but also in promoting

[31] See *A and others v Secretary of State for the Home Department*, House of Lords (16 December 2004) in which the Lords of Appeal held a portion of the Anti-terrorism, Crime and Security Act 2001 to be incompatible with Arts 5 and 14 of the European Convention on Human Rights.

pluralism. This implies rationalising the use of the national margin of appreciation, which leaves room for national differences. As suggested earlier, the width of the margin should be determined according to comparative and social studies. The Constitutional Treaty includes a re-nationalisation clause, a sort of 'emergency brake' to be applied when a state believes a European law does not respect the fundamental principles of its legal order (Article III–270 and 271).

Trying to order pluralism by reconciling the two apparently contradictory goals of integration and pluralism is clearly very difficult and complex. As the American comparatist Mirjan Damaska remarked, criminal law specialists faced with the confusion and complexity of today's legal landscape are 'like mariners on the ocean without compass, star or landmark'.[32] Damaska advises innovation rather than to simply steer on blindly. Similarly, the present author has suggested that the European legal area needs what is provocatively called a 'truly common law'.[33] Only time will tell if we succeed in creating it.

Afterword

Since November 2004, European Integration has passed through some turbulence: in addition to the rejection of the constitutional treaty by voters in France and the Netherlands, criminal law issues were the subject of two contradictory movements.

On the one hand, the ECJ took a stand on interpreting framework decisions[34]. More importantly, on September 13, 2005 the Court addressed for the first time the issue of the communities' criminal jurisdiction, accepting the Commision's competence to provide for criminal sanctions via directives. In a case involving enveronmental protection, one of he essential objectives of the Community, the Court recalled that in thoery, criminal law is beyond the Commission's jurisdiction. It noted however that this "finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent

[32] M Damaska, 'Negotiated Justice in International Criminal Courts' (2004) 2 *Journal of International Criminal Justice* 1018 at 1019.

[33] M Delmas-Marty, *Towards a Truly Common Law: Europe as a laboratory for Legal Pluralism* (Cambridge, Cambridge University Press, 2002).

[34] *Pupino*, ECJ, 16 June 2005, C-105/03, regarding the framework decision of march 2001 on the status of victims, requires adaption of Italian criminal procedure to European imperatives and thus runs the risk of granting framework decisions the direct effect reserved by the treaties to derivative law (regulations and directives). This may weaken the rights of the accused.

national autorities is an essential measures for combating serious environmental protection are fully effective".[35]

In a contrary move, three constitutional courts mainfested resistance to implementation of the European Arrest Warrant.[36] To overcome the contradiction of European judges accelerating European integration while national judges take refuge in their state's particularities, European criminal law must be constructed in a more balanced fashion. It is not enough to develop instruments that accelerate integration (framework decisions of the 3rd pillar and also now 1st pillar directives); instruments that slow integration to protect fundemental rights must also be developed. Until the Charter of Fundamental Rights becomes directly enforceable, there will be no such brake within the Union itself. Given the time it takes for a case to be heard in Strasbourg, the temptation of national judges to apply the brakes themselves is understandable.

[35] *Commision v Council*, C176-03, ECJ, 13 Sept. 2005, para. 48. For a discussion of the framework decision on environmental criminal law, see G. Giudicelli-Delage, "Les figures de l'internationalisation pénale", *Revue de Science Criminelle* 2005, n°3

[36] S. Manacorda, "Judical activism dans le cadre de l'escape de liberté, de justice et de sécurité de l'Union européenne", to be published, *RSC* 2005, n°4 (in addition to the ECJ decision cited above), the auther comments on three decisions: that of theh Constitutional Court of Poland (27 March 2005) declaring the text contrary to the Constitution but suspending the decision's application; of the Belgian Court of Arbitration (13 July 2005), which petitioned the ECJ for a preliminary reference; and of the *Bundesverfassungsgericht* (18 July 2005), which finds unconstitutional and abrogates the German law on the European arrest warrant.)