# Memorandum on a European Model Penal Code

Ulrich Sieber*

## A. Introduction

In 1971, the Council of Europe discussed the possibility of a European Model Penal Code. Based on a memorandum by Prof. CH.J. Enschedé of the University of Amsterdam, the outcome of this discussion was negative, a harmonization of criminal laws was not seen as a 'special virtue'.[1]

However, 22 years later, the topic of a European Model Penal Code was once more on the agenda of the Committee on Legal Affairs and Human Rights of the Council of Europe.[2] In its letter of 26 March 1996, the Council of Europe asked the author to assist the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly 'in the preparation of a report on a European Model Penal Code'. The letter made reference and deliberately appealed to the initiative that was turned down 25 years before.

With respect to this history, the first part of the present article will analyse the sociological changes that have occurred since a European Model Penal Code was last

---

* Prof. Dr. Ulrich Sieber, Head of the Chair for Criminal Law, Criminal Procedural Law, Information Law and Legal Informatics, Director of the Centre for European Legal Studies, University of Wuerzburg, Domerschulstraße 16, D–97070 Wuerzburg, Phone: +49–931–312304, Fax: +49–931–312797, e-mail: sieber.office@jura.uni-wuerzburg.de, www.jura.uni-wuerzburg.de/lst/sieber. The following article is based on the 'Memorandum for the Council of Europe on a European Model Penal Code' which the author prepared for the Parliamentary Assembly of the Council of Europe in 1996. The Memorandum analyses the future European policy in criminal matters and advocates the creation of a European Model Penal Code designed to improve legislation in criminal matters while leaving room for the flexibility needed, as different European legal regimes converge.

1 *See* the quotation of Louis B. Schwartz at the beginning of the memorandum of Enschedé, 'Model Penal Code for Europe', Council of Europe AS/Jur, at pp. 22, 45 of 23 March 1971: 'There is no special virtue in having uniformed penal laws'. *See also* Enschedé, ibid. at pp. 14 (3.5.3), 18 (4.3.3) and 21 (4.5.1).

2 *See* the proposal in Council of Europe Parliamentary Assembly, Motion for a Recommendation on a European Model Penal Code, Doc 6851 of 28 May 1993, ADOC6851–1403–25/5/93–4–E, No. 14 subs. iii: 'The Assembly recommends that the Committee of Ministers further instruct the CDPC to draft a European Model Penal Code and a European Model Code of Criminal Procedure.'

*European Journal of Law Reform*, Vol. 1, No. 4

considered in 1971 and will then examine how far these changes have already influenced European criminal law and European criminal policy. In view of the envisaged European Model Code, the second part of this article will outline the future contours of the European criminal law system with special regard to the desirability of unification, harmonization or co-operation. On the basis of this sociological, legal and policy oriented analysis, the third part will discuss how far model penal legislation can contribute to the aim of further legal integration in Europe, and what benefits, problems and costs are involved in a European Model Penal Code. This part will also include concrete recommendations for future action.[3]

# B. The Facts: Fundamental Changes in European Criminal Law Policy

## *I. Changes in Society and Crime: New Challenges to Criminal Law Policy*

At the end of the 20th century, European criminal law policy faces *three fundamental challenges*: (1) the development of the post-industrial *information society* results in the ever-increasing importance of information processing and information transmission technologies, as well as information itself; (2) the development of the *risk society* creates greater risks in all areas of life, for example risks caused by breakdowns of nuclear power stations or chemical plants; and (3) the development of the *global society* involves people, capital and information being far more mobile and leads to a reduction in the importance of national borders in general and, in particular, within the European Union (the EU). These sociological changes do not exist in isolation as independent phenomena, but they are often closely interwoven. Their interaction has widespread effects in almost all areas of life. It is evident that these developments have had and continue to have considerable impact on crime and criminal law policy.[4]

*With respect to crime*, the implications of these developments can best be illustrated in the field of computer crime. The post-industrial information society is based on the value of information, a commodity itself. Governments, companies and individuals now depend on computer systems with databases, networks and telecommunication lines that allow the rapid transfer of information from virtually

---

[3] Readers who are mainly interested in the practical results of the present changes and perspectives for a future European Model Penal Code (and not in the underlying aims) might start with Part B.I and then turn directly to Part D or the final summary.

[4] For details *see* Sieber, in *Informationsgesellschaft und innere Sicherheit* (Bundesministerium des Innern (ed.)) (1996) pp. 37 et seq.; Sieber, in (1995) *Computer und Recht* (*CR*) 100, at pp. 110 et seq.

any place in the world to any other virtual place. International data communications networks are the lifeline of contemporary society and especially modern economies. Attacks on these lifelines or attempts to manipulate, destroy, or unlawfully obtain access to data can therefore have a huge impact not only on the original victims themselves, but on a large number of people against whom the crime was not directed and who traditionally would have never been affected. For example, the 'theft' of know-how from a company via hacking endangers jobs; a 'small' manipulation of data in a military computer system or in the computer system of a nuclear power plant or a stock exchange can affect millions of people beyond the actual victim of the crime.

The changes brought about by the information society not only contribute to the dangers involved in the risk society, but are also one of the main driving forces in the resulting global society. The ubiquity of information in modern communication systems makes it irrelevant where the perpetrators and victims of crimes are located geographically. There is no need for the perpetrator or the victim of a crime to move or to meet in person. Unlawful actions such as computer manipulations in one country can have direct, immediate effects on the computer systems of another country, thus leading to damage, including damage to life or property, or to the dissemination of unlawful material in international computer networks.[5]

This globalization of the effects of a crime can be observed not only in computer misuse but also in respect of many other offences, such as crimes against the environment. Just as radioactive fallout from Chernobyl did not stop at borders, neither will the water of a river deliberately polluted by toxic waste. It is clear that the global effects of crime are often less drastic when the criminal actions require the physical movement of persons or goods, such as the shipping of toxic waste, or the transportation of a hired killer.[6] However, in a global society that cherishes values such as free trade and the free movement of persons, goods, and capital, traditional crimes will necessarily become more international.

While international perpetrators are becoming more mobile, *prosecution authorities* are still limited to their national jurisdictions. The result is a conflict that raises fundamental questions about the future role of the nation state.[7] Traditionally, one of the main justifications for the existence of the national democratic state was that it guaranteed the individual freedoms of its citizens. As the state alone had a monopoly on force, it was meant to protect, and be capable of

---

[5] *See* Sieber, *The International Handbook on Computer Crime* (1986) pp. 114 et seq.; Sieber, *The International Emergence of Criminal Law* (1992) pp. 97 et seq.; Sieber, in (1997) *CR*, pp. 581 et seq., 653 et seq.

[6] E.g. the perpetrator may fly in with the morning flight from a foreign country, kill the victim and take the evening flight back before the crime is detected.

[7] *See* Sieber, in *Corpus Juris der strafrechtlichen Regelungen zum Schutz der finanziellen Interessen der Europäischen Union* (Delmas-Marty (ed.)) (1998) pp. 1 et seq.

protecting, its citizens from crime and attacks on their personal liberties.[8] However, under prevailing international law, the sovereignty of the national state ends at its national borders.[9] To the extent that these borders are no longer obstacles for the commitment of crimes[10] but rather for their prosecution, the justification for the very existence of the nation state is challenged.[11]

This involuntary loss of power of the traditional nation state is accompanied by a voluntary loss of power due to the transfer of sovereignty to supranational organizations. The European Community has acquired powers in many sectors of economic and other activites, while traditional core powers of national sovereignty, such as criminal prosecution, have remained with the Member States. The legal effects of this partial integration accentuate the factual effects of the global society. The selective transfer of powers has not only facilitated the emergence of new types of crime, such as international subsidy fraud, but more importantly, the prosecution of traditional crimes has become more difficult due to the policy of open borders and the principle of the free movement of persons. Weak political compromises have tried to counter this situation,[12] but as long as the unified internal market is not accompanied by a truly European judicial space, the prosecution of cross-border crimes will remain slow and ineffective even within the EU. As paradoxical as it might seem, the only way to fight the problems caused by incomplete integration effectively is by further integration.

