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Limits to criminal law

C.P.M. Cleiren

My role is to give you a short introduction to the items of the coming days. I don't like to talk out of turn. So I will restrict myself to an attempt to bring the items of the conference together in a way that you can use it as a guide for the coming discussions.

The interest in criminal law is of all ages.

We cannot claim the interest in criminal law as phenomenon of our decade, nor as phenomenon of a particular state.

That's not surprising because of the strong impact of this domain of law on society and on personal life of individuals.

This strong impact of criminal law in daily life can be considered as partly responsible for the fluctuation in criminal law thinking.

In turbulent period's public and political spokesman often refer to criminal law as the method to regulate, canalise and de-escalate actual problems in society.

The public has great expectations of the use of criminal law. Political representatives and the administration also try to tackle various social problems by interventions in the sphere of the criminal justice system, for instance by new legislation and by increasing law enforcement.

Nevertheless, the criminal justice system is not the only method of regulating behaviour. Moreover, it isn't even the primary method to make use of.

So, in other words, we may ask if the criminal justice system offers an adequate instrument to regulate behaviour and to realise social aims or goals?

To judge whether criminal law is an adequate instrument to reach these goals we ought to distinguish in several aspects as legitimacy, effectiveness, desirability, feasibility and enforceability.

During this conference these aspects will give an important background to the study and discussion on the main topic.

To start with, it is important to point out that the topic of this conference gives rise to reflection:

I think it is reasonable to emphasise the topic of limits to criminal law in two levels:

1. Internal aspects of criminal law.

Criminal law in force can be considered as the result of a long process. In most west European countries the criminal law system has its roots in the Age of Reason. Thus, because of these roots, there is a strong relationship with the rule of law and the significance of legitimacy and credibility.

We all know that the principle of legality is considered as one of the most important basic principles of our criminal law systems. This principle influences the law of procedure as well as the substantive criminal law. The legality principle is connected with other principles, such as predictability and proportionality.

In order to ensure sufficient predictability the offences must be defined clearly and made public, the sanctions ought to be related to specific crimes and citizens must be aware of the sanction that will follow.

The competencies of the judicial powers must be described and limited, the conditions ought to be clear. An important condition for instance can be found in the basic

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ground to start an investigation. Under which conditions judicial authorities can start a criminal investigation?

Does they have the competence to chose freely, or is there first step depending on a higher authority, or a fixed fact like an offence, suspicious behaviour, a suspect.

In addition I can mention the systematic character of legislation. In most of west European countries the system of substantive law is related to the underlying protected rights and interests.

Thus, strongly based on a long tradition and having roots in fundamental values and principles, the basic principles of criminal law hardly change.

Nevertheless the criminal law-procedure in most West- European countries, has shown itself flexible. The same can be concluded for substantive criminal law.

How can this be explained or understood?

2. External aspects of criminal law

We can focus on external aspects that affect (the use of) criminal law, just like the European Convention of human rights and the European Courts decisions. And, as you know, nowadays all European countries are confronted with limits and duties established by the European Union. These limits refer to aspects that ought to be taken into account when one applies the criminal law system. On the other sight it is necessary to mention that external aspects can also offer opportunities. For instance, comparing legal systems can offer new views and solutions for actual problems.

I will try to explain this point

National criminal law is not standing alone, nor standing apart and for several reasons.

- Depending on the national legal culture there will be links with other fields of law, like civil and administrative law; under circumstances the links between the field will offer opportunities, for instance in working together in law enforcement. In other circumstances the link to other field of law can give raise to domain conflicts.
- Criminal law is under pressure of European measures and conditions;
- Criminal law is bounded by the European convention of human rights;
- Criminal law is created in order to reach social aims; you can think of traffic offenses,
- Criminal law is limited by state-policy in the field of legislation;
- Criminal law is limited by finical backing of the state
- Criminal law depends on political thinking and ad hoc decisions.
- Criminal law depends on the national character of law enforcement,
- Criminal law enforcement depends on the partners in the judicial chain a instance on the national facilities for the execution.

