Supranational delineation of criminal repression: ideological developmental axes of EU criminal law*

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Abstract

The paper intends to highlight the main ideological pillars of the work in progress in EU criminal repression, as expressed in: (a) the founding treaties, (b) their promotion via EU-introduced criminal law, and (c) the case-law produced by the ECJ in its competence to interpret EU criminal law throughout its implementation. To serve this purpose, the presentation focuses on two key fields of EU interventions: penalizing fraud against the Union’s financial interests and terrorism. The research confirms both the supremacy of an EU ideology of aggressive self-protection by means of criminal law, which promotes a purely economistic policy without limits outlined by the rule of law, and an ideology of security endorsing a contemporary pre-emptive criminal law which leads to the penalizing of thought and mass-monitors EU citizens. ECJ’s reactions against this endeavor are sometimes detectable, albeit not a solid given. However, an essential monitoring of the Union law's punitive ideological deviations requires support from both member states and their judiciaries.

1. INTRODUCTORY REMARKS

1. Ideology is a system of ideas and values, particularly of the foundations of economic and political theory and action\(^1\). Ideology is often contradicted to social scientific knowledge and may include estimations that are non-receptive of empirical criticism or evaluation\(^2\). As accurately observed, “to know and speak the truth is the essence of science, while expediency is the soul of ideology”\(^3\).

2. Law expresses the ideological preferences of the forces prevalent during its shaping\(^4\), but also produces ideology itself.

3. The relationship between law and ideology\(^5\) is influenced not only by the legislature, but also by its practical implementation, particularly by the judiciary. The primacy of expediencies

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*This text is the English version of a presentation made at the 13th Panhellenic Conference of the Greek Association of Criminal Law on the topic of «Ideology and Criminal Law» which was held in Athens on 27-29.04.2018.


2 See I. Manoledakis, Introduction to Science (in Greek), 2nd ed., 127 et seq.

3 See I. Manoledakis, Law and Ideology (in Greek), 225.


5 See in relation to this topic, N. Luhmann, Soziologische Aufklärung 1 (Positives Recht und Ideologie), 1970, 178 et seq., where the author stresses that the sociological theory and research after Marx highlighted a very high level of complexity of the social system within which law is, at best, just a parameter and therefore considers absolutely
unrelated to legal provisions and stemming from diverse ideological preferences during the application of law leads to the corrosion of the law and of the very idea of justice⁶.

4. In democratic societies criminal law-associated ideology is linked to choices on punishment and the respect for human rights⁷.

5. Monitoring the reprimanding ideology of criminal law has historically emerged -in particular via the Enlightenment- through control and limitation principles for criminal repression and by acknowledging rights to those afflicted by it⁸.

6. The modern production of criminal law is not limited to the national level. Its provisions are drafted in an international environment and reflect the ideological preferences of the international organizations devised by the predominance of field-specific forces. Compared to the formation of national criminal laws, the corresponding international drafting process displays structural deficiencies in terms of democratic legitimacy⁹, and is quite frequently accompanied by inadequate consolidation of fundamental rights¹⁰. This is why checks and reservations on behalf of individual States -particularly those under an institutional framework acknowledging increased formal validity to ratified international conventions, such as the Greek one (Art. 28 § 1 CoG)- are of such great value. Nonetheless, each State still holds predominance over the ratification or not of an international convention and, hence, over the adopting or not of the latter’s ideological preferences regarding criminal repression.

7. In supranational configurations such as the EU, as in any two-tier lawmaking system of vertical intervention by the overlaying on the underlaying (i.e. on Member States)¹¹, things are different. Ideological preferences on criminal repression are expressed first and foremost through the founding treaties of such bodies, as, in our case, the EU. In addition, the diffusion and transposition in Member States of any ideology conveyed by individual legal instruments of (secondary) EU law with regard to criminal suppression, does not rely on the States’ freedom of choice to adopt them. Directives defining offenses and envisaging minimum sentences or procedural rules may express ideological preferences not endorsed by individual Member States, but are nevertheless binding, given the application of the principle of majority in the relevant field (Art. 294 TFEU). The only latitude available to Member States to remain unbound by such a directive is to evoke the exceptional mechanism of emergency suspension of legislative process [Articles 82(3) and 83(3) TFEU], which has so far remained unexploited by any Member State. Thus, EU’s ideological preferences on criminal repression are in principle necessary a sociological theory of law, within the framework of which the first duty should be the clarification of the relationship between law and ideology.