The example of the EU can be transferred to the whole of Europe and to the community of nations throughout the world. The remarks made in the context of a supranational organization also apply to international organizations. International crime can only be fought internationally. The community of nation states can only respond to the new challenges of the international risk society if it acts as one. The irony behind this is that the nation state will only be able to

---

[8] Cf. Locke, 'Two Treatises of Government' Book II, Chap. XI, § 131: 'when they [men] enter into society, ..., only with an intention in every one the better to preserve himself, his liberty and property'. For the view of Locke (as well as of Hobbes) *see also* MacCormick, in '*de Lege*' (1995) *Yearbook of the Legal Faculty of the University of Uppsala* 227, at pp. 228 et seq.

[9] For the connection between sovereignty and territory *see* MacCormick *supra* note 8 at pp. 227, 233.

[10] For the problems of cross-border crime *see also* the collection of various articles in (1993) 1 *European Journal on Criminal Policy and Research*, issue 3.

[11] Moreover, not only is the nation state losing power, but its adversaries are becoming more powerful than ever before. Organized international criminal groups have plenty of money at their disposal and are willing to use it unscrupulously in the pursuit of further illegal profits. This weakness of the traditional nation state can also be seen in its inability to control multinational enterprises. *See* in this context the identical evaluations of legal philosophy, modern sociology and legal analysis e.g. by Arendt, *Vita Activa* (1960) at p. 331; Sieber *supra* note 4 at pp. 37 et seq.

[12] *See* Sieber, in (1996) 114 *Schweizerische Zeitschrift für Strafrecht* (ZStrR), pp. 357, 377 et seq.

compensate for the problems resulting from its loss of power once more powers are transferred to international and supranational bodies. However, national governments and societies will not find it easy to understand why this further transfer is necessary.

## *II. The Status of Criminal Law Policy in Europe*

The European and international society has already tried to respond to the threats and challenges posed by the global risk and information society. However, their answers are diverse and often ineffective.

Since 1949, the efforts of the Parliamentary Assembly and the Committee of Ministers of the *Council of Europe* have considerably improved legal co-operation among states in the field of criminal law. These efforts have not only borne fruit for the members of the EU but also for all the other Member States of the Council of Europe and for many states that observe the work of the Council of Europe. The institutions of the Council of Europe have dealt with all aspects of criminal law including constitutional law and fundamental freedoms, substantive and procedural law in addition to sentencing and international co-operation. The European Convention on Human Rights guarantees most fundamental procedural rights for the whole of Europe. To date, the Council of Europe has passed various conventions in the field of criminal law, most importantly on extradition and on legal assistance, which are in effect in almost all Member States.[13] For example concerning computer crime, the Council of Europe recommended that a list of precise minimum rules should be implemented by the Member States. This list could be amended in accordance with the provisions of an additional 'optional list'.[14] In the field of environmental protection, where the need for international co-operation is most evident and the dangers are extremely high, the Council of Europe recently proposed a 'Draft Convention for the Protection of the Environment through Criminal Law',[15] an attempt to establish minimum

---

[13] *See* Jescheck, *Leipziger Kommentar zum Strafgesetzbuch* (1992, 11th ed.) Einl. no. 101; Vogler, in (1992) *Juristische Ausbildung* (Jura) at pp. 586 et seq. Nevertheless, it is clear that a real harmonization of law has not been achieved in many cases so far and many conventions lack practical importance. Since it is an international organization based on intergovernmental co-operation, the Council of Europe relies on the Member States to implement its conventions, and this has not always been accomplished. However, currently, the Council of Europe is the only European platform with the organizational and legal structure necessary for producing legal regulations for the whole of Europe. In view of the situation in the countries of Central and Eastern Europe, this fact represents an invaluable advantage in the fight against international crime.

[14] *See* Council of Europe, *Computer Related Crime* (1990); the minimum list is reprinted in Sieber, *The International Emergence of Criminal Information Law* (1992) at pp. 78 et seq.

[15] Draft Convention for the Protection of the Environment through Criminal Law of 21 June 1995 (Dok. Council of Europe DIR/JUR [95] 11), reprinted in Möhrenschlager, in (1996) Wistra Issue 1, p. IV.

standards of criminal environmental law in all Member States. Recommendations advocating that criminal law should operate internationally have been made in many other areas of law. Although these recommendations are not described as part of a European Model Penal Code, in substance they can be regarded as the core of such future legislation.[16]

By contrast to the Council of Europe, the *European Community* is a supranational organization with the power to impose binding law on the Member States. Regulations and Directives of the European Community, which make it possible to move from non-binding recommendations and from conventions requiring unanimous voting to authoritative instruments which can be adopted by majority vote, have ushered in a new era of harmonization of criminal law in Europe. Both primary and secondary Community law include administrative penalties for infringement of competition law, market regulations and rules relating to the financial interests of the EC.[17] Various Directives require the Member States to adopt sanctions, such as the Insider Dealing Directive of 13 November 1989[18] and the Money Laundering Directive of 10 June 1991.[19] The judgment of the European Court of Justice of 21 September 1989 in the *Greek Maize* case was of special importance for the harmonization of law, since it stated that Member States must take all necessary measures (including criminal sanctions), to ensure the effectiveness of Community law.[20] The requirement that the financial interests of the EC should be at least as effectively protected as national financial interests was included in Article 209a of the EC Treaty by the Maastricht Treaty in 1993.

Furthermore, the K Articles forming Title VI of the Treaty on EU aim at improving intergovernmental co-operation in the fields of justice and home affairs. *This third pillar of the EU* is now starting to function in criminal matters. At the Cannes Summit held in June 1995, representatives of the Member States were able to reach an agreement on the basis of Article K 1 No. 5 and signed a 'Convention for the Protection of the Communities' Financial Interests'[21] on 26 July 1995. The Convention requires every Member State to punish fraud with appropriate criminal penalties. It also regulates important issues of general

---

[16] *See*, e.g. the above-mentioned recommendations relating to computer crime which include detailed suggestions for a minimum list and an optional list of crimes to be sanctioned by the Member States.

[17] For an overview *see* Dannecker, in *Strafrechtsentwicklung in Europa* (Eser and Huber (eds.) (1995) vol. 4.3 at pp. 83 et seq.; Sieber, in (1991) 103 Zeitschrift für die gesamten Strafrechts wissen schaften *(ZStW)* at pp. 957, 965 et seq.; Tiedemann, 'Die Europäisierung der mitgliedstaatlichen Rechtsordnungen in der Europäischen Union' (Kreuzer, Scheuing and Sieber (eds.)) (1997) at pp. 133 et seq.

[18] Directive 89/592 of 13 November 1989, OJ 1989 L 334/30.

[19] Directive 91/308 of 10 June 1991, OJ 1991 L 166/77. For both Directives *see also* Tiedemann, in (1993) *Neue Juristische Wochenschrift* (*NJW*) at pp. 23 et seq.

[20] Case 68/88 [1989] ECR 2965, at pp. 2984 et seq.

[21] OJ No. C 316/48 of 27 November 1995.

criminal law. In the meantime, two additional protocols have been added to this Convention. One concerns the extension of national bribery offences to Community officials;[22] the other aims at the introduction of criminal liability for legal persons.[23] However, as these documents have been agreed upon within the framework of traditional intergovernmental co-operation, their inherent weakness is that they have to be adopted by national parliaments as well as ratified in order to enter into force for the Member States.

Efforts to harmonize criminal law can also be found within the OECD, the United Nations and, since 1996, the G7 States. As early as 1985, the *OECD* prepared the way for work later done by the Council of Europe in computer crime by producing detailed recommendations about punishable acts in the area of computer crime.[24] The *United Nations* (especially its Vienna Crime Branch) has contributed to the harmonization of criminal law, for example by its convention on money laundering and its later model legislation in this field.[25] The *G7 States* (within the group of Ministers for Science) launched their joint fight against misuse of international computer networks in Bonn in November 1996.[26]

This shows that the community of nations is moving towards greater *integration* of criminal law policy. However, the contours of the future policy are not clear. For that reason it is necessary to first specify the aims of the future European criminal policy (*infra* Section C) before evaluating the strenghts and weaknesses of specific means and instruments such as model laws (*infra* Section D).

