

## Editorial: European Efforts to Harmonize Legislation Against Economic Crime

Harmonization of criminal law is not in itself a new topic. We are familiar with various techniques of legal integration from the times of the genesis of the nation state. However, the social, economic and legal conditions have changed dramatically since then. Over the last decade we have ceased talking about harmonizing rules in the traditional core of criminal law (murder, theft etc.). Since the East–West rift was overcome, the globalization of the economy has reached a new qualitative stage: the movement of capital, of goods and services and, at least in some regions of the world, also of persons has been largely liberalized. Companies, more than ever, have the choice where to produce, from where to organize themselves and where to pay taxes. Technical innovations, especially in telecommunications, have drastically increased the pace of international transactions. And these achievements are used by legally and illegally operating persons alike. The concentration, mobility and organizational restructuring along with the globalization process in the legal economy is mirrored in the world of criminally operating entities, be they ‘criminal organizations’, ‘crime-entrepreneurs’ or merely established corporations occasionally overstepping the limits.

Since crime control is a traditional domain of the nation state, cross-border crime and increasingly the intensive use of legal sanctuaries and offshore financial havens demonstrate the ineffectiveness of the national justice systems, even if they are prepared to grant each other mutual legal assistance.

Nikos Passas in his contribution goes a step further when he holds that insisting on national sovereignty under the conditions of legal and other asymmetries actually has criminogenic effects. Together with other authors in this issue of the *European Journal of Law Reform* he indicates, however, that if globalization causes problems, it also offers the key to new solutions: Call them ‘global control’ or ‘global governance’.

The authors of this volume clearly distance themselves from simple unilateral extensions of jurisdiction to make good for the loss of territorial control. Some are more outspoken than others: Mireille Delmas-Marty and Stefano Manacorda make

reference to recent US legislation enforcing unilaterally declared trade sanctions against Cuba ('Helms-Burton Legislation'). Apart from the selective use (Passas) of such measures, leading to the reproach of hypocrisy (Rider), it is made clear that hegemony is a very insecure basis for an international accord (Pieth). It becomes evident that the major challenge in harmonizing preventive and repressive strategies against transnational economic crime lies in developing mutually acceptable forms of agreement. This issue will be followed up by several authors, especially when discussing the means of harmonization in detail (Sieber on model legislation, Pieth on soft law in general). Delmas-Marty and Manacorda point out that Europe, the Europe of the *Council of Europe* and especially the *European Union* (the EU), could be seen as a kind of 'observation laboratory of legal integration'.

For the empirical criminologist Petrus van Duynne the search for a rational approach to transnational economic crime starts with sound research. Using Plato's cave parable he lashes out against the simplifying rhetoric used by politicians and some international organizations. He offers concrete behavioural hypotheses for the economically most damaging group of long-term fraudsters and suggests ways to ameliorate the data basis and to reach a better understanding of fraudulent behaviour. His suggestions take into account the current reluctance of European countries to share their data, and yet he offers a vision of a 'European memory' as a basis for strategic decisions.

This issue of the *European Journal of Law Reform* contains two types of detailed analysis of how to harmonize criminal law in Europe: First, it follows up on concrete projects, one in the context of the Council of Europe, the other in the EU. Secondly, it focuses on two topical approaches to specific areas, first on the issue of money laundering and then on the process of agreement of standards on organized crime and corruption.

Ulrich Sieber publishes the English version of his 'Memorandum on a European Model Penal Code'. This text is part of a most significant attempt of the Council of Europe to reopen the discussion on developing model criminal legislation for Europe. In his broad approach he discusses the historical steps to harmonization as well as the need for it and the means available. Sieber opts for a concentration on those areas of substantive and procedural law that are crucial to establishing international control, especially where a purely national approach would be insufficient. In light of the traditional role of the Council of Europe preference is given to 'soft law'.

However, the Council's initiative is only one project giving meaning to the concept of internationalized control in a European context. The text of Mireille Delmas-Marty and Stefano Manacorda discusses a second and quite different example. Both authors have contributed decisively to the *corpus juris* a project at the same time restricted in scope but far more ambitious in reach. It would seem logical to the outsider that the EU in its current move towards supranationality should have the means to defend its own financial interests. However, since criminal law remains a nearly exclusive competence of Member States, sanctioning has to be either non-penal or indirect through Member States. So far, results have not been very

convincing. Therefore, a group of academics has broken the taboo and attempted the impossible: to develop a unified core code on EU fraud and related crimes as well as basic procedural principles (including the centralization of law enforcement in the first stages of procedure). Delmas-Marty and Manacorda use this project, which has been met with an astonishing interest both amongst politicians and academics, to explain their vision of an *espace européen judiciaire*. Their contribution is in French, just to mark that the *European Journal of Law Reform* will occasionally publish contributions in other, major European languages, besides English.

Barry Rider, in the first of the two topical approaches to harmonization, focuses on money laundering and starts by exposing the hypocrisy of what he calls the 'crusade against money laundering'. After offering a new interpretation of the phenomena he makes clear that the impact of criminal legislation against money laundering has been marginal: 'the war is still being lost.' In an original analysis of civil law decisions he then follows up cases where bankers or financial intermediaries have been held civilly liable for their part in frauds, conspiracies etc. and examines the extension of this jurisprudence to cases of money laundering. He fears, however, that civil law applied 'almost in desperation by judges' could 'impose too great a burden or rather risk' on the profession, whereas criminal law, as designed today, is inefficient. His suggestion, to introduce some of the concepts developed in civil law, and already implemented in the new rules of confiscation, like the obligation to explain and justify property, into criminal law, however, is likely to be controversial.

The last contribution by Mark Pieth, recounts the history of the making of international law in two specific areas: on criminalizing the participation in criminal organizations on the one and on transnational corruption on the other hand. He uses these examples to demonstrate the lack of discourse between academics and international organizations. The current critique of academics is all the more radical, it raises the issues of unlimited expansionism of criminal law, the loss of fundamental guiding concepts like legality and culpability and, as a third line of critique, the hegemonial tendencies disregarding democratic rights.

The discussion of these fundamental objections brings us back to the starting point. What are the conditions of acceptable international agreement in control issues and is there such a thing as 'democracy beyond borders'?<sup>1</sup>

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<sup>1</sup> Anthony McGrew, 'Democracy Beyond Borders?' in *The Transformation of Democracy?* (London 1997).