⁶ See, indicatively, comparing the majority and dissenting opinion in Judgement 11/2001 of the Supreme Court of Greece, Criminal Justice (in Greek) 2001, 1220 et seq. (which concerned the constitutionality of article 26 of law 2721/1999 regarding the statute of limitations of offenses of obstruction of transport which were committed by farmers during their demonstrations in March 1997) and the critical thoughts on this topic on the occasion of decisions that transferred the issue to the plenary by Ε. Συμεωνίδου-Καστανίδου, Amnesty and special statutory limitations, Criminal Justice (in Greek), 2001, 478 et seq.
¹⁰ Since the latter is only provided to the extent that it is recognised by the concerned international treaties. See indicatively regarding the deficit in guaranteeing substantive and procedural rights to citizens in international legislation concerning money laundering, N. Παρασκευόπουλος, Money Laundering and Human Rights, in Union of Greek Penologists, Money Laundering, «Clean» or Free Society?, 2007, 40 et seq.
¹¹ See M. Κατάφα-Γηντί, The EU and US criminal law as two-tier models: A comparison of their central axes with a view to addressing challenges for EU criminal law and for the protection of fundamental rights, 2016, 12 et seq.

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permeated and incorporated bindingly within Member States’ laws, which makes for a significant divergence compared to other internationally enacted criminal provisions.

Furthermore, the lack of democratic legitimacy in EU lawmaking has been reduced through the involvement of the European Parliament in the legislative process, but is not yet utterly eradicated\textsuperscript{12}. Under these circumstances, it is apparent that an increased risk exists for the predominance of ideological preferences of bureaucracy as a law-producing system.

Furthermore, EU’s history reveals that the consolidation of fundamental rights that are particularly valuable to monitor the punitive ideology expressed by criminal law arrived very belated in relation to the development of EU institutions and instruments of criminal repression (Lisbon Treaty, December 2009).

Finally, the ECJ is positively competent to interpret the secondary criminal law (Article 267 TFEU), and can utilize this institutional capacity to scrutinize punitively aberrant ideological preferences. However, the ECJ is not a court specialized in criminal matters, while it has been the driving force of EU advancement\textsuperscript{13}, even going beyond its institutional framework, which, however, does not apparently favor a role contrary to the relevant EU policy objectives, when this proves to be necessary.

Following the abovementioned remarks, this paper attempts to highlight certain core ideological pillars of the now developing EU criminal repression, as expressed first and foremost in the founding treaties, in the correspondingly produced criminal provisions, and in the relevant ECJ case-law which interprets the EU criminal law throughout its implementation.

2. COREIDEOLOGICAL AXES OF CRIMINAL REPRESSION ACCORDING TO THE FOUNDING TREATIES

EU’s competences of intervention in criminal law matters are committed to the creation of a single area of freedom, security and justice, i.e. the third major integration project of contemporary EU policy, following the single market and the monetary union\textsuperscript{14}.

In reading article 67 TFEU, one realizes that criminal law particularly pertains to paragraph 3 thereof, according to which: “The Union shall endeavor to ensure a high level of security with the adoption of measures to prevent and combat crime,……, measures for the coordination and cooperation between police and judicial authorities ….. and the mutual recognition of judicial decisions in criminal matters,…….” This general provision reveals the unilateral orientation of criminal law towards the security and facilitation of repressive mechanisms\textsuperscript{15}. Concurrently, paragraphs 2 and 4 thereof, referring to freedom and justice, are equally disappointing. Freedom is perceived simply as freedom to move within a Union without internal borders, and justice only as the facilitated access to its apparatus through the principle of mutual recognition of

\textsuperscript{12} See M. Kaiafa-Ghandi, The Treaty establishing a Constitution for Europe and challenges for criminal law at the commencement of the 21\textsuperscript{st} century, European Journal of Crime, Criminal Law and Criminal Justice 2005, 500 and note 79. Cf. also BVerfG BvE 2/08, BvR5/08, BvR1010/08, BvR 1022/08, BvR 1259/08, BvR 182/09 of June 30\textsuperscript{th} 2009, paras 276 et seq.

\textsuperscript{13} Regarding the scientific thoughts in relation to the role of the ECJ and the recognition of its decisive role in the process of unification, see E. Sahpekidou, European Law (in Greek), 2\textsuperscript{nd} Ed., 2013, 517-518.