## C. The Aims: Possible Contours of the European Criminal Law System of the Future

The changes brought about by globalization and the resulting European trend for closer co-operation in criminal matters do not automatically justify a specific form of integration such as unification, harmonization, or co-operation of national criminal

---

[22] OJ No. C 313/1 of 23 October 1996.

[23] OJ No. C 221/11 of 19 July 1997.

[24] *See* OECD, 'Computer Related Criminality: Analysis of Legal Policy in the OECD Area, Final-Report' (April 1986) DSTI/ICCP 84.22, pp. 69 et seq.; Sieber, *supra* note 14, pp. 76 et seq.

[25] *See* Council of Europe, *The Money Laundering Conference* (Strasbourg 28, 30 September 1992). Extract of UN Convention against illicit traffic in narcotic drugs and psycho-tropic substances, ML 92 (5). An expert group of the United Nations International Drug Control Programme (UNDRP) has also drafted a 'Model Law on Money Laundering and Confiscation in Relation to Drugs', Legal Advisory Programme, November 1995.

[26] Having been the German delegate in this group, the author's list of recommendations contained, *inter alia*, the development of a 'minimum list' of crimes against computer misuse in international data networks (including the distribution of pornography, racist material, as well as information glorifying violence).

law systems.[27] Historical experience and comparative law show that there are various ways of responding to transnational crime. The following analyses these ways in which the European criminal law system could develop (*infra* Section I) and then looks at the factors and principles to be taken into account when selecting one of these options (*infra* Section II).[28] Section III *infra* assesses the effect of these factors and principles on the European criminal law system of the future and Section IV *infra* considers their effect on a possible harmonization in the context of model legislation.

## *I. Options: Forms of Co-operation between Criminal Law Systems*

The various forms of co-operation which could provide a model for the European criminal law system of the future differ mainly in the degree of *de-centralization of legislation and of legal application.* The descending degree of centralization can be shown in the following four basic models of the German, the Swiss, the North American and the Northern European criminal legal systems.

The German model for co-operation of the various federal states is a prototype of unification. It contains a strong element of centralization both in substantive and procedural law. In German legal history, beginning with the Northern German Federation, federal criminal law has always taken precedence over the criminal law systems of the confederates.[29] When comparing German integration in the second half of the 19th century to today's European integration, one cannot fail to note the speed of the development of those days. The 'higgledy piggledy particularism'[30] of nine German criminal law regimes was easily given up. Less than 20 years after the passing of the resolution on the 'Urgency and Necessity of a Uniform Criminal Legislation' by the first Congress of the German Law Association in 1860,[31] the Criminal Code and the Criminal Procedural Code of the Federation (*Reichs-*

---

[27] In this section the term *integration* is a generic term covering *unification* (providing *identical* statutes), *harmonization* (only requiring *similar laws based on the same values*) and *co-operation* (usually based on different laws and a system of mutual recognition and transfers of legal decisions to other systems). For this terminology, *see also* Delmas-Marty, *supra* note 7 at pp. 83 and at pp. 86 et seq.; Greve, in '*de Lege*' (1995) *Yearbook of the Legal Faculty of the University of Uppsala* 91 at p. 96.

[28] The reflections under points C.I and II are based on a report of the author originally elaborated for the conference of criminal law professors (*Strafrechtslehrertagung*) in Bochum in 1991. Cf. Sieber, in (1991) 103 *ZStW*, at pp. 957 et seq.

[29] *See* Art. 2, s. 1 of the Constitution of the Northern German Federation of 1867; Art. 2 of the Constitution of the German Empire of 1871; Art. 13 s. 1 of the Constitution of the Weimar Republic; Art. 31 of the Constitution of the Federal Republic of Germany (*Grundgesetz*).

[30] Translated quotation of Köstlin, in (1856) *Goltdammers Archiv für Strafrecht* at (*GA*) pp. 47 et seq. (*buntscheckiger Partikularismus*).

[31] *See* Keeper of the Minutes, Verhandlungen des ersten Deutschen Juristentages (Amt der ständigen Deputation (ed.)) (1860) at pp. 244 et seq.

*strafgesetzbuch* and *Reichsstrafprozeßordnung*) were enacted.[32] Similar centralized criminal law systems can be found in most Member States of the EU especially in countries that do not have a federalist structure.

The second model is the Swiss criminal law regime combining unification and co-operation. In one respect, it is identical to the German model since, as a result of a referendum in 1942 and an intense political struggle, almost all power to legislate on substantive criminal law is in the hands of the federation.[33] Procedural law, on the other hand, is chiefly regulated independently from canton to canton; in Switzerland – even for federal law! – different cantonal procedural codes and a Federal Procedural Code apply. A standardization has as yet failed, owing to the different sizes of the cantons, political struggles, and different courts and administrative organizations. However, the need for increased harmonization and unification is apparent from the demands for standardization of procedural law made by Swiss legal science.

The decentralized elements are even more evident in the third model, the criminal law system of the United States of America (combining harmonization with co-operation). On the constitutional basis of the 'limited powers' of the federal institutions,[34] both a federal criminal code and 50 state criminal legal regimes with different substantive and procedural rules evolved. The North American legal regime differs from the German and the Swiss system in one way in particular: federal law is indictable before federal courts (with a full sequence of courts), and state law is indictable before state courts.[35] This parallelism leads to some serious problems, especially the possibility of double prosecution for the same offence.

The fourth and loosest form is the basic model for the co-operation of sovereign states that only co-ordinate the mutual recognition of decisions. This model is practised in the closely co-operating states of Northern Europe.[36] The effective co-operation of these countries shows that the enactment and application of different legal regimes through different agencies can also form the basis for different legal systems to work together.

This overview illustrates that there are various options for co-operation between the Member States of the EU and the Council of Europe and that there is not just one model. For this reason each European state should be careful not to consider its own model of integration (as well as its national penal code!) superior to all others.[37] The

---

[32] This rapidly developed legislation could be mentioned as an example of the advantages of using legal models, because it was highly influenced by the Prussian Criminal Code of 1851.

[33] *See* Art. 64bis, ss. 1 of the Constitution of the Swiss Confederation; Art. 335 of the Swiss Criminal Code.

[34] *See* Art. 1, s. 8 US Constitution; Gainer, in (1989) *Criminal Law Forum*, at pp. 99, 109.

[35] For the review of state jurisdiction by federal courts through 'collateral attacks' *see* Schmid, *Das amerikanische Strafverfahren* (1986) at p. 23 and pp. 88 et seq.

[36] *See* the founding agreement on the co-operation between Denmark, Finland, Iceland, Norway, and Sweden of 23 March 1962 (Helsinki Accord) and Berg, *Der Nordische Rat und der Nordische Ministerrat* (1988).

[37] *See also* Weigend, in (1993) 105 *ZStW* 774, at p. 792.

following section will examine whether there are rational criteria for deciding between these options and outline some basic features for a European criminal law system.

## II. Criteria for Evaluation: Fundamental Principles of Public and Criminal Law

The basic principles for assessing how the European criminal law system should develop in the future can be found in the philosophical and constitutional concepts of federalism, subsidiarity, and protection of minorities as well as in the legal notions of justice, equality and legal certainty. In the following section, these principles and ideas will be used in developing a theory for the distribution of legislation and application of law in the future of European criminal law.[38]

### 1. The Concepts of Federalism, Subsidiarity and Protection of Minorities

An indication of the way 'European criminal law' might go in the future can be found in the value concepts of federalism that formed the basis for Immanuel Kant's essay on 'The Eternal Peace'[39] as early as 1795. In addition, partly encompassed by the concept of federalism, the principles of subsidiarity and the protection of minorities are relevant in this context.

The *classical constitutional principles of federalism*[40] – vertical separation of powers, increased participation of the citizens, and political balance – are of little use with respect to the distribution of jurisdiction. However, the traditional concept of federal power-sharing through 'two centres of government' favours the German and Swiss models of execution of federal law through Member State authorities. In addition, with respect to the size and distance of a future European executive, the words *Alexis de Tocqueville* used to describe the need for federalism remain valid: 'Even if the law should bring oppression, freedom could find shelter in its form of application'.[41]

---

[38] A first approach for such a theory was made by Sieber, in (1991) 103 *ZStW* at pp. 957, 973 et seq., and positively judged by Zuleeg, *Europäische Einigung und Europäisches Strafrecht* (Sieber (ed.)) (1993) at pp. 41, 46. This first approach then was developed further by Greve, *supra* note 27 at pp. 91 et seq., especially at pp. 97 et seq.

