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The Power of Comparative Constitutional Law Reasoning in European Criminal Law Procedure

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Abstract: This paper explores the constitutional dimension of comparative criminal law procedure in a European context. It does so by focusing on the European civil law traditions and by explaining how the impact of constitutional law reasoning has changed the criminal law landscape. The paper argues that the influence of European Union law and the European Convention on Human Rights regime together with other comparative law effects have led to an adapted version of the comparative law project, where the orthodox distinction between civil law and common law is largely erased. Specifically, the paper focuses on the question of fairness and justification in the criminal law process, the principle of proportionality and the notion of dignity in a comparative perspective. The paper draws on both doctrinal and theoretical examples.

Keywords: European criminal law, constitutional law, fair trial, principle of proportionality, dignity

1 Introduction

It is often said that a robust criminal law system needs a constitutional structure.¹ But why is the constitutional law project so central for our understanding of criminal law procedure across states? Constitutional principles, such as the rule of law, human rights and democracy, are intrinsic to the structure of a modern state and ensure a constitutional right to a fair hearing in criminal law. Moreover, the need to secure a decent and democratic society is the underlying reason as to why states have legislation on criminal law and procedure.² Indeed,

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1 See eg Alon Harel, *Why Law Matters* (OUP 2014) ch 2.

2 Avishai Margalit, *The Decent Society* (Harvard University Press 1998) 262.

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it has been suggested that punishment is the litmus test of a decent society, as the way a society conducts its punishment policies and procedures reveals whether it is a decent society or not.³ As Margalit argues a decent society treats human beings as humans, ie, with dignity.

The idea of a constitutional structure for understanding legal systems is paramount to any public use of coercion and the shaping of the criminal process.⁴ Such a structure also needs to fulfil basic notions of justice and fairness. For John Rawls, for example, the use of political power is fully proper only when:

it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in light of the principles and ideals acceptable to their common human reason.⁵

In this view, a well-ordered society is a fair system of social and political co-operation which is effectively regulated by a public conception of justice. Moreover, in Kantian terms, a crime is a transgression of public law that makes the person who commits it unfit to be a citizen.⁶ Modern day criminal law processes handle this claim of a need to be fit as a citizen, by justifying detention as either a pre-trial measure or a punishment upon conviction as a security measure and where criminal law is often considered as a justified use of coercion against the individual's freedom.⁷ Moreover, criminal law is distinctive because of its moral voice; it is a coercive system directed at controlling the behaviour of citizens.⁸ Coercion, then, as Joseph Raz has observed, is used to ensure compliance with the law.⁹ Likewise, the classic Weberian conception of the state as entailing a monopoly on the legitimate means of physical violence, both with respect to external conflicts, such as the decision to go to war and the internal maintenance of law and order confirms the idea of criminal law as

³ Ibid.

⁴ Jeremy J Waldron, 'Safety and Security' (2006) 85 Nebraska Law Review 454.

⁵ John Rawls, *Political Liberalism* (Columbia University Press 1993) 137; see, also, for example, Leif Wenar, 'John Rawls', *The Stanford Encyclopedia of Philosophy* (Spring 2017 Edition); Edward N Zalta (ed), available at <<https://plato.stanford.edu/archives/spr2017/entries/rawls>> accessed June 2018; and Wilfried Hinsch, 'Justice, Legitimacy, and Constitutional Rights' (2010) 39 Critical Review of International Social and Political Philosophy 39–54.

⁶ Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press 2009) 314.

⁷ Ibid.

⁸ Andrew P Simester and Andrew von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalization* (Hart Publishing 2011) 3–7.

⁹ Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986) 416–417.

essentially state bound.¹⁰ Therefore, it has been suggested that Weber used the word 'legitimate' in order to characterise one type of domination: the type in which obedience is based in part upon the belief that command is binding. In this sense, society has legitimacy when its members are willing to assume the disciplines and burdens which membership entails, including the policies on criminal law and procedure.¹¹ However, as one commentator points out, legitimacy is normally based upon what is considered to be successful practice in procedural and factual terms.¹² But why is this important in criminal procedural law context? As this paper will explore, it is very essential as the constitutional structure of a state is intimately connected to human rights protection and the question of the legitimacy of the criminal law process. Furthermore, as Malcolm Thorburn has argued, both criminal law and constitutional law deal with questions of justification, that is, what state authorities are entitled to do against individuals.¹³ The function of the criminal process is then to guarantee that state regulation of unwarranted behaviour is conducted in a fair and just way. In other words, both criminal law and constitutional law doctrines are concerned with justifying the power of the state and thereby the boundaries of individual freedom.

In addition, the constitutional structure is crucial in the context of criminal law procedure as a bridge to international human rights law. As Mattias Kumm stresses, the ongoing re-conceptualisation of sovereignty as shaped by international law, as well as the basic structural features of contemporary human rights practice and the increasing interaction between national and transnational human rights adjudication, means that the idea of national constitutional law is far from immune from the global impact of human rights law. This has consequences, as it shapes the manoeuvre for states to regulate their national criminal law procedures which, as will be seen, is particularly the case in Europe due to the strong Convention on Human Rights (ECHR) and European Union law influence which trumps conflicting national constitutional law.¹⁴ While the

¹⁰ Ibid.

¹¹ Discussed in John Simmons, 'Justification and Legitimacy' (1999) 109 *Ethics* 793, citing Charles Taylor, *Why People Obey the Law* (Yale University Press 1990).

¹² Sebastiano Maffettone, 'Global Legitimation and Reasonableness' in Giorgio Bongiovanni et al (eds), *Reasonableness and Law* (Springer 2009) 147.

¹³ Malcolm Thorburn, 'Criminal Law as Public Law' in R Anthony Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press 2011) ch 2.

¹⁴ Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009) 258–325.

