Department of Law

Defending Liberty and Structural Integrity

A social contractual analysis of criminal justice in the EU

Robin Lööf

Thesis submitted for assessment with a view to obtaining the degree of
Doctor of Laws of the European University Institute

Florence, May 2008

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BA 8142, 5 May 2008

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List of abbreviations

AFSJ	Area of Freedom, Security and Justice
CISA	Convention Implementing the Schengen Agreement
CoE	Council of Europe
EC	European Community
ECJ	European Court of Justice
EU	European Union
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EEW	European Evidence Warrant
FDPR	Proposal for a Council Framework Decision on certain Procedural Rights in Criminal Proceedings throughout the European Union
RT	Reform Treaty (*or* Treaty of Lisbon)
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations

Introductory chapter

The principles of the modern criminal law in Europe date back hundreds of years. As we shall see, the first coherent treatises of criminal justice laying down many of the principles to which we still adhere appeared in continental Europe during the mid-eighteenth century. Enlightenment philosophers, concerned with the relationship between the state and the citizen, between the collective and the individual, found criminal justice a natural area of study. Even before then, however, embryos of principles we today hold as fundamental can be found in charters, bills and constitutions limiting the power of medieval Kings over their subjects. If we then take the concept of the criminal law, the idea that the collective can and should exact punishment for violations of certain pre-determined rules, it dates back to the dawn of civilisation.

With the advent of centralised governments and, eventually, the nation states, the criminal law and the right to punish came to be increasingly associated with the very identity of the polity. The power to enact rules and to punish their transgression became a defining sign of a sovereign state. Today, we define as 'failed' or 'collapsed states' those territories where central government can no longer enforce its laws.[1] A further testimony to the strong link between the identity of a polity and criminal justice is the extreme sensitivity countries display with regard to their systems of criminal justice and their general predisposition to consider any other system inferior to their own: 'Indifference towards and mistrust of other criminal justice systems, which serves to hinder reform in the field – or to protect the identity of the individual systems, depending on how you look at it – can be seen to be a natural consequence of this nationalism.'[2]

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[1] Robert I. Rotberg, 'Failed States, Collapsed States, Weak States: Causes and Indicators', in Rotberg, R. I., Ed. (2003). State Failure and State Weakness in a Time of Terror. Washington DC, Brookings Institution.

[2] Summers, S. J. (2007). Fair Trials - The European Criminal Procedural Tradition and the European Court of Human Rights. Oxford and Portland, Oregon, Hart Publishing., at p. 11.

This is the basic, international environment of criminal justice. In Europe cooperation between systems of criminal justice became smoother as an increasing communality of interests manifested itself. There is, however, a difference between cooperation and integration. The European Union (EU) has been and continues to be an integrationist structure. Under its auspices and, in particular, its enforcement of the four freedoms[3], large areas of social life in Europe are now subject to integrated institutions and rules. In contrast, the criminal law was long too sensitive, too close to the heart of the remains of national sovereignty in our globalised world for the EU to be given any influence over it. And yet, in around one decade criminal justice has gone from being a peripheral concern at the fringes of EU intergovernmental cooperation, to being one of its most prolific – and controversial – policy areas. Having started out with a sliver of competence to make what essentially amounted to "soft law" under the Treaty of Maastricht, with the recently signed Treaty of Lisbon (hereinafter: the Reform Treaty (RT)) we are now on the cusp of conferring competences on the EU institutions in the field of criminal justice similar to those they have to perfect and to regulate the four freedoms in the common market. How and, more importantly, why has this come about? How can the age-old principles of criminal justice be accommodated within the, by comparison, infant legal framework of the new Europe? Do they have to be? What does this mean for the various systems of criminal law in Europe? What does this mean for Europe?

The present work attempts to provide a systemic interpretation of criminal justice in the new context of the EU. It will begin with a discussion of the academic and policy justifications for this in many ways astonishing development of criminal justice as an EU policy area. As we shall see, these justifications serve as accurate historical accounts of why the development of the EU into an important actor in the field of criminal justice took place. Where they can be said to be wanting is that they do not provide a satisfactory analytical answer to the question of why this development was important or even desirable. The reason we need a convincing analytical account of the development of EU criminal justice is that law needs a reasonable interpretive framework with reference to which legal provisions can be interpreted. From an evolutionary perspective, such a framework also serves to identify any incoherencies

[3] To wit: the free movement of workers, goods, services and capital.

in the existing legal provisions and thereby serves as a guide for the future development of the law. This introductory chapter will conclude that the common justifications for EU criminal justice – while being relatively accurate historical accounts – are insufficient as an analytical framework in this sense because they start from the wrong perspective and that this is the reason for the erratic development and resulting inconsistencies of this EU policy area.

Justificatory models for EU action in criminal justice

For 35 years European integration was strictly economic. From the signature of the Treaty of Rome on 7 February 1957 which gave rise to the European Economic Community until the 1992 signature of the Treaty of Maastricht, criminal justice was thought to be well outside the competence of the common, European institutions. There were, however, other fora for cooperation in the field of criminal justice in Europe; fora which had sometimes reached advanced levels of development.[4] There was the Council of Europe (CoE) under the auspices of which several important conventions in the field of criminal justice were signed, e.g. the European Convention on Extradition of 1957 and the European Convention on Mutual Assistance in Criminal Matters of 1959. There were also fora which were developed on the fringes of European economic cooperation involving all or some of the members of the EC. One example is the informal ministerial conference known as *Trevi* which lasted from ca. 1975 to 1993 and which helped pave the way for the creation of the third pillar at Maastricht. Mention could also be made of *Shengen* which began as an extra-EC/EU cooperation among a smaller number of EC/EU Member States with the stated purpose of effecting the EC/EU goal of freedom of movement. Schengen has since been integrated, albeit asymmetrically, into the EU treaty structure.[5]

The 1992 creation of the EU was very much the beginning of a new era in the history of European integration. The Treaty of Maastricht divided the areas of EU competence into what came to be known as 'pillars.'[6] The traditional EC competences for the development and regulation of the common market were put in the first pillar. This pillar is characterised by legislation by qualified majority with the Council – representing Member State governments – and the European Parliament – directly elected by the citizens of the EU – acting as co-legislators. Further, there is

[4] See generally Monar, J. (2001). "The Dynamics of Justice and Home Affairs: Laboratories, Driving Factors and Costs." Journal of Common Market Studies **39**(4): 747-764.
[5] Decision 1999/436/EC of 20 May 1999 (OJ L 176, 10.7.1999, pp. 17–30).
[6] On the 'pillar' metaphor, see Bruno de Witte, 'The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?', in Heukels, T., N. Blokker, et al., Eds. (1998). The European Union after Amsterdam - A Legal Analysis. The Hague, London, Boston, Kluwer Law International.

a strong system of control of Member State compliance under the supervision of the European Commission and, ultimately, the European Court of Justice. The real novelty of Maastricht however, was the creation of the second and third pillars. The second pillar contains provisions for EU action in foreign policy and the third in criminal justice and home affairs. In short, the concept of an 'ever closer union among the peoples of Europe' from the first preambular paragraph of the EC Treaty was given a significant push as the new EU was conferred competences in these policy fields closely associated with national sovereignty. It might have been a bit precocious when said in 1963, but in 1992 the most optimistic (or pessimistic) of observers could say with a little more conviction that '[t]he Europe that gave birth to the idea of the nation-state appears to be well on the way to rejecting it in practice.'[7]

The third pillar started out as the sole seat of the Area of Freedom, Security and Justice (AFSJ) which was taken to involve all those policy areas broadly aimed at ensuring security within the EU area of free movement. It is doubtful whether it was ever conceptually defensible thus to group criminal justice with immigration and asylum policy.[8] The point has become moot however. In 1997, the Treaty of Amsterdam transferred the provisions on visas, immigration and asylum from Title VI of the EU Treaty (the formal name for the third pillar) to Title IV of the EC Treaty (first pillar).[9] What is left in the third pillar is only cooperation in the field of criminal justice. Amsterdam also added a new legal instrument which was to become central to third pillar legislation: the Framework Decision. It is important to remember that the broad use of the term AFSJ persists and thus still relates to criminal justice as well as immigration and asylum. Institutionally speaking, post-Amsterdam the AFSJ thus spans the first and third pillars.

This work will be concerned with EU criminal justice which means that the institutional focus will be on the third pillar.[10] A short and partial digest of the

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[7] Lindberg, L. N. (1963). The Political Dynamics of European Economic Integration. Stanford, Stanford University Press., at p. 3.

[8] See introduction to Fletcher, M., R. Lööf, et al. (2008). EU Criminal Law and Justice. Cheltenham, UK; Northampton, MA, USA, Edward Elgar. (forthcoming).

[9] For comment, see Monar, J. (1998). "Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation " European Law Review **23**(4): 320-335.

[10] Recent developments prevent us from saying that the third pillar involved the first conferral of competences in matters of criminal justice to the EU. In Case C-176/03 *Commission of the European*

present institutional structure of the third pillar is as follows. According to Article 29 of the EU Treaty, 'the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice.' Article 31 then outlines the competences of the EU for '[c]ommon action on judicial cooperation in criminal matters', and Article 34(2) specifies the legislative instruments available to the EU to this effect.

Although initially slow[11], legislative activity has since gained momentum and at certain times has accounted for about 40 per cent of the EU's legislative output.[12] To date, the EU criminal law *acquis* is significant. In the field of substantive criminal law, in chronological order of adoption, EU framework decisions have established common definitions of offences in the following fields: counterfeiting[13], fraud and forgery in respect of non-cash means of payment[14], money laundering[15], terrorism[16],

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Communities v. Council of the European Union ("*Environmental crimes*"), judgment of 13 September 2005, the European Court of Justice recognised that the EC, i.e. acting in the first pillar, could require that Member States use criminal law to safeguard the application of EC law. See Communication from the Commission to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (Case C-176/03 Commission v Council), COM(2005) 583 final, 24.11.2005, and, generally, White, S. (2006). "Harmonisation of Criminal Law under the First Pillar." *ibid.* **31**(1): 81-92. This of course means that the EC was *always* competent to enact criminal legislation. In Case C-440/05 *Commission of the European Communities v. Council of the European Union* ("*Ship-source pollution*"), judgment of 23 October 2007, the ECJ went further down this route, arguably without satisfactorily clarifying the limits of the EC's criminal law competence. See, e.g., Fletcher, M., R. Lööf, et al. (2008). EU Criminal Law and Justice. Cheltenham, UK; Northampton, MA, USA, Edward Elgar. (forthcoming). What is certain, however, is that the EC's criminal competence is limited to so-called "regulatory criminal law", i.e. legislation to reinforce economic-regulatory schemes. The focus of the present work, as will become clear, is the "pure", or traditional, criminal law, i.e. criminal laws which are ends in themselves.

[11] As noted in, e.g., Steve Peers, 'Human Rights and the Third pillar', in Alston, P., Ed. (1999). The EU and Human Rights. Oxford, Oxford University Press.

[12] See, e.g., Grabbe, H. (2002). Justice and Home Affairs: Faster Decisiont, Secure Rights. London, Centre for European Reform (policy brief). and Monar, J. (2005). "Justice and Home Affairs in the Constitutional Treaty. What added value for the 'Area of Freedom, Security and Justice'?" European Constitutional Law Review **1**: 226-246.

[13] Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (OJ L 140, 14.6.2000, p. 1), amended by Council Framework Decision 2001/888/JHA of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (OJ L 329, 14.12.2001, p. 3).

[14] Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment (OJ L 149, 2.6.2001, p. 1).

[15] Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (OJ L 182, 5.7.2001, p. 1).

[16] Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (OJ L 164, 22.6.2002, p. 3).

trafficking in human beings[17], illegal migration[18], corruption in the private sector[19], sexual exploitation of children and child pornography[20], drugs offences[21], and hacking.[22] Framework decisions harmonising environmental offences and the offence of ship-source pollution[23] have recently been annulled by the ECJ[24] (these offences will now be harmonised by first pillar directives).

No less significant, the *acquis* in criminal procedure includes the adoption of framework decisions on a European Arrest Warrant (EAW)[25], mutual recognition of orders freezing assets,[26] mutual recognition of financial penalties[27] and the execution of confiscation orders.[28] A framework decision on a European Evidence Warrant[29] (EEW) designed to facilitate the gathering and movement of pre-trial evidence in criminal cases throughout the Union has yet to be formally adopted (although a general approach was agreed in Council on 1-2 June 2006).[30] There are currently draft framework decisions to implement mutual recognition in respect of convictions,[31] transfer of sentenced persons by way of a European Enforcement Order,[32] the recognition of non-custodial pre-trial supervision measures by way of a

[17] Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings (OJ L 203, 1.8.2002, p. 1).
[18] Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ L 328, 5.12.2002, p. 1).
[19] Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (OJ L 192, 31.7.2003, p. 54).
[20] Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography (OJ L 13, 20.1.2004, p. 44).
[21] Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (OJ L 335, 11.11.2004, p. 8).
[22] Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems (OJ L 69, 16.3.2005, p. 67).
[23] Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution (OJ L 255, 30.9.2005, p. 164)
[24] See cases Case C-176/03 ("*Environmental crimes*") and C-440/05 ("*Ship-source polution*") above.
[25] Council Framework Decision on the European arrest warrant and the surrender procedures between Member States 2002/584/JHA, (OJ L 190, 18.7.2002, p. 1-20).
[26] OJ L 196, 2.8.2003, p. 45-55.
[27] OJ L 76, 22.3.2005, p.16-22.
[28] OJ L 328, 24.11.2006, p. 59-78.
[29] COM(2003) 688, 14.11.2003.
[30] On the progress of this instrument, see eucrim 1-2/2007, at p. 39.
[31] COM(2005) 91 final, 17.03.2005.
[32] In particular, Austria, Sweden and Finland have presented an ambitious draft framework decision on the mutual recognition and enforcement of sentences of imprisonment in the EU (OJ C 150 21.6.2005 p. 1-16).

European Supervision Order[33] and the recognition and supervision of alternative sanctions and suspended sentences (i.e. probation).[34]

As will have become apparent, the EU's role in criminal justice is now an established and increasingly pervasive fact.[35] The question now is where EU criminal justice is going. Is the current *acquis* as far as it should go? Is it too far already? Should the EU develop into a federalised criminal justice system? Whichever of these questions one answers "yes" to, a reasonable follow-up question is "why?" In order to answer the "why?" for the future, it is necessary to answer the question of how we got here in the first place: why was the EU ever given competences in the field of criminal law?

Although there will be numerous nuances, on my analysis there have been two main currents of thought which have served to justify the EU's involvement in criminal justice. The first of these, which will here be referred to as the 'consequentialist justification', essentially argues that the EU has created/given rise to a situation where the fundamental premises of fighting crime have changed and that it is therefore logical that the EU assumes the responsibility of "fixing" things. As will become clear, the border with the second justification, here referred to as the 'reactive justification', is sometimes less than clear-cut. Put simply, however, the reactive justification emphasises the EU's need, as an independent political actor, to be seen to provide responses to pressing issues of the day.

As we have seen, EU criminal justice is now a reality. There is therefore little doubt that these justificatory models have been very influential. However, after describing them, the following pages aim to look at these two justificatory models in detail to see whether they provide an adequate analytical framework for EU criminal justice and, *a fortiori*, its continued development in the sense described above. The negative response to this question constitutes one of the justifications for the present work.

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[33] COM(2006) 468 final, 29.8.2006.
[34] France and Germany have presented a draft framework decision on the recognition and supervision of suspended sentences, alternative sanctions and conditional sentences (OJ C 147, 30.6.2007, p.1-16).
[35] See Kaunert, C. (2005). "The Area of Freedom, Security and Justice: The Construction of a 'European Public Order'." European Security **14**(4): 459-483.

1. The consequentialist justification

There is a popular perception that organisations in general and the EU in particular, by virtue of their very existence, strive to increase their remit at the expense of fora which are somehow considered more "natural." If the popular image is often one of power hungry bureaucrats grasping at every straw of influence, there are also good principled arguments for why one set of competences logically should entail another, or if you will, is consequential upon it. In the debate on the competences to be attributed to the EU, this is known as "spill-over."[36]

In the more specific context which concerns us here, the argument is generally made beginning with the removal of internal borders and the completion of the common market, and the consequences this is assumed to have had and has on the nature of crime in Europe:

> 'The abolition of the remaining obstacles to cross-border economic activities and the full implementation of the "four freedoms" generated de facto a common internal security zone encompassing all Member States in which free movement, increased economic interpenetration and the facilitation of cross-border financial activities rendered borders between the Members States increasingly ineffective both as instruments of control and obstacles to the movement of asylum-seekers, illegal immigrants and crime.'[37]

The regulation of the economic and to some extent social consequences of the common market is generally seen as the natural remit of the institutions at the European level.[38] The argument was then made that to deny the EU competence to deal with the common market-effects on crime amounts to artificially separating one set of logical and predictable consequences of the freedom of movement from another. The fact that 'criminals, and terrorists in particular, do not respect national borders' and that, in addition, 'the Single Market has made it very easy for them to

[36] This model is usually traced back to Lindberg, L. N. (1963). The Political Dynamics of European Economic Integration. Stanford, Stanford University Press.
[37] Monar, J. (2001). "The Dynamics of Justice and Home Affairs: Laboratories, Driving Factors and Costs." Journal of Common Market Studies **39**(4): 747-764., at p. 754.
[38] There are, however, limits to the EC's competence even in this most classic of competence fields. See, e.g., Case C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union* ("*Tobacco advertising*"), judgment of 5 October 2000.

travel freely across the EU – more freely than national police forces', all amounts to 'a compelling need for action at supra-national level.'[39]

These claims are compelling because they appear logically sound. They also have the merit of being easily turned into "political speak." When analysed closely, however, it is difficult to ascertain what exactly is claimed. Has the common market merely caused a qualitative shift in already existing criminal structures? Has there been a quantitative increase in crime levels? All of the above? Are criminals really, and literally, outrunning the police by using some Member States with more "favourable" systems of criminal justice as "safe havens" for pan-European criminal activities?[40] That organised, transnational crime is a serious problem and a challenge for us all is beyond doubt[41] and in some places in the world, 'criminal organizations are able to defy government authority, suborn or even partially supplant it.'[42] As far as the EU pre-2004 enlargement was concerned, however, 'in virtually none of the Member States does organized crime pose a real threat to the democratic constitutional state and the free market economy. Rather, it represents a greater or lesser challenge to the authorities.'[43] The question is, of course, whether this remains the case or whether the expansion of the common market has led to a deterioration of the situation. Although they make for sobering reading, pure crime statistics[44] are not very helpful in this regard and, by way of example, Mueller admits that 'we do not know how many of the businesses we frequent daily have been infiltrated, or are actually owned, by

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[39] Douglas-Scott, S. (2004). "The Rule of Law in the European Union - Putting the Security into the Area of Freedom, Security and Justice." European Law Review **29**(2): 219-242., at p. 222. See also Ferola, L. (2002). "The Fight Against Organized Crime in Europe - Building an Area of Freedom, Security and Justice in the EU." International Journal of Legal Information **30**(1): 53-91.

[40] See, e.g., Weyembergh, A. (2004). L'harmonisation des législations : condition de l'espace pénal européen et révélateur de ses tensions. Bruxelles, Editions de l'Université de Bruxelles., at p. 180.

[41] See generally contributions in Williams, P. and D. Vlassis, Eds. (2001). Combating Transnational Crime - Concepts, Activities and Responses. London, Frank Cass.

[42] Roy Godson and Phil Williams, 'Strengthening Cooperation Against Transnational Crime: A New Security Imperative', in *ibid.*

[43] Cyrille Fijnaut, 'Transnational Organized Crime and Institutional Reform in the European Union: the Case of Judicial Cooperation', in *ibid.*, at p. 278. Along the same lines, see also the Europol OCTA 2006, at p. 10, and Proposal for a Council Decision on the Exchange of Information and Cooperation concerning Terrorist Offences, COM(2004) 221 final, 29.3.2004.

[44] See, e.g., Alvazzi del Frate, A. (2004). "The International Crime Business Survey: Findings from Nine Central-Easterns European Cities." European Journal on Criminal Policy and Research **10**(2-3): 137-161., Lewis, C., G. Barclay, et al. (2004). "Crime Trends in the EU." European Journal on Criminal Policy and Research **10**(2-3): 187-223., and Brady, H. and M. Roma (2006). Let justice be done: Punishing crime in the EU. London, Centre for European Reform (policy brief).

transnational organized crime groups.'[45] Consequently, we have no way of knowing the organisational structure and reach of these groups. Fijnaut has remarked that 'for all intents and purposes, it is impossible to have an overview of the nature, scope, and development of (organized) crime in the EU and its neighbouring countries.'[46]

This lack of reliable statistics is probably to a large extent due to the fact that the information we are looking for is empirically elusive: how would one go about verifying the claim that the common market engenders a particular type of crime? How could we control for other factors such as the general process of internationalisation of economic activity, licit as well as illicit? The existence of organised, transnational criminal networks in parts of the world where borders are very much part of economic life lends credence to Bruggeman's assertion that

> 'the internationalisation of the major criminal organisations has come about regardless of the treaties on the free movement of goods and persons. They have been helped in this internationalisation process by the gaps in, and inadequacy of, international treaty rules and by the difference in national legislation and by the gaps in, and incompleteness of, the criminal laws of many countries.'[47]

What Bruggeman alludes to is the effect of globalisation on pre-existing criminogenic asymmetries. The idea is that certain asymmetries – economic, social, power and influence related, etc. – have criminogenic potential which is intensified by the increase in international exchange.[48] This intensification is due to a combination of several factors: Globalisation arguably facilitates massive accumulation of wealth and, some would say, accentuates economic inequalities. Further, it renders inequality more visible to more people. Finally, whereas the exercise of economic

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[45] Gerhard O. W. Mueller, 'Transnational Crime: Definitions and Concepts', in Williams, P. and D. Vlassis, Eds. (2001). Combating Transnational Crime - Concepts, Activities and Responses. London, Frank Cass., at p. 16.

[46] Cyrille Fijnaut, 'Police Co-operation and the Area of Freedom, Security and Justice', in Walker, N., Ed. (2004). Europe's Area of Freedom, Security and Justice. Oxford, Oxford University Press., at p. 267.

[47] Willy Bruggeman, 'Policing in a European Context', in Apap, J., Ed. (2004). Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement. Cheltenham, UK; Northhampton, MA, USA, Edward Elgar., at p. 164.

[48] See Nikos Passas, 'Globalization and Transnational Crime: Effects of Criminogenic Asymmetries', in Williams, P. and D. Vlassis, Eds. (2001). Combating Transnational Crime - Concepts, Activities and Responses. London, Frank Cass.

power is now virtually unconstrained by national borders, the exercise of, for want of a better expression, "disciplining power" is still very much constrained by red lines on the map. At the other end, 'asymmetries provide the catalyst for globalization to produce criminal opportunities, motives to take advantage of those opportunities and weaker controls.'[49] Finally, '[t]he time-space compression activates the crimongenic potential of existing power and economic asymmetries too.'[50] In short, 'criminogenesis increases significantly as a result of the dynamic of globalization, which multiplies, intensifies or activates asymmetries.'[51]

The only reasonable conclusion to be drawn from all this is that organised, transnational crime is a side-effect of the increasingly organised and transnational nature of all economic activity, and that while it is not an unreasonable assumption that the common market does have an effect in this regard in that it constitutes one aspect of globalisation in general, there is no reliable empirical data either to confirm or to quantify this assumed effect. The Europol Organised Crime Reports (OCR) and, since 2006, the Organised Crime Threat Assessments (OCTA) confirm this conclusion. The 2005 OCR states that 'OC [Organised Crime] takes advantage from the increasing mobility, urbanisation, anonymity and diminishing social control which are characteristic of modern society' in general while, in relation to specific crime, exploiting the 'discrepancies between EU laws and national legislations in committing among others environmental crime and high technology crime, and […] gaps in EU procedures for example in VAT and other fraud.'[52] The 2005 OCR also states that enlargement does not seem to have had a qualitative impact on organised crime. The 2006 OCTA points to the diversity in organisational models in the world of organised crime, but especially to a degree of regional integration within Europe. As for the factors creating the "market" for organised crime, Europol points to a number of sources of criminogenic asymmetries mainly to do with remaining regulatory differences between Member States, in e.g. alcohol taxation, and various EU budgetary schemes more or less open to fraud. Consequently, it is very difficult to isolate the impact of the common market on organised crime. While the

[49] *Ibid*., at p. 33.
[50] *Ibid*., at p. 34.
[51] *Ibid*., at p. 28.
[52] At p. 8.

organisational integration of the various operators certainly seems to be facilitated by increased integration, that very integration seems to do away with some of the criminogenic asymmetries on which those same operators thrive.[53]

Nevertheless, despite the inconclusive data, the '[e]uropeanization of Justice and Home Affairs was seen as part of a series of flanking measures intended to compensate for the security deficit arguably arising from the abolition of internal border control.'[54] This provided the main justification for the creation of the third pillar at Maastricht. Later on, still taking the threats as a given, further changes to the new institutions of the third pillar were justified and made again, seemingly, without addressing the fundamental issue of 'whether organized crime was actually starting to pose such a threat to the EU that structural intervention in relationships just created was urgently required.'[55] The consensus seems to be that the "spill-over" argument was instrumental in bringing about the inclusion of criminal justice in the EU treaty framework and in its ulterior consolidation.

Once in place, however, the third pillar has itself started to give rise to calls for secondary "spill-over." The argument is now that once the EU has started to concern itself with the enforcement side of criminal justice, it can no longer ignore the other aims and values served by the criminal process. In commenting on the EAW, Allegre and Leaf have provided a clear example of this claim:

> 'As judicial and police cooperation are enhanced to meet the mounting problem of cross-border crime and the issue of fugitives from justice taking advantage of freedom of movement in the EU, all elements of criminal justice in Member States must become a matter of concern for the EU as a whole.'[56]

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[53] EU Organised Threat Assessment 2006, especially at p. 22.

[54] Paul de Hert, 'Division of Competencies between National and European Levels with regard to Justice and Home Affairs', in Apap, J., Ed. (2004). Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement. Cheltenham, UK; Northhampton, MA, USA, Edward Elgar., at p. 71

[55] Cyrille Fijnaut, 'Transnational Organized Crime and Institutional Reform in the European Union: the Case of Judicial Cooperation', in Williams, P. and D. Vlassis, Eds. (2001). Combating Transnational Crime - Concepts, Activities and Responses. London, Frank Cass., at p. 287.

[56] Alegre, S. and M. Leaf (2004). "Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study - the European Arrest Warrant." European Law Journal **10**(2): 200-217., at p. 215.

There is a very strong feeling in the academic and NGO communities that the European cooperation in matters of criminal justice has been repression-orientated and that it lacks elements relating to procedural safeguards and the rights of the defence. In this regard, Peers is categorical: '[A]ny further legal integration must strike the right balance between prosecution and defence interests.'[57] The role of procedural safeguards in the nascent European criminal justice will be the focus of discussions further on. For now suffice to say that the concern is that the balance of the criminal process perhaps best described using the French procedural expression *égalité des armes*[58], albeit struck differently in each individual legal system, has become imperilled by this one-sided development of the European dimension of criminal procedure. To those advocating EU action in the field of procedural safeguards, it is simply a matter of a symmetrical imperative: no system of criminal justice, at whatever stage in its development, is complete without addressing the issue of procedural safeguards. To put it bluntly, 'if we are developing common powers and policing at EU level, then we must also develop the "European safeguards" necessary for the defence of civil liberties'[59] simply because these operate 'as an indispensable counterweight in the context of a "checks and balances" theory in the field of judicial cooperation in criminal matters.'[60]

That arguments based on "spill-over" have been and remain central to the continued development of the EU in general, and of the third pillar in particular, is beyond doubt. If, however, we shift our attention from the historical account to a more systematic analysis of the "spill-over" argument, things become somewhat problematic. In order to address this issue we need to analyse in more detail what "spill-over" actually entails.

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[57] Peers, S. (2000). EU Justice and Home Affairs Law. Harlow, Pearson Education., at p. 187.

[58] 'Equality of arms' denotes the idea that the prosecution and the defence have hafd equal procedural means to build their cases. On the notion in the ECHR context, see, e.g., Stavros, S. (1993). The Guarantees for Accused Persons Under Article 6 of the European Convention on Human Rights: An Analysis of the Application of the Convention and a Comparison with other Instruments. Dordrecht/Boston/London, Martinus Nijhoff Publishers., and Université Robert Schuman de, S. (1996). Les nouveaux développements du procès équitable au sens de la Convention européenne des droits de l'homme. Bruxelles, Bruylant.

[59] Sarah Ludford, 'An EU JHA Policy: What should it Comprise?', in Apap, J., Ed. (2004). Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement. Cheltenham, UK; Northhampton, MA, USA, Edward Elgar., at p. 27.

[60] Jimeno-Bulnes, M. (2004). "After September 11th: the Fight Against Terrorism in National and European Law. Substantive and Procedural Rules: Some Examples." European Law Journal **10**(2): 235-253., at p. 252.

In *The Political Dynamics of European Economic Integration* Lindberg presents the concept of "spill-over" as a method to effect political integration:

> '"[S]pill-over" refers to a situation in which a given action, related to a specific goal, creates a situation in which the original goal can be assured only by taking further actions, which in turn create a further condition and a need for more action, and so forth […] [T]he initial task and grant of power to the central institutions creates a situation or series of situations that can be dealt with only by further expanding the task and the grant of power.'[61]

In the above quotation, note needs to be taken of the absolutely central role played by the *goal* of the central institutions in the concept of "spill-over." The goal of the central institutions is in fact the reference against which the validity of a traditional "spill-over" argument must be gauged. In other words, it is essential always to separate the descriptive and the prescriptive parts of a "spill-over" argument. For only if there is a common definition of the goal of the central institutions (description) can the further grant of power to achieve that goal (prescription) be justified on the basis that it is necessary to achieve that goal.[62] "Spill-over" thus only applies within a certain ideological framework. It then follows that before that ideological framework has been established, there is no "spill-over" argument to be made.

The point of the traditional "spill-over" argument, as identified by Lindberg, is that it seeks to identify the situation where further conferrals of competence are to be considered as uncontroversial. What is claimed is in fact that any controversy was dealt with in the identification of the goal of the original conferral of competence. Further conferrals of competence should therefore be uncontroversial because they only serve to do away with obstacles to the achievement of that precise and already agreed to goal. To illustrate we can imagine that the EU had agreed to establish freedom of movement of workers but had originally only been given competence to deal with direct discrimination on the basis of nationality. Having thus agreed to the

[61] Lindberg, L. N. (1963). The Political Dynamics of European Economic Integration. Stanford, Stanford University Press., at p. 10.
[62] This reasoning coincides with that of the ECJ on Article 308 of the EC Treaty in Opinion 2/94 (EC accession to the ECHR) [1996] ECR I-1759.

goal of free movement of workers, it is brought to the attention of the Member States that indirect discrimination constitutes a serious obstacle to the achievement of this goal. Using "spill-over" argumentation, it would thus be an uncontroversial extension of EU competences to give it the competences to deal also with indirect discrimination on the basis of nationality.

While the goal of the common market can be described with some accuracy with reference to the EC Treaty, it is difficult to say the same with reference to the third pillar provisions in the EU Treaty. While, as we have seen, it seems a plausible hypothesis that the common market has had an effect on crime patterns, it cannot be said that this constitutes an obstacle to the achievement of the goal of the common market. Crime fighting effectiveness can thus not be said to have been part of the goals of the common market. It therefore follows that the extension of EU competences to deal with it cannot be said to be an uncontroversial extension of EU competences in the traditional "spill-over" sense.

It is very likely that some of the difficulty stems from the transfer of the concept of "spill-over" from the realm of economic integration where Lindberg found and analysed it, to a policy area such as criminal justice where the goals of the EU are (even?) less agreed. In discussions on the future development of the third pillar, this is a very live issue. Arguments are often made that there is an objective *need* for one development or another, backed up or not as the case may be by empirical data. As Fijnaut points out, however, in discussing the *Corpus Iuris*-project[63], which is justified predominantly in terms of "spill-over", in reality 'this is largely an ideological question.'[64] This must be read to mean that the neutral terminology of "spill-over" is used to hide what in reality is an argument on what the goal of the EU ought to be. On this basis, it appears a trifle simplified to say, as Allegre and Leaf do, that since police and judicial cooperation have to some extent been realised in the EU,

[63] Delmas-Marty, M. (1997). Corpus juris: introducing penal provisions for the purpose of the financial interests of the European Union. Paris, Economica.

[64] Cyrille Fijnaut, 'Transnational Organized Crime and Institutional Reform in the European Union: the Case of Judicial Cooperation', in Williams, P. and D. Vlassis, Eds. (2001). Combating Transnational Crime - Concepts, Activities and Responses. London, Frank Cass., at p. 293. See also, on the proposed European Public Prosecutor, Christine Van den Wyngaert, 'Eurojust and the European Public Prosecutor in the Corpus Juris Model: Water and Fire?', in Walker, N., Ed. (2004). Europe's Area of Freedom, Security and Justice. Oxford, Oxford University Press.

'*all* elements of criminal justice in Member States must become a matter of concern for the EU as a whole'[65] (my italics). This could in fact only be said if there was prior agreement that the goal of the EU was the promotion of the traditional criminal procedure characterised by *égalité des armes*. The need for the prior agreement is that the argument that the EU should concern itself with 'all elements of criminal justice' presupposes that the controversial issue of whether the EU-wide promotion of *égalité des armes* is more important than the maintaining of national sovereignty over criminal justice has been settled. Conversely, the current situation is at least implicitly justified by a different view of the interplay between collective coercion and procedural safeguards in the criminal procedure. Whether that position is tenable as a matter of legal philosophy will be addressed in detail further on. For present purposes, what is important to note is that this is a discussion of substantive legal philosophy which has potential consequences for the view of the goal of the EU. It cannot be presented as a simple logical deduction with reference to an as yet not agreed-to goal for EU cooperation.

It follows that in this context the presence or, as is more often the case, absence of empirical data is a side-issue of little importance. Referring back to what was said above regarding the successful use of "spill-over" to justify the creation of the third pillar, if it had been the case that the Member States were adamant that criminal justice not be part of the EU's competence catalogue for ideological reasons, referring to the likely or actual increase in cross-border criminal activity is not a good counter argument. All ideological positions are maintained at some cost; this can be called "choice cost." The difficulty is that when it comes to the subject-matter of the third pillar the cost is tallied in blood rather than in money. That, however, still does not change the fundamental fact that, as Walker points out, 'security policy is never *compelled* by external events.'[66] External events are an indicator as to what the choice cost of one policy option may be but they are in no way conclusive as to the correctness of that policy option. Saying that 'because of the cross-border nature of

[65] Alegre, S. and M. Leaf (2004). "Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study - the European Arrest Warrant." European Law Journal **10**(2): 200-217., at p. 215.
[66] Neil Walker, 'In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey', in Walker, N., Ed. (2004). Europe's Area of Freedom, Security and Justice. Oxford, Oxford University Press., at p. 13.

terrorism, the EU is an appropriate forum to deal with it'[67], is only true if certain ideological preconditions pertain, namely that effective repression of terrorism trumps national sovereignty over criminal justice (assuming that terrorism is considered a problem of criminal justice).

It can thus be seen that a statement which at first glance may seem devoid of ideological controversy becomes very problematic if it is to provide the basis for institutional reform. Simply saying that '[t]he task is to diminish or eradicate undesirable asymmetries and to reduce the criminogenic effect of those we wish to preserve or cannot do much about'[68] in the context of international cooperation in fact seeks to bypass a large number of controversial issues. The argument which needs to be made and won in order to justify the internationalisation[69], or, in this case, europeanisation of criminal justice, must relate to the weight attributed to national sovereignty *vis-à-vis* repressive effectiveness.[70] A policy position incorporating a strong defence of national sovereignty in criminal justice may or may not come at a choice cost in human lives. That is an as yet unanswered empirical question. In turn, that may or may not be considered a reason to modify this underlying policy position. It is, however, always logically erroneous to deduce the correctness of one policy option from the eventual choice cost of another. Again referring to the creation of the third pillar, the ideological nature of the development is illustrated by the absence of empirical data to substantiate the claims as to the choice cost relating to cross-border criminal activity. This strongly indicates that the empirical reality, if there is such a thing, was very much subordinated to ideological considerations. This question is addressed at length by von Bogdandy in his partial and guarded endorsement of

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[67] Douglas-Scott, S. (2004). "The Rule of Law in the European Union - Putting the Security into the Area of Freedom, Security and Justice." European Law Review **29**(2): 219-242., at p. 220.

[68] Nikos Passas, 'Globalization and Transnational Crime: Effects of Criminogenic Asymmetries', in Williams, P. and D. Vlassis, Eds. (2001). Combating Transnational Crime - Concepts, Activities and Responses. London, Frank Cass., at p. 46.

[69] On which, see Delmas-Marty, M. (2002). "Global Crime Calls for Global Justice." European Journal of Crime, Criminal Law and Criminal Justice **10**(4): 286-293.

[70] See, e.g., Roy Godson and Phil Williams, 'Strengthening Cooperation Against Transnational Crime: A New Security Imperative', in Williams, P. and D. Vlassis, Eds. (2001). Combating Transnational Crime - Concepts, Activities and Responses. London, Frank Cass.; Willy Bruggeman, 'Policing in a European Context', in Apap, J., Ed. (2004). Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement. Cheltenham, UK; Northhampton, MA, USA, Edward Elgar.; and Gruszczyńska, B. (2004). "Crime in Central and Eastern European Countries in the Enlarged Europe." European Journal on Criminal Policy and Research **10**(2-3): 123-136.

human rights as the new 'axis of the European legal system.'[71] He correctly identifies the ideological roots of that agenda: 'Given the strong centralizing effects, a forceful human rights policy will, nevertheless, be advocated by those who wish courageous steps to be taken to strengthen the European federation.'[72]

This novel use of "spill-over" related arguments is problematic in that they imply that the EU naturally entails some inexorable and self-justificatory movement towards universal centralisation. This is above all a democratic problem. As Monar has pointed out, '[m]ajor political projects, once launched on a sufficiently broad scale and backed by an effective legitimizing political discourse, can become a driving force of their own.'[73] However, this is only true as long as it is not remembered that "spill-over" argumentation is ultimately based on agreed goals which, in turn, are based on ideological choices. The failure to take this into account is the fundamental flaw of consequentialist argumentation.

In conclusion, it seems evident that "spill-over" and related consequentialist arguments have been absolutely central to the creation and the further development of the third pillar. The above criticism of the way the arguments have been made should not be read as a general criticism of the direction of the EU's development. In fact, it probably is a forceful argument in favour of further europeanisation of criminal justice that law enforcement must undergo structural modification in order to deal with criminal entities operating in a virtually borderless world;[74] as Walker correctly points out, 'no sensible security policy can be blind to gradual or sudden environmental changes.'[75] Here, however, we gradually move away from the consequentialist arguments that the EU, by virtue of its very existence and

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[71] von Bogdandy, A. (2000). "The European Union as a Human Rights Organization? Human Rights and the Core of the European Union." Common Market Law Review **37**: 1307-1338.
[72] *Ibid*., at p. 1337.
[73] Monar, J. (2001). "The Dynamics of Justice and Home Affairs: Laboratories, Driving Factors and Costs." Journal of Common Market Studies **39**(4): 747-764., at p. 758.
[74] See, e.g., Raymond E. Kendall, 'Responding to Transnational Crime', in Williams, P. and D. Vlassis, Eds. (2001). Combating Transnational Crime - Concepts, Activities and Responses. London, Frank Cass., and Gerspacher, N. (2005). "The Roles of International Police Cooperation Organizations - Beyond Mandates, Towards Unintended Roles." European Journal of Crime, Criminal Law and Criminal Justice **13**(3): 413-434.
[75] Neil Walker, 'In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey', in Walker, N., Ed. (2004). Europe's Area of Freedom, Security and Justice. Oxford, Oxford University Press., at p. 12.

development, has given rise to a general situation which requires further centralisation to an argument according to which the EU, since it is a political actor subject to popular opinion, needs to react to sudden and often traumatic events in the lives of its citizens. As we will see, individual events have sometimes had a determinate effect on third pillar developments.

2. The reactive justification

The very existence of the EU compels it to relate somehow to specific events, whether their remedy would be considered within EU competences or not. This is emphasised not least by popular clamour for "action" and a consequential wish from the EU to benefit from this possibility to gain popular appeal. From a PR perspective this makes a lot of sense: 'What is beyond dispute is public support for the objectives of the Third Pillar. A Eurobarometer Report in 2000 showed that the European public regarded fighting organized crime and drug trafficking as the second equal highest priority of the EU.'[76] Little surprise then that the EU should try to benefit from the obvious 'output legitimacy'[77] it stands to gain in responding forcefully to popular demands in the field of internal security. In relative terms, the third pillar is not old as a policy area, but already this outspoken wish to "deliver the goods" has set it apart from the other areas of EU action: 'One striking characteristic of the development of Justice and Home Affairs (JHA) has been the extent to which it has taken the form of a *reaction* to current events or to secular trends, *or at least has been presented in these terms*.'[78]

Examples of actual events leading to the introduction of new policy initiatives or significantly speeding up already existing ones are not hard to come by. One of the driving factors behind the introduction of asylum as an EU issue was the fact that

[76] Denza, E. (2002). The Intergovernmental Pillars of the European Union. Oxford, Oxford University Press., at pp. 286-287.
[77] See, e.g., Lenaerts, K. and M. Desomer (2002). "New Models of Constitution-Making in Europe: The Quest for Legitimacy." Common Market Law Review **39**: 1217-1253.
[78] Neil Walker, 'Freedom, Security and Justice', in De Witte, B., Ed. (2003). Ten Reflections on the Constitutional Treaty for Europe. Florence, European University Institute; Robert Schuman Centre for Advanced Studies and Academy of European Law., at p. 164.

Germany felt (and still feels) that it bore a disproportionate burden in terms of asylum applications and refugee reception.[79] If there were many contributing factors leading up to making asylum a matter for EU action, there are also examples of legislative action being taken as a direct consequence of events having given rise to intense media coverage in one or several Member States.[80] One very telling example is the 1997 adoption of the Joint Action concerning action to combat trafficking in human beings and sexual exploitation of children.[81] The general consensus seems to be that this by all means worthy measure was adopted solely as a result of Belgian pressure following the Dutroux-scandal.[82] It then provided the grounding for continued EU action in the area of trafficking which resulted in a 2002 Framework Decision harmonising the substantive law on the subject.[83] The main problem with this 'jumping of scales'[84], from the national to the European level, is that it is only motivated by national political expediency. It may or may not be appropriate for the EU to act in the area in question, what matters is that having the EU "adopt" an issue usually helps a national government in 'taking the heat off an increasingly acrimonious domestic political debate.'[85] If the substance of the issue is a policy "no-brainer" (as is the ban on the sexual exploitation of children), or even potentially beneficial for the other Member States, action will be taken. Always, however, such proposals become bargaining chips in the overall political process. Monar sees this phenomenon as one of the main explanations for the uneven development of policy areas in the third pillar.[86]

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[79] See Monar, J. (2001). "The Dynamics of Justice and Home Affairs: Laboratories, Driving Factors and Costs." Journal of Common Market Studies **39**(4): 747-764.
[80] See Weyembergh, A. (2004). L'harmonisation des législations : condition de l'espace pénal européen et révélateur de ses tensions. Bruxelles, Editions de l'Université de Bruxelles.
[81] See above.
[82] See Weyembergh, A. (2004). L'harmonisation des législations : condition de l'espace pénal européen et révélateur de ses tensions. Bruxelles, Editions de l'Université de Bruxelles. and Monar, J. (2001). "The Dynamics of Justice and Home Affairs: Laboratories, Driving Factors and Costs." Journal of Common Market Studies **39**(4): 747-764.
[83] See above.
[84] See Paul de Hert, 'Division of Competencies between National and European Levels with regard to Justice and Home Affairs', in Apap, J., Ed. (2004). Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement. Cheltenham, UK; Northhampton, MA, USA, Edward Elgar.
[85] Monar, J. (2001). "The Dynamics of Justice and Home Affairs: Laboratories, Driving Factors and Costs." Journal of Common Market Studies **39**(4): 747-764., at p. 756.
[86] *Ibid*.

The single event which undoubtedly provided the most impetus to the nascent European criminal justice system was the terror attacks on New York and Washington on 11 September 2001.[87] Within a relatively speaking very short time span, the EU had adopted three legislative acts which became watersheds for the third pillar. These were the Council Framework Decisions on the European Arrest Warrant and the common definition of Terrorism, and the Council Decision setting up Eurojust.[88] While most of these measures 'had been in the pipeline prior to September 11'[89], the political will which had been lacking before that fateful date was now overabundant: 'All of these radical measures were subject to less controversy and agreed more quickly than could have conceivable been the case without the events of 11 September 2001.'[90]

This swift and forceful reaction to an international trauma such as 9-11 could be seen as a very positive demonstration that the EU, despite the often maligned continued operation of unanimity in this area, can make significant progress. Another view is that the very fact that the EU could take action this swiftly and this forcefully is cause for concern. In fact, the history of the post-9-11 legislative frenzy provides us with an interesting insight into the possible consequences of the Council's institutional independence in this area. As Douglas-Scott points out, the lack of democratic accountability enabled a Council unanimously convinced that action was necessary to jump to it in a way which would have been impossible 'had democratic controls been in place […] the checks and balances of the democratic process tend[ing] to get in the way of efficiency.'[91] Thus, contrary to the usual way of things, lack of democratic accountability may, under special circumstances, operate as a catalyst for action in the third pillar. Lack of democratic accountability, however, can also be seen as the

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[87] See, e.g, Wade, M. L. (2007). "Fear vs Freedom Post 9/11 - A European debate: Introduction." European Journal of Criminal Policy and Research **13**: 3-12.
[88] See above.
[89] Douglas-Scott, S. (2004). "The Rule of Law in the European Union - Putting the Security into the Area of Freedom, Security and Justice." European Law Review **29**(2): 219-242., at p. 220.
[90] Joanna Apap and Sergio Carrera, 'Progress and Obstacles in the Area of Justice and Home Affairs in an Enlarging Europe: An Overview', in Apap, J., Ed. (2004). Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement. Cheltenham, UK; Northhampton, MA, USA, Edward Elgar., at p. 8. See also Deen-Racsmány, Z. and R. Blekxtoon (2005). "The Decline of the Nationality Exception in European Extradition?" European Journal of Crime, Criminal Law and Criminal Justice **13**(3): 317-363.
[91] Douglas-Scott, S. (2004). "The Rule of Law in the European Union - Putting the Security into the Area of Freedom, Security and Justice." European Law Review **29**(2): 219-242., at p. 221.

result of such swift action by the Council. The absence of any identifiable opposition makes it extremely difficult to hold anyone to account for the decisions once made. The Council as such is not accountable before the electorate and a unanimous vote by members of numerous political persuasions is a very effective screen against attacks by domestic opposition.

If asymmetric policy development may be considered a rather minor problem the solution to which being to make sure the under-developed policy areas catch up, the lack of democratic accountability is a serious concern in both of its incarnations as catalyst and as result. Its catalytic effect raises concerns over issues of opportunity and quality of legislation, while from the point of view of it *qua* result, the lack of any real possibility to hold the responsible politicians to account surely menaces the core of democratic government. Faced with an extraordinary event which can be construed as an emergency situation, we have now seen that the very institutional design which was perceived as hindering, indeed construed to hinder and to slow down EU action – unanimity – can in fact facilitate precipitous action. In this regard the institutional set-up of the third pillar is very reminiscent of what Agamben calls a 'state of emergency'[92], a concept which is also found in many national constitutions. The EU is, strictly speaking, not empowered to deal with "states of emergency"[93] in this sense but it has nevertheless become clear that the EU, in its own way, does deal with them. In the case of 9-11, the state of emergency which followed served to justify and to rally support for EU action. The problem is that the measures justified and brought in to deal with an emergency situation related to terrorism 'go far beyond the terrorism field, seeping into the criminal law generally, intruding on individual rights.'[94] It might be contended that this is necessary, that the world is now in something of a "permanent state of emergency."[95] The problem is that generally in national constitutions, parliament defines or acknowledges a state of emergency and

[92] Agamben, G. (2003). Stato di eccezione. Torino, Bollati Boringhieri.
[93] The RT does include the possibility of a future EU "state of emergency" response. Article 175 C TFEU: 'The Union shall encourage cooperation between Member States in order to improve the effectiveness of systems for preventing and protecting against natural or man-made disasters.' New Article 10 A EU would extend such cooperation to the EU's external action in assisting third country victims of such events.
[94] Douglas-Scott, S. (2004). "The Rule of Law in the European Union - Putting the Security into the Area of Freedom, Security and Justice." European Law Review **29**(2): 219-242., at p. 228.
[95] See, e.g., Blair, T. (2006). I don't destroy liberties, I protect them. The Observer. London.

also verifies that the measures adopted during the state of emergency are limited to that period.[96] In any case, the executive cannot declare a state of emergency and act upon it unilaterally.[97] This is, however, exactly what seems to be the case in the EU context: national executives, acting as the EU legislature, use a perceived state of emergency to enact measures which, at the very least, can be qualified as controversial. In addition, these measures extend beyond the context of the perceived emergency, both temporarily and substantively.

Arguably, what is here referred to as the 'reactive justification' for EU action is not a justification at all. As the reasoning above shows, it is more a description of the exceptional circumstances under which other, substantive, justifications acquire decisive force. This little analytical observation aside, the EU's search for 'output legitimacy'[98] in the context of the third pillar is problematic for a number of reasons, the most serious being the lack of democratic accountability which becomes increasingly glaring as the Council of Ministers becomes increasingly active.

The consequentialist and reactive justifications share their claim to objective and apolitical rationality. Action is presented as a natural and uncontroversial consequence of objective facts. In both cases, however, we have seen that this screen of objectivity hides a reality which is very much ideological, be it in the implicit understanding of what the 'goals' of the EU are in the case of "spill-over" and related arguments, or the determination of what constitutes a state of emergency in the case of reactive justifications. Luckily, these two options do not exhaust the justificatory potential for EU action in the area of criminal justice. As we shall see, many commentators have realised that the only way coherently to argue for EU action in criminal justice is to acknowledge the ideological tenor of the discussion. The argument is thereby transposed from hidden agendas on what the EU is or should do to what the EU ought to be.

[96] See, e.g., Article 36 of the French Constitution of 1958.
[97] See reasoning of the UK House of Lords in *A. v. Home Secretary* [2004] UKHL 56.
[98] See above.

3. Re-evaluating the justifications for EU criminal justice

By virtue of the present-day institutional structure of the third pillar, the EU's legislative policy in the field of criminal justice is executive-driven.[99] In terms of how we classically conceive of democratic government, this is unacceptable. The discussion on whether the two attempted justifications of this state of affairs described above have been and continue to be presented in good faith I leave to the side. What has to be accepted is that they both serve to justify eminently political choices as apolitical reactions. There is, however, a current of thought which tackles the ideological questions inherent in the discussion on EU criminal justice head on, arguing from the perspective of the principled goals EU criminal justice ought to serve to promote.

The common starting point for all adherents of this "teleological school" is the need to politicise this policy area, which generally translates into calls for a significantly increased role for the European Parliament. For example, van den Wyngaert emphasises the importance of 'input legitimacy' in this area currently so dominated by 'output legitimacy.'[100] To her, the former is 'crucial because it coincides with the principle of legality of crimes and sanctions.'[101] van den Wyngaert leaves it open whether the increased influence should be in favour of the European and/or national parliaments 'depending on the centre of gravity that the new structure will have: more intergovernmental or more European'[102], but the absolutely necessary connection between criminal policy and democratic accountability is never in doubt. As stated by Weyembergh, 'the principle of legality constitutes the individual consideration for our negotiated liberty.'[103]

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[99] See, e.g., Weyembergh, A. (2004). L'harmonisation des législations : condition de l'espace pénal européen et révélateur de ses tensions. Bruxelles, Editions de l'Université de Bruxelles., at p. 293.
[100] See above and, also, Kaiafa-Gbandi, M. (2005). "The Treaty Establishing a Constitution for Europe and Challenges for Criminal Law at the Commencement of 21st Century." European Journal of Crime, Criminal Law and Criminal Justice **13**(4): 483-514.
[101] Christine van den Wyngaert, 'Eurojust and the European Public Prosecutor in the Corpus Juris Model: Water and Fire?', in Walker, N., Ed. (2004). Europe's Area of Freedom, Security and Justice. Oxford, Oxford University Press.
[102] *Ibid*.
[103] Weyembergh, A. (2004). L'harmonisation des législations : condition de l'espace pénal européen et révélateur de ses tensions. Bruxelles, Editions de l'Université de Bruxelles., at p. 276. [« *[L]a légalité pénale représente pour chacun la contrepartie d'une liberté négociée* »]

Once EU criminal justice policy is overtly recognised as a political project, the issue of procedural symmetry exemplified above by the expression *égalité des armes* and deemed incorrect in the context of a consequentialist argument is aptly brought to the fore. If, as would appear to be, for instance, den Boer's wish, the EU is to work towards 'the gradual establishment of a European *Rechtstaat*'[104] it is imperative to start revaluing the 'Freedom' in the 'Area of Freedom, Security and Justice.' And this is, in fact, the most common approach adopted by those who overtly present their views as ideological arguments for the future of Europe: 'The right balance between Freedom, Security and Justice needs to be ensured. Security and law enforcement policies need to be developed with "freedom" as the point of departure.'[105] Rethinking the EU's objectives in terms of the promotion of freedom and human rights has an illustrious following[106] and even sceptics of the idea of making this the central concern for the EU as a whole seem to agree that 'legal scholarship should investigate this possibility, in particular in those legal fields which are the most sensitive, such as the nascent police cooperation law, freedom of movement or access to justice.'[107]

What is generally acknowledged in academia is that the EU's *de facto* entry into the field of criminal justice should herald a substantive shift in terms of the politico-legal philosophy animating the project. The idea seems to be that criminal justice requires a whole new dimension to be introduced in the way we think about Europe. Since the stakes are no longer the mere economic damages resulting from restrictions of the four freedoms, but the joint responsibility in how state coercion is exercised in relation to Europe's citizens, the EU needs

[104] Monica den Boer, 'The European Convention and its Implications for Justice and Home Affairs Cooperation', in Apap, J., Ed. (2004). Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement. Cheltenham, UK; Northhampton, MA, USA, Edward Elgar., at p. 131.
[105] Joanna Apap and Sergio Carrera, 'Progress and Obstacles in the Area of Justice and Home Affairs in an Enlarging Europe: An Overview', in *ibid.*, at p. 12.
[106] Noted in this regard is Alston, P., Ed. (1999). The EU and Human Rights. Oxford, Oxford University Press.
[107] von Bogdandy, A. (2000). "The European Union as a Human Rights Organization? Human Rights and the Core of the European Union." Common Market Law Review **37**: 1307-1338., at 1336.

> 'a consensus concerning the necessary standards of the procedural rights' protection or, in other words, a model of protection which is not ruled by considerations of effectiveness or simplification but which defines the unswerving, indispensable level of protection for a law community with principles inherited by the national constitutions and ECHR.'[108]

The main point to retain from the above citation is the need for a 'consensus' in the field of procedural rights, the translation of freedom in the specific context of criminal justice. And here we rejoin the discussion of the goal of the EU familiar from the debate on "spill-over" and other consequentialist arguments. There is indeed a need for a consensus on what the goals of the EU are in the context of criminal justice. Criminal justice cannot be treated as mere administrative 'flanking measures'[109] in the service of the four freedoms as would appear to have been the case thus far.[110] If the EU is sometimes to dictate the circumstances under which its citizens can be sent to prison it needs a story on why it does it, as it has a story on the purpose of the four freedoms. Lindahl makes the argument that 'values are a constitutive feature of territoriality as such.'[111] What he means is that a legal territory is defined by the geographical limits of the ability of a particular association of human beings successfully to defend a given set of values. In this sense, values logically precede territory in that the values have to be defined before any territory within which to defend them can be defined. Applied to the EU, it may even be the case that the area of freedom, security and justice cannot be said to exist in any real sense as a legal territory before we have reached some kind of consensus on the values we intend to bind in and safeguard by way of its creation.[112] The story on, or justification for, why the EU is to deal with criminal justice is thus necessarily ideological unless we are content to see the EU as a geographical reality – as distinct from its constitutive Member States – slip through our fingers.

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[108] Kaiafa-Gbandi, M. (2005). "The Treaty Establishing a Constitution for Europe and Challenges for Criminal Law at the Commencement of 21st Century." European Journal of Crime, Criminal Law and Criminal Justice **13**(4): 483-514., at p. 497.
[109] See Paul de Hert, 'Division of Competencies between National and European Levels with regard to Justice and Home Affairs', in Apap, J., Ed. (2004). Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement. Cheltenham, UK; Northhampton, MA, USA, Edward Elgar.
[110] See, e.g., Steve Peers, 'Human Rights and the Third pillar', in Alston, P., Ed. (1999). The EU and Human Rights. Oxford, Oxford University Press.
[111] See Lindahl, H. (2004). "Finding a Place for Freedom, Security and Justice: The European Union's Claim to Territorial Unity." European Law Review **29**(4): 461-484., at p. 468.
[112] *Ibid*.

In a way, the discussion called for would come at a very opportune moment. In the Western world we are currently experiencing an almost universal re-evaluation of our systems of criminal justice and the protection of our fundamental freedoms[113] and the EU both sees itself and is increasingly seen as an important institutional framework in this regard. Tellingly, in the so-called "Hague Programme" the Council affirms that '[t]he citizens of Europe rightly expect the EU, while guaranteeing respect for fundamental freedoms and rights, to take a more effective, joint approach to cross-border problems such as illegal migration, trafficking in and smuggling of human beings, terrorism and organised crime, as well as the prevention thereof.'[114] The debates we see in the individual Member States on the role of criminal justice in society need to be expanded to encompass the European dimension.[115] It is perhaps 'vain and outdated' to hope that this expansion of the debate on criminal justice to include Europe may serve to steer European criminal justice back to the ideals of the Enlightenment and early modern times.[116] Nevertheless, it is to be hoped that the change of perspective puts into more stark relief the civilisational issues at stake. Again citing Kaiafa-Gbandi:

> 'We should never forget that the European legal civilization is an anthropocentric civilization and this fact is principally depicted by the safeguards for people's fundamental rights and freedom. That is the reason why the Union should recall "the

[113] See, e.g., Smith, A. T. H. (2007). "Balancing Liberty and Security? A Legal Analysis of United Kingdom Anti-Terrorist Legislation." European Journal of Criminal Policy and Research **13**: 73-83.

[114] The Hague European Council Conclusions, 4-5 November 2004, at p. 9. See also European Commission Communication on measures to be taken to combat terrorism and other forms of serious crime, in particular to improve exchanges of information, COM(2004)221 final, 29.3.2004; European Commission Communication on the Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations, COM(2004) 401 final, 2.6.2004; and European Commission Communication on establishing a framework programme on "Security and Safeguarding Liberties" for the period 2007-2013, COM(2005) 124 final, 6.4.2005.

[115] In this regard, and for a nuanced account of the implementation of EU *acquis* criminal justice in the most recent Member States, see John R. Spencer, 'The Impact of Accession on the Criminal Law and Criminal Procedure of the New Member States', in Hillion, C., Ed. (2004). EU Enlargement: A Legal Approach. Oxford and Portland, Oregon, Hart Publishing.

[116] Weyembergh, A. (2004). L'harmonisation des législations : condition de l'espace pénal européen et révélateur de ses tensions. Bruxelles, Editions de l'Université de Bruxelles., at p. 298. [« *[I]l nous paraît vain et dépassé d'attendre de l'Union européenne qu'elle fasse revenir le droit pénal à ce qu'il était au siècle des Lumières ou à l'époque moderne* »]

> forgotten freedom" which was born in the bosom of European legal tradition and especially in the field of criminal law.'[117]

There will be many and varied hopes as to the result of this discussion but what needs to be remembered is that there is no fatalism about EU action in the field of criminal justice. Contrary to what many seem to argue[118], '[t]here is no law of historical development.'[119] There certainly are choice costs related to any perceivable course of action but ultimately it boils down to political choices which should be based on principles which have been subject to open debate. In short, if the EU chooses to engage in criminal justice, it must do so properly. Doing it properly also entails accepting that criminal justice is an indivisible whole, the varying aspects of it all translating the basic values of the society it serves to protect.

We are now in a position to identify the exact source of the failure, mentioned in the beginning of this chapter, to provide a satisfactory analytical framework for EU's development into an actor in the field of criminal justice. With few exceptions, the justifications discussed above all start from the perspective of how the criminal law can develop and perfect the EU, alternatively how it can compensate for some of its undesirable side-effects. This, it is firmly submitted, is fundamentally flawed. This attempt to instrumentalise the criminal law was never going to provide the answer because it fails properly to take into account the fact that the criminal law is the backbone of human society. These attempts to put the criminal law at the service of EU law have, as we shall see, resulted in a patchy and oftentimes incoherent legislative landscape.

This is not to say, however, that the EU should not be an actor in the field of criminal justice. The EU probably was an actor in criminal justice long before it formally

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[117] Kaiafa-Gbandi, M. (2005). "The Treaty Establishing a Constitution for Europe and Challenges for Criminal Law at the Commencement of 21st Century." European Journal of Crime, Criminal Law and Criminal Justice **13**(4): 483-514., at p. 513.

[118] See, e.g., Recasens, A. (2000). "The Control of Police Powers." European Journal on Criminal Policy and Research **8**(3): 247-269.

[119] Didier Bigo, 'The European Internal Security Field: Stakes and Rivaleries in a Newly Developing Area of Police Intervention', in Anderson, M. and M. den Boer, Eds. (1994). Policing Across National Boundaries. London and New York, Pinter Publishers., at p. 166.

adopted this role; the EU has had and continues to have a fundamental impact on criminal justice by virtue of the simple fact that it changes the social context in which criminal justice has to operate. And this is the point: EU criminal justice should not, in my opinion, be approached from the point of view of EU law, but from the point of view of the criminal law. EU action in the field of criminal justice should not seek to perfect the EU, but rather seek to perfect the criminal law in the novel context that is the EU. The discipline of EU criminal justice should thus aim to set the EU in the context of the criminal law rather than, as has tended to be the case thus far, the criminal law in the context of the EU.

This work is dedicated to providing this alternative view of EU criminal justice, to providing a goal for criminal justice in the EU. The result is that this is primarily a study of the criminal law, and only secondarily and incidentally a study of EU law. This perspective has dictated the methodological approach adopted. In order to be able to set the EU developments in the context of criminal justice, it has first to be defined what that context is. Consequently, in Title I we will look at the development of the theory of criminal justice since the Enlightenment. It will be concluded that the theory which provides the analytically most coherent justification for criminal justice is social contract theory. This theoretical framework famously makes a number of normative claims but what is often ignored is that these normative claims are dependent upon a prior ontological context – the social contractual unit. Title II is therefore dedicated to answering the ontological question of whether the EU can or should be seen as a social contractual unit to which the normative precepts of social contract theory can be applied. After concluding that this is the case, Title III then draws the specific normative conclusions for criminal justice in the EU from the perspective of social contract theory.

Adopting social contract theory as the theoretical framework of this thesis may seem to commit me to a number of controversial positions. As we shall see, social contract theory has suffered authoritative criticism from authors as diverse, both temporally and ideologically, as Bentham and Dworkin. For this reason I would like, pre-emptively, to make a number of points on the matter of what I do and, most importantly, do not claim. These points will all be expanded upon in the body of this

work but I feel that it would be useful if the reader kept them at in mind from the start. I do not claim that social contract theory exhaustively covers the realm of moral philosophy. I do, however, claim that social contract theory has peremptory force within its field of application. It therefore follows that the identification and, consequently, the delimitation of the field of application of social contract theory – the social contractual unit – becomes crucial. Although our focus will be on the ontology, i.e. the scope, of the social contractual unit, it needs to be pointed out that the version of social contract theory defended here is also limited as to the depth of the social contractual unit. Whereas the scope, fundamentally, determines who can claim rights to defend liberties under the social contract, the delimitation of the depth of this social contract implies that although fundamentally interpersonal, the social contract does not determine all aspects of interpersonal relations (provided, of course, that these do not involve violations of the fundamental principles of the social contract).[120] My arguments in Title I on the correct interpretation and application of social contract theory stand, or fall, on their own. Whether I am justified in applying them to the EU in Title III is completely dependent upon my having been successful in identifying the EU as a social contractual unit in Title II. Less central, but perhaps helpful in order to stay out of unnecessary controversy, I wish to emphasise, again, that this is a work on criminal justice and thus solely concerned with *immediate coercion*, i.e. direct violence on individuals and the violence used in response. Whether or not the principles developed in Title I can and should be applied with respect to *mediate coercion*, i.e. coercion applied to prop up and to defend state regulation in the spheres of social and economic policy, I pass under silence, I hope consistently. This is not to say that I do not see and acknowledge the applicability of social contract theory to these wider discussions, merely that they do not concern me here.[121]

[120] I do not, for instance, feel that social contract theory has much to contribute to the discussion of inequality in private (non-violent) relationships resulting in the, by some perceived, systematic subordination of one party. Cf. Richardson, J. (2007). "Contemporary Feminist Perspectives on Social Contract Theory." Ratio Juris **20**(3): 402-423.

[121] This is why I will not deal with the development, alluded to above, of criminal justice as an aspect of various policies related to the common market.

Title I

Social contract theory – normative principles of criminal justice

Introduction and brief historical overview

The legitimacy of a system of criminal justice is under threat more from abuses in its criminal procedure than from injustices in its substantive criminal law.[122] This is not a new realisation as can be seen in some of our most revered historical texts.[123] In *Magna Carta* (1215)[124] the English King promises that '[n]o freemen shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land'[125], and further that '[t]o no one will we sell, to no one will we deny or delay right or justice.'[126] The English Petition of Right (1628), largely attributed to the efforts of the legendary Edward Coke CJ, made appeal to the principles of the *Magna Carta* establishing that 'no freeman may be taken or imprisoned or be disseised of his freeholds or liberties, or his free customs, or be outlawed or exiled, or in any manner destroyed, but by the lawful judgment of his peers, or by the law of the land.'[127] In the American Declaration of Independence (1776) one of the grievances against English rule was the 'depriving us in many cases, of the benefits of trial by jury.' Article 7 of the *Déclaration des Droits de l'Homme et du Citoyen* (1789) states that '[n]o man may be accused, arrested or detained otherwise than as determined by law and under the procedure established by it'[128], and its Article 9 lays down that '[s]ince every man is presumed innocent until found guilty, if it is necessary to arrest him, all severity beyond the absolutely essential shall be severely punished by the law.'[129] All

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[122] For example the crushing dominance of claims to the European Court of Human Rights based on the Article 6 right to a fair trial (see Grotrian, A. (1994). Article 6 of the European Convention on Human Rights. Strasbourg, Council of Europe, Publishing and Documentation Service., at p. 6). See also the pervasiveness of the "rights of the defence" in textbooks on criminal procedure. It needs to be remembered, however, that what may seem substantive is in fact procedural. This was been shown with admirable clarity in relation to the presumption of innocence in Tadros, V. and S. Tierney (2004). "The Presumption of Innocence and the Human Rights Act." Modern Law Review **67**(3): 402-434.