[39] Kant, *Zum ewigen Frieden* (1795) especially section 2, 2nd Definitive Article on the Eternal Peace (*see Werke*, in *Sechs Bänden* (Weischel (ed.)) (1964) Vol. VI at pp. 195, 208 et seq.)

[40] See Isensee, (1990) *Archiv für Öffentliches Recht* (*AöR*) at p. 248; Kimminich, in *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (Isensee/Kirchhof (eds.)) (1987) Vol. 2, at pp. 1114 et seq.

[41] De Tocqueville, *De la Démocratie en Amérique* (1835) part II, chapter 16, (citation of the French original taken from: *Union générale d'éditions* (Paris 1963) at p. 158). The current tendency of the European legal provisions on sanctions to concentrate legislative and prosecuting activities, as well as first instance judgment, in the executive power of the Commission is not in accordance with this model.

The *principle of federalism* and *the principle of subsidiarity*[42] postulate a balance in terms of the way society is organized between the 'drive to unity' and the 'idea of freedom',[43] i.e. the principle that the larger community must not assume functions that the smaller community is capable of fulfilling. This notion, as well as the general *legal idea of efficacy*,[44] must be applied to the problems of effectiveness described above. These principles lead to the inevitable conclusion that at least a certain amount of integration of the European criminal law systems is required as an answer to the antagonism between globally operating perpetrators and nationally operating criminal law systems. With respect to differing criminal law systems, not only the insufficiencies of the present co-operation forms (especially in mutual assistance procedures[45]), double proceedings and evasion of law by perpetrators[46] but also the weakening of the acceptance of legal provisions through territorially different behaviour rules are relevant.

Federalism also has a *function of ethnical integration*, and just as the *principle of protection of minorities*, it points to the *cultural dependency* of law.[47] The catchwords 'Europe of Regions' and 'Europe as Variety in Unity' are reminders of this cultural dependency of law, just as the 'ownership theory' in the American theory of federalism. Respect for pluralism of cultures is further found in the principles concerning the protection of minorities, which are guaranteed by, for example, Article 27 of the International Convenant on Civil and Political Rights (1966) and the Vienna Declaration and Programme of Action (1993).[48] With respect to the jurisdiction of criminal law in Europe, this leads to the question whether the objects protected by criminal law and the respective criminal law provisions are culturally similar, or whether they differ from one country to another. In trying to answer this question, various areas of criminal law will have to be differentiated.

Federalism also implies a certain *experimental function*, the competition of systems and legal regimes, the process of trial and error.[49] Again, differentiations will

---

[42] *See* Deuerlein, *Föderalismus* (1972) at pp. 306 et seq. and pp. 319 et seq.; Herzog, *Der Staat* (1963) at p. 399.

[43] *See* Otto von Gierke, *Das deutsche Genossenschaftsrecht* (1868) Vol. 1, reprint: (1954) at p. 1.

[44] *See* Radbruch, in *Rechtsphilosophie* (Wolf and Schneider (eds.)) (1972, 8th ed.) at pp. 142 et seq.

[45] *See also* Weigend, in (1993) 105 *ZStW* at pp. 774, 793 for the importance of this procedural co-operation.

[46] *See* Sieber, in *Multinationale Unternehmen und Strafrecht* (Tiedemann (ed.)) (1980) at pp. 155, 172.

[47] The cultural dependence of law is especially stressed in Peter Häberle, 'Constitutional Doctrine as Cultural Science' in Max Ernst Mayer's criminal legal philosophy as well as in Greve's considerations for criminal policy law. *See* Häberle, *Verfassungslehre als Kulturwissenschaft* (1982); Max Ernst Mayer, *Rechtsnormen und Kulturnormen* (1903); Greve, *supra* note 27 at p. 91 and at p. 98. For the influence of socio-economic facts on the criminal legal order *see also* Jung and Schroth, in (1983) *GA* at pp. 241, 256 et seq.

[48] *See* Greve, *supra* note 27 at pp. 105 et seq.

[49] *See* Häberle, in (1991) *Die Verwaltung*, at pp. 169, 190.

be necessary in this respect. Human rights and the principle of commensurability set tighter boundaries for experiments in federalism with respect to coercive powers than with respect to rules of procedural organization.

## 2. *Justice, Equality and Legal Certainty*

The legal notions of equality, justice, legal security and the rule of the law must be respected as well when developing an outline for the future European criminal law. Even if the *principle of equality*, being the 'immanent contradiction of federalism',[50] generally does not apply to federally different regimes,[51] the intensity of criminal legal intrusion into the sphere of human rights, and the principle of commensurability, demand homogeneity requirements and uniform minimum standards for coercive powers of the state.

The legal *idea of justice* has already been mentioned in the 19th century by Binding. He has pointed out that, when criminal laws differ on two sides of a frontier, there is inevitably a loss of 'faith in justice and in the sanctity of legal duty'.[52] It is striking proof of the identity of German and French values that the same idea has been formulated in a similar way by Pascal: '*Le droit a son époque. Plaisante justice qu'une rivière borne! Vérité en deçà des Pyrénées, erreur au-delà*'.[53]

The *principles of legal certainty and the rule of law* also speak in favour of a certain amount of unification of law.[54] This is especially important in the field of economic criminal law, which often relates to detailed market regulations. On the level of the abstract command of a national provision, the European citizen who uses the fundamental freedoms guaranteed by the EC Treaty cannot possibly know, for example, 15 different national blanket clauses referring to market regulations. For this reason, there are clear advantages of having the same formal legislation. As a consequence, it is desirable to remove formal differences and to create greater unity in many areas.

---

[50] With respect to federalism as 'thing with its contradiction', *see* Maier, in (1990) 115 *AöR*, at pp. 213, 230.

[51] *See* BVerfGE (Decisions of the German Federal Constitutional Court, Official Records), Vol. 33 at pp. 303, 352 et seq.; Stern, *Das Staatsrecht der Bundesrepublik Deutschland* (1984, 2nd ed.) Vol. I, at pp. 661 et seq.

[52] 'Der Glaube an die Gerechtigkeit und an die Heiligkeit der Rechtspflicht wird erschüttert, wenn innerhalb einer national einigen und wesentlich auf gleicher Culturstufe stehenden Bevölkerung hier erlaubt, was dort verboten ist, hier dasselbe Delict mit Strenge, dort nur sehr mild geahndet wird, hier Strafen für unzulässig erklärt werden, die dicht jenseits der Grenze ihr Anwendungsgebiet besitzen', cf. Binding, *Handbuch des Strafrechts* (1885) Vol. 1, at p. 47.

[53] Yet cited by Enschedé *supra* note 1 at p. 7. Enschedé's translation: 'The law has its epochs. What kind of justice is that of a boundary river! Truth on this side of the Pyrenees, error on the other.'

[54] *See* Greve, *supra* note 27 at pp. 91 and at pp. 109 et seq.

## *III. Consequences: the Future European Criminal Law System*

The notions discussed in Section II *supra* are diverse and partly contradictory. They do not permit a simple decision for or against unification, harmonization or co-operation. In a generalizing and – given the limited scope of this study – necessarily global manner, one could only say that there are clear advantages in having the same formal legislation in ethically neutral or culturally identical areas. However, this can only be accepted as a generalized result. For more precise results, there must be more differentiation and the principles and criteria of Section II *supra* must be worked out in relation to various sectors of criminal law. It is also necessary to distinguish between short, medium and long term solutions. Furthermore, in practice the future of European criminal law will to a great extent be determined by political considerations and not only by rational analysis. For these reasons only an outline of the desirable direction of future European criminal policy is possible here. This draft has especially to differentiate between the various areas of substantive criminal law (*infra* Section 1), procedural law (*infra* Section 2) and the administration of criminal law (*infra* Section 3).

### *1. Substantive Criminal Law*

Harmonization seems *reasonable* for most areas of *substantive criminal law*. Whether it is not only reasonable but even *necessary* depends on whether various crimes can be effectively tackled by separate national legal orders.