ECHR system has strongly formed the EU criminal law project and influenced it from scratch, so to speak, this paper does not make any sharp distinction between the actual influence of ECHR vis-à-vis EU law on national criminal law procedure.¹⁵ The EU principles of effectiveness, loyalty and non-discrimination (as well as the different EU law structure, and the preliminary ruling system etc.) means generally that the EU law impact as such is more directly felt in the various Member States as compared to the broader impact of the ECHR obligations.¹⁶

The point here is rather that states must, as a matter of constitutional rights law, put in place a system which effectively protects the people from the dangers originating from other private persons, such as criminal activities which threaten, for example, life, physical integrity, or property.¹⁷ As Alon Harel argues, robust constitutionalism denotes a justificatory approach which does not justify constitutions merely by pointing out the desirability of the contingent desirable outcomes of constitutions.¹⁸ It maintains that, in addition to such desirable contingent outcomes, constitutionalism re-structures the relationships between the state and its citizens in ways that protect and promote human dignity. Furthermore, Martti Koskeniemi has noted that ‘what is important is the use of the constitutional vocabulary to express a fundamental critique of present politics’.¹⁹ This is why constitutional law is relevant in times of emergency. Does, for example, the threat of mass suffering (for example, a terrorist attack) justify pre-emptive measures, invasions of privacy, extraordinary rendition and other violations of human rights? How are we to adjudicate such questions from a theoretical and practical perspective?²⁰ Human dignity is often said to form a foundation for all constitutional rights and a central argument for the existence of human rights.²¹ Specifically, human dignity is the legitimating basis of public

¹⁵ On the ECHR and EU criminal law see eg Andre Klip, *European Criminal Law* (Intersentia 2014).

¹⁶ See eg Paul Craig and Grainne de Burca, *EU Law, text cases and materials* (Oxford University Press 2015) ch 1.

¹⁷ Kai Möller, ‘From Constitutional to Human Rights: On the Moral Structure of International Human Rights’ (2014) 3 *Global Constitutionalism* 373–403.

¹⁸ Harel (n 1) ch 2.

¹⁹ Martti Koskeniemi, ‘Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization’ (2007) 8 *Theoretical Inquiries in Law* 9, 35–36; also discussed in Vicky Jackson, ‘Paradigms of Public Law: Transnational Constitutional Values and Democratic Challenges’ (2010) 8 *ICON* 517.

²⁰ Harel (n 1) ch 2.

²¹ Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press 2015) 104–105; Jacob Weinrib, *Dimensions of Dignity* (Cambridge University Press 2016) 14–15.

authority because the concept of human dignity holds that each person has both a right and a duty to interact with every other person on terms of equal freedom.²²

In the following, I explore the claim that modern criminal law procedure is inextricably linked to constitutional law, and why it matters in civil law jurisdictions in Europe.²³ In doing so, this paper sets out to discuss what constitutional principles are *sine qua non* for a criminal justice system which respects the rule of law, human rights and democratic principles, and how these principles are safeguarded through constitutional law. Specifically, the paper explores the impact of constitutional law on the criminal law procedure across European civil law traditions. While the civil law tradition is diverse due to language and cultural differences between the countries, because of the EU integration project, national laws, including the codes of criminal procedure, have been harmonised through measures such as the European Arrest Warrant, which introduced mutual recognition in the area of criminal procedure.²⁴ Against this background, this paper investigates the implications of constitutional principles in contemporary criminal process and how constitutionalising may have led to a mixing of the civil law and common law traditions.²⁵

The paper begins by looking at the constitutional theory for understanding criminal law procedure. It also draws on national examples regarding how national constitutions deal with criminal law procedure. For example, the question of whether laypersons should participate in criminal trials, the debate on the principle of legality, and the question of mandatory prosecutions. Subsequently, the paper looks at fairness in the criminal law process and the right to a fair trial as a constitutional principle. Thereafter, the paper discusses the principles of proportionality and dignity, and their fundamental status both in constitutional law and in criminal law procedure, and how these axioms have spread from German law to EU and ECHR law, and how they shape all of the civil law jurisdictions in contemporary constitutional law in Europe. As criminal

²² Weinrib (n 21).

²³ On the history of criminal law, see Farmer, *The Making of Modern Criminal Law: Criminalization and Civil order* (Oxford University Press) ch 1.

²⁴ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1.

²⁵ The key distinction of a civil law criminal law procedure is surely the adversarial system and codified procedures. But as Dubber and Hörnle point out, a moderately close look at procedural criminal law in comparative context draws into question the usefulness and accuracy of the traditional distinction between adversarial and inquisitorial systems as they are increasingly becoming blurred. Markus D Dubber and Tatjana Hörnle, *Criminal Law: A Comparative Approach* (Oxford University Press 2014) ch 5.

law procedure involves the practice of state action against the individual, the legal safeguards for individuals is of paramount importance, and therefore it needs to be clarified what principles we are discussing. This paper tries to serve this purpose.

2 Constitutional structure: Theory and practice in European criminal law procedure

The public conception of justice is also fundamental to the idea of criminal justice. The right to a fair trial and due process are then reflected in the idea of a right to justification and the right to defend oneself.²⁶ The right to justification is not just a substantive criminal law notion in terms of justification of action, but one that is relevant in constitutional law and criminal procedure at large.²⁷ For this reason, criminal law is a ‘public law’ account because it conceives of the operations of the criminal justice system, in so far as they are legitimate, as concerned with the basic question of public law: to wit, when the use of state power is legitimate.²⁸ While this mainly concerns the question of the constitutional foundations of substantive criminal law, it also raises some interesting questions about the role of the state in procedural law and the power of courts. It has been suggested that, in order to determine more precisely when the competence of courts is supported by democratic legitimacy, we may employ the ‘three key values’ of democracy namely accountability, participation, and equality.²⁹ In this way, courts engage in reasoned deliberation and provide an explanation for the alleged violation.³⁰ Hence, courts provide individuals with an opportunity to raise their grievances and challenge what these individuals perceive (justifiably or unjustifiably) as a violation of their rights.³¹ As Rainer Forst argues, the basis of the demand for justice is the claim to be respected as an agent of justification, that is, in one’s dignity, as a being who can both ask for and give justification.³² Part of the justification of a criminal law system and its

²⁶ Ibid.

²⁷ Malcolm Thorburn (n 13) 21–43.

²⁸ Ibid.

²⁹ Eoin Daly, ‘Freedom as Non-domination in the Jurisprudence of Constitutional Rights’ (2015)

²⁸ Canadian Journal of Law and Jurisprudence 289–316.

³⁰ Ibid.

