G.J.M. Corstens[1]

Criminal Law in the First Pillar?

1. INTRODUCTION

Until recently the three European Communities adopted a cautious approach to the criminal law. This probably stemmed from a belief that criminal law reflects part of national culture – a country's legal culture – and is therefore a symbol of State sovereignty. Criminal law is clearly a more characteristic feature of a nation than, say, private law. This suggests that as the European Union acquires more powers, and member states transfer more of their sovereignty to it, the need may arise for the instrument of criminal law as a means of enforcement.[2] As a community grows in importance, it feels a need for its own criminal law as an emblem of its 'sovereignty', a system that represents and confirms its independent position. We can see something of the kind happening in the case of the European Union. The number of criminal law measures introduced in the context of the third pillar is growing quite fast. As yet, of course, the EU is far from a new entity that strengthens its laws through its own administration of criminal justice. Nonetheless, it is moving in that direction. In section 2 below, I will examine the precise nature of the relationship between the Communities, in other words the First Pillar of the European Union, and the criminal law. The administration of criminal justice occupies a central place in the third pillar. Many third-pillar initiatives have been taken in recent years to harmonise the criminal law. I also mention the recognition of decisions made by foreign criminal law authorities.[3] These questions are examined in section 3. Section 4 addresses the issue that lies at the heart of this article, namely whether the EC is competent to require the member states to introduce criminal law sanctions, in other words to make the involvement of the national criminal justice obligatory.

---

1. Justice of the Supreme Court of the Netherlands.
2. For the concept of sovereignty, *see* C.A.J.M. Kortmann, *Constitutioneel recht* (Constitutional law), 4th impression (Deventer 2001) pp. 67–70.
3. *See* A.H.J. Swart, *Een ware Europese rechtsruimte* (A true European legal area), inaugural lecture, University of Amsterdam (Deventer 2001).

European Journal of Crime, Criminal Law and Criminal Justice, Vol. 11/1, 131–144, 2003.

2. THE POSITIVE AND NEGATIVE EFFECTS OF COMMUNITY LAW ON CRIMINAL LAW

Community law is to a large extent implemented through the medium of national law.[4] Since the Communities generally lack a *mécanisme intégral d'exécution*,[5] they are almost always dependent on national law for the enforcement of their laws. This is the positive effect of Community law on criminal law. Save for certain specific obligations under primary EC law, the general basis for this lies in Article 10 of the EC Treaty. The use of the criminal law is achieved by three methods: the national, combined and Community methods. The national method is a consequence of the fact that the general obligation of member states to penalise infringements of Community law has not been elaborated at Community level. At national level the sanctions can be tacitly incorporated into national law, for example by treating subsidy fraud as fraud or forgery. By prosecuting those guilty of an EC fraud on the basis of these definitions, member states can penalise infringements of Community rules under their criminal law. Sanctions may also be expressly incorporated into national law. In the Netherlands, for example, section 1 of the Economic Offences Act provides that it is an economic offence to infringe Council Regulation (EC) No. 2100/94 on Community plant variety rights[6] and to infringe section 3, subsection 4, of the Act of 28 June 1989 (Bulletin of Acts and Decrees, 245), which amends the legislation in accordance with the Twelfth Directive of the Council of the European Communities of 25 July 1985 to establish European Economic Interest Groupings.[7] It follows that Community law is sanctioned directly in the former case and indirectly – through transposition into national law – in the latter case. As we shall see, member states are not entirely free in their choice of whether or not to employ criminal law: the principle of assimilation and the requirement that the sanctioning of Community law be effective, proportionate and dissuasive both impose restrictions.

The mixed method means that at Community level it is more or less prescribed that the response at national level to an infringement of a provision of Community law should be a criminal sanction. We encounter this method in primary Community law. For example, Article 194 of the Euratom Treaty, which regulates the protection of Euratom secrets, provides that each member state must treat any infringement of a provision of Community law as an infringement of its own secrecy laws. In addition, this Article provides that the expediency principle (i.e. the principle that the prosecutor has the discretion whether or not to prosecute) does not apply here. A similar provision is contained in Article 27 of the Statute of the Court of Justice, but this relates to perjury committed before the Court of Justice.[8] This method does not exist in secondary Community law. Proposals to oblige Member States to use the criminal law under secondary Community law too have hitherto always been rejected.[9] There

4. For an extensive discussion of this matter, *see* G. Corstens and J. Pradel, *European Criminal Law* (The Hague-London-New York 2002), nos. 387–502.
5. G. Corstens and J. Pradel, *op. cit.*, nos. 389.
6. OJ L 227.
7. OJ L 199/1.
8. *See also* Art. 30 Statute of the EC Court of Justice, as amended by the Treaty of Nice.
9. *See also* G. Corstens and J. Pradel, *op. cit.*, nos. 430–431.