

Editorial

Special Issue on Changing Approaches to Authority and Power in Criminal Justice

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1. Introduction

In present-day society various developments with regard to criminal justice systems occur at different levels. In the Dutch criminal justice system there are the manifestations of the risk society with its ideology of controlling (perceived and present) risks and dangers. Persons, cells and/or groups who have their own ideas about society or religion react against citizens, institutions, the administration and/or society as such. They commit crimes or carry out attacks with sometimes disastrous consequences. Apart from that, technological developments facilitate new forms of criminality for these persons, cells and/or groups as well as more or less ordinary criminals. New risks and dangers emerge. Politicians demand new, more severe criminal law legislation. However, the same technological developments allow investigating authorities to employ new methods and powers for the investigation of crime. This can result in an infringement of the fundamental rights of individuals.

On the juridical level, the Europeanization and internationalisation of criminal law is taking place and there is an increasing influence of the human rights framework on the criminal justice system. The Treaty of Lisbon provides the European Union (EU) with a more extensive legal basis for adopting directives for the approximation of criminal offences and sanctions against particular crimes, as well as rules of criminal procedure. The principle of mutual recognition is being advanced as the underlying principle for judicial cooperation (Article 82(1) TFEU). Furthermore, the process of changing the 34 framework decisions on criminal law(-related) issues into directives under the Treaty of Lisbon will continue; three are framework decisions that have

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already been replaced by directives¹ and others will follow.² These are only a few examples of the Europeanization of criminal law by means of Union law.

Next to that, there is the human rights framework, in Europe particularly based on the European Convention on Human Rights (ECHR). Landmark cases of the European Court of Human Rights (ECtHR) can have important effects on domestic criminal justice systems. The *Salduz* case,³ for instance, required the Dutch Supreme Court, the Dutch Government and the Dutch public prosecutor's office to adjust the domestic practice of police interrogations without even offering the possibility to consult a lawyer.⁴ When the draft directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest is adopted in its current form,⁵ the Dutch legislature and finally also the Dutch Supreme Court will have to change their current restrictive interpretation of the *Salduz* case. The draft directive obliges Member States to grant suspects or accused persons, in any event before any questioning, the right to have access to a lawyer. This right includes, amongst other things, the lawyer's right to be present during any questioning and hearing (Article 3(1) in conjunction with Article 4(2)). A draft bill has already been prepared to implement the forthcoming directive in the Netherlands.⁶ This is also a fine example of how human rights standards developed in the case law of the ECtHR are being incorporated and interpreted by the EU. These standards and the EU's interpretation thereof are then enforced by the traditional mechanisms of Union law: directives are binding as to the results they aim for (Article 288 TFEU), they can have direct effect and domestic criminal courts are obliged to apply the European Court of Justice's doctrine of consistent interpretation.⁷ Thus, the debate in the Netherlands as to whether the *Salduz* case entails the right of an accused person to have a lawyer present during the first police interrogation or only the right to consult a lawyer has been resolved.⁸

2. Changes in the criminal justice system; a new research programme

In the dynamics of these developments changes in the criminal justice system occur. These changes have effects with respect to forms of criminality, the relationships between individuals themselves and the relationships between individuals, institutions and government bodies. This will affect principles of criminal law: their meaning, content and mutual relations must be

1 Namely Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, OJ L 328, 6.12.2008, p. 28; Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements, OJ L 280, 27.10.2009, p. 52; Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 15.4.2011, p. 1.

2 See Commission proposal for a Directive of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA, COM(2010) 94 final; Proposal for a Directive of the European Parliament and of the Council on Attacks against Information Systems, replacing Council Framework Decision 2005/222/JHA, COM(2010) 517 final.

3 ECtHR 27 November 2008, *Salduz v. Turkey*, appl.no. 36391/02.

4 Dutch Supreme Court (*Hoge Raad*) 30 June 2009, LJN BH3079, NJ 2009, 349, *Brief van de minister van Justitie* [Letter of the Minister of Justice], *Kamerstukken II* 2008/09, 31 700 VI, nr. 117, respectively *Aanwijzing rechtsbijstand politieverhoor* [Instruction on legal assistance during police interrogations], 2010 *Staatscourant*, 4003.

5 COM(2011) 326 final.

6 *Conceptwetsvoorstel rechtsbijstand en politieverhoor* [Draft Bill on Legal assistance and police interrogation], 22 March 2011, <www.internetconsultatie.nl>.