³¹ Harel (n 1). And draft paper Alon Harel ‘Robust constitutionalism’ (on file with the author).

³² Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (Columbia University Press 2012).

procedure is to guarantee security both within the state and to the citizens.³³ As Jeremy Waldron points out, for thinkers such as Hobbes, the whole idea of the political enterprise is security, which should be guaranteed by the sovereign both internally and externally.³⁴ On the other hand, under a republican vision of freedom as non-domination, as put forward by Alon Harel, freedom does not merely require that rights not be violated, it also requires that those rights be publicly recognised.³⁵ The point which Harel makes is that there is an intrinsic value in constitutionalism as honouring rights, and that global norm-setting contributes to freedom from static constitutions. This seems particularly important in the context of the constitutional impact on the criminal process. Why? Because central to the idea of constitutionalism is, as Mattias Kumm emphasises, the notion of bounded government restrained by law from acting outside its powers.³⁶

A constitutional structure is also paramount to the idea of the rule of law. Yet, any analysis of criminal law procedure at the micro-level and in comparative context reveal that, although the rule of law is the overarching mechanisms which states have to follow, there are slight differences in the interpretation of the more narrow definitions of criminal law legality across Europe.³⁷ In Germany, for instance, the principle of legality (*Legalitätsprinzip*) is thought to imply a principle of compulsory prosecution – a direct attempt to eliminate police and prosecutorial discretion altogether.³⁸ The principle of legality or, rather, the principle of legal certainty (*Bestimmtheitsgrundsatz*), is, instead, focused on the strictly laid down criminalisation in legislative instruments. In any case, in most other criminal law systems in the civil law tradition, legality reflects a holistic idea of a fair trial and legal certainty, and, in particular, a ban on retroactive criminal law.

Take the example of Dutch criminal law. In article 1, subsection 1, of the Dutch criminal code (*Wetboek van Strafrecht*), the principle of legality is embodied in the definition ‘*een daaraan voorafgegane wettelijke strafbepaling*’. This translates into the definition that no offence is punishable if it is not under the effect of a pre-existing statutory penal provision in Dutch law. This

³³ Waldron (n 4) 454.

³⁴ Ibid.

³⁵ Harel (n 18).

³⁶ Mattias Kumm, ‘Constitutionalism and the Moral Point of Constitutional Pluralism’ in Pavlos Eleftheriadis and Julie Dickson (eds), *Philosophical Foundations of EU Law* (Oxford University Press 2012) ch 9.

³⁷ Markus Dubber, ‘Comparative Criminal Law’ in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law* (Oxford University Press 2006) 1287.

³⁸ Dubber and Hörnle (n 25).

definition of the principle of legality in Dutch Criminal Law is also defined in Article 16 of the Dutch Constitution.³⁹ In contrast to many European countries, such as Germany, there is, however, no mandatory prosecution in The Netherlands. Prosecution is at the discretion of the Public Prosecutor. The Public Prosecution Service in The Netherlands has a ‘prosecution monopoly’ in the sense that only its public prosecutors (*‘Officier van Justitie’*) can decide on whether they will prosecute someone and for which crime or offence (Article 9 of the Dutch Code of Criminal Procedure).⁴⁰ If the criminal case is feasible, then the public prosecutor can waive grounds for prosecution of the suspect on grounds derived from ‘public interest’. This is known as the ‘principle of opportunity’. This gives the public prosecutor the choice of whether or not to proceed to (further) prosecution (Articles 167 and 242 of the Dutch Code of Criminal Procedure).⁴¹

However, not all states in Europe have an opportunity principle for deciding on whether a criminal law case is warranted for prosecution. Many European countries have a system of mandatory prosecutions.⁴² But, as will be explained below, in the context of the philosophical grounding of the criminal law process in Europe, a key to understanding it is its current mainstreaming through EU and ECHR principles.

39 Jaap de Hullu, *Materieel Strafrecht* (Wolters Kluwer 2015) 85. In principle, the opportunity principle offers the Public Prosecution Service much discretionary freedom, powers, and scope. For the sake of equality, the Board of the Public Prosecution Service (known as the *‘College van Procureurs-Generaal’*) has issued investigation and prosecution guidelines. These guidelines are regarded as ‘law’, provided that they are properly published, and they bind the Public Prosecution Service to the principles of due process.

40 The Dutch public prosecutor (*Ov*) first assesses the feasibility of the criminal case: Could this criminal case lead to a conviction or a declaration of guilt (Article 9a of the Dutch Penal Code or *‘Wetboek van Strafrecht’* in Dutch)? If this is not the case, then the public prosecutor must dismiss the criminal case, known as a ‘technical dismissal’ (*‘technischseponeren’* in Dutch).

41 There are two views regarding the opportunity principle laid out in Articles 167 and 242 of the Dutch Code of Criminal Procedure:

- 1) The Negative Principle of Opportunity (*‘het negatieve opportuniteitsbeginsel’*): in principle, the Public Prosecution Service (Openbaar Ministerie) will proceed with prosecution unless there are reasons of public interest (*‘algemeenbelang’*) not to prosecute.
- 2) The Positive Principle of Opportunity (*‘het positieve opportuniteitsbeginsel’*): in principle, the Public Prosecution Service (Openbaar Ministerie) does not prosecute, unless this is demanded for reasons of public interest (*‘algemeenbelang’*).

There are several possible situations in which the Public Prosecution Service has to make a decision about the prosecution of the suspect. These situations each have their own set of rules and regulations.