[123] For a good history of civil liberties, see Pound, R. (1975). The Development of Constitutional Guarantees of Liberty. Westport, Connecticut, Greenwood Press.

[124] For the text and a good historical context, see Danziger, D. and J. Gillingham (2003). 1215 - The Year of Magna Carta. London, Hodder and Stoughton.

[125] § 39.

[126] § 40.

[127] § III.

[128] « *Nul homme ne peut être accusé, arrêté ni détenu que dans les cas déterminés par la Loi, et selon les formes qu'elle a prescrites.* »

[129] « *Tout homme étant présumé innocent jusqu'à ce qu'il ait été déclaré coupable, s'il est jugé indispensable de l'arrêter, toute rigueur qui ne serait pas nécessaire pour s'assurer de sa personne doit être sévèrement réprimée par la loi.* »

international human rights documents espouse these principles. For European purposes, the most important is Article 6 of the European Convention of Human Rights and Fundamental Freedoms (ECHR).

Perhaps surprisingly, the importance of procedural safeguards in our constitutional history is not matched by corresponding reflection on their principled justification and place in the larger scheme of moral and political theory. So although the assumption that '[t]he extent to which human rights are respected and protected within the context of its criminal proceedings is an important measure of a society's civilisation'[130] is longstanding, criminal procedure, and the procedural safeguards which define it, seems to have been left to depend on crude assumptions as to the needs of society more or less checked by a concern for individual rights.

What I want to do is to start remedying this deficiency by attempting to provide a theory of procedural safeguards in criminal proceedings coherent with political and moral theory. As will become clear, I make no claims to ideological neutrality: I believe that classical liberal social contract theory is the only concept of society which can coherently account for the complex interplay between individual wants and desires, and societal demands for collective discipline. Because "liberalism" in general, and social contract theory in particular, has come to be used in a variety of contexts to mean a variety of things, a large portion of what follows will be an explanation and justification of what I consider to be the core principles of this theory. The theory of procedural safeguards that I present and, I hope, justify, is directly consequential upon these principles.

[130] Andrews, J. A., Ed. (1982). Human Rights in Criminal Procedure - A comparative Study. The Hague/Boston/London, Martinus Nijhoff Publishers., at p. 8.

1. The enlightenment origins of the theory of criminal procedure

When the Enlightenment philosophers observed the society around them they saw criminal justice systems often used as instruments of injustice by more or less dictatorial rulers. It needs to be remembered, however, that during this period (early to middle 18th century) in what we would now refer to as Western Europe there was a marked difference in legal culture and attitude to personal freedom.[131] In England, the absolutist tendencies of the monarchs had been to some extent curbed with not insignificant help from a relatively independent judiciary[132] while in large parts of the European continent, and France in particular, legal systems were often little more than administrative branches of an over-powerful executive.[133]

The first attempts at critical analysis of the legitimacy of the procedural aspects of criminal justice come to us from France. Why critical analysis of this type should originate in the France of Louis XV, rather than the significantly more liberal England of George II we can only speculate. It is probable, however, that England criminal procedure and procedural safeguards were practical concerns as was the law in general and therefore little academic attention was devoted to them. 'Unlike continental states used to a civilian academic tradition working with a corpus of learned laws, England was only slowly beginning from the late eighteenth century to develop a body of legal treatises and an academic tradition.'[134] This would explain why what I refer to as "theory of criminal procedure" originated on the continent: academic concern for the criminal process as such arose out of a very distinct need for reform.

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[131] See Ratnapala, S. (1993). "John Locke's Doctrine of the Separation of Powers." American Journal of Jurisprudence **38**: 189-220.
[132] See Pound, R. (1975). The Development of Constitutional Guarantees of Liberty. Westport, Connecticut, Greenwood Press.
[133] See e.g. introduction to Stefani, G., G. Levasseur, et al. (2004). Procédure pénale (19e édition). Paris, Dalloz.
[134] Lobban, M. (2000). "How Benthamic Was the Criminal Law Commission?" Law and History Review **18**(2): 427-432., at p. 432.

1.1. Montesquieu

In 1748, Montesquieu published *De l'Esprit des Lois*.[135] It is a momentous work spanning most disciplines which can loosely be considered as belonging to the social sciences. Whether any of them is treated in a satisfactory manner by today's standards I happily leave to the experts in the various fields to decide. As far as procedural theory is concerned, *De l'Esprit* is by no means a coherent treatise on the subject. Its importance lies elsewhere. Montesquieu did not set out to write a normative work but rather wanted to subject society in its entirety to critical, empirical analysis. His main claim is one of systemic coherence in government: governing principles have to accord to the type of government they are meant to apply to and its particular requirements.

We can only guess at Montesquieu's personal feelings on the subject, but given his status and experience[136] he knew better than to turn his *œuvre* into a tract on political reform. He thus never expressly states a preference for any specific type of government. Consequently, it is in a spirit of observation rather than explanation that we commence our discussion of the origins of procedural theory.

A number of principles of criminal procedure we today hold for evident truth Montesquieu posited in the form of statements of observable fact. Thus he stated that '[p]olitical freedom resides in personal security, or at least one's view of one's security' and that '[t]his security is never more under threat than in public or private prosecution.' Montesquieu concludes that 'the citizen's freedom depends first and foremost on the rectitude of the criminal law.'[137]

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[135] Montesquieu (Charles Louis de Secondat, b. d. l. B. e. d. M. (1995). De l'Esprit des Lois. Paris, Éditions Gallimard.

[136] Charles Louis de Secondat, baron de la Brède et de Montesquieu, was born into an aristocratic family and the high offices, including judicial, which came with this status.

[137] « *La liberté politique consiste dans la sûreté, ou du moins dans l'opinion que l'on a de sa sûreté.*

Cette sûreté n'est jamais plus attaquée que dans les accusations publiques ou privées. C'est donc de la bonté des lois criminelles que dépend principalement la liberté du citoyen » (Livre XII, Chapitre II, at p. 376).

To Montesquieu, questions of procedure were of the very essence to this rectitude of the criminal law, hence 'the efforts, the costs, the delays, and even the dangers of justice, are the price each citizen pays for his freedom.'[138]

As stated above, we should be careful to draw any normative conclusions from this statement. It is first and foremost to be read as an empirical fact that the government of a particular society will have to deal with. A despotic government, for instance, would not wish its citizens to be free. In fact, for a government the main characteristic of which is *terror*[139], freedom would be counter-productive to say the least. On the other hand, for a republican government which thrives on the *virtue* of its citizens[140], freedom would be very desirable.

It is of course slightly rigid to infer from Montesquieu's stated aim of empirical neutrality and failure *expressly* to state a preference, the absence of a *de facto* preference. Montesquieu knew the system and its flaws well and it is difficult not to infer a distinct preference for freedom over servitude, for virtue over terror. In a time of increased use of the concept of "the other"[141] it is interesting to note that Montesquieu was an early proponent of this doubtful rhetorical devise. In fact, as an illustration of evil government (i.e. the archetypal despotism), Montesquieu makes inordinate, and probably undeserved, use of Ottoman Turkey.[142] In the context of criminal procedure, the '"Eastern menace" serves as the counter-example to "moderate society" where the value of each citizen is considerable and where a citizen will be deprived neither of his honour nor his possessions except after a long process: 'his life will not be taken except when the nation itself attacks it; and it only attacks leaving him with all possible means of defending it.'[143]

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[138] « *[L]es peines, les dépenses, les longueurs, les dangers même de la justice, sont le prix que chaque citoyen donne pour sa liberté* » (Livre VI, Chapitre II, at p. 198).
[139] See Livre III, Chapitre IX.
[140] See Livre III, Chapitre III.
[141] For a critique of this see, e.g, Baderin, M. A. (2005). "Human Rights and Islamic Law: The Myth of Discord." European Human Rights Law Review **2**: 165-185.
[142] This imagery was widespread already in mid-17th century Western Europe. See, e.g., Vallance, E. (2006). The Glorious Revolution. London, Little, Brown.
[143] « *Mais dans les États modérés, où la tête du moindre citoyen est considérable, on ne lui ôte son honneur et ses biens qu'après un long examen : on ne le prive de la vie que lorsque la Patrie elle-même l'attaque ; et elle ne l'attaque qu'en lui laissant tous les moyens possibles de la défendre* » (Livre VI, Chapitre II, at p. 199).

The essence of Montesquieu's legacy in terms of procedural theory is probably the descriptive point that one of the main defining features of a government is its concern for the individual in the criminal process. In this he is categorical. He states, *inter alia*, that '[w]hen the innocence of citizens is not ensured, nor is freedom.'[144]

It is also in the context of concern for the individual that we find one of Montesquieu's rare outbursts of personal conviction. When discussing the use of interrogational torture he confesses: 'I was about to say that [torture] could be of use to despotic governments where all that which instils terror enters more into the means of government […] But I hear nature's voice violently opposing me.'[145]

1.2. Beccaria

This brings us to the next milestone in the study of procedural theory, a work more famous for its views on punishment than for its contribution to the field of procedural theory. While Cesare Beccaria's *Dei Delitti e delle Pene* from 1764[146] is very eloquent in its opposition to torture and the death penalty, this is more an example of humanism before its time than of the clear and incisive analysis which distinguishes his treatment of the origins and role of procedural safeguards. In fact, the methodology which I will apply in Chapter 3 of this Title I owe largely to Beccaria. To my mind, many of his conclusions are still valid.

The starting point for Beccaria is the apparent lack of intellectual study of the criminal process and its consequences in Europe.[147] In a criticism which would not sound out

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[144] « *Quand l'innocence des citoyens n'est pas assurée, la liberté ne l'est pas non plus* » (Livre XII, Chapitre II, at p. 377).
[145] « *J'allais dire qu[e la torture] pourrait convenir dans les gouvernements despotiques, où tout ce qui inspire la crainte entre plus dans les ressorts du gouvernement [...] Mais j'entends la voix de la nature qui crie contre moi* » (Libre VI, Chapitre XVII, at pp. 225-226).
[146] Beccaria, C. (1965). Dei Delitti e delle Pene. Firenze, Felice Le Monnier.
[147] '*[P]ochissimi hanno esaminata e combattuta la crudeltà delle pene, e l'irregolarità delle procedure criminali, parte di legislazione così principale, e così trascurata in quasi tutta l'Europa*' (Introduzione, at p. 158).

of date were it written today, he further denounces the tendency of legislators to legislate in reaction to contingencies as opposed to legislating on principle.[148]

For our purposes however, the most essential feature of *Dei Delitti* is its principled treatment of procedural safeguards. If the concern for the individual was embryonic in Montesquieu, it is fully developed in Beccaria. In *Dei Delitti* Beccaria, clearly inspired by the philosophy of Hobbes, Locke and Rousseau, derives the justification for the criminal law from the social contract. This contract, entered into to end the inherent uncertainty and insecurity of the state of nature, constitutes the sole basis for man's authority over man, independently of the other sources of law, namely divine revelation and natural law. In this manner Beccaria manages to extricate the issue of divine justice which had long obscured the rational consideration of the criminal process:

> 'Not all that which is required by revelation is required by natural law; nor everything required by the latter is required by mere municipal law; but it is of the utmost importance to separate that which results from this convention, these express or tacit pacts of men, because they constitute the limits of that coercion which can legitimately be exercised by man on man without special mandate from the Supreme Being.'[149]

The rules resulting from the social contract thus constitute both the limits to and the justification for the use of collective force.[150] As long as the pact is intact, society may deprive no man of its protection. The illustration used is that of interrogational torture. On a comparative note, it is with regards to this very discussion that the difference in scope between *De l'Esprit* and *Dei Delitti* becomes very telling. Whereas, as we have seen above, Montesquieu offers no principled justification for

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[148] '*I legislatori [...] impauriti per la condanna di qualche innocente, caricarono la giurisprudenza di sovercie formalità ed eccezioni, l'esatta osservanza delle quali farebbe sedere l'anarchia impunita sul trono della giustizia; impauriti per alcuni delitti atrocie e difficili a provare, si credettero in necesità di sormontare le medesime formalità di essi stabilite: e così or con dispotica impazienza, or con donnesca trepidazione trasformarono i gravi giudizii in una specie di giuoco, in cui l'azzardo ed il raggiro fanno la principale figura*' (§ VIII f.n., at p. 199).

[149] '*Non tutto ciò che esige la rivelazione, lo exige la legge naturale; né tutto ciò che esige questa, lo esige la pura legge sociale; ma egli è importantissimo di separare ciò che risulta da questa convenzione, cioè dagli espressi o taciti patti degli uomini, perché tale è il limite di quella forza, che può legittimamente esercitarsi tra uomo e uomo, senza uno speciale missione dell'Essere Supremo*' (A chi legge, at p. 150).

[150] See generally § II.

his apparent total rejection of interrogational torture, Beccaria does. Society may only bear a hand on anyone after such person has been declared in breach of her/his obligations under the social contract by a judge.[151] Interrogational torture, by definition prior to such declaration, is therefore absolutely excluded as a breach of the fundamental preconditions of society.

Beccaria, to whom we shall return towards the end of this Title, also expresses very firm opinions on the primordial importance of legal certainty[152], the accusatorial burden of proof[153], and even considers 'the right of everyone to be believed innocent.'[154]

Thus, towards the end of the 18th century there are the beginnings of critical procedural theory in European academic thinking. It belongs to a distinctly liberal tradition which puts the individual at the centre of an ideology where the legitimate use of force is subject to strict legal limits derived from the notion of the social contract.

1.3. Bentham and the advent of utilitarianism

What I would call the second phase in the development of procedural theory began roughly twenty years later with the writings of Jeremy Bentham. With the entry of Bentham and utilitarianism, the basic building blocks of the modern debate on

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[151] '*Un uomo non può chiamarsi reo prima della sentenza del giudice, né la società può togliergli la pubblica protezione, se non quando sia deciso ch'egli abbia violati i patti, co'quali gli fu accordata*' (§ XII, at p. 214).
[152] § XXXIII.
[153] § XL.
[154] '*[…] il diritto che ciascuno ha di esser credudo innocente*' (§ VII, at p. 198). The procedural theoretical framework one is left with is so thorough that one is very disappointed at the "slip-ups" which do occur. For instance, Beccaria is of the opinion that banishment is a suitable punishment for those 'accused of an atrocious crime who are very likely, but not certain, to be guilty.' The statute under which such punishment is possible has to be very clear and precise and only apt to condemn 'him who places the nation in the fatal alternative of either fearing him or doing him wrong, however leaving him the sacred right of proving his innocence.' ['*Sembra che il bando dovrebbe esser dato a coloro, i quali, accusati di un atroce delitto, hanno una grande probabilità, ma non la certezza contro di loro di esser rei: ma per ciò fare è necessario uno statuto il meno arbitrario e il più preciso che sia possibile, il quale condanni al bando chi ha messo la nazione nella fatale alternative o di temerlo o di offenderlo, lasciandogli però il sacro diritto di provare l'innocenza sua*' (§ XVII, at pp. 273-274)]

procedural theory are in place. Henceforth all aspects of criminal law will be seen through the spectrum of the debate between the traditional, social contract inspired liberalism and one or other form of utilitarianism. Some may find the distinction perplexing. It is in fact *de coutume* to assign Bentham and even more so John Stuart Mill (more on whom later) to the box of "liberal thinkers." This, in my opinion, is where the "inflation" in the label "liberalism" takes off. From an analytical perspective there is a world between the "liberalism" of Locke and Kant and that of Bentham and Mill. It is probably a valid categorisation to the extent that all these thinkers were more "liberal" in the sense of socially tolerant than were the majority of their contemporaries. As a tool for analytical categorisation, however, the label "liberalism" has lost most of its pertinence. This will be addressed further on in this Title.

Jeremy Bentham was a prolific writer and, like Montesquieu, he has put his mark on much of social science. This is because of the force of his argument that his "utility principle" could and should be applied in all human activity, from individual to state actions. Bentham first accounts for this principle in *An Introduction to the Principles of Morals and Legislation* from 1789.[155] The book is often presented as a work on moral philosophy and one might wonder at it figuring in a work on the theory of criminal procedure. However, as has been pointed out by very distinguished writers[156] this one-sided focus is regrettable. In fact, *An Introduction* was written as an introduction to a plan for a penal code.[157]

The utility principle is concerned with maximising pleasure and minimising pain. An action thus conforms to this principle 'when the tendency it has to augment the happiness of the community is greater than any it has to diminish it.'[158] When it comes to government, its 'business […] is to promote the happiness of the society, by punishing and rewarding' and, of particular importance for our purposes, '[t]hat part

[155] Bentham, J. (1996). An Introduction to the Principles of Morals and Legislation. Oxford, Clarendon Press.
[156] See Hart, H. L. A. Bentham's Principle of Utility, postscripting the above edition.
[157] See Farmer, L. (2000). "Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833-45." Law and History Review **18**(2): 397-426.
[158] An Introduction, ch. I, § 6, at pp. 12-13.

of its business which consists in punishing, is more particularly the subject of penal law.'[159]

By focusing on the end-result of the criminal procedure, i.e. the imposition or not of punishment, Bentham effectively takes the individual out of the equation. While 'all punishment in itself is evil [and] ought only to be admitted in as far as it promises to exclude some greater evil'[160], the innocence or guilt of persons concerned is nothing more than one consideration among others. For instance, Bentham considers punishment to be groundless where 'the act was necessary to the production of a benefit which was of greater value than the mischief'[161], irrespective of whether or not the act constituted an offence. On the other hand, the innocence of a person does not seem to preclude the imposition of punishment. In fact, Bentham's treatment of this problem comes under his discussion of the 'unprofitability' of punishment: 'the danger there may be of its involving the innocent in the fate designed only for the guilty' is not a procedural issue but one of 'subjecting [the offence] to such a definition as shall be clear and precise enough to guard effectually against misapplication.'[162] To Bentham it comes down to a mere question of drafting.

Bentham's dismissive attitude towards the individual in the operations of the state becomes even clearer in *On Laws in General*, in reality a compilation of writings published posthumously. [163] Here Bentham discusses the limits of the sovereign's law making powers and reaches the conclusion that 'the mandate of the sovereign be it what it will, cannot be illegal: it may be cruel; it may be impolitic; it may even be unconstitutional: but it cannot be illegal.'[164] This is so because constitutional constraints are not derived from any alleged "rights" of individual members of society. Instead they are but promises from the sovereign *not* to act in a certain way.

Bentham's disdain for the very notion of rights is well documented. In commenting on the French *Déclaration des Droits de l'Homme et du Citoyen*, he makes the

[159] *Ibid.*, ch. VII, § 1, at p. 74.
[160] *Ibid.*, ch. XIII, § 2, at p. 158.
[161] *Ibid.*, ch. XIII, § 5, section ii, at p. 159.
[162] *Ibid.*, ch. XVII, § 14, at pp. 288-289.
[163] Bentham, J. (1970). Of Laws in General. London, University of London The Athlone Press.
[164] *Ibid.*, ch. I, § 8, at p. 16.

sweeping statement: '*Natural rights* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense – nonsense upon stilts.'[165] Bentham makes similar remarks in a 'Concluding Note' to *An Introduction* where he dismisses as nonsense the unalienable right to life and liberty alluded to in Article 1 of the Declaration of Rights of the newly emancipated colony of North Carolina.[166]

To his credit, Bentham takes the consequences of this reasoning to their logical conclusion: since it makes no sense for an entity to make what amounts to an unenforceable promise to itself, the sovereign must be an entity distinct from the body politic.[167] The entity charged with the promotion of happiness in the body politic by rewarding and punishing is not the embodiment of the greatest number, but a distinct sovereign, the existence of which we are to accept as social reality.

Under such circumstances the fact that Bentham's theory lacks a justification for the state or sovereign as the embodiment of collective coercion is a glaring defect. It is rather surprising but in this respect Bentham's theory is a clear step back from the writings of Thomas Hobbes. Not unlike Hobbes' Leviathan, the power of Bentham's sovereign knows no boundaries in legitimacy. But whereas the Leviathan is at least notionally justified by the one-time acquiescence of free individuals, Bentham's state has no such justificatory licence.

The consequence of Bentham's theory in terms of the nature of criminal procedure is that of an absolute subjection of the individual to a calculation of whether punishing him or her is conducive to public happiness. This calculation is effectuated by an entity distinct from the collective the happiness of which it is to promote, an entity unconstrained by any "rights" of individuals.

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[165] Anarchical Fallacies - Being an examination of the Declaration of Rights issued during the French Revolution, written between 1791 and 1795, published in 1816. The version cited can be found at http://jan.ucc.nau.edu/~dss4/bentham1.pdf.

[166] An Introduction, Concluding Note, § 27, at pp. 309-310.

[167] 'It is not the people who are bound by it, it is not the people whose conduct is concerned in it, but the sovereign himself; in as far as a party can be bound who has the whole force of the political sanction at his disposal', Of Laws in General, Ch. 1, § 8, at p. 16.

It would probably have been to little avail confronting Bentham with the Kantian categorical imperative that people are never to be used as means, but always as ends in themselves. In the hive that is utilitarian society, individual happiness or pain are only relevant as far as they have an impact on aggregate happiness. The idea of considering the sovereign as an entity distinct from the body politic thus becomes clear: members of the body politic are ultimately individuals whose interests will potentially have to be sacrificed for the good of the collective. A detached and impersonal sovereign devoid of such concerns is the only thing capable of always carrying out the mandates of the utility principle.

Whether the theoretical construct thus created by Bentham, with a completely impartial and completely detached sovereign or arbiter of the demands of the utility principle, is practically conceivable on its own terms is an interesting question. It is however an avenue of inquiry too tangential to our present purposes to be pursued here. For our purposes, what we are left with is a criminal procedure founded on the utility principle. Its only concern is thus the advancement of aggregate happiness in the body politic in its field of application and this unconcerned with individual rights.

1.4. Mill and the advent of "liberal utilitarianism"

Bentham's ideas were distinctly un-English[168] and in order to be palatable for English consumption, utilitarianism would have to change. This change came with the writings of John Stuart Mill. Whether Bentham considered himself a liberal I do not know but Mill definitely did. Nevertheless, he was also a utilitarian. Ostensibly combining a strong defence of individual rights with a utilitarian framework for society Mill provided what has remained the paradigmatic justification of individual rights to this day.

[168] See, e.g., Lobban, M. (2000). "How Benthamic Was the Criminal Law Commission?" Law and History Review **18**(2): 427-432.

In *On Liberty*[169] from 1859 Mill states the objective of the essay in the following terms:

> '[…] to assert one very simple principle […] that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.'[170]

Prima facie this seems a classic liberal statement of the Rights of Man and there should be no doubt as to Mill's belief in the importance of individual freedom. He is perhaps most famous for his statement on freedom of speech that '[i]f all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.'[171]

Where Mill's argumentation becomes problematic is in relation to the scope of his general principle, or, in Mill's own words, 'the appropriate region of human liberty.' The principle to guide this determination is that '[t]o individuality should belong the part of life in which it is chiefly the individual that is interested; to society, the part which chiefly interests society.'[172] What now becomes crucial is from which end one attacks the problem: concern for individual rights should start from the individual, reserving a space where society has no right to interfere. The residual space would then be where society can legitimately intervene.

On the contrary, however, Mill, like Bentham, takes society and thus some measure of collective authority as a social fact which does not require any justification in and of itself:

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[169] As reprinted in Mill, J. S. (2002). The Basic Writings of John Stuart Mill. New York, The Modern Library.
[170] *Ibid.*, ch. I *Introductory*, at p. 11.
[171] *Ibid.*, ch. II Of the Liberty of Thought and Discussion, at p. 18.
[172] *Ibid.*, ch. IV Of the Limits to the Authority of Society over the Individual, at p. 77.

> '[S]ociety is not founded on a contract, and though no good purpose is answered by inventing a contract in order to deduce social obligations from it […] the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest.'[173]

For Bentham, as we have seen, this fact led to an omnipresent collective and the complete exclusion of individual rights. For Mill, society's axiomatic status does not exclude individual rights but it does determine their extent. Thus, instead of drawing the jurisdictional line between individual and society from the point of view of the individual, Mill places himself firmly on the side of society: 'As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion.'[174]

The end result is that liberty according to Mill is only admitted when its exercise has no significant effect either way on general welfare. From this point of view it can be said that the scope of *On Liberty* is in fact very limited dealing only with the liberties of conscience and expression (and their corollaries). Further, Mill qualifies his devotion even to this limited residual conception of individual liberty:

> 'Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion […] I forego any advantage which could be derived to my argument from the idea of abstract right, as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being.'[175]

One wonders whether Mill himself realised the extent to which he here weakens the concept which is the subject of his essay. Central to the above reasoning are the twin notions of improvement and progression. Being a convinced utilitarian[176] we can have little doubt that improvement and progression in Mill's conception means ever

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[173] *Ibid*.
[174] *Ibid*., at p. 78.
[175] *Ibid.*, ch. 1 Introductory (pp. 12-13).
[176] See Mill, J. S. (2001). Utilitarianism. London, ElecBook. (*sic*!).

closer conformity with the utility principle. Liberty is thus fundamentally instrumentalised, justified only as the best method of achieving progress. Mill's claim is ultimately one of *method* rather than of principle. Setting social progress as the end to which individual rights allegedly contribute, he comes full circle. By ultimately justifying individual rights by their utility, the jurisdictional boundary drawn between the individual and society becomes superfluous. Mill's basic contention can thus be resumed with the statement that at a certain stage in a civilisation's advancement, certain individual rights contribute to general welfare and are justified with reference to utility. This may seem, and to many has seemed, a match made in heaven. It will become clear, however, that the subsuming of individual liberties to general welfare offers them little celestial protection against attack.[177]

Mill never expressly pronounced himself on those liberties associated with criminal procedure, but the near total success of his conceptual linking of individual liberties with utilitarian principles has had a universal effect on the whole field of individual liberties. Because of Mill, utilitarianism has become so dominant so as to encompass even most theorists calling themselves "liberals", heirs to the movement utilitarianism set out to counter.[178] The new term "libertarian" has even had to be invented to accommodate those theorists loyal to the original tenets of liberalism.

As far as the theory of criminal procedure is concerned, this utilitarian slant has had a number of consequences.

[177] See Murphy, J. G. (1995). "Legal Moralism and Liberalism." Arizona Law Review **37**: 73-93.
[178] See e.g. Pound, R. (1954). An Introduction to the Philosophy of Law. New Haven, London, Yale University Press.

2. The utilitarian slant and its consequences

As an introduction to this chapter, I shall take a brief look at research into an aspect of criminal procedure dealing with the very initial stages of a criminal investigation: police work. In 1968, Stoddard published an article documenting the existence of 'an informal "code" of illegal activities within one police department.'[179] This was the starting-point of a line of criminological research into what became known as 'police deviancy.' Stoddard's initial analysis was an application of Sutherland's now classical 'process of differential association.'[180] This theory holds that members of a certain association can end developing a relatively closed atmosphere in which committing certain types of crime – the type often being determined by social status – is accepted as the norm. At the same time, this association is characterised by increased internal cohesion and a correspondingly increased isolation from the rest of the law-abiding citizenry. It is this process that Stoddard claimed to be the explanation for the police deviance that he observed.

More recently however, the expressions of deviancy under scrutiny are different. Whereas the object of Stoddard's research was self-serving corruptive practices as well as outright theft, modern theorists seem more interested in those expressions of deviancy which per definition can only be attributed to those called upon to uphold the law. As a consequence of this, discussion has taken a distinctively utilitarian turn. With respect to the sometime failure by police officers strictly to adhere to principles of the Rule of Law, Bayley suggests that Stoddard's approach is simply mistaken. 'The problem', according to Bayley, 'is that they believe that the violation of law and of human rights is sometimes required for effective law enforcement.'[181] The question which preoccupies many in this field is whether this is true. This seems an

[179] Stoddard, E. R. (1968). "'The Informal Code' of Police Deviancy: A Group Approach to 'Blue-Coat Crime'." Journal of Criminal Law, Criminology & Police Science **59**(2): 201-213.
[180] Sutherland, E. H. (1940). "White-Collar Criminality." American Sociological Review **5**(1): 1-12.
[181] Bayley, D. H. (2002). "Law Enforcement and the Rule of Law: Is There a Trade-Off?" Criminology and Public Policy **2**(1): 133-154, Finckenauer, J. O. (2002). "Laws, Rules and Police Policy." Criminology and Public Policy **2**(1): 161-166.

impossible question to answer. As is hinted at by Chevigny[182], while the claim that law enforcement would be more effective if police were given more freedom from procedural constraints is empirical, it is impossible adequately to measure the dividends derived from increased community confidence in the police force due to strict adherence to those same procedural constraints. Another consideration is that statistics will always be biased: short-term decreases in crime-rates are easy to detect, whereas the erosion of community confidence is a slow process the tangible results of which are statistically difficult to attribute. Faced with this methodological impossibility, one can only agree with Chevigny's conclusion that the debate should remain one of social values rather than one of attempting to tease out some statistical "truth" to a question which is essentially moral: what kind of society do we want to live in?

The view of procedural safeguards as obstacles to effective enforcement of the law can nevertheless have two effects: first, individual police officers "cutting corners" on the street, and, second, by more "upright" claims for changes in the law to free the police force from the shackles of extensive procedural safeguards.[183]

The common concern, however, of the police officer cutting corners and his superiors lobbying for changes in the law of criminal procedure is a notion of better serving society, making the average law-abiding citizen safer and thus happier: classic utilitarianism. As we move to consider the effects of the utilitarian slant on the normative debate on procedural safeguards, we will see that the same consideration of somehow maximising happiness dominates.

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[182] See e.g. discussion in Chevigny, P. G. (2002). "Conflict of Rights and Keeping Order." Criminology and Public Policy **2**(1): 155-160.

[183] See e.g. John Alderton, 'Human Rights and Criminal Procedure: A Police View' in Andrews, J. A., Ed. (1982). Human Rights in Criminal Procedure - A comparative Study. The Hague/Boston/London, Martinus Nijhoff Publishers. This discussion was central in the UK government's proposal to extend possible pre-trial detention to a maximum of three months. After massive resistance in both houses, the maximum time went from 14 to 28 days in section 23 of the Terrorism Act 2006. See e.g. Association, P. (2005). Clarke urges Lords to give way on terror bill. The Guardian. London.

2.1. The lure of empiricism

By putting the maximisation of aggregate happiness at the centre of all human endeavours, utilitarianism makes an extremely rational claim. Its uniqueness with respect to other moral theories is that its claims are not *a priori* prescriptive but methodological. We are not told what to do, but how to determine what to do. According to classic utilitarianism, whatever course of action serves to increase aggregate happiness is the correct one. The modern expression of utilitarianism in criminal procedure is the notion that individual liberty must be weighed against collective security. This will be addressed at length further on, for now suffice to say that it seems reasonable to assume that the attraction of utilitarianism lies precisely in this "empiricising" of morality.

It is thus not surprising that there is a branch of the theory of criminal procedure which attempts to do precisely this. By conducting empirical research into satisfaction-rates as a result of various procedural options, the school of "procedural psychology" attempts to provide objective data on which options are superior. The expanding array of findings is interesting and illuminating but as I will attempt to show, the fundamental problem is not the reliability of empirical findings. Instead, the problem resides in the fundamental premise of the research.

In the early seventies, the natural curiosity of comparative lawyers, no doubt spurred on by a healthy dose of competitiveness, led to attempts to settle the age-old question of the comparative merits of the inquisitorial versus adversary systems of trial procedure empirically. The first series of experiments were conducted by Thibaut and Walker, professors of psychology and law respectively. They conducted a series of laboratory studies using undergraduates as subjects publishing their results in various law journals during the years 1972-1973.

These first investigations were aimed at evaluating certain received "truths" about various aspects of judicial procedure with respect to the treatment of evidence. They dealt with the ability of the adversarial system to counter received bias in legal

decision makers[184], the effect of the order of presentation on outcomes in an adversarial setting[185], and an ambitious investigation into the comparative merits of inquisitorial and adversarial systems regarding the discovery and presentation of evidence.[186]

A rough synthesis of the results obtained would be that the adversary mode of proceeding worked to the advantage of the weaker party. Of particular interest as far as criminal procedure is concerned is Thibaut and Walker's conclusion that client centred counsel for the defence (whether facing a more inquisitorial style, court-centred prosecution counsel or a more adversarialy inspired party-biased prosecution counsel) seems to work to the advantage of the accused.

Thibaut and Walker's research sought to establish some psychological facts with regard to structural features of the process. As such their work ought not to have been very controversial. Nevertheless, the nascent science immediately drew criticism from distinguished quarters. Starting out with the wise caution that 'our modern eagerness for empirical information must not blind us to the need for careful theoretical preparation before we descend to the empirical plane', Damaška queried whether the, by necessity, exclusive focus on the factual aspects of adjudication did not render any comparison between systems devoid of use.[187] Indeed, especially as far as the criminal process is concerned, the "correct" treatment of factual evidence will largely be determined on the basis of other values than epistemological accuracy: 'As the criminal process is not an untrammelled exercise in cognition, it does not take much imagination to realize that from the standpoint of other important values, an epistemologically inferior technique may on the whole be preferable.'[188] Different systems of criminal procedure will have different conceptions of what the exact purpose of that procedure is and the values they want it to reflect. According to

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[184] Thibaut, J., L. Walker, et al. (1972-1973). "Adversary Presentation and Bias in Legal Decisionmaking." Harvard Law Review **86**: 386-401.
[185] Walker, L., J. Tibaut, et al. (1972-1973). "Order of Presentation at Trial." Yale Law Journal **82**: 216-226.
[186] Lind, E. A., J. Thibaut, et al. (1972-1973). "Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings." Michigan Law Review **71**: 1129-1144.
[187] Damaška, M. R. (1974). "Presentation of Evidence and Factfinding Precision." University of Pennsylvania Law Review **123**: 1083-1106.
[188] *Ibid*., at p. 1103.

Damaška, then, '[i]t must [first] be determined with sufficient precision what is the referent to which the characterization "truth" or "falsity" applies.'[189]

I agree with Damaška's analysis to the extent that the unavoidable interlacing of facts, law, and the values translated by the law makes empirical comparisons of systems difficult. This is true, however, only to the extent that value-based differences are considered admissible. As we have seen when discussing classic theories, opinions on the theory of criminal procedure are intimately connected with moral philosophy, which is intrinsically universalist. Cultural differences can then only, on any theory, be admissible if they do not challenge any of the core values of the fundamental theory. Inversely, if we hold certain features of the criminal procedure to be essential, as we do, we must then also consider them immune to cultural relativism.

Damaška may have realised this. Unfortunately though, his discussion of these distinctions is relegated to a few remarks in a footnote: 'Minimizing the *total number of inaccurate outcomes* and minimizing *false positives* are two different concerns. As long as one remains in the sphere of procedural epistemology, the two issues must not be confused.'[190] What Damaška is saying, I think, is that there is a fundamental difference between the search for objective truth (assuming it exists), which characterises for instance experimentation in the natural sciences, and the objective of a criminal trial. Whereas the former seeks as little deviation as possible from an imagined mean of scientific reality (i.e. minimising the total number of inaccurate outcomes), the latter is primarily concerned with making sure that no person is erroneously convicted (i.e. minimising false positives). This is nothing other than the old adage that it is preferable to let ten (or a hundred, or a thousand) men go free rather than to convict one innocent. If we hold this to be a universal imperative for criminal procedure, results such as those presented above will surely be helpful in the context of any particular system.[191]

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[189] *Ibid*., at p. 1085.
[190] *Ibid*., f.n. 33, at p. 1098.
[191] For an example of procedural reform attempting to grapple with these issues, see Spencer, J. R. (2007). "Acquitting the innocent and convicting the guilty - Whatever will they think of next!" Cambridge Law Journal **66**(1): 27-30.

The research conducted by Thibaut and Walker was not only concerned with the objective effect on perceptions of the truth of different ways of presenting evidence. 'One of the most striking discoveries of the Thibaut and Walker research group was the finding that satisfaction and perceived fairness are affected substantially by factors other than whether the individual in question has won or lost the dispute.'[192] These results were presented in a 1975 book[193] and have since been the subject of intense study. The underlying assumption would appear to be that it is an objective good to minimise the displeasure incurred by a judicial process, civil or criminal, and thus hostility towards the institutions responsible for it.[194] And given that most judicial processes result in a winner and a loser, if there is indeed a degree of independence of the rate of displeasure from the fact of losing, that is an interesting finding.

Thibaut and Walker contended that procedures which delegate significant control over the course of the proceedings to the parties themselves are seen as fairer by *all* participants, irrespective of whether they won or lost, than procedures in which the decision maker retains control. Translated into the inquisitorial-adversarial debate, this means that archetypically adversarial proceedings seem "fairer" than archetypically inquisitorial ones.

Subsequent research has yielded a large and diverse body of data largely confirming this initial finding in a variety of settings.[195] Of particular interest here is of course research specifically into criminal procedure since there are several reasons why "procedural justice" cannot simply be considered to cover all types of procedure. First, there is research showing that citizens use complex and varying sets of criteria when evaluating the fairness of procedures, depending on the type of procedure they are involved in.[196] A second and more fundamental problem has to do with methodology. By necessity much of the research done in this area is based on

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[192] Lind, E. A. and T. R. Tyler (1988). The Social Psychology of Procedural Justice. New York, Plenum Press., at p. 26.
[193] Thibaut, J. and L. Walker (1975). Procedural Justice: A Psychological Analysis. Hillsdale (NJ), Laurence Erlbaum.
[194] See discussion in Lind, E. A. and T. R. Tyler (1988). The Social Psychology of Procedural Justice. New York, Plenum Press.
[195] See discussion in Röhl K. F., 'Procedural Justice: Introduction and Overview', in Röhl, K. F. and S. Machura, Eds. (1997). Procedural Justice. Aldershot, Ashgate.
[196] Tyler, T. R. (1988). "What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Proceedings." Law and Society Review **22**: 103-153.

laboratory reproductions of trial settings and many would argue that this method is unable to reproduce the degree of seriousness for the defendant characteristic of the criminal trial; results obtained thereby cannot be transposed to the area of criminal procedure.[197] In order to test these propositions Casper, Tyler, and Fisher conducted experiments with real-life felony suspects.[198] Although admitting that there were a host of factors determining displeasure rates, the authors felt that they had established that 'procedural justice makes a significant and independent contribution'[199] and, consequently, that 'previous findings of the importance of procedural fairness are probably not simply an artifact of the experimental method, the use of college student subjects, or situations in which stakes are not especially high.'[200] Anecdotally, the factors singled out by this study as important to the reduction of displeasure (defendant-counsel interaction, treatment by police, etc.) correspond to the impression given when I conducted a very limited number of interviews with individuals convicted and sentenced to long prison sentences awaiting the outcome of their appeals.[201]

To recapitulate, and paraphrasing Lind and Tyler in their overview of the research conducted in the field generally[202] as concerns criminal procedure, it can be said that the results so far show that whereas fact-finding is perhaps slightly more accurate in inquisitorial procedures, adversarial procedures would appear to counter bias in decision makers and generally benefit the, on the evidence, weaker party, which tends to be the defendant. However, the factor which seems to excite the most comment is the independent importance of procedural aspects to the reduction of "loser displeasure."

Interesting as these results are, the question is whether they are relevant for what concerns us here, namely the normative theory of criminal justice and procedural

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[197] See eg. Anderson, J. K. and R. M. Hayden (1980-1981). "Questions of Validity and Drawing Conclusions from Simulation Studies in Procedural Justice: A Comment." *ibid.* **15**(2): 293-304.
[198] Casper, J. D., T. R. Tyler, et al. (1988). "Procedural Justice in Felony Cases." Ibid. **22**: 483-503.
[199] *Ibid.*, at p. 494.
[200] *Ibid.*, at pp. 503-504.
[201] These interviews were conducted on 19 July 2005 at Österåker detention centre, north of Stockholm, Sweden.
[202] Lind, E. A. and T. R. Tyler (1988). The Social Psychology of Procedural Justice. New York, Plenum Press.

safeguards. The authors of the research narrated above are relatively guarded as to how they would like to see their results used. Do they really intend for them to be guides to procedural design? Returning again to the very instructive work of Lind and Tyler, the authors have this to say:

> 'Across-the-board endorsement of either the adversary or the inquisitorial procedure runs counter to some research results' but '[i]f we can design a hybrid procedure that does indeed provide the benefits of the adversary procedure without its shortcomings, it would constitute the first instance of procedural engineering guided by science rather than intuition – a notable accomplishment for an area of research less than two decades old.'[203]

For the purposes of discussion, and on the basis of the results of the research, I shall treat procedural psychology as making the following normative claims in relation to the *structural* aspects of institutional procedural design:

1) Fact-finding should be as comprehensive as possible;
2) Presentation of fact should *in principle* correspond to the actual distribution of facts supporting the position of the respective parties; and
3) Initial bias in the decision maker should be countered.

As noted above, procedural psychology does allow for the modulation of 2) to give effect to the non-epistemic principles crucial to the criminal procedure resulting from the presumption of innocence. I discussed these aspects in relation to the criticism presented by Damaška and will merely repeat that the premises of this type of structural research are fairly uncontroversial and, when animated by universal conceptions of the role of criminal procedure, should be of value for cross-systemic comparisons. This means that if we accept, to the extent that it is possible, the habitual division of criminal procedure into a part dealing with the "administrative" side of investigations, and another part concerned with the protection of the individual, empirical research of the kind conducted by procedural psychologists is relevant, perhaps even essential, to the former. What one has to remember though is that this is only so to the extent that the protection of the individual, or procedural safeguards, sets the basic parameters within which "administrative design" can be employed.

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[203] *Ibid.*, at p. 117.

A more controversial normative claim made by procedural psychology is that criminal procedure should aim to reduce displeasure engendered by the criminal process. Bentham would be at home: this is in direct descent from his "utility principle". There are, however, two aspects to this claim which need to be separated. The first relates to the reduction of displeasure experienced by the individual convict. This is, all other things equal, a laudable pursuit. Even to the die-hard retributivist, society's condemnation lies in the sentence handed down, not in the manner the convict was treated while still merely an accused and thus presumed innocent. Strictly speaking, this consideration is not utilitarian since there is no aggregate pleasure or absence of displeasure to be minimised.

If, however, in a purely private dispute the effects on larger society can be said to be minimal to nonexistent, this is not the case with a criminal process. As we shall see later on, the criminal process concerns the trying of an individual for an offence against society. Thus, in the context of a criminal procedure, things are never equal.

This is where the second, and for the purposes of criminal procedure more fundamental aspect comes in. Lind and Tyler note, with a clear nod to criminal procedure, that not all disputes belong exclusively to the parties. It follows that it would be 'a mistake to weigh disputant preferences too heavily in deciding how the dispute should be resolved.' For procedures belonging primarily to society, as do criminal ones, societal interests need to figure heavily and, consequently, there is a need 'to broaden the scope of our studies of the sources of procedural justice judgments to include the fairness judgments of nondisputants.'[204] Here is a clear reference to aggregate displeasure and absence of displeasure, but here is also a practical example of the utilitarian dilemma in its relationship with individuals.

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[204] *Ibid.*, at p. 123. 'Nondisputants' can of course be taken as referring primarily to victims and only secondarily to society at large. This, it is submitted, would make little difference to our reasoning. First, it not obvious that rates of satisfaction with a particular process differ significantly between victims and members of the public although the intensity of feeling most certainly does. Second, as will be discussed further on, it is a fundamental tenet of Western criminal procedure that victimhood is collectivised in the sense that a violation of an individual is considered an attack on the whole of society. According to the criminal law, "society" is the victim. Therefore, it would be conceptually problematic to single out the individual victims as the standards for nondisputant satisfaction.

Taken in isolation, the second aspect is a direct application of Bentham's utility principle. The combination of the first and second aspects is a practical application of Mill's jurisdictional division between the individual and social spheres. And given that the reduction of individual convict-displeasure is only a correct pursuit to the extent justified with reference to the 'fairness judgments of nondisputants', just as with Mill's division, this one collapses, leading to disregard of the individual interest if and when in conflict with the collective interest. What ultimately remains is a classically utilitarian claim for the use of criminal procedure to reduce aggregate displeasure in society within its field of operation.

In addition to the problems associated with the "Millian synthesis", there is a second, methodological reason why the claim made by procedural psychology with regard to the reduction of displeasure seems difficult to maintain. The basis for most of the investigations into displeasure rates in criminal procedures is interviews conducted with suspected criminals, one interview immediately after arrest and one after their case has been finally settled. Further, and again true to its utilitarian origins, procedural psychology confers an inherently axiomatic status on society. It follows that all displeasure inflicted, irrespective of the subject of the displeasure, is inherently bad. The methodological result is that all subjects are treated equally irrespective of their institutional positions. By this I mean to say that whereas the first interview correctly treats all suspects as being in the same situation (presumed innocent), there are strong arguments for treating those ultimately convicted differently from those ultimately acquitted. Should not the displeasure experienced by someone who never ought to have been involved in the criminal process weigh heavier than that of someone who deserves punishment for a serious crime? My own opinion on the matter will become clear later on. At this point, the intention is merely to highlight the failure of procedural psychology even to raise the question.

In equating the displeasure experienced by the accused who has been convicted and that experienced by the accused who has been acquitted, procedural psychology betrays the controversial foundations of this part of its remit. Adapting Damaška's caution to this part of procedural psychology, I maintain that this is a clear attempt at passing over a fundamental controversy by the use of "objective" statistics. Just as a

bloody knife is only relevant evidence in a trial for an offence which could be committed using such a weapon, proving that a certain procedure reduces aggregate displeasure is only relevant if we agree that that is a proper object of criminal procedure. I do not know whether most procedural psychologists would consider themselves utilitarian or if they have even given the question much thought. Be that as it may; in their zeal to remove what to them seems irrational, positing that procedural engineering should be guided by 'science rather than intuition'[205], they ignore the inherently controversial nature of procedural theory and the larger questions of political morality of which it is an aspect. And if they do not, then at least it ought to be expected of them expressly to limit themselves to that part of criminal procedure concerned with "administrative design", taking the fundamental values inherent in the procedure as given.[206] So while it might be true as Röhl states that '[t]he philosophers who have discussed procedural justice […] have so far failed to recognize the extensive empirical results available'[207], that failure must be considered as less serious than the failure of the proponents of empirical research to be upfront about which philosophy they serve.

2.2. The modern predominance of "liberal utilitarianism"

The entry of empirical science into procedural theory cannot on any level be considered a total evil. As we have seen, if the normative framework is clear, empirical science is a valuable ally in procedural design. The problem, rather, is when empiricism is presented as neutral, as somehow obviating the need for normative debate, when in fact the link between the theory of criminal procedure and political morality is inescapable.

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[205] Lind, E. A. and T. R. Tyler (1988). The Social Psychology of Procedural Justice. New York, Plenum Press., at p. 117.

[206] This would, of course, make cross-systemic comparisons very difficult since it would necessitate the elucidation of a cross-systemic value consensus before 'descending to the empirical plane' and "administrative design."

[207] Röhl K. F., 'Procedural Justice: Introduction and Overview', in Röhl, K. F. and S. Machura, Eds. (1997). Procedural Justice. Aldershot, Ashgate.

However, whereas the results of empirical investigations can simply be ignored if one disagrees with the normative premises of the investigation, things are more complicated when normative theory itself attempts to shift those very premises. This, in my view, is the most serious effect of the "Millian" liberal synthesis. Many of those modern thinkers who call themselves "liberals", while aiming to challenge the utilitarian hegemony, end up accepting, at some level, its fundamental, teleological premise that the goal of the good society can ultimately justify sacrificing individual rights. This putting society before the individual passes over the main problem of teleological theory, namely the presupposition that the mere existence of collective force renders it *prima facie* legitimate.[208] It is as though it is assumed that collective thinking is so steeped in a utilitarian logic that a theory is only acceptable if the good of "society" is exalted above all else.

2.2.1. Rawls

The instigator of what could be called a liberal "renaissance" in post-war Western legal philosophy is John Rawls. In his *chef d'œuvre*, *A Theory of Justice*[209], Rawls set out 'to work out a conception of justice that provides a reasonably systematic alternative to utilitarianism, which in one form or another has long dominated the Anglo-Saxon tradition of political thought.'[210] Just as with Mill, it needs to be pointed out that *A Theory of Justice* is not a work on procedural theory. Again, however, the importance of its contribution to rights theory in general is such that it cannot be ignored.

Rawls' main objection to utilitarianism is precisely the way it justifies systematic disregard for individual rights in the name of the welfare of society: 'The striking feature of the utilitarian view of justice is that it does not matter, except indirectly, how this sum of satisfaction is distributed among individuals any more than it matters,

[208] See below.
[209] All references taken from Rawls, J. (1999). A Theory of Justice. Cambridge, Massachusetts, The Belknap Press of Harvard University Press.
[210] Preface for the revised edition, at p. xi.

except indirectly, how one man distributes his satisfactions over time.'[211] In this respect, Rawls clearly sees himself as being the intellectual heir of traditional liberalism: 'What I have attempted to do is to generalize and carry to a higher order of abstraction the traditional theory of the social contract as represented by Locke, Rousseau, and Kant.'[212] The reason why Rawls wants to use the concept of the social contract to challenge utilitarianism is that he realises, in my view correctly, that it is the only way we can conceptualise a justification for the survival of freedom for individuals in society, something utilitarianism completely disregards[213]:

> 'Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many.'[214]

Rawls' contextual analysis is impeccable. The problem lies in the way he imagines the social contract and the consequences which ensue. For Rawls is not satisfied with logically deriving his principles of justice from the demands it can be assumed that individuals in a state of nature would make upon subjecting themselves to collective rule. He fears that natural differences in abilities and fortunes between individuals would lead to the conclusion of an unfair union and that this fundamental inequality, in combination with the requirement of unanimity, would lead to the agreement of a union the guiding principles of which would be 'weak and trivial.'[215]

The solution to this problem is taken from the introduction of the notion of the 'original position.' This is an invention of Rawls' which 'corresponds to the state of nature in the traditional theory of the social contract.'[216] The idea is that the parties to the social contract be equal so that the principles of justice they agree upon are not

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[211] A Theory of Justice, at p. 23.
[212] *Ibid.*, Preface, at p. xviii.
[213] 'I do not believe that utilitarianism can provide a satisfactory account of the basic rights and liberties of citizens as free and equal persons, a requirement of absolutely first importance for an account of democratic institutions' (*ibid.*, Preface, at p. xii).
[214] *Ibid.*, at pp. 3-4. I will address the theoretical foundations for this claim in Chapter 3 of this Title.
[215] *Ibid.*, at p. 122.
[216] *Ibid.*, at p. 11.

unduly disadvantageous to the weaker members of society. The instrument for achieving this is that the parties to the social contract are conceived of as negotiating behind a 'veil of ignorance':

> 'It is assumed, then, that the parties do not know certain kinds of particular facts. First of all, no one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like. Nor, again, does anyone know his conception of the good, the particulars of his rational plan of life, or even the special features of his psychology such as his aversion to risk or liability to optimism or pessimism. More than this, I assume that the parties do now know the particular circumstances of their own society […] The persons in the original position have no information as to which generation they belong.'[217]

Thus stripped of inequalities, these 'free and rational persons concerned to further their own interests'[218] are in a position where they can unanimously agree on principles of justice which are both 'fair' and substantial. The two principles Rawls suggests we would arrive at are the following:

> '[1] Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.
>
> '[2] The principles of justice are to be ranked in lexical order and therefore liberty can be restricted only for the sake of liberty. There are two cases: (a) a less extensive liberty must strengthen the total system of liberty shared by all, and (b) a less than equal liberty must be acceptable to those citizens with the lesser liberty.'[219]

If one accepts Rawls' premises, it is not inconceivable that his conclusions are valid. To my mind however, both arguments adduced by Rawls to justify his premises, i.e. this fundamental modification of the traditional conception of the social contract –

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[217] *Ibid*., at p. 118. The issue of the rights of future and/or potential people under the Rawlsian framework is dealt with in Reiman, J. (2007). "Being Fair to Future People: The Non-Identity Problem in the Original Position." Philosophy & Public Affairs **35**(1): 69-92.. It is uncertain whether Rawls would have agreed with the claim made in this article that his principles can be used to derive an obligation to select between one potential individual rather than another. In any case, the implication that *all potential people* be included in the original position makes is even less theoretically plausible than it already is.
[218] *Ibid*., at p. 10.
[219] *Ibid*., at p. 220.

and justifying the introduction of the second principle –, are controversial and very much open to challenge from a social contract-logic. I will thus deal with them one at a time.

The notion of 'fairness' is central in *A Theory of Justice*. Rawls even calls the theory he eventually arrives at 'Justice as fairness.'[220] The problem for Rawls is that while he wants to show that the principles of justice resulting from the social contract would be inspired by 'fairness', in order to achieve this he needs to manipulate the pre-contractual situation in accordance with it. It is common ground that the defining characteristic of the pre-contractual state of nature is precisely the absence of universally acknowledged principles. So unless Rawls means to say that pre-contractual man actually lived behind a 'veil of ignorance', which he does not[221], he needs to show how this rather substantive notion of 'fairness' appeared in the state of nature in the first place.

Unfortunately, Rawls never explains why man in the state of nature would accept to be thus limited in the negotiations leading up to the conclusion of the social contract. I suspect this is because he cannot. And here is where a clear utilitarian influence bcomes apparent despite Rawls' attempt to distinguish 'Justice as fairness' from utilitarianism:

> '[U]tilitarianism is a teleological theory whereas justice as fairness is not. By definition, then, the latter is a deontological theory, one that either does not specify the good independently from the right, or does not interpret the right as maximizing the good […] Justice as fairness is a deontological theory in the second way.'[222]

This is a very limited interpretation of what is meant by the notion of a teleological theory. In fact, it is limited to the point of being erroneous. Traditional social contract theory would place itself squarely in Rawls' first version of a deontological

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[220] See discussion in the Preface.
[221] Rawls asks us to use his conception of the social contract to evaluate the justice of institutions by imagining ourselves as being behind the 'veil of ignorance', comparing our private moral theories with the ones which would be acceptable in the 'original position' until we can pass judgment in 'reflective equilibrium.'
[222] A Theory of Justice, at p. 26.

theory. It seems doubtful that it would recognise any other version. The second version, which would appear to be Rawls' invention, amounts to saying that any theory which is not utilitarianism is deontological. This is highly contestable. If, as is reasonable, we put deontological in direct opposition to teleological theories, we would then have to say that utilitarianism is the only possible version of teleology. This is not so. The etymology of the notion is the Greek ***τέλος*** which means "goal" or "end." A teleological theory is thus one the principles of which are defined so as to achieve a particular end result. As individuals we all live our lives in accordance with a teleological theory: we all have an idea of what a good life would be for us and we live so as to achieve it. The problem many liberals have with teleology is when it is transposed on society; if society defines for itself what constitutes the good life, it drastically and coercively limits the possibilities for individuals to define this for themselves.

Although it is inherent in Locke, we owe the clearest articulation of this principle to Kant who in his theory of practical morality[223] makes a radical distinction between Right and Virtue. In short Kant argues that only such duties as have external justifications (i.e. the equal freedom of choice of others) can rightly be subject to legislation because such legislation would not encroach upon our faculty of choice which, conclusively, is what makes us human. These are called duties of Right. Duties of Virtue, on the other hand, are those we set up as maxims for our private actions towards whatever ends we choose for our lives. Their justifications are purely internal to ourselves. Although Kant says that there are duties of virtue which we ought to set up for ourselves, the essence of what makes them virtue is that they are chosen in the face of opposing inducements. The reason legislating for ends is morally repugnant is that it would be tantamount to legislating for virtue. Not only would this mean that it ceases to be virtue, but more importantly it would take away from us that which sets us apart from beasts: our capacity for practical morality, i.e. our capacity to choose our own ends. In simple terms, traditional liberalism only recognises legislating in defence of everyone's equal right to choose and strive for

[223] As articulated in Kant, I. (1991). The Metaphysics of Morals. Cambridge, Cambridge University Press.

what to her or him constitutes the good life. Crucially, again, this precludes a collective definition of what constitutes the "good society."

Turning back to Rawls, his notion of 'fairness' is clearly related to his idea of the good society: 'We want to define the original position so that we get the desired solution. If a knowledge of particulars is allowed, then the outcome is biased by arbitrary contingencies.'[224] To say then, as he does, that 'Justice as fairness' is not a teleological theory is mistaken. The benefit of social contract theory is precisely that it provides us with a tool for evaluating which moral principles real, free individuals could agree upon for the purposes of subjecting themselves to collective rule. Rawls' original position only begs the question. For how did 'fairness' make its appearance as a "meta-principle" to govern the very choice of moral principles in the social contract?

The problems with reference to individual liberty become clear when we introduce the factor of collective force into the equation. This is the crucial point as far as criminal procedure is concerned: criminal procedure is precisely meant to determine the conditions under which collective force can be deployed against an individual. In this respect, social contract theory is about providing for the possibility of legitimate collective coercion. It is the central characteristic of the state of nature that it is replete with force, but none of it legitimate and thus morally consequential.

Rawls' original position, however, is steeped in coercion. Since, as we have seen, the veil of ignorance is not an actual occurrence but an instrumental device for the channelling of reason, Rawls must admit that were it not for the veil of ignorance, free individuals would reason differently. That the veil of ignorance is placed there for the sole purpose of justifying the choice of 'Justice as fairness' is something Rawls expressly states on several occasions: 'This original position is not, of course, thought of as an actual historical state of affairs, much less as a primitive condition of culture. *It is understood as a purely hypothetical situation characterized so as to lead to a certain conception of justice*.'[225] Later on, Rawls specifies why this is important:

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[224] A Theory of Justice, at p. 122.
[225] *Ibid.*, at p. 11 (my emphasis).

'Somehow we must nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage.'[226] The only factor which could force free individuals to abandon their self-interest as informed by their own specific situation is coercion. In the state of nature, before the conclusion of the social contract, such coercion does not exist.

This very need for coercion raises the question of Rawls' second argument to justify his substantial modification to social contract theory. With reference to the restrictions imposed on the original position, Rawls makes the following claim:

> 'Without them we would not be able to work out any definite theory of justice at all. We would have to be content with a vague formula stating that justice is what would be agreed to without being able to say much, if anything, about the substance of the agreement itself. The formal constraints of the concept of right, those applying to principles directly, are not sufficient for our purpose. The veil of ignorance makes possible a unanimous choice of a particular conception of justice […] Moreover, if in choosing principles we required unanimity even when there is full information, only a few rather obvious cases could be decided. A conception of justice based on unanimity in these circumstances would indeed be weak and trivial.'[227]

There are two answers to be made to this from a perspective of traditional contract theory. First, it was never a requirement that the social contract should result in substantial principles of justice. Only a desire to reconcile this fundamental element of classic liberalism with teleology could lead to the affirmation that this was necessary. Second, the consequences Rawls sees as flowing from the requirement of unanimity are not at all obvious. Rawls notes that the requirement of unanimity is likely to impinge upon the possibility of arriving at substantial principles but there is nothing in social contract theory which dictates that the number of individuals has to determine the nature of the principles chosen, rather than the other way around. Or, put differently, there is no objective reason for why each and every individual in the state of nature has to agree to the social contract. Those who choose to "go it alone" will remain in a state of nature with regard to those having concluded a social

[226] *Ibid.*, at p. 118.
[227] *Ibid.*, at pp. 121 and 122.

contract, whether they do so as individuals or by concluding a rival social contract based on different principles.

To conclude this critique of Rawls' theory, I maintain that his failure to provide plausible justifications for his profound modification of social contract theory is because his theory is not at all deontological as he claims, but teleological. The illustration of this is that the social contract in the Rawlsian version neither provides the justification for the fundamental principles of collective justice, nor the justification for the deployment of collective coercion. In the vein of Mill trying to justify individual rights by way of utilitarianism, Rawls attempts what is equally ideologically impossible: using social contract theory to justify teleological principles.[228] And as with Mill, the problem is not so much the theory itself but that it is presented under false pretences. The fundamental point is the following: in both cases, no matter how much the authors themselves want to claim it otherwise, individual liberty is sacrificed to the realisation of the "good society."

2.2.2. Dworkin

The second incontrovertible "giant" in the field of "liberal" rights theory of the last fifty years is Ronald Dworkin. Much like Rawls, Dworkin takes issue with that aspect of utilitarianism which gives short shrift to individual rights and this is aptly illustrated by the title to the first of two books we shall deal with here: *Taking Rights Seriously*.[229] In addition, and contrary to Rawls, Dworkin actually sets out at least the beginning of an argument on the application of his general theory to criminal procedure.

In the introduction to *Taking Rights Seriously*, Dworkin identifies as his target that 'ruling theory of law' which combines positivism and utilitarianism.[230] It can probably safely be said that Dworkin's theory is decidedly anti-positivist. For our

[228] See, generally, Nozick, R. (1974). Anarchy, State, and Utopia. Malden, MA, USA; Oxford, UK, Blackwell Publishing., at p. 183 *et s.*
[229] All references taken from Dworkin, R. (1977). Taking Rights Seriously. London, Duckworth.
[230] Taking Rights Seriously, Introduction, at p. ix.

purposes, however, the interesting preliminary question is to what extent Dworkin considers his own theory to be anti-teleological or even anti-utilitarian. Fortunately, with Dworkin, unlike with Rawls, we do not have to make inferences partly against the assertions of the author.

The reason Dworkin takes issue with utilitarianism is not that it makes aggregate pleasure the standard by which it adopts social rules. Rather, what appears problematic to Dworkin is the fact that there are different types of pleasure-inducing preferences which we often fail to distinguish: 'the preferences of an individual for the consequences of a particular policy may be seen to reflect, on further analysis, either a *personal* preference for his own enjoyment of some goods or opportunities, or an *external* preference for the assignment of goods and opportunities to others, or both.'[231] This failure to distinguish between the two types of preference leads to the conclusion that 'the apparent egalitarian character of a utilitarian argument is often deceptive.' [232]

As we shall see further on, the pivotal concept of Dworkin's theory of right is equality. Accordingly, Dworkin only takes issue with utilitarianism to the extent that he considers it contrary to how he conceives of equality and, in this respect, it seems as though utilitarianism could be brought in line with a strong protection of individual rights. If this seems familiar, it is probably because we have seen this attempted before in what I referred to above as the "Millian synthesis." Dworkin does recognise the similarity but he is nevertheless of the opinion that Mill had not gone far enough to provide a practical guide to collective decision-making. To the extent that Mill's theory only provides guidance for instances of suggested legislation for paternalistic purposes or for reasons of public morality, Dworkin thinks that it 'says nothing about how the government shall distribute scarce resources like income or security or power, or even how it shall decide when to limit liberty for the sake of some other value.'[233] As will have become clear from my discussion of Mill above, I would agree that his theory of liberty is indeed limited, but not in the way suggested by Dworkin. *Pour mémoire*, on my reading of Mill, he limits individual liberty first

[231] *Ibid.*, at p. 234.
[232] *Ibid.*
[233] *Ibid.*, at p. 261.

conceptually leaving no space for conflict with the potential distribution of 'scarce resources', and, second, instrumentally, only accepting its primacy as long as it serves societal 'progress.' It is beyond doubt that Mill adheres to utilitarian principles for the distribution of scarce resources so from this perspective Dworkin's criticism seems unfair. The point Dworkin makes is of course related to Mill's conceptual limitation of liberty which he considers leaves too little room for individual rights. I would agree, but this is different from saying that Mill's theory leaves the issues untreated.

Be that as it may, Dworkin sets out to show that utilitarianism is not necessarily incompatible with a theory which takes rights seriously. This is where the distinction between personal and external preferences is assigned some very heavy lifting. The essence of the idea is that whenever a policy decision has to be made, each person should only be allowed to consider what is objectively useful to her- or himself and not such things as might betray an unfavourable opinion of another. A simple example would be a decision on the distribution of food: the only consideration Dworkin thinks a person is entitled to take into account is how much food she or he personally has; not that she or he would prefer it if a neighbour starved. If the latter preference were taken into account, 'the chance that anyone's preferences have to succeed [would] then depend, not only on the demands that the personal preferences of others make on scarce resources, but on the respect or affection they have for him or for his way of life.'[234] If such external considerations ended up tipping the balance, 'the fact that a policy makes the community better off in a utilitarian sense would *not* provide a justification compatible with the right of those it disadvantages to be treated as equals.' [235]

Is this necessarily true? Independently of its objective merits, Dworkin's reasoning raises two issues on its own terms. First, it supposes that external preferences only work in one direction. Can it not be assumed that the individual at the receiving end of another's disrespect reciprocates the sentiment thus cancelling out the two in utilitarian terms, or that she or he has an external preference that the opinion of

[234] *Ibid.*, at p. 235.
[235] *Ibid.*

someone who holds his fellow human beings in such low regard should not be taken into account? If that is the case, taking external preferences into account seems less contrary to equality than Dworkin seems to allow. Second, Dworkin is unclear on an issue which seems of crucial importance: who owes the duty of equal treatment which the taking into account of external preferences is to violate, the decision-maker or the individuals themselves? It seems unlikely that Dworkin expects us as individuals to show equal concern for the interests of our fellow human beings as we do for our own: external preferences would indeed breach an obligation of equal treatment as between individuals, but the theoretical enforcement of such angelic altruism would require a veil of ignorance made of Kevlar. I cannot imagine this to be what Dworkin means. We are thus left with the decision-maker as the holder of the duty of equal treatment. This, however, logically entails that even the taking into account of external preferences seems to imply no violation of the right to equal treatment. The utilitarian decision maker, as described by Bentham, is conceptually independent of the society to which its decisions are to apply. The taking into account of individual external preferences which are disrespectful of other individuals does not necessarily imply that the decision maker adopts those preferences as its own. The utilitarian decision maker is only supposed to weigh individual preferences and to produce a decision maximising aggregate pleasure. The possibility that the end result of the utilitarian calculus is disrespectful of certain individuals does not mean that the decision-maker "personally" held the preference which tipped the balance.