In the special part of criminal law *harmonization is indispensable* where national control is no longer possible,[55] or as expressed above, where there is a conflict between globally operating criminals and nationally operating criminal law systems. This is true, for example, with respect to the dissemination of pornographic or racist material in international computer networks, where, for technical reasons, national control strategies no longer work.[56] In this global area of 'cyberspace' common minimum rules are needed as soon as possible. Harmonization is also necessary in areas in which acts in one country have direct effects in other countries and cannot effectively be controlled within national frontiers. This is particularly the case in respect of other computer crimes (such as manipulations in one country with results via international computer networks in another country), for environmental crimes[57] (with effects that can often be felt beyond national frontiers), other economic crimes (especially those involving international trade in goods, capital and services) trans-border traffic of illegal drugs and international terrorism. From an economic standpoint the fact that a different standard of criminal law could also distort free

---

[55] *See also* Weigend, in (1993) 105 *ZStW*, at pp. 774, 784.

[56] *See* Sieber, in (1996) *JuristenZeitung* (*JZ*), at pp. 429 et seq., 494 et seq.; Sieber, in (1997) *CR*, pp. 581 et seq., 653 et seq.

[57] *See* Dannecker, in (1996) *JZ*, at pp. 869, 878; Tiedemann, *supra* note 17 at II 2 b; critical Greve, *supra* note 27 at pp. 91, 110.

competition must be considered.[58] This can be illustrated in the field of criminal law relating to food production and distribution where different criminal laws could create market barriers.[59]

As far as supranational interests are concerned (such as the financial interests of the EU),[60] harmonized rules also seem natural.[61] Similarly the treatment of war crimes[62] requires international harmonization because criminals are often not prosecuted by 'their own' national legal order. Additionally, special consideration has to be given to areas in which different forms of legislation lead to 'crime havens', 'forum shopping' and circumvention of national laws,[63] as has been particularly noticeable in the case of multinational companies which attempt to operate in those countries with the fewest economic restrictions or where activities prohibited by their home country's national criminal law are not judged as criminal action.[64]

In all these areas, there is a need for short or medium term harmonized solutions. In some of them the need to agree on common minimum rules is so pressing that it should take precedence over efforts of respecting and safeguarding certain cultural specifics. In the long run, these areas will be the candidates for unification in order to provide legal certainty and the rule of the law in European society, as it comes together.

As far as other crimes are concerned, for example murder or theft,[65] unified laws

---

[58] *See* especially Zuleeg, *supra* note 38 at pp. 41, 54; *see also* Dannecker, in (1996) *JZ*, at pp. 869, 879. Furthermore it is to be noted that, for example, in Germany large parts of criminal law are placed into accessorial rules of administrative economic law, which itself is strongly influenced by European law.

[59] For the changes of responsibilities in this area caused by an EC Directive of 29 June 1992 (OJ 1992 C 228/24) *see* Dannecker *supra* note 17 at pp. 70 et seq.; for constitutional problems of the punishment of offences against EC law by German criminal law relating to food production and distribution *see* Dannecker, in (1996) *JZ*, pp. 869, 874.

[60] *See also* Weigend, in (1993) 195 *ZStW*, at pp. 774, 798 et seq.; Dannecker, in (1996) *JZ*, at pp. 869, 874 et seq.

[61] In the special field of protection of the financial interests of the EU, there might even be a need for a set of, substantive as well as procedural, unified rules, already formulated in a *Corpus Juris* by leading European experts in the field of criminal law. *See* Delmas-Marty, *Corpus Juris Introducing Penal Provisions for the Purpose of the Financial Interests of the European Union* (1997). The French original is published together with a German translation in *Corpus Juris der strafrechtlichen Regelungen zum Schutz der finanziellen Interessen der Europäischen Union* (Delmas-Marty (ed.)) (1998). *See also infra*, pp. 222 et seq.

[62] *See also* Bassiouni, *International Criminal Law*, at pp. 3 et seq.; Delmas-Marty, *European Criminal Policy* (1995) at pp. 83 et seq.; Weigend, in (1993) 105 *ZStW*, at pp. 774, 795 et seq.

[63] For the danger of circumvention *see also* Jung and Schroth, in (1983) *GA*, at pp. 241, 251.

[64] *See* Sieber, in *Multinationale Unternehmen und Strafrecht* (Tiedemann (ed.)) at pp. 167, 172. *See also* Weigend, in (1993) 105 *ZStW*, at pp. 774, 784 ('oasis of impunity').

[65] In this area there should be a large ethical consent between most European countries, *see* Jung and Schroth, in (1983) *GA*, at pp. 241, 255.

could also law is *not as urgent*, but may be useful for facilitating international co-operation. Where cultural specifics are not concerned, unified laws could also foster the mobility and flexibility of lawyers. Furthermore, knowledge about one legal order could more easily be transferred to another, so that the progress of legal science as such could be accelerated and improved. However, in these areas, harmonization is only possible with a long term agenda.

On the other hand, bearing in mind the cultural dependence of (especially criminal) law, short term unification or harmonization is *not desirable* in areas in which there are truly cultural or historical specifics. However, it is necessary to check whether such specifics are based on real cultural peculiarities or just on historical reminiscences or political accidents in the process of law making.[66] Greve has pointed out a number of examples where national criminal laws differ considerably in Europe: abortion is regulated more liberally in the Scandinavian States than in Germany and still handled extremely restrictively in Ireland;[67] mercy killings are now partly permitted in the Netherlands, but in principle punishable for example in Germany; the 'sinfulness of drinking' is upheld especially in the Nordic countries; the use of cannabis is strictly forbidden in Germany, but partly tolerated in the Netherlands; bigamy of homosexual partners is covered by the Danish provision on bigamy but unimaginable in Greece; the so-called 'Auschwitz Lüge' (that is the denial of the holocaust) is punishable for historical reasons in Germany but protected by the guarantee of free speech in other countries. In areas with such cultural specifics, any harmonization will need much more time until the convergence of the EU has led to a closer identity of cultures. With respect to this coming together, it should be clear that we neither desire nor expect similarity of European cultures. However, since criminal law is a last resort and should only be used to protect the 'ethical minimum', it should be possible to arrive at broader European consensus in European criminal law than in other legal areas.[68] Therefore, the possibility that a European Penal Code could include these areas should not be completely ruled out in the long run.

Since the parts of a criminal code dealing with specific offences can only be applied together with the general rules of the code (often referred to as its General Part) harmonization of these general rules is urgently needed especially for those areas or crimes in which harmonization of the specific law is essential. However, again there are differences to stress. For example as far as new forms of punishments are concerned (such as compensation between offenders and victims), Europe should

---

[66] *See also* Greve, *supra* note 27 at p. 91, and at p. 93.

[67] For this *see also* Weigend, in (1993) 105 *ZStW*, at pp. 774, 788.

[68] While it has to be acknowledged that a common law can have an *identity-forming function* (as was recognizable during the founding of the German Empire of 1871), the principles of democracy and due course of law as well as the European Declaration on Human Rights are the ones that should primarily help in forming a European identity; substantive criminal provisions are of little effect here.

not prematurely give up the experimental element of federal societies mentioned above and the possibility of different legal systems competing for the best solution.

## 2. *Procedural Law and International Co-operation*

Distinctions must also be drawn so far as procedural law is concerned. With respect to *coercive powers*, the need for harmonization is greater and more urgent. This is also illustrated by the fact that minimum rules of protection of human rights in criminal prosecution are secured by the European Convention on Human Rights.