42 For example, the Scandinavian countries, Germany and Italy.

When it comes to the principle of legality and legal certainty in procedural context, in most civil law countries, there is no explicit general right to ‘expect’ a strictly laid down evidence procedure: what matters is that the evidence in question should be collected and considered objectively.⁴³ The crucial matter is that the defendant must be treated fairly and have the right to a defence, and that the burden of proof rests – with certain limited exceptions – on the prosecutor. What then of legal certainty here? For example, if a legal measure introduces new rules which offer protection of the witness/plaintiff by laying down certain and objective rules for hearings by alternative means that were not in place when the alleged crime was committed, can it then be used retroactively? In most cases, this would not be a breach of procedural legality.⁴⁴ Across Europe, such rules should be interpreted in the light of the general requirement for a fair trial as promoting objectivity in the manner in which hearings take place and should be subject to scrutiny by the ECHR system. In short, Article 6 (2)-(3) ECHR states that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law and have the right to examine, or have examined, any witnesses against him or her. In this connection, suffice it to say that the rules regarding evidence are to be construed in such a way that the defendant is treated fairly by the authorities and the courts, ie, the notion of the presumption of innocence is closely intertwined with Article 6 (1) ECHR, which stipulates the imperative of objectivity. The procedural notion of legality comes into play here.⁴⁵ Expressed differently, the crucial matter is that the defendant be treated fairly, has the right to a defence and that the burden of proof is placed – with limited exceptions – on the prosecutor. This is the multifaceted function of legality as both a procedural and a substantive principle.

In this way, the ECHR influence has had a significant comparative law impact on the national system. With regard to the usefulness of comparative law for understanding the corpus forming constitutional criminal procedure, it has been suggested that comparative law, ‘[...] allows for greater self-knowledge’, ‘enriches the options available’, and expands the judge’s ‘horizon and the interpretive field of vision’, and is thus ‘a good source [...] for cross-fertilization

⁴³ For example, *Kokkinakis v Greece* (1993) Series A no 260-A; *Cantoni v France*, ECHR, Reports 1996-V and compare, for example, Cases C-74/95 & 129/95, *Criminal Proceedings against X* [1996] ECR I-6609 and Case C-354/95, *National Farmer's Union*, ECR [1997] I-4559.

⁴⁴ See Italian case, Case C-105/03, *Pupino*, [2005] ECR I-5285.

⁴⁵ Moreover, that any uncertainties are interpreted in favour of the defendant.

of ideas'.⁴⁶ Indeed, in the global 'online' era, there seems to be a growing horizontal communication between constitutional systems, which seems particularly relevant and challenging for the concept of due process rights in criminal law context.⁴⁷ Specifically, criminal procedure is meant to work as a buffer against the unjust application of state rules. This is also the core message of the rule of law, which, as indicated, is wider than the notion of procedural legality and legal certainty in that it presupposes a democratic and just system, thus indicating a certain quality of the law. Any constitutional law needs to comply with reasonableness in terms of proportionality, human rights, and dignity. Given the strong international and European influence on national constitutional law, and given the increased trend of judicial borrowing between constitutional courts in Europe and, as mentioned, the EU and ECHR influence, the constitutional structure is, to some extent, 'global'.⁴⁸ This is also the classic debate on the distinction between administrative and criminal law penalties and, to what extent, this distinction can be based upon pragmatically concerns and politics.

The civil law system is, of course, grounded in the inquisitorial tradition where the judge plays a prominent role and the Court is 'fact-finding'.⁴⁹ For example, in France and Spain, the criminal law process is traditionally inquisitorial, but elements of the adversarial process have been added in recent years mostly due to the ECHR influence. Indeed, the many international and comparative law elements that have shaped modern criminal law procedure have slowly eroded the classic distinction between inquisitorial and adversarial tradition, or, to put it differently, between the civil law and common law tradition. One reason for this is the constitutionalising of criminal law and the obligation for Member States to uphold legal safeguards through law. The importance of constitutional law then is to guarantee the right to a criminal law process. The criminal law process involves the search for 'truth' as a basic function of the criminal

⁴⁶ Aharon Barak, *The Judge in a Democracy* (Princeton University Press 2006); see also, Ran Hirschl, *Comparative Matters* (Oxford University Press 2014).

⁴⁷ See for example, Gábor Halmay, 'The Use of Foreign Law in Constitutional Interpretation' in Michel Rosenfeld and András Sajó (eds), *Oxford Handbook on Comparative Constitutional Law* (Oxford University Press 2012) ch 64.

⁴⁸ On judicial borrowing in Europe and national constitutional courts, see, for example, Maarten Feteris, 'Development of the Law by Supreme Courts in Europe' (2017) 13 *Utrecht Law Review* 155.

⁴⁹ See for example, Koen Vriend, *Avoiding a Full Criminal Law Trial: Fair Trial Rights, Diversions and Shortcuts in Dutch and International Criminal Proceedings* (Springer 2017) ch 1.

law process.⁵⁰ Under the influence of human rights protection norms, countries have come closer together in their willingness to guarantee to adopt these rules. Sometimes, the guarantee of a fair trial means a limit in the search for truth when it is necessary to ensure fairness. Jenia Turner describes how the innocent paradigm is somewhat more prominent in adversarial systems, as compared to civil law jurisdictions.⁵¹ This seems to confirm the advantage of comparative constitutional law, as recent scholarship on international and constitutional human rights protection argues that competing values coming from the international law *fora* often increase rights in the national constitutional setting.⁵²

Another central aspect of many civil law traditions is the participation and importance of laymen in the court trial. Just like the jury system, the participation of laypersons increases the democratic participation through processes of deliberation.⁵³ Most civil law countries such as Germany, The Netherlands and Sweden⁵⁴ do not have a jury system, but laypersons participate in most criminal law trials that are not about mere petty crimes.⁵⁵ While, in the Dutch Constitution (Section 116, subsection 3 of the Dutch Constitution), nothing prevents the lay administration of justice, it has been argued that the trend towards layperson participation seems to have been declined recently, at least in political terms.⁵⁶ Moreover, in France, serious cases are tried by three judges and nine jurors (or laypersons), but it has been stated that they are not obliged to give reasons for their decisions.⁵⁷ However, for minor and ‘middle’ criminal law cases, the French courts have to give reasons.⁵⁸ From a constitutional perspective, this distinction, seems to run counter to the idea of the right to justification as discussed above. In any case, in the appellate courts in civil law jurisdictions,

50 R Anthony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial* (Hart Publishing 2004) 207; Jenia Iontcheva Turner, ‘Limits on the Search for Truth in Criminal Procedure: A Comparative View’ in Jacqueline E Ross and Stephen C Thaman (eds), *Comparative Criminal Procedure* (Edward Elgar Publishing 2016) 35.