The only way of saving Dworkin's reasoning is by severing the nexus between preference and pleasure. Under traditional utilitarian analysis, our preferences should be a reflection of which decisions would give us the most pleasure, or be the most effective in reducing our displeasure. If instead we take personal preference to mean the reflection of the concerns a good person should have, and external preferences as reflecting concerns no good person should have, the taking into account of external preferences, while still not inherently contrary to equality, would at least reflect a teleological theory different from utilitarianism and one which, on balance, does take rights marginally more seriously. This is probably the underlying justification to Dworkin's own explanation of his rights theory:

> 'The concept of an individual political right, in the strong anti-utilitarian sense I distinguished earlier, is a response to the philosophical defects of a utilitarianism that counts external preferences and the practical impossibility of a utilitarianism that does not. It allows us to enjoy the institutions of political democracy, which enforce overall or unrefined utilitarianism, and yet protect the fundamental right of citizens to equal concern and respect by prohibiting decisions that seem, antecedently, likely to have been reached by virtue of the external components of the preferences democracy reveals.'[236]

Like Rawls' theory, Dworkin's is very teleological[237], but unlike Rawls Dworkin does not try to deny it. However, what Rawls did do, and which Dworkin does not, was to recognise the need for some version of social contract theory to couch the primacy of individual rights over collective coercion. As we have seen, Rawls' hidden teleological agenda prevents his theory from being a social contract theory at all. This much is recognised by Dworkin:

> 'the [social] contract cannot sensibly be taken as the fundamental premise or postulate of that theory […] It must be seen as a kind of halfway point in a larger argument, as itself the product of a deeper political theory that argues for the two principles through rather than from the contract.'[238]

For reasons left unexplained, Dworkin seems to take this failure of Rawls' theory as a reason to discard social contract theory altogether. Interwoven with the critique of Rawls, Dworkin makes the traditional point about the historical fiction apparently underlying social contract theory: '[H]ypothetical contracts do not supply an independent argument for the fairness of enforcing their terms. A hypothetical contract is not simply a pale form of an actual contract; it is no contract at all.'[239] According to Dworkin, this is fatal to social contract theory as such and the inevitable conclusion is that arguments for principles of justice have to be independent of 'the false premise that a hypothetical contract has some pale binding force.'[240] Later on, Dworkin offers further argument for why social contract theory is unworkable as a

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[236] *Ibid.*, at p. 277.
[237] On this, see, e.g., Macleod, C. M. (1997). "Liberal Neutrality or Liberal Tolerance?" Law and Philosophy **16**: 529-559.
[238] Taking Rights Seriously, at p. 169.
[239] *Ibid.*, at p. 151.
[240] *Ibid.*, at p. 152.

theoretical construct. Not unlike Rawls, he feels that the need for unanimity is a substantial failing and that there is a clear risk of unreasonable individuals holding the whole of potential society ransom: 'Everyone whose consent is necessary to a contract has a veto over the terms of that contract.'[241] Needless to say, this is no less based on a misconception of the requirement of unanimity in social contract theory than it was when discussed in connection with our treatment of Rawls' theory.

In the later work *A Matter of Principle*, Dworkin further criticises social contract theory, stating that foundational theories cannot be based on 'fictitious social contracts, and the other paraphernalia of modern political theory' which would be tantamount to 'leav[ing] justice to convention and anecdote.'[242] So whereas it is necessary for Rawls that his claim that each and every individual who applied her- or himself would agree that his theory is just be plausible, Dworkin merely asserts that his theory is just from the point of view of society, whether individuals agree or not.

Having thus discarded social contract theory, traditionally the instrument guaranteeing the safeguarding of individual rights, Dworkin has to find another theoretical construct to arrive at his stated goal of providing a theory which takes individual rights seriously, at least in relative terms. Consequently, it is now time to look at Dworkin's conception of right in detail, as expressed in *Taking Rights Seriously*.

As will become clear, Dworkin's theory is not so much a theoretical construct as one aiming to provide a guide for prudential and consistent treatment of rights claims in a society where claims of right are often conflicting. In the introduction, Dworkin gives a descriptive definition of what rights are: 'Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.'[243] Consequently, a right is always an objection of *principle* based on individual concerns

[241] *Ibid.*, at p. 177.
[242] Dworkin, R. (1986). A Matter of Principle. Oxford, Clarendon Press., at pp. 219 and 220.
[243] Taking Rights Seriously, Introduction, at p. xi.

to a *policy* purportedly serving collective welfare.[244] Rights are thus only a particular type of weighty consideration to be taken into account by government when evaluating the justification of a particular course of action. The only reason for the existence of rights in the Dworkinian analysis is the inherently conflicutal nature of governmental decision-making and the fact than it will always privilege one interest over another. The existence of rights does not preclude action, but it imposes a heavy justificatory burden on government. Because the bulk of the law is by nature purely majoritarian '[t]he institution of rights is […] crucial, because it represents the majority's promise to the minorities that their dignity and equality will be respected.'[245] In areas where a decision cannot help but upset one or more interests, individual or merely minority, it is only the antecedent promise by government to give due consideration to all of the interests involved which can ever motivate obedience in the individuals or groups disappointed by the decision: 'When the divisions among the groups are most violent, then this gesture, if law is to work, must be most sincere […] If Government does not take rights seriously, then it does not take law seriously either.'[246]

Further distilled, a right is not so much a theoretical construct for the defence of the individual, but rather a prudential concept of good government. Thus explained, are Dworkinian rights theoretically justifiable? If we are not to take the easy way out and merely state that Dworkin's theory is a descriptive theory of how rights should be seen in the American constitutional context, finding such a theoretical justification is necessary. Conscious of not wanting to fall into the Millian trap and wanting to set rights apart from mere considerations of policy, Dworkin readily agrees that 'we must try to discover something beyond utility that argues for these rights.'[247]

The consequence of Dworkin's rejection of social contract theory is that, just as in teleological theory in general and utilitarianism in particular, collective coercion (here in the form of 'government') is axiomatic and consequently adorned with an

[244] In the Dworkinian vocabulary, '[a]rguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal' (*ibid.*, at p. 90).
[245] *Ibid.*, at p. 205.
[246] *Ibid*.
[247] *Ibid.*, at p. 271.

axiomatic claim to legitimacy. It follows that individuals are not even theoretically independent of the social framework set to govern them. From this perspective, the only possible foundation for some measure of individual independence lies in the restraints government puts on itself.[248] It follows from the practical consideration of retaining the loyalty of minorities that '[g]overnment must not only treat people with concern and respect, but with equal concern and respect. […] It must not constrain liberty on the ground that one citizen's conception of the good life of one group is nobler or superior to another's.'[249]

As touched upon earlier, the foundation of Dworkin's theory of right is *equality*, a concept which is put in stark contrast with the concept of liberty. Distinguishing himself decidedly from the foremost classical advocates in liberal tradition, Dworkin rejects the notion of a general 'right to liberty.' This is, in my opinion, where the lack of a theoretical grounding for the notion of a right in Dworkin's reasoning gives rise to serious difficulties. Dworkin's reason for rejecting a general 'right to liberty' is that it is incompatible with prescriptive law, which, by its very nature 'diminishes a citizen's liberty as licence: good laws, like laws prohibiting murder, diminish this liberty in the same way, and possibly to a greater degree, as bad laws, like laws prohibiting political speech.'[250] This, surely, is giving unduly short shrift to theoretical distinctions underpinning criminal law in the post-Enlightenment Western tradition. The reason we distinguish between a law proscribing murder and one prohibiting political speech, generally claiming the latter to be liberticidal but the former not, is precisely the notion of right. Society has the obligation to deploy collective coercion when, and only when, the rights of individuals are threatened by other individuals.[251] The general 'right to liberty' of which Dworkin speaks so disparagingly, pertains to that area where individual behaviour threatens no individual right leaving collective coercion (legislation) devoid of legitimating circumstances. It is an illustration of the fact that the principle in liberal society is the absence of collective coercion, thus leaving men free to do what they like as long as they do not thereby trample the rights of their fellow human beings. So whereas the law

[248] Cp. Bentham's views on "rights", above.
[249] Taking Rights Seriously, at pp. 272-273.
[250] *Ibid.*, at p. 262.
[251] See, e.g., Hampton, J. (1995). "How Can You Be Both a Liberal and a Retributivist: Comments on Legal Moralism and Liberalism by Jeffrie Murphy." Arizona Law Review **37**: 105-116.

proscribing murder serves to protect the right to life, no right is threatened by political speech.[252]

That Dworkin chooses to disagree with this tradition is unsurprising given that it owes much to social contract theory which Dworkin explicitly rejects. The difficulty is that Dworkin fails to provide any theoretical reason for considering the law proscribing murder as inherently "good" and the law prohibiting political speech as inherently "bad." According to Dworkin, all laws being liberticidal, the only relevant question is whether this "attack" on liberty 'is justified by some competing value, like equality or safety or public amenity.'[253] It follows that 'individual rights to distinct liberties must be recognized only when the fundamental right to treatment as an equal can be shown to require these rights.'[254] This, however, does not provide a solution. It merely serves to illustrate that rights in the Dworkinian sense are an amorphous concept. Another inevitable consequence, and where the inconsistency in Dworkin's reasoning becomes apparent, is that no course of action proposed by government can ever be pre-emptively held "good" or "bad", as he would have it, but that there must always be an exercise of weighing competing values. With the importance Dworkin elsewhere accords to the technique of 'speculative consistency' in argument about particular rights[255], he would be forced to concede that according to his theory, not even the right to life is guaranteed the absolute protection of government. Is this what is meant by taking rights seriously?

This inconsistency between what Dworkin clearly considers to be fundamental rights and the inability of his theoretical construct to protect them is further compounded by his discussion of the consequences of a governmental decision in a dispute involving rights claims. On the analysis resulting from the above discussion, it would seem that if such a decision respects each individual's right to equal concern and respect and yet

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[252] A recent and, tragicomically, recurring example is the global controversy surrounding the publication by, originally, Danish newspapers of caricatures of the Muslim prophet Muhammed.
[253] Taking Rights Seriously, at p. 262.
[254] *Ibid.*, at pp. 273-274.
[255] Dworkin, R. (1986). A Matter of Principle. Oxford, Clarendon Press., at p. 24. This technique, according to Dworkin, serves to 'test a theory of rights by imagining circumstances in which that theory would produce unacceptable results.' I will resist the urge to make a list but one can easily imagine scenarios where even a law prescribing 'murder' can be characterised as "bad" in the sense of conflicting with a sufficient aggregate of other, competing values.

violates an individual right, either the right claimed does not apply to the situation at hand, or it was too light a concern under the circumstances. In any case, Dworkin having failed to provide a theory of right beyond this to guide governmental action, the individual has access to no theoretical framework to justify opposing the decision arrived at. Frustratingly, this is not what Dworkin argues. Rather the contrary in fact, since he claims that 'anyone who thinks [so] must believe that men and women have only such moral rights as Government chooses to grant, which means that they have no moral rights at all.'[256]

A right according to Dworkin is thus nothing more than what each and every individual may consider to be a weighty consideration for government to take into account when deciding upon matters of policy, irrespective of theoretical foundation. Is it then safe to venture that Dworkin has introduced a substantial element of circularity: that the only 'rights' governments are likely to take into account are those represented by a sufficiently large group of people, in the end large enough to merit concern on grounds of policy in any case? I think this is the reason for Dworkin's rather unprincipled treatment of the issue of civil disobedience in general, and draft dodging in particular, in *Taking Rights Seriously*. While this is not the exact reasoning underlying Greenawalt's criticism of Dworkin's distinction between principles and policies, his conclusion fits this interpretation of the final consequence of Dworkin's own reasoning:

> 'Any sharp distinction between principles and policies as bases for judicial decision is not warranted. In some instances they incontrovertibly merge, and in many more instances judges may assume that pursuit of the general welfare is a part of their business and that consistency with the general welfare is an accepted aspect of evaluation of contested claims of rights.'[257]

In addition to his general rights theory Dworkin has devoted a considerable amount of time to the role of principles (i.e. rights) in criminal procedure. In *Taking Rights Seriously* Dworkin attributes liberalism with the following proposition: '[T]he proper

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[256] Taking Rights Seriously, at p. 185.
[257] Greenawalt, K. (1976-1977). "Policy, Rights and Judicial Decision." Georgia Law Review **11**: 991-1053., at p. 1053.

goals of the criminal law include the protection of individual freedom as well as the prevention of crime, and that the procedural safeguards strike a balance between these two goals.'[258] Whether this is indeed the "liberal" position I will answer in the next Chapter. Suffice it to say that it is the way the question is being put in the contemporary normative debate by those who claim to be the defenders of liberty.[259] Dworkin, however, immediately rejects this as a proper position because, as he correctly observes, 'it encourages others to ask why the majority of law-abiding citizens should not strike the balance further on the side of its own protection.'[260] Unsurprisingly, in view of his general rights thesis, Dworkin's liberalism does not go much further than rhetoric. The liberalism he argues for is not one in which individual freedom is a no-go area for state coercion. Instead it is a liberalism of semantics. While he wants to assert the role of moral principles as 'constraints on the law rather than citing the law's conflicting goals', he still recognises the inevitability of conflict. The Dworkin distinguishes his liberalism from the one he attacks is that 'these are not occasions for fair compromise, but rather, if the principles must be dishonoured, for shame and regret.'[261] Normative flimsiness is not the problem with the balancing exercise; it is perfectly all right as long as we trample individual liberty with a heavy heart.[262]

This conclusion is consistent with Dworkin's overall rights theory as presented in *Taking Rights Seriously*. His most extensive treatment of criminal procedure, however, is found in the later *A Matter of Principle*[263] where he discusses at great length the rights of the accused. There is, in fact, an argument to be made that

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[258] Taking Rights Seriously, at p. 12.
[259] See, e.g. Blair, T. (2006). I don't destroy liberties, I protect them. The Observer. London.; for a response to Blair's claims, see Nabulsi, K. (2006). Don't sign up to this upside down Hobbesian contract. The Guardian. London.. See also Smith, A. T. H. (2007). "Balancing Liberty and Security? A Legal Analysis of United Kingdom Anti-Terrorist Legislation." European Journal of Criminal Policy and Research **13**: 73-83.
[260] Taking Rights Seriously, at p. 12.
[261] *Ibid.*, at pp. 12-13.
[262] An earlier example of this type of reasoning is found in Hart, H. L. A. (1968). Punishment and Responsibility. Oxford, Clarendon Press.: "No doubt this recognition of the individual's claim not to be sacrificed to society except where he has broken laws is not itself absolute. Given enough misery to be avoided by the sacrifice of an innocent person, there may be situations in which it might be thought morally permissible to take this step. But, again, if we took the step, we would have to face a clash between two principles […] but a clash between two principles is different from the simple application of a single utilitarian principle that anything which benefits society is permissible" (at p. 81).
[263] See above.

Dworkin has become increasingly concerned with individual freedom in his later writings.

In *A Matter of Principle*, the starting-point is the following question: 'If people are not entitled to the most accurate trials possible, hang the cost, then to what level of accuracy are they entitled?'[264] Dworkin recognises the dearth of systematic treatment of these issues in theory and criticises the "striking the right balance"-formula then and now prevalent in discussions about procedural fairness. Dworkin is concerned with the necessity to avoid the infliction of 'moral harm' by the erroneous conviction of innocent people. 'Moral harm', for Dworkin, is that harm which a person suffers from an erroneous conviction, in addition to the harm inflicted by the punishment itself. In his view 'it makes no sense for our society to establish the right not to be convicted when known to be innocent as absolute, unless that society recognizes moral harm as a distinct kind of harm against which people must be specially protected.'[265] It is on this notion of 'moral harm' that Dworkin bases his criticism of the utilitarian balancing exercise because, as he sees it, 'the utilitarian calculus that the cost-efficient society uses to fix criminal procedures is a calculus that can make no place for moral harm […] even if the calculus includes the preferences that people have that neither they nor others be punished unjustly.'[266] Again, I am not so sure that Dworkin's attempt to distance himself from utilitarianism is successful. The empirical research provided by the school of procedural psychology reviewed above bears out Dworkin's intuitive assertion as to the existence of 'moral harm.' There is no reason why aggregate pleasure cannot be conceived of so as to take into account the potential intervention of 'moral harm.' The notion of 'moral harm' can be conceived of in two forms, one weak and one strong: the weak version would only take into account the harm suffered by the person erroneously convicted. That is unlikely to make much of a difference in the normative considerations of government. The strong version is potentially more effective. 'Moral harm' could in fact be thought of as affecting every person in society, a sort of collective harm the aggregate effect of which could potentially weigh quite heavily on normative considerations.

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[264] *Ibid*, at pp. 72-73.
[265] *Ibid*, at p. 81. For a criticism of Dworkin's treatment of 'moral harm', see Bayles, M. D. (1990). Procedural Justice: Allocating to Individuals. Dordrecht, Boston, Kluwer Academic Publishers.
[266] A Matter of Principle, at p. 81.

The difficulty with the strong version of 'moral harm' is of course that it requires knowledge that the conviction was erroneous. That is seldom the case although there are situations in which this sort of phenomenon could be said to have played a very important role in normative change.[267] Even so, Dworkin seems to reject the possibility of casting the notion of 'moral harm' in this stronger sense. This is because he wants normative decisions in the field of procedural rights in criminal procedure to be the exclusive beneficiary of the increased weight conferred by the risk of 'moral harm', when they, inevitably, are opposed to general welfare. In this way, according to Dworkin, the weak version of 'moral harm' can provide 'a middle ground between the denial of all procedural rights and the acceptance of a grand right to supreme accuracy.'[268]

This, as has already been pointed out, does not obviate the need for the balancing exercise Dworkin started out by criticising; it merely alters its characteristics slightly. The most important thing in Dworkin's theory of criminal procedure, as in his general rights theory, is not so much the rights of the individual, but rather the equality of all individuals:

> 'Procedural rights intervene in the process, even at the cost of inaccuracy, to compensate in a rough way for the antecedent risk that a criminal process, especially if it is largely administered by one class against another, will be corrupted by the impact of external preferences that cannot be eliminated directly.'[269]

Recently, in the frenzy of self-doubt which has engulfed the Western world following the September 11-attacks, Dworkin has managed to show that his principles can stand the test of time. While he can, with some credibility, affirm in the direction of the pure utilitarians that 'we must ask not whether the guilty deserve more protection than those procedures afford, but whether the innocent do', he can also, in the same essay, allow that '[t]he terrorist threat to our security is very great, and perhaps

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[267] An example of this is the weight attributable, in the debates leading up to the abolition of the death penalty in the UK, to the statements made by ex-Home Secretary Mr Chuter Ede who by then (1956) no longer believed in the guilt of Timothy Evans whom he had refused a reprieve and thereby sent to his death. Discussed in Hart, H. L. A. (1968). Punishment and Responsibility. Oxford, Clarendon Press.
[268] A Matter of Principle, at p. 90.
[269] *Ibid.*, at pp. 197-198.

unprecedented, and we cannot be as scrupulous in our concern for the rights of suspected terrorists as we are for the rights of people suspected of less dangerous crimes.'[270] I hope the reason why Dworkin feels justified in making these *prima facie* contradictory statements has been made clear by our discussion of his theory: once the condition of equal treatment has been satisfied, even the person presumed innocent stands without a principled justification for asserting his moral rights against the always weighty claim of collective welfare.

2.3. Liberalism adrift

The rather discomforting result of the above seems to be that while we abound in theories of political morality and to some extent criminal procedure professing themselves to be "liberal", we are in desperately short supply of theories which are genuinely liberal in the sense of taking 'the actual living person, the concrete human being, both as starting point and final criterion.'[271] What is the reason for these, arguably, intellectual misnomers? We can only hypothesize. My own hypothesis is that since much of liberal theory is rooted in the Anglo-American tradition, it has become contaminated by the general American political nomenclature in which the *somma divisa* is that between "conservatives" and "liberals." A rough description would be that the former are economically liberal but socially conservative, and the latter economically interventionist but socially liberal. I shall pass no judgment on whether either movement is internally consistent; my interest lies in this divide's almost exclusive reliance on questions of social policy for in the definition of political belonging. If you are socially liberal (in the sense of tolerant), you will be defined a "liberal." While American political liberalism does share some aspects of traditional liberal theory, it is very selective in its application. I contend that it is this lax definition of liberalism which has made its way into legal theory. Thus it seems that, generally speaking, the litmus test of liberalism in politics as well as in legal theory is

[270] 'The Threat to Patriotism', in Calhoun, C., P. Price, et al., Eds. (2002). Understanding September 11. New York, The New Press.
[271] Orton, W. A. (1945). The Liberal Tradition - A Study of The Social and Spiritual Conditions of Freedom. New Haven, Yale University Press., at p. 33.

whether the author would oppose a ban on homosexuality. I found confirmation for this reasoning in a footnote in an article by Butler and as we shall see, the definition of "liberalism" is even less stringent than the one I have given above: 'By "liberalism", I mean to refer to a political ideology on the left end of the American mainstream […] Liberals are more likely than moderates and conservatives to support state intervention in free enterprise […] [and] to favour government policies […] that redistribute wealth to the poor.'[272]

Whether this terminology really serves a purpose in political terms I leave to others to decide. My objection is that this renders the term "liberalism" worthless as a way of orientating ourselves in legal theory in general, and rights theory in particular. As the latter is essential to criminal procedure we are currently in a situation of utter confusion.[273]

This criticism of the misuse of the term "liberal" is by no means new. In 1945, Orton bemoaned that

> '[a] great tradition – the oldest and richest in political history – is all but lost in a fog of careless words and empty phrases [...] [M]ore, it is being deliberately misapplied by persons whose programs, whatever their merits, are in temper and outlook, as to means as well as ends, radically alien to the liberal tradition.'[274]

However, Orton's book is itself a reminder that we should be careful in condemning intellectual positions on the basis of their conformity or not with a given label. More often than not, this will turn into an exercise of first defining the "correct" position described by the label so as to suit one's own conception only to find (surprise!) that the position scrutinised does not conform to it. I am well aware that I am at risk of falling into this trap and I therefore wish to make it clear that I do recognise that there is a political – and perhaps also a legal – tradition which by now, more by historical

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[272] Butler, P. (1999). "Retribution, For Liberals." UCLA Law Reveiw **46**: 1873-1893., f.n. 5, p. 1875.
[273] For a similar conclusion, see Hampton, J. (1995). "How Can You Be Both a Liberal and a Retributivist: Comments on Legal Moralism and Liberalism by Jeffrie Murphy." Arizona Law Review **37**: 105-116.
[274] Orton, W. A. (1945). The Liberal Tradition - A Study of The Social and Spiritual Conditions of Freedom. New Haven, Yale University Press., at p. 1.

right than anything else, is recognisable as the "liberal" tradition. It serves no purpose here to mount a full-scale attack on the entitlement to the term "liberal." I will, however, note with some regret that "liberalism" today covers an enormously wide spectrum of positions, far from all of which are mutually compatible. While I would argue that teleology of any kind is ultimately fatal to individual liberty, my main contention is that it is in any case definitely incompatible with any reading of liberalism that consistently defends individual autonomy. The position defended here is that individual autonomy can ultimately only be justified and consistently defended on the basis of social contract theory. If the consistent defence of individual autonomy and, consequently, liberty is taken as the *raison d'être* of liberalism, the test of any theory claiming to be genuinely "liberal" would thus be whether it is ultimately teleological, i.e. premised on some conception of the "good" society. If it is, it may certainly have merit, but cannot claim to be liberal.

This position will probably be held to be "unfair" on liberal utilitarians.[275] This unfairness, however, is only derived from its less than delicate attempt to reserve the term "liberal" to one branch of the wide canopy of the liberal tree. That is an unwinnable argument. This concession does, however, focus attention on the substantial theoretical distinction between social contract theory and all versions of teleological theory. As will become apparent, I do not consider it possible to place oneself "somewhere in the middle" of a theoretical sliding scale with at one end "act-utilitarianism" and at the other "libertarianism." There is a sharp dividing line between deontological (i.e. rights based) and teleological theories and liberalism based on social contract theory is in fundamental opposition to all teleological theories, including "liberal utilitarianism" and all its derivatives. It is regrettable that "liberalism" in and of itself can no longer be said to be the one consistently anti-teleological theory without precision as to the theoretical underpinnings of the particular liberal tradition referred to, but that is where we are. This brings us to the sub-category of liberalism perhaps most associated with a staunch defence of individual autonomy: "libertarianism."

[275] See, e.g., Bird, C. (2007). "Harm Versus Sovereignty: A Reply to Ripstein." Philosophy & Public Affairs **35**(2): 179-194. and the response in Ripstein, A. (2007). "Legal Moralism and the Harm Principle: A Rejoinder." Philosophy & Public Affairs **35**(2): 195-201.

Nozick, probably the most influential standard bearer of this tradition, memorably begins his most famous work *Anarchy, State, and Utopia* with the affirmation that '[i]ndividuals have rights, and there are things no person or group may do to them (without violating their rights).'[276] It cannot be denied that Nozick's 'utopia' is a state constructed around the principles which will be argued for below. So while the theory presented by Nozick and the theory I am about to describe share many fundamental premises and end in compatible conclusions, I would however like to point out some important differences. Nozick's conception of the "state of nature" and the process whereby a state is formed from it is derived from a more literal reading of Locke than I feel can be justified with reference to social contractual principles. Probably as a result of this original stance, Nozick pays little attention to what will become central to the present work, namely the strict limitation of the normative principles of social contract theory to the *internal relationships in the social contractual unit*. Consequently, it is difficult to derive any ontological principles from *Anarchy, State, and Utopia* to distinguish the pre- or non-social contractual state from the social contractual state; the borders between the 'protective association', the 'dominant protective association', and, finally, the 'state' are very fluid.[277] Perhaps this is an ungenerous reading of Nozick, but whereas he states that his aim is to show how a state 'would arise from anarchy [...] by a process which need not violate anyone's rights'[278], I would contend that the notion of "rights" cannot precede the social contract nor can rights be claimed outside the confines of the social contractual unit. This emphasis on the social contractual unit as the ontological context for the normative principles of social contract theory is not only a condition for their theoretical plausibility: it will also be central to the application below of social contract theory to criminal justice in the EU.

[276] Nozick, R. (1974). Anarchy, State, and Utopia. Malden, MA, USA; Oxford, UK, Blackwell Publishing., Preface at p. ix.
[277] Anarchy, State, and Utopia, Part I.
[278] Anarchy, State, and Utopia, Preface at p. xi.

3. A social contractual reappraisal of criminal procedure and procedural safeguards

The central fallacy in teleological theory, in my view, is the presupposition that the mere existence of collective force renders it *prima facie* legitimate. In other words, since brute force is an incontrovertible factor, it needs no justification, only guidance.[279] Liberalism in the social contract tradition on the other hand, uses the methodological devise of social contract theory to sever the link between the existence of collective force and its legitimacy. This, surely, is the proper way for lawyers to begin. Law, in the social contractual conception, is the collected conditions for the *legitimate* use of collective coercion against individuals.[280] Law in and of itself cannot prevent the use of collective coercion against individuals under other circumstances, but it *can* declare such use to be illegitimate.[281] Ultimately law is nothing but words, with no inherent strength with which to oppose a contrary majority bent on contravening its mandates. It is precisely because of this ultimate superiority of brute force over law that law has no business trying to justify its own demise. This, however, is what teleological theories of right do when they adapt the principles of right and, consequently, law to the presumed demands of a fearful majority.

Criminal justice as translated in criminal procedure constitutes the crucible in which the consequences flowing from theories of right turn into conditions for the actual use of collective coercion against actual individuals. As we have seen above, although they may erect more or less important obstacles against it, teleological theories of right ultimately sacrifice individuals to collective expediency. Further, since Mill it has become customary to combine teleology with a claim to upholding liberal principles. I hope that the reasoning above has shown that what has been referred to

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[279] Finnis, for example, claims that '[t]he ultimate basis of a ruler's authority is the fact that he has the opportunity, and thus the responsibility, of furthering the common good by stipulating solutions to a community's co-ordination problems' (Finnis, J. (1980). Natural Law and Natural Rights. Oxford, Clarendon Press., at p. 351).

[280] See, e.g., Watson, A. (1985). "Law in a Reign of Terror." Law and History Review **3**: 163-168.

[281] On this normative but not constitutive link between law and coercion, see Lamond, G. (2001). "Coercion and the Nature of Law." Legal Theory **7**: 35-57.

as the "Millian synthesis" is an analytical fallacy. In this chapter I will attempt a redefinition of the liberal social contractual theory in order to apply it to the theory of criminal justice and the role played by procedural safeguards in criminal procedure. In so doing I will return to the sources of liberal theory reading them in a way which, I hope, will show that this aged tradition can provide solutions to modern problems.

3.1. The individual as the normative axiom and the "state of nature"

It is legitimate to ask why we should put the individual in such an exalted position as traditional liberal social contract theory does. The answer is that this is an intuitive position. Kant saw the imminently human faculty of practical reason as the source of an individual's very humanity and thus constituting her or his claim to dignity and respect:

> 'But man regarded as a person, that is, as the subject of a morally practical reason, is exalted above any price; for as a person (homo noumenon) he is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in himself, that is, he possesses a dignity (an absolute inner worth) by which he exacts respect for himself from all other rational beings in the world.'[282]

The thing to note in this passage is Kant's categorisation of a person as *homo noumenon*: the individual is thus a *noumen* (as opposed to a *phenomena*), an intuitive entity which can have no justification. The individual in Kantian philosophy is axiomatic and neither needs nor can have a rational justification. So why, in choosing between intuitive starting positions, should we accept the individual as axiomatic and therefore legitimate, and reject the teleological starting position that is "society"?

Fortunately, there are ways of evaluating and comparing even intuitive positions. The difficulty immediately raised by taking "society" as axiomatic in this sense is that already "society" is an ambivalent term. If we take it in the weak sense that Man

[282] Kant, I. (1991). The Metaphysics of Morals. Cambridge, Cambridge University Press., § 435, at p. 230.

cannot be conceived without a minimum of social interaction it is a mere truism that no one has ever attempted to deny (*sic.*). If, on the other hand, the axiomatic "society" is taken in a stronger sense not as mere human interaction but as a structure for the exercise of collective coercion against individuals in the interests of the collective, difficulties arise with the internal logic of the position. For the very need for collective coercion allows for the fact that individuals will disagree with aspects of "society's" dictates.[283] Consequently, the exercise of collective coercion against individuals cannot be axiomatic because it presupposes individual interests contrary to those of society. It follows that collective coercion always has to be justified with reference to the individuals subjected to it and the fact that the action the collective seeks to hinder is an expression of wants and desires contrary to those of "society." So Kant's is a strong intuitive position. No one can deny that individuals disagree over almost everything and that this results from our personal wants and desires.[284] Nor could anyone deny that collective coercion without the legitimacy conferred upon it by some kind of normative framework is nothing but the cumulative muscle of contingently converging wants and desires.

This brings us to the concept of the "state of nature" and the first common misconception associated with that concept. In general, the state of nature is taken to mean some kind of (pre-)historic, formless chaos. The source of this misconception is in all likelihood Thomas Hobbes. A definite turning point in Western political theory,

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[283] Finnis notably fails to discriminate between these two senses of 'society.' He very helpfully defines a 'group' – in the generic sense of a human 'community' – as 'wherever there is, over an appreciable span of time, a co-ordination of activity by a number of persons, in the form of interactions, and with a view to a shared objective' (Finnis, J. (1980). Natural Law and Natural Rights. Oxford, Clarendon Press., at p. 153). This definition corresponds perfectly with what we have here called society in the weak sense. Later, however, Finnis introduces coercion to enforce what he considers the pre-existing duties of justice resulting from these *voluntary* associations (e.g. in relation to sexual morality (*ibid.* at pp. 216-217)). This attempt to render uncontroversial the introduction of coercion and the corresponding disappearance of individual choice, or, in Finnis' own terminology, of a 'shared objective', in reality destroys the very precondition for Finnis' 'group' or society in the weak sense since the very concept of a 'shared objective' presupposes the existence of free, i.e. uncoerced, choice. This results in a far-reaching defence of 'paternalism' which ends in the assertion that '[t]o judge another man mistaken, and to act on that judgment, is not to be equated, in any field of human discourse and judgment, with despising that man or preferring oneself' (*ibid.* at p. 223). To which the response is: granted, but only as long as that judgment does not translate into a claim to use the coercive resources of everyone to impose it on the man with whom we disagree.

[284] I will not address the contention that our consciousness can be detached from our individuality (see Harris, S. (2005). The End of Faith. New York, W. W. Norton & Company.). I have no reason to disagree with this assertion beyond adding the proviso that the state of meditation which seems necessary in order to achieve this state renders all critical reflection impossible. Kant would say that in so doing we give up our human dignity.

it is probably fair to say that Hobbes, with his *Leviathan* (1651)[285], fathered social contract theory. However, Hobbes' theory is, by our standards, crude and unrefined and not much beyond the basic tenets of social contract theory can be salvaged from *Leviathan* for modern social contract theorists. Nevertheless, one of the most famous lines in political theory is taken from Hobbes' description, in *Leviathan*, of human life in the state of nature as "solitary, poore, nasty, brutish, and short."[286] For all its subsequent fame, this simplistic view of the "realities" of the state of nature did not stand uncontested for long.

In 1690 came the publication of John Locke's *Two Treatises of Government*.[287] Locke was closely associated with the Whig-faction of the then very tumultuous English political landscape.[288] The Whigs were opposed to the Torys and one of the defining features of the Torys' political theory was the divine right of kings. One of the most influential works defending this conception was Sir Robert Filmer's *Patriarcha*, published in 1680 and Locke's *First Treatise* is a rebuttal of this book. As such neither *Patriarcha* nor the *First Treatise* is of any interest to us. This context nevertheless helps to explain the motivations behind the monumental *Second Treatise*. Locke, having thoroughly destroyed Filmer's thesis of kings as the direct descendants of Adam in the *First Treatise*, felt that

> 'he that will not give just occasion to think that all government in the world is the product only of force and violence, and that men live together by no other rules that that of beasts, where the strongest carries it […] must of necessity find out another rise of government, another original of political power, and another way of designating and knowing the persons that have it.'[289]

This search for a justification for the exercise of political power starts, for Locke, with 'the state all men are naturally in […], a state of perfect freedom to order their actions and dispose of their possessions and persons […] without asking leave, or depending

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[285] Hobbes, T. (1985). Leviathan. London, Penguin Books.
[286] *Ibid.*, ch. 13, at p. 186.
[287] Locke, J. (2003). Two Treatises of Government and A Letter Concerning Toleration. New Haven and London, Yale University Press.
[288] For a good description of this period in Britain, see Vallance, E. (2006). The Glorious Revolution. London, Little, Brown.
[289] Second Treatise, ch. I, § 1, at p. 101.

upon the will of any other man.'[290] This, however, is as far as Locke is willing to follow Hobbes. '[T]hough this', Locke argues, 'be a state of liberty, yet it is not a state of licence':

> 'The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions: for men being all the workmanship of one omnipotent and infinitely wise maker […] they are his property, whose workmanship they are, made to last during his, not another's pleasure.'[291]

Let us stop and consider the "nature" of the state of nature. Much can be, and has been, made of the difference between the Hobbesian and Lockeian states of nature.[292] It could be said that, on this point, Hobbes is actually more "progressive" than Locke: in the Hobbesian state of nature, even god appears absent. Locke, as we have seen, posits that god has given reason to all men equally and that the law of nature we ought always to obey derives from this divinely inspired reason.[293] The question is whether these two ways of perceiving the state of nature, looked upon as pure theory devoid of historical and contingent baggage[294], really are that different. This results from the fact that both authors acknowledge as a central feature of the state of nature the lack of legitimate authority for the imposition of social discipline, i.e. "society" in the strong sense described above. The authors are thus in agreement that the enforcement of our brute interests, or the law of nature, is a matter of individual concern.[295] The question of whether there is, in theory, a normative framework we *ought* to obey is

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[290] *Ibid.*, ch. II, § 4, at p. 101.
[291] *Ibid.*, ch. II, § 6, at p. 102.
[292] See, e.g. Ratnapala, S. (1993). "John Locke's Doctrine of the Separation of Powers." American Journal of Jurisprudence **38**: 189-220.; Valette, J.-P. (2001). "Le pouvoir chez John Locke." Revue du Droit Public **2001**(1): 85-117.
[293] In Nozick, R. (1974). Anarchy, State, and Utopia. Malden, MA, USA; Oxford, UK, Blackwell Publishing., Part I, the author seems to follow Locke in acknowledging the existence principally relevant normativity in the state of nature. I alluded to this above and the "reading down" of this aspect of Locke's writings should be seen as justification also for my criticism of this aspect of Nozick's reasoning.
[294] This way of decontextualising is not universally accepted. See, e.g., Gardner, E. C. (1991). "John Locke: Justice and Social Compact." Journal of Law and Religion **9**: 347-371. The extent to which one sees the presence of god in Locke, however, seems to depend on how much one would like to see it, see Richards, P. J. (2002). ""The Law Written in Their Hearts"?: Rutherford and Locke on Nature, Government and Resistance." Journal of Law and Religion **18**: 151-189.
[295] See Leviathan, ch. 14, at p. 189, and Second Treatise, ch. II, § 7, at p. 103.

moot since there is, at this point, no common authority which could legitimately enforce it.

Later contract theorists built on this realisation and in *Dei Delitti*, Beccaria finally utilises it to sever all divine normativity from the state of nature[296]; leaving us with the realisation that the "nature" of the state of nature is nothing but a mirror of our subjective opinion of human nature in general. Thus, a pessimist will tend to agree with Hobbes, whereas a person of a more optimistic disposition will tend to agree with Locke. The best definition of the state of nature, in my opinion, is found in Kant:

> 'It is true that the state of nature need not, just because it is natural, be a state of injustice […], of dealing with one another only in terms of the degree of force each has. But it would still be a state devoid of justice […], in which, when rights are in dispute […], there would be no judge competent to render a verdict having rightful force.'[297]

In conclusion then, the state of nature in classical social contract theory cannot be defined as a state of total chaos and anarchy. It is to be understood simply as the absence of commonly recognised norms legitimising collective coercion against individuals. This state of affairs does not preclude "society" in the weak sense described above, for, again quoting Kant, 'a *state of nature* is not opposed to a social but to a civil condition, since there can certainly be society in a state of nature.'[298]

For the individual, therefore, the state of nature is a situation defined by the absence of any normative framework recognised by her or him and where the individual enjoys an in principle unlimited licence to pursue her or his own wants and desires, alone or together with others, the only constraint being the wants and desires of others which these others are prepared physically to defend. Or, in Hobbes' words: 'To this warre of every man against every man, this also is consequent; that nothing can be

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[296] See above, Chapter 1, Section 2.
[297] The Metaphysics of Morals, § 312, at p. 124.
[298] *Ibid.*, § 242, at p. 67.

Unjust. The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common power, there is no Law: where no Law, no Injustice.'[299]

It might then be suggested that the incitement to leave the state of nature and conclude the social contract will vary immensely depending on our views of human nature. Granted. However, there never existed a society where murder, rape and assault were unheard of, and even if such a society were conceivable, it is perfectly inconceivable that the fundamental insecurity resulting from an absence of collective protection against such phenomena would not render life very trying indeed.[300] In this way we arrive at the fundamental explanation of the need for a social contract creating that normative framework which gives rise to the *legitimate exercise of collective coercion*. From now on, when I speak of "society" it is in this sense of the embodiment of collective coercion that it is to be read.

3.2. The Social Contract: trading freedom as licence for liberty and rights

In ceding their licence to defend their interests, whatever they might be, to society, individuals cannot be taken as wanting to abandon those freedoms the benefit of which society was meant to ensure. In an imagined negotiation of free individuals, it is difficult to imagine anyone agreeing to collective norms allowing for her or his enslavement or even killing. If that were the proposition, the individual concerned would be better off taking her or his chances in the state of nature. On the contrary in fact, it is precisely these eventualities individuals will want society to protect them against. The principles embodied in the social contract will then have to be such as to

[299] Leviathan, ch. XIII, at p. 188.

[300] 'It is not experience from which we learn of men's maxim of violence and of their malevolent tendency to attack one another before external legislation endowed with power appears. It is therefore not some fact that makes coercion through public law necessary. On the contrary, however well disposed and law-abiding men might be, it still lies a priori in the rational Idea of such a condition (one that is not rightful) that before a public lawful condition is established, individual men, peoples, and states can never be secure against violence from one another, since each has his own right to do *what seems right and good to it* and not be dependent upon another's opinion about this' (The Metaphysics of Morals, § 312, at pp. 123-124).

be able to be agreed on by all parties to the contract. It then logically follows that the social contract will, as a *sine qua non*-condition of its conclusion, embody guarantees for such freedom as can logically be enjoyed by all at the same time as well as the collective protection of this freedom. The social contract thus contains two aspects: 1) the guarantee of such freedom as is compatible with an equal freedom of all other parties to the contract, 2) the right to the assistance of collective coercion against any person threatening the freedom thereby guaranteed. '[T]he only legitimate restrictions on conduct are those that secure the mutual independence of free persons from each other.'[301]

It is important to emphasise that the social contract does not have to include the totality of individuals thus "negotiating." [302] The formation of a social contractual unit will give rise to the obligations outlined below as between the members of that social contractual unit. With regards to those individuals who – for whatever reason – decide to stay outside the social contractual unit the normative principles of social contract theory do not pertain. Consequently upon our conclusion that the Hobbesian and Lockeian conceptions of the state of nature are a result of their differing views on human nature, the relationship between social contractual units need by no means be unpleasant. This relationship merely cannot be determined with reference to moral principles derived from the application of social contract theory. These principles will provide the basis for the discussion of punishment later on.

From this we can now tease out a few conceptual elements which will be central for the remainder of this work: *Freedom* is that naked licence found in the state of nature.[303] *Liberty* is freedom guaranteed by the social contract.[304] A *right* is that

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[301] Ripstein, A. (2006). "Beyond the Harm Principle." Philosophy & Public Affairs **34**(3): 215-245., at p. 229.

[302] This point is made in Rousseau, J.-J. (1966). Du Contrat Social. Paris, Garnier-Flammarion., Livre IV, Ch. II. The effect of this is to remove any influence of the factual existence of irrational individuals on the rational construction of this theoretical model. In other words, if you want a social contractual right to bash people over the head, we will ignore that for the purposes of the basic principles of the social contract. If you disagree, you do not join and stay in the state of nature where bashing people over the head is always an option. Consequently, however, you will have no claim to protection against someone else bashing you over the head first.

[303] With this I hope to have defined 'freedom' with sufficient precision so as to avoid criticisms based on some alleged ambiguity of the term. See MacCallum Jr, G. C. (1967). "Negative and Positive Freedom." The Philosophical Review **76**(3): 312-334.

entitlement to the assistance of collective coercion in the defence of liberty. A principle of the utmost importance results: Society cannot positively grant any measure of freedom to its members; it can merely negatively protect such freedom as its members already had in the state of nature by the conferral upon that freedom of the status of liberty. On the other hand, society's fundamental *raison d'être* is this protection of the liberty of its members. Freedom only becomes liberty through the conferral of a right to protect it. The use of collective coercion is hence both the justification of the existence of liberty and a way of evaluating its fundamental justice: 'What persons may and may not do to one another limits what they may do through apparatus of a state [...] The moral prohibitions it is permissible to enforce are the source of whatever legitimacy the state's fundamental coercive power has.'[305] A further clarification: the fact that the collective of individuals generally delegates the exercise of collective coercion to a specialised entity (generally referred to as the "executive") does nothing to detract from the fundamental fact that a claim of *right* is a claim for the exercise of coercion by all the individuals party to the contract as against a person allegedly having violated or having already violated a liberty.[306] When society uses coercive measures it unavoidably does so on a strict mandate from all of its members.[307]

Another question which needs to be answered is the fate of freedom after the conclusion of the social contract. In this regard it is important to note that the totality of freedom or freedom as licence can never be but suspended by the conclusion of the social contract. The violation of liberty is always a result of the exercise of freedom.[308] One aspect of this that has been discussed thoroughly by most of the classical social contract theorists and is the question of resistance to society. Yet

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[304] By distinguishing *freedom* from *liberty* I do away with the concept of a "*civil* liberty" since it follows from this distinction that all liberty is "civil" in the sense of protected by society. This is not merely conceptual confusion for its own sake but in preparation for my global conception of procedural safeguards to be presented below.

[305] Nozick, R. (1974). Anarchy, State, and Utopia. Malden, MA, USA; Oxford, UK, Blackwell Publishing., at p. 6.

[306] See Thompson, M. (1995). "Aquinas, Locke, and Self-defence." University of Pittsburgh Law Review **57**: 677-684.

[307] 'The function of the policeman presupposes the community; he does not create the community' (Orton, W. A. (1945). The Liberal Tradition - A Study of The Social and Spiritual Conditions of Freedom. New Haven, Yale University Press., at p. 240).

[308] This realisation is the source of the requirement of a subjective element (*mens rea*) in the definition of offences.

again, however, divergences which are ostensibly fundamental will on closer inspection, in my opinion, reveal themselves to be but differences of emphasis and terminology.

Hobbes famously reasoned that

> 'because every Subject is by this Institution Author of all the Actions, and Judgments of the Soveraigne Instituted; if followes, that whatsoever he doth, it can be no injury to any of his Subjects; nor ought he be by any of them accused of Injustice […] he that complaineth of injury from his Soveraigne, complaineth of that whereof he himselfe is Author; and therefore ought not to accuse any man but himselfe.'[309]

Hobbes also grants the Sovereign complete discretion 'to do whatsoever he shall think necessary to be done, […] for the preserving of Peace and Security, by prevention of Discord at home and Hostility from abroad.'[310] Combine this with the complete impunity under which this same Sovereign operates and we have a perfect justification for every kind of totalitarianism. The problem, of course, is the fact that for Hobbes, the statement that the Sovereign can do no injury to his subjects is not a principle limiting the exercise of his or its power, but rather a way of saying that the Sovereign is infallible in the exercise of his or its prerogatives. The reason we are to accept that every ostensible injury done to us by the Sovereign is but an illusion is the underlying fundamental that 'though of so unlimited a Power, men may fancy many evill consequences, yet the consequences of the want of it, which is perpetuall warre of every man against his neighbour, are much worse.'[311] However, Hobbes does allow for the survival of freedom in that 'every Subject has Liberty in all those things, the right whereof cannot by Covenant be transferred.'[312] Consequently, even the man justly condemned by the Sovereign 'hath […] the Liberty to disobey' and 'to resist those that assault him.'[313] Of particular interest for our purposes is Hobbes' robust defence of the right against self-incrimination: 'If a man be interrogated by the Soveraign, or his Authority, concerning a crime done by himselfe, he is not bound

[309] Leviathan, ch. XVIII, at p. 232.
[310] *Ibid.*, at pp. 232-233.
[311] *Ibid.*, ch. XX, at p. 260.
[312] *Ibid.*, ch. XXI, at p. 268.
[313] *Ibid.*, at p. 269.

(without assurance of Pardon) to confesse it; because no man […] can be obliged by Covenant to accuse himselfe.'[314] Be that as it may, for Hobbes there are no limits in justice to the exercise of sovereign power and, ironically, it is only the absence of such power which absolves subjects from their overriding duty of obedience: 'The Obligation of Subjects to the Soveraign, is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them.'[315] Once the social contract is concluded, the Sovereign 'may commit Iniquity; but not Injustice, or Injury in the proper signification.'[316] The freedom of individuals to resist their own destruction removes nothing of the justice of the Sovereign's endeavour to destroy them.

The Hobbesian conception of the social contract as a pact between men giving rise to sovereign power ('Leviathan') against which they can never with justice resist was strongly contested by Locke. For Locke, the social contract was and remained a multilateral agreement which put all parties under obligation to one another:

> 'Wherever law ends, tyranny begins, if the law be transgressed to another's harm; and whosoever in authority exceeds the power given him by the law, and makes use of the force he has under his command, to compass that upon the subject which the law allows not, ceases in that to be a magistrate; and, acting without authority, may be opposed as any other man who by force invades the right of another.'[317]

This principled right of resistance to the unjust use of coercion is rendered coherent by Locke's distinction between society, resulting from individual's desire to end the state of nature, and government, the particular organisation of society; a distinction Hobbes failed to make. Consequently, according to Locke it is possible to offer armed resistance to the exercise of collective coercion by government without challenging the existence of society. The situation when this is not only just but necessary is when government destroys 'that which every one designs to secure by

[314] *Ibid*.
[315] *Ibid*., at p. 272.
[316] *Ibid.*, ch. XVII, at p. 232.
[317] Second Treatise on Government, ch. XVIII, § 202, at p. 189.

entering into society, and for which the people submitted themselves to legislators of their own making'[318]:

> 'Whensoever therefore the legislative shall transgress this fundamental rule of society; and either by ambition, fear, folly, or corruption, endeavour to grasp themselves, or put into the hands of any other, an absolute power over the lives, liberties and estates of the people; by this breach of trust they forfeit the power the people had put into their hands for quite contrary ends, and it devolves to the people, who have a right to resume their original liberty, and, by the establishment of a new legislative (such as they shall think fit) provide for their own safety and security, which is the end for which they are in society.'[319]

This is to be distinguished by the dissolution of society as between two or more individuals:

> 'Whosoever uses force without right, as every one does in society, who does it without law, puts himself into a state of war with those against whom he so uses it; and in that state all former ties are cancelled, all other rights cease, and every one has a right to defend himself, and to resist the aggressor.'[320]

Arguably, the only difference is one of perspective: the misuse of governmental authority will result in the government's agents placing themselves in a 'state of war' with the whole people, just as does the individual who 'uses force without right.' Even if they act with the authority of positive law, that law can never sanction the transgression of the fundamental basis of society, i.e. those aspects of freedom upon which the social contract, by virtue of its own logic, has to confer the status of liberty. The essential difference between Locke and Hobbes, though, is that Locke places society itself under the same obligations as individuals with respect to the terms of the social contract.

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[318] *Ibid.*, ch. XIX, § 222, at p. 197.
[319] *Ibid*.
[320] *Ibid.*, § 232, at p. 202.

In this regard, the position taken by Rousseau in *Du Contrat Social*[321] on the nature of civil society after the conclusion of the social contract needs to be distinguished from both the Hobbesian and Lockeian positions. Rousseau's view of the social contract can adequately be compared to the formation of a jointly owned company; all individuals collectively give up all their natural freedoms to the common *cité* in which they then hold equal shares. The effect is that each individual has no individual liberty but only a share of the collective liberty which is exercised by the *cité* in accordance with the 'common will.'[322] However, Rousseau is forced to acknowledge that individual will contrary to the common interest may manifest itself, something which he describes as an 'injustice the spread of which would destroy the body politic.'[323] The solution is that the social contract contain a necessary but implicit clause that 'whosoever refuses to obey the common will shall be forced to do so by the whole body [politic].'[324] Rousseau thus distinguishes himself from Locke in that, according to the former, society does not protect the exercise of individual liberty, it holds it in trust and exercises it on behalf of individuals. Equally, however, the distinction with respect to Hobbes needs to be emphasised. Although, as in Hobbes' theory, individuals in Rousseau's society give up their whole freedom to a sovereign, in return they gain not only security, as Hobbes would have it, but also an equal share in the sovereign.

It is interesting and, perhaps, surprising that Kant follows Rousseau and adopts a conception of the social contract as giving rise to an entity, the Sovereign, into whose hands the contracting parties relinquish all their freedom:

> 'The reason a people has a duty to put up with even what is held to be an unbearable abuse of supreme authority is that its resistance to the highest legislation can never be regarded as other than contrary to law, and indeed as abolishing the entire legal constitution. For a people to be authorized to resist, there would have to be a public law permitting it to resist, that is, the highest legislation would have to contain a provision

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[321] Rousseau, J.-J. (1966). Du Contrat Social. Paris, Garnier-Flammarion.
[322] See generally Du Contrat Social, Livre I, Ch. VI, in particular the following: « *Chacun de nous met en commun sa personne et toute sa puissance sous la suprême direction e la volonté générale ; et nous recevons en corps chaque membre comme partie indivisible du tout.* »
[323] *Ibid*., Ch. VII. [« *[...] injustice dont le progrès causerait la ruine du corps politique.* »]
[324] *Ibid*. [« *quiconque refusera d'obéir à la volonté générale y sera contraint par tout le corps* »]

> that it is not the highest and that makes the people, as subject, by one and the same judgment sovereign over him to whom it is subject.'[325]

It is however difficult to tell whether Kant perceives the Sovereign in Rousseau's sense as the collective of individuals or in Hobbes' as an entity external to the collective of individuals. This confusion stems from Kant's assertion that the fundamental reason why a right of resistance in the Lockeian conception is inconceivable is that there can be no 'judge in this dispute between people and sovereign (for, considered in terms of rights, these are always to distinct moral persons).'[326] The people cannot claim a right to resist the sovereign because that would mean 'that the people wants to be the judge in its own suit.'[327] Whereas Rousseau states that 'as long as the subjects are only subjected to such conventions [i.e. expressions of the common will], they are obeying nothing but their own will.'[328] This would imply that a right of resistance is a right to resist against one's own will. Kant however, as we have seen, expressly makes it clear that 'considered in terms of rights, these [the people and the sovereign] are two distinct moral persons.' So what is that prevents there from being a right of resistance? Even more importantly, Kant does not explain why it follows from his principles of justice that the sovereign should decide; in these circumstances, is he not equally 'judge in his own suit'?

The question though, is whether the stance here taken by Hobbes, Rousseau and Kant is tenable even on its own premises. It would seem that it is not. The reason is the basic truth that law by itself can never contain force. Neither Hobbes nor Kant could deny, nor do I think they would even try to, that persons threatened by authoritarian government in a way which directly challenges the reasons for which they entered into society would offer resistance and that if they were sufficiently numerous or strong, there is nothing government could do about it. Ultimately, and oftentimes unfortunately, might *does* make right. It should be admitted, however, that Hobbes escapes this trap in absolving the people from their obligation of obedience in this

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[325] *The Metaphysics of Morals*, § 320 (p. 131).
[326] *Ibid*.
[327] *Ibid*.
[328] Du Contrat Social, Livre II, Ch. IV. [« *[t]ant que les sujets ne sont soumis qu'à de telles conventions, ils n'obéissent à personne, mais seulement à leur propre volonté.* »]

very situation.[329] Interestingly, Rousseau does not. For him, the complete merging of individual wills into the great, always just "common will" is taken all the way to the extreme:

> 'He who wishes to spare his own life by the efforts of others also has to give it up to their benefit if need be. The citizen is no longer the judge of the danger to which the law demands that he be exposed, and when the Prince has told him: the State requires that you die, he must die[330]; it being the case that it is only on this condition that he lived in safety until then and that his life is no longer solely nature's blessing but a conditional bequest by the State.'[331]

The logical inconsistency of this stance with social contractual principles was dealt with above. Consequently, Rousseau's stance will be ignored for the purposes of this discussion.[332]

With the premise acknowledged by both Hobbes and Kant that, ultimately, resistance against government is unavoidable and sometimes even morally imperative, the Hobbes-Kant stance must be read so as to say nothing more than that the positive laws of government in an already constituted society cannot logically stipulate for the legal destruction of that very government. Locke would however not necessarily have to disagree with this conclusion because it is logically without prejudice to the

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[329] See above. Seen in this light, it is a somewhat circular position: people have no right to resist as long as they can be coerced into obeying.

[330] This, of course, places enormous weight on the process whereby the "common will" is ascertained and, consequently, the law established. Rousseau gives a reasonably clear account of the structural qualities of any norm pretending to be an expression of the "common will" (see Du Contrat Social, Livre II, Ch. VI) but becomes disappointingly vague when trying to lay down the procedural aspects of legislative activity (*ibid.*, Ch. VII). The only clear conclusion seems to be that some appeal to divine authority is required.

[331] Du Contrat Social, Livre II, Ch. V. [« *Qui veut conserver sa vie aux dépens des autres doit la donner aussi pour eux quand il faut. Or le citoyen n'est plus juge du péril auquel la loi veut qu'il s'expose, et quand le Prince lui a dit : Il est expédient que tu meures, il doit mourir ; puisque ce n'est qu'à cette condition qu'il a vécu en sûreté jusqu'alors, et que sa vie n'est plus seulement un bienfait de la nature, mais un don conditionnel de l'État.* »]

[332] Rousseau's stated admiration for the laws of ancient Sparta is perhaps reason enough to suspect that for him "freedom" is a very ambiguous concept. For a good description of the Spartan regime, see Holland, T. (2005). Persian Fire. London, Abacus. It needs to be pointed out however that there is a second layer to Rousseau's reasoning. While the individual will is collectivised in the common will, this common will in the form of laws has to be executed by a specific government. If this government or executive acts in contravention of the common will, it places itself in a similar position to the individual acting contrary to the same common will (Du Contrat Social, Livre III, Ch. X). This still implies that there is no individual right of resistance.

fundamental principles of the social contract which bind government and its agents and which no positive laws of government can alter. The right to resistance recognised by Locke is thus the mere institutionalisation of the truth that no society is reducible to its government.[333]

It follows that like the ostensible conflict over the nature of the state of nature, the apparent differences in Hobbes, Locke and Kant as to the question of the fate of freedom after the conclusion of the social contract prove, upon closer inspection, to be insignificant as a matter of principle.[334] Consequently, it can then be said that upon a consistent reading of classical liberal social contract theory, freedom is put in abeyance until such time as the individual chooses to exercise it[335], the members of society always having the right to oppose the exercise of freedom in violation of liberty, regardless of whether that exercise is individual or governmental in its source. Against this reading of the interplay between the social contract and freedom it might be argued that it puts the survival of society entirely in the hands of individuals themselves. There are two answers to this argument. The first is that an individual only ever has the absolute faculty to alter her or his personal position in relation to society and place her- or himself in a state of nature with respect to that same society. As I will develop later, society survives perfectly well with this occurring all the time. The second answer is that the objection itself betrays a view of the state of nature akin to that of Hobbes discussed above. An analogy can be made with international relations. Most social contract theorists, including the classical ones discussed here[336], agree that the world of international relations is in fact nothing other than a state of nature between different social contractual units. The fact that we do not live in a world where inter-state warfare is the rule merely shows that perhaps Hobbes was overly pessimistic in his view of human nature. The definition of the state of nature

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[333] For reasoning consequent upon this realisation, see Kang, J. M. (2004). "John Locke's Political Plan, Or, There's No Such Thing As Judicial Impartiality (And It's A Good Thing, Too)." Vermont Law Review **29**: 7-23.

[334] Rousseau is, as we have seen, a case apart.

[335] In Valette, J.-P. (2001). "Le pouvoir chez John Locke." Revue du Droit Public **2001**(1): 85-117.the author does make a different interpretation but I find that it places almost exclusive reliance on Locke's statement in § 121 (at p. 112) on the conclusive nature of the agreement to join society without sufficiently taking into account the right of resistance.

[336] For Locke, see, e.g., *ibid.*

pertaining between states is exactly the same as that between individuals: opportunity unconstrained by collectively recognised and enforced law.[337]

There remains one fundamental aspect of social contract theory on which there is still much debate. What is the nature of social contract theory as such? This is the question of the historicity of the social contract, or, put simply, whether historically there ever was any conclusion of a social contract of the kind envisaged by social contract theorists. As we have seen, Dworkin is of the opinion that the impossibility to prove the actual conclusion of the social contract undermines the whole theory. In that context, this fundamental critique of social contract theory was left unanswered and the time has now come to reply to it.

Whether the earliest social contract theorist, Hobbes, really believed that the social contract of which he spoke was an actual historical occurrence is difficult to say. He does anticipate the objection and defends himself on the grounds of historical possibility and proto-colonialist assumptions about Native American society.[338] Rousseau's position is, again, vague but what is deductable is that for him, the social contract and its just laws is merely one constitutional alternative among many for a people. In fact, Rousseau states that the preconditions, both social and geographical, which need to pertain in order for a people to be able to support just laws, are very rare.[339] It would thus seem that for Rousseau, not only can the social contract be a historical reality, but since its principles are only applicable in rarely occuring circumstances, we cannot draw universal conclusions from it.

It is certain that Kant did not consider the state of nature to have been a historical reality, and, consequently, neither the social contract itself: 'Properly speaking, the

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[337] Thus in von Clausewitz, C. (2005). On the Nature of War. London, Penguin Books. the premise that 'there is no moral force without the conception of States and Law' is the normative basis for the conclusion on which von Clausewitz' fame is based: 'War is not merely a political act, but also a real political instrument, a continuation of political commerce, a carrying out of the same by other means' (at pp. 6 and 31).

[338] 'It may peradventure be thought, there was never such a time, nor condition of warre as this; and I believe it was never generally so, over all the world: but there are many places, where they live so now. For the savage people in many places of *America*, except the government of small Families, the concord whereof dependeth on naturall lust, have no government at all; and live at this day in that brutish manner, as I said before.' (Leviathan, ch. XIII, at p. 187).

[339] Du Contrat Social, Livre II, Ch. VIII.

original contract is only the Idea of this act, in terms of which alone we can think of the legitimacy of a state.'[340] Locke's position is ambiguous and in truth dependent on which part of the following is emphasised: 'To understand political power right, and derive it from its original, we must consider what state all men are naturally in […].'[341] If Locke is seen as following in the footsteps of Hobbes seeing Native American society as a real-life example of the state of nature, which his rather more positive conception of human nature would only render more likely, we will emphasise the latter part of the sentence and take literally the assertion that the state of nature is the natural state of men. If, however, state of nature and its corollary the social contract are seen as instruments in Locke's stated objective to 'understand political power right', the social contract appears more like it does in Kant, as a methodological devise.[342]

Whatever Locke in fact believed, this latter reading is surely correct in principle. As lawyers, we do not appeal to social contract theory as a historical explanation of the existence of society. The objective, as Kant very clearly postulates, is to find a principled justification for the use of collective coercion against individuals to either get them to act or to refrain from acting in a way contrary to the interests of the collective or to punish them for such actions. Therefore, in my view, serious social contract theory cannot be seen as quasi-history. Nor is it logically dependent on the potential historical veracity of its claims as Dworkin, somewhat simplistically, would have it. Social contract theory justifies itself on the objective reality that individuals have moral disagreements, putting this factor at the heart of a justificatory scheme for collective coercion. Social contract theory is thus a *methodological devise for the evaluation of the conformity of societal institutions with the irreducible principles of society*.

Seen in this way, social contract theory shares many characteristics with theories of natural law. Notably, both theories claim to be of universal validity: 'Principles of this sort would hold good, as principles, however extensively they were overlooked,

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[340] The Metaphysics of Morals, § 316, at p. 127.
[341] Second Treatise of Government, ch. II, § 4, at p. 101.
[342] See, e.g., Gardner, E. C. (1991). "John Locke: Justice and Social Compact." Journal of Law and Religion **9**: 347-371. See also Tinland, F. (1989). "La notion de sujet de droit dans la philosophie politique de Th. Hobbes, J. Locke et J.-J. Rousseau." Archives de Philosophie du Droit **34**: 51-66.

misapplied, or defied in practical thinking, and however little they were recognized by those who reflectively theorize about human thinking.'[343] There is however one significant difference: whereas traditional natural law claims to be absolute, social contract theory is contingent. It does not, like traditional natural law, claim the existence of any absolutely valid, universal values.[344] Rather, it bases itself on the internal and pragmatic logic of society itself: social contract theory only applies universally to the extent that there is society pretending legitimately to exercise coercion against individuals.

Consequently however, in addition to this normative aspect of social contract theory, there is an *ontological* aspect which seeks to identify the society or *social contractual unit* within which the normative prescriptions of social contract theory can be enforced. Between social contractual units these normative prescriptions do not apply which makes the identification of the extent social contractual units a crucial component of social contract theory. Title II will be devoted to the ontological aspect of social contract theory.

The purpose of this effort to rehabilitate social contract theory is to lay the groundwork for the theoretical consideration of procedural safeguards in the criminal procedure. It is now time to turn our attention to this effort.

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[343] Finnis, J. (1980). Natural Law and Natural Rights. Oxford, Clarendon Press., at p. 24.

[344] It is easily conceded that the tradition of "natural law" has developed beyond the traditional forms broadly associated with religious zealotry and which, consequently, can no longer be dismissed with an as easy flick of the wrist (see MacCormick, N. (1981). "Natural Law Reconsidered." Oxford Journal of Legal Studies **1**: 99-109.). However, even in this more developed form, natural law still presupposes that it is necessarily true that '[t]he worst and most unreasonably or unjustly organized of human societies would still offer better conditions than a Hobbesian, or even a Lockean, state of nature' (*ibid.*, at p. 104). I hope to have shown above that this is by no means necessarily so.

3.3. Criminal justice within the social contractual unit

As is noted by Bayles, '[d]espite the pervasiveness and importance of procedural justice, philosophers have largely ignored the topic.'[345] Indeed, the principled consideration of the principles of criminal procedure in the light of more general principles of moral and political philosophy is a neglected area of legal theory. Beccaria's *Dei Dilitti* is an example of such a principled consideration, but since then examples are hard to come by. Intuitively, this is surprising in view of the fundamental importance of these principles to the persons involved. A possible explanation is that the pervasiveness of utilitarianism has led to an, in my view, inordinate focus on the element of punishment in criminal law.[346] There is indeed a large literature discussing the various possible justifications for punishment. Annexed to, and somewhat dependent upon the issue of punishment is that of the justification for criminalising certain behaviours. Still, the intermediate stage between criminalisation and punishment, between the political decision to criminalise certain behaviours and the punishment of a specific individual for transgressing the resulting law, has been largely ignored.

Of course, criminal procedure is intimately connected with substantive criminal law and it is difficult to conceive of a theory of the former which did not also make at least tentative assumptions about the latter. I will not depart from this. In my view, however, it would be too hasty to conclude that criminal procedure is the mere servant of substantive criminal law. One of the main points I wish to make is that the principles of procedural safeguards which result from social contract theory are universal and independent of the exact content of the substantive criminal law.

The conception of criminal law resulting from the view of society presented in these pages should by now come as a surprise to no one. This conception was very eloquently described by Beccaria and is that the criminal law should be no more and

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[345] Bayles, M. D. (1990). Procedural Justice: Allocating to Individuals. Dordrecht, Boston, Kluwer Academic Publishers., at p. 1. Again, at p. 115: 'The literature on theoretical justifications of procedure is sparse and primarily pertains to conflict resolution, in particular, legal adjudication.'

[346] For an example, see Butler, P. (1999). "Retribution, For Liberals." UCLA Law Reveiw **46**: 1873-1893.

no less than the very articulation of the social contract.[347] Put differently, criminal law positively establishes those behaviours which constitute a breach of the social contract.[348] Consequently, these are also the articulation of the only situations in which an individual is justified in claiming from her or his fellow members of society the protection of collective coercion[349], whatever the specific shape that may take.[350] Locke's dramatic rendition of this principle is worth quoting in full:

> '[E]very man, in the state of nature, has a power to kill a murderer […] to secure men from the attempts of a criminal, who having renounced reason, the common rule and measure God hath given to mankind, hath, by the unjust violence and slaughter he hath committed upon one, declared war against all mankind; and therefore may be destroyed as a lion or a tiger, one of those wild savage beasts with whom men can have no society nor security.'[351]

In *The Metaphysics of Morals*, Kant devotes a significant number of pages to the principles to govern the infliction of punishment and to the extent it can be said that Kant has a consistent theory on the matter[352], it conforms to that described above.

However, Kant should be credited with more than this. Entering into a debate with Beccaria concerning the logical possibility of imposing the death penalty (Kant not

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[347] '*Ma non bastava formare questo deposito, bisognava difenderlo dalle private usurpazioni di ciascun uomo in particolare, in quale cerca sempre di togliere dal deposito non solo la propria porzione, a usurparsi ancora quella degli altri. Vi volevano de'motivi sensibili, che bastassero a distogliere il dispotico animo di ciascun uomo dal risommergere nell'antico caos le leggi della società. Questi motivi sensibili sono le pene stabilite contro agl'infrattori delle leggi*' (Dei Delitti, § II, at pp. 164-165).