7 More generally on the effects of directives, see S. Prechal, *Directives in EC Law*, 2005.

8 See, for instance, M.J. Borgers, 'Een nieuwe dageraad voor de raadsman bij het politieverhoor?', 2009 *Nederlands Juristenblad*, no. 2, p. 88-93 as opposed to T. Spronken, 'Ja, de zon komt op voor de raadsman bij het politieverhoor!', 2009 *Nederlands Juristenblad*, no. 2, p. 94-100.

reassessed. This needs to be done from the perspective of authority and power. Criminal law is used as an instrument to control perceived and present risks and dangers by creating the penalization of new forms of conduct, more extensive investigative powers, (swift) procedures to deal with criminal cases with less safeguards and so on, while citizens expect, on the one hand, an adequate response from the police and the judicial authorities, but, on the other, they seem to be inclined to doubt the authority of these authorities or to protest against certain measures taken by them. Furthermore, the process of Europeanization and internationalization requires a reorientation of the relationship between domestic legislatures, administrations and the courts, on the one side, and the European legislature and the European Court of Justice, on the other, in terms of powers and authority.

The new research programme by the Willem Pompe Institute for Criminal Law and Criminology sees to this pivotal field of power and authority. It is entitled 'Changing Approaches to Authority and Power in Criminal Justice'. The programme's central research question first addresses the following question: to which changes will the principles of criminal law be subjected as a consequence of societal, technological, European and international developments concerning criminality, relationships between individuals, institutions and government bodies regarding authority and power and the role of the criminal justice system? Answers to this descriptive research question allow an answer to be given to the second, normative part of the central research question: how should the criminal justice system react to these changes? In order to deal with this twofold central research question the research programme has three coherent research clusters centred on three sub-research questions.

The first cluster focuses on the relationship between public bodies (the legislature, the courts and the administration – the latter includes the public prosecutor's office) at the level of the national democratic constitutional state. The organisation, functioning and legitimacy of the domestic criminal justice system depend on the interaction between the legislature, the courts and the administration. Shifts at the level of legislation, for instance a catch-all criminal offence with a description of the criminal behaviour in open wording, confront the courts with a responsibility to crystallise the contents of the offence in order to apply the offence in a concrete criminal case. The courts are bound, however, by principles of law, such as the principle of legality. These and other shifts between public bodies give rise to questions with regard to the fundamental principles of criminal law as well as the role, position and responsibilities of the actors in the criminal justice system.

The second cluster takes it up to another level: the European and global level. This phenomenon influences and affects the process of globalization and Europeanization and criminality and the criminal justice system in a changing society are studied. The cluster is especially oriented towards European criminal law and the powers and possibilities of the EU, the human rights approach of the ECHR and international criminal law. The meaning of these phenomena, influences and effects for relations of authority and power of public bodies, institutions and individuals in their mutual relationships will be analysed and evaluated. I have already provided some examples above. The domestic criminal justice system and its response to societal problems and developments cannot be discussed without the European and global dimension. The national legal order is becoming increasingly intertwined with the European and international legal orders. As a consequence, public bodies, institutions and individuals give up some of their authority and/or powers, but there are also clear cases where they profit from the process of Europeanization and globalization. This can result in a rebalancing of these actors' authority and powers.

The third cluster, finally, brings together insights from the first and second cluster by means of focusing on the position of the individual. What are the positions, rights and responsibilities of individuals in changing authority and power relations between individuals, public bodies and institutions within the criminal justice system as a consequence of the developments studied in the first and second cluster? And, moreover, what is the individual's contribution to these changes? In present-day society the media, and the social media in particular, allow persons to voice their opinion on societal events or incidents and to demand intervention or another measure on the part of the legislature or the administration. This can result in legislation which interferes with individual freedoms. The legal protection of certain rights and freedoms will become more important, especially for persons in a difficult position, such as suspects at the pre-trial stage, defendants and their counsel in the criminal trial, victims who want to claim damages, and convicted persons.

3. What is this special issue all about?

The new research programme by the Willem Pompe Institute for Criminal Law and Criminology, as well as the programme's first deliverables were presented at the Utrecht University School of Law's Research Afternoon in May 2011. The programme started in January 2011 and will continue until 2016. It provides the framework for all research activities by researchers at the Willem Pompe Institute for Criminal Law and Criminology. Criminal lawyers, criminologists and forensic psychologists and psychiatrists work closely together under the umbrella of the institute. The new programme carries on with the Institute's tradition of interdisciplinary and comparative law research.

