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**The principles of *ultima ratio*, subsidiarity
and proportionality in EU criminal law**

An EU Approach to Criminal Law;
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1. About the "EU criminal policy" before the Lisbon Treaty? I

- Before the entry into force of the Treaty of Lisbon, there has not been any comprehensive and/or coherent European criminal policy within the EU.
- Main influence in Europe was derived from the European Convention on Human Rights and the multilateral agreements on inter-state cooperation in penal matters of the Council of Europe.
- After the Amsterdam Treaty (1999) two mainstreams within the EU were discernible: mutual recognition of criminal judgements and a fragmentary approximation of criminal legislation in order to maintain and develop the EU as an "area of freedom, security and justice".



1. About the EU criminal policy before the Lisbon Treaty II

- Critics was directed to the emphasis of the security and efficiency objectives of the legislative instruments of the EU.
- According to the critics of Scandinavian scholars, many valuable features of the Nordic criminal policy were weakly represented in those of the EU measures: for example, the role of crime prevention was not enough taken into consideration; such criteria as legitimacy and humaneness were not applied in assessing the rationality in criminal policy; the criteria of effectiveness and dissuasiveness related to EU-sanctions were criticized for their strong connotation with deterrence and a high level of repression.



2. Towards an emergence of EU criminal policy after the Lisbon Treaty I

- The enlargement of the competence of the EU in the field of criminal law: Articles 83 (1)-(2) , 325 (4) of the TFEU: there is an urgent need of developing EU criminal policy.
- A stronger role to the European Parliament and a full judicial control to the European Court of Justice ; Charter of Fundamental Rights was made legally binding by the Lisbon Treaty: therefore, a better balance for human rights considerations in respect of the efficiency criteria.
- More attention to the principles of European criminal law among scholars: see, especially, "Corpus Juris" 1997, "Economic criminal law in the European Union" 2002 , "A Programme for European Criminal Justice" 2006 and "A Manifesto on European Criminal Policy" 2009/2011.



2. Towards an emergence of EU criminal policy... II

- A framework for the further development of an EU criminal policy under the Lisbon Treaty by the European Commission: Communication, COM (2011) 573 final (20.9.2011): Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law
 - The aim of this framework is that "it considerably enhances the possibility to progress with the development of a *coherent* EU Criminal Policy which is based on considerations both of effective enforcement and a solid protection of fundamental rights".



3. Assessing generally the contents of EU criminal law principles in COM(2011)573 final I

- According to COM(2011)573 , an EU criminal policy is *particularly* warranted in respect of Article 83(2) TFEU. This is true, but in order to enhance a more coherent criminal policy within the EU, good governance would require that the fundamental principles should guide the *whole* EU criminal legislation as much as possible.
- In COM(2011)573, among the fundamental principles guiding EU criminal legislation are the principles of *subsidiarity, the protection of fundamental rights* (EU Charter of Fundamental Rights and ECHR), *necessity and proportionality* ("ultima ratio") at the level of enacting criminal law measures, and necessity and proportionality at the level of specifying the criminal measures.



3. Assessing generally the contents of the EU criminal law principles... II

- In addition, the legality principle (legal certainty) is mentioned in the COM(2011)573 as a principle guiding "minimum rules" (definition of criminal offences and sanctions).
- When comparing COM(2011)573 and the Manifesto on European Criminal Policy (2009, 2011) differences can be seen, in particular, to what extent the requirement of a legitimate purpose (as part of the *ultima ratio* and proportionality principles) is emphasized.
- In both of these documents, the relationship between the principles of *ultima ratio*, subsidiarity and proportionality is not elaborated very much



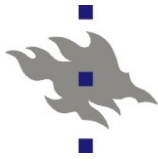
4. On the relationship between the principles of *ultima ratio*, subsidiarity and proportionality

- There is much academic discussion on the principle of *ultima ratio* (last resort, necessity test) in the criminal law theory, but its contents is still quite vague.
 - For instance, Nils Jareborg (2006) regards *ultima ratio* as a *metaprinciple* for limiting criminalisations; the most important sub-principles are then 1) the penal value principle, 2) the utility principle and 3) the humanity principle (and they are connected with the proportionality principle)
- For me the principles of *ultima ratio*, subsidiarity and proportionality are keenly connected with each other and, in particular, in respect of EU criminal law. Their legal basis can be found in the EU legislation.