\textsuperscript{15} See, indicatively, in relation to the same choice made in the draft of the Treaty for the adoption of a Constitution for Europe, Th. Weigend, Der Entwurf einer europäischen Verfassung und das Strafrecht, ZStW 2004, 275-277, 302.
judicial decisions. This outlook has nothing to do with the concepts of freedom and justice of the European legal culture, as elaborated through the teachings of the Enlightenment.\footnote{See P.-A. Albrecht, Die vergessene Freiheit, 11 et seq. 117 et seq. With regard to freedom cf. also K. Günther, Bedrohte individuelle Freiheit im aufgeklärten Strafrecht-Welche Freiheit?, Kritische Justiz 2016/4, 520 et seq.}

Thus, one observes that the articulated ideological platform of EU criminal law development sets the scene for a criminal law containing an aggressively punitive rationale that has nothing to do with its subsidiarity and its use as ultima ratio as imposed by the rule of law principles.

The ideological articulation of this prospect is distilled through the notion of security, a “super-legal interest” which in reality is not such in itself, but rather the result of many different legally protected civil interests, such as life, physical integrity, property, etc.\footnote{See the analysis in M. Kania-Ghandi, The Delimitation of the Offense of Terrorism and the Challenges in a Rule of Law-Oriented Criminal Law, in vol. II for Manodelakis (in Greek), 2007, 271 et seq. and especially 276.} This notion of security as a tool, with its abstract and obscure features, facilitates the acknowledgement by individuals of violations against it where they do not actually exist, thus decomposing the principles of criminal law that require its operation as a last resort, under specifically defined concepts and subsidiarity.

To ensure the vital balance between criminal law’s objectives within the EU founding context, one is compelled to resort to the combined interpretation and application of Article 67(1) TFEU and especially Article 6 TEU. These provisions establish EU’s commitment to respect fundamental rights and its accession to the ECHR. However, the hitherto unsuccessful accession to the ECHR\footnote{See opinion 2/13 of ECJ (Plenary), 18 December 2014.} -despite the exponential increase in EU legal instruments which facilitate repressive mechanisms- confirms the primacy of security in the abovementioned sense at an institutional and practical level. The same manifestation is documented by the mere quantitative comparison between legal instruments on criminal procedure (especially those promoting the principle of mutual recognition of judicial decisions) and those referring to a harmonized consolidation of procedural rights for suspects and defendants\footnote{See for a concise reference to them I. Anagnostopoulos, Rights of defendants in the EU: The directives 2010/64/EU and 2012/13/EU, Athens, 2017, 201 et seq (in Greek) and with regard to the future perspectives, op. cit., 203-204.}

3. CENTRALIDEOLOGICAL FOUNDATIONS OF CRIMINAL REPRESSION IN THE CONTEMPORARY SECONDARY EU LAW: THE EXAMPLES OF FRAUD AFFECTING THE FINANCIAL INTERESTS OF THE EU AND TERRORISM

Moving ahead to the secondary EU law via which the Union implements its political objectives in the field of criminal justice, two indicative samples should catch one’s attention: offenses against EU’s financial interests on one hand, and organized crime and terrorism on the other; the prior refers to the protection of EU’s own legally protected interests\footnote{Cf. the efforts that have been made already at the time the EU did not have competence of intervention through the directives 2010/64/EU and COM 2002 577 final (in Greek) and with regard to the future perspectives, op. cit., 203-204.} which are reasonably emphatically promoted, insofar as a subject to the fortification claims self-protection, while the

\[\text{16}\] See P.-A. Albrecht, Die vergessene Freiheit, 11 et seq. 117 et seq. With regard to freedom cf. also K. Günther, Bedrohte individuelle Freiheit im aufgeklärten Strafrecht-Welche Freiheit?, Kritische Justiz 2016/4, 520 et seq.

\[\text{17}\] See the analysis in M. Kania-Ghandi, The Delimitation of the Offense of Terrorism and the Challenges in a Rule of Law-Oriented Criminal Law, in vol. II for Manodelakis (in Greek), 2007, 271 et seq. and especially 276.

\[\text{18}\] See opinion 2/13 of ECJ (Plenary), 18 December 2014.

\[\text{19}\] See for a concise reference to them I. Anagnostopoulos, Rights of defendants in the EU: The directives 2010/64/EU and 2012/13/EU, Athens, 2017, 201 et seq (in Greek) and with regard to the future perspectives, op. cit., 203-204.

\[\text{20}\] Cf. the efforts that have been made already at the time the EU did not have competence of intervention through means of criminal law in the first (community) pillar of the previous regime. From this period derive not only the proposal of a directive on the criminal-law protection of the Community's financial interests (COM 2001 272 final and COM 2002 577 final) and the Green Book concerning the criminal protection of financial interests of the Community and the establishment of the European Public Prosecutor’s Office (COM 2001 715 final), but also the famous draft Corpus Juris, which was produced upon assignment by the Commission to an experts’ team from various member states (see Corpus Juris 2000 Version of Florence, and M. Delmas-Martel/J. Vervaele (eds), The implementation of the Corpus Juris in the Member States, Vol I 2000, Vol II 2000, Vol III 2000, Vol IV 2001).
latter encompasses areas of undoubtedly dire international criminality which is currently tremendously vexing\textsuperscript{21}.