[348] It is worth clarifying here that the fact that a specific penal provision would be held illegitimate under the scheme developed above does not detract from its *functional* position as a term of the social contract of a particular social contractal unit. It is endemic that aspects of the penal rules of any particular social contractual unit will be contrary to the principles resulting from social contract theory and thus in principle illegitimate.

It should also be noted at this point that I am not concerned with the justification for or conceptualisation of the consequences of the breach of *private* contracts.

[349] I leave aside the question of so-called "crimes against the state." Suffice to point out that following on from my definition of the state as nothing more than the collective of individuals, if an offence against the "state" as conceptually different from its component parts is at all conceivable I would be very hesitant to sort it under criminal law.

[350] If such protection is not forthcoming, she or he is free to defend her- or himself. See Thompson, M. (1995). "Aquinas, Locke, and Self-defence." University of Pittsburgh Law Review **57**: 677-684.

[351] Second Treatise of Government, ch. II, § 11, at p. 104. For a similar statement, see Rousseau, J.-J. (1966). Du Contrat Social. Paris, Garnier-Flammarion., Livre II, Ch. V.

[352] Murphy, J. G. (1987). "Does Kant Have a Theory of Punishment?" Columbia Law Review **87**: 509-532.

only approved of the death penalty but considered it to be a moral duty) he clarifies a very important point on the distinction between the justification for punishment, and its nature. Beccaria considered that the death penalty was inadmissible because no individual could agree to cede the right to destroy her or his life at the conclusion of the social contract.[353] Answering this, Kant points out the fundamental flaw in this reasoning: 'As a colegislator in dictating the *penal law*, I cannot possibly be the same person who, as a subject, is punished in accordance with the law; for as one who is punished, namely as a criminal, I cannot possibly have a voice in legislation.'[354] There is thus a logical incoherence in Beccaria: his position would require that individuals in the state of nature could put themselves in the position of a criminal for the purposes of the conclusion of the social contract. However, in the absence of collectively recognised standards of behaviour which characterises the state of nature, the concept of a "criminal" makes no sense. The corresponding reality is that no behaviour, including killing, can be objectively characterised as "wrong" in any meaningful sense; in the state of nature, killing is nothing but one possible course of action among others. It is only within the confines of society that killing can be declared "wrong" and thus a matter for collective prevention. We can now return to the issue of the death penalty. Since it is a punishment inflicted by reason of a crime, the crime per definition has to be established antecedent to the infliction. At that time however, the criminal is no longer in society where killing is wrong, because the establishment of a crime puts the criminal back into a state of nature with respect to the society the fundamental terms of which he breached. At this point it is necessary to go back to the passage by Locke quoted above and notice his use of the modal-verb 'may' with respect to the destruction of the criminal. This is essential because as we have seen, the state of nature neither pro- nor prescribes any behaviour. The infliction of any particular kind of punishment is thus a purely discretionary choice by a society.

The apparent severity of the above statements will perhaps be somewhat dampened if we remind ourselves that they are part of a larger theory of criminal justice in which the definition of particular "crimes" have to be made with reference to the violation of

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[353] '*Chi è mai colui che abbia voluto lasciare ad altri uomini l'arbitrio di ucciderlo? Come mai nel minimo sagrificio della libertà di ciascuno vi può essere quello del massimo tra tutti i beni, la vita?*' (Dei Delitti, § XVI, at p. 250).
[354] The Metaphysics of Morals, § 335, at p. 144.

liberty. Even so, it might seem shocking that a person convicted of a crime, so defined, be deprived of all rights. In my view, however, this is less controversial than it may seem and, importantly, not so different from how things work already. Questions of ordinal justice are traditionally the strict purview of the legislature, without reference to any "rights of convicts" to one type of sentence or another. Further, there are all kinds of considerations a given society will take into account when deciding how to deal with its criminal elements: conditions of re-entry into society, destabilising effects of sentences generally perceived as cruel, perhaps even moral obligations towards other human beings, etc. My argument here is limited to affirming that on a social contractual conception of society these are matters of pure internal morality for that society, unrelated to any "rights" of the convicted person concerned under the social contract, she or he no longer being a party to it.

For our purposes however, the essential point to be derived from this is the precise articulation of the nature of the criminal conviction. It is in fact *a decision of a society to remove a particular individual from the sphere of its protection*. Consequently, I disagree with the very premise of the following statement by Bayles:

> 'Deprivation of liberty for commission of a crime is not a benefit-terminating decision, because the criminal justice system did not previously grant freedom. If liberty is generally granted at all (which is unlikely), it is by the constitution or an act of the legislature for all citizens and not the result of a determination about the individual in person.'[355]

This statement is flawed on a number of levels. First Bayles fails to realise that although society cannot grant freedom, it is under an obligation to protect it in the form of liberty. Building on this first error, the quoted passage conflates the conviction – the principled establishment of a breach of the terms of the social contract – with the further, prudential decision of punishing this by a deprivation of liberty. The consequence is the generally erroneous contention that a criminal conviction entailing deprivation of liberty 'is not a benefit-terminating decision.' On the contrary: a conviction is per definition a decision terminating a benefit, namely

[355] Bayles, M. D. (1990). Procedural Justice: Allocating to Individuals. Dordrecht, Boston, Kluwer Academic Publishers., at pp. 7-8.

that of the right to the protection of society, or, to be more precise, the social contractual unit. It is only by virtue of this decision that any given social contractual unit can ever legitimately ponder the further question of whether it is prudent to apply any form of coercion against the convicted individual by way of punishment. This is the very reason why the utilitarianism-induced concentration on justifications of punishment is erroneous. Society is not, as Hart would have it, 'divisible at any moment into two classes (i) those who have actually broken a given law and (ii) those who have not yet broken it but may.'[356] A person having broken the law is no longer part of a social contractual unit in that she or he no longer has any rights according to the definition given above. It follows from this that it is untrue that, as Butler would have it, punishment, conceived of as harm inflicted by society on an individual, 'requires justification.'[357] It is not the punishment *per se* which requires justification. Alone in requiring justification is the decision removing the culprit from the protective sphere of a social contractual unit, rendering punishment a legitimate possibility in the first place.

What I do not wish to imply is that punishment thereby is a completely unprincipled affair, to be conducted according to the unfettered whim and discretion of whoever is closest. I certainly recognise – in fact I encourage – moral principles of punishment to be applied in deciding the type and quantum of punishment to be applied to any given perpetrator of a violation of the social contract. Simply, these principles will not be a consequence of social contract theory.

This view of criminal justice gives us a tool beyond intuitivism to justify one of the most important principles of modern Western criminal justice, namely that crime is not merely a matter between the perpetrator and the victim[358] but one which pits the perpetrator against society as a whole. Because the commission of a crime is a breach of a contract with *all* members of society it logically follows that all members have an interest in its establishment. It is only at the later point when society has to decide

[356] Hart, H. L. A. (1968). Punishment and Responsibility. Oxford, Clarendon Press., at p. 27.
[357] Butler, P. (1999). "Retribution, For Liberals." UCLA Law Reveiw **46**: 1873-1893., at p. 1876.
[358] On this, see Langbein, J. H. (1973). "The Origins of Public Prosecution at Common Law." American Journal of Legal History **17**: 313-335.

how to deal with the, at this point, foreign element that the degree of harm caused to the individual victim is likely to be a weighty consideration.[359]

The above framework for criminal justice merely raises the question of how exactly a liberal society is to deal with the inevitable phenomenon that is crime. The first question which needs an answer is structural: What institutional form should criminal procedure take? The vocabulary employed so far will have been very reminiscent of something we are very familiar with, namely the criminal trial before a court of law presided over by independent judges. We further assume that these judges apply law made by way of majority voting in a legislature representing the people according to their will as expressed in free and regular elections. This organisational structure is a consequence of the doctrine of the separation of powers and is intimately associated with the liberal theory of the state. The question is whether liberalism actually requires it. This question does not have an obvious answer. What is clear is that, perhaps contrary to popular belief, 'neither Locke nor Montesquieu invented the theory of the separation of powers.'[360] This being said, Valette is a bit hasty in his conclusion that Locke's theory is 'fairly far removed from all constitutionalism based on the separation of powers.'[361] On the contrary, it would seem that Lockeian social contract theory is in fact a strong defence of the separation of powers. For historical reasons, however, this is 'not expressed with the terminological precision to which modern scholarship is accustomed.'[362] Rather, as Ratnapala convincingly shows in her analysis of this aspect of Locke's thinking, the key to understanding the place of the separation of powers in modern social contract theory lies in understanding the *absolute* deficiency of the state of nature as distinguished from the merely *contingent*. Since, as we have seen, the material situation in the state of nature need not be bad,

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[359] See, on this point, Hampton, J. (1995). "How Can You Be Both a Liberal and a Retributivist: Comments on Legal Moralism and Liberalism by Jeffrie Murphy." Arizona Law Review **37**: 105-116., p. 106. It is true that the above description of criminal law leaves it open whether the social contract could be interpreted so as to assimilate the actual punishment to "liquidated damages-clauses." I have chosen not to develop this theme because it is irrelevant to my argument as to the consequence of social contract theory on criminal procedure: the breach would still have to be established before punishment of any kind can logically be contemplated.

[360] Ratnapala, S. (1993). "John Locke's Doctrine of the Separation of Powers." American Journal of Jurisprudence **38**: 189-220., at p. 190.

[361] « *La pensée politique de Locke est assez éloignée de tout constitutionnalisme fondé sur la séparation des pouvoirs* », Valette, J.-P. (2001). "Le pouvoir chez John Locke." Revue du Droit Public **2001**(1): 85-117., at p. 101.

[362] Ratnapala, S. (1993). "John Locke's Doctrine of the Separation of Powers." American Journal of Jurisprudence **38**: 189-220., at p. 212.

material inconvenience can only ever be a contingent reason for concluding the social contract. What is an absolute deficiency of the state of nature however, is the lack of, first, a 'settled, known law, received and allowed by common consent to be the standard or right and wrong'; second, 'a known and indifferent judge, with authority to determine all differences according to the established law'; and, third and finally, 'power to back and support the sentence when right, and to give it due execution.'[363] So, according to Lockeian social contract theory, the only absolute reasons for individuals to exit the state of nature and conclude the social contract 'correspond closely to the lack of differentiation between legislative, judicial, and executive powers in the state.'[364] To the extent that they deal with the matter, Beccaria and Kant accept the separation of powers as essential to just government. There is thus ample evidence to agree with Ratnapala's conclusion that 'Locke's major contribution to modern constitutionalism was his persuasive argument that an adequate separation of the law making and law executing functions is a *sine qua non* of a constitution under which liberty is secure.'[365] However, for the specific purposes of criminal procedure, a further justification for the separation of powers needs to be added.

In essence, the executive is the organisational name for the repository of delegated exercise of collective coercion. It therefore befalls on the executive physically to protect the liberty of the members of society. Why could the executive not just investigate, arrest and punish? In this respect, we must take the fundamental fallibility of all things human into account. Faced with the inescapable truth that the factual claim inherent in any criminal conviction is never 100% certain[366], we are under an obligation at least to minimise the likelihood of error and its

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[363] Second Treatise of Government, ch. IX, §§ 124-126, at p. 155

[364] Ratnapala, S. (1993). "John Locke's Doctrine of the Separation of Powers." American Journal of Jurisprudence **38**: 189-220., at pp. 203-204.

[365] *Ibid.*, at p. 218.

[366] Examples of works discussing the general problem of epistemology in criminal justice include Coady, C. A. J. (1992). Testimony - A Philosophical Study. Oxford, Clarendon Press.; and Damaška, M. R. (1986). The Faces of Justice and State Authority. New Haven and London, Yale University Press.. Examples of modern as well as historical difficulties associated with this include Langbein, J. H. (1983). "Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources." The University of Chicago Law Review **50**(1): 1-136. Greer, S. (1986). "Supergrasses and the Legal System in Britain and Northern Ireland." Criminal Law Review **102**: 198-249, Greer, S. (1987). "The Rise and Fall of the Northern Ireland Supergrass System." Criminal Law Review **1987**: 663-670, Costigan, R. (2000). "Anonymous Witnesses." Northern Ireland Legal Quarterly **51**(2): 326-358.

consequences.[367] In this regard, we also know, not least from the literature on "blue-coat crime" discussed above, that there is a significant risk that the executive becomes over-zealous in the execution of its mission to protect society from law-breakers. With this in mind, it is imperative to have an institutionally independent counterweight specially charged with defending the liberty of individuals in upholding the terms of the social contract and, consequently, acting as the final arbiter ultimately sanctioning the executive's apparent wish to exercise collective coercion on a particular individual by reason of a breach of those terms. So whereas the members of society delegate the exercise of collective coercion to the executive, it delegates the protection of their individual liberty to this independent institutional counterweight. When I hereafter speak of the "court" it is to this generic institution that I refer.

Having thus established that liberalism requires a court ultimately to declare, on the basis of evidence presented to it by the executive and, logically, the accused member, whether a breach of the social contract has occurred, the next question is which normative principles should govern the proceedings leading up to that declaration. This is the core of our topic for it is here that the notion of procedural safeguards comes in: prior to a declaration of breach of and exclusion from the social contract (i.e. a conviction) the court must prevent the executive from exercising its delegated coercive powers in a manner itself contrary to the fundamental principles of the social contract.

3.4. The social contract and the nature of the procedural safeguard in criminal proceedings

As we have seen, the preceding pages dealing with the principles to govern criminal law are at least inspired by an existing canon of thought. What is surprising is that so few have drawn the necessary conclusions for criminal procedure. In a social

[367] This, in my view, is the one principled reason for absolutely opposing the death penalty. See, e.g., Waldron, J. (1992). "Lex Talionis." Arizona Law Review **34**: 25-51.

contractarian system of criminal justice, the role of that part of criminal procedure referred to as "procedural safeguards" is in fact the application of the principle that all members of society, which necessarily includes the not (yet?) convicted, are entitled to the full protection of that society. It is true that this places huge importance on the distinction between a member and a convicted non-member of society and also puts into question some pervasive institutions of criminal procedure. An example is the question of pre-trial detention. Without going into details, it would have to be conceded that pre-trial detention would be contrary to the principles of the social contract in relation to a previously unconvicted individual. In relation to a previously convicted individual, society can have made her or his readmission into the fold of the social contractual unit conditional on the future possibility of pre-trial detention if she or he is again the suspect of an offence.[368]

As we have seen above, the social contract does not give rise to an entity separate from the individuals concluding it. What we term the "state" is a *delegation of the exercise of collective coercion* for which each and every individual remains responsible. Therefore, it is equally illegitimate for the state to deprive an innocent person of her or his life or liberty as for a mob to do the same. Criminal procedure thus has two parallel purposes: (1) the organisation of society's identification of individuals in breach of their obligations under the social contract, and (2) the protection of suspected but not yet condemned individuals from violations of the social contract on behalf of society. It is my contention that criminal procedure should not, as is generally assumed[369], be conceived of as a "balancing exercise" between a "collective interest" in detecting crime and the "individual interest" in the protection of suspects. The reason why this is an erroneous theoretical framework is that it does not sufficiently take into account the notion of *agency*.

The underlying premise of the "balancing-doctrine" is that there is a morally relevant link between procedural safeguards for suspects and criminal acts. This in turn rests on the twin propositions that (a) the "society" which "grants" these safeguards is an

[368] Cf Nozick, R. (1974). Anarchy, State, and Utopia. Malden, MA, USA; Oxford, UK, Blackwell Publishing. on 'Preventive restraint', at p. 142.
[369] See, e.g., Andrews, J. A., Ed. (1982). Human Rights in Criminal Procedure - A comparative Study. The Hague/Boston/London, Martinus Nijhoff Publishers.; and Zander, M. (2000). The State of Justice. London, Sweet & Maxwell.

entity which can be held responsible in any significant way, and that (b) this responsibility can result from the failure to exercise coercion on an innocent person. As to (a), we have already seen that "society" cannot be conceived of as an entity morally separate from the collective of individuals composing it. Those very individuals cannot therefore logically impute moral responsibility of any kind on "society" unless they mean to indulge in severe self-criticism. As to (b), to the extent that it is separable from (a), no member of society is ever justified in depriving another member of that society of her or his life or liberty. The suspicion of criminal activity does not give an individual or group of individuals a licence to do so, therefore nor can they require such action of "society." So even if a factual link between the benefit derived by a specific suspect of a procedural safeguard and her or his later commission of a crime could ever be established, that still does not render "society" responsible for the crime nor can it be used to cast doubt on the legitimacy of that particular procedural safeguard.

A factor which assists in making this "balancing exercise" generally palatable is the use, by its proponents, of an implied distinction between the normal, law-abiding citizen and some, more or less well-defined, notion of the "other."[370] The "normal citizen" who, surprisingly, is always part of the majority, is appealed to in two ways. First, this law-abiding member of the community is reminded of the threats she or he is under from these undefined criminal elements and that it is government's only wish to provide her or him with the security necessary for her or him to go about her or his daily life. Second, she or he is told of the obstacles placed in the way of successfully (per-/)prosecuting the threats to her or his quiet life by excessive attentiveness to the "rights" of suspects and accused. Implied in this second prong of the appeal is that the "normal citizen", being per definition law-abiding, need not fear anything since the proposed deteriorations in procedural safeguards would only affect the "others." Butler has observed these mechanisms with respect to punishment:

> 'If punishment is mainly directed towards "others," the majority may not care as much about why the government is doing it. As a result, they may not scrutinize the

[370] For a prime example, see the 2005 paper by the UK Presidency of the EU 'Liberty and Security: Striking the Right Balance.'

> government's justification as closely. In addition, the body politic may not pay attention to the government's justification if it appears to benefit from inflicting pain on "others".'[371]

A realisation of this seems to have been the deep, underlying factor in the UK House of Lords decision in *A and Others v Home Secretary*.[372] The substantive issue was Section 23 of the Anti-Terrorism, Crime and Security Act 2001 which instituted a special regime for non-UK nationals suspected of terrorism. The essential feature of the scheme was the so-called "three-walled prison": the suspect could be detained indefinitely on the executive order of the Home Secretary if she or he did not avail her- or himself of the option of leaving the UK. Since in most cases the treatment in all likelihood reserved for them in the only countries to which they could return was worse than "mere" indefinite detention at the UK Home Secretary's pleasure, that was not an option in any realistic sense. The appellants claimed, *inter alia*, that this was discriminatory and therefore contrary to Article 14 of the European Convention of Human Rights and Fundamental Freedoms since this regime was not applicable to UK nationals similarly suspected of terrorism. In agreeing, the House of Lords affirmed the fundamental principle that '*[i]ndefinite imprisonment without charge or trial is anathema in any country which observes the rule of law.*'[373] In addition, and equally important, their Lordships implicitly dismissed the notion of the "other" as an argument in the elaboration of procedural safeguards. It is highly unlikely that the great majority of "normal citizens" would have accepted a provision allowing for indefinite detention by executive *fiat*, the only alternative being exile. Singling out a category of people for treatment in a way associated with medieval monarchy and modern totalitarian dictatorships is, in terms of social contract theory, a breach of the social contract by all other members of society. It is doubtful that the UK parliament thought of it in those terms, but in adopting Section 23 they reintroduced a state of nature with a potentially significant number of people on UK soil. In consequence, violent opposition by the individuals singled out, though probably futile, could on no account be deemed illegitimate.

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[371] Butler, P. (1999). "Retribution, For Liberals." UCLA Law Reveiw **46**: 1873-1893., at pp. 1876-1877.
[372] [2004] UKHL 56.
[373] *Per* Lord Nicholls, at § 74.

In terms of social contract theory, Section 23 was thus founded on the introduction of a 'third category' of individual beyond the dichotomy "member"/"non-member" of society: the "presumptive non-member." Even if not clearly defined, the "presumptive non-member" has to be easily identified by members, or those considering themselves members, so that it becomes impossible for any member to feel threatened by the measures directed at the "presumptive non-member." Even if Section 23 was very clear in this respect, statements such as the following are more ambiguous as to whom exactly they refer:

> 'If we don't take head-on organised criminals or terrorists, others are harmed. The question is not one of individual liberty vs the state but of which approach best guarantees most liberty for the largest number of people. In theory, traditional court processes and attitudes to civil liberties could work. But the modern world is different from the world for which these court processes were designed.'[374]

Consequently, there is a distinct need to lower our standards of procedural safeguards in order that the "normal citizen" may enjoy a larger degree of freedom. Only 'organised criminals or terrorists' need worry and they, quite frankly, have it coming anyway. If you have nothing to hide, you have nothing to fear.

The reason why this is unreason squared is almost too obvious to need mentioning: until our police forces are endowed with divine inspiration enabling them to determine with absolute certainty who the 'organised criminals' and 'terrorists' are, we need courts to do this and until a court convicts, *anyone* brought before it is innocent. There can thus be no third category of person, no "presumptive non-member" of society. No one can be treated as a non-member unless declared so by a court.

While it is not a coherent argument against procedural safeguards to say that relaxing them would only affect a vaguely pre-identified category of individuals, it does not follow that we must accept uncritically the nomenclature in which procedural

[374] Blair, T. (2006). I don't destroy liberties, I protect them. The Observer. London.

safeguards are currently couched. Criminal procedure on the model outlined here requires that a court determine to the greatest degree of certainty humanly possible whether a breach of the social contract has occurred while in the meantime preventing the interference with the liberty of the accused. Those are the principles which confer legitimacy on the criminal procedure. The conceptual category "rights of the defence" are not, on this view, rights in the sense identified above, but mere methodological instruments for the realisation of these fundamental principles. It follows that criticism of proposals basing itself on the sacred status of these historically contingent "rights" is misdirected. There is no guarantee that just because a particular proposal modifies the exercise of a particular "right of the defence" that that modification violates the accused's liberty. If, on closer inspection it does not, we need to modify the old conception of the "right" in question.[375]

It is thus clear that liberal theory does not impose any particular kind of procedural methodology with respect to the determination of whether a particular individual has in fact violated the social contract in relation to another individual, or, in other words, those aspects of criminal procedure which could be referred to as *forensic criminal procedure*. As long as they conform to the fundamental principles developed above, as long as they respect the line beyond which the collective may not stray in that process – i.e. respect for the principles of *protective criminal procedure* –, it is perfectly legitimate for procedures to develop along culturally and historically divergent lines. However, it also follows that objections based on these fundamental principles cannot be shrugged off with reference to such historical and cultural legacies.[376] Although the means employed for its realisation may differ, legitimacy itself is a universally applicable standard. The universal applicability of the principles of legitimacy established above gives us a common standard with reference to which we can gauge the inherent justice in any system of criminal justice.

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[375] See, e.g., Spencer, J. R. (1987). "Child Witnesses, Video-Technology and the Law of Evidence: Part 1." Criminal Law Review **February**: 76-83. and Spencer, J. R. (1987). "Child Witnesses, Corroboration and Expert Evidence: Part 2." Criminal Law Review **April**: 239-251. The ECtHR later ruled that some of the accommodations proposed by Spencer in cases involving child witnesses were compatible with Article 6 ECHR, see *P.S. v. Germany*, judgment of 20 December 2001 (application no 33900/96), and *S.N v. Sweden*, judgment of 2 July 2002 (application no 34209/96).

[376] For an example of such underlying relativism, see Hamsoun, C. J. and R. Vouin (1952). "Le procès criminel en Angleterre et en France." Revue Internationale de Droit Pénal **23**: 177-190.

There is, however, a second version of the "balancing exercise" argument. It could be argued that if we are to have a system of criminal justice at all, we need to balance the risk of getting it wrong against the benefits of identifying and convicting criminals. The first purpose of criminal procedure given above must establish a system capable of leading to a conclusive judgment on the merits of a particular case. However, as soon as human beings, imperfect as we are, establish and run a system, there is always a risk of error. Does not the very notion of a criminal justice system involve a "balancing exercise"? Surely there is a cut-off point where we must accept an average of one innocent convicted to every X guilty acquitted if we are to have a system of criminal justice at all? There are two points which need to be made in relation to this argument. First, this "balancing exercise" is different from the one criticised above. In the reasoning criticised above, the violation of the liberties of specific accused individuals are justified by the alleged benefits this would bring to overall crime fighting effectiveness. The present argument holds that even if the liberties of the accused are scrupulously respected throughout the proceedings, the very fact that we make a final decision which constitutes a declaration of exclusion from the social contract involves an element of risk which we accept having balanced it against the consequences of never making such decisions. This brings us to the second point. Accepting that human structures inevitably involve an element of error is not the same thing as accepting error as an element of human structures. It would be foolish to think that laws which are perfect in principle could never result in imperfect outcomes in particular cases. That, however, is no argument for introducing imperfection in the laws themselves. A violation of the social contract is always an absolute wrong. The inability of a social contractual unit always to prevent or, failing that, to punish such violations is, however, "only" a mediate failure which will diminish its attraction to individual members.[377] A social contractual unit without a system of criminal justice is the equivalent of a 'collapsed state', 'a black hole into which a failed polity has fallen.'[378] There is thus an absolute need for a system of criminal justice. However, this does not mean that a system of criminal justice can ever ensure never to be the source of violations of the social contract in the

[377] See, e.g., Alexander, L. (1998). "Are Procedural Rights Derivative Substantive Rights?" Law and Philosophy **17**: 19-42.

[378] Robert I. Rotberg, 'Failed States, Collapsed States, Weak States: Causes and Indicators', in Rotberg, R. I., Ed. (2003). State Failure and State Weakness in a Time of Terror. Washington DC, Brookings Institution., at p. 9.

process of associating particular violations of the social contract with particular individuals. When it comes, finally, to the always present risk of the individual declaration of exclusion or conviction itself constituting a violation of the social contract, this must be accepted as an *absolute wrong which cannot be offset with reference to overall system effectiveness*. In that sense the simple effects of human imperfection do not give rise to a "balancing exercise" because there is nothing of moral relevance to balance it against; only the moral nothingness of no system at all. Knowingly accepting risk is not the same thing as knowingly introducing risk.

The upshot of this reasoning is of course that the terms of the social contract bind us all equally as actors in society. The objection that breaches of the above-mentioned principles occur all the time is not evidence of their fallacy; merely the conclusion that upon application of those very principles we can see that systems of criminal justice everywhere allow for the collective breach of the fundamental principles of the social contract. Perfect compliance with its terms is, as Kant stated, 'that condition which reason, *by a categorical imperative*, makes it obligatory for us to strive after.'[379] This may very well be a never-ending strife but that realisation can never absolve us from the obligation to use all our might to make society conform to principles of legitimacy as far as is humanly possible.

Why is this important? If society can be made "better" by contravening these abstract principles derived from an imagined "contract", why should we bother? The answer to this will be intuitive rather than principled because, as I said above, ultimately law cannot counter brute force. The only thing we can object is that we cannot have it both ways: we cannot pretend to subject individuals to illegitimate use of collective coercion and at the same time demand loyalty from them.[380] If "society" controlled by the majority decides to breach the terms of the social contract, it must be prepared to suffer the consequences. In today's Western Europe it is unlikely that sufficient numbers of individuals will find illegitimate action by governments so destructive of their liberty so as to offer actual resistance in a way which could pose a threat to the

[379] The Metaphysics of Morals, § 318, at p. 129.
[380] See, Robert I. Rotberg, 'Failed States, Collapsed States, Weak States: Causes and Indicators', in Rotberg, R. I., Ed. (2003). State Failure and State Weakness in a Time of Terror. Washington DC, Brookings Institution.

very existence of society. That is because each and every individual, when faced with illegitimate governmental action in the field of criminal justice with which they would fundamentally disapprove if they were directly concerned, either does not feel concerned with reference to a conception of society involving some notion of "presumptive non-members" of society, or simply makes a cost-benefit analysis weighing in the sum-total of injustice in society against the sum-total of benefit derived from staying in that society.[381] However, even if most of us would need personally to suffer severe injustice before making the conscious decision of disassociating ourselves from society, it is my contention that society should always strive towards being the defender of the social contract rather than its enemy. Every illegitimate use of collective coercion diminishes each and every one of us in whose name it is exercised. When an individual commits a crime, she or he alone bears the responsibility. When, on the other hand, society does the same, the seriousness of the crime is multiplied by the number of members of that society. For every such use, our responsibility to society weakens.[382] Finally turning back to the question of why compliance with these principles is important, society has an interest in striving for perfect compliance if it considers the minimisation of states of nature an objective good. For if it does not, society's claim on our allegiance is based on nothing more than the generally sufficient but ultimately both practically and morally contingent muscle of its henchmen.

[381] For an interesting, if theoretically unconvincing, discussion of so-called 'exit-options' in social contract theory, see Fried, B. H. (2003). ""If You Don't Like It, Leave It": The Problem of Exit in Social Contractarian Arguments." Philosophy & Public Affairs **31**(1): 40-70.

[382] See also Nozick, R. (1974). Anarchy, State, and Utopia. Malden, MA, USA; Oxford, UK, Blackwell Publishing., ch. 3.

Title II

Ontological principles of the social contract – the EU as a social contractual unit

Whenever one discusses procedural theory or the theory of criminal justice, even if one attempts to make universally valid assertions, a socio-geographical context is generally assumed if not made explicit. This assumption helps to crystallise the philosophical discussion in that it excludes factors which would otherwise complicate matters in a way which could obscure the core issues. The advantages of this assumed geographical boundedness are twofold and inherent in the Weberian notion of the "State" as the holder of the monopoly on the exercise of legitimate coercion within a defined territory: The first is the unity of the monopoly on the exercise of legitimate coercion, and the second is the loyalty of the people inhabiting the defined territory towards this unitary holder of the coercive monopoly. The way we tend to think of the modern nation-state as it has developed from the 1648 Peace of Westphalia until its contemporary slow but steady decline is the perfect example. A clearly identifiable government enforces a system of laws with which the people within the boundaries of the territory are assumed to agree. The reasoning in the previous Title can without difficulty be applied to this version of societal organisation.

The difficulty is that the theory developed in Title I above, or any theory of criminal justice for that matter, cannot be applied to any version of European criminal justice with the socio-geographical assumption intact. In the context of European criminal justice, the loss of the assumed, Weberian states-as-Leviathans context cannot be avoided and must be dealt with.[383] Even though we can still clearly define the territory of application, that territory comes with at least twenty-seven different monopolies on legitimate coercion in various parts of that territory. Further, it cannot without explanation be assumed that the inhabitants in these various parts of theterritory feel loyal to whatever holder of the coercive monopoly in whose part of the territory they happen to be in at any given time. To a greater or lesser extent we have been debating the principles of criminal justice for a long time, but not before now have we been forced to deal with the application of these principles to the voluntary integration of a large number of autonomous systems of criminal justice. This is extremely sensitive because, as Brady reminds us, '[t]he administration of

[383] An example of a text focusing on this issue is Lindahl, H. (2004). "Finding a Place for Freedom, Security and Justice: The European Union's Claim to Territorial Unity." European Law Review **29**(4): 461-484.

criminal law is central both to the liberty of the individual and the sovereignty of the state.'[384] As individuals we may feel a strong need to defend our liberty, but as citizens of a nation-state we may feel a conflicting need to assert the sovereignty of our national polity. The representatives of national governments are likely to perceive the threats to the liberty of "their" citizens coming from sources outside their powers to counter, but at the same time they may feel that a loss of sovereignty is a price too high to pay. In short, '[c]riminal justice is such a potent symbol of the body politic that many feel must remain the primary, if not the sole, responsibility of individual national governments.'[385]

The mere fact that we have started to think of the sovereignty of the nation-state as potentially conflicting with our liberty is, from the point of view of legal history, very significant. It means that our aspirations as individuals have started to put us in situations where our "own" systems of criminal justice cannot always protect us. In other words and applied to European integration, '[t]he free movement of persons within the European Union has been established without providing for a mechanism by which States could continue to effectively pursue their role of guarantor of internal security.'[386] The acceptance of the potential conflict between national sovereignty and personal liberty also means that when faced with this dilemma we are not always willing to change our aspirations but, on the contrary, require criminal justice to adapt to them. I say 'not always' because as stated in the introductory chapter, we are never logically forced to make a certain choice. That, however, does not prevent there being objectively undeniable choice costs related to any given course of action. Kaiafa-Gbandi has observed this phenomenon and the strain it puts on the familiar structure of the criminal law:

> 'The commencement of 21st century found criminal law being tested by unprecedented challenges to the extent that it was called to function more and more intensely out and

[384] Brady, H. and M. Roma (2006). Let justice be done: Punishing crime in the EU. London, Centre for European Reform (policy brief)., at p. 5.
[385] John Benyon, Lynne Turnbull, Andrew Willis and Rachel Woodward, 'Understanding Police Cooperation in Europe: Setting a Framework for Analysis', in Anderson, M. and M. den Boer, Eds. (1994). Policing Across National Boundaries. London and New York, Pinter Publishers., at p. 47.
[386] Vennemann, N. (2003). "The European Arrest Warrant and Its Human Rights Implications." Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht **63**: 103-121., at p. 105.

> beyond national borders and thus redefine its own identity as a branch of law primarily related to the exertion of state power.'[387]

Due to the strong connection of criminal justice with concepts as sensitive as individual liberty, national sovereignty, and, not least, political morality, it is no exaggeration to see the development of the third pillar 'as one of the most significant developments in European integration at the beginning of the 21st century.'[388] The significance of this development is just as manifest from the point of view of the development of the criminal law. Tulkens asserts that the development of European criminal justice through the third pillar represents 'a revolution possibly as important as the one which, at the end of the eighteenth century, gave birth to the modern criminal law.'[389]

The existence of the third pillar is now a fact. Also, the EU's continuing development, with its citizens increasingly making use of and thus getting increasingly dependent upon its socio-economic integrative possibilities, makes it more than likely that integration within the third pillar will continue to develop and deepen. This is the premise of the further discussion which centres on the application of the theory of criminal justice developed in the previous Title to the new reality of EU criminal justice. Applying social contract theory to the development of EU criminal justice is not only interesting from the point of view of the normative conclusions we will be able to draw, but also because it gives us the opportunity to develop social contract theory itself. The whole premise of social contract theory is that there is a social contractual unit to which those normative conclusions can be said to apply. It is crucial to recall that the social contract is *interpersonal*, i.e. it defines the relationship between individuals and not the relationship between the individual and the state. It therefore follows that there is a prior, ontological aspect of social

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[387] Kaiafa-Gbandi, M. (2005). "The Treaty Establishing a Constitution for Europe and Challenges for Criminal Law at the Commencement of 21st Century." European Journal of Crime, Criminal Law and Criminal Justice **13**(4): 483-514., at p. 483.

[388] Monar, J. (2005). "Justice and Home Affairs in the Constitutional Treaty. What added value for the 'Area of Freedom, Security and Justice'?" European Constitutional Law Review **1**: 226-246., at p. 227.

[389] Tulkens, F. (2000). "L'Union européenne devant la Cour européenne des droits de l'homme." Revue Universelle des Droits de l'Homme **12**(1-2): 50-57., at p. 50. [« *[A] travers le troisième pilier [...] ce qui est en jeu est véritablement l'avènement d'un droit pénal européen. Il s'agit, à mon sens, d'une révolution peut-être aussi importante que celle qui, à la fin du XVIII*e *siècle, a donné naissance à l'avènement du droit pénal moderne* »]

contract theory consisting in identifying the existence of this interpersonal organisation. This aspect of social contract theory is rarely discussed because the existence of the social contractual unit – the nation state – has generally been taken for granted. When it comes to EU criminal justice, there can be no such ontological assumption. In order to apply social contract theory to the EU, it must first be shown that the EU can in fact be said to constitute a social contractual unit. The present Title will therefore analyse some key legal developments in EU criminal justice in order to show that the ontological premise for the application of social contract theory to the EU does indeed exist. The normative conclusions of that application are then left to the third and last Title. Given the interpersonal aspect of the social contract, the essence of this exercise will be to show that the legal developments of EU criminal justice have resulted in a situation where the social contractual status of individuals is the same throughout the EU. Although perhaps obvious, it should be pointed out that this Title is in no way intended to provide an exhaustive account of legislative developments in the third pillar. The developments dealt with are those considered particularly illustrative of the ontology of the EU-wide social contract.[390]

Geographical introduction – criminal justice and the contingent border

In discussing the definitional problems associated with conceiving of the EU as a geographical entity, Lindahl convincingly offers the alternative interpretation that the EU 'only appears indirectly, by way of what legal power claims to be its representations: the internal market and the area [of freedom, security and justice].'[391] These representations are, in turn, superimposed on another representational distinction which allows us to distinguish "Europe" from the rest of the world. As part of that representation, the 'area of freedom, security and justice' (AFSJ) not so much fills a pre-existing space with legal content but rather that a particular space appears because the legal content requires a bounded space to function: '[T]he

[390] For an exhaustive account of the legal developments in the Third pillar, see Fletcher, M., R. Lööf, et al. (2008). EU Criminal Law and Justice. Cheltenham, UK; Northampton, MA, USA, Edward Elgar. (forthcoming) or Peers, S. (2006). EU Justice and Home Affairs Law. Oxford, Oxford University Press.
[391] Lindahl, H. (2004). "Finding a Place for Freedom, Security and Justice: The European Union's Claim to Territorial Unity." European Law Review **29**(4): 461-484., at p. 479.

closure of space into a legal place, into a bounded region, is essential to the very possibility and concrete realisation of freedom, security and justice.'[392] To make a territorial claim like this by way of a policy option has, by necessity, a profound normative impact for the people physically inhabiting the territory so claimed.

As I argued in the previous Title, the purpose of the social contract is to safeguard the liberty of the individual members of the resulting society. It is easy to see that "liberty" as described above could also be described as the possibility to enjoy personal freedom in security, only mediated by the needs of justice, i.e. the liberty of others. The AFSJ then, is nothing less than a claim to merge the existing independent and parallel social contracts into one covering the space covered by the 'area', i.e. the EU. In other words, the until now prevailing structure in Europe where one nation-state corresponded to one social contract is, by a legal sleight of hand, substituted for a new one in which these several social contracts are merged into one. This transformation of course supposes a communality of values where the most important difference appears when we place the emphasis on 'communality' rather than values. The social contract defended by criminal justice in the classical liberal conception translates into a relatively stable set of values, at least in theory. The central difference then is that we are called upon to extend the strength of the collective coercion at our disposal to the defence of the *whole* communality as defined by the AFSJ.

The assertion that the AFSJ implies a merging of social contracts may seem surprising. Nevertheless, if it is to be claimed that the creation of the AFSJ affects a fundamental change to the inhabitants of the EU, it is difficult to see how it could be otherwise. This reasoning is substantiated if we analyse the situation as it was prior to the AFSJ: Before the AFSJ it made normative sense to state that a violation of the liberty of a citizen of Member State A, on the territory of Member State A, by a citizen of Member State B was of no concern to the citizens of Member State B. This is because the social contract to which they were party had not been violated. From the point of view of Member State B then, the punishment of its citizen was a matter of contingent circumstances. If she or he happened to have remained on the territory

[392] *Ibid.*, at p. 461.

of Member State A, there could be no objection in principle to her or his punishment by Member State A as she or he, unless come as a conquering soldier, would have been temporarily included in the social contract prevailing among the citizens of Member State A.[393] If, on the other hand, she or he had managed to return to Member State B, there was no obligation in principle to return her or him to Member State A for punishment nor to punish her or him in Member State B. The previous development of practices such as *aut dedere aut judicare*[394] – i.e. the rule of thumb whereby a state would either extradite a suspected criminal to the state claiming jurisdiction or prosecute her or him itself – resulted from the need for states to maintain good relations with their neighbours, not from any obligation to the citizens of the aggrieved country. That need became increasingly imperative in the context of the EU thus rendering the refusal to extradite politically increasingly difficult. However, it could never be said that the violation of a "foreign" social contract was of imperative concern to the parties of another.[395]

My contention is that the AFSJ has fundamentally changed the above schema in the sense that since its creation, we, the people living on the territory enclosed by the AFSJ, are now united by *one and the same* social contract. That in turn implies that the violation of that contract by *anyone anywhere* in the AFSJ translates into an obligation for all of us adequately to deal with that violation. The eventual crossing of an intra-EU border by the suspect no longer has any significance whatsoever as far as our responsibility for her or his being tried for the violation. It is no longer a question of whether the suspect should be tried. Nor is it a question of *aut dedere aut judicare*, the violation of which principle constitutes a snub against a neighbouring sovereignty rather than against the alleged victims of the violation of the social contract. Within the EU's AFSJ, and the resulting merger of social contracts, it is only a question of *quo judicare*.

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[393] Even if he had not, there can be no objection since nothing is owed as of right to a non-member of the social contract (see previous Title).

[394] See Dugard, J. and C. Van den Wyngaert (1998). "Reconciling Extradition with Human Rights." American Journal of International Law **92**: 187-212.

[395] For a discussion of this topic, see Deen-Racsmány, Z. and R. Blekxtoon (2005). "The Decline of the Nationality Exception in European Extradition?" European Journal of Crime, Criminal Law and Criminal Justice **13**(3): 317-363.

However, as is illustrated by the institutional reality of the EU, the fact that any collective coercion now applied within the confines of the AFSJ by reason of a violation of the social contract it represents is applied in all our names does not necessarily translate into the unification of the *modalities* of that application. As has frequently been pointed out, there is no European institution with operational police powers, nor is there a unified criminal jurisdiction.[396] The question is whether this undermines the contention that there has been a merger of social contracts. While it is not an unreasonable position to hold that since the enforcement of the social contract has become a common imperative, the institutional organisation of that enforcement should be unitary[397], there is in fact no logical necessity for such unification. Many nation-states have internal jurisdictional boundaries between different law enforcement institutions based on geographical- and/or subject-matter distinctions[398], and in many cases relations between them are far from harmonious.[399] Equality of treatment is of course an issue but it is doubtful whether it could be guaranteed to a greater extent at the level of the nation-state than at a pan-EU level. While equality of treatment can never be guaranteed even between two police stations in the same city, few would argue that rigid divisions of labour between law enforcement authorities result in a fundamental conflict within the underlying social contract. Likewise, the same attitude should be adopted in relation to the research indicating that practices may differ to a significant extent between criminal courts in different parts of the same nation-state, especially with regard to sentencing practice.[400] There is thus no absolute necessity for a European police force with operational authority in order for

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[396] See, e.g., Monica den Boer, 'The European Convention and its Implications for Justice and Home Affairs Cooperation', in Apap, J., Ed. (2004). Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement. Cheltenham, UK; Northhampton, MA, USA, Edward Elgar.

[397] See, e.g., Recasens, A. (2000). "The Control of Police Powers." European Journal on Criminal Policy and Research **8**(3): 247-269.

[398] In Italy, for example, there are four distinct police forces: *la Polizia nazionale*, *la Polizia municipale*, *i Carabinieri*, and *la Guardia di Finanza*. In France *la Police Nationale*, *la Police Municipale*, and *la Gendarmerie Nationale* enforce the law based on a combination of jurisdictional principles based on both geography and subject-matter. In the UK there is the Royal Ulster Constabulary in Northern Ireland, the Scottish police, and the 43 police forces in England and Wales.

[399] See Alain, M. (2001). "Transnational Police Cooperation in Europe and in North America: Revisiting the Traditional Border Between Internal and External Security Matters, or How Policing is Being Globalized." European Journal of Crime, Criminal Law and Criminal Justice **9**(2): 113-129.

[400] See, e.g., National Council for Crime Prevention (BRÅ), 'The probability of being sentenced to a prison term – A statistical analysis', report 2000:13 (official translation), available on http://www.bra.se. ['*Sannolikheten att dömas till fängelse – En statistisk analys*'] Concerns over similar, unjustified geographical sentencing discrepancies led to the creation in the UK of the Sentencing Guidelines Council.

the claim that the AFSJ operated a merging of social contracts to hold. Nor is it necessary for there to be a unified criminal jurisdiction.

Title I established that the fundamental principles of enforcement have to be the same throughout a single social contractual unit. Put differently, there must be fundamental agreement as to the triggers of coercive action by the authorities of the state. These triggers are the violations of the social contract, of the liberty of individuals, and they have to be universally recognised. So whereas the practical modalities of the enforcement of the social contract need not be the same throughout a social contractual unit, those different enforcements do have to be in application of the same fundamental principles.

What is necessary, then, is that the *application* of the social contract itself be unitary. This is the fundamental problem with which EU criminal justice has to grapple: how does one organise the fragmented enforcement of a unitary social contract? It is in relation to this question that the definition of the intra-EU border becomes crucial. In order for the creation and implementation of the AFSJ to affect a fundamental normative change, it must be possible to consider the borders on its inside as historic vestiges to be dealt with, perhaps also respected in the way one respects social tradition, rather than as normative jurisdictional imperatives. The issue which arises from this basic problem relates to the procedural organisation of the implementation of the enforcement of the EU-wide social contract. What does the current implementation of the AFSJ tell us about how to conceive of the intra-EU border?

1. Mutual recognition and the European Arrest Warrant – giving EU-wide effect to local violations of the social contract

Inspired by the successful use of the concept in the construction of the single market, itself a development of earlier notions of recognition and enforcement of foreign judgements[401], the Council declared that *mutual recognition*[402] was to be the 'cornerstone' of the building of the AFSJ.[403] Executing this declaration, the Commission elaborated on the concept, explaining it to mean an acceptance by every national jurisdiction that 'while another state may not deal with a certain matter in the same or even a similar way as one's own state, the results are accepted as equivalent to decisions of one's own state.'[404] In 2002, the European Council adopted the measure which has come to embody the principle of mutual recognition: the Council Framework Decision on the European Arrest Warrant and the Surrender Procedures Between Member States (EAW).[405]

The exact content of the EAW has been described in great detail by numerous authors.[406] Nevertheless, it is useful to recall the aspects which set the regime instituted by the EAW apart from traditional extradition and thus need to be kept in mind: First, the EAW renders the transfer of suspects and convicts between Member

[401] See, e.g., Schmidt, S. K. (2007). "Mutual recognition as a new mode of governance." Journal of European Public Policy **14**(5): 667-681. and Fichera, M. and C. Janssens (2007). "Mutual recognition of judicial decisions in criminal matters and the role of the national judge." ERA Forum **8**: 177-202.
[402] On which, see Poiares Maduro, M. (2007). "So close and yet so far: the paradoxes of mutual recognition." Journal of European Public Policy **14**(5): 814-825.
[403] Tampere European Council Conclusions, 15-16 October 1999, at § 33.
[404] European Commission Communication on mutual recognition of final decisions in criminal matters, COM(2000) 495 final, 26.7.2000, at p. 4.
[405] Council Framework Decision on the European arrest warrant and the surrender procedures between Member States 2002/584/JHA, (OJ L 190, 18.7.2002, p. 1-20).
[406] See, e.g. and in a non-exclusive selection, Alegre, S. and M. Leaf (2004). "Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study - the European Arrest Warrant." European Law Journal **10**(2): 200-217.; Flore, D. (2002). "Le Mandat d'Arret Européen: Première mise en Oeuvre d'un Nouveau Paradigme de la Justice Pénale Européenne." Journal des tribuneaux(6050): 273-281.; Jégouzo, I. (2004). "Le mandat d'arrêt européen out la première concrétisation de l'espace judiciaire européen." Gazette du palais **Recueil**(juillet-août 2004): 2311-2313.; and Vennemann, N. (2003). "The European Arrest Warrant and Its Human Rights Implications." Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht **63**: 103-121.

States an entirely judicial affair without executive involvement as is the case, albeit to varying degrees, with traditional extradition. Second, for thirty-two classes of offences, exhaustively listed, the traditional requirement of dual criminality – that the alleged facts constitute an offence in both the issuing as well as the executing state – is abolished, provided that the offence is punishable in the issuing Member State with a minimum maximum sentence of three years' imprisonment.[407] Roughly half of these offences have been the subject of European harmonisation.[408] Third, there is no possibility to refuse the surrender of own nationals, a change which for some systems, mainly civil law jurisdictions, is of monumental importance.[409] Some jurisdictions even had the so-called nationality exception written in their constitutions. This last issue has led to a certain degree of constitutional turmoil in some Member States. Germany amended its *Grundgesetz* so as to allow for the implementation of the EAW and the surrender of its nationals, although the original implementing legislation was found to be unconstitutional by the *Bundesverfassungsgericht*.[410] Poland, on the other hand did not amend its constitution and the *Trybunał Konstytucyjny* consequently declared the implementing legislation unconstitutional.[411] However, the Polish constitutional tribunal stayed the effects of its judgment for eighteen months to allow time for a constitutional amendment without prejudicing European cooperation.[412] The fourth and final important aspect of the EAW is that the possible grounds for refusal, divided into mandatory[413], and optional[414], are exclusively enumerated in the

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[407] Article 2(2).

[408] See Jégouzo, I. (2004). "Le mandat d'arrêt européen out la première concrétisation de l'espace judiciaire européen." Gazette du palais **Recueil**(juillet-août 2004): 2311-2313.

[409] See Deen-Racsmány, Z. and R. Blekxtoon (2005). "The Decline of the Nationality Exception in European Extradition?" European Journal of Crime, Criminal Law and Criminal Justice **13**(3): 317-363., and, for the French perspective, Malabat, V. (2004). "Observations sur la nature du mandat d'arrêt européen." Droit pénal **12**: 6-10.

[410] BVerfG, 2 BvR 2236/04, judgment of 18 July 2005, Absatz-Nr. (1 - 201). See, e.g., Brady, H. and M. Roma (2006). Let justice be done: Punishing crime in the EU. London, Centre for European Reform (policy brief).

[411] Wyrok z dnia 27 kwietnia 2005 r. Sygn. akt. P 1/05, judgment of 27 April 2005.

[412] For a comment on this judgment, see Łazowski, A. (2005). "Case note: [Polish] Constitutional Tribunal on the Surrender of Polish Citizens Under the European Arrest Warrant. Decision of 27 April 2005." European Constitutional Law Review **1**: 569-581.

[413] To wit: 1) the offence is covered by an amnesty in the executing state, 2) *ne bis in idem*, and 3) the person concerned is *doli incapax* in the executing state (Article 3).

[414] To wit: 1) for offences not covered by Article 2(2), the requirement of dual criminality is not fulfilled, 2) proceedings against the person concerned are underway for the offence covered by the EAW, 3) proceedings as in 2) have been definitively closed, 4) the offence falls under the jurisdiction of the executing Member State but is statute barred, 5) *ne bis in idem* with respect to a third state, 6) for an EAW requesting the surrender for the serving of a custodial sentence, the executing Member State

EAW. The inclusion of the optional grounds for refusal are thus at the discretion of the individual Member States.

From a strictly legal-technical point of view, it could perhaps be said that the EAW constitutes a 'small revolution'[415], if for no other reason than the fact that the time of surrender between Member States has dropped from an average of nine months to around forty days.[416] Little surprise then that national police authorities find the EAW extremely useful. It is however doubtful whether the revolutionary analogy is apt from a more fundamental point of view. In fact, some authors would claim that the EAW is merely another step in a development to facilitate extradition/surrender between the Member States of the EU and of the Council of Europe[417]. Yet others argue – somewhat counterfactually in view of the four aspects of the EAW enumerated above – that there is no real significant change which would justify the abandon of the traditional term "extradition" in favour of the new "surrender."[418] What is more significant, however, is that much of the commentary on the EAW, institutional as well as academic, speaks of it as an adaptation to a reality which could very well be described as the existence of an EU-wide social contract. The original Commission proposal emphasises that the old extradition procedures were no longer 'suited to a frontier-free area such as the EU in which there is a high degree of trust and cooperation between States that share a sophisticated concept of the State based on the rule of law'[419], and writers such as Sanchez present the EAW as a measure adapting procedure to an existing reality rather than creating a new one.[420] In the

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may undertake to execute the sentence, and 7) the issuing state claims extraterritorial jurisdiction (Article 4).

[415] Jégouzo, I. (2004). "Le mandat d'arrêt européen out la première concrétisation de l'espace judiciaire européen." Gazette du palais **Recueil**(juillet-août 2004): 2311-2313., at p. 2311. [« *Il s'agit incontestablement d'une petite révolution juridique* »]

[416] Statement by The Right Honourable Colin Boyd QC, Lord Advocate of Scotland at the ERA Conference 'Developments in EU Criminal Justice: Consequences for Legal Practitioners', Edinburgh 29 September-1 October. See generally Pérignon, I. and C. Daucé (2007). "The European Arrest Warrant: a growing success story." ERA Forum **8**: 203-214.

[417] See, e.g., Malabat, V. (2004). "Observations sur la nature du mandat d'arrêt européen." Droit pénal **12**: 6-10.

[418] See Plachta, M. (2003). "European Arrest Warrant: Revolution in Extradition?" European Journal of Crime, Criminal Law and Criminal Justice **11**(2): 178-194.

[419] Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States, COM(2001) 522 final, 25.9.2001, at p. 2.

[420] Sanchez, W. (2002). "Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States." Columbia Journal of European Law **9**: 195-197.

same vein, Flore draws our attention to the beneficial effects in rendering all Europeans truly equal before the law. [421] What seems to be the core of his argument is the fact that now all persons suspected of having committed an offence in one jurisdiction will be treated the same, regardless of their having crossed an intra-EU border or not.

1.1 Abandoning dual criminality between Member States, extending legality within the EU

The partial yet significant abandonment of the principle of dual criminality and the fact that this amounts to an express relinquishment of national sovereignty has also been the subject of much comment. While it is possible that the adopted EAW is ostensibly less radical in this regard than the original Commission proposal[422], it is not certain that the effects would have been such. In fact, Article 27 of the original proposal[423] made dual criminality an optional grounds for a refusal to surrender with respect to an exhaustive list of offences drawn up by the individual Member States. In other words, while the new principle would have been the complete absence of the requirement of dual criminality, Member States would still have been able to retain mutually incompatible cores of offences for which the requirement would be retained. Needless to say, such a system and the resulting patchwork of mutually incompatible lists which would have been the likely result would have rendered the EAW much less effective than the version finally adopted. Whatever the reason for the reversal of principle, the retained system with a core of offences for which the requirement of dual criminality cannot be retained and the optional application of that requirement for other offences both provides for a smoother and more uniform application of the EAW across the EU, and perfectly captures the idea that there is now an EU-wide social contract. Whatever the exact content of that contract, we can clearly see that

[421] Flore, D. (2002). "Le Mandat d'Arret Européen: Première mise en Oeuvre d'un Nouveau Paradigme de la Justice Pénale Européenne." Journal des tribuneaux(6050): 273-281.
[422] See Vennemann, N. (2003). "The European Arrest Warrant and Its Human Rights Implications." Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht **63**: 103-121.
[423] Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States, COM(2001) 522 final, 25.9.2001.

the principles of the social contract established in the previous Title have their functional equivalents in the list of offences in Article 2(2). So although one can only agree with the assertion that an extension of the field covered by the abolishment of the requirement of dual criminality would make the enforcement of criminal law even smoother[424], it absolutely does not follow that such a course of action would necessarily perfect the EU-wide social contract.

It is however an inescapable conclusion that the EU-wide social contract is currently one of variable geometry. Certain behaviour defined as universally unacceptable is no longer subject to the irrational results of intra-EU border crossing. *A contrario* that leaves the rest of human behaviour subject to the regulation of the individual Member States. How are we to make sense of this? In the previous Title social contract theory was defined as a methodological devise for the evaluation of the conformity of societal institutions with the irreducible principles of society. It was also made clear that societal institutions refer to the principles which direct the application of the coercive force of the state. It follows then that social contract theory has a *normative* or *prescriptive* function. However, whereas this prescriptive function of social contract theory is aspirational in the sense that we use it continuously to improve the performance of a particular social contractual unit, the crucial aspect of social contractual theory is that the existence of a social contractual unit implies unity of status of all individuals under its jurisdiction. As we saw in the previous Title, the actions of an individual, if found in violation of the liberty of another, causes that individual to lose the protection of the social principles and is thus back in a state of nature *vis-à-vis* the collective to which she or he used to belong. As we have already had reason to state, the definition of a social contractual unit is a collective of individuals where such statuses are uniform across the collective. This is the essence of the *ontological aspect* of social contract theory. It is imperative that these two aspects of social contract theory are kept distinct. The ontological aspect defines the existence of the social contract whereas the prescriptive aspect is a tool with which we can evaluate the legitimacy or justice of any particular application of collective coercion. The argument made here is that the EU has now developed to the point

[424] See Weyembergh, A. (2004). L'harmonisation des législations : condition de l'espace pénal européen et révélateur de ses tensions. Bruxelles, Editions de l'Université de Bruxelles.

where, from an ontological point of view, it can be said to constitute a single social contractual unit. It is then a further question whether that EU-wide social contractual unit can be deemed just in every instance that collective coercion is applied. This distinction between prescription and description, or, between the normative and ontological aspects of social contract theory, is why social contract theory is not concerned with whether all aspects of human behaviour are dealt with similarly across the EU. Most of the legislative *acquis* which allows the argument to be made that there is an EU-wide social contract, for example the EAW, is precisely geared towards the ontological aspect of social contract theory and are both unconcerned with and have little if no effect on the prescriptive aspect. The failure to make the ordinal classification of description and prescription could be seen as the source of much of the criticism levelled at European instruments of criminal justice, and in particular the EAW.

Typical of this is the line of argument which sees the potential surrender of a person from a Member State where the behaviour complained of is not an offence as a violation of the principle usually expressed in the latin adage *nullum crimen, nulla poena sine lege*, or simply as the principle of legality.[425] As to the applicability of the principle itself in EU law there is little doubt. The principle of legality is indispensable to liberty and therefore an integral part of the rule of law and as such has to be read into the foundational principles formulated in Article 6(1) of the EU Treaty. However, with respect to the difficulties related to the partial removal of the principle of dual criminality, it is doubtful it can even be said that the principle of legality is ever put in jeopardy. The circumstance these authors envisage is when a citizen of Member State A is suspected of having committed an illegal act in Member State B and has since returned to Member State A where the behaviour is not illegal, and is then surrendered to Member State B. This situation can arise in relation to the 32 categories of offences set out in Article 2(2) EAW because the EAW expressly provides that the precise offences included in the categories are determined with reference to the legislation of the issuing Member State. If, in the above example, the activity for which the citizen of Member State A is wanted in Member State B would

[425] See, e.g., Alegre, S. and M. Leaf (2004). "Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study - the European Arrest Warrant." European Law Journal **10**(2): 200-217.

have been perfectly legal in Member State A, but constitutes 'corruption' in Member State B, the authorities of Member State A have to accept the definition of the offence in Member State B. The problems arguably arising out of this situation were dealt with in the case of *Advocaten voor de Wereld* decided by the ECJ on 3 May 2007[426] in which the partial removal of the dual criminality requirement was challenged.

Before the Belgian *Arbitragehof*, *Advocaten voor de Wereld* sought the annulment of the Belgian Law of 19 December 2003 transposing the EAW. For present purposes, there were two central grounds of claim, both related to the Article 2(2) EAW-removal of the dual criminality requirement and both submitted to the ECJ by the *Arbitragehof* by way of a request for a preliminary ruling. It was alleged, first, that in removing the requirement of double criminality in respect of the listed offences, the EAW resulted in a violation of the principle of equality, and, second, that these listed offences were insufficiently clear and precise thus violating the principle of legality.

With respect to the first prong of *Advocaten voor de Wereld*'s claim – the principle of equality – the ECJ chooses to read it as relating to the difference in treatment with reference to two individuals facing extradition or surrender, one on the basis of one of the categories in Article 2(2) EAW, and one on the basis of another offence. The ECJ here concludes that the Council legitimately could form the view that '*the categories of offences in question feature among those the seriousness of which in terms of adversely affecting public order and public safety justifies dispensing with the verification of double criminality*'[427] and that therefore

> '*even if one were to assume that the situation of persons suspected of having committed offences featuring on the list set out in Article 2(2) of the Framework Decision or convicted of having committed such offences is comparable to the situation of persons suspected of having committed, or convicted of having committed, offences other than those listed in that provision, the distinction is, in any event, objectively justified.*'[428]

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[426] Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad*.
[427] *Ibid.*, at § 47.
[428] *Ibid.*, at § 58.

With respect to the principle of legality, the ECJ clarified that

> '*while Article 2(2) of the Framework Decision dispenses with verification of double criminality for the categories of offences mentioned therein, the definition of those offences and of the penalties applicable continue to be matters determined by the law of the issuing Member State, which, as is, moreover, stated in Article 1(3) of the Framework Decision, must respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU, and, consequently, the principle of the legality of criminal offences and penalties.*'[429]

By way of conclusion, we have seen that the ECJ held that neither the principle of equality nor the principle of legality were violated by the EAW, and in particular the partial removal of the dual criminality requirement in its Article 2(2). However, whereas the reasoning with respect to the principle of legality is impeccable, the same cannot be said of the reasoning with respect to the principle of equality where the reasoning is, with respect, inexhaustive. Whether the ECJ deliberately chose to "read down" the question posed or not is impossible to say, but the reply it provides does not address the foundation of the question referred to it by the *Arbitragehof*. The aspect of equality the *Arbitragehof* must be seen as referring to was not that of two individuals facing extradition or surrender for two different offences. Rather, the situation envisaged by the referring court was probably that of two individuals having performed the exact same acts, person X on the territory of Member State A and person Y on the territory of Member State B, and who now both find themselves before the court in Member State A. If in this situation the acts in question do not constitute an offence in Member State A but do come within one of the categories of offences listed in Article 2(2) EAW according to the legislation of Member State B, the court in Member State A will have to free person X whereas it will be forced to detain person Y in execution of a EAW issued by Member State B. Put in these terms, the *Arbitragehof*'s question is in essence whether it would be in violation of the principle of equality before the law for a court to treat two individuals having performed the exact same acts differently for the simple reason that one of them had

[429] Judgment, at § 53.

acted on the territory of a different Member State. This is the aspect of the principle of equality which the ECJ declined to address.

If we dissect the question by the *Arbitragehof*, read in the manner outlined above, it seems to imply that the Member State in which the suspect finds her or himself might have an obligation to protect her or him from criminal proceedings which she or he would not risk as a result of actions on the territory of that Member State. This would amount to some kind of extra-territorial application of an *a contrario*-reading of the principle that *ignorantia legis non excusat*: not knowing the law is in fact an excuse with respect to the laws of other countries. Although Advocate General Ruiz-Jarabo Colomer[430] did seek to delve somewhat deeper in the issues raised by the referring court, arguably he failed fully to address the fundamentals of the question. The Advocate General took the question to relate to the possibility that the categories of offences listed in Article 2(2) EAW will receive different interpretations in different Member States and that this could give rise to a situation of discrimination. In order to answer this question, he distinguished between '*equality in the law itself and the equality which operates when the law is applied*'[431] and that the question posed by the referring court related to the latter. Having thus framed the issue, the Advocate General affirmed that '*there is no inequality in the application of the law where conflicting judgments are handed down by courts which are acting in the legitimate exercise of their jurisdiction to determine a case, because the principle of equality does not require separate courts to reach identical conclusions.*'[432] In other words, behaviour which could give rise to a EAW and be exempt from the requirement of dual criminality must by definition fall within one of the categories of offences listed in Article 2(2) and, further, there is obviously no objective discrimination in the application of these categories to the inhabitants of the EU. The ulterior possibility that individual criminal jurisdictions in the EU *interpret* these categories differently cannot, in the opinion of the Advocate General, be considered discriminatory.

With respect, the answer provided by the Advocate General also misses the point. While it is true that the categories of offences in Article 2(2) are indifferently

[430] Opinion of 12 September 2006.
[431] *Ibid.* at § 97.
[432] *Ibid.* at § 97.

applicable to all inhabitants of the EU, individual courts do not apply those categories directly. And fortunately so because none of them specify the behaviour referred to with enough precision to satisfy the principle of legality. As the ECJ pointed out in its judgment, the law applied in an individual case will be that provision of the criminal law in each individual Member State deemed to correspond to the category listed in Article 2(2) of the EAW. At this point, different courts in different Member States do not differ in their interpretation of the same provision as the Advocate General seems to suggest, but apply different provisions altogether.

While it would be rare for a set of acts to be entirely legal in one Member State while falling within one of the categories listed in Article 2(2) in another, it is perfectly possible for the constituent elements of an offence to differ so as to make the categories difficult to apply.[433] In order to turn the problem raised by the *Arbitragehof* into a concrete example, we can take the 28th category listed: 'rape.' In the UK, rape is defined as having sexual intercourse with a non-consenting person while knowing of or being reckless as to that absence of consent.[434] In Sweden, in order for the same behaviour to be classified as rape, an additional factual element has to be proven, namely the application of actual or threatened violence, or that the non-consenting party was in a defenceless position.[435] At this point let us imagine that two Swedish citizens have sexual intercourse with non-consenting women *without the application of violence*, person X in Sweden and person Y in the UK. Person X is arrested in Sweden and person Y, having travelled back to Sweden, is also arrested there but on the basis of a EAW issued by the UK authorities for him to face charges of 'rape.' In this situation, according to the *Arbitragehof*'s question, the receiving Swedish authorities could be seen as having to treat two individuals having performed the exact same acts differently. With respect to person X, his actions do not come within the definition of 'rape' since one of the constituent elements – the application of actual or threatened violence, or that the non-consenting party was in a defenceless position – is lacking. He would most likely face charges of aggravated sexual assault. In relation to person Y, however, the same court would have to detain and eventually

[433] However, the following reasoning would apply equally to a situation in which the applicable set of acts is entirely legal in one Member State but falls within one of the Article 2(2)-categories in another.
[434] Section 1 of the Sexual Offences Act 2003.
[435] *Brottsbalken*, chapter 6, § 1.

surrender him on the basis of the charge of 'rape' issued by the UK authorities. Does this constitute a violation of the principle of equality?

The answer, surely, is no. The question posed by the *Arbitragehof*, even read in this more generous manner, starts by positing erroneous points of comparison for the application of the principle of equality. Given that person Y performed the illegal acts on UK territory, he only finds himself in front of a Swedish court – and the Swedish court only finds itself able to compare him with person X – because he managed to escape arrest in the UK. That contingent circumstance does not entitle person Y to equality of treatment with reference to person X. Person Y is entitled to equality of treatment with reference to individuals suspected of violating the same laws as he has, i.e. UK rape legislation. In executing the EAW the Swedish court in fact strengthens equality of treatment by putting person Y in a position to enjoy equality of treatment with the correct points of comparison.[436] Thus, the actual solution given by the ECJ in *Advocaten voor de Wereld* is correct even though the reasoning could be said to be incomplete.