This special issue of the Utrecht Law Review contains the first deliverables. The issue opens with a contribution by Ferry de Jong. He discusses, on a theoretical level, one of the leading concepts in the research programme, namely authority. When criminal courts render their verdicts in criminal cases they apply and interpret the norms of criminal law. Those norms, however, govern the conduct of individuals, law enforcement authorities, institutions and others, so the legitimacy and authority of judgments is essential. The application of norms is guided by doctrine. According to De Jong substantive criminal law doctrine sees to the framework of unified and systematized theoretical concepts that define the preconditions for the imputation of criminal liability and fits different legal rules into functional parts of one systematically organized unit.⁹ De Jong identifies three kinds of developments which this substantive criminal law doctrine is experiencing: casuistry, formalization and proceduralization. He evaluates these developments and identifies the meaning and importance of doctrine in present-day judicial lawmaking. The function of doctrine is to provide tools for reflexive contemplation and to direct courts in their application of legal rules and norms. By doing this, doctrine contributes to legality and legal certainty. However, De Jong argues that the directive power of doctrine seems to diminish due to the mentioned developments. That may influence the concepts of the legality and legitimacy of court decisions.

Renée Kool deals in her contribution with a new form of criminality, namely online grooming. This encompasses behaviour consisting of an adult who actively approaches and seduces children via the Internet with the ultimate intention of committing sexual abuse or producing child pornography.¹⁰ Online grooming is made possible by technological developments

⁹ See De Jong in this issue, Section 1.2 and 6.

¹⁰ See Kool in this issue, Section 2.

(compare Section 1); the Internet allows contact to be easily made with children for criminal purposes. Thus a considerable risk of harm to children is created – Kool speaks of ‘stranger danger’. And almost everyone is convinced of the need for criminal law measures, also on the European level. But with respect to the application of criminal law many questions arise, such as how the offence should be defined given the fact that the act of grooming is mainly situated in cyberspace and which investigative powers the police and the judicial authorities should have at their disposal for adequate law enforcement in order to contribute to the confidence of citizens that the government is taking the necessary measures. These issues are typical of the issues that touch upon the essence of the new research programme. Kool discusses these and other issues. Using a comparative law approach she points to problems with the definition of the criminal offence of grooming in the United Kingdom and the Netherlands as well as with proactive investigation powers in both countries. She demonstrates the shortcomings of criminal law for offering precautionary protection. But the comparative law method also provides for inspiration to solve these problems.

In the contribution by Beijer and Liefwaard children are also the subject of their study, but now as victims and witnesses in criminal proceedings. According to the international standards in the 1989 UN Convention on the Rights of the Child and other international legal instruments children have a general right to participate. The contents and implications of this right are discussed. Then the focus shifts to the evidentiary value of child testimony in the United States. A difficult dilemma is sketched: how to balance the interests of child victims and witnesses and to prevent secondary victimisation with the interests of the defence to challenge child testimony. The discussion is taken to the level of the European human rights framework by discussing the same dilemma using the case law of the ECtHR and the framework decision on the standing of victims in criminal proceedings,¹¹ all this against the background of the fair trial concept. At the same time, the authors point to the fact that the ECHR does not guarantee child victims and witnesses the right to participate in criminal proceedings. There is a difference between international standards and the ECHR, although the authors conclude that the Member States of the ECHR can comply more easily with the international standards than the United States. In their contribution Beijer and Liefwaard comfortably switch between international law, American law and European human rights law and they allow the reader to learn from this comparative approach.

As a criminologist, Siegel devotes attention to those who divulge hidden wrongdoing. She observes a trend in persons who reveal crimes in the media and thus violate a legal or informal duty to keep matters confidential. Forms of criminality become public and the general public can conceive this as new crimes to which a criminal law response should follow. She also wonders whether this kind of behaviour can be classified as a form of betrayal. The opposite is also mentioned: in order to be successful in one’s illegal activities it can be necessary to convert public activities into secret ones. Siegel illustrates the trend and its multiple aspects with a well chosen selection of five cases, such as organised crime and illegal prostitution. The mechanism to promote openness and to dismantle the wall of silence – whistleblowing – is also discussed. However, having secrets as a citizen often means that one has a personal sphere without governmental intervention; this is a topic that relates to the relationship between the individual and the

11 Framework Decision (2001/220/JHA) of 15 March 2001 on the standing of victims in criminal proceedings, OJ L 82, 22.3.2001, p. 1. This framework decision will be replaced by a directive. To that end the Commission has developed a Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime, COM(2011) 275 final.

government and belongs to the third cluster of the research programme (compare Section 2). Her contribution sets the agenda and identifies topics for future research.