51 Turner (n 50) 35.

52 Eyal Benvenisti and Alon Harel, ‘Embracing the Tension between National and International Human Rights Law: The Case for Discordant Parity’ (2017) 15 *ICON* 36.

53 Turner (n 50).

54 Swedish National Court Administration, <<http://www.domstol.se/Funktioner/English/The-Swedish-courts/District-court/The-tasks-of-lay-judges>> accessed June 2018.

55 Thomas Weigend and Jenina Iontcheva Turner, ‘The Constitutionality of Negotiated Criminal Judgments in Germany’ (2014) 15 *German Law Journal* 81–105.

56 Corjo Jansen, ‘The Participation of Laymen in the Dutch Judiciary 1811–2011’ (2014) 20 *Fundamina* 427.

57 Catherin Elliott, ‘France’ in Kevin Jon Heller and Markus Dubber (eds), *Handbook of Comparative Criminal Law* (Stanford University Press 2011) 209.

58 *Ibid.*

criminal trials often do not have lay member participation (while, for example, the Swedish Appellate Courts still have lay member participation if the expected sentence involve imprisonment-related punishment).⁵⁹

What is hugely important for a constitutional understanding of the criminal law process is the European and international law influence. While the EU law framework has had a great impact on the civil law corpus of criminal law, in general, the EU law framework often leaves it to the national systems and their courts to monitor its compliance. An extremely important principle here is the principle of proportionality, which is not contingent on the different constitutional systems, but is, instead, dependent on the facts and specifics of the case and the loyalty towards the EU system.⁶⁰ In addition, the rules governing criminal procedures are interlinked with enforcement questions in constitutional law. Furthermore, the ECHR case law on the autonomous interpretation of a crime has transformed the European landscape for criminal law procedure.⁶¹ With regard to the constitutional dimension/s of criminal law procedure across Europe, as indicated above fair trial rights are largely mainstreamed by the Article 6 ECHR obligations for states to interpret the notion of a sanction in an autonomous way. This has a great impact today, with the fight against terrorism high on the agenda. For example, France has until very recently had a permanent state of emergency since 2015, and other European countries have also favoured administrative procedures in which detention times can be greatly prolonged and with cross-over issues with migration law and the question of criminalisation of immigration ('crimmigration').⁶² After the terrorist attacks in Paris on 13 November 2015, the French government declared a formal 'state of emergency'. The emergency regime devolved to the police and other authorities, including the Ministry of Interior and Prefects (who represent the state at the local level), a broad array of powers, including to search houses day or night, and issue house arrest orders without prior judicial authorisation. The new French counter-terrorism bill is now absorbing

⁵⁹ Swedish National Court Administration, available at: <<http://www.domstol.se/Brott-straff/Overklaga-domen-till-hovratten>> last accessed May 2018.

⁶⁰ Eg Takis Tridimas, *General Principles of EU Law* (Oxford University Press 2006).

⁶¹ For example, *Engel and others v Netherlands* (1979–1980) Series A no 22; and *Orzuk v Germany* (1984) Series A no 73.

⁶² Jennifer M Chacon, 'Human Trafficking, Immigration Regulation, and Subfederal Criminalization' (2017) 20 *New Crim LRev* 96, at 129; Andrew Ashworth and Lucia Zedner (eds), *Preventive Justice* (Oxford University Press 2014); David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press 2006); Karlo Turola, 'Ultima Ratio as a Constitutional Principle' (2013) 3 *Oñati Socio-legal Series* 6–20.

the exceptional powers employed under the state of emergency into ordinary law.⁶³ Suspects can ask to wear electronic bracelets, and the restrictions can be renewed after six months for up to one year with new or complementary information.⁶⁴ Interestingly, under the criminal law framework, this kind of monitoring is usually not permitted until there is a conviction and a guilty verdict, and the monitoring option would then be a less severe form of punishment for those committing a crime for the first time, for example.⁶⁵ By using the emergency provisions, the ‘normal’ criminal law framework is set aside. Interestingly, the new Counter Terrorism Directive at the EU level adopted in 2017 mainly uses the criminal law framework and not the administrative one, which would mean that the countries cannot derogate from their obligations to ensure a fair trial, and, in any case, they have to comply with proportionality.⁶⁶ As Wanda Mastor recently asked in the context of the French counter-terrorism strategies and constitutional law: ‘What is the criteria for an emergency to become an “absolute” emergency?’ Mastor continues to argue that, more than any other legislation, the French Intelligence Act raises the difficult constitutional question of balance between the respect for freedom and the safeguarding public order.⁶⁷ The important question is, then, how can a constitutional system guarantee a robust criminal justice system which honours fair procedures even in the times of emergency?

3 Fairness and the criminal law trial

This section will now tentatively seek to explore the concepts of legality and fair procedure as well as the constitutional right to a hearing in a criminal procedural context. This section will focus on the right to a hearing and fair trial as forming the corpus of constitutional law. As Anthony Duff observes:

if a criminal court is to be morally justified in convicting a defendant, it must be able to sustain three claims. The first is that the conduct constituting the alleged crime was

⁶³ The *Financial Times*, ‘France: The Permanent State of Emergency’ 2 October 2017, (A-S Chassany).

⁶⁴ Enregistré à la Présidence de l’Assemblée nationale le 5 juillet 2016, available at <<http://www.assemblee-nationale.fr/14/rap-enq/r3922-t1.asp>> accessed June 2018.

⁶⁵ See for example, the Swedish system, ‘villorlig dom, fotboja etc’.

⁶⁶ Directive 2017/541 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.