Although the ECJ provided a very convincing analysis of the aspect of the question referred relating to the issue of the principle of legality, the question of the application of the categories of offences in Article 2(2) of the EAW merits some further development. Although one can only agree with the ECJ's conclusion that the responsibility for complying with the principle of legality lies with the Member State legislatures in drafting the detailed legislation under which a given person is charged, the question remains on the limits of the issuing Member State's discretion in claiming that a particular offence defined in its legislation falls within any particular category in Article 2(2) of the EAW. Flore is of the opinion that the executing court should verify that that facts alleged in the EAW generically fit into the category listed in Article 2(2), leaving the constituent elements up to the authorities in the issuing Member State.[437] Although this type of control is practically possible given that the

[436] See discussion of opposition to the EAW in the UK in Spencer, J. R. (2003-2004). "The European Arrest Warrant." The Cambridge Yearbook of European Legal Studies **6**: 201-217.

[437] Flore, D. (2002). "Le Mandat d'Arret Européen: Première mise en Oeuvre d'un Nouveau Paradigme de la Justice Pénale Européenne." Journal des tribuneaux(6050): 273-281., at p. 276. [« *contrôler que, sur le plan générique, le fait qui est à la base du mandat d'arrêt est un de ceux contenus dans la liste [...] Dès lors que l'autorité judiciaire d'exécution aura constaté que le fait est bien couvert par la*

model EAW annexed to the framework decision requires the issuing court to describe the circumstances of the alleged offence, it does not really deal with the fundamental problem. How can the generic facts of a situation be separated from the constituent elements of an offence in general? If we again use the example of the disparities in the definition of 'rape' under UK and Swedish laws, how would this control be applied? In the above example, the UK EAW would specify the allegedly non-consensual sexual intercourse involving person Y. Those are objective elements but they also correspond to the UK definition of the objective requisites, or *actus reus*, of 'rape.' The further objective element required in Swedish law – i.e. the application of actual or threatened violence, or that the non-consenting party was in a defenceless position – is no less an objective element and in the absence of an EU harmonising measure of the offence it seems difficult to argue that the UK definition of the objective act is more in conformity with the pan-European "generic rape" than is the Swedish. It could of course be argued that UK "rape" in fact linguistically corresponds to the Swedish aggravated sexual assault but we are then faced with the bizarre situation that the most serious sexual offence in Sweden lacks a legal UK equivalent. The reason why this example is so apt is precisely because we are dealing with the *actus reus* of an offence. These constitute the factual elements which, according to Flore, it would be relatively easy for the executing judicial authority to verify correspond to the invoked category, leaving the subjective element – *mens rea* –, excuses, justifications, etc. for the issuing judicial authority to settle.[438] There is thus the possibility that a EAW issued for rape by a UK court would fail if the Swedish judge applied the principles laid down by Flore. The answer, it is submitted, is that national judges, when faced with a marginal situation, apply a common sense test and treat the categories as generic descriptions of type-offences; a criminal version of the Platonic 'ideas.' Difficult to describe but, one would hope, fairly obvious in practice and, as Advocate General Ruiz-Jarabo Colomer points out in his opinion in *Advocaten voor de Wereld*, '*should any uncertainty remain about the meaning of the terms used in Article 2(2) of the Framework Decision, the procedure*

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liste, elle sera tenue par la définition donnée des infractions en question par le droit de l'Etat d'émission, c'est-à-dire par les éléments constitutifs tels qu'ils sont prévus par cette législation »]

[438] See *ibid*.

for referring a preliminary ruling under Article 35 EU provides a suitable channel for a uniform interpretation within the territory of the Union.'[439]

The interaction of the EAW with the principle of legality raises a further issue. It starts from the assertion that the people of a Member State have made a determination as to which behaviour is to be deemed objectively unacceptable and have enshrined it in their criminal law. The fact that another Member State criminalises behaviour not covered by the criminal law of the first Member State is, quite simply and objectively, wrong and should be obstructed whenever the opportunity arises:

> 'Since sovereign States are free to take different views as to what should be criminalized and to what extent, and these differences are rooted deeply in different cultures and national identities and represent different choices resulting from the democratic process in each State, why should States in principle be obliged to assist another State to apply its criminal law where the two States differ on whether the relevant act should be criminalized?'[440]

This reasoning must also be deemed unsatisfactory. This response, however, begs a further question: given that the theory of criminal justice presented in the previous Title is universalist, how can I now argue that universalist claims by Member States are unsatisfactory? The answer is that universalist claims *per se* are not. The problem is that Peers' argument is in fact fundamentally parochial albeit couched in universalist terminology. Member States have long since stopped making universalist claims *vis-à-vis* one another. If a Member State truly wanted to make a universalist claim, it would not merely object to the subjection of people under its own jurisdiction to the objectionable foreign legislation; it would object to *anyone* being subjected to it. For example, the Swedish law on rape is different from most of its European neighbours. Yet, Sweden does not object to Britons being convicted of rape under UK law, or French under French law, or anyone under either for that matter. As was pointed out in the previous Title, the principles of a universalist theory can be effectively applied in a number of ways and there is little more than cultural and

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[439] At § 98.
[440] Peers, S. (2004). "Mutual Recognition and Criminal Law in the European Union: Has the Council got it Wrong?" Common Market Law Review **41**: 5-36., at pp. 24-25.

historic accident determining the exact outlines of a system of criminal justice. Article 6 EU makes it clear that the Member States of the EU profess to share a civilisational heritage and a belief in the same fundamental principles. Disagreement over the application of these principles does not automatically translate into a complete disavowal of their validity as application of those principles. Claims that one system of criminal justice embodies the one true application of the shared European civilisational consensus could theoretically be made but not in the abstract. Such a claim would need both to define precisely what is contained in this civilisational consensus and to explain why that system of criminal justice, as distinguished from all others, provides its optimal realisation.

It has been argued here that the ECJ's ruling on the implications of the EAW for the principles of equality and legality was entirely correct. That is not the end of the matter, however. From a theoretical perspective, the combination of a retention of jurisdictional boundaries and the application of the principle of mutual recognition poses a number of problems which need solutions.

1.2. Mutual recognition and the transjurisdictional enforcement of decisions

From a practical point of view, mutual recognition entails two things. First, positively, a foreign decision necessitating enforcement should hold equal executory force as a domestic decision. The authorities of the recognising state must enforce the foreign decision.[441] Second, and negatively, 'a decision taken by no matter which authority in the EU fully deals with the issue and that no further decision needs to be taken at all.'[442] There is some debate as to the effect of mutual recognition on intra-EU borders. Notably, Guild sees in the compulsory acceptance of foreign decisions, in principle without any verification in the executing state, 'an inversion of an area

[441] European Commission Communication on mutual recognition of final decisions in criminal matters, COM(2000) 495 final, 26.7.2000, at p. 8.
[442] *Ibid.*, at p. 9.

without borders into an area that respects without question borders.'[443] According to Guild, mutual recognition implies the unquestioning compliance with complicated normative choices by virtue of the simple fact that they come from the other side of a jurisdictional boundary, i.e. an intra-EU border. Thus the methodology chosen to effect the AFSJ appears to Guild to go against the fundamental judicial principle of limiting the exercise of executive power. In an EU devoid of centralised norms for the application of collective coercion, when the execution of a decision is entrusted to a jurisdiction different from the one which made it, the limitations inherent in the norms upon which the decision was based lose their significance: 'Without power there is no meaning to the limitation of power.'[444] In order to be understandable, the argument must be that the norms which act as limitations on the institutional power entrusted with the enforcement of a decision, much like certain wines, "do not travel." The question is whether the fear that mutual recognition in fact 'unleash[es] the power of the Member States to exercise punishment at the edges of their own constitutional settlements'[445], is any less pertinent if applied to purely national criminal procedures. Nowhere do we expect the police to reassess the legal basis for the decision they are institutionally obliged to enforce. The Metropolitan Police would expect an arrest warrant issued by the magistrates at City of Westminster Magistrates[446] to be legal just as *la police nationale* would one issued by the investigative magistrates at *la chambre d'accusation de Paris*. They would both assume that any eventual issues relating to the legality of the decision had been considered by the responsible judicial officers subject to the possibility of appeal. It is difficult to see in what way this would be different for French police enforcing a decision from City of Westminster, or the Met enforcing one from *le parquet de Paris*. Judicial decisions have the effect of legitimising the application of force necessary for their enforcement. The legitimacy of the judicial decision itself can never be ascertained at the level of its enforcement, let alone by reference to the nationality of the enforcers. Of course, there is the possibility that the judicial decision by either jurisdiction is tainted by an

[443] Guild, E. (2004). "Crime and the EU's Constitutional Future in an Area of Freedom, Security, and Justice." European Law Journal **10**(2): 218-234., at p. 219.
[444] *Ibid.*, at p. 220.
[445] *Ibid.*
[446] Much to my chagrin I have learned that the ancient and venerable Bow Street Magistrates Court closed in late 2006. Its responsibility for extradition cases has been transferred to the City of Westminster Magistrates Court.

objective procedural irregularity. However, unless the decision is such that we would hold the police morally obliged to disobey, there is no valid reason why we should hold them to a higher standard of vigilance with respect to a foreign decision than we do with respect to a domestic one.

To be precise, the above schema contains a simplification. French courts still cannot directly enjoin British police to execute their decisions, and vice-versa. What is meant by mutual recognition is that the corresponding judicial authorities in the executing Member State translate the decision into the "language" of the local system for local police, or other executive authority, to enforce. However, they do this assuming that there is no need to reassess the legality of the original judicial decision in application of a principle of 'trust in the adequacy of one's partners rules, [and] that these rules are correctly applied.'[447]

The idea that we are enforcing a European social contract is probably necessary in order for an English judge merely cursorily to check the formal correctness of a French decision in order to give it legal force in the UK. Since 'a judge trained in the common law tradition will find it hard to assess the fairness of a trial in a requesting state that follows the inqusitorial system, and vice versa'[448], there simply could not be an efficient cooperation in criminal justice without an institutionalised belief in the fundamental compatibility of the various systems of criminal justice in play. The crossing of an intra-EU borders is now a contingent event as far as most of the legal implications relevant to individuals are concerned. Consequently, there is no reason why it should not also be in relation to the application of the criminal law. The implication of the discussion of the effects of the EAW is a clear indicator that the EU has now adopted the position argued for in Title I, that a system of criminal justice fully respecting the requirements of our common principles of justice can take many shapes. Consequently, the universalist/absolutist position which argues for the universal superiority of our own systems of criminal justice has lost currency in

[447] European Commission Communication on mutual recognition of final decisions in criminal matters, COM(2000) 495 final, 26.7.2000, at p. 4.

[448] Dugard, J. and C. Van den Wyngaert (1998). "Reconciling Extradition with Human Rights." American Journal of International Law **92**: 187-212., at p. 204. See, anecdotally, Hamsoun, C. J. and R. Vouin (1952). "Le procès criminel en Angleterre et en France." Revue Internationale de Droit Pénal **23**: 177-190.

favour of a system which espouses universal principles locally applied. In the universalist/absolutist framework, it made a great deal of sense to use borders as a check-point to verify the respect of our own, superior values. The practical conclusion of the development of the EU's AFSJ via the development of mutual recognition is that we must cease to think of the jurisdictional boundaries of the criminal law as compensatory civil liberties protecting us from the differences between systems. Nevertheless, the question arises whether the removal of border-related civil liberties-control in application of an instrument such as the EAW is in conformity with the current system of international obligations binding all EU Member States.

1.3. The intra-EU border, mutual recognition and existing human rights standards

As will have become apparent from the above discussion, traditional extradition law very much regarded the national border as an opportunity to emphasise the independence and superiority of national criminal law. A government would *ex gratia* allow a foreign power to bring to justice an individual presently under its jurisdiction:

> '*In the case of extradition, contact is initiated between two sovereign States, the requester and the requested, each of which acts from an independent position. One State asks for the cooperation of the other State which decides whether to provide that cooperation on a case-by-case basis, having regard to grounds which exceed the purely legal sphere and enter into the scope of international relations, where the principle of opportuneness plays an important role.*'[449]

With time, however, emphasis has come to shift from the protection of the integrity of the system itself, to the protection of the individual and her or his rights in the criminal process. Today in the Western world, although government is still the final

[449] *Advocaten voor de Wereld*, see above, opinion of AG Ruiz-Jarabo Colomer, at § 42.

arbiter, extradition is mostly a judiciary-driven process aimed at minimising the risk that the individual subject of the proceedings be deprived of too much of her or his rights. Parallel to this development, countries have subscribed to various human rights declarations making clear their responsibility for the violation of human rights, including in proceedings over which they have jurisdiction and/or control. Consequently, extradition became not only a process in the realm of international relations governed by the 'principle of opportuneness', but a necessary occasion for a country to verify that it did not violate its international human rights obligations.

In Europe, the most significant human rights instrument in this regard, as well as in most others, is the ECHR. For the EU in particular, Article 6(2) of the EU Treaty proclaims the Union's adherence to, *inter alia*, 'fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms', Article 7(1) of which expressly provides that '[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.' Particularly with respect to the framing of the EAW, the issue of compliance with fundamental principles of human rights law did not go unnoticed by the EU legislator. Prembular paragraph 10 of the EAW states that the implementation of the mechanism may be suspended in the event of a 'serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.' Is this safeguard not enough to satisfy those fearing violations of human rights principles by virtue of the operation of the EAW? Apparently not. Fears that the application of the procedure provided for in Article 7 of the EU Treaty will be too late for those suffering from violations of the principles expressed in Article 6 EU are common. Since the mechanism of the EAW could only be suspended *after* the bringing of proceedings under Article 7, there is the off chance that 'the framework decision [on the EAW] obliges Member States to surrender a person, although the surrender is incompatible with the human rights protected by art. 6 TEU', and that the EAW thus 'violates

treaty law and can be declared invalid under certain circumstances.'[450] In order to find out whether the EAW does potentially violate applicable human rights law, we need first to clarify what the human rights law says on the matter of extradition or surrender. Given its dominating position in human rights law in Europe, we will look at the pronouncements by the ECtHR on the basis of the ECHR.

It was not obvious that extradition proceedings *per se* constituted a risk of violation of the ECHR and, consequently, that the Convention applied to them at all. It could in fact be argued that whether the substantial proceedings in the country of destination violate human rights or not is a matter causally detached from the particular setting of extradition proceedings. That was not the approach adopted by the ECtHR when it finally addressed the issue directly. In *Soering*[451] the Court settled the principle that '*in so far as a measure of extradition has consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a Contracting State under the relevant Convention guarantee.*'[452] The Court was quick to emphasise that it was practically impossible and, in any case, hardly desirable for a Convention state to verify the complete compliance with the provisions of the ECHR by the requesting state as a precondition for extradition. It was only '*where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country*' that extradition would engage the responsibility of the requested state under the ECHR.[453] *Soering* concerned the extradition by the UK to the United States of America, a non-party to the ECHR, and the risk of 'inhuman or degrading treatment or punishment' concerned the death penalty commonly imposed for the type of offence of which the applicant was accused. There were therefore several ambiguities as to the precise

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[450] Vennemann, N. (2003). "The European Arrest Warrant and Its Human Rights Implications." Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht **63**: 103-121., at pp. 114-115.
[451] *Soering v. United Kingdom*, judgment of 7 July 1989 (application no 14038/88). All judgments of the ECtHR can be found on http://www.echr.coe.int/echr.
[452] *Ibid.*, at § 85.
[453] *Ibid.*, at § 91. On this, see Zühlke, S. and J.-C. Pastille (1999). "Extradition and the European Convention - Soering revisited." Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht **59**: 749-784., and Frédéric Sudre, 'Le renouveau jurisprudentiel de la protection des étrangers par l'article 3 de la Convention européenne des droits de l'Homme', in Fulchiron, H., Ed. (1999). Les étrangers et la Convention européenne de sauvegarde des droits de l'Homme et des libertés fondamentales. Paris, L.G.D.J.

merits of the case. Was it only concerned with extradition to non-parties to the Convention? Was it limited to the Article 3 prohibition of torture, and inhuman or degrading treatment or punishment? As to the latter question, the Court itself provided a tentative answer stating that it could '*not exclude that an issue might exceptionally be raised under Article 6 […] by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country*'[454], but provided no guidance as to how this was to be assessed, especially when the requesting party was a party to the Convention. It will be recalled that Article 6 ECHR deals with fair trial rights in general, and with the requirements of fair trial in criminal proceedings in particular.

The applicability of the *Soering*-principle to Article 6 ECHR was confirmed in *Mamatkulov*.[455] In this case the Grand Chamber of the ECtHR further clarified that '*the risk of a flagrant denial of justice in the country of destination must primarily be assessed by reference to the facts which the Contracting State knew or should have known when it extradited the persons concerned.*'[456] This did not, however, dispel all the remaining difficulties in applying the *Soering*-principle. As was pointed out in a dissenting opinion, '*[w]hat constitutes a "flagrant" denial of justice has not been fully explained in the Court's jurisprudence.*'[457] The dissenting judges were of the opinion that the use of the word '*flagrant*' clearly '*intended to impose a stringent test of unfairness going beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself.*'[458]

Again, however, the requesting state in *Mamatkulov*, Uzbekistan, was and is a non-party to the Convention. The question of whether the *Soering*-principle was applicable to a state party to the ECHR was finally settled in *Chamaïev* where

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[454] *Soering*, at § 113.
[455] *Mamatkulov and Abdurasulovic v. Turkey*, judgment of 4 February 2005 (judgment of the First Section of 6 February 2003) (application nos 46827 and 46951/99). See, e.g, Poynor, B. (2005). "Mamatkulov and Askurov v Turkey: The Relevance of Article 6 to Extradition Proceedings." European Human Rights Law Review **2005**(4): 409-418.; and (2005). "Case Comment on Mamatkulov v Turkey." European Human Rights Law Review **2005**(3): 317-320.
[456] *Ibid.*, at § 90.
[457] *Ibid.*, dissenting opinion of Judges Rozakis, Bratza, Bonello and Hedigan.
[458] *Ibid.*

Georgia was put on notice that it would be in violation of Article 3 if it executed a decision to extradite one of the applicants to Russia (a party to the Convention) and in particular to the federal state of Chechnya.[459] The Court found that since the decision had been made, there were so many facts come to light regarding the situation in that part of Russia that the execution of the decision, without a substantial reconsideration of the circumstances, would put Georgia in violation of its Convention obligations.[460] Notice should be taken of the enormous amount of information relied on by the ECtHR – international reporting from organisations such as the Council of Europe (the Court's own parent organisation), Amnesty International, the Helsinki Committee, etc. – to enable it to find that Georgia, if it executed the extradition decision, could be said objectively to know that the applicant faces a real risk of treatment contrary to Article 3. This is to be compared with the decisions regarding the other applicants in the case in respect of whom the extradition decisions had already been executed and where the Court found that it could not be said that Georgia should have been aware of any risks such as to put it in violation of its Convention obligations. It should also be pointed out that, to date, the ECtHR has never found a violation of Article 6 with respect to extradition proceedings.

The conclusion to be drawn from this relatively sparse case law on extradition emanating from the ECtHR with respect to the EU and the development of the AFSJ is that it would be extremely difficult, nigh on impossible, for an EU Member State to be found in violation of its ECHR obligations by a decision to surrender an individual to another Member State. Capital punishment is absolutely prohibited in the EU and it is difficult to imagine one or several Member States descending into a state comparable to Chechnya without the EU either collapsing or suspending the concerned Member States in accordance with Article 7 EU. With the exception of capital punishment, the level of violation known to the requested state required for there to be a violation of Article 3 ECHR by virtue of an extradition decision seems more severe than the 'serious and persistent breach' required for the activation of the suspension procedure in Article 7(2) EU. This is emphasised by the fact that the

[459] *Chamaïev et autres c. Géorgie et Russie*, judgment of 12 April 2005 (application no 36378/02).
[460] *Ibid*. [« [*L]a Cour juge avéré que, si la décision d'extrade M. Guélogaïev, prise le 28 novembre 2002, était mise à exécution sur le fondement des évaluations faites à cette date, il y aurait violation de l'article 3 de la Convention* » (§ 368)]

ECtHR would seem to require a 'flagrant' violation of fair trial rights in order for an extradition decision to be in violation of Article 6 ECHR whereas the Article 7 EU standard of 'serious and persistent' applies equally with respect to all the principles mentioned in Article 6 EU. It appears obvious that the ECtHR does not want the states party to the ECHR to use extradition proceedings as an excuse to pass judgment on the systems of criminal justice in requesting states. Although the violation of the Convention resulting from the extradition decision is completely independent from an eventual substantive violation in the requesting state resulting from the consequent criminal proceedings[461], violations in general must be rampant and well documented so as to make it unlikely, appreciated from the objective and reasonable position of the requested state, that the suspect will *not* suffer similar treatment upon surrender.

From a different perspective, it is precisely because the violation resulting from the extradition decision is completely independent of any substantial violation that much of the criticism of the principle of mutual recognition, often made concrete by the EAW, is so difficult to understand. This criticism generally uses the ECHR as a benchmark for the level of protection due to individuals in criminal proceedings only then to express fears that the application of the principle of mutual recognition result in a withdrawal of that protection. Thus Alegre and Leaf argue that the fact that signature of the ECHR is an EU accession requirement matters little: 'Respect for human rights […] is not simply a matter of declaratory intent, the protections must be real, not simply apparent on paper. The vast majority of current EU Member States and accession states have had recent judgments against them in the European Court of Human Rights relating to their criminal justice systems.'[462] In the same vein, Guild asks the following question: 'How can the individual who is entitled to enjoy a right of free movement in a single area of freedom, security, and justice be protected in respect of violence when the rules on violence vary with the borders of the Member States?'[463] The obvious reply that all violence in the EU is subject to the ECHR is brushed aside with the motivation that 'among the implications of this argument is

[461] See *Mamatkulov*, above.
[462] Alegre, S. and M. Leaf (2004). "Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study - the European Arrest Warrant." European Law Journal **10**(2): 200-217., at p. 216.
[463] Guild, E. *ibid*."Crime and the EU's Constitutional Future in an Area of Freedom, Security, and Justice." 218-234., at p. 224.

that the Court of Human Rights [take] on the role of a final court of appeal for the territory of the EU, a role it has expressly rejected.'[464]

It is difficult to arrive at any conclusion other than that the failure of these authors to take into account the actual ECtHR case law on extradition/surrender has led them to argue wide of the mark. In terms of criminal proceedings, the responsibility for compliance with the ECHR safeguards lies predominantly with the state party which proposes to exercise its monopoly on violence by substantially charging the suspect.[465]

The ECHR cannot be said to confer any subjective right on suspects facing extradition/surrender to an *a priori* verification of the Article 6 ECHR-compatibility of the criminal justice system in the requesting state. Although, as noted above, the ECtHR has not excluded the possibility of a violation of Article 6 ECHR by virtue of a decision to extradite/surrender a suspect, we also saw that the circumstances which would have to pertain for this to be an even remote possibility are adequately covered by the EU Treaty. On the contrary, as far as the effect of the EAW on ECHR compliance is concerned, it seems more likely that the use of the latter will result in fewer findings of violation of Articles 5 and 6 ECHR due to the massive reduction of delays. The argument that as the individual moves freely across the EU 'it is only judgments in criminal matters that may follow him or her' and that 'civil liberties protections do not enjoy mutual recognition or the right to travel with the individual freely within the Union'[466] seems no more correct than it did prior to the principle of mutual recognition. The existing common civil liberties protections have remained the same, covering as they do the whole of the AFSJ.

[464] *Ibid.*, at p. 233.
[465] This is of course separate from the issue of Article 5 ECHR and the conditions of detention in the requested state in view of extradition which has resulted in numerous findings of violation.
[466] Guild, E. (2004). "Crime and the EU's Constitutional Future in an Area of Freedom, Security, and Justice." European Law Journal **10**(2): 218-234., at p. 233.

1.4. Civil liberties beyond existing human rights standards

This reasoning is not meant to imply that all concerns regarding the future of civil liberties in the AFSJ are unwarranted. As we saw in the introductory chapter, the common justifications for EU action in the area of criminal justice are clearly open to criticism especially from the point of view that 'there may be serious implications for […] civil liberties.'[467] The EU's relative lack of concern for the civil liberties aspect of the criminal procedure may even warrant fears that we are now seeing the 'emergence of a European Criminal Law of a potentially repressive, rather than protective nature.'[468] However, these concerns, which I readily admit to sharing, cannot be linked to any concrete violation of any extant common standards of procedural safegauards. The common standard in Europe is the ECHR and it is *not* being violated. At the same time, the fact that the ECtHR does not force us to reconsider the *status quo* does not mean that we cannot or should not be concerned about the standard of procedural safeguards in criminal proceedings in the EU. Just because there is no subjective right to be tried according to the system which is the most protective of civil liberties[469] does not mean that we should not take an interest in the overall standard or the potential effects of mutual recognition on that standard. It is hard to deny the fact that instead of relatively benefiting the most protective systems, mutual recognition gives a greater scope of action for the more repressive ones. Whether that will in turn lead to the more protective systems aligning themselves with the less protective, as Weyembergh seems to believe[470], remains to be seen. What needs to be understood is that these concerns are not based on any existing common standard of procedural safeguards, but rather on what we might

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[467] Monica den Boer, 'The Quest for European Policing: Rhetoric and Justification in a Disorderly Debate', in Anderson, M. and M. den Boer, Eds. (1994). Policing Across National Boundaries. London and New York, Pinter Publishers., at p. 174.

[468] Mitsilegas, V. (2001). "Defining Organised Crime in the European Union: The Limits of European Criminal Law in an Area of "Freedom, Security and Justice"." European Law Review **26**(6): 565-581., at p. 581.

[469] Weyembergh, A. (2004). L'harmonisation des législations : condition de l'espace pénal européen et révélateur de ses tensions. Bruxelles, Editions de l'Université de Bruxelles., at p. 151. [« *[I]l n'existe pas de droit subjectif à bénéficier du système le plus protecteur des droits individuels* »]

[470] *Ibid*., at p. 151. [« *[L]oin de tendre à alignement des droits nationaux vers le haut sur ce plan, la reconnaissance mutuelle incite plutôt à se contenter du plus petit commun dénominateur et entraîne de la sorte un nivellement par le bas des droits et garanties procédurales dont jouissent les personnes concernées par le procès pénal* »]

think should be the common standard or fears for the integrity of our own national solutions.

When evaluating the AFSJ from the perspective of social contract theory it needs to be remembered that both procedural safeguards and the repressive aspects of criminal justice are different and irreducible sides of the same coin. It must be stated that the social contract would break down if either were disregarded and this without succumbing to the common but incorrect balancing exercise.[471] The Commission emphasises this exact point in a 2005 communication:

> 'Freedom can only be enjoyed within a framework of personal security provided by law. In particular, citizens' liberties and rights can only be guaranteed if they are sufficiently protected from criminal acts, which do not only threaten the freedom and rights of individuals but also the democratic society and the rule of law.'[472]

Thus, the extension of the repressive aspects of the social contract to the EU as a whole forces us to reconsider the traditional means of implementing procedural safeguards. Undeniably, through the development and, especially, the judiciarisation of procedures of extradition and *exequatur*, the border had become an integral part of the institutionalised enforcement of procedural safeguards.[473] A perfect example of this is the now famous decision in *ex parte Ramda*[474] where the English Division Court quashed a decision to extradite a suspect to France on the grounds that there were unresolved suspicions that the evidence against the suspect had been obtained through the use of torture. However, what the English court did was to apply its own standard as to its obligations to guarantee a fair trial for the suspect in extradition proceedings, not a universal standard which is applicable all over the EU. If on similar facts the Division Court had allowed an extradition and the case had been brought to the ECtHR, considering the case law referred to above it seems a near

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[471] See above.
[472] Euopean Commission Communication on establishing a framework programme on "Security and Safeguarding Liberties" for the period 2007-2013, COM(2005) 124 final, 6.4.2005, at p. 2.
[473] See, e.g., Marie-Hélene Descamps, 'La reconnaissance mutuelle des décisions judiciaires pénales', in Flore, D., S. Bosly, et al. (2003). Actualités de droit pénal européen. Bruxelles, La Charte.
[474] Judgment of 27 June 2002, [2002] EWHC 1278 (Admin). See also French *Cour d'appel de Pau*, *Irastorza Dorronsoro*, judgment of 16 May 2003 (No 238/2003) for a similar result in the context of extradition from France to Spain.

certainty that the UK would have been acquitted of any alleged violation of Article 6 ECHR. Whether the eventual substantive proceedings in France would similarly have passed muster is an entirely different matter. If, as seems likely, the UK Extradition Act 2003 which purports to implement the EAW into UK law, and in particular its Section 21, would allow for a similar result even under the regime instituted by the EAW, it is doubtful whether the implementation can be said to be correct. If a similar situation should arise again, a reference to the ECJ would be most welcome. However, as long as the UK has not made the requisite declaration under Article 35(2) TEU the ECJ does not have jurisdiction to rule on the matter. Nevertheless, the point still stands. *Ex parte Ramda* is a decision which must be read in the context of traditional extradition law resulting from an outdated conception of the enforcement of criminal law in Europe.[475] It is an expression of a fragmentary conception of the social contractual matrix in Europe where each individual has an absolute right to the protection of the state on whose territory she or he happens to be, according to the rules of that state. The conception of the EU as a single social contractual unit argued for here entails the transferral of the principle of *locus regit actum*, derived from the conflict of laws, to the criminal law. Material jurisdiction automatically entails procedural jurisdiction and within the institutional parameters of Article 6 and 7 EU, procedural safeguards as implemented in the various Member States are deemed sufficient, subject of course to the possibility of challenging them under the ECHR. As has been pointed out by Grabbe, '[c]itizens will not be willing to accept free movement across the borders of the EU-25 if they fear that criminals and terrorists can easily take refuge in another member-state.'[476] By reacting to this perceived popular clamour for action, the EU has institutionally adopted the idea of the EU-wide social contract. Testimony to this is the fact that the "Hague programme" declares

[475] Following the 2002 decision, the Home Secretary requested additional information from the French authorities. When this information had arrived, a new extradition decision was made which was again challenged before the Divisional Court. This time the judges found that the extradition could proceed. See *Ramda v Secretary of State for the Home Department*, judgment of 17 November 2005, [2005] EWHC 2526 (Admin). In addition, Keene LJ saw fit to make the following *obiter dictum*: 'It needs to be emphasised that this has happened under the procedures set out in the 1989 Act, widely recognised as being cumbersome and time-consuming. Extradition requests made after 31 December 2003 are now dealt with under the new Extradition Act, 2003 which amongst other things provides for a fast-track arrangement with Member States of the European Union through use of the European Arrest Warrant. It is to be hoped that the scale of delay which has occurred in the present case will be avoided under those new procedures.'

[476] Grabbe, H. (2002). Justice and Home Affairs: Faster Decisiont, Secure Rights. London, Centre for European Reform (policy brief)., at pp. 3-4.

that '[f]reedom, justice, […] internal security and the prevention of terrorism should henceforth be considered indivisible within the Union as a whole.'[477] The EU clearly sees itself as contributing to making the repressive aspect of the social contract more effective.

[477] The Hague European Council Conclusions, 4-5 November 2004, at p. 10.

2. Ne bis in idem and horizontal-structural coherence

It is hoped that the above discussion focusing on the effects of the EAW on criminal justice in the EU has proven one branch of the argument that by virtue of the recent developments in EU criminal justice, it can be said that there is now an EU-wide social contract. The fact that an individual suspected of having violated the social contract can no longer escape having to answer for her or his actions by virtue of the crossing of an intra-EU border or jurisdictional boundary shows that such violations have a pan-EU impact in the sense that there is now an EU-wide responsibility to judge them. Consequently, legality is now, in principle, EU-wide. This is however not sufficient to show the existence of an EU-wide social contract. It must also be shown that judgments on matters of violations of the social contract have a conclusive EU-wide effect, i.e. that they determine the status of the individual accused *vis-à-vis* the collective seen as the whole of the EU. The status of an individual as a member or a non-member of the collective has to be uniform throughout a single social contractual unit; anything else would be paradoxical. Consequently, this requirement of *coherence of individual status* is absolutely central to the argument that there is an EU-wide social contract.

2.1. Jurisdictional conflicts: the absence of positive instruments of prevention

The adoption and implementation of the EAW has established the principle that material jurisdiction automatically entails procedural jurisdiction. This state of affairs, however, naturally raises the issue of determining the principles to be applied to the determination of material jurisdiction. Article 31(1)(d) EU confers competence to the EU to adopt legislation to 'prevent' conflicts of jurisdiction and already in its 2000 communication on the principle of mutual recognition, the Commission strongly argued that for the offences covered by the principle 'there are further strong

arguments for establishing an EU-wide system of jurisdiction.'[478] The EAW, as we have seen, emphasises territorial jurisdiction and makes provision for the possible prevention of conflicts of jurisdiction. Nevertheless, the possibility remains that a Member State claims extra-territorial jurisdiction. Most criminal legislations in the Member States provide for jurisdiction either when the perpetrator or the victim of an offence are nationals of that Member State – the active or passive personality principles respectively. Further, the geographical permutations of a case can also lead to effective claims of extra-territorial jurisdiction. In all these situations, there is a high risk of positive conflicts of jurisdiction. With the effective procedural implementation of the principle of mutual recognition, it seems even more true now than when it was first said in 2000 that 'the moment appears to have come for the existing system, by which a number of Member States could have jurisdiction for the same offence, to be complemented by rules clearly designating one Member State.'[479] In the 2005 Green Paper suggesting possible solutions to the problem of positive conflicts of jurisdiction, the Commission states that '[i]n a developed area of freedom, security and justice it seems appropriate to avoid, where possible, such detrimental effects; by limiting the occurrence of multiple prosecutions on the same cases.'[480]

While it must be seen as regrettable that no legislation on the intra-EU attribution of jurisdiction in criminal matters has yet been adopted, mention should be made of the pragmatic work of Eurojust in this regard. One of its tasks is in fact the determination of complicated cases of potential jurisdictional conflict. Its probably most notable successes in this regard is the centralisation of the criminal sequels of the *Prestige* disaster under Spanish jurisdiction.[481] It should also be mentioned that Article 61e(1)(b) TFEU strengthens the EU's competence to deal with this matter in that it adds the competence to 'settle' conflicts of jurisdiction and not merely, as is the case at present, to 'prevent' them.

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[478] European Commission Communication on mutual recognition of final decisions in criminal matters, COM(2000) 495 final, 26.7.2000, at p. 12.
[479] *Ibid.*, at p. 19.
[480] European Commission Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings, COM(2005) 696 final, 23.12.2005, at p. 3.
[481] See Eurojust Case Nr. 27/FR/2003.

The absence of EU legislation determining which jurisdiction is competent over any given matter means that there is no compulsory way for the problems associated with positive conflicts of jurisdiction to be resolved in advance. This means that there is a risk that resources will be wasted in dual investigations and prosecutions going ahead in different Member States with respect to the same alleged offence. While this is problematic from the point of view of the tax-payers, from the perspective of social contract theory, this does not necessarily pose a problem. From the point of view of the argument made here – that the EU now constitutes a single social contractual unit – the fundamental problem of positive conflicts of jurisdiction is the risk that they result in conflicting determinations of guilt or innocence in different jurisdictions in the EU, i.e. an incoherence in individual status. As we shall see, however, this aspect of the possibility of positive conflicts of jurisdiction has been dealt with by Article 54 of the Convention Implementing the Schengen Agreement of 19 June 1990 (CISA)[482] – implementing the principle of *ne bis in idem* – and the ECJ case law interpreting it.

2.2. The ambiguous principle of ne bis in idem

Article 54 CISA is presented as giving EU-wide scope to the principle of *ne bis in idem*. Known in the Anglo-saxon world as 'double jeopardy', the principle of *ne bis in idem* entails that final judgment in criminal proceedings against an individual is to be treated as just that – final. The rule that no individual should have to suffer several prosecutions in respect of the same offence is enshrined in the laws of the majority of liberal democracies and in international human rights instruments such as the International Covenant on Civil and Political Rights and the ECHR.

With a number of different legal sources purporting to translate the same principle, it is natural that questions of mutual compatibility arise. In the EU context it is of particular interest to compare the provisions of the ECHR with those of the CISA. As is well known, adherence to the ECHR is a prerequisite for EU membership and Article 6(2) EU makes clear that the EU is bound to 'respect fundamental rights, as

[482] OJ L 239, 22 September 2000, pp. 19-62.

guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms.' At the same time, since its incorporation in the EU treaty framework[483] the CISA constitutes EU law. Fundamental incompatibilities between these two sources of the principle of *ne bis in idem* would not only be unfortunate but would also betray serious confusion as to the purpose and meaning of the principle itself. Fortunately, out of the relatively few cases with a direct bearing on the construction of the AFSJ which have so far made it to the ECJ, the majority concern the interpretation of 54 CISA. There is now a relatively significant body of case law on the principle of *ne bis in idem* as it operates between EU Member States. This case law is not only very instructive in clarifying the meaning of 54 CISA, which, in turn, can be compared with the approach to the principle of *ne bis in idem* adopted by the ECtHR under the ECHR, but it is also very instructive as to the ECJ's overall conception of the AFSJ.[484]

It is difficult to find an explanation for the inclusion of Article 54 in the CISA distinct from the overall rationale of the CISA itself. The CISA itself is generally described as having been 'intended to compensate for the effects of the lifting of internal border controls.'[485] We will have reason to come back to the connection between freedom of movement and the principle of *ne bis in idem* further on. For now, suffice to say that this purported link has played an important role in the ECJ's case law on 54 CISA. The text of 54 CISA reads as follows:

> A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.

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[483] On which, see Leidenmühler, F. (2002). "The incorporation of the Schengen *acquis* into the framework of the EU by example of the 'ne bis in idem' principle." The European Legal Forum: Forum iuris communis Europae **2**(5 (Sept-Oct)): 253-257.

[484] Many of my views on Article 54 CISA and *ne bis in idem* were first expressed in Lööf, R. (2007). "54 CISA and the Principles of *ne bis in idem*." European Journal of Crime, Criminal Law and Criminal Justice **15**(3): 309-334.

[485] van den Wyngaert, C. and G. Stessens (1999). "The International *Non bis in idem* Principle: Resolving Some of the Unanswered Questions." International Comparative Law Quarterly **48**: 779-804., at p 9.

In the context of the ECHR, the relevant provision is Article 4 of Protocol n° 7 of 22 November 1984 (P7-4):

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

There are thus two aspects of the principle of *ne bis in idem*. The first is the nature of the decision which confers finality on criminal proceedings in relation to a particular set of facts and which bars future proceedings in relation to those facts – *bis*. The second is the principles determining whether a second set of proceedings are in relation to the same set of facts as the first – *idem*. We will deal with these two aspects in order, comparing the approach of the EctHR with that of the ECJ. This comparative analysis will show that despite the apparent similarities, the two provisions deal with matters of fundamentally different natures and that 54 CISA in fact constitutes an instrument whereby the coherence of individual status throughout the EU is ensured.

2.3. 'Bis' – the definition of finality

The ECtHR has handed down a very limited number of judgments dealing with the question of how 'finally acquitted or convicted' in P7-4 is to be interpreted.

However, on the basis of the existing case law and a number of admissibility decisions, we are able to draw a few tentative conclusions:

1) The second paragraph of P7-4 would appear to cover review of final decisions potentially resulting in a reopening of proceedings if serious flaws in the original process are uncovered.[486] Further, these decisions seem to indicate that even if the reopening of the case results in a second conviction after the sentence from the first conviction has been carried out, that is not contrary to the basic principle in the first paragraph. However, the ECtHR has now established that

> '*the mere consideration that the investigation in the applicant's case was "incomplete and one-sided" or led to an "erroneous" acquittal cannot in itself, in the absence of jurisdictional errors or serious breaches of court procedure, abuses of power, manifest errors in the application of substantive law or any other weighty reasons stemming from the interests of justice [...], indicate the presence of a fundamental defect in the previous proceedings.*'[487]

In this regard, the Court found it particularly suspicious that '*the arguments used by the prosecution to justify the reopening of the proceedings and fresh investigation of the applicant's case were exactly the same as those used by the prosecution in ordinary appeal proceedings to justify the remittal of the case for re-trial.*'[488]

2) A decision to discontinue proceedings would appear only to be covered by the prohibition in P7-4 if it is held to be final in the national legal order.[489]

3) Subsequent to a final judgment, a further discretionary sanction can be meted out by a different authority from the one which handed down the original sentence, without it being considered a new criminal proceeding, if there is '*a sufficiently close connection between them, in substance and in time*.'[490]

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[486] *Nikitin v. Russia*, judgment of 20 July 2004 (application no 50178/99); *Fadin v. Russia*, judgment of 27 July 2006 (application no 58079/00). See also *Bratyakin v. Russia* admissibility decision of 9 March 2006 (application no 72776/01).

[487] *Radchikov v. Russia*, judgment of 24 May 2007 (application no 65582/01), at § 48.

[488] *Ibid.*, at § 51. The ECtHR consequently found a violation of Article 6 ECHR and did not consider that the applicant's complaint raised any separate issues under P7-4. A ruling is also awaited in *Chervonenko v. Russia*, admissibility decision of 25 September 2006 (application no 54882/00).

[489] Admissibility decisions *Wassdahl v. Sweden* of 29 November 2005 (application no 36619/03) and *Harutyunyan v. Armenia* of 7 December 2006 (application no 34334/04).

[490] Admissibility decision *Nilsson v. Sweden* of 13 December 2005 (application no) 73661/01). See also *Maszni c. Roumanie*, judgment of 21 septembre 2006 (application no 59892/00).

The ECJ, on the other hand, has provided a clear interpretation of the meaning of the corresponding provision, 'finally disposed of', in 54 CISA. According to Luxembourg, 54 CISA precludes further criminal proceedings in a different Contracting Party following any decision which, in the jurisdiction in which it was handed down, has the effect of in principle precluding further proceedings. This results from a trio of cases which merit closer scrutiny.

At issue in the first case to be decided on the interpretation of 54 CISA, *Gözütok and Brügge*[491], was the possibility available in some Member States for the defendant to accept a settlement proposed by the public prosecutor in exchange for the discontinuance of proceedings against her or him. Such settlements are usually reserved for smaller offences and generally involve the payment of a fine determined unilaterally by the prosecutor. In both cases dealt with, the applicants had accepted such settlements only to be prosecuted on the same facts in a neighbouring country. The ECJ was faced with the particular problem that at no point in the settlement procedure was there any involvement of a court, nor had there been a judicial decision in the strict sense. Such details however did not interest the ECJ which held that:

> '*Article 54 of the CISA, the objective of which is to ensure that no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement, cannot play a useful role in bringing about the full attainment of that objective unless it also applies to decisions definitively discontinuing prosecutions in a Member State, even where such decisions are adopted without the involvement of a court and do not take the form of a judicial decision.*'[492]

The ECJ thus seemed to read 54 CISA as a provision imposing mutual recognition of final decisions in criminal proceedings. There is, as the ECJ put it, '*a necessary implication that the Member States have mutual trust in their criminal justice systems*

[491] Joined Cases C-187/01 and C-385/01, judgment of 11 February 2003.
[492] At § 38.

and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.'[493]

In the second, *van Straaten*[494], the applicant had been acquitted for lack of evidence and it was suggested that such a decision did not constitute a decision finally disposing of the case in the sense that the issue of factual guilt and innocence remained outstanding. The point could be made because in *Gözütok and Brügge* the ECJ had found that the settlement in issue did constitute an admission of guilt by the defendant. The ECJ however did not allow itself to become embroiled in this epistemological discussion which would have forced it to deal with the issue of whether the absence of evidence of guilt necessarily implies the absence of guilt. For the ECJ, the important thing was whether a final decision acquitting the applicant has the structural effect that she or he is to be treated as innocent in the jurisdiction in which the decision was handed down. If the answer was 'yes', the effect of 54 CISA is the *ipso facto* extension of that effect throughout the EU. Consistent with the line taken in *Gözütok and Brügge* the ECJ emphasised that the failure to include an acquittal for lack of evidence within the ambit of 54 CISA would not only have the effect of '*jeopardising [the] exercise of the right to freedom of movement*'[495], it would also '*undermine the principles of legal certainty and of the protection of legitimate expectations.*'[496]

On the same day that it handed down the judgment in *van Straaten*, the ECJ also handed down its judgment in *Gasparini*.[497] The issue here was that of criminal proceedings abandoned due to the operation of a statute of limitation time-barring prosecutions a determinate number of years after the commission of the offence charged. The difficulty is of course that in this situation no judgment has intervened formally to settle the issue of the guilt or the innocence of the defendant. Further complicating matters is the fact that national rules on time-bars to prosecution, where they exist at all, vary significantly between criminal jurisdictions in the EU. In her

[493] At § 33.
[494] Case C-150/05, judgment of 28 September 2006.
[495] At § 58.
[496] At § 59.
[497] Case C-467/04, judgment of 28 September 2006.

well-reasoned opinion[498], Advocate General Sharpston noted that the ECJ was faced with a '*stark choice*' between what she referred to as a '*substance-based approach*' which required '*some examination of the merits within the context of the first prosecution*' in order for 54 CISA to operate, and what she referred to as a '*procedure-based approach*' which amounted to holding that any bar to further proceedings in the first jurisdiction, procedural or otherwise, barred proceedings in all the others.[499] Considering these options, AG Sharpston reached the conclusion that the effect of 54 CISA should not be to effect an *a minima* harmonisation of national rules of criminal procedure: '*discontinuance of criminal proceedings through the application of a time-bar without any assessment of the merits should not be covered by the principle of* ne bis in idem *in Article 54 of the CISA.*'[500]

AG Sharpston arrived at this conclusion after having analysed the historical and philosophical purpose of *ne bis in idem*. In her opinion, an opinion which has some support in legal historical research[501], *ne bis in idem* '*is mainly (although not exclusively) regarded as a means of protecting the individual against possible abuses by the State of its* jus puniendi.'[502] It is a question of the state only having one chance to '*settle its accounts with the individual it suspects of having committed an offence against it*'.[503] It is here that the '*stark choice*' between the 'substance-based' and the 'procedure-based' approaches comes in. The former approach implies that society has only had the chance to 'settle its accounts' after a trial on the merits whereas the latter implies that society's one chance is contained within the procedural rules it sets for itself precisely for the purpose of settling such accounts.[504] AG Sharpston was of the opinion that three considerations strongly militated in favour of the 'substance-based approach'. First, a 'procedure-based approach' would risk giving rise to '*considerable disquiet*' in the many and varied jurisdictions to which 54 CISA applies.[505] Second, while the promotion of the freedom of movement was important,

[498] Case C-467/04, opinion of 15 June 2006.
[499] At § 85.
[500] At § 90.
[501] See, e.g., Sigler, J. A. (1963). "A History of Double Jeopardy." American Journal of Legal History **7**(4): 283-309.
[502] At § 72.
[503] At § 74.
[504] See at §§ 75-76.
[505] See at § 76.

it had to be weighed against the need to ensure that it could be exercised within an AFSJ where crime was kept at a minimum thus promoting a '*high level of safety*'.[506] Third, she thought that a 'procedure-based approach' carried with it a risk of '*"criminal jurisdiction shopping" [with individuals] deliberately courting prosecution in a Member State where [they know] that proceedings would necessarily be declared to be time-barred*' only then to rely on 54 CISA to oppose prosecution anywhere else in the EU.[507]

The ECJ, however, paying little heed to the long and detailed analysis provided by its Advocate General, simply recalled the fundamental purpose of 54 CISA in the protection of the right of freedom of movement holding that '*[n]ot to apply Article 54 of the CISA when a court of a Contracting State, following the bringing of criminal proceedings, has made a decision acquitting the accused finally because prosecution of the offence is time-barred would undermine the implementation of that objective.*'[508]

The full significance of this principled choice of direction by the ECJ will become clear further on in our analysis. First, however, we must deal with the second element of the principle of *ne bis in idem*: the definition of *idem*, or what the proper comparator is for the determination of whether an individual has been tried twice for the same alleged violation of the law.

2.4. 'Idem' – the meaning of sameness

In this respect, P7-4 opposes anyone being tried or punished twice for the same 'offence.' Given that the geographical scope of P7-4 is limited to the same

[506] At § 82. AG Sharpston argued that the ECJ itself had applied this reasoning in Case C-469/03 *Miraglia* (see § 83 of the opinion). It is respectfully submitted that that was not the basis of that judgment. In *Miraglia* Dutch prosecutors had finally closed proceedings because duplicitous proceedings were on-going in Italy only then to rely on 54 CISA to refuse judicial cooperation to the Italian authorities. It must be considered that the ECJ limited itself to holding that 54 CISA *itself* could not be used to prevent criminal proceedings everywhere.
[507] At § 104.
[508] At § 28.

jurisdiction, one would think that the application of the principle was fairly straightforward. However, despite this privileged starting point, the case law of the ECtHR has not exactly been a model of consistency. First, in *Gradinger v. Austria*[509] the Court held that it was a violation of P7-4 to fine an individual in administrative proceedings[510] for drink driving after that individual had been acquitted of drink driving as an aggravating circumstance in proceedings for causing death by negligence. Then, some three years later, in *Oliveira v. Switzerland*[511] the Court was again faced with dual administrative and criminal proceedings following a traffic accident. This time however the ECtHR held that a criminal conviction for negligently causing physical injury was not barred by a previous administrative fine for negligent failure to control the vehicle. With one judge dissenting, the Court explained that '*[t]here is nothing in that situation which infringes Article 4 of Protocol No. 7 since that provision prohibits people being tried twice for the same offence whereas in cases concerning a single act constituting various offences (concours idéal d'infractions) one criminal act constitutes two separate offences.*'[512]

In *Fischer v. Austria*[513], a case with facts very similar to *Gradinger*, the Court tried to clear up some of the confusion. It started off by admitting that its case law up till then appeared '*somewhat contradictory.*'[514] It then distinguished *Oliveira*, holding that in each case of several offences charged based on the same conduct, it had to be established that there was no significant overlap in the objective constituent elements of the offences charged. This approach has been confirmed by the judgments in *W.F. v. Austria*[515] and *Sailer v. Austria*.[516]

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[509] Judgment of 28 September 1995 (application no 15963/90).
[510] The national classification of the proceedings does not matter to the ECtHR which applies an independent definition of 'criminal proceedings' for the purposes of P7-4 analogous to that applied in the context of Article 6 ECHR.
[511] Judgment of 30 July 1998 (application no 25711/94).
[512] At § 26.
[513] Judgment of 29 May 2001 (application no 37950/97).
[514] At § 23.
[515] Judgment of 30 May 2002 (application no 38275/97).
[516] Judgment of 6 June 2002 (application no 38237/97). See also admissibility decision *Aşcı v. Austria* of 19 October 2006 (application no 4483/02) and *Viola c. Italie*, judgment of 5 October 2006 (application no 45106/04).

It would seem however that the "*Oliveira* doctrine", albeit circumscribed, remains valid. In *Göktan v. France*[517] the Court had to deal with international drugs trafficking which under French law constituted both a criminal offence and a separate customs offence. Somewhat surprisingly perhaps, the ECtHR held that this single course of conduct could legitimately constitute several offences and that punishments for them could be made to run consecutively. Pre-empting an obvious question, the Court obligingly clarified that although it is preferable for such double offences to be tried *en bloc*, it was of no importance as far compliance with P7-4 is concerned.

The *Göktan* decision is not the only example of the ECtHR departing from the "*Gradinger-Fischer* principle", to the extent that it can be deemed to exist. Notably it would seem that a judgment does not necessarily confer status of *res judicata* on all the events covered in the act of accusation. A person acquitted of an offence with aggravating circumstances can be retried for the aggravating circumstance alone if the authority dealing with the first charge had not considered it because the substantive offence was not proven.[518] Finally, the Court seems to allow for dual offences for the same course of conduct if the purposes of incrimination differ, as can be shown, *inter alia*, by one of them being a strict liability offence.[519]

In stark contrast to the chaotic case law under P7-4, the application of the *idem*-provision in 54 CISA by the ECJ has, on the contrary, indeed been a model of consistency. This could seem surprising given that the text of 54 CISA refers not to 'same offence', but to 'same acts.' Doctrine has been divided on the merits of this factual approach as opposed to the legal approach of classification of offences embodied in P7-4. On the one hand it has been noted that for transnational application of the principle of *ne bis in idem*, the factual approach of the CISA is the only viable alternative since a legal approach would risk drastically reducing the effectiveness of the principle in protecting the individual.[520] On the other hand, it has also been stated that:

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[517] Judgment of 2 July 2002 (application no 33402/96), applied in admissibility decision *Maier v. Austria* of 5 December 2002 (application no 70579/01).
[518] See admissibility decision *Bachmaier v. Austria* of 2 September 2004 (application no 77413/01).
[519] See admissibility decision *Rosenqvist v. Sweden* of 14 September 2004 (application no 60619/00).
[520] See, e.g., Farinelli, S. (1991). "Sull'applicazione del principio *ne bis in idem* tra gli Stati membri della Comunità europea." Rivista di diritto internazionale **74**(4): 878-909.. See also the very thorough

> 'any general international non bis in idem provision should, in principle, bar only new prosecutions for the same offence, not for the same facts [since] an overly broad definition of the "same fact" may result in unjust effects, in that prosecutions have to be declared inadmissible because a person has been prosecuted on the same facts but for a lesser charge.'[521]

The ECJ seems not to have been tempted by any reading of 54 CISA with a potentially restrictive impact on the freedom of movement. In *van Esbroek*[522] AG D. Ruiz-Jarabo Colomer forcefully rejected any consideration other than the material facts constituting the offence. Thus, and in marked contrast to the case law of the ECtHR, neither legal qualification nor the interests protected were to be taken into account in determining whether a person had been tried twice *in idem*.

The ECJ confirmed this approach and expressly pointed out that '*the terms used in [54 CISA] differ from those used in other international treaties which enshrine the* ne bis in idem *principle.*'[523] This legislative choice implied that '*the Contracting States have mutual trust in their criminal justice systems*'[524] from which it followed that '*the possibility of divergent legal classifications of the same acts in two different Contracting States is no obstacle to the application of Article 54 of the CISA.*'[525] The ECJ then logically concluded that '*the only relevant criterion for the application of Article 54 of the CISA is identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together.*'[526] The ECJ confirmed this approach in *van Straaten*. In two recent judgments the Court has confirmed this line which must now be considered firmly established.[527]

Biehler, A., R. Kniebühler, et al. (2003). Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union. Iuscrim. Freiburg, Max-Planck-Institut für ausländisches und internationales Strafrecht.

[521] van den Wyngaert, C. and G. Stessens (1999). "The International *Non bis in idem* Principle: Resolving Some of the Unanswered Questions." International Comparative Law Quarterly **48**: 779-804., at p. 791.

[522] C-436/04, opinion of 20 October 2005.

[523] C-436/04, judgment of 9 March 2006, at § 28.

[524] At § 30.

[525] At § 31.

[526] At § 36.

[527] See Cases C-288/05 *Kretzinger* and C-367/05 *Kraijenbrink*, judgments of 18 July 2007.

With two European courts applying ostensibly the same principle with such varying results, one is naturally tempted to ask whether this makes the slightest difference in practice. Unfortunately it is possible to construct realistic scenarios in which a defendant would "benefit" from the differences in approach for arbitrary reasons. To give an example, in the *Göktan v. France* scenario, it is possible to imagine a second EU state having competence over the trafficking offence in question. If the applicant in that case had already been convicted elsewhere of the *exportation* to France of the drugs concerned France would still, at least, have an interest in the customs offence. Under P7-4 nothing, it would seem, prevents France from prosecuting the customs offence. It is however highly likely that 54 CISA now stands in the way of such action. The result is that a drug trafficker would benefit from first being convicted outside of France and, furthermore, that that benefit would be more than purely formal. If the applicant in *Göktan* had first been convicted in, say, Belgium, he would have been spared the two years' imprisonment he eventually served in France, a clear case of "reverse discrimination." However, EU law is not unfamiliar with this concept and it is very likely that the ECJ would hold, just like it has in the context of the first pillar[528], that reverse discrimination resulting from the application of EU law is a wholly domestic problem.

It is, however, hardly surprising that two international or supranational jurisdictions have arrived at such diverging interpretations in applying the principle of *ne bis in idem*. The application of that principle in international law has caused the furrowing of many a brow in academia[529], and its introduction into the EU legal order has had a similar effect.[530] However, as has already been hinted at, it is here argued that the divergence in the application of the principle of *ne bis in idem* between the ECHR and the EU derives not so much from a divergent interpretation or application of the

[528] See, e.g., Cases C-206/91 *Koua Poirrez*, judgment of 16 December 1992 and C-459/99 *MRAX*, judgment of 25 July 2002.

[529] See, e.g., Morosin, M. N. (1995). "Double Jeopardy and International Law: Obstacles to Formulating a General Principle." Nordic Journal of International Law **64**: 261-274.

[530] See, e.g., Farinelli, S. (1991). "Sull'applicazione del principio *ne bis in idem* tra gli Stati membri della Comunità europea." Rivista di diritto internazionale **74**(4): 878-909., van den Wyngaert, C. and G. Stessens (1999). "The International *Non bis in idem* Principle: Resolving Some of the Unanswered Questions." International Comparative Law Quarterly **48**: 779-804., Vervaele, J. A. E. (2005). "The transnational *ne bis in idem* principle in the EU: Mutual recognition and equivalent protection of human rights." Utrecht Law Review **1**(2): 100-118., and Wasmeier, M. and N. Thwaites (2006). "The development of ne bis in idem into a transnational fundamental right in EU law: comments on recent developments." European Law Review **31**(4): 565-578.

principle itself as from the implicit realisation by the ECJ that *ne bis in idem*, in the context of the AFSJ, means something completely different from the principle enshrined in P7-4. The unity of terminology naturally leads to the assumption that 54 CISA and P7-4 both constitute international recognition and protection of the same principle. By using the principles developed in Title I however, we will see that *ne bis in idem* under 54 CISA is a completely different animal.

2.5. Ne bis in idem – distinguishing lateral-temporal and horizontal-structural consistency

The application of social contract theory to the principle of *ne bis in idem* reveals that it constitutes an aspect of the relationship between a particular individual and the collective once the responsibility of that individual for a particular crime has been finally determined. By a final judgment, the collective declares an individual either innocent or guilty of a particular violation of its foundational contract. This judgment then forms the basis of the continued relationship between that individual and the collective, or, rather, the *status of the individual* vis-à-vis *the collective*. The principle of *ne bis in idem* incorporates the realisation that proceedings which risk resulting in an ulterior variation of this normative status are fundamentally problematic. In traditional, nation state based criminal law the problem is one of mere temporal consistency: an individual is first declared continually to be part of the social contractual unit (acquittal) only later to be declared to have severed her- or himself from it (conviction), with respect to the same behaviour. We shall call this 'lateral-temporal inconsistency.' While the same structural problems are manifest in relation to a second trial following a conviction as are following an acquittal, this poses less of a problem. For in order for an acquittal to mean anything, in order for the criminal process not to descend into a '"heads-we-win, tails-let's-play-again" scheme'[531] run by the representatives of the collective, an acquittal must entail not only a confirmation of an individual's prior status but also a strengthening of that status; like

[531] Reed Amar, A. (1996-1997). "Double Jeopardy Law Made Simple." Yale Law Journal **106**: 1807-1848., at p. 1815.

the tissue constituting a healed bone-fracture is stronger than the surrounding bone tissue, the status as presumptively innocent of an individual charged and acquitted with respect to a particular set of facts must be stronger than every other individual's with respect to those facts. Consequently, bearing in mind the extreme disruption to an individual's life brought about by a criminal trial, it has increasingly been held a "right" only ever to have to go through such an ordeal once for any given course of action.[532]

It has been stated, however, and probably rightly so, that this "*ne bis in idem*-as-right" school of thought is a somewhat weak position. The argument is that the principle of *ne bis in idem* derives rather from the principled tilting of the criminal process in the accused's favour, itself anchored in the consequences on the epistemic aspect of social contract theory argued for in Title I.[533] On this line of reasoning, allowing the collective a "second bite at the cherry" would violate the fundamental balance of the criminal process: 'If the *state* wins in an initial fair trial for attempted murder, it does not give the defendant the right to ignore the verdict and demand a new trial on a clean slate. Why should the defendant be placed in a lesser position when *she* wins? When the game is over, it's over. The winner is the winner; that's that; done is done.'[534]

On the other hand, it has also been argued that even though the principled tilting of the criminal procedure in the accused's favour is fundamental, the whole notion of epistemology which is at the heart of the functional aspect of criminal procedure, i.e. to ascertain and attribute responsibility for violations of the social contract, would be nonsensical without a basic concern that criminal judgments be factually accurate. Without a concern for factual accuracy, victims would have no faith in the system and it would crumble:

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[532] See, e.g., Wasmeier, M. and N. Thwaites (2006). "The development of ne bis in idem into a transnational fundamental right in EU law: comments on recent developments." European Law Review **31**(4): 565-578.
[533] See, e.g., Roberts, P. (2002). "Double Jeopardy Law Reform: A Criminal Justice Commentary." Modern Law Review **65**(3): 393-424.
[534] Reed Amar, A. (1996-1997). "Double Jeopardy Law Made Simple." Yale Law Journal **106**: 1807-1848.

> 'There are public and private interests in both sides of this supposed fight between outcome and process. The public has interests in fair procedures for all citizens, and victims have private interests in procedures which help to ensure the conviction of the guilty. Moreover, if criminal proceedings, and their conclusions, are to be accepted as legitimate, they should aim to maximise both accuracy and fairness.'[535]

Such considerations raise the issue of novel or even revolutionary advances in forensic science and to what extent they should justify exceptions to the principle of *ne bis in idem*. Add to this the importance attributed to *res judicata*[536] and the detrimental effects on the authority of the judiciary which would result upon a system with too easy a review of its final judgments and we are confronted with a thorny issue indeed.[537]

It will be recalled that in Title I, it was argued that the principles of protective criminal procedure are not to be considered the result of any kind of "balancing exercise." Although the effects of a re-opening of proceedings thought finally disposed of has a clear effect on the individual, there is nothing inherent in the re-opening of criminal proceedings which necessarily violates the defendant's liberty. Rather, the concern with lateral-temporal consistency derives from our concern both with epistemology and with the institutional strength of the judiciary. Therefore this aspect of criminal procedure is properly categorised as an aspect of forensic, rather than protective, criminal procedure. It will be remembered that in matters of forensic criminal procedure, different jurisdictions are likely to arrive at different conclusions without any one being absolutely superior to another. The different rules in force in the different Member States of the EU on the circumstances under which criminal

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[535] Dennis, I. (2004). "Prosecution Appeals and Retrials for Serious Offences." Criminal Law Review(August): 619-638., at p. 624.

[536] See, e.g., van den Wyngaert, C. and G. Stessens (1999). "The International *Non bis in idem* Principle: Resolving Some of the Unanswered Questions." International Comparative Law Quarterly **48**: 779-804.

[537] For a good discussion of these difficulties, see the Dennis-Roberts debate: Dennis, I. (2000). "Rethinking Double Jeopardy: Justice and Finality in Criminal Process." Criminal Law Review: 933.; Roberts, P. (2000). "Acquitted Misconduct Evidence and Double Jeopardy Principles: From Sambasivam to Z." Criminal Law Review: 952.; Dennis, I. (2001). "Double Jeopardy and Prosecution Appeals." Criminal Law Review(May): 339-340.; Roberts, P. (2002). "Double Jeopardy Law Reform: A Criminal Justice Commentary." Modern Law Review **65**(3): 393-424.; Dennis, I. (2004). "Prosecution Appeals and Retrials for Serious Offences." Criminal Law Review(August): 619-638.

proceedings 'finally' settled may be reopened is therefore a perfect example of legitimate divergences in matters of forensic criminal procedure.

Lateral-temporal inconsistency only deals with the situation in which a single criminal jurisdiction operates within a particular social contractual unit. If we now imagine a situation where criminal jurisdiction is geographically and, to a greater or lesser extent, materially divided within a single social contractual unit, the purpose and justification behind the principle of *ne bis in idem* appear radically different. While a concern with temporal consistency remains, that concern must now be preceded by a concern of a more fundamental nature. If an offence, for whatever reason, falls within two or more of the jurisdictions within the social contractual unit, divergent results on an individual's responsibility do not merely constitute a temporal inconsistency but also, and crucially, a normative paradox with respect to that individual's status *vis-à-vis* the collective making up the social contractual unit. Following the analysis of the effects of a criminal judgment provided in Title I, how can an individual at the same time be both a reconfirmed member of a social contractual unit and held to have severed her- or himself from it through a violation of the foundational contract of that unit? We shall call this 'horizontal-structural inconsistency' and it will be argued that a concern with 'horizontal-structural inconsistency' is the best explanation for the ECJ's line of case law on the interpretation of the principle of *ne bis in idem* under 54 CISA.

Applying this reasoning, the decisions in *Gözütok and Brügge*, *van Straaten* and *Gasparini* are readily explicable and the rejection of the alternative interpretation of 54 CISA proposed by AG Sharpston in *Gasparini* takes on particular significance. In all three cases further proceedings against the individuals concerned were impossible in the jurisdictions which had first dealt with the offences in question. Per definition the results of criminal proceedings are never a foregone conclusion, and therefore criminal proceedings in a different jurisdiction would necessarily have entailed a risk of a decision in conflict with the decision in the first jurisdiction. At this point, as pointed out by AG Sharpston in *Gasparini*, the ECJ had a choice. In favour of the 'substance-based approach' proposed by the Advocate General stood that it at least superficially interpreted the phrase 'finally disposed of' in 54 CISA in a manner

acceptable to all Member States. Given the plethora of different ways of finally disposing of criminal proceedings under the various criminal procedures in the EU, reducing the common provision on the principle of *ne bis in idem* to the lowest common denominator, i.e. the binary distinction between a substantial finding of guilt and a substantial finding of innocence, would have been a tempting solution. There are two fundamental problems with this approach. First, from a conceptual point of view, it obfuscates the fact that whatever the procedural nomenclature, there are in reality only two ways finally to dispose of criminal proceedings: a finding of guilt or the absence thereof. The latter category can have different names, one of which undoubtedly is the formal 'acquittal', but from a social contractual perspective the result is one and the same: the individual is reconfirmed a member of the social contractual unit, i.e. she or he has to be considered innocent. In the absence of an express finding of guilt the presumption of innocence, the benefit of which we are all entitled to, remains unrebutted and as far as the criminal law is concerned non-guilt equals innocence. It follows that any impossibility to pursue an individual automatically confers upon her or him the status of innocent. On the contrary, in seeking to distinguish between the status of the individual formally acquitted after a full trial on the merits, and the status of the individual against whom proceedings have somehow become impossible, AG Sharpston implicitly argued that innocence is somehow relative. Second, and more important for our purposes, the solution proposed by AG Sharpston would have allowed for the possibility that an individual is considered innocent in one part of the EU but guilty in another. On a social contractual analysis, this would be conceivable only if the AFSJ were conceived of as a collection of separate social contractual units. In rejecting this solution, it is argued, the ECJ also rejected this conception of the AFSJ.