### 3.1. On fraud affecting EU’s financial interests

The Directive for EU-fraud and the EPPO Regulation were passed in July and October 2017, respectively.

#### 3.1.1. The EU Directive on the fight against fraud to the Union’s financial interests by means of criminal law

The Directive includes four focal points that reveal its ideological preferences: (a) the inclusion of VAT fraud in its scope, when total damages exceed € 10.000.000 and the relevant acts are linked to two or more countries, (b) the so-called “other criminal offenses against the financial interests of the EU”, (c) the penalties, and (d) the statute of limitations for specific criminal offenses.

As regards point (a), VAT fraud appears in Art. 3 of the new directive as an act affecting EU’s financial interests\textsuperscript{22}, in accord with the relevant ECJ case-law\textsuperscript{23}. However, it is well-known that VAT revenue does not constitute in itself EU budget proceeds. It is property owned by the Member States and they are obliged to allocate a certain percentile of it to the Union. So, whatever damage is done to the EU assets is indirect, i.e. it signifies the inability of the Member State to reimburse evaded inflows from its own property\textsuperscript{24}. The ECJ’s and the Directive’s opposing perspective on this issue essentially converts a national legally protected interest into an EU one, and incorporates it as such under the Union’s criminal protection regime. The scientific misconception can be understood, if one considers that the same argument may be used to turn any fraud against the national GDP that affects the calculation of the Member State’s contribution to the EU budget into an offense against the EU’s financial interests.

The ideological footprint of the Union’s mindset is clear: the expediency behind the consolidation of tax collections to be apportioned to the EU turns a national legally protected interest into a Union’s one before it becomes such. Thus, it is defensible to say that the party under protection by criminal law strives to defend itself against damages on still unowned yet claimed assets, particularly insofar as they relate to its financial constituent.

Furthermore, the ideological preference towards a concealed and perhaps voluntary confusion over the protected legitimate interest is apparent in the so-called “other criminal offenses against the financial interests of the Union” (Article 4). According to the Directive, these include money laundering of assets derived from EU-fraud, active and passive bribery that are detrimental or possibly detrimental to EU’s financial interests. However, it is highly doubtful that money laundering and the precedent offense affect the same legally protected interest,


\textsuperscript{22} See the directive’s preamble (EU) 2017, 1371, para. 4.

\textsuperscript{23} See indicatively the ECJ’s judgements in Aklagaren v. Hans Akerberg Fransson C-617/10, of February 26th 2013, para 26 and Taricco I, C-105, 14, paras 37-38.

\textsuperscript{24} See Th. Papakuriakou, Tax offenses I-Introductory Remarks, in S. Pavlou/Th. Samiou, Special Criminal Laws, 5th update (in Greek), November 2016, 11-12.
while contemporary theory rightly rejects this outlook. Therefore, money laundering of assets derived from EU-fraud does not assail EU’s financial interests. In addition, any detrimental or possibly detrimental bribery primarily and evidently affects another legitimate interest (public office, national or EU), which is anyhow safeguarded independently at EU level. Therefore, drafting a whole set of provisions around EU-fraud and falsely labeling it “other offenses against the financial interests of the Union” serves but expediency by ideologically promoting the core choice to ensure effective protection of EU’s financial interests. In particular, it facilitates the establishing of EPPO competence for the prosecution of the relevant offenses and, most importantly, by extension it instrumentalizes substantive criminal law for procedural purposes of effective prosecution.

The logical continuation of this wearisome process extends to the field of penalties. Therein, sanctions for EU-fraud and for other offenses against the financial interests of the Union [Article 7(3)] are not distinguished from a demerit perspective when the damage or benefit exceeds € 100.000. Then again, one rightfully wonders how abuses against different legally protected interests –namely, EU assets and public office- are equated, especially when the latter requires an additional damage or threat against the Union’s financial interests. Evidently, the ideological confusion over what is punishable and the focus on procedural expediencies does not benefit compliance with the proportionality principle.