⁶⁷ Wanda Mastor, ‘The French Intelligence Act: The French Surveillance State?’ (2017) 23 *European Public Law* 707.

criminal under a system of law binding on the defendant; secondly that the court has authority to try him or her; and thirdly that his guilt has been proved through a fair process.⁶⁸

For Duff, the legitimacy of this process depends both on its procedural fairness and on the courts' authority to call the defendant to answer.⁶⁹ Indeed, while the rule of law sets the outer limits of what is acceptable in a democratic society, the principle of legality is the ABC of any criminal lawyer's grammar. The notion of fair procedure in criminal law is connected to the due process paradigm in constitutional law. Constitutional rights under the broad umbrella of 'due process' are often said to function as a filtering mechanism through which we can determine what forms of treatment persons can receive at the hands of the state and whether they are consistent with their status as free and equal right-bearers.⁷⁰ Since limitations on rights must be 'rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations', this can be interpreted as a mechanism for ensuring that coercive state interference remains non-*arbitrary* in the republican sense, in that it tracks 'commonly avowable' public interests.⁷¹ From a constitutional perspective, the criminal law process institutionalises a right to justification and ensures a system that is in compliance with constitutional justice.⁷²

The constitutional principle of a right to judicial review grants individuals a right to a hearing.⁷³ In the criminal law setting, this means the institute of fair trial. The right to a hearing can be conceptualised in terms of deliberative duties.⁷⁴ While the Member States have their own national criminal law procedures, the ECHR and the EU Charter of Fundamental Rights have broadly elevated these obligations to constitutional obligations. The right to a hearing then also has a democratic element to it. As has been noted by Devika Hovell, 'procedural fairness serves essentially as a process

68 R Anthony Duff, 'Authority And Responsibility in International Criminal Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) ch 29.

69 Ibid.

70 Malcolm Thorburn, 'Proportionality' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press 2016) ch 15.

71 Philip Pettit *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2013) ch 4 and 5.

72 Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-based Proportionality Review' (2010) 4 *Law & Ethics of Human Rights* 141.

73 Alon Harel, 'Constitutionalism and Justice' (paper on file with the author).

74 Harel (n 1).

by which to enable community participation'.⁷⁵ As Alon Harel argues, the right to a hearing consists of three components: first, is the opportunity to voice a grievance, second, the opportunity to be provided with a justification for a decision that impinges or may impinge upon one's right, and third, the duty to re-consider the initial decision giving rise to the grievance.⁷⁶

Judicial review and the trial, in other words, becomes a mechanism for effective interaction between decision-makers and individuals in a way that ensures that individuals are not merely the subjects of decisions, but have the opportunity to participate in the decision-making process, thereby rendering decision-making more representative.⁷⁷

What, then, does a fair trial mean in criminal law practice proper? In short, in order to qualify as a 'fair' trial in criminal trial proceedings, the charges against the accused are presented in open court, they are supported by evidence that can be challenged, and the proceedings are concluded by the reasoned judgment of the court.⁷⁸ Despite the openness and democratic nature of a fair trial, the presumption of innocence, which is a sacred principle in criminal law, is not immune from politics or from possible failures in the criminal process. So although all European states who are members of the EU and the ECHR already had the presumption of innocence in place in their constitutional systems, they may still not always uphold these rights fully.⁷⁹ Likewise, under the ECHR jurisprudence, the civil law countries have had to extend their fair trial principles to cover also the pre-trial process and detention times.⁸⁰

Moreover, similar to plea bargaining, the Dutch system, for example, not only uses out-of-court settlements based upon consensus, it also provides for a special diversion from the full criminal trial.⁸¹ This diversion entails that the prosecutor can unilaterally impose a sentence and thereby avoid the criminal trial. Thus, despite the strong European impact on national constitutions, interestingly, the case law of the ECtHR under Article 6 ECHR does not prevent the waiver of procedural rights through plea bargaining, and the Court of Human Rights has

⁷⁵ Devika Hovell, *The Power of Process: The Value of Due Process in Security Council Sanctions Decision-Making* (Oxford University Press 2016) ch 4.

⁷⁶ Harel (n 1) 202.

⁷⁷ Ibid.

⁷⁸ Vriend (n 49).

⁷⁹ See, for example, Sarah Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (Hart Publishing 2007); R Anthony Duff et al (n 50), vol 1–3.

⁸⁰ Jeremy McBride, 'Human rights and Criminal Law Procedure', available at <<https://rm.coe.int/16806f0ef9>> accessed May 2018.

⁸¹ Vriend (n 49) ch 1.

emphasised that any such waiver must be clearly established, accompanied by minimum safeguards, and not be against the public interest.⁸² More specifically, as has been pointed out, the bargain has to be accepted by the first applicant in full awareness of both the facts of the case and the legal consequences, and in a genuinely voluntary manner; in addition, the content of the bargaining and the fairness of the manner in which it had been reached between the parties has to be subjected to sufficient judicial review.⁸³ However, it has been suggested that, if the standard of achieving ‘beyond reasonable doubt’ as the basis for the presumption of innocence were to tip totally in the direction of protecting individuals from being wrongly punished, there could be no institutionalised practice of criminal law procedure in a non-utopian world.⁸⁴ This, then, is one of the main problems with the right to a fair trial, as finding out the truth cannot always be achieved.

How do civil law countries deal with their constitutional law obligations which stem from their obligations to enforce EU criminal law in cross-border cases? The enforcement of EU law through the template of mutual recognition is constitutionally challenging and interesting, as it is based upon trust across the European traditions.⁸⁵ Mutual recognition means that courts are mutually obliged to accept judgments or warrants and similar demands from other countries in the EU. For example, Article 3 of the European Arrest Warrant (EAW) provides a list for mandatory grounds for refusing to execute an EAW, such as where amnesties have been granted, where there is a *ne bis in idem* (double jeopardy) situation, or where, for example, the person in question is deemed too old to stand trial. Yet the EAW has abolished dual criminality, which meant that many states such as Germany and Poland had to change their constitutional rules that stated that their own citizens could not be extradited. Similarly, Spain had to change the constitutional right not to be extradited for trial *in absentia*.⁸⁶ In the recent cases of *Aranyosi* and *Căldăraru*,⁸⁷ the CJEU held that the executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to

⁸² Weigend and Turner (n 55). See, also Vriend (n 49).

⁸³ *Natsvlishvili and Togonidze v Georgia* App no 47.940/99 (ECtHR, 29 April 2014).

⁸⁴ Mattias Kumm and Alec Walen, ‘Human Dignity and Proportionality: Deontic Pluralism and Balancing’ in Grant Huscroft et al (eds), *Proportionality and the Rule of Law* (Cambridge University Press 2014) 67.

⁸⁵ For an overview, see for example, Ester Herlin-Karnell, ‘Constitutional Principles in the Area of Freedom, Security and Justice’ in Cian Murphy and Diego Acosta Arcazazo (eds), *EU Security and Justice Law, after Lisbon and Stockholm* (Hart Publishing 2014) 38–53.