It is true that the ECJ couched its judgments in terms of the protection of the freedom of movement. However, this argument would be difficult to sustain as a normative underpinning for the ECJ's case law. There are several reasons for this: First, as is shown by the example of the USA and the 'dual sovereignty' doctrine of its Supreme Court[538], the possibility of further prosecution is by no means necessarily incompatible with freedom of movement. Second, if accounts truly have not been

[538] See *Heath v. Alabama*, judgment of 3 December 1985, 474 U.S. 82 (1985).

settled with respect to a particular set of facts it is difficult to see why a trial should be prevented by some right of the suspect to come and go as she or he pleases. As the facts of *Gasparini* attest, under certain circumstances the trial can go ahead without the accused even being present, or even knowing about it, and this for reasons unrelated to the accused's willingness to exercise her or his freedom of movement. Similarly then, if an accused has been informed of a case against her or him, she or he still has the option of staying away from that Member State until the case has been decided. If she or he is acquitted, no problem. If, on the other hand, she or he is found guilty, it is difficult to argue that a convicted criminal should have the right to escape the legitimate consequences of her or his crimes. This only to show that there is no necessary material link between the risk of multiple prosecutions and the freedom of movement.

Material considerations aside, what should perhaps be of more concern to the ECJ is the fact that conceptually the question of whether an individual should be tried or not is always logically prior to the question of whether she or he should enjoy freedom of movement. If we are all in principle free individuals, the limit of that freedom is precisely the collective's legitimate exercise of its criminal jurisdiction. Even within a particular jurisdiction, an individual only enjoys freedom of movement as long as she or he cannot legitimately be detained. The same must pertain *mutatis mutandis* within the EU area of free movement. It follows that the legitimacy of criminal proceedings against a particular individual cannot be determined with reference to freedom of movement. If any criticism at all is to be levelled at the ECJ's case law it is perhaps this conceptual confusion: a logically prior rule cannot be restricted with reference to what in this context must be held to constitute a necessarily secondary principle.

The reference to the freedom of movement in the ECJ's case law on the principle of *ne bis in idem* is thus only convincing if seen as an expression of a more fundamental conception of the AFSJ as a whole. With this line of case law the ECJ has given the AFSJ concrete normative significance. The reference to '*an* area of freedom, security

and justice'[539] in Article 29 of EU must now be read so as to mean that the AFSJ constitutes a single social contractual unit within which there can be no divergences in the normative status of individuals *vis-à-vis* the collective. Duplicitous criminal proceedings in different jurisdictions within the AFSJ are therefore intolerable but not because they potentially affect an individual's willingness to exercise her or his freedom of movement, but because they risk causing the normative paradox of horizontal-structural inconsistency.

It could be countered that this interpretation of the ECJ's case law sits uneasily with the qualification contained in the second part of 54 CISA. Further proceedings are only prohibited 'provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.' It could be argued that 54 CISA explicitly provides for the risk of causing horizontal-structural inconsistency: what is to prevent a Contracting Party from trying and acquitting a fugitive?

If 54 CISA is read in isolation, that seems indeed to be the consequence. If we analyse the situation alluded to in the second part of 54 CISA, we are faced with the scenario of a fugitive from justice detained in another jurisdiction than the one which imposed the sentence. The crucial question in this situation is whether the detaining jurisdiction can legitimately proceed with its own prosecution of the fugitive for the same acts for which she or he has been convicted and sentenced in the jurisdiction escaped. If the answer is yes, there is a structural risk of horizontal-structural inconsistency built into the AFSJ and it would be difficult to argue that the single contractual unit-theory can be maintained. At this point it must be emphasised that 54 CISA cannot be read in isolation. The jurisdiction which imposed the sentence would logically issue a EAW for the return of the fugitive. At this point the relevant question becomes whether the very rigid scheme of the EAW allows the detaining jurisdiction to refuse surrender because it intends to prosecute the fugitive on the same facts as those for which she or he was convicted in the jurisdiction escaped. Fortunately, the answer seems to be negative. The potentially applicable provisions on legitimate refusals to execute a EAW all presuppose that the would-be refusing

[539] My emphasis.

jurisdiction has criminal jurisdiction to prosecute on the facts in question in the first place. In this regard, the upshot of the ECJ's case law on the principle of *ne bis in idem* is that a final disposal of a case in one Contracting Party *pre-empts* criminal jurisdiction in another. In other words, if criminal proceedings against an individual are 'finally disposed of' in one Contracting Party, no other Contracting Party has jurisdiction over the facts at issue in those proceedings. Thus, for instance, the apparent possibility for a Contracting Party to refuse surrender on the basis that prosecutions on the same facts as those covered in the EAW are ongoing[540] is in fact inapplicable to the situation where the EAW is issued for the purpose of the execution of a sentence. The prosecution in the detaining Contracting Party is illegitimate since under 54 CISA it does not have material jurisdiction. Logically therefore, it cannot be used as grounds for opposing surrender.

It might be put forward that this reasoning is contradicted by the very existence of the second part of 54 CISA. On this strictly textual reading, jurisdiction is retained by any and all comers as long as a sentence imposed has not been served. Two arguments can be made against such a reading. First, it seems to imply a 'substance-' rather than a 'procedure-based' approach: a solution rejected by the ECJ. Second, and more fundamentally, it needs to be remembered that the CISA pre-dates both the Treaty of Maastricht which created the EU and the AFSJ, and the Treaty of Amsterdam which further developed them. With Council Decision 1999/436/EC of 20 May 1999[541], a third pillar legal basis, Article 34 EU, was found for 54 CISA which was thus formally made a component of the AFSJ. It follows that when the ECJ now interprets 54 CISA it does so in a legal environment radically different from the one pertaining at the time of the signing of the CISA. The praetorian all but erasing of the second part of 54 CISA is thus merely a consequence of the dramatically changed legal setting of which it is now part.

Unfortunately, when presented with an opportunity to rule on the exact scope of the second part of 54 CISA, the ECJ did not take the above considerations into account.

[540] Article 4(2).
[541] OJ L 176, 10.7.1999, p. 17–30.

In *Kretzinger*[542], the defendant had already been convicted *in absentia* in Italy and sentenced to two years' imprisonment in respect of the facts for which he was on trial before the German referring court. The Italian authorities, however, had made no effort to enforce the sentence and under these circumstances the ECJ found that the second part of 54 CISA meant that the Italian conviction did not preclude the German proceedings.[543] Given that no EAW had been issued, no arguments based on exhaustion of jurisdiction were made. In that respect, it can hoped that the ECJ will have the opportunity to revisit this aspect of its case law interpreting 54 CISA. Until such time, it is inescapable that this rip in the horizontal-structural consistency of the AFSJ exposes an imperfection in the social-contractual web of the EU.

A similar point needs to be made in relation to the exceptions to 54 CISA contained in 55 CISA. The potential difficulties associated with the existence of these provisions could of course be minimised. What amounts to a strong disincentive to claim pure extra-territorial jurisdiction in 55(1)(a) CISA is unlikely to constitute a problem in practice. Likewise it is difficult to see that sub-paragraphs (1)(b)[544] and (c)[545] would ever risk compromising the structural integrity of the AFSJ, especially since the indications are that the ECJ would interpret them very strictly.[546] Nevertheless, the exceptions are there and declarations have been made. Here, too, it must be said that their very existence does sit uneasily with the conception of the AFSJ as a single social contractual unit.

Before too much is made of this, however, it should be remembered that the case law of the ECtHR discussed above provides examples of accepted inconsistencies *within* individual criminal jurisdictions which are more serious for the integrity of a social contractual unit than those provided for in 55 CISA. The conclusion which imposes itself is that the perfect integrity of the social contractual unit is an ideal towards which it has an obligation to strive. Given that perfection appears beyond the reach of even the typical and undisputed social contractual units, it would be unduly unfair to

[542] Case C-288/05, see above.
[543] At §§ 45-52.
[544] Acts constituting offenses 'against national security or other equally essential interests.'
[545] Acts 'committed by officials of that Contracting Party in violation of the duties of their office.'
[546] See *Van Esbroek*, above, at § 32.

use the absence of perfection of the AFSJ in this regard as a justification to discard the entire theoretical construct.

It is therefore argued that despite uncomfortable inconsistencies, the existence of the second part of 54 CISA and 55 CISA does not contradict the conclusion that the best rationale for the ECJ's case law is the conception of the AFSJ as a single social contractual unit. Some outstanding normative and institutional consequences of this interpretation need to be mentioned.

As has already been suggested above, the consequence of this interpretation of the ECJ's case law on the principle of *ne bis in idem* is that it is simply not the same thing as its traditional namesake. The aims of traditional *ne bis in idem* or double jeopardy and *ne bis in idem* under 54 CISA are very different. The former, seeking to contain within acceptable limits the difficulties arising from lateral-temporal inconsistency, must respond to different concerns than the latter which protects against the arguably more serious horizontal-structural inconsistency. As explained above, the avoidance of lateral-temporal inconsistency is important but it remains but one of the goals of the criminal procedure. The prevention of horizontal-structural inconsistency, on the other hand, is an absolute imperative within a social contractual unit. In fact, the social contractual unit risks its very existence if it allows for geographical divergence in the normative status of individuals *vis-à-vis* the collective. Whereas the avoidance of lateral-temporal inconsistency involves weighing the sometimes-divergent interests of the actors of the criminal process, the prevention of horizontal-structural inconsistency is concerned with the integrity of society itself.

It follows that we are faced with two completely distinct principles. They differ both in their aims and, consequently, in the strength with which they can be said to impose themselves on criminal jurisdictions. Under these circumstances it is logical to ask whether referring to them both, equally and without qualification, as *ne bis in idem* is justifiable. If we accept the reasoning offered here, the answer follows as a matter of logic: some kind of terminological qualification is necessary. This is both in order to avoid confusion, but also, and more importantly, in order to emphasise the fact that

the considerations underpinning the two principles are conceptually distinct and therefore deserve distinct treatment.

Further strengthening the case for the above analysis, it leads to some conceptually pleasing consequences in the interplay between various European and international legal instruments. First, seen in this light the difference in application of the principle of *ne bis in idem* by the ECtHR under P7-4 and by the ECJ under 54 CISA is less concerning than perhaps it first appeared. It is in fact entirely possible, if not imperative, that in the AFSJ seen as a single social contractual unit, both principles be applied concurrently. 54 CISA is only concerned with the structural integrity of the AFSJ *qua* social contractual unit, whereas P7-4 lays the parameters for the weighing of the interests of the institutional actors in any given criminal process. In other words, there is nothing in 54 CISA or in the case law interpreting it which dictates the circumstances under which a case 'finally disposed of' may be reopened, as long as this reopening takes place in the same jurisdiction in which the original final decision was taken. While it is true that scenarios can be constructed where the combined application of the two principles produces some seemingly perverse side effects[547], these are entirely the result of the rules on the avoidance of lateral-temporal inconsistency pertaining within a particular jurisdiction. Whatever choice a particular jurisdiction makes in this regard, it is entirely unrelated to 54 CISA and the conception of the AFSJ as a single contractual unit. So rather than constituting a threat to the above analysis, these hypothetical constructs serve to illustrate the separate natures of the two principles.

Second, a potential conflict can be seen between the factual approach to *idem* in 54 CISA and the *prima facie* legal approach adopted by the drafters of Article 50 of the EU's Charter of Fundamental Rights (CFR) which provides for a 'Right not to be tried or punished twice in criminal proceedings for the same criminal offence':

> No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

[547] See, e.g., the "internationalised *Göktan*-scenario" above.

If the CFR were to become law with the entry into force of the RT and if *ne bis in idem* is seen as a unitary concept, it is difficult to see how 50 CFR and 54 CISA could co-exist within the AFSJ. However, and as has been inadvertently hinted at[548], if we accept that there are two distinct principles at play, there is no conflict. 50 CFR is then the translation in the context of EU law of the concern to avoid lateral-temporal inconsistency and has its parallel in P7-4 and not in 54 CISA. The principles of coexistence discussed above in relation to those latter provisions are then directly transposable to the hypothetical coexistence of 54 CISA and 50 CFR.

Against all this it can of course be claimed that the legislative choice to use the established terminology of '*ne bis in idem*' in the drafting of 54 CISA should be considered a very strong indication that all that was intended was to extend the territorial application of the traditional principle. The point is arguable but anyone wanting to argue it would have to account for a good number of very conspicuous differences between the traditional principle, for which P7-4 is a useful proxy, and 54 CISA as interpreted by the ECJ. Textually, it is worth highlighting the difference in geographical scope and the choice, in 54 CISA, of a factual as opposed to a legal conception of *idem*. This latter approach was considered such a revolution by some authors that they proposed a counter-textual reading of the provision to avoid either seemingly insurmountable conceptual difficulties[549], or unacceptable consequences for national sovereignty.[550] Nevertheless, as was pointed out by AG Ruiz-Jarabo Colomer in his opinion in *Van Esbroek*, it seems obvious that '*a criterion based on the legal classification of the acts or on the protected legal interest might create as many barriers to freedom of movement within the Schengen territory as there are penal systems in the Contracting States.*'[551] A legal approach would not only run counter to the social contractual analysis of the AFSJ argued for here, but would also

[548] See Wasmeier, M. and N. Thwaites (2006). "The development of ne bis in idem into a transnational fundamental right in EU law: comments on recent developments." European Law Review **31**(4): 565-578.
[549] Farinelli, S. (1991). "Sull'applicazione del principio *ne bis in idem* tra gli Stati membri della Comunità europea." Rivista di diritto internazionale **74**(4): 878-909.
[550] van den Wyngaert, C. and G. Stessens (1999). "The International *Non bis in idem* Principle: Resolving Some of the Unanswered Questions." International Comparative Law Quarterly **48**: 779-804.
[551] C-436/04, opinion of 20 October 2005, above, at § 35.

render any transnational application of the principle of *ne bis in idem* virtually impossible. Finally, the precision and justifications provided by the ECJ would also have to be otherwise explained, notably the apparently all-conquering principle of mutual recognition and the weight attributed to the freedom of movement.

Interim conclusions

As was stated at the end of Title I, the normative consequences of social contract theory developed presuppose an actual collective within which the responsibility for the respect of the precepts of the social contract can be attributed. Through looking in detail at the theoretical effects of two of the main pillars of the AFSJ – the EAW and 54 CISA –, this Title has attempted to show that the EU now passes muster under this ontological aspect of social contract theory and that for the purposes of criminal justice the EU is now best concptualised as a single social contractual unit. As we have seen, although the actual application of collective coercion is decentralised to the various jurisdictions making up the AFSJ, intra-EU movement no longer places any legal obstacles to the enforcement of local violations of the social contract and the normative consequences of such violations extend to the whole of the EU. Crucially, from the point of view of resolving the ontological issue attached to the application of social contract theory, or identifying its actual *locus*, the EU has now, with very few and minor exceptions, collectivised the power of final disposal.[552] Things are often seen more clearly from the outside and I can only agree with Sanchez when he emphasises the importance of the EAW and what it stands for in laying the 'foundation for the emergence of a truly European criminal law that can "provide citizens with a high level of safety within an area of freedom, security and justice."'[553]

Concerning the aspect of the development of the AFSJ often perceived as lacking, i.e. procedural safeguards, in this Title criticisms have been levelled at the common assumptions leading to this conclusion. While the EU can be said to promote a system which runs afoul of many national solutions and may or may not lead to a lowering of average standards, it is not in breach of any commonly agreed standards of procedural safeguards. This being so, criticism of the EU for failing to take procedural safeguards seriously can only be in reference to the subjective standards of the critic. If one is constructively to criticise the EU for the failings in the EU-wide

[552] I am grateful to Neil Walker for this expression.
[553] Sanchez, W. (2002). "Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States." Columbia Journal of European Law **9**: 195-197., at pp. 197-198.

social contract, which I believe one should, that criticism has to use as its point of departure the new reality that is the EU-wide social contract. Having thus identified the EU as a single social contractual unit, the normative principles established in Title I have to be applied to the EU. The demands this places on the application of criminal justice in the EU and the institutional set-up of the EU are the issues to which we now turn.

Before embarking upon the Title in which the consequences for EU criminal justice flowing from the conclusions drawn in the first and second Titles will be outlined, it will probably be helpful briefly to recapitulate those conclusions.

Recapitulation

In the above Titles two things have been argued. First, that the best way of conceptualising the criminal process is as a determination of a particular individual's status with respect to a particular social contractual unit. In other words, it is a determination of whether an individual should continue to benefit from the protection offered by the social contract in the form of an absolute right to the intervention of collective coercion whenever her or his liberties are threatened, or on the contrary whether she or he, as a consequence of an established violation of the terms of the social contract, is to be declared excluded from that social contractual unit. The former alternative corresponds to any form of non-conviction and the latter corresponds to a conviction. The consequence of a conviction is to put the concerned individual in what has traditionally been referred to as the "state of nature" but which in reality merely constitutes a state where there are no normative obligations pertaining between the social contractual units in question, i.e. the individual and the collective from which she or he has been excluded. It follows that from the moment of this declaration of exclusion the collective is freed from its previous obligations to the individual excluded. This, in turn, enables it to impose freedom restricting sanctions on the individual, most commonly as a condition for her or his readmission into the social contractual unit of the collective.

One of the most important aspects of this conceptualisation is that it emphasises the character of the social contractual unit as a normative bond between individuals. We saw that the individual's logical priority over society leads to the conclusion that the institutions of the social contractual unit are merely agents of that unit. That unit, in turn, is properly conceived of as a free association of individuals. The "state" is thus nothing more than a functional agent of the individuals gathered in the social contractual unit. In terms of the criminal process as described, the state is a normative irrelevance. Consequently, the status determined by the criminal process is not between an individual and the state, but between one individual and all the other individuals constituting the social contractual unit. Normatively speaking, a

conviction and resulting exclusion from the social contractual unit has only *inter-personal* consequences.

As we now move on to the second argument made in the Title above, it is very important that we keep in mind this inter-personal aspect of social contract theory. In the previous Title, it was argued that the developments of the EU's AFSJ have now reached the point where it can best be thought of as having given rise to an EU-wide social contractual unit. This argument was based on two main strands which merit repetition in concise terms. First, by virtue of the instruments implementing the principle of mutual recognition, and notably the EAW, the normative consequences of the exercise of freedom in one jurisdiction in the EU now extend to the totality of the jurisdictions comprising the EU. That means that exercises of freedom in the territorial jurisdiction of one Member State and deemed by that jurisdiction to constitute a violation of its interpretation of the social contract are enforceable against the actor on the entirety of the territory of the EU. Second, the interpretation by the ECJ of the *ne bis in idem* provision in Article 54 CISA has given rise to a situation where the exercise by one Member State of its jurisdiction exhausts jurisdiction across the EU.[554] In social contractual terms, the effect is that the determination of the status of an individual *anywhere* in the EU, determines that status *everywhere* in the EU. That anathema to the social contractual unit referred to as 'horizontal-structural inconsistency' is thus all but banished from the EU.

A criticism made of this development is that since it has not been accompanied by instruments positively attributing jurisdiction, it risks resulting in rushes to exercise jurisdiction so as to exhaust any other claims of jurisdiction from other potentially interested Member States.[555] From a practical perspective, this risk must be seen as marginal. Systems of criminal justice are not known for their spare capacity and are unlikely to go out of their way to deal with contested cases when they do not have to. It seems more likely that the cases of positive conflicts of jurisdiction which occur are the result of lack of communication between jurisdictions, rather than a particularly

[554] In this case, jurisdiction would be exhausted also for the non-EU members of Schengen.
[555] Flore, D. and S. de Biolley (2003). "Des organes juridictionnels en matière pénale pour l'Union européenne." Cahiers de droit européen **39**(5-6): 597-637.

self-assertive attitude on behalf of the jurisdictions involved.[556] More significantly, however, from a theoretical perspective it is evident that the EU instruments which do deal with the issue of jurisdiction give priority to the principle of territoriality. Not only is this the case in those framework decisions which harmonise specific substantive offences[557], but, highly indicative, the EAW frowns upon extraterritorial jurisdiction to the point of giving Member States the option of never recognising criminal decisions based on its exercise. This is in marked contrast with the near unstoppable force of a criminal decision based on the exercise of territorial jurisdiction.

A failure to attribute sufficient weight to this privileging of territorial jurisdiction and the corresponding marginalisation of extraterritorial jurisdiction is the likely reason for criticisms of the mutual recognition regime concentrating on the removal of the dual criminality requirement. Weyembergh, for instance, correctly states that this removal in the EAW has the effect of potentially forcing the authorities in one Member State to collaborate with the authorities of another 'even if the concerned behaviour is not considered as an offence in its national penal law.'[558] This, she fears, 'tends to privilege the substantive criminal law which is more repressive' something which is 'problematic with regard to the Union's objective of establishing an area of freedom, security and justice' in that the balance between those three components would thereby be disturbed. [559] In fact, no system is privileged over another in the sense that no system's jurisdiction is extended by the operation of mutual recognition. The mutual recognition regime merely ensures that territorial, and therefore undisputed, jurisdiction can effectively be exercised within a territory where the limits of jurisdictions no longer correspond to the limits of the territory within which individuals are free to move.

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[556] See European Commission Green Paper on Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings, COM(2005) 696 final, 23.12.2005.
[557] See, e.g., Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (OJ L 164, 22.6.2002, p. 3) and Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings (OJ L 203, 1.8.2002, p. 1).
[558] Weyembergh, A. (2005). "Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme." Common Market Law Review **42**(6): 1567-1597., at p. 1576.
[559] *Ibid*.

This construction of the EU gives rise to the perhaps paradoxical result of simultaneously strengthening two phenomena which could be seen as antagonistic: europeanisation and localism. By giving EU-wide effect to the exercise of territorial jurisdiction, the AFSJ is built upon the interlocking of local territorial jurisdictions. From the point of view of social contract theory, this is a very satisfactory state of affairs. An individual is entitled to expect the protection of her or his liberties locally which in turn obliges her or him not to violate the liberties of others as defined locally. In an EU built around the principle of free movement, the extension of the interpersonal web of the social contract to encompass the whole of the EU constitutes the 'reverse side of the medal.'[560] It follows naturally that if an individual should violate the social contract as defined in one part of the EU she or he forfeits the right to the protection of the collective everywhere else in the EU as well. From the point of view of legal certainty is this also a very satisfactory state of affairs. It ensures that individuals know exactly what they are entitled to expect from each other in the place where they happen to be, something which is essential in an area where residence is a matter of pure personal choice. Legal certainty in criminal law requires adherence to the principle encapsulated in the Latin adage *ignorantia legem non excusat*: not knowing the law is no excuse to the commission of a crime. A critical argument is often made from the point of view of democracy that it is somehow unfair to subject an individual to criminal laws she or he had no means of affecting through participation in the local legislative process.[561] While it must be agreed that this would be grossly unfair if it meant the imposition of the criminal law of one jurisdiction on an individual by way of extraterritorial jurisdiction, we have already seen that the EU renders such instances extremely unlikely. Nevertheless, even in view of this legal state of affairs, it seems as though this "democratic localism" argument persists. Here is not the place to restate the arguments made in the previous Title which make it legally plausible to view the EU as a single social contractual unit. In any case that is not necessary because criticism of this view of the EU from the point of view of democratic localism in fact goes to the very core of social contract theory. It seems to start from the Hobbesian position that the criminal law

[560] Editorial (2006). "Mutual trust." European Constitutional Law Review **2**: 1-3., at p. 2.
[561] See, e.g., Weyembergh, A. (2005). "Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme." Common Market Law Review **42**(6): 1567-1597.

represents the sovereignty surrendered by a group of individuals to a sovereign state normatively independent of them and that the '[c]riminal law regulates the relationship between the individual and the State.'[562] In this conception, the criminal law is not an instrument to police interpersonal relations but the exercise of power by a sovereign on "his" subjects. Even in an area of free movement, individuals still "belong" to one sovereign who alone retains the right to punish them in accordance with the mandate given to him. From this perspective, knowledge or ignorance of the laws of another sovereign are irrelevant given that an individual can only legitimately be punished by her or his "own" sovereign. International, and *a fortiori*, European cooperation in criminal matters are then seen as a delegation of the right to punish by one sovereign to another. A logical condition for such delegation is that punishment is meted out by the foreign sovereign under the same circumstances as it would have been by the individual's sovereign. Hence the very heated reaction to the removal of the dual criminality requirement in the EAW.

If we embark on the project of constructing the EU's AFSJ with this Hobbesian starting point, the objection from democratic localism makes a lot of sense. What I hope to have shown in the previous Titles is that this is an erroneous way to conceive of, first, social contract theory, and, second and consequently, the development of EU criminal justice. The failure of the democratic localism thesis and the removal of the dual criminality requirement are both the result of the same fundamental conception of the criminal law as enforcing a social contract which in turn regulates interpersonal relations, not relations between individuals and the state.

Given that it is not expressly mentioned anywhere in Title VI EU[563], when the EU opted for the principle of mutual recognition to guide integration in the field of criminal justice, it settled for one 'institutional choice among a set of institutional alternatives.'[564] What has been presented so far is an interpretation of the result of

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[562] Mitsilegas, V. (2006). "The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU." *ibid*. **43**: 1277-1311., at p. 1280.
[563] See, e.g., Cullen, P. and L. Buono (2007). "Creating an Area of Criminal Justice in the EU: Putting Principles into Practice." ERA Forum **8**: 169-176.
[564] Sievers, J. (2007). The European Arrest Warrant: The potential and prerequisites of mutual recognition as a mode of governance. 3rd Challenge Training School: *Police and Judicial Cooperation in Criminal Matters in the EU: Which Future for EU's Third Pillar?* Brussels, CEPS., at p. 2.

that choice. This conceptualisation of the structures of the EU's AFSJ achieves the integrated coexistence of diverse local models for giving effect to the social contract.[565] Respect for an EU-wide social contract emphasising its interpersonal character is achieved by ensuring that individuals, wherever they are in the EU, can be sure that their liberties, as defined locally, are protected by their right to collective coercion in defending them irrespective of the ulterior movements of the individuals involved. The sense of security this provides is essential to the sustainability of any community.[566] At the same time, the EU-wide character of the social contract is ensured by the EU-wide recognition of a locally ascertained fracture of the social contract *but also* by the EU/wide acceptance of the innocence of an acquitted individual.

More generally, this conceptualisation provides a good framework in which to debate the merits and demerits of any particular practice. Within this framework, particular systems of criminal justice, the results of centuries of historical and cultural development, can learn from each other without being threatened by each other:

> 'The Member States are a huge reservoir of different experiences and practices. By analysing and evaluating those and identifying practices which are producing the best results Member States can be given an incentive to learn from each other, and common EU measures can be based on best practices rather than on a compromise between good and less good ones.'[567]

From the individual perspective, differences in culture as manifested in the particular attitude adopted by particular Member States in matters of criminal justice can then also be yet another factor to weigh in when deciding whether and where to exercise

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[565] See Marie-Hélène Descamps, 'La reconnaissance mutuelle des décisions judiciaires pénales', in Flore, D., S. Bosly, et al. (2003). Actualités de droit pénal européen. Bruxelles, La Charte.

[566] See Ian Loader and Neil Walker, 'Necessary Virtues: The Legitimate Place of the State in the Production of Security', in Wood, J. and B. Dupont, Eds. (2006). Democracy, Security and the Governance of Society. Cambridge, Cambridge University Press.

[567] Jörg Monar, 'Maintaining the Justice and Home Affairs Acquis in an Enlarged Europe', in Apap, J., Ed. (2004). Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement. Cheltenham, UK; Northhampton, MA, USA, Edward Elgar., at p. 49. This can be seen as implicit endorsement in the context of EU criminal law of the so-called 'open method of coordination' which operates in the common market context.

freedom of movement. In this sense, the EU criminal justice system can be made to shadow the 'realities of European integration.'[568]

Nothing, however, is ever that simple. The interpretation defended so far of the EU as a single social contractual unit has a number of implications. It is these implications which will be dealt with in Title III. Two kinds of implications will be distinguished. First we will discuss the theoretical implications and, second, the practical implications. This latter section will provide argument on how the EU is normatively to draw the conclusions of its developments so far in order to safeguard the coherence and integrity of its social contract.

[568] Marie-Hélène Descamps, 'La reconnaissance mutuelle des décisions judiciaires pénales', in Flore, D., S. Bosly, et al. (2003). Actualités de droit pénal européen. Bruxelles, La Charte., at p. 109. [« *le principe de reconnaissance mutuelle 'constitue un dépassement de la coopération judiciaire classique basée sur la territorialité et offre ainsi la perspective de la mise en place d'une nouvelle conception de la procédure pénale mieux adaptée aux realités de l'intégration européenne.* »]

Title III

Theoretical and normative implications of the EU as a single social contractual unit:
The social contractual uniformity of basic liberties and corresponding rights

To say that legal developments can best be interpreted with reference to a conception of the EU as constituting a single social contractual unit commits one to a number of theoretical consequences. As Koskenniemi has noted, the position defended here is one which reconnects with classic liberal thinking on rights and liberties and one which is severely critical of ulterior developments in Western political tradition which have coloured European tradition since the Enlightenement. It is a position which, it must be accepted, '[falls] back on a naturalist (or "mythical") conception of basic rights whose special character depends on their not being subject of the kinds of legal-technical arguments and proof that justify – and make vulnerable – "ordinary" rights as policies.'[569]

Likewise, in the dichotomous structure of social contract theory, this conception sets the EU apart from the rest of the world. However, if the starting point was that pre-EU Europe was made up of separate social contractual units, this change of perspective is less significant from the point of view of the relationship with the rest of the world than it is from the internal point of view. The need to distinguish the moral unity of the EU from all that surrounds it[570] is from this perspective less important than the obligating 'recognition of the unity of fundamental values in Europe in its entirety.'[571] Given that relations between social contractual units are based on the principle of opportunity and can therefore equally be characterised by peaceful cooperation as by destructive conflict, and that social contract theory emphasises the interpersonal rather than the inter-institutional, focus needs to be on the internal and individual implications of the EU as a single social contractual unit rather than the possible external implications of that position. From the external perspective, while there might be practical implications, it is unlikely that the view of the EU as constituted by one as opposed to several social contractual units has any theoretical consequences.

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[569] Martti Koskenniemi, 'The Effects of Rights on Political Culture', in Alston, P., Ed. (1999). The EU and Human Rights. Oxford, Oxford University Press., at p. 113.
[570] See, e.g. , Charles Leben, 'Is there a European Approach to Human Rights?', in *ibid.*
[571] Dutheil de la Rochère, J. (2004). "The EU and the Individual: Fundamental Rights in the Draft Constitutional Treaty." Common Market Law Review **41**: 345-354., at p. 353.

Article 6 EU makes it clear that the Member States of the EU and, consequently, the individuals making up those Member States, share a common value system. All legislation, whether originating from the EU institutions or from the Member States, is enacted in pursuit of those values. Systems of criminal justice, dealing directly, as they do with issues of life and liberty, are perhaps more intimately related to those values than other aspects of law. As we have seen in previous chapters, the existence of these common values was a precondition for the option of mutual recognition as the way to realise the AFSJ. It was a recognition that even if criminal justice, in the various jurisdictions making up the EU's AFSJ, had not been formally harmonised, those same jurisdictions had nevertheless achieved a level of "organic harmonisation"[572] by virtue of belonging to the Western European legal tradition and the shared experiences of history.[573] Indeed, 'from a comparative law perspective it is easy to show that the paths of the various criminal laws in Europe are, if not coincident, leading in the same direction, and running very close to one another.'[574] The notion of "organic harmonisation" is here employed to describe the process whereby institutionally independent systems respond to similar circumstances and constraints in similar manners leading to increased similarities without the intervention of commonly agreed standards. While care needs to be observed in borrowing concepts from the natural sciences to describe phenomena in the social sciences, in this regard I do think that there are some points of similarity between the evolution of organisms in a specific habitat and the evolution or development of criminal justice systems in the specific "social habitat" of Western Europe. In any case, the level of organic harmonisation attained was deemed sufficient to found a system of mutual recognition which in turn, as we have seen, gave rise to developments which can best be interpreted as having given rise to an EU-wide social contract. In what follows, we will see that the reliance placed on these common

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[572] Kimmo Nuotio uses similar terms to describe the growth of trust between systems: 'trust is a cultural phenomenon that has grown slowly out of "soft" harmonization, out of the fact that two legal cultures have grown to be based on similar ideological premises', Kimmo Nuotio, 'Harmonization of Criminal Sanctions in the European Union – Criminal Law Science Fiction', in Husabø, E. J. and A. Strandbakken, Eds. (2005). Harmonization of Criminal Law in Europe. Supranational Criminal Law: Capita Selecta. Antwerpen - Oxford, intersentia., at pp. 91-92.

[573] I am indebted to Marise Cremona for clarifying this aspect of my reasoning and for putting it into words.

[574] Cadoppi, A. (1996). "Towards a European Criminal Code?" European Journal of Crime, Criminal Law and Criminal Justice **4**(1): 2-17., at p. 7.

values has enormous consequences for reasoning on matters of criminal justice within the EU, both from the perspective of individual jurisdictions and the EU as a whole.

As we have seen in a previous Title, from the perspective of the individual there are two threats to their liberties which the social contract is meant to protect against: threats from other individuals acting individually and threats from the other individuals acting collectively. This distinction corresponds to that between substantive criminal law and criminal procedure. While the focus of the present work is on issues of criminal procedure, for a number of reasons it is impossible not to deal at least incidentally with the issue of how the conception of the EU as a single social contractual unit corresponds to the reality of substantive criminal law in the EU today and whether it is sustainable from that point of view. These reasons stem from the fact that social contract theory, by its nature, has implications on all aspects of criminal justice. Completely neglecting to consider substantive criminal justice could perhaps be taken as an indication that I do not see or recognise these implications. Further, there has been a great deal more written on substantive criminal law and sanctions in the context of European cooperation and harmonisation than on criminal procedure. Before embarking on the main analysis of criminal procedure, it therefore seems important to dedicate a few pages to substantive criminal law. However, the following discussion is to be seen as a parenthesis and it is in no way intended to exhaust the subject. A thorough re-evaluation of the implications of social contract theory on criminalisation in general and criminalisation in the EU in particular would be most welcome.[575]

[575] A welcome step in this direction is the recently started four-year, multidisciplinary research project on criminalisation under the direction of Antony Duff (Philosophy, Stirling), Lindsay Farmer (Law, Glasgow), Victor Tadros (Law, Warwick) and Sandra Marshall (Philosophy, Stirling), with funding from the Arts and Humanities Research Council. The resuls will be a precious contribution to this field.

1. A digression: substantive criminal law

As I argued in a previous Title, the substantive criminal law translates into specific offences those actions which constitute violations of the social contract. The practical implication is that the actions thus specified as criminal serve as triggers for the individual's right to the intervention of collective coercion in her or his defence. One of the logical consequences of claiming that there is an EU-wide social contract is that an individual should have the right to the intervention of collective coercion wherever in the EU violations against her or his liberties protected by the social contract occur.

Without restating what was said above on the precise circumstances under which social contract theory requires the intervention of collective coercion, it needs to be emphasised that it is the action constituting the violation of the social contract which constitutes the trigger for such intervention. It is thus not an argument against an EU-wide social contract to point out that the substantive criminal law of the various jurisdictions in the EU define offences in a variety of ways. From the point of view of social contract theory, what needs to be established is that all actions which threaten the protected liberties of the individual do in fact trigger the intervention of collective coercion. The way any particular system then chooses precisely to define that action in its positive law is irrelevant. This way of going back to the 'meta-principles' of our systems of criminal justice[576] is not an unknown process. For example, evidence suggests that this is precisely the way the "international community" has had to proceed in order to give birth to the existing system of international criminal law.[577]

Without having engaged in an extensive comparative study to verify whether every conceivable behaviour constituting a violation of individual liberty is in fact criminalised in all the jurisdictions in the EU, it will nevertheless be asserted that that is in all probability the case. The absolute requirements of the social contract are elementary to any civilisation and it would be sensational if the intentional violation

[576] See Fragòla, S. P. and P. Atzori (1990). Prospettive per un diritto penale europeo. Padova, CEDAM - Casa Editrice Dott. Antonio Milani.
[577] See, e.g., Jescheck, H.-H. (2004). "The General Principles of International Criminal Law Set out in Nuremburg, as Mirrored in the ICC Statute." Journal of International Criminal Justice **2**(1): 38-55.

of the physical integrity of an individual or of her or his property rights should not be the subject of criminal pursuits in all jurisdictions in the EU. When it comes to the positive translation of these actions into positive law, it is therefore not surprising that there is 'great homogeneity' among criminal jurisdictions in the EU.[578] What is more, the underlying principles for positive lawmaking in matters of criminal law – in particular the principles of legality, subjectivity and prospectivity – seem to be the subject of a general consensus.[579] In matters of substantive criminal law then, the organic harmonisation already mentioned seems to have given rise to sufficient uniformity in the protection of individual liberty across the EU to support the construction of the EU as a single social contractual unit. This can be deduced from the fundamental uniformity of positive criminal law in the various jurisdictions of the EU from the point of view of the actions triggering criminal pursuits. So while it can readily be agreed that criminal law traditionally constitutes a 'core element of national sovereignty'[580], it is probably no longer correct that in the EU today 'a people discriminates itself from other peoples in the way they criminalize behaviour.'[581]

In fact, largely due to the influence of the ECHR, there are now, after the decriminalisation of homosexuality and the end of the discrimination of associated sexual practices, very few remaining areas of genuine disagreement over whether any particular actions or behaviour should incur a penal response. There is thus very little margin for any Member State in the EU to distinguish itself from all others by its criminalisation of a particular behaviour.[582] In this regard, and by way of perhaps problematic example, mention could be made of the very real disagreement between the Netherlands and virtually every other Member State of the EU on how to deal

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[578] Fragòla, S. P. and P. Atzori (1990). Prospettive per un diritto penale europeo. Padova, CEDAM - Casa Editrice Dott. Antonio Milani., at p. 105.

[579] See *ibid*. and Cadoppi, A. (1996). "Towards a European Criminal Code?" European Journal of Crime, Criminal Law and Criminal Justice **4**(1): 2-17.

[580] Wasmeier, M. and N. Thwaites (2004). "The "Battle of the Pillars": Does the European Community have the Power to Approximate National Criminal Laws." European Law Review **29**(5): 613-635., at p. 613.

[581] Hildebrandt, M. (2007). "European criminal law and European identity." Criminal Law and Philosophy(1): 57-78., at p. 58.

[582] According to Henri Labayle « *il paraît difficile d'imaginer qu'une conception commune de [l']ordre public ne finisse par s'imposer, même a minima et en refusant le concours du juge de l'Union européenne.* » In 'Les nouveaux instruments juridiques du traité d'Amsterdam: problèmes d'interprétation', in Cullen, P. and S. Jund, Eds. (2002). Criminal Justice Co-operation in the European Union after Tampere. Europäische Rechtsakademie (ERA). Köln, Bundesanzeiger Verlagsges.mbH., at p. 72.

with the problem of narcotics, and in particular those "soft" narcotics which in the Netherlands have been decriminalised under a strict licencing scheme. It will not be speculated on whether the *de jure* maintained criminalisation of "soft" narcotics in the other Member States is accompanied by any serious effort to *de facto* enforce those provisions. The disagreement is notorious and cannot be ignored. Nevertheless, two things need to be emphasised and they ought significantly to diminish the importance of this example as an argument against the conception of the EU as a single social contractual unit.

First, there are many theories of crime[583] and although one could most certainly be extracted from the theoretical conclusions in Title I, this is not the place to do so. For all their diversity, however, these theories – whether 'classical', 'positivist', 'functionalist', etc. – seem to agree on the basic level of protection to which an individual living in society is entitled, i.e. protection of her or his physical integrity and her or his property interests. The disagreements as far as behaviours susceptible to criminalisation are concerned relate, to put it bluntly, to so-called 'victimless crimes', i.e. where the behaviour of an individual is considered criminal regardless of the fact that no other individual was in any way harmed by it. The use of drugs is a perfect example of a 'victimless crime.' Consequently, whether an individual can smoke a joint with impunity is strictly speaking not an issue of protecting individual liberty from the actions of other individuals which is the heart of substantive criminal law. Whether an individual *should* be able to smoke a joint with impunity is an issue which needs to be dealt with from the perspective of whether collective coercion can be justifiably deployed to prevent that particular activity.[584] Differences in approach in this regard do thus not cause a difference in the protection of personal physical integrity in the EU, something which could have caused a problem for the integrity of the EU-wide social contract. Whether certain incriminations are legitimate is an aspect of the normative side of social contract theory, not the ontological side dealt with in Title II the implications of which we are dealing with here. It has been said before but it bears repeating: the normative failings of any particular social

[583] For a good overview, see Tulkens, F. and M. van de Kerchove (2007). Introduction au droit pénal : Aspects juridiques et criminologiques. Bruxelles, Kluwer.
[584] For a solution very much in line with the version of social contract theory defended here, see Harris, S. (2005). The End of Faith. New York, W. W. Norton & Company.

contractual unit, or parts thereof, is a separate issue to the structural integrity of that social contractual unit and does not pose any intrinsic obstacle to its being conceived of as such.

Second, the Dutch approach causes more difficulties from the perspective of sentencing than from the perspective of activities actually criminalised. That, however, hardly distinguishes drugs offences from any other category of offences. Generally, in fact, 'the state of penal sanctions in Europe is very diverse.'[585] In this regard, it needs to be remembered that social contract theory results in a dichotomous conception of criminal justice: an individual is either a member or a non-member of the social contract. What the social contractual unit which has excluded an individual then chooses to do with or to that individual is, from the point of view of social contract theory, irrelevant.

Although the type and degree of severity of criminal sanctions are thus strictly speaking unimportant for the argument made here, the importance attributed to this aspect of penal policy in the literature on EU criminal justice renders it necessary at least to address the issue. The starting point in this respect needs to be an understanding that 'criminal law and procedures are matters which lie at the heart of national legal traditions and the substantial divergences in Member States' laws reflect fundamental historical, political and constitutional differences.'[586] A preliminary question follows naturally: If such diversity can be maintained without threatening the integrity of the EU wide social contract, why should we engage in harmonisation at all? The question becomes even more pressing when it is acknowledged that criminal sanctions do not seem to be the subject of a process of organic harmonisation as are substantive and procedural criminal law.

A number of arguments are put forward in order to justify harmonising criminal sanctions in the EU. One of the most prevalent is a variant of argumentation

[585] Albin Eser, 'Comparative typology of convergences and divergences', in Delmas-Marty, M., G. Giudicelli-Delage, et al., Eds. (2003). L'harmonisation des sanctions pénales en Europe. Paris, Société de législation comparée., at p. 415.
[586] House of Lords, European Union Committee, 'The Criminal Law Competence of the European Community', 42nd report of session 2005-2006 (HL Paper 227), at p. 48.

described in the introductory chapter: the very existence of stark differences within an area of free movement causes a distortion in the movement patterns of criminals. If a particular offence attracts lower sentences in one Member State, this theory goes, this Member State can end up constituting a 'sanctuary' for this type of criminal activity.[587] Much like other arguments based on an alleged criminogenic effect of differences in substantive and procedural criminal law, this variant in relation to levels of sanctions is, as Kimmo Nuotio has pointed out several times[588], not supported by any solid criminological research. There is very little to suggest that any other consideration than the risk of being caught plays an important role in the tactical choices made by criminals, whether they operate on a local or on an international level.

To summarise briefly, the sometimes great divergence in sanctions within the EU is irrelevant from a social contractual perspective and there is little or no empirical evidence suggesting that divergences in sanctions have criminogenic effects. Nevertheless, an argument is made that the EU ought to be used as an instrument for change and "progress" in matters of criminal sanctions.[589] While possibly appealing in principle, it is very doubtful whether the EU has the competence to legislate on criminal sanctions if it is not shown that it poses a direct problem to cooperation. This is because the general provision enabling the EU to harmonise substantive criminal law and sanctions only empowers the EU to establish 'minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.'[590] What is meant by

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[587] See, e.g. Geneviève Giudicelli-Delage, 'Introduction générale', in Delmas-Marty, M., G. Giudicelli-Delage, et al., Eds. (2003). L'harmonisation des sanctions pénales en Europe. Paris, Société de législation comparée., Walter Perron, 'Perspectives of the the Harmonization of Criminal Law and Criminal Procedure in the European Union', in Husabø, E. J. and A. Strandbakken, Eds. (2005). Harmonization of Criminal Law in Europe. Supranational Criminal Law: Capita Selecta. Antwerpen - Oxford, intersentia., and Weyembergh, A. (2005). "Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme." Common Market Law Review **42**(6): 1567-1597.

[588] See 'Reasons formaintaining the diversity', in Delmas-Marty, M., G. Giudicelli-Delage, et al., Eds. (2003). L'harmonisation des sanctions pénales en Europe. Paris, Société de législation comparée., and 'Harmonization of Criminal Sanctions in the European Union – Criminal Law Science Fiction', in Husabø, E. J. and A. Strandbakken, Eds. (2005). Harmonization of Criminal Law in Europe. Supranational Criminal Law: Capita Selecta. Antwerpen - Oxford, intersentia.

[589] See, e.g. Asbjørn Strandbakken, 'Introduction', in Husabø, E. J. and A. Strandbakken, Eds. (2005). Harmonization of Criminal Law in Europe. Supranational Criminal Law: Capita Selecta. Antwerpen - Oxford, intersentia.

[590] Article 31(1)(e) EU.

'minimum' should probably be defined with reference to what is said in Article 3(1)(c) EU which empowers the EU to ensure the 'compatibility in rules applicable in Member States, as may be necessary to improve [cooperation in criminal matters].' It therefore seems a logical deduction that a general harmonisation of sanctions could only be contemplated if it could be shown that the absence of such harmonisation constitutes a non-negligible obstacle to cooperation in criminal matters in the EU. As we have shown above, that does not seem to be the case. Consequently, and by way of example, the suggestion that the EU legislate to ban the use of the indeterminate prison sentence[591] is unlikely to be realisable under current institutional arrangements.

Currently, in EU legislation harmonising substantive criminal law, sanctions are made the subject of a harmonised 'minimum maximum.' This means that the harmonising framework decision will determine a common minimum level of the maximum sentence a Member State may impose on conviction of the offence harmonised. For example, under Framework Decision 2002/629/JHA on combating trafficking in human beings, Member States are enjoined to make sure that aggravated trafficking 'is punishable by terms of imprisonment with a maximum penalty that is not less than eight years.'[592] From a policy perspective there is a strong argument for the EU to revisit its current policy, or absence thereof, with respect to sentencing when it harmonises criminal offences and their sanctions under Article 31(1)(e) EU. The current system of minimum maximum sanctions is a result of the need to ensure that the necessary cooperation is made possible given that many traditional instruments of international cooperation as well as more recent ones such as the EAW are premised on the offence in question attracting penalties of a certain severity, typically a minimum prison sentence of quite a short duration. This is a legitimate and important concern which justifies the imposition of the minimum maximum sentence required to ensure cooperation with respect to the offences harmonised. However, the EU has gone beyond this minimum use of the 'min-max' principle and regularly imposes, as we saw with the example of human trafficking, minimum maximum sentences of a

[591] Elisabeth Lambert-Abdelgawad, 'Tentative de modelisation', in Delmas-Marty, M., G. Giudicelli-Delage, et al., Eds. (2003). L'harmonisation des sanctions pénales en Europe. Paris, Société de législation comparée.

[592] Article 3(2) of Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings (OJ L 203, 1.8.2002, p. 1).

duration such as to reflect the EU's level of moral condemnation of the offence. Consequently, we find ourselves in a situation where the EU has clearly gone beyond a purely instrumental approach to harmonising sentencing solely concerned with ensuring cooperation between the different jurisdictions in the EU, to what can generously be called a half-baked theory of punishment.

From this perspective, the absence of a wider EU policy on the purposes of criminal sanctions causes a number of difficulties, both at the level of the EU and at the level of individual Member States. At the level of the EU, the operation of the system of mutual recognition does require the cooperation of judicial officials locally in the Member States. It is very likely that the view taken by national judges on whether the criminal justice systems of fellow EU Member States are too lax or, inversely, too severe in their sentencing policies has a significant effect on her or his preparadness blindly to give effect to judgments and decisions coming from there[593], and this quite beyond the discussion of whether they would be legally justified in refusing. As Asp points out, 'it is fair to assume that there is some sort of correlation between the degree of harmonization and the degree of willingness to recognize each others judgements.'[594] Also, and, it is argued, more importantly, the same goes for the view individuals have of systems of criminal justice other than their "own."[595] All this is said without taking a stand in favour of any of the jurisdictions in the EU or in favour of one theory of punishment over another; it is merely suggested that discussions along these lines would be salutary.

At the level of the Member States, the absence of a wider EU policy on criminal sanctions can be said to be at the root of the possibly destabilising effects of EU legislation harmonising the definitions of and sanction for certain criminal offences on the internal coherence of the substantive criminal law of the Member States. The levels of sanctions for various offences relative to each other constitute a profound

[593] Alessandro Bernardi, 'Opportunité de l'harmonisation', in Delmas-Marty, M., G. Giudicelli-Delage, et al., Eds. (2003). L'harmonisation des sanctions pénales en Europe. Paris, Société de législation comparée.
[594] Petter Asp, Mutual Recognition and the Development of Criminal Law Cooperation within the EU', in Husabø, E. J. and A. Strandbakken, Eds. (2005). Harmonization of Criminal Law in Europe. Supranational Criminal Law: Capita Selecta. Antwerpen - Oxford, intersentia., at p. 32.
[595] Walter Perron, 'Perspectives of the the Harmonization of Criminal Law and Criminal Procedure in the European Union', in *ibid.*

moral statement from any system of criminal justice as to how it perceives the seriousness of any given criminal offence. This is called *ordinal justice*. As it happens, as a result of the accumulation and superimposition of offences over time as well as of the tendency of legislators to use the criminal law as a way of conveying that they take a particular popular concern seriously, it is probably difficult to find an individual system of criminal justice which translates any coherent set of principles of ordinal justice. This, however, should not detract from the point that it is an objective good to strive towards such coherence. The EU should be aware that when it specifies particular levels of sanctions in instruments harmonising particular offences, it does effect the internal systems of ordinal justice of the Member States.[596] Of course, choosing the "min-max" harmonisation scheme could be seen as a statement that the EU does not want to engage in a dialogue on principles of ordinal justice, a dialogue which would in all likelihood be very difficult. The "min-max" system ensures that cooperation is facilitated while it confers a significant margin of appreciation to national legislators to indicate to their judges how seriously they ought to punish a particular offence. This margin of appreciation operates at the normative level as well as at the level of application. First, Member State legislatures are very free as to how they chose to transpose these provisions in national law; not only can the maximum sentence be increased but there could also be inserted mandatory minimums or, on the contrary, very "lenient" alternative sentences. There is indeed nothing preventing a national jurisdiction from providing for any number of alternative forms of punishment; fines, community work, compulsory treatment are only a few of the possibilities available reflecting the wide variety of opinions on the purpose of the criminal sentence. Second, individual courts still have to apply the provisions enacted by the legislature and they will do this in accordance with the prevailing, local practice and very much inspired by local principles of ordinal justice. One criticism whch has been directed at this system is that it represents a 'repressive

[596] Simon Claisse et Jean-Sébastien Jamart, 'L'harmonisation des sanctions', in Flore, D., S. Bosly, et al. (2003). Actualités de droit pénal européen. Bruxelles, La Charte.

orientation'[597] and that it risks exacerbating an already existing tendency to 'overpenalise.'[598]

This discussion of ordinal justice brings us back to where we started the discussion of the merits of harmonisation of substantive criminal law and whether the ongoing process of organic harmonisation should be complemented by a policy of active harmonisation. Systems of criminal justice develop and systems of criminal justice which are in constant contact with each other tend to develop in a converging fashion. That clearly has been and continues to be the case in Western Europe. As stated earlier in this chapter, Article 6 EU and, to some extent, Article 49 EU are testimony to some degree of organic harmonisation or convergence of at least the principles of the different systems of criminal justice in the EU. The precise extent of that organic harmonisation is of course an open question. Some adopt the attitude that whatever convergence there may be, it is not enough. Weyembergh considers the *oeuvre* of approximation and harmonisation of criminal law to be essential to the legitimacy of the EU's AFSJ. According to her, the EU should actively work 'to give Europeans a common sense of justice.'[599] It is clear that if the EU was to embark upon any effort to harmonise the substantive criminal law of the Member States in any fashion beyond its currently unsystematic approach, thought would have to be given to the 'issue of common underlying values'[600] and particularly principles of ordinal justice. Kimmo Nuotio is sceptical as to whether this is possible:

> 'Taking into consideration the reasons behind the current diversity in Europe, there is not much hope that one could formulate the guiding criminal policy principles, fill them with common evaluations, and be able to reform the whole of the law of penal sanctions in

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[597] Weyembergh, A. (2005). "Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme." Common Market Law Review **42**(6): 1567-1597., at p. 1588.
[598] Simon Claisse et Jean-Sébastien Jamart, 'L'harmonisation des sanctions', in Flore, D., S. Bosly, et al. (2003). Actualités de droit pénal européen. Bruxelles, La Charte., at p. 71.
[599] Weyembergh, A. (2005). "Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme." Common Market Law Review **42**(6): 1567-1597., at p. 1581.
[600] Stefano Manacorda, 'Harmonisation et coopération : la nature et l'articulation des rapports', in Delmas-Marty, M., G. Giudicelli-Delage, et al., Eds. (2003). L'harmonisation des sanctions pénales en Europe. Paris, Société de législation comparée., at p. 582. [« *la question des valeurs communes sous-jacentes* »]

> order to create a reasonable convergence in the area. The differences are not only random and accidental, they are also systemic.'[601]

In the absence of any serious attempts at such an exercise[602] it is very difficult to say whether the EU could successfully conduct a discussion on principles of ordinal justice and theories of punishment. It may very well be that such a discussion will materialise naturally as a result of the operation of mutual recognition and the increased interaction between the various jurisdictions of the EU that this will bring. Such a discussion may, as was intimated above, be deemed desirable from a policy perspective. However neither the discussion nor any initiatives which may be taken as a result of it are necessary as a matter of principle to the operation of the EU as a single social contractual unit.

The justifiable heterogeneity of substantive criminal law and sanctions in the different jurisdictions in the EU can however under certain circumstances be the cause of severe difficulties, theoretical as well as practical. The acceptability of the heterogeneity in substantive criminal law is in fact premised on the continued predictability and transparency of the law applicable: your geographical location determines the rights you have as well as the specific interdictions you have to abide by. It is the consequences of ulterior shifts in the geographical locations of the actors concerned which EU law applying an EU-wide social contract is and should be designed to protect against. There is a practice which constitutes a potential threat to this symmetrical and smooth operation of the EU-wide social contract. It can be said to stem from a will to impose the particular solutions of one system of criminal justice, in particular its solutions in matters of substantive criminal law and sanctions, on all others. It thus risks short-circuiting the system of EU-wide coordination of local jurisdictions to which the AFSJ strives. This is the practice of extraterritorial jurisdiction.

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[601] Kimmo Nuotio, 'Reasons for maintaining diversity', in *ibid.*, at p. 470.

[602] There have been strong academic calls for such a model code to be drawn up. See, e.g., Sieber, U. (1994). "European Unification and European Criminal Law." European Journal of Crime, Criminal Law and Criminal Justice **2**: 86-104. and, in particular, Sieber, U. (1999). "Memorandum on a European Model Penal Code." European Journal of Law Reform **1**(4): 445-471.

The threat of extraterritorial jurisdiction

At this point, a distinction needs to be made: by extraterritorial jurisdiction it is meant jurisdiction in circumstances where neither the act nor the effects of the act are felt on the territory where the authorities claim jurisdiction. Currently, in cases where the act is performed in one Member State and its effects are felt in another, the combined effects of Article 4(7)(a) of the EAW – making the fact that the offences 'are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State […]' an optional grounds for refusal of surrender – and 54 CISA – which, as we have seen, exhausts jurisdiction anywhere in the AFSJ by its exercise in one Member State – seem to entail that it will be a case of which Member State is first in a position to exercise its jurisdiction, whether it is considered a case of extraterritorial jurisdiction or not. From a positivist standpoint, this is perhaps not very neat, but to say that '[t]he Framework Decision [on the EAW] does not touch on national rules concerning jurisdiction'[603] is only possible from a very blinkered national perspective. In practice, it is to be hoped that increased use of the institutional cooperation mechanisms provided by agencies such as EUROJUST and EUROPOL should make these situations less conflictual.

"Pure" extraterritorial jurisdiction, then, would most commonly be based on either the active or the passive personality principle which means jurisdiction based on the nationality of the perpetrator or on the nationality of the victim respectively.[604] In traditional international cooperation in criminal matters, it is easy to see why these bases of jurisdiction had a useful role to play as a complement to territorial jurisdiction. In the case of the passive personality principle, it might be the case that the state under the territorial jurisdiction of which a particular offence falls either lacks the resources or, perhaps, the inclination to pursue. In that situation, the state of nationality of the victim can, with reference to the passive personality principle, quite

[603] Impalà, F. (2005). "The European Arrest Warrant in the Italian legal system: Between mutual recognition and mutual fear within the European area of Freedom, Security and Justice." Utrecht Law Review **1**(2): 56-78., at p. 64.

[604] In Chehtman, A. (2008). "Should States have the Right to Punish Municipal Offences Committed Abroad?" LSE Law, Society and Economy Working Papers **4/2008**., at p. 2, two further bases are mentioned: protection (i.e. if the offence was committed 'against the sovereignty or national security of that state') and universality.

legitimately take matters in hand. In the case of the active personality principle, the scenario is easier to imagine: for any number of reasons, a state may refuse to extradite one of its citizens. In traditional international cooperation in matters of criminal law, the applicable principle is *aut tradere, aut judicare*: either you extradite, or you prosecute. By virtue of the active personality principle, a state which refuses to extradite to the state on the territory of which the offence took place, can then prosecute the alleged offender itself provided, of course, that she or he is suspected of an offence recognised by the "home" state.

In the EU's AFSJ today, none of the scenarios which could justify the exercise of extraterritorial jurisdiction seem plausible. As we have seen, the EAW did away with the "nationality exception" to extradition between Member States of the EU which means that the justification for the active personality principle has been removed. Further, as a matter of national, international and, it is also argued, natural law, all Member States are bound to enforce the social contract on their territories irrespective of the nationality of the victim. Consequently, there should be no violation of the social contract committed on the territory of the EU which could translate into a "negative conflict of jurisdiction" with no system of criminal justice claiming jurisdiction. Negative conflicts of jurisdiction are the only reasonably justification for the passive personality principle which, consequently, seems bereft of justification between Member States of the EU.

It follows that the structural characteristics of the EU's AFSJ which have been outlined so far, with the significant reinforcement of the territoriality principle, strongly put in question the continued legitimacy of the exercise of extraterritorial jurisdiction as between the Member States of the EU. This issue has already caused some friction. In its decision to invalidate the German legislation implementing the EAW mentioned in the previous chapter, the *Bundesverfassungsgericht* focused on the risk that as a result of the German implementing legislation a German citizen risked standing trial in another Member States for actions taken on German soil, actions which were not criminal under German law. In holding that the national legislator had not made proper use of the margin of appreciation left to it by the European legislator in Article 4(7) of the EAW in providing for the automated

surrender of nationals to Member States exercising extraterritorial jurisdiction[605], the *Bundesverfassungsgericht* can also be read as cautioning against the exercise of such jurisdiction more generally. The German Supreme Constitutional Court in fact stated the following:

> '*It can remain an open question whether it is compatible with the required levels of constitutional protection to give precedence to the option of penalising an action over the option of leaving such actions unpenalised as the basis of the mechanism of mutual recognition.*'[606]

Even though the *Bundesverfassungsgericht* could only, for obvious reasons, state the position under the German *Grundgesetz*, such caution is both warranted and welcome also from the point of view of the EU seen as a single social contractual unit: if extraterritorial jurisdiction is not removed, there is indeed a risk that penalisation rather than freedom becomes the basis of mutual recognition.

Given that, as we have seen, it serves no procedurally remedial purpose, the continued provision for extraterritorial jurisdiction between Member States of the EU can only be a result of remaining disagreements over the correct attitude to take with respect to the remaining areas of fundamental contention in substantive criminal law. As was stated in conjunction with the discussion of the Dutch "soft" drugs example, such disagreements are natural and even healthy in that the criminal law needs always to re-evaluate the basis of its provisions. It follows that disagreement over what justice requires in any particular circumstance should never be precluded as between different jurisdictions; just as aspects of the criminal law are the subject of debate within a particular jurisdiction, so too should they be between those jurisdictions. The point to recall though is that the conceptualisation of the EU as a single social contractual unit forces a certain discipline onto such disagreements. The

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[605] For an English comment of the decision, see Mölders, S. (2006). "European Arrest Warrant Act is Void – The Decision of the German Federal Constitutional Court of 18 July 2005." German Law Journal **7**(1): 45-58.

[606] 2 BvR 2236/04, at § 122. [,*Es kann offen bleiben, ob es mit dem gebotenen grundrechtlichen Schutzniveau vereinbar ist, nicht die Entscheidung eines Mitgliedstaates für die Straffreiheit einer Handlung, sondern umgekehrt die Entscheidung für die Strafbarkeit zur maßgeblichen Grundlage des Mechanismus der gegenseitigen Anerkennung zu machen.*']

communality of values which the EU professes to incarnate has to be the framework within which such disagreements occur. The merits or demerits of any particular solution within the social contractual unit have to be evaluated with reference not to a different solution which is its hierarchical equal as far as the EU social contract is concerned, but to those values upon which the EU-wide social contract is itself based. Such disagreements can have two outcomes: 'In some cases mutual respect for difference will be adequate, while in other cases it may be pertinent to unify the law and to consider violation of such unified law to be an infringement of the legal tradition of the Union.'[607] An example which is more to the point than "soft drugs" in that it actually involves a "victim" is the very real disagreement between Belgium and the Netherlands and most other jurisdictions in the EU on the exact limits of "homicide" due to the fact that euthanasia, under certain very precisely defined circumstances, has been decriminalised in those two countries. Another jurisdiction, could not object to the Belgian solution on the sole ground that it considers it "wrong" or even "barbaric." The EU social contract forces argumentation onto a higher level, presumably focusing on which system best respects the common values of life and individual liberty. Whether there will ever be a common solution is in a way not interesting. What is important is that it is entirely possible for jurisdictions in the EU to consider each other's solutions to be imperfect interpretations of those common values referred to above without necessarily being a violation of them. Such disagreements are perfectly digestible by the social contractual unit that is the EU, especially since 'the principle of subsidiarity would seem to imply that unification should only occur where respect for Community objectives cannot be achieved by other means.'[608]

However, the environment for this 'digestion' of differences and dispassionate discussion on the merits and demerits of particular solutions provided by the conception of the EU as a single social contractual unit is put in jeopardy by the continued provision for extraterritorial jurisdiction. This is because provisions of extraterritorial jurisdiction represent an assumption of the moral high-ground by the

[607] Hildebrandt, M. (2007). "European criminal law and European identity." Criminal Law and Philosophy(1): 57-78., at p. 76.
[608] Delmas-Marty, M. (1998). "The European Union and Penal Law." European Law Journal **4**(1): 87-115., at p. 107.

jurisdiction claiming it. Not content with agreeing to disagree, the jurisdiction claiming extraterritorial jurisdiction seeks to undermine the solution arrived at by the population in another part of the EU. Such would be the case if, for example, France claimed extraterritorial jurisdiction over instances of euthanasia occurring in, for example, Belgium, because either the doctor or the patient is French. The situation would be similar if Belgium refused to accept that euthanasia is a crime on the other side of the Ardennes even if performed by a Belgian doctor or involving a Belgian patient.

All indications are that the EU institutions have realised the possible harm which could result from the continued provision for extraterritorial jurisdiction between its Member States. This is the explanation for why such jurisdiction is virtually excluded from the mutual recognition regime. It is therefore recommended that EU Member States take the stated intentions of all EU instruments on this matter to their logical conclusion and abandon all claims to extraterritorial jurisdiction in circumstances where any other EU Member State could claim territorial jurisdiction. This is important to close the remaining theoretical gap in the structure of the EU conceived of as a single social contractual unit. Continuing with the example of euthanasia, the scenario[609] is as follows: a Belgian doctor supervises an instance of euthanasia of a French patient on Belgian territory in circumstances fully compliant with Belgian law. French authorities, spurred on by angry relatives of the patient, claim jurisdiction based on the passive personality principle and issues a EAW. As long as the doctor stays in Belgium, she or he does probably does not risk surrender to France since Article 4(7)(a) of the EAW would provide Belgium with legal grounds for refusing to execute the French EAW. The doctor may however travel abroad and then she or he does risk surrender to France if they happen to be arrested in a Member State with similar rules on extraterritorial jurisdiction as France in which case Article 4(7)(b) of the EAW prevents that third Member State from refusing to execute the EAW.

[609] I am indebted to Rob Blekxtoon for this scenario although I do not, as will have been clear, share his view that the fact that it is a theoretical possibility is an argument against the removal of the dual criminality principle.

An even more problematic situation could arise if France proceeded to try and to convict the doctor *in absentia*. In compliance with its obligations under Article 6 of the ECHR, France would have to ensure that the doctor had adequate notice that proceedings against her or him had been scheduled[610], that she or he was adequately represented at the trial[611], and that there was provision for an adequate time period after the conviction during which, if she or he presented her- or himself to the authorities, she or he would be entitled to a full retrial.[612] If all this was done and the period for opposition passes, the conviction does become final. In that case, it is arguable that 54 CISA would preclude even Belgium from having recourse to the grounds for refusal provided for in the EAW since, as we saw in the previous chapter, those grounds presuppose the existence of jurisdiction in the Member State invoking them. 54 CISA has as its consequence that the French judgment, once the period for opposition has passed, exhausts jurisdiction across the EU.[613]

In practice, the doctor in this scenario can prevent any of this from happening by reporting her- or himself to the Belgian judicial authorities for them to make a ruling on the legality of that particular instance of euthanasia. Such a ruling would then have to be recognised all across the EU by virtue of 54 CISA barring any further proceedings. This would defeat the French claim. Even so, the availability of a practical solution does not detract from the fact that the continued existence of provisions for extraterritorial jurisdiction in circumstances where territorial jurisdiction within the EU can be claimed constitutes an incoherence in the structure of the EU system of criminal justice and especially if the latter is conceived of as implementing an EU-wide social contract. From this perspective, and despite the residual nature of the issue, it is indeed problematic that despite express competence in Article 31(1)(d), the EU has not legislated in order to 'prevent[…] conflicts of jurisdiction between Member States.'[614]

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[610] See, e.g., *Brozicek v. Italy*, judgment of 19 December 1989 (application no 10964/84).
[611] See, e.g., *Poitrimol v. France*, judgment of 23 November 1993 (application no 14032/88), and *Lala* and *Pelladoah v. the Netherlands*, judgments of 22 September 1994 (application nos 14861/89 and 16737/90).
[612] See, e.g., *Poitrimol v. France*, above.
[613] See above.
[614] See also Flore, D. and S. de Biolley (2003). "Des organes juridictionnels en matière pénale pour l'Union européenne." Cahiers de droit européen **39**(5-6): 597-637. It should be noted that the proposed changes in the Reform Treaty include Article 69 A(1)(b) TFEU which would give the EU the express

To summarise, when it comes to the protection against violations of the social contract by other individuals, we have seen that a perhaps unexpectedly high degree of heterogeneity is containable within a single social contractual unit and therefore, *a fortiori*, within an EU-wide social contract. This heterogeneity is limited by the essential core of the protection provided by any social contract, essentially individuals' physical integrity and property interests. The detailed translation of these essential principles into applicable law can be the subject of some disagreement and there can also be disagreement over the extension of the criminal law to other areas of human activity. What is important to remember is that the compliance of specific aspects of the law with the principles of social contract theory is a separate issue to the structural integrity and coherence of the social contract itself. Whether a specific provision in one jurisdiction in the EU complies with those principles will be a matter of discussion but the disagreement itself is no threat to the EU-wide social contract.