Harmonization is not only necessary if traditional co-operation is to be improved with a view to facilitating direct co-operation between the prosecuting agencies in criminal matters. It is also a prerequisite for developing the more far-reaching concept of a 'European judicial space' in which to tackle the most fundamental problem encountered by criminal law systems when they try to co-operate, namely jurisdictional limitations. The traditional way of co-ordinating the prosecution of criminal offences is based on territorial competence and the fact that decisions are only effective within the limits of national sovereignty. They have to be transformed to other spheres of sovereignty by the mechanisms of legal recognition (for example, by mutual judicial assistance procedures). Harmonization of procedural law would enhance territorial scope and allow foreign decisions to be implemented directly, as is the case in federal states.[69] In EC administrative law, the concept of 'deregulation', i.e. the mutual recognition and acceptance of foreign standards and decisions concerning the lawful distribution of goods and services, has proved effective over the past ten years. The emergence of a harmonized European legal regime will raise the question of whether 'deregulation' will apply in relation to the 'negotiability' of a European search warrant, and thus whether clumsy mutual recognition procedures will become obsolete and whether a real single 'European judicial space' can be achieved.[70]

On the other hand, the need to harmonize the *organizational parts* of criminal procedural law is not so pressing. The way that criminal law systems are organized is closely related to cultural and historical developments, as can be seen from the differences between continental legal systems (based on official investigations) and Anglo-American legal systems (which are more adversarial, involving for example cross examination). There are good reasons for preserving these features which are specific to different cultures and to maintain a certain competition between various procedural models.[71]

---

[69] The need for procedural co-operation could also be an argument for the harmonization of substantive law. There might be a greater willingness to give up parts of national sovereignty if substantive criminal law in different countries was as similar as possible, *see* Tiedemann, *supra* note 17 at II. 2 c.

[70] *See* Sieber, in (1991) 103 *ZStW*, at pp. 957, 962 et seq.

[71] For the introduction of adversarial elements into the traditional Italian Criminal Procedure *see* Cirese and Bertucci, *The New Italian Criminal Procedure for Foreign Jurists* (1993) at pp. 26 et seq. concerning the function of the public prosecutor.

## 3. *Administration of Criminal Law*

Turning to the administration of criminal law, the above analysis confirms that, even if there were uniform laws throughout the EU, they should be administered by national bodies. Supranational administration will continue to be the exception, although it might be necessary in two areas. First, centralized European agencies (such as EUROPOL, OLAF and a future European public prosecutor) should be available for co-ordination of the national police forces and prosecutors in dealing with transnational crimes. Secondly, an appellate court (such as the European Court of Justice) is essential to ensure that supranational laws are consistently interpreted by national courts.

## 4. *Conclusions*

Taking account of the aim of this memorandum, the above analysis shows that increased integration of European criminal law is possible and desirable. There will be different degrees of integration, taking different forms (ranging from unification to harmonization to co-operation) and taking place over different timescales.

However, *all* methods of co-operation between national criminal law systems require some degree of harmonization in order to ensure that the entire criminal law system runs smoothly. This is true not only of the most centralized model of co-operation between the federal German states and the mixed Swiss model, both of which require unification in the sense of identical criminal law provisions. Even the loosest form of co-operation, such as the co-operation between the Nordic countries, can only function effectively if it is underpinned by some harmonization of values and laws.[72] In particular, if judicial decisions are to be valid throughout Europe, there is a need for harmonized laws. The more European legal systems differ (especially in underlying values), the more difficult even loose co-operation will be.

For these reasons the present author does not agree with Enschedé's conclusion cited above that harmonization of criminal law is not desirable.[73] Therefore, the next section will analyse the mechanisms capable of providing flexible forms of unification, harmonization and co-operation.

---

[72] This can best be illustrated by the recent cases of Nazi propaganda distributed on international computer networks. As long as Germany criminalizes the dissemination of Nazi propaganda and other countries allow the same acts by virtue of the principle of freedom of speech, any collaboration between these differing legal systems inevitably leads to frictions and inconsistencies.

[73] *See supra* note 1.

# D. The Means: Model Legislation and Other Mechanisms

The foregoing illustrated that integrating the various national criminal codes of Europe is generally desirable but that integration will take different forms in different areas and take place over different time spans, ranging from unification through harmonization to co-ordination. On this basis, the following will assess the role of legal models in the process of integration. After outlining the various mechanisms for integration of legal provisions, the following will analyse the different types of legal models, evaluate their benefits, problems and costs and develop recommendations for future action on model legislation.

## *I. The Various Mechanisms for Integrating Legal Provisions*

A discussion of the 'theory of legal adoption' is beyond the scope of this paper which can only give a brief description of different mechanisms of integration.

### *1. Legal Obligations*

The highest degree of harmonization is achieved via *legal obligations*. In federal systems there is often constitutional provision for such harmonization. By developing legal obligations, the US Supreme Court standardized the procedural laws of the various states. Framework law and Directives are also important means of legal harmonization, often giving more freedom as to how the law is to be implemented. International agreements, which in some countries have the status of constitutional law, have similar effects.

As described above, *Europe* has experienced fundamental changes in this area since the end of the 1950s. The European Convention on Human Rights, together with the European Court of Human Rights in Strasbourg, has established minimum standards in procedural law, which increasingly influence national procedural codes.[74] The Treaties leading to the founding of the European Communities and the resulting secondary law, together with the case law of the European Court of Justice in Luxembourg, have introduced further far-reaching changes through their binding instruments with the system of 'institutionalized legal harmonization' which also opens new dimensions in the field of comparative law for the closing of gaps in EC law.[75] Conventions are looser forms of harmonization which depend initially on consensus but become binding once they are transformed into national law.

---

[74] *See* Jung, in (1990) *Der Strafverteidiger (StV)* at pp. 509, 515; Kühl, in (1988) 100 *ZStW*, at pp. 406 et seq. and at pp. 601 et seq.

[75] The following citations from civil comparative law also apply in respect of criminal law: 'The national legal sciences have started to melt together and form an all encompassing world science, in which every national science together with the science of comparative law form distinct branches'. (*see* Rheinstein, *Gesammelte Schriften* (Leser (ed.)) (1979) Vol. 1, at pp. 283, 291). And: 'What started as scientific curiosity, has become highly practical, has

### 2. *'Soft' Adoptions*

There are also much looser or 'soft' forms of harmonization: the *exchange of legal ideas* between legal scientists and the copying of a foreign example as the most established forms of legal adoption. This *'informal adoption'* is especially effective when representatives of legislative bodies and executive agencies collaborate, as has happened in antitrust law between the European Commission and the national competition authorities. Successful international harmonization can be seen in the Nordic states where legislation is co-ordinated through the Nordic Council and the Nordic Ministerial Council on the basis of the Helsinki Accord.

Effective means and results of such a co-operation can be model laws such as the Model Penal Code of the American Law Institute[76] or the Latin-American Model Penal Code[77] which was initiated by the Chilean Institute for Criminal Law. The following will concentrate on this mechanism of (non-binding) Model Legislation.

## *II. The Types of Legal Models*

The term 'model code' is usually used with a specific connotation.[78] For example, the Legal Affairs Committee of the Council of Europe described the projected model code in 1970 as something 'to give guidance and to be a source of aspiration and of inspiration for legislators when they are considering penal law reforms'.[79] However, there is no need to limit the present discussion to a specific type of model code, especially if the term is used for legal policy functions. Instead, it is much more helpful to distinguish the different types of non-binding models which could be used for the purpose of law reform, focusing on their legal character, their scope and their authors.

With respect to the *character of legal models,* non-binding models may illustrate one 'ideal' solution (such as the prototype of a model penal code, the American Model Penal Code).[80] However, they might also recommend minimum rules and leave room for additional optional rules (such as the recommendations of the

---

*cont.*

become a scientific institution enabling us to search for answers to the questions that are posed to legal science by our time and our world, especially in an age that, once again, is moving towards a new uniform law, a new *ius commune*' (*see* Coing, in (1981) *NJW* at pp. 2601, 2604).

[76] *See* Honig, *Entwurf eines amerikanischen Musterstrafgesetzbuches* (1965).

[77] For a summary *see* Jescheck, *Festschrift für Heinitz* (1972) at p. 717.

[78] The term 'model code' is regularly associated with the American Model Penal Code (AMPC) of 1961; cf. Enschedé, *supra* note 1 at p. 4.

[79] *See* Enschedé, *supra* note 1 at p. (1.3).

[80] For the content of the AMPC cf. Enschedé *supra* note 1 at p. 5.; Honig, *Entwurf eines amerikanischen Musterstrafgesetzbuches* (1965).

Council of Europe on computer crime).[81] Furthermore legal models could also contain a 'maximum list' avoiding over criminalization.