The primacy of effectiveness in the protection of the Union’s financial interests is also obvious in EU’s novel provision on the statute of limitations for the corresponding offenses, which imposes a minimum time threshold for the limitation of serious EU-fraud offenses (Article 12). This intervention in the criminal justice systems of Member States is incompatible with EU’s primary law. Of course, this establishes the obligation to provide effective protection of Union assets, but in referring to criminal law in specific, it envisages that Member States shall take the same measures to counter EU-fraud as they do to thwart fraudulent acts violating their own financial interests. Therefore, Union law cannot institute an obligation for a special statute of limitations for violations against EU’s financial interests.

Consequently, the safeguarding of EU’s financial interests according to Union criminal law is typified not only by an apparent ideology of continuous expanding and offensive self-protection

25 See N. Chatzinikolaou, The criminal repression of the legalisation of revenues from criminal activities in M. Kaiafa-Gbandi (scientific supervision), Financial Crime and Corruption in the Public Sector, I Assessment of the current institutional framework (in Greek), 2014, 748 et seq, 758, 767, and the containing footnotes.
26 Cf. the criticism to the draft directive M. Kaiafa-Gbandi, Criminalizing the violations of the EU’s financial interests, in M. Kaiafa-Gbandi (scientific supervision), Financial Crime and Corruption in the Public Sector, I Assessment of the current institutional framework (in Greek), 2014, 476 et seq.
27 See article 4 of the Regulation for the European Public Prosecutor’s Office, according to which the EPPO shall be responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices to, criminal offences affecting the financial interests of the Union which are provided for in Directive (EU) 2017/1371...
29 Article 12 par. 2 foresees that: «Member States shall take the necessary measures to enable the investigation, prosecution, trial and judicial decision of criminal offences referred to in Articles 3, 4 and 5 which are punishable by a maximum sanction of at least four years of imprisonment, for a period of at least five years from the time when the offence was committed».
30 Of course, this choice of the EU was obviously aiming for a relatively short deadline of statutory limitations that would not overturn the existing choices of member states. However, this constitutes a coincidental result without meaning that it does not lead to a problem in relation to the general institutional choice of determining a special statutory limitation for the crime of fraud against the financial interests of the EU.

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which lacks inhibitions and exceeds competence, but also by an ideology of instrumentalization of substantive criminal law to guarantee full effectiveness of criminal repression.

3.1.2. The EPPO Regulation

The prevalence of effectiveness in suppression of offenses against EU’s financial interests is manifest in the recent EPPO Regulation31.

Article 41 on the rights of suspects and defendants introduces a complementarity model between Union and national law to protect procedural rights, and a system promoting more favorable treatment (: when the national regime offers a higher degree of protection compared to its EU counterpart). Priority is given to the minimum level of protection foreseen by Union law for the relevant rights, while national provisions operate complementarily, either when they envisage a higher level of protection, or when they acknowledge rights not granted by EU legislation or by the ECHR. This system, is not as rights-friendly as it appears to be32. This is because of the increased complexity resulting from the combination of EU and national law and the multitude of applicable national provisions, which may even stem from different member states (e.g. on collecting evidence from different EU legal orders).33 In addition, this model does not ensure legal certainty and predictability to allow for the adoption of an effective legal defense, nor does it cancel the peril of a procedural tangle, where different levels of protection will coincide within the same criminal procedure, even referring to the same right (as, per example, when a suspect has been examined in more than one member states, the right to silence and non-self-incrimination). Besides, this system cannot obstruct the mutual recognition of judicial decisions of other member states as far as they are based on the lower protection level proscribed by the EU.

At the level of consolidating human rights, this setting confirms the primacy of an ideology of aggressive EU self-protection by means of criminal law which managed to prevail, unsurprisingly with responsibility of the represented Member States -such as Greece- through enhanced cooperation, to the extent that the proposed provisions did not win unanimity34.