However, as we have also seen, this heterogeneity is only acceptable in so far as it is combined with a system of clear delimitation of territorial competence. The social contract implies an individual entitlement to know a) that you can rely on the protection of the local authorities against violations against the social contract, and b) that you will not be prosecuted for actions which are perfectly legal where you perform them.[615] This is why the continued existence of extraterritorial jurisdiction is the greatest threat to the EU-wide social contract.

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competence not only to prevent conflicts of jurisdiction – which is the present mandate under Article 31(1)(d) EU – but also to 'settle' such conflicts.

[615] The link between social contract theory and the territoriality principle harks back to Beccaria. See, e.g., Tulkens, F. and M. van de Kerchove (2007). Introduction au droit pénal : Aspects juridiques et criminologiques. Bruxelles, Kluwer., at p. 264.

2. Protecting liberty against the collective, a.k.a. the State: Principles of criminal procedure in an EU-wide social contract

In terms of social contract theory, as previously alluded to, there is clear analytical difference between the substantive criminal law and criminal procedure. The former deals with the protection of individuals from violations of the social contract by other individuals who thereby forfeit their rights under the social contract, whereas the latter deals with protecting the individual from violations of the social contract by the collective of individuals in the process whereby that collective determines whether a particular individual has violated the social contract as against another individual. Criminal procedure, on this analysis, does not seek to determine the exact methodology adopted by the collective to ascertain whether a particular individual has in fact violated the social contract in relation to another individual – above referred to as *forensic criminal procedure* –, it merely seeks to establish a line beyond which the collective may not stray in that process – above referred to as *protective criminal procedure*. For most practical purposes, criminal procedure in this sense can be equated with "civil liberties" as the expression is used in common parlance. There are two reasons why we will not use this expression in the present discussion of the principles of criminal procedure. First, "civil liberties" has become a complex expression denoting different things to different people sometimes going well beyond the ascertainment of particular violations of the substantive criminal law. Second, and more importantly, in the terminology established in previous Titles, 'liberty' denotes those freedoms which the social contract seeks to protect from without distinctions as to whether the threat comes from other individuals or the individuals acting as the collective. To avoid confusion then, the terminology of "criminal procedure" will here be used, it being understood that the principles referred to are those pertaining to what we above denoted 'protective' criminal procedure.

A further distinction follows from the analytical distinction between substantive criminal law and criminal procedure. Whereas the violation of the social contract by

an individual in relation to another takes the shape of a course of action, the violation of the social contract by the collective in relation to an individual presupposes that the agent of the collective can legitimately be said to act on behalf of the collective. Without that legitimacy, any action taken by that agent would constitute nothing else than the actions of one individual member of the social contract in relation to another and would thus fall under the substantive criminal law. The legitimacy which transforms the actions of an individual in relation to another into the actions by the collective in relation to that individual can only be found in legislation. So whereas for the substantive criminal law the question is whether certain causes of action trigger the right to the protection of collective coercion, for criminal procedure the question is whether particular legislation conforms to the requirements of the social contract. To illustrate this distinction we can take the example of the treatment of suspects during police questioning. It will always be a violation of the social contract for a police officer to assault a suspect. In order properly to classify the assault, however, we would need to know whether the laws of the collective whose agent the police officer is permit her or him to use such methods in relation to suspects. If they do not, the police officer's behaviour constitutes a violation of the social contract by one individual in relation to another and falls to be dealt with under principles of substantive criminal law. If, on the other hand, those laws do permit such behaviour[616], the police officer legitimately acts as an agent of the collective and the behaviour constitutes the violation of the social contract by the collective in relation to the individual suspect and is properly dealt with under the principles of criminal procedure. It therefore follows that the discussion of criminal procedure needs to focus on positive legislation rather than courses of action.

It is easy spontaneously to feel that violations of the social contract by the collective constitutes a particular evil the consequences of which far outweigh those of violations perpetrated by individuals. The latter need to be accepted as a part of the human condition; the former imply the breakdown of the very fabric of the social contract forcing individuals back into that state of existence where, to use an oft

[616] In order to capture the reality of policing in many countries, it needs to be clarified that such permission can be either express or implicit; the systemic non-prosecution of police brutality in combination with the admissibility of evidence obtained during "physical questioning" must be equated with legal permission.

repeated expression, 'man is a wolf to man.' As Europeans, we have experience of such states of existence from our very recent history.[617] Some, like Günther, derive a deeper meaning from this historical fact and are of the opinion that 'this history of injustice and fear as a common European history'[618] obliges us to a particularly European conception of the rights of individuals in relation to the state. If nothing more is meant thereby than that this common history commits us to particular vigilance with respect to developments in criminal procedure, it can readily be accepted. However, that is not what Günther intends. He points out that our common history identifies a number of concrete instances of human suffering as a consequence of certain identifiable ideologies, in particular fascism and national socialism. To Günther it therefore follows that these concrete experiences not only justify but oblige us to commit to a particular and rather substantive conception of what society needs to do in order to prevent the recurrence of these experiences. The problem is that this implies certain curtailments on human activity (in particular as regards freedom of speech and association) which, it would here be argued, go well beyond the requirements of the social contract and which risk infringing the very liberty it is meant to protect.

Although it was probably meant more as an exhortation in the context of European relations with the wider world, Dame Ludford's statement can without distortion also be used as a point of departure for auto-reflection: 'Cultural assumptions must not become a barrier to the robust assertion of the universality, not only in the world, but also within Europe, of civil rights standards.'[619] As was stated earlier in this Title, from the point of view of social contract theory, what is important is not to distinguish the EU-wide social contract from the surrounding social contractual units, but to ensure its internal coherence. Despite the existence of a common European experience which ought to incite us to particular vigilance in matters of criminal procedure, the particular systems of criminal justice of the Member States are also the

[617] A very insightful account of 20th century European history can be found in Ferguson, N. (2006). The War of the World. London, Penguin Books.
[618] Klaus Günther, 'The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture', in Alston, P., Ed. (1999). The EU and Human Rights. Oxford, Oxford University Press., at p. 126.
[619] Sarah Ludford, 'An EU JHA Policy: What should it Comprise?', in Apap, J., Ed. (2004). Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement. Cheltenham, UK; Northhampton, MA, USA, Edward Elgar., at p. 33.

result of their particular histories and experiences. Endeavouring to reason in terms of the requirements of the EU system of criminal justice inevitably comes up against the fact that national laws and practices are 'defended by national delegations as if each of them has obviously the best legislation on the respective JHA issues in place.'[620] Understandable as it may be, from the perspective of the EU as a single social contractual unit, no solution arrived at in any particular Member State can claim normative supremacy over another. The EU has united this multitude of different jurisdictions on the basis that they all share a set of fundamental values, not least of which that they all observe the rule of law. From that perspective they are normative equals.[621] It is only with reference to the values held as the common and fundamental basis for this union that any given system can be considered as lacking.

This aspect of EU cooperation in criminal justice has led to a vivid debate on how best to instrumentalise these fundamental values so that they really do constitute real standards of criminal procedure which individuals across the EU can have enforced against the collective. The speed with which the EU has instrumentalised the principle of mutual recognition and the corresponding appearance of the EU-wide social contract has meant that EU citizens now have a direct and, in some cases, even pressing interest in the standards of criminal procedure everywhere in the EU. This has lead to sustained calls for the at least partial harmonisation of criminal procedure in the EU.

[620] Jörg Monar, 'Maintaining the Justice and Home Affairs Acquis in an Enlarged Europe', in *ibid.*, at p. 42.
[621] See Edmondo Bruti Liberati, 'Des difficultés de la coopération', in Cullen, P. and S. Jund, Eds. (2002). Criminal Justice Co-operation in the European Union after Tampere. Europäische Rechtsakademie (ERA). Köln, Bundesanzeiger Verlagsges.mbH.

2.1. Arguing about harmonisation[622]

Before we even get onto the difficulties there are on the issue of whether the treaties currently confer competence to the EU to conduct general harmonisation of criminal procedure, notice needs to be taken of the varied and sustained principled arguments in favour of such harmonisation. Many take their cue from the very practice of mutual recognition which, according to the proponents of this way of thinking, presupposes a level of mutual trust between the institutional actors in the various jurisdictions which they feel is currently lacking. In fact, according to Weyembergh, '[t]he daily practice of judicial cooperation offers many examples of the prevalence of mutual distrust. Mutual distrust also affects the negotiation of EU instruments which concretize the mutual recognition principle.'[623]

In many places in this Title and in above Titles it has been stated that this kind of reasoning is problematic, both from the specific point of view of the very logic of the mutual recognition system, and, in particular, from the point of view of social contract theory. The logic of mutual recognition presupposes a sufficient level of convergence in the fundamental aspects of the systems of criminal justice united in the EU. This is a legal-empirical argument which has nothing to do with whether certain institutions and individual actors believe it to be the case. Arguing from the sociological fact that mutual distrust exists gives legal credence to and justifies an attitude which is in violation of positive law as the Member States, which includes the national judiciaries, are bound to apply it. From the point of view of social contract theory, this position misses the fact that the social contract is an interpersonal construct: whether there is trust between institutional actors is, from this perspective, irrelevant.

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[622] The term 'harmonisation' is here used as shorthand for the active minimisation of legislative differences at whatever degree of detail. It is thus not intended in the more limitative sense given to it by certain authors, see, in particular, Mireille Delmas-Marty, 'A la recherche d'un langage commun', in Delmas-Marty, M., G. Giudicelli-Delage, et al., Eds. (2003). L'harmonisation des sanctions pénales en Europe. Paris, Société de législation comparée. and Weyembergh, A. (2004). L'harmonisation des législations : condition de l'espace pénal européen et révélateur de ses tensions. Bruxelles, Editions de l'Université de Bruxelles.. It is noted that the term 'approximation' is used in the RT and this term will be used where appropriate although no substantive distinction is intended.

[623] Weyembergh, A. (2005). "Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme." Common Market Law Review **42**(6): 1567-1597., at pp. 1574-1575. See also, e.g., Serge de Biolley, 'L'harmonisation des procédures', in Flore, D., S. Bosly, et al. (2003). Actualités de droit pénal européen. Bruxelles, La Charte.

What matters is that individuals are guaranteed to be treated in conformity with the requirements of the social contract across the EU. The prominence of human rights standards in the EU *acquis* is prima facie conclusive of that being the case.

From a legal-empirical point of view, there is thus a certain logic to the statement in the preamble to the EAW that it is 'based on a high level of confidence between the Member States.'[624] As we saw in the previous chapter, the ECJ also bases its analysis on the existence of sufficent trust between the systems of criminal justice in the EU. This does not stop the critics of mutual recognition without positive harmonisation of criminal procedure from persisting with their argument that institutional distrust which, in many circumstances, is little more than veiled expressions of national chauvenism on behalf of judicial actors[625] should be treated as a reason to suspend the mutual recognition programme. Again quoting Weyembergh:

> '[T]he trend whereby the existence of mutual trust is merely declared, actually raises questions about the EU's objective of establishing an area of freedom, security and justice. According to its promoters, mutual trust is grounded on and is justified by the common values shared by the Member States. However, if one looks at the concrete patterns of values, one is forced to realize how limited they are. As a consequence, the declared mutual confidence is more blind than enlightened.'[626]

It is of course a question of perspective whether one considers the sources of 'common values shared' binding he Member States of the EU as 'limited.' Suffice to say that both the primary sources, primarily Article 6 EU, and the secondary sources which concretise the primary sources, primarily the ECHR, do impose a certain number of very precise obligations on systems of criminal justice in the EU. It is often pointed out that compliance with the ECHR is far from universal and that all Member States are with different rates of regularity condemned by the ECtHR for

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[624] Preambular § 10.
[625] The EU committee of the UK House of Lords has picked up on this fact, see House of Lords, European Union Committee, 'Procedural Rights in Criminal Proceedings', 1st Report of Session 2004-2005 (HL Paper 28), and in particular at § 69.
[626] Weyembergh, A. (2005). "Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme." Common Market Law Review **42**(6): 1567-1597., at p. 1575.

violations of Article 6 ECHR.[627] That is undeniable. It is however difficult to see how it could be argued that imperfect compliance with the ECHR justifies preventing individuals from being brought to trial in the Member State where an offence has been committed simply because they have left it since, which is what this criticism boils down to, without also arguing that no one should have to stand trial in that Member State. If the simple fact that violations of Article 6 ECHR have been found with respect to a system of criminal justice should render it unfit for purpose, it is doubtful whether any criminal trials could proceed anywhere.

One explanation for this position could be the situation that "foreigners" find criminal trials particularly difficult not least because procedures of translation and interpretation are not always up to a very high standard, something which is of particular concern to Jakobi and de Mas.[628] Again, it is difficult to dispute the factual premise of the argument but, yet again, it is difficult to see how it could be used as an argument specifically to criticise the EU's mutual recognition regime. It is a fact that more than ever before, as a result of the free movement of persons but also of more global migratory patterns, there are millions of people who live in a country where they are imperfectly integrated not least because they do not yet master the local language. Jacobi and de Mas work for Fair Trials Abroad and their perspective is predominantly that of the tourist who gets caught up in criminal proceedings abroad. However, it is difficult to see how this can coherently be used as a specific criticism of the mutual recognition regime in the EU when in terms of culture related difficulties, there is nothing to distinguish the tourist from the migrant worker or refugee. With or without mutual recognition, national systems of criminal justice will always have to deal with the specific problems posed by the involvement of individuals of foreign extraction.

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[627] See, e.g., Stephen Jakobi and Sarah de Mas, 'Achieving Balance among Liberty, Security and Justice: An Agenda for Europe', in Cullen, P. and S. Jund, Eds. (2002). Criminal Justice Co-operation in the European Union after Tampere. Europäische Rechtsakademie (ERA). Köln, Bundesanzeiger Verlagsges.mbH., Serge de Biolley, Un pouvoir juridictionnel européen en matière pénale ?', in Flore, D., S. Bosly, et al. (2003). Actualités de droit pénal européen. Bruxelles, La Charte., Flore, D. and S. de Biolley (2003). "Des organes juridictionnels en matière pénale pour l'Union européenne." Cahiers de droit européen **39**(5-6): 597-637.

[628] Stephen Jakobi and Sarah de Mas, 'Achieving Balance among Liberty, Security and Justice: An Agenda for Europe', in Cullen, P. and S. Jund, Eds. (2002). Criminal Justice Co-operation in the European Union after Tampere. Europäische Rechtsakademie (ERA). Köln, Bundesanzeiger Verlagsges.mbH.

In view of the relative weakness of the arguments put in favour of active EU harmonisation of criminal procedure, it is not a farfetched proposition that what many authors more or less secretly hope is for the EU to act as a "progressive" force more generally in the area of civil liberties. This is a fairly common assertion in academic opinions[629] and as a matter of political desirability there is little to object to in this vision. However, as a matter of analytical necessity it is difficult to see how it would oblige us to a policy of harmonisation of criminal procedure. These thoughts are often linked to arguments about a perceived lack of balance in the creation of the AFSJ. In what sometimes seems a partly semantic discussion, it is often asserted that out of the three conceptual elements of the AFSJ, the '"security" element has been dominant.'[630] The argument here is that the fact that the EU's policy in criminal justice has been couched in terms of 'freedom, security and justice' automatically implies that '[o]ne of the key components in an EU JHA policy is the commitment, in developing legislation and policy, to give equal regard to freedom and justice as to security.'[631] Although the argument is superficially attractive in that it appeals to our sense of balance and moderation, it merely begs the question: What exactly is meant by insisting on a 'balance' between the three elements of the AFSJ?[632] Is it so that "justice" requires equal legislative attention to be given to "security" as to "freedom" aspects? Does that not imply that "justice" as a concept includes the two former? What about the idea that "security" and "freedom" from threats, etc. are the same thing… ? As a matter of rhetoric it is a pleasing triplet and it can probably be placed in that tradition of aspirational taglines which can trace its lineage back to the 'Life,

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[629] See, e.g., Philip Alston and J. H. H. Weiler, An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights', in Alston, P., Ed. (1999). The EU and Human Rights. Oxford, Oxford University Press., Heike Jung, 'Maintaining Human Rights in the Process of Harmonizing European Criminal Law', in Husabø, E. J. and A. Strandbakken, Eds. (2005). Harmonization of Criminal Law in Europe. Supranational Criminal Law: Capita Selecta. Antwerpen - Oxford, intersentia., Peers, S. (2000). EU Justice and Home Affairs Law. Harlow, Pearson Education.

[630] House of Lords, European Union Committee, 'Procedural Rights in Criminal Proceedings', 1st Report of Session 2004-2005 (HL Paper 28), at § 1.

[631] Sarah Ludford, 'An EU JHA Policy: What should it Comprise?', in Apap, J., Ed. (2004). Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement. Cheltenham, UK; Northhampton, MA, USA, Edward Elgar., at p. 30.

[632] For further examples, see Weyembergh, A. (2005). "Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme." Common Market Law Review **42**(6): 1567-1597., and Stephen Jakobi and Sarah de Mas, 'Achieving Balance among Liberty, Security and Justice: An Agenda for Europe', in Cullen, P. and S. Jund, Eds. (2002). Criminal Justice Co-operation in the European Union after Tampere. Europäische Rechtsakademie (ERA). Köln, Bundesanzeiger Verlagsges.mbH.

liberty and the pursuit of happiness' of the American revolution and the '*Liberté, égalité, fraternité*' of its French ditto. It is of course true that the American and French slogans were meant to encapsulate the hopes and aspirations of, respectively, a newly born and a re-born nation-state whereas the EU's AFSJ is more limited in scope. Nevertheless, a comparison may prove enlightening. As it was with its historically illustrious counterparts, the AFSJ is capable of serving as support for the hopes and aspirations of a great number of very varied ideologies all claiming to interpret and give voice to its "mandate." We may say that as a matter of political philosophy, a system of criminal justice ought to provide a certain balance between 'freedom, security and justice' but then again, we might just as well disagree. Therefore, it should be obvious that an argument in favour of harmonisation of criminal procedure simply cannot be derived from what must be considered the purely aspirational terminology 'freedom, security and justice.'

Finally, there is a current of thought which adopts a more constitutional approach to the issue of harmonisation of criminal procedure. Starting from the notion that criminal law has the dual function of protecting individuals against crime (the "sword-function") and of protecting individuals against the state (the "shield-function")[633], this current then makes the argument that in any given system of criminal procedure these functions have to be represented at the same normative level. So if substantive criminal law and forensic criminal procedure are organised on the EU level, so must protective criminal procedure. In the words of the European Parliament's Committee on Civil Liberties: 'If prosecution is organised on a European scale, then so should citizen's rights.'[634] The proponents of this argument[635] make the simple point that if the EU legislates to make it easier to pursue suspects across the Union, i.e. exercises

[633] For a very extensive treatment of this concept, see Cartuyvels, Y., H. Dumont, et al., Eds. (2007). Les droits de l'homme, bouclier ou épée du droit pénal? Bruxelles, Publications des facultées universitaires Saint Louis.

[634] European Parliament, Committee on Civil Liberties, Justice and Home Affairs, 'Report on the proposal for a Council framework decision on certain procedural rights in criminal proceedings throughout the European Union, A6-0064/2005, 21.3.2005, at p. 26

[635] See, e.g., Sarah Ludford, 'An EU JHA Policy: What should it Comprise?', in Apap, J., Ed. (2004). Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement. Cheltenham, UK; Northhampton, MA, USA, Edward Elgar., Impalà, F. (2005). "The European Arrest Warrant in the Italian legal system: Between mutual recognition and mutual fear within the European area of Freedom, Security and Justice." Utrecht Law Review **1**(2): 56-78., and Flore, D. and S. de Biolley (2003). "Des organes juridictionnels en matière pénale pour l'Union européenne." Cahiers de droit européen **39**(5-6): 597-637.

the "sword-function", then it should also legislate to provide suspects with an "EU shield." This is another argument which is superficially attractive in that it appeals to our sense of symmetry or balance. In addition it must be conceded that if one adopts an exclusively EU perspective, it makes perfect sense: the EU does provide for the substantive criminalisation of certain offences and procedures whereby suspects may be brought to justice. Protective criminal procedure (as distinguished from forensic criminal procedure) may indeed appear neglected.

It is, however, only from a very limited perspective that it can be said that protective criminal procedure is effectively lacking from EU criminal justice. Applying social contract theory we are forced to look at things from the point of view of the individual charged with an offence and the circumstances under which she or he finds her- or himself subject to the procedure destined to ascertain whether she or he has in fact violated the social contract. Constructing the most European scenario possible we can posit the following: a Swedish citizen arrested in France on the basis of a EAW issued in the United Kingdom for terrorist offences as defined in the 2002 Framework Decision. While this might seem a completely EU law driven scenario, the truth is that even a case such as this will predominantly be conducted with reference to national criminal law and not merely in the sense that all EU law will have been implemented in the law of the individual Member States using local instruments. Like any suspect, the suspect in this scenario will benefit from national standards of (protective) criminal procedure. These will most certainly have been affected by the ECHR and the rulings of the ECtHR but they will have a very local "flavour." From the point of view of social contract theory as applied to criminal procedure, what matters is that the collective does not violate the social contract in ascertaining whether the suspect has indeed forfeited her or his rights under it. Whether it does or not will depend on the *ensemble* of its positive legislation in the area. Which normative level the legislation stems from is irrelevant as far as social contract theory is concerned. As we have seen previously, it cannot be said that the EU legislation in the area of criminal justice in itself violates the rights of individuals under the social contract nor that it creates a situation of discrimination as between EU citizens. Whether violations do in fact occur is entirely a matter of national standards of

criminal procedure and there will inevitably be procedural avenues to challenge such violations.

It could of course be argued that EU legislation harmonising criminal procedure could potentially provide more effective protection[636] or that it ought to be the aim of the EU's AFSJ to ensure that rights 'are applied properly and consistently by all the Member States.'[637] From the perspective of the effective enforcement of individual rights in criminal procedure, EU enforcement of such rights, even if they are the same as the ones enshrined in the ECHR, is likely to be much more effective than the Council of Europe system. The Commission correctly pointed this out in a 2003 Communication: 'The ECtHR cannot be relied upon as a safety net to remedy all breaches of the ECHR.'[638] If the ECJ were given competence to declare provisions of national criminal procedure incompatible with the fair trial provisions of, say, Article 6 ECHR the protection under that article would be considerably improved. Among other things, unlike the ECtHR, the ECJ has the authority to make judgments *in abstracto* by way of the preliminary reference procedure of Article 35(1) EU. There is also the more general observation that the EU is a more complete legal order than the Council of Europe. Including principles of protective criminal procedure within the EU system would have the result of including them in a very strong legal web allowing them to draw strength from the other constituent parts of that web. In the above Title we discussed the mechanisms determining whether a social contract would hold together and the conclusion reached was that a rational actor makes the choice on a pure balance of benefits-calculation. There is little reason to doubt that the same is true when it comes to national compliance with rulings by supra national jurisdictions. From the point of view of an EU Member State, non-compliance with a ruling by the ECtHR would perhaps, ironically, have its most serious consequences in its intra-EU relations. There is little real pressure the system of the Council of Europe can bring to bear. On the other hand, non-compliance with a ruling by the ECJ is an

[636] Christine van den Wyngaert, 'Eurojust and the European Public Prosecutor in the Corpus Juris Model: Water and Fire?', in Walker, N., Ed. (2004). Europe's Area of Freedom, Security and Justice. Oxford, Oxford University Press.
[637] European Parliament, Committee on Civil Liberties, Justice and Home Affairs, 'Report on the proposal for a Council framework decision on certain procedural rights in criminal proceedings throughout the European Union, A6-0064/2005, opinion of the Committee of Legal Affairs, at p. 30.
[638] European Commission Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM(2003) 75 final, 19.2.2003, at p. 39.

act of rebellion against the EU legal order as a whole which could have very serious consequences: social, economic, and political.

While these may be considered sound policy opinions, they are no different from the pure policy arguments canvassed above: as a matter of what social contract theory dictates, it is simply untrue to say that just because the EU facilitates cross-border prosecutions it also needs to provide for EU-wide principles of protective criminal procedure. The nature of the criminal trial is such that it is the content of procedural rights at the disposal of the defendant which matters, the normative origins of those rights are entirely irrelevant.

2.2. Attempting harmonisation: analysis of a failed initiative

As will have been gathered from the above discussion, the EU was under significant pressure to engage in the harmonisation of protective criminal procedure. Not wanting to be seen as not responding to what it perceived as popular demand for action, in 2004 the European Commission responded 'robustly'[639] by submitting a proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union (FDPR).[640] In view of the, it is submitted, strong arguments of principle which can be raised against the very principle of the need for such harmonisation, it can of course be wondered if the 'Commission – or at least some of its officials – concentrates too much on, even seems almost obsessed by acquiring an element of power in criminal justice matters, and that its arguments are actually irrelevant.'[641] It would now appear that the

[639] House of Lords, European Union Committee, 'Procedural Rights in Criminal Proceedings', 1st Report of Session 2004-2005 (HL Paper 28), at § 10.
[640] Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings througout the European Union, COM(2004) 328 final, 28.4.2004.
[641] Fijnaut, C. and M. S. Groenhuijsen (2002). "A European Public Prosecution Service: Comments on the Green Paper." European Journal of Crime, Criminal Law and Criminal Justice **10**(4): 321-336., at p. 327.

Commission has withdrawn this proposal[642] but the debate which it sparked and the issues it raises, both of principle and law, make it a good case study.[643]

The FDPR committed the Commission, at least in principle, to the school of thought which holds that the institutional distrust between some members of Member State judiciaries entails that the EU needs to harmonise criminal procedure. The difficulties encountered in the negotiations on the FDPR do not prevent this position from being regularly reiterated in institutional pronouncements. The "Hague Programme", for instance, states that '[t]he further realisation of mutual recognition as the cornerstone of judicial cooperation implies the development of equivalent standards for procedural rights in criminal proceedings.'[644] Further, in an assessment of the advances of the AFSJ since Tampere, the Commission states that 'mutual recognition requires a common basis of shared principles and minimum standards, in particular in order to strengthen mutual confidence.'[645] It should be made clear at the outset that there is little to be objected to in this last statement. Mutual recognition does require 'a common basis of shared principles and minimum standards.' The problem is that those common standards and principles already exist and that, as we will see below, the FDPR would add very little, if anything, to them.

After the project of the FDPR had been severed from the EAW project to which it was originally tied[646], its revival in 2003 was the source of much hope. In the Green Paper laying out the principles behind the proposal, the Commission emphasised the importance of common standards of procedural safeguards in order for 'the judicial authorities of each Member State to have confidence in the judicial systems of the

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[642] Statement by Mr. Peter Csonka, Head of Unit – Criminal Justice, DG JLS, at the IEE Summer School 'The EU Penal Area', Brussels, 4 July 2007. Formally, however, the proposal is merely awaiting political agreement in Council. See also eucrim 1-2/2007, at p. 30.

[643] Many of my views on the FDPR were first expressed in Lööf, R. (2006). "Shooting from the Hip: Proposed Minimum Rights in Criminal Proceedings throughout the EU." European Law Journal **12**(3): 421-430.

[644] The Hague Programme: strengthening freedom, security and justice in the European Union' (OJ C 53, 3.3.2005, pp. 1-14), at p. 12.

[645] European Commission Communication on the Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations, COM(2004) 401 final, 2.6.2004, at p. 10.

[646] See Deen-Racsmány, Z. and R. Blekxtoon (2005). "The Decline of the Nationality Exception in European Extradition?" European Journal of Crime, Criminal Law and Criminal Justice **13**(3): 317-363.

other Member States.'[647] Even if the FDPR ostensibly represented a change in emphasis in the policy of the Commission – a change from declaring the existence of mutual trust to creating it – it was always questionable whether this intention, taken as read, was actually translated by the FDPR. This is because if the issue causing problems for mutual trust and, consequently, for mutual recognition, is the insufficiency of existing common standards on procedural safeguards, it had to be shown that the EU purported to provide a more rigorous check on Member State differences than the old, apparently insufficient institutional framework did. In order to ascertain this we need carefully to scrutinise the rights which were included in the FDPR. These rights were decided following a process which began in early 2002 and involved a consultation paper posted on the Justice and Home Affairs web-page and a questionnaire sent to the Member States. The conclusion was that the following five rights were 'so fundamental that they should be given priority at this stage'[648]: 1) access to legal advice, 2) free access to interpretation and translation, 3) special protection for particularly vulnerable suspects, 4) consular assistance, and 5) a written notification of rights (the "Letter of Rights"). The first thing to point out is that these are all important and laudable principles. However, as will be immediately clear, they are in no way novel requirements in the different criminal jurisdictions in the EU. The "Letter of Rights" would be a novelty in that it would constitute the first international/supranational formal obligation on states to provide suspects with a written catalogue of their rights. Nevertheless, the importance of this educational measure would wholly depend on the concrete rights listed.[649]

Although broadly welcomed in academic circles, the Commission's selection of rights to be included in the FDPR raised some eyebrows.[650] As we shall see, this scepticism was justified givent that the rights laid down in the FDPR were in many ways both redundant as well as empirically unmotivated.

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[647] European Commission Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM(2003) 75 final, 19.2.2003, at p. 4.
[648] *Ibid.*, at p. 14.
[649] See Zupančič, B. M. and J. Callewaert (2007). "Relationship of the EU Framework Decision to the ECHR: Towards the fundamental principles of criminal procedure." ERA Forum **8**: 265-271.
[650] See, e.g., Weyembergh, A. (2005). "Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme." Common Market Law Review **42**(6): 1567-1597.

Starting with the right to consular assistance, Article 36(1)(a) of the Vienna Convention on Consular Relations[651] which has been ratified by all 27 Member States lays down the principle that 'consular officers shall be free to communicate with nationals of the sending State and to have access to them.' With respect to suspects and accused, Article 36(1)(c) then goes on to specify that 'consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation.'

Moving on, the third right enshrined in the FDPR translates the idea that special protection for vulnerable suspects is necessary to make sure that the physical, medical, mental or other inability of the suspect or accused to understand and or to follow the proceedings does not prejudice the fairness of the criminal proceedings against her or him. Although it has never been formulated in so many words, nor this right is anything new in our common European legal heritage. The ECtHR has stated that the accused's right under Article 6 ECHR to participate in his or her trial '*includes […] not only his right to be present, but also to hear and follow the proceedings.*'[652] Compliance with Article 6 ECHR therefore implies an obligation to take into account any special inherent characteristics of the accused.

Finally with regard to the first two rights included in the FDPR, the text of Article 6 ECHR deals with them directly. Sub-section (3)(c) lays down the right for every accused 'to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.' The case law of the ECtHR has specified that this guarantee extends to the pre-trial stage[653] and that the state party has an obligation to

[651] Signed on 24 April 1963. The full text of this convention can be found at http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf.

[652] *Stanford v. UK*, judgment of 25 January 1994 (application no 16757/90), at § 26. The applicant complained that his bad hearing had not been sufficiently taken into account during his trial. For a commentary, see de Frouville, O. (1995). "Stanford c. Royaume-Uni." Journal du droit international **3**: 750-752.

[653] See, e.g., *Imbroscia v. Switzerland*, judgment of 23 October 1993 (application no 13972/88); *John Murray v. UK*, judgment of 8 February 1996 (application no 18731/91); and *Magee v. UK*, judgment of 6 June 2000 (application no 28135/95).

verify the adequacy of the defence.[654] Lastly, sub-section (3)(e) stipulates for the right 'to have the free assistance of an interpreter if [the suspect] cannot understand or speak the language used in court.' Again, the case law of the ECtHR provides us with concrete guidance in the application of this right and we now know that implied in this provision are the obligations to translate relevant documents[655], to verify that interpretation and translation are adequate[656], and that the principle of gratuity is absolute.[657]

After this brief review, we can conclude that the rights included in the FDPR were already covered by international obligations binding on all the EU's 27 Member States. In all of its essentials, the FDPR mirrored the existing provisions including some of the developments owed to the ECtHR. In this regard, the Green Paper even specified that 'the intention behind the initiative […] is not in any way to replace or even to complement the ECtHR', rather '[t]he hope is that as a result of this initiative, Member States will achieve better standards of compliance with the ECHR.'[658] However, even this modest ambition was seriously relativised by Recital 8 of the Preamble to the FDPR which ominously stated that '[t]he proposed provisions are not intended to affect specific measures in force in national legislations in the context of the fight against certain serious and complex forms of crime in particular terrorism.' It is to be emphasised that the ECHR itself does not provide a similar loophole and in fact the majority of ECtHR case law on substantive violations of the right to access to legal assistance fall within the potential ambit of Recital 8.[659] The very existence of Recital 8 seemed to confirm the widespread suspicion that unanimous agreement on this minimum of procedural safeguards would be bought at the price of common

[654] See, e.g., *Artico v. Italy*, judgment of 30 May 1980 (application no 6694/74); *Kamasinski v. Austria*, judgment of 19 December 1989 (application no 9783/82); and *Daud v. Portugal*, judgment of 21 April 1998 (application no 22600/93).
[655] *Luedicke, Belkacem and Koç v. Germany*, judgment of 28 November 1978 (application nos 6210/73, 6877/75 and 7132/75).
[656] *Kamasinski v. Austria*, above.
[657] *Luedicke, Belkacem and Koç*, above.
[658] European Commission Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM(2003) 75 final, 19.2.2003, at p. 39.
[659] See, e.g., *Imbrioscia v. Switzerland*; *John Murray v. UK*; *Magee v. UK* (above).

safeguards 'at a very low level, perhaps even lower than the jurisprudence of the ECtHR.'[660]

If we then return to the instrumental aim of the FDPR, namely to promote mutual trust and thus promote mutual recognition, it is difficult to see how it could have constituted a positive contribution. The FDPR did not provide a more rigorous check on Member State differences than the old sources of the same rights and it even seemed as though the standards under the FDPR were lower than they are under the ECHR. As a consequence of this an attempt was made to make the proposal "Strasburg-proof." During the last set of negotiations on the FDPR under the German presidency in late 2006, a new version of the FDPR alligned the formulation of the rights with the text of the ECHR.[661]

Still, in terms of the stated change from a declaratory to a constructive tactic for the fostering of mutual trust, one is tempted to conclude that contrary to appearances, the FDPR was nothing more than yet another declaratory initiative. In a way, the Commission had admitted as much in the Green Paper: 'This Green Paper does not seek to create new rights nor to monitor compliance with rights that exist under the ECHR or other instruments, but rather to identify the existing rights the Commission sees as basic and to promote their visibility.'[662] Despite this, the Commission's global interpretation of its efforts, as described in the 2004 AFSJ assessment, is that contrary to much of the criticism often levelled at it, 'the Commission has always been at pains to ensure balance between the freedom, security and justice aspects.'[663] In the final analysis, it is tempting to see the FDPR as an elaborate attempt at window dressing to counter the common impression that the instrumentalisation of the AFSJ has been very security orientated.

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[660] Statement made by Mr. Ivan Bizjak, Director-General for Justice and Home Affairs, General Secretariat of the Council, at the Academy of European Law conference in Edinburgh, 29 September 2005. See also House of Lords, European Union Committee, 'Procedural Rights in Criminal Proceedings', 1st Report of Session 2004-2005 (HL Paper 28).

[661] New proposed draft of the FDPR from the *Bundesministerium der Justiz* of 6 December 2006.

[662] European Commission Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM(2003) 75 final, 19.2.2003, at p. 15.

[663] European Commission Communication on the Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations, COM(2004) 401 final, 2.6.2004, at p. 4.

In all probability, however, this would be a hasty conclusion. It is very likely that the Commission was sincere in its wishes to change from declaratory to constructive tactics in the fostering of mutual trust. Nevertheless, it seems the ineluctable truth that the institutional realities of the third pillar coupled with the current political climate effectively prevented the legislative translation of the Commission's intentions. What we were left with was constructivist justifications for declaratory measures.

Even if the FDPR had been a more constructive proposal in terms of the rights actually laid down, there is still the crucial issue of whether the EU, as a matter of the powers attributed to it by the Treaties, would be competent to adopt a proposal such as the FDPR. Again, the discussion surrounding the FDPR will be used as a case study to illustrate this point.

2.3. Criminal procedure and conferred powers

As stated above, the idea was that harmonisation of minimal procedural rights should have accompanied the introduction of the EAW. The reason why it did not is that there is an as yet unresolved dispute whether there is a legal basis in the EU treaty for the EU to harmonise criminal procedure in general. While the EU Treaty, in its Article 31(1)(b), provides an explicit legal basis for the 'facilitating [of] extradition between Member States', it provides no such express basis for EU action in the area of procedural rights. When it presented the FDPR, the Commission felt that it had overcome this obstacle by appealing to a logic of implied competences.

In the 2003 Green Paper, the Commission emphasised the centrality of mutual trust and confidence between judicial systems to the operation of the principle of mutual recognition. In this regard, it asserted that '[f]aith in procedural safeguards and the fairness of proceedings operate so as to strengthen that confidence.' It followed that it would be 'desirable to have certain minimum common standards throughout the European Union, although the means of achieving those standards must be left to the

individual Member States.'[664] While acknowledging that all Member States are bound by such common standards under Article 6 of the European Convention on Human Rights (ECHR), the Commission was of the opinion that although differences in implementation of these standards may not as such entail a violation of the ECHR, for the particular purposes of mutual recognition 'divergent practices run the risk of hindering mutual trust and confidence which is the basis of mutual recognition.' This, according to the Commission, 'justifies the EU taking action pursuant to Article 31[(1)](c) of the TEU.'[665] In the proposal itself, the Commission expanded on the reasoning explored above but also added a further consideration: in the Programme of measures to implement the principle of mutual recognition, the Council and Commission had identified a number of 'parameters which determine [the] effectiveness' of mutual recognition.[666] These included 'mechanisms for safeguarding the rights of […] suspects' (parameter 3) and 'common minimum standards necessary to facilitate the application of the principle of mutual recognition' (parameter 4).

This combination of logical deduction from the requirements of the principle of mutual recognition and institutional statements of principle led the Commission to the conclusion that the harmonisation of procedural rights came within the intention of the framers of Article 31(1)(c) EU. This paragraph empowers the EU to take action in the realm of judicial cooperation in criminal matters to ensure the compatibility of rules applicable in the Member States 'as may be necessary to improve such cooperation'. There is also academic support for this reasoning to base the EU's competences in the area of procedural rights on what is necessary to give effect to mutual recognition as the chosen way to instrumentalise the express treaty goal of the AFSJ.[667]

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[664] European Commission Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM(2003) 75 final, 19.2.2003, at p. 4.
[665] *Ibid*, at p. 9.
[666] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters (OJ C 12, 15.1.2001, p. 10), at pp. 11-12.
[667] See, e.g., Weyembergh, A. (2005). "Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme." Common Market Law Review **42**(6): 1567-1597.

This argument is by no means implausible. As we have seen, the existence of institutional distrust in the systems of criminal justice of other Member States is not strictly speaking an argument against the principle of mutual recognition. Nevertheless it is still highly likely that as a matter of practice, in a system where national judges are required to have more or less absolute faith in the criminal justice systems of other Member States, judges would feel more comfortable if the "foreign" decisions had been reached applying laws which had been the subject of EU harmonisation.[668] For instance, the UK House of Lords (in its legislative guise) found considerable weight in the argument that in order for such a system to be acceptable, 'there must be confidence that the individual, the subject of the proceedings, has been and will be treated fairly.'[669]

In general, the academic response to the FDPR was overwhelmingly positive and additional arguments to bolster the Commission's principled reasoning on the extent of the EU's competences under Article 31(1)(c) EU have been offered. In particular, it has been argued that all subject matters which are susceptible to legislative action have implicit human rights aspects. It would follow that if there is competence to legislate on a particular subject matter, there is an implied competence to legislate on associated human rights.[670] In this particular instance, it is argued that the EU's undeniable competence to legislate on certain matters of forensic criminal procedure automatically implies EU competence to legislate on associated matters of protective criminal procedure.[671] It is difficult to argue against the basic contention of this argument. Most, if not all, areas of legislative action could indeed be said to have a more or less obvious link with human rights. If this were then taken to be directly translatable to legislative competence it does indeed seem strange to deny the EU competence to deal with all aspects of an area of legitimate legislative intervention.

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[668] For comparative law discussions of these issues, see, e.g, Dugard, J. and C. Van den Wyngaert (1998). "Reconciling Extradition with Human Rights." American Journal of International Law **92**: 187-212.. Anecdotally on a similar theme, see Hamsoun, C. J. and R. Vouin (1952). "Le procès criminel en Angleterre et en France." Revue Internationale de Droit Pénal **23**: 177-190.

[669] House of Lords, European Union Committee, 'Procedural Rights in Criminal Proceedings', 1st Report of Session 2004-2005 (HL Paper 28), at § 6.

[670] J. H. H. Weiler and Sybilla C. Fries, 'A Human Rights Policy for the European Community and Union: The Questions of Competences', in Alston, P., Ed. (1999). The EU and Human Rights. Oxford, Oxford University Press.

[671] *Ibid*.

However, given that this reasoning could be applied to most, if not all, of the EU's areas of legislative competence thus potentially resulting in a large expansion of that competence we should probably ask ourselves whether a link in principle of one of the EU's areas of legislative action with human rights should suffice to confer legislative competence on the EU. If implied competences are to be based on the potentially gluttonous concept of "human rights" it would be wise at the very least to attach a condition of detrimental effect to the very vague link proposed by the above argument. If it could be shown that EU action in the field of forensic criminal procedure did in fact have a detrimental effect on protective criminal procedure, that in combination with the very clear link between the two could constitute a good argument in favour of reading Article 31(1)(c) EU in the way suggested by the proponents of the implied competences argument. As we have seen above, however, as a matter of analytical interpretation, it does not necessarily follow that EU action strengthening or making more effective the repressive aspects of criminal procedure implies a corresponding weakening of protective criminal procedure. In particular, it was argued at length that the provisions instrumentalising the EU-wide social contract have no particular effect on the procedural rights of suspects and defendants. If that is accepted, it is difficult to go along with the argument which seeks to use an implicit link with human rights as a justification to read into the present Treaty provisions an EU competence to harmonise criminal procedure generally.

A further argument in favour of the competence of the EU to adopt legislation in the area of procedural rights has been voiced. The idea is that the simple adoption of a legislative proposal such as the FDPR by the Council would 'settle the question' of EU competence in the area of common minimum standards in procedural rights.[672] This proposition rests on a controversial interpretation of the EU's subsisting three-pillar structure.[673] It holds that since the third pillar is based on intergovernmental cooperation and its corollary unanimity, the Member States, unlike under the first, Community pillar, have not ceded any normative competence to the EU. It would

[672] Statements made by Ms. Caroline Morgan of the Criminal Justice Unit, Directorate D, at the Academy of European Law conference in Edinburgh, 1 October 2005.

[673] For an early critique of this interpretation, see Bruno de Witte, 'The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?', in Heukels, T., N. Blokker, et al., Eds. (1998). The European Union after Amsterdam - A Legal Analysis. The Hague, London, Boston, Kluwer Law International.

follow that under the third pillar, not being a system of conferred and thus limited competences, whatever a unanimous Council decides, it had the competence to decide.[674] A supporting textual argument could also be advanced: Article 31(1) EU does not use a language unambiguously related to a system of limited competences when it states that '[c]ommon action on judicial cooperation in criminal matters *shall include* […]' (italics added).[675]

Two arguments based on the text of the EU Treaty are, it is submitted, fatal to this proposition. First, Title VI EU goes to quite some length in setting out the areas of common action[676], and the modalities of this common action.[677] This detail would seem superfluous indeed if, ultimately, the Council could do whatever it wanted, unconstrained by the text of the Treaty. Second, while Article 35 EU subjects the ability of the ECJ to give preliminary rulings to a declaration by the individual Member States enabling their national courts to ask for them, it expressly states that in the context of such proceedings, it has the authority to rule on 'the *validity* and interpretation of framework decisions.' Article 35 EU also empowers the ECJ, at the instigation of either a Member State or the Commission, to 'review the legality of framework decisions […] on grounds of *lack of competence*, […] *infringement of this Treaty* or of any rule of law relating to its application, or *misuse of powers*.'[678] Interpreting this article so as to exclude legal basis from any one of the three italicised grounds of review seems strained, to exclude it from the three combined seems *contra legem*. In view of this textual evidence, it seems highly improbable that the mere adoption by the Council of a proposal such as the FDPR should preclude further discussion on whether the EU Treaty empowers the EU to take action in the field of procedural rights.

It also seems slightly odd that such emphasis on the intergovernmental character of the third pillar and the consequential clear distinction between the third and first pillars should be relied upon by certain representatives of the European Commission.

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[674] I am indebted to a conversation with Mr Hans G Nilsson of the Council for this insight.
[675] See in this sense Advocate General Kokott in Case C-105/03 *Maria Pupino*, opinion of 11 November 2004, at § 50.
[676] Articles 30 and 31.
[677] Article 34.
[678] Italics added.

The doctrine of "supremacy"[679] which has been crucial to the development of the EC as a coherent legal order is intimately tied up with the fact that Community competences are clearly and strictly delimited: '*by creating a community of unlimited duration, having [...] real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the community, the Member States have limited their sovereign rights,* ***albeit within limited fields*** *[...].*'[680] On this reasoning, expressly excluding the third pillar from the logic of conferred competences would surely also entail the impossibility to claim the legal effects associated with the doctrine of supremacy with respect to third pillar instruments. For its part the ECJ seems inclined to read the institutions of the third pillar in an as analogous manner as possible to the corresponding institutions of the first pillar. Examples in this regard are the cases of *Pupino*[681] and *Advocaaten voor de Wereld*.[682] The former established that the duty of conforming interpretation of EC directive-fame also applies with respect to third pillar framework decisions.[683] In the latter, while dealing with the issue of admissibility, the ECJ essentially stated that the principles of admissibility governing a preliminary reference under Article 35 EU are as far as possible to be the same as those governing the traditional preliminary reference procedure under Article 234 EC. Neither of these cases expressly invokes the doctrine of supremacy which of course leaves it an open question whether supremacy in the context of the third pillar, if at all accepted, would necessarily mean the same thing as supremacy in the context of the first pillar. It is true that supremacy is not an unambiguous concept. Saying that EU law is supreme can be meant in a weak or a strong sense. In the weak sense, it does not need to imply more than that there are central, EU mechanisms for determining whether national legislation complies with EU law. In the strong sense, supremacy of EU law would have the additional implication that any non-compliant national law is automatically rendered inapplicable. The uniqueness of supremacy in

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[679] Sometimes also referred to as 'primacy.'
[680] Case 6/64 *Costa v. E.N.E.L.*, judgment of 15 July 1964 (emphasis added).
[681] Case C-105/03 *Maria Pupino*, judgment of 16 June 2005.
[682] Case C-303/05.
[683] For comments on this aspect of the case, see, e.g., Spencer, J. R. (2005). "Child witnesses and the European Union." Cambridge Law Journal **64**(3): 569-572., and Fletcher, M. (2005). "Extending "Indirect Effect" to the Third Pillar: The Significance of Pupino." European Law Review **30**(6): 862-877. For a comparison of one of the institutional aspects of this decision with the principles of the first pillar, see Lööf, R. (2007). "Temporal aspects of the duty of consistent interpretation in the First and Third Pillars." European Law Review **32**(6): 888-895.

the *EC* context – and which sets it apart from claims to supremacy generally in public international law – is that since *Costa v. E.N.E.L.* both theory and practice have accepted it to mean supremacy in the strong sense. As far as the third pillar is concerned, the jury is still very much out on, first, the applicability of supremacy and, second and eventually, its force.

From a practical point of view, it must be agreed with Lenaerts and Corthaut that '[t]he same reasons that led the Court in Costa v ENEL to proclaim the primacy of EC law are easily transposed to the EU legal order.'[684] Even from a purely legal perspective, and as I have written elsewhere[685], the third pillar equivalent of *Costa v. E.N.E.L.* may already have occurred. As we saw in Title II Article 54 CISA has the effect of rendering national criminal legislation inapplicable in cases covered by the principle of *ne bis in idem* as defined in that provision.[686] Further, lest it be forgotten, while CISA is originally a free-standing international agreement, in the EU context – and since Council Decision 1999/436/EC of 20 May 1999[687] – it constitutes derivative law with a legal basis in Article 34 EU, hierarchically on a par with framework decisions. Taken together, all the above considerations must be seen as strong indication that supremacy *in the strong sense* applies also with respect to the third pillar and legislation adopted under it.

The above reasoning is of course premised on the EU's current three-pillar structure with its pronounced inter-pillar variations. We now have the signed RT which, if ratified by the 27 Member States, would result in a virtually uniform institutional framework for all areas of EU action, including criminal justice. Importantly, attached to the RT is Declaration No. 17 concerning primacy. This declaration recalls, making express reference to *Costa v. E.N.E.L.*, that 'in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of

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[684] Lenaerts, K. and T. Corthaut (2006). "Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law." European Law Review **31**(3): 287-315., at p. 289.
[685] See Lööf, R. (2007). "54 CISA and the Principles of *ne bis in idem*." European Journal of Crime, Criminal Law and Criminal Justice **15**(3): 309-334.
[686] See above.
[687] OJ L 176, 10.7.1999, pp. 17-30.

Member States, under the conditions laid down by the said case law.'[688] The important thing to note is that this statement is made without distinction as to policy area. Logically then, the above argument would be resolved in favour of supremacy in the strong sense also covering EU criminal justice legislation. While this authoritative and in principle clarifying settlement is certainly to be welcomed, it is not entirely certain that the consequences will be entirely beneficial. There is in fact a risk that this treaty-based extension of the doctrine of supremacy to the entire spectrum of EU legislative action will result in a re-opening of the *Solange*-dispute.[689] It will be recalled that in the famous *Solange II*-decision the German *Bundesverfassungsgericht* called a truce in its judicial stand-off with the ECJ over the issue of the supremacy of EC law over the provisions of the German *Grundgesetz*. It stated that such supremacy was acceptable 'as long as' ('*solange*') EC law '*generally ensure[s] an effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution [...]*.'[690] While this decision seems to have ended the controversy in the context of *EC* law, the decision of the *Bundesverfassungsgericht* discussed above on the compatibility with German constitutional principles of certain consequences of mutual recognition combined with a removal of the requirement of dual criminality shows that renewed judicial hostilities over the meaning and extent of supremacy are not unlikely in the context of *EU* law.[691] At the very least, this decision should be seen as a warning shot across the bow of the onward steaming mutual recognition programme. Although, as was previously established, the particular fears of the German constitutional court in

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[688] This solution should in fairness be contrasted with Article I-6 of the defunct Treaty establishing a Constitution for Europe which stated expressly that '[t]he Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.' However, being a mere confirmation of the state of the law, the consignment of supremacy to Declaration No 17 in the RT should be seen as part of the removal of the 'semantic spectacle introducing the Constitutional Treaty' (Somek, A. (2007). "Postconstitutional Treaty." German Law Journal **8**(12): 1121-1131., p. 1125).

[689] For an analysis and history of the fundamentals of this dispute, see de Witte, B. (1995). "Sovereignty and European Integration: The Weight of Legal Tradition." Maastricht Journal of European and Comparative Law **2**(2): 145-173.

[690] *Re Wünche Handelsgesellschaft ("Solange II")*, judgment of 22 October 1986, [1987] 3 Common Market Law Review 225, cited in Craig, P. and G. de Búrca (2003). EU Law: text, cases and materials. Oxford, Oxford University Press., p. 292.

[691] Impalà, F. (2005). "The European Arrest Warrant in the Italian legal system: Between mutual recognition and mutual fear within the European area of Freedom, Security and Justice." Utrecht Law Review **1**(2): 56-78.

that case can be allayed with the disapplication of extraterritorial jurisdiction in cases where territorial jurisdiction can be claimed within the EU, the underlying message from Karlsruhe is clear: under current institutional arrangements German constitutional guarantees will not be sacrificed to the construction of the AFSJ. In this context, the institutional merger of the pillars effected by the RT could have the perverse side-effect of contaminating the whole of EU law with a conflict which is currently contained within the third pillar.

Having ironed out these issues we can return to the main issue of this discussion: whether Article 31(1) EU provides a sufficient legal basis for limited EU action to harmonise procedural rights for suspects and accused in criminal proceedings. In the final analysis, the Commission is probably correct that Article 31(1)(c) EU does constitute such a basis if it can be showed that such action would facilitate the practical operation of mutual recognition. This conclusion, however, imposes on the EU legislator an obligation to justify such action with reference to real difficulties actually encountered. There would have to be empirical evidence or at the very least very compelling anecdotal evidence that mutual recognition currently does not work as well as it should because of the lack of harmonisation in a particular area of protective criminal procedure.

In the particular case of the FDPR, there is little sign that the Commission actually set out to gather such evidence. While it claims that the rights chosen 'are of particular importance in the context of mutual recognition,'[692] it left this statement to justify itself as though it were self-evident. On the other hand, the Commission devoted a lot of attention to developing its conception of the FDPR as an auxiliary enforcement mechanism of the ECHR: 'The hope is that as a result of this initiative, Member States will achieve better standards of compliance with the ECHR in the areas covered by this Green Paper.'[693] The Commission offered a number of justifications for this; it referred, *inter alia*, to the difficulties involved in bringing a claim to the

[692] Explanatory Memorandum, at § 24.
[693] European Commission Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM(2003) 75 final, 19.2.2003, p. 39.

ECtHR.[694] More indicative of its methodological ambivalence, however, was the claim that the different ways Member States comply with the requirements of the ECHR is a problem in itself. According to the Commission, this leads to the problematic situation that not only do levels of safeguards differ between Member States but also (and more importantly?) to public speculation about the adequacy of other Member States' criminal justice systems. The Commission went on to point out that the ECtHR finds a significant number of violations against Member States and that the principles of the ECHR need to be more effectively incorporated in the criminal justice systems of all Member States.[695]

No trace can be found of the Commission's having actually looked for concrete examples of where lack of mutual trust has caused difficulties for the operation of the principle of mutual recognition. This is particularly strange given that a couple of instances of inter-EU judicial distrust have become notorious. An obvious example is the UK decision of *ex parte Ramda*.[696] There the English Division Court quashed a decision to extradite a suspect to France on the grounds that there were unresolved suspicions that the evidence against the suspect had been obtained through the use of torture. Another example is a judgment by the French *Cour d'appel de Pau* where similar considerations motivated a refusal to giving force to a EAW issued by a Spanish judge.[697] There are more examples of this type.[698] In addition, there is evidence that practitioners were in reality unconvinced that the choice of procedural rights in the FDPR addressed the causes of the doubts practitioners and suspects actually have in relation to the criminal justice systems of other Member States.[699]

There are several difficulties associated with this rather dismissive approach to the question of competences. As will have been clear from the discussion above, the

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[694] See, e.g., Explanatory Memorandum, at § 10.
[695] Explanatory Memorandum, at §§ 19-21.
[696] [2002] EWHC 1278 (Admin).
[697] *Irastorza Dorronsoro*, (No 238/2003), Judgment of 16 May 2003. The *Cour de cassation* was seized somewhat later with a similar case on review from a decision also from the *Cour d'appel de Pau*. The Supreme court confirmed the decision of the lower court but excised from its decision the grounds based on the suspicion of torture.
[698] See Alegre, S. and M. Leaf (2004). "Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study - the European Arrest Warrant." European Law Journal **10**(2): 200-217.
[699] Statements made by Mr. James Hamilton, Irish Director of Public Prosecutions, at the Academy of European Law conference in Edinburgh, 29 September 2005.

principle of conferral – and therefore limitation – of powers is not only important in that it delimits the competences of the EU but also in that a number of institutional consequences – not least of which the doctrine of supremacy – are attached to and justified with reference to it. As it is, the Commission was mainly criticised on two counts: for seeking to establish a principle for the delimitation of EU competence which clearly raised the spectre of "creeping competence"[700] and, for not respecting the principle of subsidiarity. The latter principle seeks to discipline the peremptory use by the EU of competences shared with the Member States by enjoining it to show that the objective of the intervention can be better achieved by the EU acting centrally than by the Member States acting individually.[701] In reference to this, the Commission stated, tautologically, that 'in this area only action at the EU level can be effective in ensuring *common* standards' and that 'standards can only be *common* if they are set by the Member States acting in concert.'[702] While it is difficult not to agree with this, one is hard-pressed to find in this use of the concept any way of limiting EU competence, which, to a great extent at least, was the idea behind it. If the idea behind the FDPR was to promote greater compliance with the ECHR in the domain of procedural rights, it would be difficult for the Commission to argue that there are any natural limits to EU competence in the domain of human rights.

It cannot be sufficient to say that common standards would be beneficial to mutual trust which, in turn, is beneficial to mutual recognition: that is only to say that criminal justice systems have more faith in what they know than in what they do not. What is clear is that under current competence restraints, the EU is not empowered to create, *ab initio*, a normative superstructure of criminal procedure to bolster the systems existing in the Member States. The selection of the five rights in the FDPR makes more sense if read as the initial step to create a self-contained and integral system of criminal procedure rather than as an instrumental tool for the realisation of mutual recognition. Such a move would have constituted flagrant institutional overreach.

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[700] See, e.g., House of Lords, European Union Committee, 'Procedural Rights in Criminal Proceedings', 1st Report of Session 2004-2005 (HL Paper 28).
[701] See Article 2 EU making reference to the definition in Article 5 EC.
[702] Explanatory Memorandum, at § 19.

To conclude this point, it can be said that there is a plausible argument for saying that the EU does have competence to harmonise aspects of protective criminal procedure, but only to remedy a proven deficiency in the mutual recognition system. This places a significant burden to provide justifications with reference to comparative research and would require close cooperation with the criminal jurisdictions of the Member States in order to identify such areas of difficulty.

From the point of view of the development of the EU system of criminal justice, such an exercise is likely to be very useful but it is conceded that it leaves the limits of EU competence somewhat vague. It is easy to agree with de Biolley when he states that to avoid endless arguments on this issue, it would be infinitely preferable to clarify this competence basis in the treaties.[703] How fortunate then that the RT provides precisely such clarification.[704] If and when the RT comes into force, Article 69 A TFEU would operate a rough distinction between procedures to coordinate the criminal justice systems of the Member States (Article 69 A(1) TFEU) and aspects of forensic criminal procedure, i.e. aspects of criminal procedure applicable in a specific trial (Article 69 A(2) TFEU). This latter division also reflects a hierarchical conception very clear in the RT of the relationship between mutual recognition and the approximation of laws. Article 69 A(2) TFEU in fact states that minimum rules shall only be approximated in the areas it enumerates '[t]o 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.'

Regarding the specific competences to coordinate the criminal justice systems of the Member States, Article 69 A(1) TFEU enumerates four areas of EU action including sub-paragraph (a): a blanket mandate to 'lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions.' Article 69 A(2) TFEU goes on to enumerate the areas where EU action may intervene, but only if necessary to give effect to mutual recognition, to approximate specific aspects of forensic criminal procedure. In the context of the present

[703] Serge de Biolley, 'L'harmonisation des procédures', in Flore, D., S. Bosly, et al. (2003). Actualités de droit pénal européen. Bruxelles, La Charte.
[704] See generally Fletcher, M., R. Lööf, et al. (2008). EU Criminal Law and Justice. Cheltenham, UK; Northampton, MA, USA, Edward Elgar. (forthcoming).

discussion, sub-paragraph (b) should be highlighted: 'the rights of individuals in criminal procedure.'

The combination of the express consecration of mutual recognition and the division between procedures to coordinate the criminal justice systems of the Member States and forensic criminal procedure gives the system under the TFEU a clarity which the present Article 31 EU lacks. The competence basis in Article 69 A(1)(a) TFEU is written as, and clearly intended to be, a catch-all basis for the implementation of the principle of mutual recognition. It is also made clear that approximation of forensic criminal procedure, including procedural safeguards, is only justifiable if the simple mutual recognition of the different laws and procedures is for some reason impossible or unacceptable. This ought to ensure maximum coordination while according maximum respect to national traditions. It should be pointed out however that given the lack of criteria by which to assess whether mutual recognition would be acceptable, the new provisions are unlikely to settle the argument as to the proper division of labour between mutual recognition and approximation of laws in criminal procedure generally.

2.4. The quest for tangible symbols of unity

Whether one considers it satisfactory or not, it is a fact that the development of the EU system of criminal justice so far has focused on the coordination of differences rather than minimising of those differences. It seems that even irrespective of arguments of principle and competence canvassed above, there is a wish for the EU to establish tangible symbols of unity in the area of criminal procedure. In the sense that this is an expression of the importance of just criminal procedures to the defence of civilised society[705], this is to be welcomed, especially from the point of view of social contract theory. This quest for tangible symbols to represent our common commitment to these principles will however often become problematic when it is to

[705] For a discussion of one of the aspects of this, see Stavros, S. (1992). "The Right to a Fair Trial in Emergency Situations." The International and Comparative Law Quarterly **41**(2): 343-365.

be translated into concrete legislative initiatives. An example of this is the proposal to create an office of European Public Prosecutor (EPP).[706]

What started out as a proposal to deal with the very specific problem of fraud against the financial interests of the EU, has become the centre of a discussion on the soul of the EU system of criminal justice. In this discussion, one of the arguments often made is that the EPP would be the embodiment of our common values in the area of criminal proceure[707], and that it would therefore be necessary in order to achieve the goals of the AFSJ.[708] The commentators engaged in this debate also point to the tasks of supervision and coordination which the EPP could take on with respect to the various bodies already set up in order to facilitate police and judicial cooperation in the EU.[709]

Some authors, however, have pointed to the problems associated with the introduction of a central EU prosecution auhtority as proposed in the *Corpus juris*.[710] This is mainly associated with the way it is proposed that the EPP should function, with one deputy EPP working in each Member State prosecuting instances of violations against the substantive provisions in the *Corpus juris* in the jurisdiction(s) of the Member State subject to the detailed rules of criminal procedure of that jurisdiction. While it is true that the *Corpus juris* does propose some harmonisation of the criminal procedure to be applied to these cases it expressly leaves everything else to be decided

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[706] For the initial proposal, see Delmas-Marty, M. (1997). Corpus juris: introducing penal provisions for the purpose of the financial interests of the European Union. Paris, Economica. For a good description and discussion, see Christine van den Wyngaert, 'Eurojust and the European Public Prosecutor in the Corpus Juris Model: Water and Fire?', in Walker, N., Ed. (2004). Europe's Area of Freedom, Security and Justice. Oxford, Oxford University Press.

[707] See, e.g., Mireille Delmas-Marty, 'Harmonisation des sanctions et valeurs communes : La recherche d'indicateurs de gravité et d'efficacité', in Delmas-Marty, M., G. Giudicelli-Delage, et al., Eds. (2003). L'harmonisation des sanctions pénales en Europe. Paris, Société de législation comparée., Walter Perron, 'Perspectives of the Harmonization of Criminal Law and Criminal Procedure in the European Union', in Husabø, E. J. and A. Strandbakken, Eds. (2005). Harmonization of Criminal Law in Europe. Supranational Criminal Law: Capita Selecta. Antwerpen - Oxford, intersentia.

[708] Henning Radtke, 'The Proposal to Establish a European Prosecutor', in Husabø, E. J. and A. Strandbakken, Eds. (2005). Harmonization of Criminal Law in Europe. Supranational Criminal Law: Capita Selecta. Antwerpen - Oxford, intersentia.

[709] See, e.g., *ibid.*, and Guild, E. and S. Carrera (2005). "No Constitutional Treaty? Implications for the Area of Freedom, Security and Justice." Centre for European Policy Studies **CEPS Working Document No. 251/October 2005**.

[710] See, *e.g.*, Christine van den Wyngaert, 'Eurojust and the European Public Prosecutor in the Corpus Juris Model: Water and Fire?', in Walker, N., Ed. (2004). Europe's Area of Freedom, Security and Justice. Oxford, Oxford University Press.

locally in the different jurisdictions. Furthermore, this non-harmonised "procedural residue" does not constitute details of no consequence. The idea behind the EPP is that a central authority applying a uniform law could better oversee complex investigations often involving several jurisdictions. The EPP would designate one of her or his deputies to bring the prosecution before the courts of one jurisdiction which she or he finds best placed to deal with it. As has very correctly been pointed out, however, this institutional arrangement entails a somewhat perverse incentive for the EPP to forum shop.[711] What is to stop the EPP, when deciding in which jurisdiction to bring the prosecution, from placing a lot of weight on the issue of which system appears the most advantageous to the prosecution from the point of view of the 'different standards in burden of proof, mode of trial, sentencing and admissibility of evidence' pertaining in the jurisdictions available to chose from?[712] There seems to be no satisfactory answer to this question unless one envisages a system of strict attribution of jurisdiction, but this would undermine the whole rationale of the *Corpus juris*.

The symbolic potential of the EPP is also somewhat lessened by its proposed substantive remit of fraud agains the EU's financial interests. Is this really the core of the EU system of criminal justice? Are not threats to the physical security of EU citizens more important than the theft of their money?[713] In the absence of specific EU criminal jurisdictions applying their own procedural rules[714], it seems that the EPP would create more procedural difficulties than it would solve.

This does not, however, provide a solution to the underlying issue of the importance of tangible symbols of unity in the area of criminal procedure. Translated into the vocabulary of social contract theory, the question is how the fundamental values of criminal procedure inherent in the EU-wide social contract and differently translated in the various jurisdictions can be universally guaranteed and, consequently, how a

[711] Alegre, S. and M. Leaf (2003). "Criminal Law and Fundamental Rights in the EU: Moving Towards Closer Co-operation." European Human Rights Law Review **3**: 326-335.
[712] *Ibid.*, at p. 331.
[713] Fijnaut, C. and M. S. Groenhuijsen (2002). "A European Public Prosecution Service: Comments on the Green Paper." European Journal of Crime, Criminal Law and Criminal Justice **10**(4): 321-336.
[714] For suggestions in this direction, see Flore, D. and S. de Biolley (2003). "Des organes juridictionnels en matière pénale pour l'Union européenne." Cahiers de droit européen **39**(5-6): 597-637.

possible violation of the social contract by the collective could be checked? As has already been emphasised, all social contracts are pacts between individuals to guarantee against violations of the most fundamental of human interests. An EU-wide social contract has to provide that same guarantee. What has to be understood though is that this is not a consequence of some perceived risk that EU citizens are now more likely to face trial in a Member State other than their Member State of origin: it is a consequence of the simple fact that in an EU-wide social contract, all criminal jurisdictions everywhere in the EU enforce the social contract on the delegated authority of all individuals party to it. Just as a determination of an individual violation of the social contract now settles the status of the individual *vis-à-vis* all individuals in the EU, so a collective violation of that same social contract places all of us in a position of normative inferiority with respect to the individual afflicted.