In summary, criminal law is part of a broader field of action and consequently criminal law itself is a field in action.

If the aspects mentioned give rise to amendments, they don't give rise to change legislation directly. Nevertheless, a message for change cannot and may not be denied.

Summing up

Looking to the internal aspects, we can conclude that the criminal law is depending on fundamental norms and values.

For the criminal procedure we can defend that the limits are given by the balance between on one hand the public interest to enforce the law and on the other hand the individual rights that ought to be protected. In addition the criminal law procedure is bound by state-authority, restricted competencies, specific conditions etc.

In most west European countries this balance is laid down in legislation. The balance between both integrated interests will not change very fast. So, it is understandable the legislation will not be changed in case of ad hoc reasons.

The restrictions within the criminal law system can be found or be converted to the basis norms and values that are underlying the legislation.

Substantive law is created to protect important rights and interest. So, for substantive law we can defend that it is not allowed to change the underlying protected right or interest without democratic procedure. Thus, the principles of the rule of law and the democratic principles give restrictions.

So, criminal law procedure and substantive criminal law is strongly depending on fundamental values and norms of society.

Looking to the external aspects, we can conclude that criminal justice system is depending on several external factors and part of a broader field in action.

Consequently criminal law itself is a field in action. If we can point out limits, they have a relative character and can change every day. From this perspective and so on this level, limits within the criminal law system are relative.

Relation

The internal aspect of criminal law (1) and the external aspects to criminal law (2) are strongly related.

Nevertheless they have their own specific characteristics and dynamics.

The external aspects that influence and determine the criminal law are more dynamic than the internal aspects.

In what way the external and the internal aspect of the criminal system are related to each other?

Although the internal aspects seem to be inflexible, society is not a static organ. So in case of pressure by external factors the legislator has to ask itself what restrictions are lying in the system themselves in a way that they cannot be abandoned.

Values and norms, although basis and fundamental can change, or better, can be modified or moderated.

In case of fundamental changes in the dominant ideology of society, it is necessary to work out these changes in criminal policy and legislation.

So external aspects can give rise to the need to nuance or to adapt the connected value and norms in criminal law system.

But what is the adequate way for the legislator and the criminal justice authorities to deal with ad hoc ideas and short time solutions from politicians?

For the topic of this conference

I want to pose that wishes, inspired by external aspect can have strong and sometimes unintended results for the internal aspects of the system. Nowadays the external aspects have a strong weight and are in very large part conditional for the criminal justice system as a whole. Therefore we must be careful to change legislation in criminal domain only based on pressure related to external aspects.

Turning back to the topic of this conference: limits to criminal law.

So, we could distinguish two levels. At the first level we found the the important and fundamental limits for criminal law. The values and fundamental principles of that level are more timeless, constant and has their roots in our culture. They bind by legislation.

Nevertheless, the second level of the external aspects, seems to have strong and direct consequences for the first level, the criminal law system in itself.

To illustrate this point I would like to mention an important modification, or if you like transformation, which took place in the last century. The development and the fall of the Welfare state.

The welfare state, which has come to a head in the second half of the last century has had a great influence on the thinking of criminal law and criminal policy.

In short, the Welfare State involves that risks of individuals were collectivised and services and provisions were formulated as *rights of the individual citizens*. In this model of state-policy law is seen as an instrument of the government to control and shape the society.¹

This model implicated an extension of potential use of criminal law. Criminal law was brought into action to realise social aims.

However, at the same time, the ideological character of the Welfare State inspired to protect individuals against state-interventions.² As a result the Welfare State caused rather fundamental moves in law enforcement and criminal procedure. Law grew out to be more responsive. In criminal law this development gave rise to a greater attention to individual rights of the citizen and in particular to the suspect and the defence. In accordance with this change, the influence of the European Convention of Human Rights in most Western European countries increased.

Private life ought to be protected against the state and against state-involvement. Privacy was brought up as one of the most important values to be respected and protected. And the state, as the central construct of the Welfare state, was pointed out to guarantee these values.