3.2. Core ideological axes of criminal suppression of terrorism

In the field of terrorism, on the other hand, the new Directive ((EU) 2017/541) commands a change of paradigm in the role of the criminal law, as characteristically palpable in the introduction of punishability for traveling with the intent of terrorist acts and for organizing or facilitating such journeys (Articles 9 & 10). In particular, the neutral act of traveling from or to a Member State with the intention to participate in the activities of a terrorist group or for the purpose of providing or receiving training to commit terrorist acts becomes punishable, and so does its attempted variants (Article 14(3) (!). The radical leap in punishability within what I
have already named pre-emptive repression\(^{35}\) (in view of the past regime of Framework Decisions on terrorism) is articulated in a scientifically inaccurate, ideological manner, appears as a punishment of preparatory acts, and consists in the fact that the herewith punishable acts themselves do not indicate any link whatsoever with terrorism. Thus, the weight of punishability is inevitably conveyed by a criminal purpose, which cannot be derived from the punishable act, given that a trip itself or even an entry into a country can never express it. Here lies the big difference with the punishing in exceptional circumstances of various acts traditionally viewed as preparatory in our criminal law (e.g. those of high treason-Art. 135 grCC or of explosion-Art. 272 grCC). In these cases, the corresponding acts reflect -at least in view of their characteristics- a certain risk to the legitimate interests, and allow for the drawing of a conclusion on the intended ensuing offense. However, as long as the objective basis of punishability is not defined in such a way that enables such a link, any legitimization of criminal law intervention remains feeble, while the subsequent uncertainty for the inspected citizen becomes apparent.

This pre-emptive criminal law -which now administers a set of preventive measures before any kind of actual risk surfaces against legally protected interests- essentially ends up repressing thought. It often utilizes a misleading terminology, thereby concealing the scientific truth. So, it is noticeable, for example, that the so-called “recruitment” of terrorists according to the directive is nothing more than a simple incitement of another person to commit or to contribute to the commitment of a terrorist crime, i.e. a mere attempt to instigation\(^{36}\). These misleading and bloated designations facilitate the approval of the provisions and the requirement for strict penalties. At the same time, though, they become an aspect of political management of criminal law\(^{37}\).

This assignment of punishability on neutral acts has a very significant accompanying upshot. Acts such as the travelling for terrorist purposes, if the specific purpose is lacking, may be committed by almost everyone. Monitoring them in a wider relevant context -since such acts individually may not reveal the purpose- is the next step in criminal repression, to enable the collection of information as to which of them could be of State interest in combating terrorism. Hence, the ideology of security not only becomes a lever for promoting a criminal law which moves slowly but steadily from punishing acts to punishing thought but also develops into the justification for mechanisms of mass citizen surveillance through the collection and exchange of personal data of persons flying from country to country\(^{38}\).


\(^{36}\) See regarding the deceiving terminology Kaiafa, Criminal Chronicle (in Greek) 2009, 388, 393-394, 396.


\(^{38}\) See the PNR agreements of the EU with third countries, which caused significant problems in light of the much lower protection level of personal data in such countries. The beginning occurred in 2003 under the pressure of the USA. Today, the EU has signed such agreements with the USA, Canada and Australia. An agreement with Mexico is currently under negotiation, while the same is expected to occur with Japan prior to the Olympic Games of 2020. The concluded agreements have multiple problems of deficient protection of private life and personal data. The

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On the other hand, it is noticeable that while the objective of combating and preventing terrorism relates to a “super-purpose” of safeguarding a multitude of legally protected interests—including modern democracies themselves—and is thus presented as something quite exceptional that requires a “special” approach, the relevant provisions’ content attests that the assumed measures do not relate to any such “special” issue, as evident in the headings of the relevant legal acts or their preambles. The extent of the Prüm convention, for example, which has been included in the EU acquis and refers not only to terrorism but to a batch of various offenses which are not even defined and need not be transnational in nature, is representative of provisions that pass under the pretext of terrorist threat to extend their application on a whole range of violations, for which they are impossible to justify in terms of proportionality (e.g. automatic online access to protected information stored in personal information databases of other Member States, such as DNA profiles).

If one adds the Union’s plans to enable interoperability between existing databases to this picture, then the system of mass monitoring as to the subject of reference (i.e. as to whom it concerns) will also begin to acquire features of massive-scale application to the subjects under monitoring, since inter-functionality refers to databases automatically accessible by several operators, even from different jurisdictions.

In promoting the ideology of security, the EU anti-terrorism legislation not only increasingly compromises itself with the retribution of thought, but is also constantly supplemented by measures of mass citizen surveillance, to achieve identification of the individuals whose criminal purpose it seeks to suppress, as the acts it punishes cannot express it. In this way, the ideology of security erodes the rule of law and fails to objectively promote the security it promises, as it covertly infringes a numerous rights of persons entirely uninvolved to the problem it seeks to address.