The *scope of legal models* can vary considerably. They might be limited to one area (for example, to EU subsidy fraud or money laundering). They can encompass, in a partial or sectoral approach, a, smaller or bigger, area of the law such as computer crimes,[82] crimes against the environment,[83] economic crimes or specific or all aspects of the general part of the criminal code. They can, as a typical model penal code does, aim at the average range of the traditional core national codes (such as the American Model Penal Code or the Latin American Penal Code). Moreover, there might even be a comprehensive approach trying to cover all criminal law provisions including the multitude of accessory crimes arising in civil and administrative law (such as copyright or data protection).

The *authors or institutions* on behalf of which a model code is drafted could be supranational, international or national governmental organizations. However, model codes might also be produced by private institutions such as the American Law Institute (which created the American Model Penal Code)[84] or the Chilean Institute for Criminal Law (which designed the Latin-American Model Penal Code).[85] It is obvious that authorship will have a considerable impact on the content of the model. A model code prepared by the International Bar Association will differ substantially from a model code prepared by an international police association. The authors and the supporting institution also have an impact on how difficult it will be to reach an agreement, since a homogenous group of lawyers with a well-defined common interest will find it easier to agree than state officials anxiously protecting the sovereignty of their states. The authors of a code can finally determine whether the model must be agreed upon unanimously or by (simple or qualified) majority.

The variety of models offers a wide range of options for the Council of Europe's future legal policy. For this reason, the approach in the present paper is not limited to one type of model penal code such as a non-binding, ideal solution, drafted by government institutions and covering the matters dealt with in the average national penal code. Instead, the options for the future European criminal law policy shall be increased via a discussion of the benefits, problems and costs of all types of non-binding legal models.

---

[81] *See* Council of Europe Doc. No. PC–R–CC (86) 11 of 26 March 1986 and 33 of 4 December 1986; *see also* Sieber, *supra* note 14 at pp. 86 et seq.

[82] Such as the suggestions of the Council of Europe Committee of Experts for Computer Related Crime *see supra* note 24.

[83] Such as the Draft Convention for the Protection of the Environment through Criminal Law *see supra* note 15.

[84] *See supra* note 80.

[85] For a summary *see* Jescheck, *Festschrift für Heinitz* (1972) at p. 717.

## *III. Benefits and Problems of Model Legislation*

### *1. Harmonizing and Rationalizing Effects for the Legal System*

#### (A) FLEXIBLE HARMONIZATION

As far as unification, harmonization or co-operation is concerned, the strength of (non-binding) models is at the same time their weakness. The dual character of model laws arises from the fact that because they are non-binding, they permit flexible derogation.

Since models are usually non-binding (and states can easily derogate from them), it is much easier to get agreement on them than on strictly binding, tightly drawn conventions. The freedom of national legal authorities to derogate from the model law gives them the possibility to take account of cultural specifics mentioned above and for integrating the model law into the particular national context, including each state's 'delicate balance of criminal law policy'.[86] This is why even some writers who in general oppose unification of European criminal law are in favour of a European Model Penal Code.[87]

However, the flexibility of legal models also means that their harmonizing and unifying effect is weaker than that of binding conventions or EC Directives. Despite this, legal models can have a considerable impact on harmonization. This impact results first from the quality of the result, i.e. the published prototype of model legislation, and secondly from the recognized authority of its authors. Furthermore, the drafting process increases the authors' understanding of foreign legal regimes. It has already been pointed out that this procedural effect, which should not be underestimated, is particularly noticeable if government officials responsible for the relevant legal matters in their own country are involved in the drafting process. Mutual understanding and friendship among the competent officers can be a much more effective driving force for harmonization than the authority of an unpopular legal measure. These aspects of implementation, in particular the participation of government officials, should be taken into account in the planning of any model legislation.

---

[86] Weigend, in (1993) 105 *ZStW*, at pp. 775, 789.

[87] *See* Greve, in *supra* note 27 pp. 91, at pp. 112 et seq. *See* especially p. 112: 'The road ahead leads through an identification of neutral or common areas, the establishment of a model penal code for the relevant parts, and thereafter a local or regional acceptance of the move'. Answering Weigend's criticism of the idea of a model penal code (in (1993) 195 *ZStW*, at pp. 774, 790) with the argument of the heterogeneity of the European criminal law systems, Greve points out that this, quite on the contrary, is 'an argument for not choosing the mandatory unification but instead the "soft" road towards unity'.

(B) RATIONALIZATION AND SYSTEMATIZATION

An even greater benefit of model legislation is the resulting rationalization, systematization and revision of law.[88] There are various reasons why this occurs.

First, evaluating and defending competing national legal regimes in an academic debate with foreign experts is an ideal way of finding the best rational solutions for problems and for eradicating irrational reliance on tradition in criminal codes. It is not surprising, therefore, that the main impetus behind existing model penal codes and international codification has been the weakness of old legal systems and the need for reform.[89] It is true that, on the whole, European criminal codes are well-developed. However, they still include irrational and anachronistic features which are usually not based on cultural specifics but on accidents of history or the casual compromises made by politicians in parliamentary disputes.[90]

Secondly, the obligation to focus the discussion about law reform on the drafting of a precise (and probably short) statute concentrates, shortens and improves the debate. The resulting statute with its explanatory memorandum is much more concrete and practical than lengthy academic papers or vague political resolutions.

Thirdly, setting out the results of the discussion not only in precise terms but in a systematic and complete code is an ideal exercise for systematizing the law. The development of a complete code covering general and specific provisions focuses on the general functions of control, the general principles of liability, justification and responsibility as well as the definition of specific crimes. Furthermore, the dogmatically correct and consistent conversion into national law is much easier with a complete code than with bits and pieces from various agreements and conventions. In this context, it is worth mentioning that the idea of codification is today gaining importance again in the field of the European criminal codes.[91]

(C) SUPPORTING DEVELOPING COUNTRIES

A further advantage of a European Model Penal Code is that it could assist newly created states or states which are making the transition to a more democratic system.[92] The recent democratization of Central and Eastern European states has illustrated the usefulness of model codes in this respect. The Council of Europe has

---

[88] Enschedé has already emphasized, citing Schwartz and Wechsler, who paved the way for the AMPC, that neither harmonization nor unification was the primary aim of the AMPC. The main aim was revising irrational and archaic codes as well as ending the disregard for criminal law shown by American judges. *See also* Enschedé *supra* note 1 at pp. 8 et seq.

[89] *See* for the American Model Penal Code Enschedé *supra* note 1 at pp. 8 et seq., for the origination of the German Strafgesetzbuch, *see* Sieber, in (1991) 103 *ZStW*, at pp. 957, 959.

[90] *See* the citation of Greve, *supra* note 27 at p. 91 and at p. 93.

[91] *See* Tiedemann, in (1996) *JZ* at pp. 647 et seq.

[92] This aim with respect to the reception of law should not be mixed up with 'legal colonialism'. On the contrary, it has already been shown that the flexible 'soft' nature of model legislation is ideal for taking into account national specifics.

made important contributions to the process of democratization, *inter alia* by providing many seminars on criminal law. Whenever participating in one of these seminars, the author heard the wish expressed that concrete help should be provided in the form of 'ideal' model legislation. Small countries, in particular, which cannot fund large law reform committees, would have preferred to rely on a truly European Model Code, instead of following just one national criminal code or the advice of a few experts. If the author's 1991 proposal to create a European Model Code[93] had been taken up, the Council of Europe could have helped the emerging democracies of Central and Eastern Europe more effectively than it did by its seminars transferring the knowledge of single specialists of specific European nations.

## 2. *Benefits for the Authors*

Any future decision of the Council of Europe about a European Model Penal Code should not only be taken on the basis of the Code's expected impact on the legal systems but also on the basis of political aims of the individuals and institutions supporting the Code. The development of a persuasive and wide-ranging European Model Penal Code would give its promoters and authors considerable authority and reputation in the inevitable process of the harmonization of European criminal law. Therefore, the process of drafting a European Model Penal Code could be taken on not only by the Council of Europe but also by the EU, by national criminal law institutes[94] or by a private association of lawyers such as the Associations of European Criminal Law founded under the auspices of the European Community.[95] Developing *the* European Model Penal Code would enhance the reputation for any organization which addresses these issues. For this reason, it is simply a question of time until somebody will try to follow the North-American and Latin-American example.