Criminal procedure and criminal policy had to count with these values. Thus in respect of private life and depending of culture in west European countries, interventions of judicial actors had to be *modified or even transformed*.

So, in the concept of the Welfare state the increasing interference by the state was strongly connected to the recognition and protection of individual life. Although this connection wasn't considered as a contradiction, the Welfare state hasn't stand firm.

¹ A.C. 't Hart, Criminal law in action, An overview of current issues in Western societies.

² Rosanvallon, Que faire de l'État? En La crier de l'État-providence

At the end of last century most Western European countries proved to be incapable to finance the costs of the welfare state and, in connection with these problems the ideology lost position.

But also other aspects brought up implications to the skills of the welfare state. For instance, the increase of cases, which are to be dealt by the courts, caused problems for the judicial administration. In many Western European countries this problem led to a reorganisation of the structure of the judicial administration and the position of the judges and the board of the courts. It seemed to be was inevitable to reorganise the management the judicial administration. *The Welfare state was in crisis.*

As a matter of course, criminal law and criminal policy take part in the crisis of the Welfare state. Criminal justice took a great part in the overburdening of the courts. Criminal justice was very expensive and had to make drastic cutbacks, in all stages of the process.

The consequences made themselves known.

Where the trust of the citizens in criminal justice was built up in the previous decade's criminal justice lost its solid position. Although there is no direct need to change substantive criminal law, the strong position of the criminal justice system and judicial authorities in law-enforcement came under discussion. The specific attention to rights for the suspect and the defence is diminished.

The welfare state collapsed. New goals came up.

Politicians recognise the limits of making society. In addition one recognises the limits of the judicial system. Under these circumstances risks of individuals are no longer considered as a problem of the state. The caring state must withdraw.

To summarise, we can conclude that the ideology and concept of the welfare state had had great influence on criminal law and criminal justice system.

Basic values and principles, with their roots in the age of Reason had heavy times. The factors of the second level made a strong appeal to the values of the first level. Nevertheless, most of these aspects of the first level keep stand.

Nowadays. New topics do come up.

Criminal law is pushed to focus on the risks in this New World, like the risk of terrorism. But - till now - the ideology is not as clear as in the case of the welfare state. The ideology is hardly defined in positive terms. Most of the fundamental discussions are in terms of a re-action, reaction to danger. Terrorism, increasing criminality, etc . Risks itself are not really and clearly defined; Yet, fear is leading.

Safety and security are the new topics to believe in.

Although the aims of this new world are not well-defined in clear and future aims, we can signal that the fear, the political commotion, etc already has led to radical changes in criminal law. Criminal law is brought into action to realise safety. In terms of most political movements this development was according with social needs.

Nevertheless, we can question part of these changes.

Some of them took place at the first level. And we can doubt whether this was a reasonable choice.

Another new topic today is the raise of European Union. Does this New World give rise to fundamental changes at the first level of values and norms of ours systems?

I can try to translate my point in terms of daily life.

Every day we all need clothes to dress us. The volume is unlimited, the diversity enormous, the pressure to follow the trends is compelling. We chose our clothes depending on our budget, our weight, the colour of our eyes etc. And we throw them out as disposable articles.

There's no real problem is we chose the wrong colour, isn't it? We do not wear it and after some months we throw it away.

Nevertheless, clothes are very important for us and we cannot deny the influence on our daily life.

Every day we all need our body, to live. Nowadays the volume of possible changes is enormous. We choose for botox injections etc. Or even we choose for plastic surgery. But we will serious doubt to change more serious parts of our body. Only if necessary we take another organ like a heart or a kidney. And I hope the choice for another face will be kept from us.

Back to the topic of this conference and the items to be discussed in the speeches and the workshops.

All the items, which are chosen by the organising committee, can be considered from the perspective that I pointed out.

Is it wishful and legitimate to consider the leading factors in the discussion of the subject as factors of the first level?

Is it defensible and justifiable to rank new proposals as important and fundamental enough to moderate or transform fundamental values and principles of our criminal law.

There we meet the limits to criminal law.

I wish you all a very fruitful conference and a pleasant stay in Leyden.