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39 See, inter alia, the preamble of Directive (EC) 2017/541 para 2.
40 The transposition into EU law of the Prüm Convention, which was initially signed by seven member states, was accomplished via Council Decisions 2008/615/JHA and 2008/616/JHA. Despite the substitution of specific provisions through the abovementioned Decisions, the Convention retained its substance and its applicability on what was not included in the Council Decisions (article 35 para 1 of Council Decision 2008/615/JHA), while its articles 1-3, 8, 9 and 12 unambiguously expose the expansion of its applicability provisions in “criminal offences and their investigation” in general.
41 See also for the ambitious interoperability plan, COM/2017/0794 final -2017/0352 (COD), available online at https://eur-lex.europa.eu/legal-content/EL/TXT/PDF/
43 See M. Karia-Gbandi, The EU paradigm on exchanging information for crime control and the challenges on the protection of personal data: shifting to a “borderless” information exchange to combat terrorism (publication pending).

The next issue of concern is whether the ECJ -according to its competence to interpret EU law- monitors the Union’s ideological preferences that do not comply with its founding Treaties and its institutional framework in general, or it promotes such ideological divergences by supporting them.

Two interrelated ECJ Grand Chamber decisions (Tarico I\(^44\) and II\(^45\)) are depictive of this reflection.

Tarico I was a preliminary ruling to a question submitted by an Italian court in a case of establishment and participation in a criminal organization intending to commit VAT-related offenses, which would certainly become foregone (by 8.2.2018 at the latest) prior to the issuing of a decision, despite the interruption of the limitation period. Considering that specific provisions of primary EU law\(^46\) were violated on account of these events, the requesting court believed that if it were allowed to circumvent the national provision on limitation, this would guarantee the effective implementation of EU law.

The ECJ considered that the Italian court essentially asked for clarification on whether national legislation on the limitation period ends up impeding the effective countering of VAT fraud. It replied that the national court should verify whether the national provisions practically allow for the effective reprimand of serious EU-fraud cases; if not, the national court must ensure full effectiveness of EU law, rendering -if necessary- national problematic provisions inapplicable, without having to pursue or await upon their abolishment through legislative channels or any other constitutional process (paragraph 49)\(^47\)\(^48\).

This ECJ ruling deconstructs the rule of law, and is dogmatically flawed\(^49\). Indeed, it is easy to imagine that national rules on the statute of limitations must remain outright inapplicable because they contradict EU law, but what does this imply? In practice, it means that the offense is not subject to any limitation period, as the judge may not assign new, longer limitation intervals for each specific case. However, the de facto abolition of the statute of limitations lies outside the competence of the judiciary, as it violates the principle of separation of powers.

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\(^{44}\) See case C-105/14, ECLI:EU:C:2015:555, of 8 September 2015 (Grand Chamber).

\(^{45}\) See case C-42/17, ECLI:EU:C:2017:936, of 5 December 2017 (Grand Chamber).

\(^{46}\) Those relating to healthy competition (articles 101, 107 of the Treaty of the Functioning of the European Union) and the case for healthy finance in every member state (article 119 of the Treaty of the Functioning of the European Union), as well as Directive 2006/112/EK (article 158) for VAT.

\(^{47}\) Considering the supremacy of the EU law, article 325 of the Treaty of the Functioning of the European Union results in rendering automatically inapplicable any opposing provision of national legislation (thought 52).

\(^{48}\) Nevertheless, in case the national Court does not implement the national provisions, it is obliged, according to the ECJ, to ensure respect for the fundamental rights of the concerned individuals (thought 53). However, according to the Court, article 49 of the Charter does not pose a problem in the concerned case, because on the basis of the above approach the consequence will only be the non-reduction of the expiration of the general statute of limitation in the framework of pending criminal proceedings (thought 55).

In Taricco I, the ECJ seems to not have accounted for the fact that the limitation period is grounds for eradication of punishability in many national legal systems, i.e. an institution of substantive criminal law. This means that any change to the relevant current regime can only be governed by the (even retroactive) application of the more lenient version for the defendant, in accordance with the respective fundamental principle bindingly enshrined in the Charter of Fundamental Rights (Art. 49)\(^5^0\). Therefore, even if ECJ’s outlook as expressed in Taricco I were to be accepted, it could never encompass pending cases.

Finally, the inclusion of the statute of limitations in a legal order’s substantive criminal law and, specifically, its punishability-abolishing aspect (as the case is in Greek law) render the ensuing application of the legality principle reasonable, as the elimination of punishability eradicates the offense by annulling the prospect of punishment. Hence, predictability as to the statute of limitations is imperative for citizens, as is the provision envisaging the threatened penalty.

In view of these setbacks and immediately after Taricco I was issued, it is no coincidence that the Italian justice submitted questions to its Constitutional Court for similar cases. In turn, the latter turned to the ECJ and asked it to examine whether the primacy of EU law extends to cases where its application would infringe fundamental principles of the Italian constitutional order, such as the principle of legality\(^5^1\).