The special issue also contains several student papers. These contributions have been written by students who have been involved, in one way or another, in the teaching activities of the Willem Pompe Institute for Criminal Law and Criminology. These teaching activities concern the regular Master's programme in Criminal Law, the Excellent Master's track within the Master's programme in Criminal Law and the criminal law courses in the Legal Research Master's programme. The courses in the Master's programme and the Legal Research Master's programme are research-based. In their content, methodology, research skills and educational materials they reflect the research programme of the Willem Pompe Institute for Criminal Law and Criminology. We are also pleased to present these student papers.

The student authors Liselotte van den Anker, Lydia Dalhuisen and Marije Stokkel participated in the Excellent Master's track within the Master's programme in Criminal Law. In their contribution they search for a general European principle on the fitness to stand trial. From a comparative law study of England and Wales, the United States and the Netherlands, an analysis of the case law of the ECtHR and a study of EU law and EU documents they derive generally accepted core elements for constructing a general European principle of fitness to stand trial. Their conclusion is that a principle of fitness to stand trial can be considered as one of the general legal principles underlying the constitutional traditions common to the EU Member States.¹²

Sanne Buisman participated in the regular Master's programme in Criminal Law, but showed a particular interest in researching the topic of money laundering. She investigates how the third EU Anti-money laundering directive¹³ is transposed in the Netherlands and Belgium and takes a comparative law approach. In her contribution she demonstrates what the intensity of the approximation of a EU directive strives for and the discretion it allows for EU Member States in the implementation process, how this influences the way European Criminal Law affects domestic criminal law and how the results of a directive can be achieved or frustrated.

Last but certainly not least, there is the contribution by Tom Booms and Carrie van der Kroon. They participated in 'The Dynamics of Law in a European and International Context: Criminal Law I and II' of the Legal Research Master's course. One of the topics of this course is the principle of legality as it is interpreted and applied by the ECtHR and the convergence in the case law of this court with the case law of the ECJ. The latter has incorporated the interpretation of Article 7 ECHR with respect to the concept of legality and the *lex certa* requirement in its case law,¹⁴ while the ECtHR has finally decided that the *lex mitior* rule is part and parcel of Article 7 ECHR and, to that end, it has followed the ECJ.¹⁵ Tom Booms and Carrie van der Kroon have taken another topic, however. They have analysed the case law of the ECtHR concerning convictions for international crimes on the basis of international law. By accepting convictions for international crimes on the basis of international law, an infringement of Article 7 ECHR with respect to the prohibition of the retrospective application of criminal law is prevented when the relevant statutory offence is of a later date than the date at which the international crimes were

12 This formula is commonly used by the ECJ in its case law where it identifies general principles of EU law, see, for example, ECJ 3 May 2007, case C-303/05, *Advocaten voor de Wereld*, Par. 49.

13 Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJ L 309, 25.11.2005, p. 15.

14 ECJ 22 May 2008, case C-266/06 P, *Evonik Degussa*, Par. 38-40; ECJ 17 June 2010, case C-413/08 P, *Lafarge SA v. Commission and Council*, Par. 94.

15 ECtHR 17 September 2009, *Scoppola v. Italy* (No. 2), appl.no. 10249/03, Par. 103-109.

committed. Booms and Van der Kroon have analysed the ECtHR's case law from the internal perspective of consistency. They have verified whether the ECtHR has applied its seven-step approach to assess whether the international legal basis on which defendants are convicted is in conformity with Article 7(1) ECHR in six subsequent cases and, if so, to which extent. This is the first time that this has been done with respect to the legality principle in these kinds of cases; such cases are traditionally more analysed. This new approach has produced several remarkable results, which are summarily visualised in a comprehensive diagram at the end of their contribution.

I would like to invite the reader to take note of all the contributions in this special issue on changing approaches to authority and power in criminal justice. Finally, I would like to express my gratitude to all those who have made this special issue possible, including the contributors, the Editor-in-Chief of the Utrecht Law Review's board of editors, Ton Hol, as well as Titia Kloos, the managing editor, and Peter Morris, the language editor.