5. On the principle of *ultima ratio* I

- Both in COM(2011)573 and in the Manifesto on European Criminal Policy is rightly referred to both the general principle of proportionality (Article 5(4) TEU) and the EU Charter of Fundamental Rights (esp. Article 49(3)) as the legal (constitutional) basis for the *ultima ratio* principle.
 - Criminalisation and criminal sanctions entail social stigmatisation (moral condemnation) and, when resorting to imprisonment as penalty, the most intrusive measure.
 - A criminal justice system is traditionally closely linked to the state's power and its value system. The democratic *legitimacy of (and trust to)* the EU criminal laws is difficult to attain. The legitimacy argument also strongly supports the demand of the consistency and coherence of the EU criminal laws.



5. On the principle of *ultima ratio* II

- The requirement of a *legitimate purpose*: protection of fundamental interests (see point 1 in Manifesto) can be derived from the *ultima ratio* principle.
 - 1) Those interests should be derived from the primary legislation of the EU; 2) the Constitutions of the Member States and the fundamental principles of the EU Charter of Fundamental Rights are not violated; and 3) the activities in question could cause significant damage (harm) to society or individuals.
- The legitimate purpose or interest as such is not enough; necessity test must be *differentiated* and assessed by the principles of subsidiarity and proportionality
- A special necessity test in Article 83(2) TFEU



6. On the principles of subsidiarity and proportionality and their interaction I

- The legal (constitutional) basis in Article 5 (3)-(4) TEU. See also Protocol (No 2) on the application of these principles.
- See also the the so-called "emergence brake" in Article 83(3) TFEU.
- These provisions imply that the principles of subsidiarity and proportionality are legally binding, increasingly important principles of EU criminal law and the criteria for their assessment and the procedures for their implementation should be developed.
- The case-law of the European Court of Justice will be significant (cf. C-440/05) ; so far some case-law exists in respect of the proportionality principle.



6. On the principles of subsidiarity and proportionality ... II

- Normally, a distinction is made between the principles of subsidiarity and proportionality by their different scope of application and legal effects: the question of subsidiarity answers to is *whether* the EU should exercise its powers and the proportionality to *how* the EU should exercise its powers. Nevertheless, these principles are keenly *interrelated*.
- *Proportionality* is a principle applied to (alleged) conflicts between two interests; the individual's interest for autonomy and public interests. The principle is traditionally further divided into three tests: 1) suitability, 2) necessity (cf. *ultima ratio*) and 3) proportionality *stricto sensu*.



6. On the principles of subsidiarity and proportionality ... III

- The principle of proportionality has in the field of criminal law not only the dimension of *prospective* proportionality, but also the dimension of *retrospective* proportionality: see Article 49(3) of the EU Charter of Fundamental Rights on the severity of penalties.
- As indicated in the COM(2011) 573, in the assessment of proportionality (necessity) the legislator needs to analyse whether measures other than criminal law means, in particular penal administrative sanctions, could address the problems more effectively, and to what extent various types of sanctions should be introduced *parallelly* (for example, administrative sanctions for minor offences and criminal sanctions for more serious offences).



7. Conclusion: research challenges

- When taking the principles of subsidiarity and proportionality seriously and requiring thorough analyses from the Impact Assessments preceding legislative proposals, we need much more comparative research on criminal law, criminology and criminal justice. We also need much more evidence-based criminological research to be utilized in criminal-policy planning and as a foundation for rational criminal policy. This is particularly true in relation to the decision-making and actors within the EU, where criminal policy has not so far been made on the basis of coherent conceptions and by utilizing relevant criminological research. Collection of statistical data is not a sufficient basis for the analyses.