Here we have come full circle: as was stated in the introductory chapter, like all systems of criminal justice the EU has to consider the basis of its authority. In times when the fundamental justifications of criminal justice everywhere seem near-forgotten in the name of political expediency, it is important to remember that '*[s]alus populi suprema lex* is an insufficient reply in a Union "founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law."'[715]

In these pages it has been argued that the best way to conceptualise criminal justice is through the spectrum of social contract theory. Further, we have seen that the best way coherently to explain recent developments in EU criminal justice is to conceive of them as the setting up of an EU-wide social contract. We have argued that that in itself does not pose a threat to the liberties guaranteed by the social contract and that the EU as a single social contractual unit can support quite a variety of internal, geographically specific solutions without them posing a threat to the overall coherence of the unit. With some slight modifications, such as the abandonment of claims to extraterritorial jurisdiction when territorial jurisdiction can be claimed

[715] Steve Peers, 'Human Rights and the Third Pillar', in Alston, P., Ed. (1999). The EU and Human Rights. Oxford, Oxford University Press., at p. 186.

within the EU, the EU single social contractual unit as it has developed manifests itself in a structurally very satisfactory manner. What remains to be discussed is the way in which the EU-wide, commonly agreed fundamental principles of criminal procedure – as they result from the normative conclusions of social contract theory and translated in the EU and ECHR *acquis* – ultimately can be made to provide EU-wide, common protection to individuals across the EU from collective violations of those principles.

3. Proposal for an EU-wide mechanism for the control of the conformity of individual jurisdictions with the requirements of the EU-wide social contract

It has been said in view of its factual existence the discussion of whether a European constitutional space is possible is outdated and that our attentions need now be directed towards providing structures to protect its coherence and guarantee its efficiency.[716] The above discussion has focused on the structures necessary to protect the coherence of the European constitutional space seen as a single social contractual unit. What needs to be dealt with now is the issue of efficiency, or how this single EU social contractual unit is best to guarantee the liberties it implies from violations of the social contract perpetrated by the agents of the collective on individuals during the process of determining responsibility for an individual violation of that same social contract. For the truth is, that while the structures guaranteeing the coherence of the EU-wide social contract are premised on a common conception of fundamental values among the Member States and their citizens, this premise has been, is and is very likely to remain, fragile.[717] This could perhaps be taken as a disheartening statement but there are aspects which may set this statement if not in a positive light than at least in a constructive one.

This fragility could in fact be seen in the context of the classical liberal scepticism towards the collective in its guise as the State. While recognising the need for an organised monopoly of violence in the defence of liberty from individual violation, the classic liberal thinkers were keenly aware that this monopoly could very easily be turned from an instrument of liberty into an instrument of oppression. This is perhaps best summed-up in Thomas Paine's famous description of government as 'in its best

[716] Françoise Tulkens et Johan Callewaert, 'La Cour de justice, la Cour européenne des droits de l'homme et la protection des droits fondamentaux', in Dony, M. and E. Bribosia, Eds. (2002). L'avenir du système juridictionnel de l'Union européenne. Bruxelles, Editions de l'Université de Bruxelles., at p. 178. [« *[...]la question n'étant plus, désormais, de savoir si l'espace constitutionnel européen est juridiquement possible, puisqu'il est déjà là, en voie d'émergence, mais de trouver les moyens de le structurer afin de lui donner la cohérence qui assurera son efficacité.* »]

[717] Marie-Hélène Descamps, 'La reconnaissance mutuelle des décisions judiciaires pénales', in Flore, D., S. Bosly, et al. (2003). Actualités de droit pénal européen. Bruxelles, La Charte.

state [...] a necessary evil.'[718] If seen as the credo of the constant revolutionary sitting in his log cabin nursing his rifle, it is perhaps not very conducive to just and participative government. However, if seen as an exhortation always to remain vigilant with respect to the institutions to which we willingly confer enormous destructive power, it is a healthy attitude from which we could benefit greatly, especially in the current climate; 'eternal vigilance is the price of liberty.'[719]

It is true that within the EU, this scepticism often takes the shape of deep suspicion of "other" systems of criminal justice from the perspective of the perceived justice of one's own. This naturally translates into "secondary" suspicion of 'Brussels' which is seen as imposing elements of those "other" systems on us.[720] That is perhaps to be expected; we are all brought up in a specific cultural context which tends to take its own customs and values as the best out there. Criticisms against the EU's mutual recognition programme often seek to derive support from the fact that the ECtHR still finds violations against Member States for their criminal procedure and, of course, that this is more of a problem in some Member States than in others.[721] This, as we have seen, does not hold up as a principled criticism of the mutual recognition programme. What it does, though, is to highlight the issue that as the various systems of criminal justice are brought into close coordination, the justice of each becomes the concern of all. Building on the *acquis* of the ECHR, a very large section of commentators now backs the accession of the EU to the ECHR.[722] Some authors may

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[718] Thomas Paine, 'Common Sense', in Paine, T. (1998). Rights of Man; Common Sense; and other political writings. Oxford, Oxford University Press., at p. 5.

[719] Orton, W. A. (1945). The Liberal Tradition - A Study of The Social and Spiritual Conditions of Freedom. New Haven, Yale University Press., at p. 97.

[720] See, e.g., Spencer, J. R. and N. Padfield (2006). "L'intégration des droits européens en droit britannique." Revue de science criminelle et de droit pénal comparé **2006**(3): 537-550.

[721] See, e.g., Stephen Jakobi and Sarah de Mas, 'Achieving Balance among Liberty, Security and Justice: An Agenda for Europe', in Cullen, P. and S. Jund, Eds. (2002). Criminal Justice Co-operation in the European Union after Tampere. Europäische Rechtsakademie (ERA). Köln, Bundesanzeiger Verlagsges.mbH., Serge de Biolley, 'Un pouvoir juridictionnel européen en matière pénale ?', in Flore, D., S. Bosly, et al. (2003). Actualités de droit pénal européen. Bruxelles, La Charte., Flore, D. and S. de Biolley (2003). "Des organes juridictionnels en matière pénale pour l'Union européenne." Cahiers de droit européen **39**(5-6): 597-637.

[722] A non-exhaustive list of examples: Christine van den Wyngaert, 'Eurojust and the European Public Prosecutor in the Corpus Juris Model: Water and Fire?', in Walker, N., Ed. (2004). Europe's Area of Freedom, Security and Justice. Oxford, Oxford University Press., Sarah Ludford, 'An EU JHA Policy: What should it Comprise?', in Apap, J., Ed. (2004). Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement. Cheltenham, UK; Northhampton, MA, USA, Edward Elgar., Alegre, S. and M. Leaf (2003). "Criminal Law and Fundamental Rights in the EU: Moving Towards Closer Co-operation." European Human Rights Law Review **3**: 326-335., Benoît-Rohmer, F. (2000).

take issue with the conclusions reached by the ECJ[723] when this prospect was seriously contemplated[724] but it seems pretty much accepted that a formal treaty basis would now be required to contemplate such a move. This issue has now been resolved in the RT which not only provides an express legal basis for the EU's accession to the ECHR but positively mandates such an accession.[725]

Beyond the formal obstacle of the legal basis and, post entry into force of the RT, the procedure of the EU's accession to the ECHR and the ultimate jurisdiction of the ECtHR there are other issues which ought to give pause and prevent us from accepting the position that this course of action is the panacea of human rights protection in the EU. The first would be the fact that the ECHR was set up to defend human rights in a strict intra-state context. The difficulties thrown up in the context of the construction of the EU system of criminal justice are, on the contrary, located in the consequences of the coordination of such systems. It is not obvious that the ECtHR is best situated to deal with these difficulties, especially since they, it is submitted, are not even human rights issues susceptible to be resolved with reference to an instrument such as the ECHR. It must be remembered that all state action in the Member States of the EU is already subject to human rights review under the ECHR. That being the case, it is not obvious what the accession of the EU to the ECHR would achieve in the field of criminal justice. It is clear that EU action as such would be subject to human rights review but the EU has virtually no competence to act directly in the area of forensic criminal procedure.[726] Rather, there is a risk of institutional confusion in that it could be argued that any issue which has an EU

"L'adhésion de l'Union à la Convention européenne des droits de l'homme." Revue Universelle des Droits de l'Homme **12**(1-2): 57-61., Guild, E. and S. Carrera (2005). "No Constitutional Treaty? Implications for the Area of Freedom, Security and Justice." Centre for European Policy Studies **CEPS Working Document No. 251/October 2005**., Olivier De Schutter, 'L'adhésion de l'Union européenne à la convention européenne des droits de l'homme comme élément du débat sur l'avenir de l'Union' and Michel Waelbroeck, 'Conclusions', both in Dony, M. and E. Bribosia, Eds. (2002). L'avenir du système juridictionnel de l'Union européenne. Bruxelles, Editions de l'Université de Bruxelles.

[723] Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, E.C.R. [1996] I-1759, opinion of 28 March 1996.

[724] See, e.g., J. H. H. Weiler and Sybilla C. Fries, 'A Human Rights Policy for the European Community and Union: The Questions of Competences', in Alston, P., Ed. (1999). The EU and Human Rights. Oxford, Oxford University Press.

[725] New Article 6(2) EU provides that '[t]he Union shall accede to the [ECHR].' However, this is unlikely to be as simple as that given that Article 188 N(8) TFEU specifies that Council shall adopt the act of accession unanimously.

[726] As distinguished from procedures to coordinate systems of criminal justice. See above.

aspect, in order adequately to identify the party – Member State or EU – responsible, must first be sent to Luxemburg for authoritative clarification before it can come before the judges in Strasbourg for final determination on the compatibility with the ECHR. This would only lengthen the already daunting delays before an issue under the ECHR can be authoritatively resolved by the ECtHR. At present, the Member States know that they will be held liable for all their actions even if the normative source of their action is EU legislation.[727] This knowledge, in combination with their obligations under Article 6 EU and the fact that the ECJ, as we have seen, provides human rights review of EU legislation with reference, notably, to the ECHR, should ensure that Member States do not put themselves in difficulties through bad EU legislation. How they implement the EU instruments in their national legal orders is and will remain their difficulty alone, one which EU accession to the ECHR could not resolve.

The other issue complicating the prospects for EU accession to the ECHR which deserves mentioning is the fact that the Council of Europe (CoE) system suffers from a grave deficiency from the point of view of enforcement. The ECtHR has built up considerable moral authority and its rulings are generally taken into consideration. However, relative to the EU system, which does have "teeth", the CoE appears decidedly weak. That being the case, why introduce a formal separation between human rights control of the EU and the sanctioning system provided by the EU? The realisation that tying a finding of a violation of the common principles of criminal procedure to the general EU legal order would provide a much stronger defence of these principles is probably part of the explanation for why some authors engage in discussions on fairly complex modifications of the EU legal order to include a completely autonomous system of criminal justice.[728] The problem with these proposals of course is that they are politically extremely sensitive and that they would possibly create more problems than they resolve.

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[727] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* ("*Bosphorus*"), judgment (Grand Chamber) of 30 June 2005 (application no. 45036/98).

[728] See, e.g., Monica den Boer, 'The European Convention and its Implications for Justice and Home Affairs Cooperation', in Apap, J., Ed. (2004). Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement. Cheltenham, UK; Northhampton, MA, USA, Edward Elgar., and Flore, D. and S. de Biolley (2003). "Des organes juridictionnels en matière pénale pour l'Union européenne." Cahiers de droit européen **39**(5-6): 597-637.

From the perspective of social contract theory however, the main argument for giving the EU its own system of institutional protection of fundamental principles of criminal justice is the difference between rights protection in public international law (such as the ECHR system) and such protection internal to the social contractual unit. For when a complaint is made to the ECHR, the argument is that the state party has failed to live up to its obligations contracted as a legal person under international law with other such legal persons. A system of internal protection would, on the contrary, recognise that the argument is that the obligations of each as members of society have been violated with respect to another member of society. The argument is not that the ECHR system is unnecessary or redundant. Merely that it belongs to a different order and should always be seen as a suppletive remedy, as the ECHR itself recognises in its Article 35(1) on the exhaustion of domestic remedies.

Therefore, what the EU needs is a system of institutional protection of the fundamental principles of criminal procedure which recognises its identity as a single social contractual unit and also draws its strength from the EU system as a whole. At the same time, it should respect the existing diversity between Member States. A further consideration ought to be the need to minimise the institutional upheavals necessary to achieve the desired result in order to make the change politically realistic.

3.1. Normative and institutional preliminaries

In the institutional debate on the third pillar, the perceived lack of 'input legitimacy' occupies a very prominent position. It is often said that the democratic deficit is particularly severe in these matters since the Council only has to consult the European Parliament before legislating on matters where popular input is seen as particularly crucial.[729]

[729] See, e.g., Weyembergh, A. (2005). "Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme." Common Market Law Review **42**(6): 1567-1597., and Labayle, H. (2005).

That may very well be. Nevertheless, it is submitted that when it comes to the protection of the values of the EU-wide social contract, the role of democratic institutions are not a very important concern. As was made clear in previous Titles, the principles of social contract theory are to be seen as the irreducible framework for the legitimate exercise of coercive action in society. It was stated there that these principles were akin to natural law in that they are a precondition to legitimate legislation which has to comply with them irrespective of the wishes of the majority. In the particular context of the EU the consequence is that the coherence and justice of the EU-wide social contract is completely independent of the institutional balance applicable to legislative action in the third pillar. The common legal foundation of which Labayle speaks[730] is thus nothing the European Parliament is in a position to establish. This common legal foundation exists as a matter of irreducible application of the principles of social contract theory to the EU legal order.

This of course begs the question of how to discover these principles and render them legally enforceable. In fact, it is argued that this is less problematic than might at first appear to be the case. The obvious starting point is the potential inherent in Article 6 EU to constitute a source for these fundamental principles[731], especially since 'Article 6(2) EU is the only *written* source of third-pillar human rights rules.'[732] With the undisputed judicial enforceability of Article 6 EU it is clear that a violation of its provisions puts the violating party in violation of the EU Treaty itself.[733] The ECJ has shown its willingness to extract abstract principles from Article 6 EU and turn them into effective criteria for the review of actions of both EU- and Member State institutions under its jurisdiction: '[T]he Court of Justice has progressively drawn from the legal traditions common to the Member States a body of general principles

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"L'espace de liberté, sécurité et justice dans la Constitution pour l'Europe." Revue Trimestrielle de Droit Européen **41**(2): 437-472.. See also von Hirsch, A. (2007). "Alternative Draft for European Criminal Proceedings." Criminal Law Forum **18**: 195-226., at p. 213.

[730] Labayle, H. (2005). "L'espace de liberté, sécurité et justice dans la Constitution pour l'Europe." Revue Trimestrielle de Droit Européen **41**(2): 437-472., at p. 451. ['*socle juridique partagé*']

[731] Lenaerts, K. and E. De Smijter (2001). "A "Bill of Rights" For the European Union." Common Market Law Review **38**: 273-300.

[732] Steve Peers, 'Human Rights and the Third Pillar', in Alston, P., Ed. (1999). The EU and Human Rights. Oxford, Oxford University Press., at p. 171.

[733] *Ibid*.

of law with which it ensures compliance in order to strengthen the accountability of the Union and the Member States to the citizens.'[734] Very significantly, in *Advocaten voor de Wereld*[735], ruling on the legality of the EAW, the ECJ declared that in the context of criminal justice '*those principles include the principle of the legality of criminal offences and penalties and the principle of equality and non-discrimination.*'[736] Some weeks later, the ECJ had occasion to establish that '*right to a fair trial, which derives inter alia from Article 6 of the ECHR, constitutes a fundamental right which the European Union respects as a general principle under Article 6(2) EU.*'[737] By way of clarification, the Court noted that this right '*consists of various elements, which include, inter alia, the rights of the defence, the principle of equality of arms, the right of access to the courts, and the right of access to a lawyer both in civil and criminal proceedings.*'[738] It seems clear that the fundamental principles of criminal justice already benefit from the status of fundamental principle of EU law under Article 6(2) EU. The two paragraphs of Article 6 EU are properly to be seen as complementary degrees of precision of the same principles rather than as separate sources of those principles. The values enshrined in Article 6(1) EU are, in this conception, the philosophical basis of all positive legal translations of those values, including the sources enumerated in Article 6(2) EU.[739]

Turning Article 6, paragraphs (1) and (2), EU into an effective normative source of criminal procedure in the EU is also important in that it represents the only post-accession legal reminder of the "moral" requirements of accession. Article 49 EU states that '[a]ny European State which respects the principles set out in Article 6(1) may apply to become a member of the Union'[740] but it remains the case that standard post-accession verification of conformity with pre-accession requirements, especially

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[734] Lenaerts, K. (2004). ""In the Union We Trust": Trust-Enhancing Principles of Community Law." Common Market Law Review **41**: 317-343., at p. 342.
[735] Case C-303/05, above.
[736] *Ibid.*, at § 46.
[737] Case C-305/05 *Ordre des barreaux francophone et germanophone e a v Conseil des ministres*, judgment of 26 June 2007, at § 29.
[738] *Ibid.*, at § 31.
[739] This is made even clearer in the RT which divides the present Article 6 EU into two, placing the philosophical values presently enshrined in Article 6(1) EU in new Article 1a EU whereas the positive translation of those values presently enshrined in Article 6(2) EU stay in new Article 6 EU.
[740] The RT amends Article 49 EU to the effect that any such European State would also have to be 'committed to promoting' such values.

in relation to criminal procedure, is virtually non-existent.[741] Using Article 6 EU to emphasise that inclusion within the EU constitutes a continuing commitment to the values expressed therein not only reconnects with the "moral" requirements of accession[742] but also has the added advantage of retroactively imposing those "moral" requirements of accession on the earlier Member States which were not subject to the same formal standards.[743] Surely this is the best way retrospectively to create the level playing-field for all Member States irrespectively of their different accession dates which, arguably, is necessary in order to promote the inter-Member State solidarity which the EU project requires.[744]

From a positivist perspective, it may seem controversial to rely on the ECJ's judicial creativity in order to render tangible the principles from which is derived the ultimate legitimacy of measures sanctioning the exercise of collective coercion. However, in addition to the arguments made in previous chapters on the pre-legislative character of these principles, it will be said that the protection of civil liberties requires judicial control over executive action as a matter of absolute necessity[745], and that this institutional safeguard has been an essential part of European culture since World War II.[746] The need for the ECJ to become part of this system of checks and balances is a simple consequence of the current realities of the EU-wide social contract which, as

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[741] It is referred to 'standard […] verification' because the later accession agreements, in particular those between the EU and the latest entrants, Bulgaria and Romania, do contain special provisions which subject these two Member States to post-accession political verification of their pre-accession obligations.

[742] Malcolm Anderson, 'Conclusions: The Way Forward for Criminal Justice Co-operation', in Cullen, P. and S. Jund, Eds. (2002). Criminal Justice Co-operation in the European Union after Tampere. Europäische Rechtsakademie (ERA). Köln, Bundesanzeiger Verlagsges.mbH.

[743] See Bruno de Witte and Gabriel N Toggenburg, 'Human Rights and Membership of the European Union', in Peers, S. and A. Ward, Eds. (2004). The European Union Charter of Fundamental Rights. Oxford and Portland, Oregon, Hart Publishing.

[744] See Cremona, M. (2005). "EU Enlargement: Solidarity and Conditionality." European Law Review **30**(1): 3-22.. See also Delhey, J. (2007). "Do Enlargements Make the European Union Less Cohesive? An Analysis of Trust between EU Nationalities." Journal of Common Market Studies **45**(2): 253-279.

[745] See, e.g., Jimeno-Bulnes, M. (2003). "European Judicial Cooperation in Criminal Matters." European Law Journal **9**(5): 614-630., Marc Verwilghen, 'Introduction' and Henri Labayle, 'Les nouveaux domaines d'intervention de la Cour de justice : l'espace de liberté, de sécurité et de justice', both in Dony, M. and E. Bribosia, Eds. (2002). L'avenir du système juridictionnel de l'Union européenne. Bruxelles, Editions de l'Université de Bruxelles., and Chalmers, D. (2005). "The Court of Justice and the Third Pillar." European Law Review **30**(6): 773-774. (although Chalmers is sceptical of the ECJ's current 'activism').

[746] Guild, E. and S. Carrera (2005). "No Constitutional Treaty? Implications for the Area of Freedom, Security and Justice." Centre for European Policy Studies **CEPS Working Document No. 251/October 2005**.

has been pointed out above, makes us all responsible for the legitimacy of coercive action taken by the collective anywhere in the EU. The legitimacy of the confidence required between all of us needs to be bolstered by the possibility of ultimate appeal to a common judicial body.[747]

This emphasis on a *common* judicial body is ever more important to ensure the coherence and logic of the mutual recognition system and to resist calls to 'nationalise' the verification of the compatibility with the principles of Article 6 EU of the various criminal justice systems of the Member States. The seeming absence of such a control has in fact lead to calls to interpret the reference to Article 6 EU in the preambles of mutual recognition instruments in such a way as to provide an implicit mandate to national courts to refuse recognition of instruments issued in other Member States on human rights grounds.[748] These same authors are aware that this would be contrary to the very idea and logic of mutual recognition in the EU. As they argue, however, 'the absence of judicial oversight constitutes a problem with respect to the safeguarding of fundamental rights, and the existence of such an oversight is in contradiction with the European judicial area.'[749] This apparent paradox is resolved with the introduction of the possibility of judicial oversight of compliance with fundamental rights by a common judicial body applying principles commonly agreed as the political precondition for the EU as such.

As will have become clear from the above discussion, there is no need for any great institutional reform to provide the EU with the institutional instruments necessary to ensure an effective check on the compatibility with fundamental principles of the social contract of the systems of criminal justice of the Member States. Article 6 EU and the general principles of EU law which flow from it are not merely a sufficient normative starting point, but one particularly apt to the meet the demands we have set for a normative basis for a control of Member State criminal justice systems in the EU: sufficient articulation to provide a real and practical safeguard for the individual

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[747] Flore, D. and S. de Biolley (2003). "Des organes juridictionnels en matière pénale pour l'Union européenne." Cahiers de droit européen **39**(5-6): 597-637.
[748] *Ibid*.
[749] *Ibid*., at p. 607. [« *l'absence de contrôle pose problème pour la protection des droits fondamentaux, et l'existence d'un tel contrôle est contradictoire avec l'espace judiciaire européen.* »]

citizen but also sufficient flexibility to prevent rulings on fundamental principles from destroying the individual characteristics of the criminal justice systems in the various Member States. This balance should be struck by maintaining the present limitation on the applicability of Article 6 EU to the application of EU law. The details of this will be discussed below. As for the identity of the body which ought to be called to perform this task of controlling the fundamental compatibility with Article 6 EU of Member State criminal justice systems, there can be little doubt that the ECJ is the best alternative. As we have seen, it sometimes suggested to put in place a new jurisdiction dedicated solely to EU criminal law and justice. Although perhaps pleasing from the point of view of institutional aesthetics, the added value of such a novel jurisdiction is doubtful. More importantly, however, the ECJ is already an established and respected supreme court of the EU. Any new supranational jurisdiction would have to earn the respect and trust of national judges and governments before it would have a realistic chance of imposing its judgments on them. The ECJ has already earned this institutional respect and clout. It is of course an open question whether it would be administratively helpful to create a new chamber dedicated to these issues within the ECJ but this is a question of the internal organisation of the Court which is best left to the ECJ itself.

The respect in which the ECJ is held by the institutions of the Member States and, in particular, the courts of the Member States has been crucial for the effective and more or less uniform application of EU law and consequently the construction of the EU as such. The institutional cornerstone of this development is the concept of supremacy of EU law, first established in *Costa v. E.N.E.L.*.[750] However, as was hinted at above, EU law's claim to supremacy is by no means unique in supranational law: '[a]ll agreements under public international law claim to reign supreme over national law as a result of the *pacta sunt servanda* principle.'[751] Two things make the EU claim stand out. First, supremacy has taken on the strong meaning of implying the automatic disapplication of contrary national law. Second, and crucially, 'this command, on the

[750] Lenaerts, K. and T. Corthaut (2006). "Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law." European Law Review **31**(3): 287-315.
[751] Liisberg, J. B. (2001). "Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?" Common Market Law Review **38**: 1171-1199., at p. 1195.

whole, corresponds to the reality on the ground.'[752] Without the effective operation "on the ground" of the rule of conflict that provisions of national law which contravene provisions of EU law have to give way, there could have been no common legal order and no EU. It is precisely the formalised cooperation instituted between the ECJ and the courts of the Member States which is responsible for this unique development. Consequently, the instrument responsible for the development of this relationship, the preliminary reference procedure, is the subject of virtually unanimous praise.[753] Given that the EU system is built around the enforcement of EU law by the courts in the Member States, the supremacy of EU law would have been nothing more than a theory had there not been a functioning relationship between the ECJ and these same courts. The ECJ would not have been able to impose its mandates on the courts in the Member States had it not built up a relationship of mutual trust and respect with these courts over the years. In this context, it has been argued that the steps the ECJ has already taken, through the preliminary reference procedure, to introduce human rights protection into EU law by way of the 'general principles of EU law' constituted a move made in order to protect the supremacy of EU law.[754] In fact, it was feared that if the ECJ did not introduce some human rights protection into the then EC law, national courts would cease to offer the cooperation and enforcement necessary for the practical implementation of the supremacy of EU law leaving the EU system itself unenforceable. In both theory and practice, it seems fairly clear that the nexus linking the good working relationship between the courts of the Member States and the ECJ with supremacy incontrovertibly passes through the protection of individual rights by the ECJ.[755] We saw in an earlier chapter how the ambiguous stance taken by the Commission and some Member States to the issue of conferred competences in the context of the third pillar constituted an ill-understood but nonetheless real threat to the supremacy of EU law. We also saw then that the ultimate justification for supremacy is the strict respect of the principle of conferred

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[752] *Ibid*.
[753] Jean-Victor Louis, 'La Cour de justice après Nice', in Dony, M. and E. Bribosia, Eds. (2002). L'avenir du système juridictionnel de l'Union européenne. Bruxelles, Editions de l'Université de Bruxelles.
[754] Bruno De Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights', in Alston, P., Ed. (1999). The EU and Human Rights. Oxford, Oxford University Press.
[755] Young, A. L. (2005). "The Charter, Constitution and Human Rights: Is this the Beginning or End of Human Rights Protection by Community Law?" European Public Law **11**(2): 219-240.

powers. Now that we understand the interdependence of supremacy, a good cooperation between courts in the Member States and the ECJ and the protection of individual rights by the ECJ, we can better appreciate the potentially devastating consequences of undermining supremacy through a careless approach to the principle of conferred powers: the weakening of supremacy undermines the need for the continuous and intense cooperation between the courts of the Member States and the ECJ. The consequent weakening the position of the ECJ in the European legal order in turn leads to less need for the ECJ to enforce EU-wide standards of individual rights.

These considerations are strong arguments in favour of giving the ECJ a central role in the protection of both the systemic coherence of the EU system of criminal justice and the individual interests involved. Or, put differently, the two cannot be separated. If supremacy is to be defended in the context of EU criminal justice, the cooperation between the courts of the Member States and the ECJ is vital. That cooperation, as we have seen, is predicated on a strong defence of individual rights by the ECJ. It needs to be pointed out, though, that the above described mechanism will be seen in a completely different light by those who oppose the perfecting of EU criminal justice. The greater involvement of the ECJ in the protection of individual rights in criminal proceedings will entail a reinforcement of the judicial supervision of national executive action in the context of national criminal proceedings. Naturally this will not be welcome news to those governments which already feel that their crime fighting activities are unduly hampered by assertive judiciaries. In this respect, it can be said that the oft regretted politicisation of general control of EU criminal justice policy[756] reflects a general tendency of our times for executives to want to bypass the judiciary in the quest for greater crime fighting effectiveness. Consequently, the problem would be not so much the strengthening of the ECJ itself, but rather the principle of judicial protection of individual rights in criminal proceedings. The merits of such arguments have been dealt with extensively in previous Titles and will not be rehearsed again. Suffice to say that a social contractual unit requires ultimate

[756] See, e.g., Henri Labayle, 'Les nouveaux domaines d'intervention de la Cour de justice : l'espace de liberté, de sécurité et de justice', in Dony, M. and E. Bribosia, Eds. (2002). L'avenir du système juridictionnel de l'Union européenne. Bruxelles, Editions de l'Université de Bruxelles.

judicial protection of individual interests in the context of criminal proceedings. For the EU viewed as a single social contractual unit, it makes both practical and theoretical sense to build on the existing institutional mechanisms which ensure both systemic coherence and the protection of individual rights: the ECJ and the preliminary reference procedure.

3.2. The trilateral preliminary reference procedure

While it is probably true that the currently fairly weak scheme of preliminary references in the third pillar is no longer adapted to its increasing level of integration[757], here the argument is not primarily the reform of Article 35 EU. This is because the traditional preliminary reference procedure deals with a different problem from the one which concerns us here. The problem we are wrestling with in this chapter is not primarily the correct application of EU derivative legislation important though that is. Here we assume that the instruments implementing the principle of mutual recognition have been transposed correctly into the laws of the various Member States. Rather, the problem with which we are concerned is the safeguarding of the common minimum level of protection of individual rights in criminal proceedings in an EU-wide social contractual unit. Our starting point is the fact that fears for the levels of such protection in other Member States may lead Member State judiciaries not to apply the EU instruments thereby threatening the systemic coherence of the EU as a single social contractual unit. The standard of judgment remains EU treaty law – Article 6(1) and (2) EU – but the perspective of the reference is dramatically different. The traditional preliminary reference scheme, which was imperfectly transferred to the third pillar, was primarily aimed at ensuring the correct implementation and interpretation of EU law in the national law of the Member State making the reference, or the compatibility of derivative EU law with higher EU law. In the context of mutual recognition and standards of protection of individual rights the problem is different: the fear that the laws of another Member State are not

[757] Serge de Biolley, 'Un pouvoir juridictionnel européen en matière pénale ?', in Flore, D., S. Bosly, et al. (2003). Actualités de droit pénal européen. Bruxelles, La Charte.

compatible with EU law and that therefore an instance of mutual recognition ought not to be accorded.[758]

This type of situation is not covered by the preliminary reference procedure as it currently exists. Granted, it would be possible for a court in one Member State faced with, e.g., a EAW to make a preliminary reference to the ECJ asking whether it can be refused on human rights grounds. The problem is that this question would completely bypass the core of the problem, i.e. the provisions of the criminal law of the issuing Member State which the judiciary of the executing Member State finds offend against accepted standards of individual rights. So even if, which is highly unlikely, the ECJ would rule that the EAW did allow for an implicit ground of refusal due to individual rights concerns, we are still nowhere nearer the answer to whether the particular provisions in question are in fact in violation of agreed standards of individual rights.

As it happens, there is a procedure for sanctioning violations of the fundamental values of the EU as laid down in Article 6 EU. Article 7 EU in fact provides two procedures for this purpose. Article 7(1) EU mandates a unanimous Council, acting on the reasoned proposal by a third of its members, the EP or the Commission, and after having heard the Member State in question and possibly independent advise, to 'determine that there is a clear risk of a serious breach by a Member State of principles mentioned in Article 6(1), and address appropriate recommendations to that State.' Article 7(2) then mandates a unanimous *European* Council, acting on the proposal by a third of its members or the Commission and after obtaining the assent of the EP and having granted a hearing to the Member State in question, 'may determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1).' After such a finding, Article 7(3) enables the Council to adopt, by qualified majority, sanctions in the form of suspension of rights under the Treaty in respect of the violating Member State.

[758] The importance of 'scrutiny of the equivalence of national regulations' in the context of mutual recognition is emphasised in Héritier, A. (2007). "Mutual recognition: comparing policy areas." Journal of European Public Policy **14**(5): 800-813.

The above described procedure has never been used, nor is it likely ever to be used. The ill-conceived and ultimately rather embarrassing political boycott of Austria after the 1999 elections which saw the far right *Freiheitliche Partei Österreichs* invited to help form a coalition government, were not the result of an application of Article 7 EU but a political agreement among the leaders of the other fourteen Member States.[759] Although this crisis led to the redrafting of Article 7 EU so that in future a similar situation could be dealt with using the Article 7 EU procedure[760], the political fallout from this crisis has probably had the effect of making it even less likely that Article 7 EU would be put to use even if it were objectively justified. It is a political process through and through and even though, fortunately, the vote of the Member State in question is not counted for the purposes of unanimity[761], the political price of the procedure is likely to be such that it would take some truly ghastly developments in a Member State for any of the necessary institutional actors to be willing to take the political risks associated with the Article 7 EU procedure.

The most glaring absence from either of the Article 7 EU procedures is that there is no judicial intervention at any stage. The violations the procedure is set up to sanction are *per* definition legal in that whether they be the result of independent executive action or due to illegitimate legislation, the reference by which they have to be judged is a legal text – Article 6(1) EU – binding upon the Member States. We are used to members of our national executives '[w]ithout shame or remorse'[762] transforming into the EU legislature, but Article 7(1) and (2) EU are the only places where the legislature composed of executives also discharges the duties of the judiciary. The situation is not confidence-inspiring. At the same time, this procedure was negotiated

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[759] For a description of this 'unique and astonishing episode lasting 222 days in the history of the European Union', see Bruno de Witte and Gabriel N Toggenburg, 'Human Rights and Membership of the European Union', in Peers, S. and A. Ward, Eds. (2004). The European Union Charter of Fundamental Rights. Oxford and Portland, Oregon, Hart Publishing., in particular pp. 73-78.

[760] The Nice Treaty added paragraph (1) to Article 7 EU which allows for the determination 'that there is a *clear risk* of a serious breach by a Member State of principles mentioned in Article 6(1)' (my emphasis). The sanction mechanism in Article 7(2) EU can still only be set in motion following a determination of 'the *existence* of a serious and persistent breach by a Member State of principles mentioned in Article 6(1)' (my emphasis). See *ibid.*

[761] Article 7(5) EU.

[762] Paul de Hert, 'Division of Competencies between National and European Levels with regard to Justice and Home Affairs', in Apap, J., Ed. (2004). Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement. Cheltenham, UK; Northhampton, MA, USA, Edward Elgar., at p. 89.

and instituted at a time when the AFSJ was embryonic at best. A decade or so later, the development of this EU policy area has led to the massive changes outlined in this Title and the last. Given that all systems of criminal justice of the Member States are now co-responsible for the protection of all individuals making up the EU-wide social contract, they are by the same token co-responsible for the integrity of that same EU-wide social contract. They need to be given a means whereby they can discharge this latter duty without threatening the systemic coherence of the AFSJ.

To recapitulate, the system we are looking for is one which complies with the following criteria: From a substantive perspective it has to provide for normative standards sufficiently articulated to provide a real safeguard for the individuals concerned, but at the same time sufficiently general so as not to put undue harmonising pressure on the various systems of criminal justice of the Member States. From a procedural perspective there are three requirements: It has a) to safeguard the systemic integrity of the AFSJ as an EU-wide social contract, b) to place the ECJ as the final arbiter of EU legality of the criminal justice systems of the Member States, and c) to involve the criminal justice systems of the Member States in their capacity as the *de facto* guardians of the EU-wide social contract. Finally, the system needs to provide for sanctions forceful enough so that violating Member States are forced to remedy any failings brought to light.

Looking at these several criteria, we can see that several already established institutions of EU law comply with various groups of the criteria. Article 6(1) EU in combination with the 'general principles of EU law' complies with the criteria set up for the substantive side of the system. Article 7(3) EU provides a strong instrument for sanctioning Member States in violation of their fundamental obligations. Finally, the preliminary reference procedure constitutes a template for the procedural side of our prospective system. The question is how best to combine them to construct a system sufficiently accessible to provide a real safeguard to individuals, yet sufficiently daunting not to be abused so that it can inspire confidence in the various systems of criminal justice.

It is submitted that the starting point for this search should be the controversy over the implied human rights grounds for non-execution of a EAW discussed in the previous chapter. As we have seen, despite the absence of legal grounds in the framework decision itself or in applicable international principles of human rights justifying such grounds for non-execution, many academics argue that such grounds need nevertheless to be read into the instrument and many Member States have included such provisions in their implementing legislation.[763] Available figures released by the Commission also show that the rates of refusal based on such "unorthodox" grounds are far from negligible.[764] Whether by legislative design or old reflexes, it is clear that courts in the Member States have concerns about each other's criminal justice systems, concerns which translate into glitches in the operation of the mutual recognition regime and thereby constitute a threat to the integrity of the EU-wide social contract. If our venture is to be successful, those concerns need to be harnessed and turned into a feature that strengthens rather than weakens the AFSJ.

The system proposed comprises two changes. The first is making it possible for all courts in the Member States, when they are contemplating to refuse execution of a decision under an EU instrument implementing mutual recognition on grounds not expressly provided for in that instrument and related to the criminal justice system of the issuing Member State, to suspend execution in order to formulate a preliminary reference to the ECJ detailing the doubtful provisions of the legislation of the issuing Member State and asking the ECJ to rule on whether those provisions comply with the obligations of Member States of the EU under Article 6(1) EU. The ECJ would then deal with this reference in the same way as it currently deals with preliminary references based on Article 234 EC or Article 35 EU.

Especially if there is an individual incustody, these references would be prime candidates for treatment under the new urgent preliminary reference procedure. One concern with the preliminary reference procedure in the AFSJ has been that, whether

[763] See European Commission Report on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2007) 407 final, 11.7.2007.
[764] See the breakdown of the replies to the questionnaire on the practical operation of the EAW during 2006, Council document 11371/2/07 REV 2, of 27 July 2007.

in the context of immigration/asylum or criminal justice, the time usually required for the Court to rule on a preliminary reference (at present ca. 18 months) could be time added to the time an individual is deprived of her or his liberty.[765] To address this problem, it was decided that the ECJ's rules of procedure should be amended. Consequently, as of 1 March 2008 there is a new 'urgent preliminary ruling procedure' (UPP). The enabling provision is Council Decision 2008/79/EC of 20 December 2007, with an attached statement[766], and the Court amended Article 9 and added an Article 104b in its rules of procedure on 15 January 2008.[767] Article 104b(1) now specifies that a preliminary reference on an aspect of the AFSJ (i.e. Title IV, part three, EC and Title VI EU) 'may, at the request of the national court or tribunal or, exceptionally, of the Court's own motion' be dealt with under this expedited procedure which, according to the Council statement attached to the enabling Council decision, 'should be concluded within three months.' In the same Statement '[t]he Council calls upon the Court to apply the urgent preliminary ruling procedure in situations involving deprivation of liberty.'

Article 104b of the rules of procedure specify that the referring court or tribunal must indicate in its request for the application of an UPP 'the matters of fact and law which establish the urgency and justify the application of' the UPP as well as, 'insofar as possible […] the answer it proposes to the questions referred.' Although the UPP will typically be applied when deprivation of liberty is at stake, there is reason to believe that the 'urgency'-criterion can be deemed fulfilled in other circumstances, for example if a national court is faced with a great number of cases all turning on the question referred to the ECJ. Whether requested by the referring court or tribunal, or at the request of the President of the Court, the decision to apply the UPP is taken by a Chamber designated to deal with such procedures 'acting on a report of the Judge-Rapporteur and after hearing the Advocate-General.' The celerity of the proceedings is ensured by a strict control of the subject-matter of the written observations as well as their length and 'in cases of extreme urgency' the Chamber may even 'decide to

[765] See Editorial (2007). "Preliminary rulings and the area of freedom, security and justice." Common Market Law Review **44**: 1-7.
[766] OJ L 24, 29.1.2008, pp. 42-44.
[767] OJ L 24, 29.1.2008, pp. 39-41.

omit the written part of the procedure.' In any case, however, '[t]he designated chamber shall rule after hearing the Advocate General.'

If and when the RT enters into force, an amendment to the generalised preliminary reference procedure would make the ECJ treaty-bound to 'act with the minimum of delay' if a preliminary reference 'is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody [...].'[768]

The second change relates to the effects of the ECJ's judgment. If the ECJ finds that the provision in question does not violate the obligations of the Member States under Article 6(1) EU, the referring court will be ordered to execute the decision from the issuing court. If, on the other hand, the ECJ finds that the provision or provisions in question do constitute a violation of Article 6(1) EU it would make two separate orders. One order would be addressed to the referring court not merely relieving it of the obligation but positively forbidding it from executing the decision involving the application of the offending provisions. However, the issuing Member State would not be completely excluded from the mutual recognition regime, but solely to the extent that any given proceedings involve the provision or provisions concerned in the ECJ's judgment. The second order would be addressed to the Commission and Council enjoining them to make use of their powers under Article 7(3) EU, as amended, to inflict such sanctions as are required in order to force the offending Member State to bring its legislation in line with the requirements of Article 6(1) EU.

Two amendments to the EU Treaty would be required in order to give effect to this proposal. First, a sub-paragraph should be added to Article 35(1) EU conferring jurisdiction on the ECJ to give preliminary rulings in the circumstances described above. This new sub-paragraph could read as follows:

> The Court of Justice of the European Communities shall also have jurisdiction, subject to the conditions laid down in this Article, to give preliminary rulings on the conformity with Article 6(1) of this Treaty of provisions of the laws of

[768] Article 234 TFEU. This essentially amounts to entrenching and giving increased weight to the new but already existing UPP described above.

> Member States where the effective application of these provisions requires the execution of a decision by another Member State in application of a legal act established under this Title.

The above amendment would ensure that this special preliminary reference procedure could only be initiated when the criminal law of one Member State cannot be effectively implemented in a specific case but for the application by another Member State of an EU legislative measure. The typical example would be a criminal investigation or trial where the Member State responsible has issued a EAW for the surrender of the suspect. In future, the same could apply with respect to the execution of a European Evidence Warrant. It is important to point out that this ensures that the scope of Article 6(1) EU will not be extended beyond the application of EU law. This amendment would merely ensure that the application of an EU legislative act does not result in a violation of the principles enshrined in Article 6(1) EU.

Article 7 EU would also have to be amended. In this case, a new sub-paragraph would need to be added between the existing first and second sub-paragraphs of Article 7(3) EU. This new sub-paragraph could read as follows:

> Where the ECJ, exercising its jurisdiction under Article 35(1), second sub-paragraph, of this Treaty, has found a violation of Article 6(1) of this Treaty, the Council shall, acting by a qualified majority on a proposal by the Commission, decide to suspend certain of the rights deriving from the application of this Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The above scheme has a number of advantages, above and beyond fulfilling the criteria set out above. From an institutional perspective, on the one hand it fits in with the variable geometry of the competence of the ECJ in the third pillar. On the other hand, it confers a certain symmetry to this variable geometry. With the present system, a Member State may shield its national legislation from being scrutinised by

the ECJ at the initiative of its own courts while enjoying all the benefits of the mutual recognition regime. Were the amendments proposed here to be adopted, this would continue to be true. However, a Member State could no longer benefit from the mutual recognition regime without its laws being subject to scrutiny for conformity with Article 6(1) EU at the initiative of courts in other Member States. At the same time, an adverse finding by the ECJ would have no immediate legal effects for the legal system found to be in violation of its Article 6(1) EU obligations. It would only mean that mutual recognition is suspended for the purposes of decisions in view of the application of the violating legislation. In purely internal matters, the provisions would remain valid – albeit very suspect – and it would be a political question for the Member State whether and how to amend its legislation. This latter decision would of course be very much influenced by the sanctions which the Council adopts on the proposal by the Commission, but that is precisely the point.

If and when the RT is adopted, the whole system of judicial overview, including the preliminary rulings procedure, will be generalised to cover all areas of EU law, thus including matters of criminal justice. These advances are however somewhat reduced by the provisions of Article 10 of the Protocol on Transitional Provisions. This article essentially says that with respect to legislative acts adopted under Title VI EU, the above changes to the system of judicial enforcement mechanism are suspended – the old Article 35 EU system persisting – until five years after the entry into force of the TFEU. Article 10(2) specifies that any measure adopted under Title VI EU but amended under the TFEU will immediately after the amendment be subject to the new scheme. Barring any amendments this means that, for instance, it will be until late 2014 at the earliest before courts in those countries who have not made the declaration under Article 35(2) EU accepting the jurisdiction of the ECJ can make preliminary references.[769] All legislation adopted under the TFEU is immediately subject to the new scheme of judicial enforcement.

[769] With respect to the UK only, Article 10, paragraphs (4) and (5) of the Protocol on Transitional Provisions creates yet another special solution prompted by the UK government's intransigent line at the negotiations of the RT. As has been outlined, the TFEU's general scheme of judicial enforcement will only apply to measures adopted under Title VI EU five years after the entry into force of the TFEU, unless they have been amended after the entry into force of the TFEU. Article 10(4) specifies that up until six months prior to the expiry of this transitional period, the UK may notify to the Council that it does not accept the extension of the ECJ's powers. If it does make such a notification, as from

While these changes are naturally a major step forward, they do not solve the problem we are dealing with here. The amendments proposed would still be necessary, although the first amendment proposed would now have to be inserted in Article 234 TFEU, the words 'Article 6(1) of this Treaty' would have to be replaced by 'Article 1a of the Treaty on European Union' and the last two words by 'this Treaty.' In the second amendment proposed, the words 'under Article 35(1), second sub-paragraph, of this Treaty' would have to be replaced by 'under Article 234, second sub-paragraph, of the Treaty on the Functioning of the European Union', and 'Article 6(1)' by 'Article 1a.'

If we now go back to the criteria we set out above, we have already dealt with the issue of the sufficiency of Article 6(1) EU and the 'general principles of EU law' as normative standards constituting a real safeguard for individuals. The other aspect required of the procedure was that it not put undue harmonising pressure on the various systems of criminal justice of the Member States. In this respect, it should be enough to point out that Article 6(1) EU and the 'general principles of EU law' would serve as the standard below which no civilised system could fall in accordance with the principles established in Title one. Rulings by the ECJ would be negative in character, merely establishing, or not, a violation of Article 6(1) EU leaving it up to the political organs of the EU, in accordance with Article 7(4) EU, to work out whether the reforms proposed by the Member State in question satisfy them that the violation has been neutralised.

Moving on to the procedural criteria, the proposed system first has to safeguard the systemic integrity of the AFSJ as an EU-wide social contract. This is really the fundamental issue which runs through the entirety of our discussions: how procedurally to coordinate jurisdictionally distinct systems of criminal justice within a single social contractual unit. In this regard, I am of the firm opinion that the

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the date of expiry of the transitional period all such measures shall cease to apply to the UK. Article 10(5) specifies that at any time following the eventual disapplication to the UK of the pre-TFEU measures, the UK may notify the Council 'of its wish to participate in acts which have ceased to apply to it.' In such case, Article 4 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice shall apply. This must be read as meaning that from this position, the UK can pick and choose which measures it wishes to participate in.

discussions up to this point justify the approach proposed here. The principles of the social contract are negative by nature, in terms of the set-up of our systems of criminal justice, they tell us what we cannot do but do not stipulate what we must do. The consequence is that while it is entirely correct that in a single social contractual unit there should be common principles according to which individual pieces of legislation are scrutinised and, if necessary, struck down, it is not necessary that there be common, positive principles on how to construct a system of criminal justice in compliance with the principles of the social contract. This is the balance struck by the proposed scheme: individual pieces of legislation will be subjected to negative scrutiny with reference to the common principles of the EU-wide social contract without any non-political judgment being made on the positive solutions adopted in any given system. In this way the system would respect the fact that while any particular issue of potential violation of the fundamental principles of the social contract is a legal issue, the construction of a particular system respecting those principles is a political one.

Arguably the most important feature of the proposed scheme is the potential tripartite interplay between the judiciaries of the Member States and between these judiciaries and the ECJ. The lack of such a system to remove the current tensions inherent in the mutual recognition regime has already been identified:

> 'The creation of a European area of criminal justice does require the existence of a supreme jurisdiction to provide a supervision under which the national judicial authorities could cooperate fully and execute the decisions of their opposite numbers in the other Member States as if they were part of their own legal order.'[770]

This scheme would reinforce the role of the courts of the Member States as the guardians of EU legality while ultimate responsibility for any eventual condemnations would lie with the ECJ. This would, it is submitted, provide the much needed

[770] Serge de Biolley, 'Un pouvoir juridictionnel européen en matière pénale ?', in Flore, D., S. Bosly, et al. (2003). Actualités de droit pénal européen. Bruxelles, La Charte., at pp. 208-209. [« *La création d'un espace européen de justice pénale nécessite, en effet, l'existence d'une juridiction supérieure, assurant un contrôle qui permet aux autorités judiciaires nationales de collaborer pleinement entre elles et d'exécuter les décisions de leurs homologues des autres Etats membres comme si elles faisaient partie de leur ordre juridique national.* »]

increase in judicial control as the EU becomes an increasingly important actor in the field of criminal law and, consequently, in the field of civil liberties.[771] At the same time, it would continue to build on the success story that is the preliminary reference mechanism to strengthen the EU legal order.[772]

The proposed scheme does risk provoking concerns about the potential abuse by individual judges of the possibility to impugn the criminal justice systems of other Member States. The possibility does exist that the ECJ, in an initial phase, is asked to rule on clearly unmeritorious references from over-zealous or even prejudiced judges. However, this risk would be much diminished as the ECJ sets the parameters for the review with its first rulings. The strongest argument in favour of giving national courts an important role in the setting of the standards of the fundamental values of the EU-wide social contract comes from the application of the sociological notion of 'dual hermeneutics' to the AFSJ by sociologist Wanda Capeller:

> '[S]cientific theories, even the concepts derived from a field of knowledge, cannot be isolated from the realm of the meanings and actions of those who constitute the objects of the theories. It can thus be said that the legal actors, themselves objects of the social sciences, are the theorists of the social.'[773]

Applied to our present endeavours, what this seems to imply is that given that the theory of ultimate EU legality stands to be applied by national judiciaries, theorising about it should not be divorced from its meaning to them or how it applies in their practical work. Conversely, conferring on national judiciaries an express responsibility to help define the theory of EU legality as it will apply also to them would in all likelihood induce national judiciaries to take this responsibility very seriously indeed. Thus the proposed scheme incorporates an element of auto-

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[771] See, e.g., Henri Labayle, 'Les nouveaux domaines d'intervention de la Cour de justice : l'espace de liberté, de sécurité et de justice', in Dony, M. and E. Bribosia, Eds. (2002). L'avenir du système juridictionnel de l'Union européenne. Bruxelles, Editions de l'Université de Bruxelles.

[772] Editorial (2007). "Preliminary rulings and the area of freedom, security and justice." Common Market Law Review **44**: 1-7.

[773] Wanda Capeller, 'Un regard sociologique', in Delmas-Marty, M., G. Giudicelli-Delage, et al., Eds. (2003). L'harmonisation des sanctions pénales en Europe. Paris, Société de législation comparée., at p. 491. [« *[L]es théories scientifiques, voire les notions issues d'un champ de connaissance, ne peuvent être isolées de l'univers des significations et des actions de ceux qui en sont l'objet. On peut dire alors que les acteurs juridiques, eux mêmes objets des sciences sociales, sont des théoriciens du social* »]

disciplining which not only will reduce to a minimum the potential for vexatious references, but which, in addition, is likely to raise the level of awareness in the minds of judges of their ultimate responsibility to all individuals caught up in the repressive machinery of criminal justice in the EU.

Finally, there is the requirement that the system include a sanctioning mechanism sufficient to induce the Member State whose legislation has been found in violation of Article 6(1) EU to adopt the necessary modifications. Although I have here opted to model my proposal on the existing sanctioning mechanisms of Article 7(3) EU, attention should be drawn to a further amendment which would make the scheme even more effective. This would be the insertion of the phrase 'or the Treaty establishing the European Community' into the proposed new sub-paragraph in Article 7(3) EU, after the words 'from the application of this Treaty.' An amendment to the then third sub-paragraph of Article 7(3) EU would also be necessary, substituting 'the Treaties' for 'this Treaty.' This further amendment would emphasise the unity of the EU legal order by linking the social and economic benefits of the EC to the respect of the fundamental values of the EU.[774] It is with this amendment that the comparative advantage of an internalised human rights control mechanism over a simple accession to the ECHR manifests itself most clearly. Violation of the fundamental values of the EU would then entail potentially massive economic sanctions, incomparable to anything the CoE could inflict. At the same time, it needs to be pointed out that these two alternatives are in no way mutually incompatible; as is the case in most national systems, a strong internal human rights control harmoniously coexists with the possibility of making ultimate appeal to Strasbourg.

[774] With the entry into force of the RT, this suggested further amendment would be superfluous.

Conclusion

The starting premise of this work is the simple observation that 'EC and EU criminal law exists and [...] is growing steadily.'[775] The academic and institutional texts and materials reviewed in the Introductory chapter show that this development has been explained and justified using a number of arguments, for presentational purposes categorised as consequential and reactive. These arguments provide a fairly complete picture of the reasoning behind this development from a historical and explanatory perspective. However, from a legal and analytical perspective they are unsatisfactory in that, few, if any, of them seem actually tenable. When deconstructing the various elements of these arguments, we could see that their empirical premises were unverified or indeed unverifiable. In addition, from a more theoretical perspective, the arguments were often based on unjustified assumptions which, when spelled out, proved to be far from uncontroversial. Consequent upon this analytical confusion, from a legal perspective these justifications fail to provide a guide to the interpretation of existing law or indeed to the future development of criminal law in the EU. These fundamental insufficiencies result in the conclusion that the conventional approach to this policy area – i.e. seeing the criminal law as another instrument to perfect the EU – is mistaken. Arguing that the criminal law is the foundation of our society, the aim of this work is then specified as setting the EU in the context of the criminal law rather than the other way around.

This task requires defining, on a very basic level, what the criminal law is. With this objective, Title I reviews the main theories which have influenced modern criminal law in Europe and finds that the most coherent justification for and explanation of criminal justice is social contract theory. Having attempted to resolve some of the internal controversies of social contract theory, Title I adopts a version which, it is hoped, is both internally coherent as well as consistent with the classical tradition

[775] Heike Jung, 'Due Process versus Crime Control – The European Dimension', in Cullen, P. and S. Jund, Eds. (2002). Criminal Justice Co-operation in the European Union after Tampere. Europäische Rechtsakademie (ERA). Köln, Bundesanzeiger Verlagsges.mbH.

from which it is derived. Importantly, it is made clear that this version of social contract theory does not (if any version ever did) seek to argue that society in fact is the result of an actual, historical social contract. Rather, given that the objective is to establish principles for the criminal law, the version of social contract theory adopted is to be seen as a methodological devise for evaluating the legitimacy of instances of collective coercion.

The starting point for this choice is a justification for taking the individual, rather than society, as the normative axiom for any model attempting to establish principles for the legitimate exercise of collective coercion (by society) against individuals. Consequently, such exercise of *freedom* (i.e. pre-societal licence) that could logically be enjoyed by all individuals at any given time is established as socially protected *liberty* to which it is therefore legitimate to attach a *right* of collective protective intervention. The result is that collective coercion can only ever be employed in defence of liberty but also, significantly, that it must be employed in the defence of liberty. The social contract is thus interpreted as a multilateral bond between all individuals in society. When an individual violates the social contract she or he places her- or himself back in a "state of nature." This state is not to be defined as some formless, pre-social chaos, but rather as a situation in which members of the collective have no social contractual obligations *vis-à-vis* the individual. The criminal conviction is therefore to be seen as a *declaration of exclusion* from society which renders any form of punishment – which, prior to the conviction, would have constituted a violation of the social contract – at all possible.

For the purposes of the present work we saw that there is one consequence of social contract theory which needs to be placed in sharper focus than is perhaps customary in the context of that theory. That is the fact that the application of the normative principles derived from social contract theory and summarised above – principles which tend to be the focus of discussions – are only applicable to the extent there is and only within a specific *social contractual unit*. If criminal justice in the EU is to be viewed through the spectrum of social contract theory, the ontological question of whether the EU can be considered a social contractual unit has to be answered before the normative principles of social contract theory can be applied to it.

Title II is dedicated to answering this prior, ontological question. It uses two of the most emblematic institutions of EU criminal law to illustrate the two sides of the "social contractual coin." First, the EAW and its application are used to illustrate how violations of the social contract in one Member State have become the responsibility of the EU as a whole. From the point of view of the victims of crime, this implies that their grievances are recognised throughout the EU, irrespective of the movements of the suspect or of her or his nationality. In this context, the fact that we have at least 27 different systems of criminal justice in the EU has to be recognised. If the argument that the EU is to be seen as a single social contractual unit is to hold water, it has to be shown whether, and if so how, the fragmented enforcement of a unitary social contract is possible. This leads to a discussion of the implications of a consistent application of the principle of mutual recognition. Countering the large literature critical of this approach on human rights grounds, it is argued that these criticisms are reducible either to a severe form of cultural relativism and/or an equally severe form of national particularism. If the argument is made that the system of criminal justice in one Member State is such that another Member State would violate human rights in helping to enforce it, the EU perspective taking all EU citizens as equal in rights would force us to conclude that that system of criminal justice is illegitimate under any circumstances. If that were the case, EU membership would have been entirely inappropriate in the first place.

The second side of the "social contractual coin" is illustrated with reference to the principle of *ne bis in idem* contained in Article 54 CISA and the ECJ's case law applying it. These are reinterpreted in light of the concern to ensure that the status of an in individual *vis-à-vis* the social contractual unit be uniform across that unit. This is perhaps the fundamental criterion by which we can judge whether systems administering criminal justice are to be seen as distinct social contractual units or, rather, as one single. If, in fact, it is in principle admissible that a person, with reference to a given course of action, can be considered guilty in one system but innocent in the other – i.e. considered as being in a state of nature and member of society respectively –, we are faced with an instance of *horizontal-structural inconsistency*. This is incompatible with a view of the two systems as constituting a

single social contractual unit. Following a review of the solutions provided by the case law of the ECJ on this issue, it is concluded that, with very few exceptions, the EU legal order does not suffer horizontal-structural inconsistency. Indeed, the argument is made that the prevention of horizontal-structural inconsistency implicitly the main concern of the supreme EU court in relation to Article 54 CISA. The conclusion with respect to the application of the principle of *ne bis in idem* as it is embodied in Article 54 CISA is that it is consistent with a conception of the EU as a single social contractual unit.

The conclusion from this structural analysis of the current legislative reality in the EU is that the existing framework of EU criminal justice provides ample evidence for considering there to be an *EU-wide social contractual unit*. The consequence is, first, that we are all collectively responsible for preventing and, more commonly, reacting to individual violations of the social contract wherever in the EU these may occur. Second, and perhaps more importantly, we are all collectively responsible for the legitimacy of the application of collective coercion against individuals wherever *it* may occur.

In Title III, an attempt is made to derive normative consequences from the conception of the EU as a single social contractual unit. In a 'diversion' on substantive criminal law, it is concluded that a relatively high degree of diversity in terms of both substantive law and principles of punishment are compatible with a conception of the EU as a single social contractual unit. However, it was also established that this is conditional upon the minimisation or even complete removal of extraterritorial jurisdiction in situations where territorial jurisdiction can be claimed within the EU. The insecurity in the social contractual position of individuals introduced by the possibility that their conduct is judged with reference to a different substantive law than the one under the protection of which she or he currently falls is in fact the main threat to the coherence and integrity of the EU-wide social contract.

A large part of Title III is dedicated to the discussion of the need for harmonisation in the field of protective criminal procedure, i.e. procedural rights. This is where the debate on the necessary levels of harmonisation and the existence of mutual trust as

preconditions for a system of mutual recognition in the EU with respect to criminal justice is canvassed. In this regard it is shown that the EU in and of itself is premised on a significant degree of convergence of the principles underlying criminal justice in the various Member States. Relevant to this is of course the principles of the ECHR. Although formally extra-EU, these principles have effectively been incorporated into the EU legal order and are enforced by the ECJ. Consistent violation of the ECHR by a Member State of the EU would in all likelihood be more serious from the point of view of its intra-EU relations than anything the CoE could exact. The conclusion is that from the perspective of the EU-wide social contract, harmonisation of protective criminal procedure is not necessary.

Nevertheless, despite this conclusion it is worth exploring to what extent the EU is currently competent to harmonise protective criminal procedure. In this regard, the Commission's attempt to effect a limited degree of such harmonisation and the debate this proposal (the FDPR) triggered are used as a point of departure. Here a concrete consequence of the analytical confusion described in the Introductory chapter is manifest. The justifications for the FDPR go from unsubstantiated empirical claims to dubious theoretical arguments on the nature of legislative competence in the third pillar. The conclusion is that while it is conceivable that a degree of EU harmonisation of protective criminal procedure is possible under the current institutional framework, the Commission failed to justify it in relation to the FDPR. It should be pointed out however, that things would change significantly when and if the RT enters into force.

Having showed that there is little need for harmonisation does however not exhaust the matter of the implications of the conception of the EU as a single social contractual unit. Harmonisation is essentially the setting of a more or less rigid common standard with which all individual systems of criminal justice have to comply. As we have seen, in relation to criminal justice there is a strong presumption that there is sufficient convergence already so that more detailed harmonisation, although it would in some respects be useful, is not required as a matter of social contract theory. Like any presumption, however, this one can be rebutted. It is probably the case that most systems of criminal justice in the various Member States

incorporate aspects which would fail to pass muster with reference to the commonly agreed fundamental principles of the EU. Such aspects can of course ultimately be brought before the ECtHR in Strasbourg but for a number of reasons, it is concluded that this option is unsatisfactory. Notably, the nature of the control exercised by Strasbourg is of a public international law character in that it defines the relationship between a state as a legal person and an external standard. The social contract, on the other hand, requires the collective to be responsible to and for the principles underpinning its own foundation. This type of control recognises the interpersonal nature of the social contract and emphasises the responsibilities of all individuals to each other within the social contractual unit.

Title III concludes that this type of control is insufficient in the EU. Nevertheless, although individually inadequate, elements of the procedures in Article 7 EU for persistent infringements of the fundamental principles of Article 6 EU, and the preliminary reference procedure in Articles 234 EC and 35 EU provide elements for the construction of a procedure to provide the requisite control on the EU level. In addition to the requirement that there be a uniform, internal mechanism for verifying the legitimacy of local applications of collective coercion with the common principles of the EU, there are a number of *desiderata* which can be satisfied by recycling aspects of Article 7 EU and the preliminary reference procedure. The first of these is that diversity between Member States should be respected as far as is compatible with the common, fundamental principles. Another is that the institutional upheavals necessary to realise this new institution should be minimised so as to make its adoption politically realistic.

The procedure proposed is one where a national court, when contemplating the refusal to execute an instrument of mutual recognition because of concerns about the justice of the system of another Member State, formulates a preliminary reference to the ECJ asking whether the relevant provision(s) of the other Member State's law and/or practice are conform to the principles of Article 6 EU. A finding that the provision(s) in question are not would have two consequences. First, the execution of instruments of mutual recognition with a view to the application of any of the offending provisions is positively prohibited. Second, the Council would be obliged, on a

proposal from the Commission, to impose Article 7 EU sanctions on the Member State in question to force it to bring the relevant provisions in line with the principles of Article 6 EU. Suggestions for the necessary amendments to the Treaty texts are provided.

It is hoped that the above proposal will not be seen as a mere thought-experiment or as a political intervention in favour of increased supranationalism. Rather, the intention is that it be seen as the normative consequence of the theoretical position adopted and defended in Title I as applied to the extant degree of development of the EU's AFSJ in Title II.

Faced with developments of potentially historical dimensions we are want to make historical comparisons. The EU generally very much invites this sort of exercise and possibly the temptation is even greater when the EU enters the hitherto sacred heartland of national sovereignty that is the criminal law. Such arguments are always difficult. While recognising that it is 'tempting [...] to compare the meandering process of European integration with the emergence of nation-states', Jung nevertheless feels that 'the differences outweigh the similarities.'[776] Suggestions have also been made that the most proper historical parallel is with pre-nation-state projects of legal unification such as the Holy Roman Empire or indeed the tradition of Latinist scholasticism.[777] Leaving the search for historical parallels to the historians, the lawyer is nevertheless faced with something entirely new when trying to make sense of criminal justice in the EU today. The development of the AFSJ is difficult to categorise combining as it does aspects of traditional EC supranationalism with a novel form of intergovernmentalism. Whichever comparisons we choose to make or however we finally decide to categorise it, it is clear that the EU's AFSJ has thrown up novel legal problems to which novel legal solutions will have to be found. Perhaps in homage to the debate of the legal nature of the EC, Paul de Hert has referred to the institutional situation of the AFSJ as a '*sui generis* system of supranational

[776] Heike Jung, 'Due Process versus Crime Control – The European Dimension', in Cullen, P. and S. Jund, Eds. (2002). Criminal Justice Co-operation in the European Union after Tampere. Europäische Rechtsakademie (ERA). Köln, Bundesanzeiger Verlagsges.mbH, at p. 63.
[777] Bernardi, A. (2004). L'europeizzazione del diritto e della scienza penale. Torino, G. Giappichelli Editore., especially at pp. 66-72.

intergovernmentalism.'[778] A no doubt well-found formula, it unfortunately gives very little guidance on where to go next.

Finally, the present work has attempted to show that although novel situations may require novel solutions, those very solutions can be inspired by time-tested principles. I firmly believe that the centuries old theories upon which Western European societies have been constructed not only remain the best justifications for criminal justice, but also that they can provide the answers to the ultra-modern challenges faced by the organisation of criminal justice as a result of the rapid development of the EU's AFSJ. In more ways than one the very foundations of our systems of criminal justice are being redefined: substantively, procedurally and structurally. From a structural perspective – as the present work has tried to show – we present-day observers are fortunate in that the process of the merging of the old, nation state-based social contracts into an EU-wide one is probably as close to the mythical "signing" of the social contract as any of us now living are ever going to get. However, although this structural – and to some extent procedural – aspect has been the theme of the present work, principles to guide the development of the criminal law in all its aspects can, and in my opinion should, be derived from the social contractual matrix argued for in these pages.

Lest the provision of criminal justice in the EU become a hapless victim of contingent calamities, public fear and short-sighted populism[779], lawyers need to reconnect with the theoretical foundations of criminal justice in order to make the case that some issues of public interest are too important to be left to the elected representatives of the public. Montesquieu's statement that our liberty as citizens depends first and foremost on the rectitude of the criminal law is as true today as ever it was; the only way we can defend the rectitude of the criminal law is to rediscover why it is that he was right.

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[778] Paul de Hert, 'Division of Competencies between National and European Levels with regard to Justice and Home Affairs', in Apap, J., Ed. (2004). Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement. Cheltenham, UK; Northhampton, MA, USA, Edward Elgar., at p. 82.

[779] See, e.g., Spencer, J. R. (1999). "English Criminal Procedure and the Human Rights Act 1998." Israel Law Review(3): 664-677.

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