⁸⁶ Case C-399/11 *Melloni v Ministerio Fiscal* [2013].

⁸⁷ Joined Cases C-404/15 and C-659/15 *Aranyosi and Căldăraru* [2016].

exclude the existence of such a risk.⁸⁸ Therefore, a constitutional structure is meant to act as a buffer against discretionary acts and it is largely policed by the proportionality principle that any measures should not be more far reaching than necessary, as will be discussed below. Specifically, a debate has arisen as to what the term ‘exceptional circumstances’ really means. As mentioned above, the notion of trust in this area has, in many ways, worked as claimed panacea for a lack of uniformity. This question has become the crucial testing-ground for the credibility of the EAW. For example, in the recent *Artur Celmer* case,⁸⁹ before the Irish High Court of Justice, concerning the question of whether surrendering someone to Poland would undermine the rule of law and EU values, and because of the risk of degrading treatment, the High Court stated that:

The judgment of the CJEU in *Aranyosi and Caldaru* [sic] [Căldăraru], proposes a two-step approach in determining whether fundamental rights have been breached. An initial finding of general or systemic deficiencies in the protections in the issuing state must be made, and the executing judicial authority must then seek all necessary supplementary information from the issuing state as to the protections for the individual concerned. These tests have been predicated on mutual trust and mutual recognition. A problem with adopting that approach in the present case is that the deficiencies identified are to the edifices of a democracy governed by the rule of law. In those circumstances, it is difficult to see how individual guarantees can be given by the issuing judicial authority as to fair trial when it is the system of justice itself that is no longer operating under the rule of law.

The CJEU delivered its judgment on the 25 July 2018 and thereby partly confirmed the worry as expressed by the Irish court but pointed out that it is chiefly for the European Council to monitor the Member States compliance with the rule of law.⁹⁰ The CJEU held that it is only if the European Council were to adopt a decision determining, as provided for in Article 7 (2) TEU, that there is a serious and persistent breach in the issuing Member State of the principles set out in Article 2 TEU, such as those inherent in the rule of law that the executing judicial authority would be required to refuse automatically to execute any EAW issued by it, without having to carry out any specific assessment of whether the individual concerned runs a real risk that the essence of his fundamental right to a fair trial will be affected. So in the absence of such a Council decision the national court will still need to critically engage in a serious deliberation as to whether the presumption of mutual trust could legitimately

⁸⁸ Case C-578/16 *CK v Republika Slovenija* [2017].

⁸⁹ High Court of Justice, Ireland *The Minister for Justice and Equality vs Artur Celmer* judgment of Ms Justice Donnelly delivered on the 12 March 2018.

⁹⁰ Case C-216/18 *PPU LM* [2018].

be rebutted and if there is a serious risk of degrading treatment of the individual in question.

Similarly in the Petruhhin case,⁹¹ delivered in 2016, the EU Court of Justice in the context of extradition agreements with third states (non-EU states), stipulated that:

where a Member State receives a request from a third State seeking the extradition of a national of another Member State, that first Member State must verify that the extradition will not prejudice the rights referred to in Article 19 of the Charter.

Article 19 Charter, in turn, requires that ‘No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment’. As has recently been suggested, the criteria with regard to the EAW might soon be very similar to that of Article 19 of the Charter, and the Member States will have to assure that prison conditions are acceptable from a human dignity perspective.⁹²

The point is that, in civil law context, due to the strong European influence, the national constitutions have been significantly altered exactly with regard to procedural criminal law. Yet, when national standards offer a higher quality in terms of procedural safeguards than the EU model, a pluralistic constitutional account should allow Member States to adopt the highest standard for the individual.⁹³

Consider the example of the case of the United Kingdom and its Brexit negotiations for leaving the EU project (in 2018). Are there any constitutional consequences of the UK leaving the EU and could these consequences have an impact on criminal law co-operation in civil law jurisdiction? The UK is not a civil law country, but it is interesting in the context of the constitutional law impact on criminal law, as it could have consequences for the rest of the continent. Given that the UK is a member of the ECHR and given that the EU values and rights are almost identical to the ECHR, what is the effect of this? If criminal law procedural co-operation is seen as a constitutional project and thereby obliged to guarantee freedom and equality for all, then I would like to ask the question of to what extent national courts have a duty or a fiduciary obligation of constitutional rights for individuals? In the specific case of Brexit,

⁹¹ Case C-182/15 Petruhhin [2016].

⁹² See André Klip, ‘Europeans First!: Petruhhin, an Unexpected Revolution in Extradition Law’ (2017) 25 *European Journal of Crime, Criminal Law and Criminal Justice* 195–204.

⁹³ Benvenisti and Harel (n 52); and Evan Criddle and Evan Fox-Decent, *Fiduciaries of Humanity* (Oxford University Press 2016).

if human rights protection would be weakened by the UK's exit but the UK still chooses to participate in some EU repressive measures, such as the fight against terrorism, and the EAW, etc, then, it could be argued that, if the UK does not offer a sufficiently high human-rights standard according to 'established EU law culture', national UK courts would still have an obligation to apply EU fundamental rights in criminal law procedures. Likewise national courts in mainland Europe would not have an obligation to blindly execute a judgment or arrest warrant on behalf of the UK if not all EU safeguards were guaranteed. Here, the implications of a constitutional structure for understanding criminal law procedure and the importance of constitutionalism in this process are crucial. The effect of global regulation, for example, (think of the fight against cyber crime, money laundering or terrorism) in this context, would mean the duty for national constitutional courts to apply the highest standard in national criminal law procedures, even when those rules come from the 'outside' if they wish to ensure a more robust protection of human rights.