## 3. *Costs and Efforts*

The considerations set out above show that flexible model legislation does not have any real disadvantages. Therefore, the benefits of model laws (both for the European legal system and for the authors) need only be balanced against the costs and efforts required for the development of a European Model Penal Code.

It is difficult to estimate the cost and time necessary for developing a European Model Penal Code. However, the task will not be easy given the number and complexity of criminal laws in modern post-industrial society.[96] For example,

---

[93] *See* Sieber, in (1991) 103 *ZStW*, at pp. 957, 978.

[94] Such as the German Max-Planck-Institute (MPI) in Freiburg.

[95] *See* e.g. for the foundation of the German Association of European Criminal Law Sieber, *Europäische Einigung und Europäisches Strafrecht* (1993).

[96] *See* Sieber, in (1995) *CR*, at pp. 100, 110 et seq. The average traditional European Penal Codes comprise between 400 and 500 statutes, many of them with detailed subsections (especially in the field of economic criminal law).

developing the American Model Penal Code (which was financed by the Rockefeller Foundation) ran up US $500,000 of expenses over a period of approximately ten years.[97] To give a European example, when a group of experts from various European Associations for Criminal Law developed a 'mini-codex' of 35 provisions on the protection of the financial interests of the EU,[98] this took some six months and cost just under ECU100,000.

For these reasons, ways and means of speeding up the process and reducing the expenditure should be carefully examined before any decisions are made. These could include:

(1) use of existing material of various international and supranational organizations (for example in the fields of money laundering, subsidy fraud, computer crime, or environmental law);[99]
(2) careful selection of the participant in the group of authors of the model code (not only as regards their knowledge of law and their experience in comparative law but also as regards their management capabilities); establishment of small groups (still representing all European legal orders); adequate procedural rules for rapid agreement among the authors (for example via majority decisions and formalized ways of expressing minority opinions); division of labour among various sub-groups (co-ordinated by a well-organized steering committee); co-operation with other institutions and research facilities (which might have an incentive for co-ordinating 'their' fields of interest);
(3) reduction of work so far as the type of model is concerned (for example, development of a minimum and optional list instead of an ideal solution);
(4) limitation of the scope of the model code (for example, to economic crimes, general principles etc.).

It is evident from these factors and options that organization, personnel and the idealism of the authors are at least as important in developing a European Model Penal Code as money. Therefore, factors like time and money should not be decisive arguments against developing a Code. A well organized approach should enable a Code to be produced at a reasonable cost and within a reasonable time. In terms of skill and money, the sophisticated legal community of wealthy European States should be

---

[97] *See* Enschedé *supra* note 1 at p. 5.
[98] *See supra* note 95 and Delmas-Marty (ed.), *Corpus Juris der strafrechtlichen Regelungen zum Schutze der finanziellen Interessen der Europäischen Union* (1998).
[99] It goes without saying that it will not be possible to use one of the existing national codes as the base of the future European Penal Model Code. There is no generally leading criminal law system in Europe and the idea of 'colonialising' other legal orders is, as already mentioned above, abstruse. Thus, the future work can only be based on common European principles (especially the ideas of the Enlightenment) and on material elaborated internationally.

able to achieve what the North American and the Latin-American States have already managed to do. As a consequence this article makes some concluding recommendations designed to achieve this result.

## *IV. Recommendations for a Possible Plan of Action*

As illustrated in Section B.II that the Council of Europe is already working on legal models. So the real question is not whether the Council of Europe should develop such models but only to what degree and in which way it should continue its work.

There is no doubt that the Council of Europe should *continue with a sectorial approach* to the harmonization and integration of specific areas of European criminal law. In addition to this, it would not be difficult for it to direct its work towards developing partial or sectoral model legislation by focusing on general terms of reference for any future legal committee dealing with model legislation. As far as substantive law committees are concerned, their future terms of reference should include, for example, the development of non-binding minimum rules and optional lists and, if the political will is there, the formulation of ideal 'model' solutions. Such terms of reference should be tested in a pilot study when a new committee is set up.

In addition to the sectoral approach, a *horizontal approach establishing a general committee* would be helpful. This would enable general rules defining the terms of reference for the Council of Europe's future sectoral work to be drawn up (covering, for example, the types of models and the decision making process). The general committee would form the nucleus of any future steering committee for the European Model Penal Code by deciding how the work on different areas of law should be distributed to specialized groups. As an additional step towards a broader ('horizontal') European Model Penal Code, the committee could also analyse work which has already been carried out by various international institutions. This analysis should be in line with the structure of a possible penal code, differentiating, for example, in substantive law between the general part of the code, the special part (including further sub-division about protected interests, such as life, property, etc.) and sanctions.

Analysis of existing material could be done not only by one general group of lawyers for the whole range of the average penal code but also, more effectively and more ambitiously, by *specialized sub-groups* which could then become sub-committees should the European Model Penal Code be developed. Again, a specialized group with the aim of developing specific model legislation could be set up in a pilot project. The pilot project could be modest, focusing, for example, on the area of computer crime, or it could be more ambitious, taking the whole area of economic crime.[100] The sub-group could select for the pilot project either an area with more homogenous values (such as crimes against life) or an area where there are strong cultural specifics (for example the dissemination on international computer

[100] An important area to test the difficulties of model legislation could be pornography and racist material on the Internet (*see also supra* note 26).

networks of illegal material such as pornography, material glorifying violence or national-socialist propaganda). Dealing with a more difficult area could be used as a touchstone for the possibility of introducing a European Model Penal Court.

## E. Summary

International crime poses new global challenges which cannot be met on a national level but must be tackled by the community of nations. In the emerging global information and risk society, the traditional nation state can defend its power against its rivals only if it co-operates with other states and supranational and international organizations.

The drive to unity in the European criminal law system, which has existed in Western democracies since the Enlightenment, is being given greater impetus by the development of the global information and risk society. Today the driving forces behind this trend are the free movement of people, goods and services, growing supranational risks, and a *Zeitgeist* focusing on security and unity. The legal impetus behind this tendency derives from the ideas of the Enlightenment, especially the values encapsulated in the European Convention on Human Rights, which forms the common basis for all democracies.

However, this process of 'moving together' does not lead to uniform results. Criminal law systems may co-operate on the basis of different models and on different levels. This memorandum has illustrated this by analysing the different ways in which Germany, Switzerland, North-America and the Nordic countries co-ordinate their criminal law systems. In this process of moving together, the distribution of legislation to central and decentralized institutions, the influence of criminal law systems on one another and the way in which the law is administered are closely linked. It is not possible in any legal system to map out the development of these elements on a theoretical drawing board since their development is influenced by historical, political, economic, and cultural factors. As a result, there is a clear need for unification, harmonization and co-operation in various areas of criminal law, however, this need is not identical for all systems and all areas of the law but requires a high degree of differentiation and specificity. Finally, there will be different stages of integration depending on whether short, medium or long term solutions are adopted.

Developing non-binding model legislation (and, in particular, a more ambitious European Model Penal Code) would be an ideal way of assisting in this exciting process. Developing a European Model Penal Law would be a flexible and 'soft' way of promoting co-operation and would allow account being taken of cultural specifics. It would also be an effective way of bringing about rationalization, systematization and revision of national legal systems. This would be of particular assistance to newly formed states or states which are developing more democratic

and rational criminal law policies. Furthermore, the drafting of a European Model Penal Code would considerably enhance the standing and authority of whoever promotes it, whether that is the Council of Europe, another European Institution, national criminal law institutes or private associations of lawyers.

However, a European Model Penal Code with the scope of an average national criminal code is just one possibility. Minimum rules and optional lists are also an excellent way of improving the criminal law system of the future. Sectoral projects of varying scope could form pilot studies for more wide-ranging and ambitious projects and would provide effective short term solutions until all the pieces can be assembled in a comprehensive European Model Penal Code.

The Council of Europe has a wide range of options for future model legislation. Given the current political situation, we would recommend taking a decisive step in the direction of future model legislation by setting up a Committee whose remit would be to develop the terms of reference of the proposed legislation, in particular its type and structure. At the same time, one or two areas should be selected in order that the general approach could be tested with a view to developing a more comprehensive European Model Penal Code.