Fortunately, ECJ’s response to the new question of the Italian Constitutional Court renounced its former perspective, although it is obvious that the ECJ tried very hard in its judgement not to let its retreat be recognizable. It avoided also to answer the delicate question of a possible supremacy of EU law over the Italian Constitution\(^5^2\). It accepted however expressis verbis that “the nullum crimen nulla poena sine lege” principle is vital to the Union’s legal order and may not be undermined by the obligation to ensure effective collection of EU’s own assets (paragraph 52).

This recoil on behalf of the ECJ is an essential victory of all those insisting on the effective protection of fundamental rights within the Union. More generally, it is a victory for the primacy of law against an economicist and short-sighted ideology of effective protection of the Union budget, which deliberately disregards that even the safeguarding of financial interests by the self-protecting State may only be implemented to the advantage of its citizens, for the benefit of whom it exists.

Consequently, despite the risk involved in trying to draw general conclusions from a typical - yet exemplary- application of an ECJ judgement, one can rather securely argue that the monitoring process of EU’s contemporary punitive ideology during the implementation of Union law by its institutionally appointed custodian, the ECJ, remains open and may support a

\(^{50}\) See in relation to the application of the most lenient criminal provision in the jurisprudence of the ECJ, decision of 3.5.2005 in the joined cases C-387/02, C-391/02 and C-403/02 (Berlusconi et al.) and decision of 6.10.2016, case C-218/15 (Paoletti et al.).

\(^{51}\) See Corte Const., no 24/2017, and the related presentation of Viganò, EuCLR 2017,107 et seq. Cf. also regarding the broad critical discussion of this decision in the Italian criminal theory Viganò, see above, 110, fn. 25.

\(^{52}\) See I. Dimitrakopoulos, The principles of legal certainty, of accuracy and foreseeability-The statute of limitation in cases of offenses with regard to VAT and the relationship between national Constitution, The Charter of Fundamental Rights of the EU and ECHR in the ECJ’s judgements Taricco I and Taricco II, [http://www.humanrightscaselaw.gr/uploads/4/8/0/3/48039377/taricco_%CF%83%CF%87%CE%AD%CF%83%CE%B7_%CE%A3_%CE%A7%CE%AC%CF%81%CF%84%CE%B7_%CE%95%CE%A3%CE%94%CE%91.pdf](http://www.humanrightscaselaw.gr/uploads/4/8/0/3/48039377/taricco_%CF%83%CF%87%CE%AD%CF%83%CE%B7_%CE%A3_%CE%A7%CE%AC%CF%81%CF%84%CE%B7_%CE%95%CE%A3%CE%94%CE%91.pdf), 15 (in Greek).

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kind of optimism for the future. Nevertheless, it needs backing through the contribution of its Member States, as proven by the recent example set by the Italian justice.

5. CONCLUSION

Lastly, allow me the following observation: as noticed, the EU’s contemporary institutional activities have turned the delivery of drastic self-protection of the Union’s financial interests and the gradual -yet unremitting- shift toward punishing thought within a criminal law of security which extends to the mass monitoring of citizens to locate the carrier of the criminal mind, into central ideological pillars of criminal repression. These punitive deviations express ideologies that are detrimental to criminal law and are also found outside the EU context, e.g. in the Greek criminal tax legislation and its statute of limitations. However, we should not forget that monitoring this divergence in our national law is much easier to do and can be effective if we so wish, with the widespread constitutionality control over criminal provisions. On the contrary, the punitive ideology expressed through EU law is quite difficult to monitor and possible only by means of questions addressed to the ECJ. This is why it is high time we sought active participation in the production of EU criminal law, with expertise and meritocratic selection in the core of our country’s representation (even at the level of legislative bureaucracy), and by exhausting the possibilities provided in EU’s institutional framework, aiming at the formulation of a criminal law in favor of all EU residents. In addition, it is crucial to preserve the importance of national judges in the application of EU criminal law to monitor any ideology that clashes the rule of law. To this end, the example of the Italian Constitutional Court’s queries to the ECJ in Taricco II bears the best testimony. We have established the freedoms of the European legal culture together, and together in unison we must defend them. EU’s institutional framework offers this potential; we simply need to exploit it, and not to retreat to a political management of criminal law for ephemeral goals.

53 See Th. Papakuriakou, Tax offenses 1-Introductory Remarks, in S. Pavlou/Th. Samiou, Special Criminal Laws, 5th update (in Greek), November 2016, 43 et seq. and especially 47.