4 Proportionality as a constitutional value

The constitutional principle of proportionality is relevant with regard to the contours of criminal law procedure.⁹⁴ Proportionality has, of course, mainly developed in German law and through the case law of the EU Court and the ECHR framework, and hence the principle of proportionality has been accepted in all EU and ECHR states, both civil law jurisdictions as well as the common law countries such as UK and Ireland.⁹⁵ Proportionality is also a general concept of international law and human rights law as well as in EU law.⁹⁶

In principle, proportionality in criminal law is concerned with the widely-felt distinctions between different kinds of offences and degrees of wrongdoing that are labelled so as to represent fairly the nature and magnitude of the law breaking.⁹⁷ Therefore, there is a link between proportionality, 'fair labelling' and maximum certainty in criminal law, and this link ought to be reflected in how the criminal law procedure is structured. Proportionality also forms part of the

⁹⁴ See Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing 1998).

⁹⁵ Barak (n 21) 186–187.

⁹⁶ *Ibid.*

⁹⁷ See Andrew Ashworth and Mike Redmayne, *The Criminal Law Process* (Oxford University Press 2010); see also, James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71 *Modern Law Review* 217.

constitutional set-up for the criminal law process.⁹⁸ Many European countries such as France have traditionally used proportionality in mainly administrative law procedures, but, more recently, it has also started to form part of the constitutional system.⁹⁹ There is, however, a difficulty in pinning down the exact contours of proportionality within the context of criminal law co-operation and procedure. Proportionality seems to play an important role in the context of *ne bis in idem* (double jeopardy). In addition, double procedures of both criminal law and administrative sanctions are in breach of proportionality.¹⁰⁰ Proportionality is also interesting in the context of the margin of appreciation doctrine, in that it emerged historically in cases relating to Article 15 ECHR, which allows Member States to derogate from a number of provisions of the Convention in time of ‘public emergency threatening the life of a nation’.¹⁰¹ Prerequisites for the exercise of derogatory powers include the existence of a war or a similar emergency which threatens the life of a nation and the proportionality of the measures, ie, that their extent be ‘strictly required by the exigencies of the situation’. This is relevant in, for example, the context of anti-terrorism legislation and how it is investigated.

Moreover, the principle of proportionality in criminal law procedure is largely connected to the constitutional value of fairness.¹⁰² The principle of proportionality has a significant impact both in constitutional law and in criminal law and procedure. In this sense, the sentencing judge has an obligation to provide proper justification for the sentence imposed in a particular case.¹⁰³ The principle of proportionality plays an important role in the context of sentencing, where it means that the punishment for an offence should be proportionate to the seriousness of the offence, taking into account the harm, wrongdoing and

98 Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press 2012).

99 Jud Mathews, ‘Proportionality Review in Administrative Law’ in Susan Rose-Ackerman, Peter L Lindseth and Blake Emerson (eds), *Comparative Administrative Law* (2nd edn, Edward Elgar Publishing 2017). On proportionality, for example, Barak (n 91); Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002); Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford University Press 2012); Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2012).

100 Case C-617/10 Åklagaren v Hans Åkerberg Fransson [2013].

101 Massimo Fichera and Ester Herlin-Karnell, ‘The Margin of Appreciation Test and Balancing in the Area of Freedom Security and Justice: A Proportionate Answer for a Europe of Rights?’ (2013) 19 *European Public Law* 759.

102 Barak (n 98).

103 For a recent interesting study, see Nicola Lacy and Hannah Pickard, ‘The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems’ (2015) 78 *Modern Law Review* 216–240.

culpability involved. With regard to the criminal law process, there is a link between proportionality and the issue of a fair trial: the appropriate legal safeguards must be respected and any derogation is contingent on proportionality and the reason as to why a derogation has been made in which the burden of justification is on the state.¹⁰⁴ Any discussion of balancing usually starts with a reference to the work of Robert Alexy and the notion of rights-based proportionality review.¹⁰⁵ Such a discussion is often connected to the actual application of proportionality and balancing in courts where the discussion has been centred on 'rights' and to what extent rights could be adequately balanced.¹⁰⁶

So constitutional rights are also connected to the proportionality test in court proceedings; if a right has been infringed, it is the classic test of to what extent such an infringement is justified. The weighing of rights is the major position in most human rights documents such as the ECHR, unless it is an absolute right, such as the right not to be tortured or the right to life. As Kai Möller explains, the court assesses if the infringement in the specific case was proportionate. Generally, a constitutional court would check 1) Has there been an interference with the right? 2) Is the interference with the right justified? (a) Is it prescribed by law?, and (b) Is it proportionate?¹⁰⁷ In the criminal procedural context, this is very relevant in grey zone areas where it is not so clear if a case is a breach of constitutional rights or a criminal act, and to what extent the breaches are justified.

Accordingly, the constraint of proportionality has procedural as well as substantive implications, ie both relevant for the criminal law process and the penalty.¹⁰⁸ Yet, as Steiker points out, even if the principle of proportionality cannot fully answer the question of procedural form, it may still have some further procedural implications for the preventive context. Moreover, she argues that because prevention is inherently forward looking, proportionality may require periodic review procedures to check the initial adjudication of dangerousness. Any initial adjudication will be premised on a finding of dangerousness

104 Andrew Ashworth, 'Criminal Law, Human Rights and Preventive Justice' in Allan Norrie et al (eds), *Regulating Deviance* (Hart Publishing 2009) 87.

105 Alexy (n 99); Kumm (n 72).

106 Kai Möller, 'Balancing and the Structure of Constitutional Rights' (2007) 5 *International Journal of Constitutional Law* 453.

107 Ibid.

108 Carol S Steiker, 'Proportionality as a Limit on Preventive Justice' in Andrew Ashworth, Lucia Zedner and Patrick Tomin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press 2017) ch 10.

based upon calculating both the gravity of the future harm and the likelihood that the harm will occur in the absence of preventive intervention.¹⁰⁹ The reason that proportionality is such a widely accepted constraint on state action, in both the penal and non-penal realms, is that it constitutes one of the primary means of delimiting state power. It has been suggested that the proportionality test merely provides a structure for the demonstrable justification of an act in terms of reasons that are appropriate in a liberal democracy.¹¹⁰ Or, to put it another way, it provides a structure for the justification of an act in terms of public reason.

The global spread of proportionality is therefore explained by the global spread of a constitutional culture which puts justification at its center. Proportionality is the central legal device ensure the flourishing of this legal culture.¹¹¹

Through this legal culture, proportionality offers a procedure through which the state is required to make explicit precisely how its conduct is consistent with the best conception of the rights in a democratic society.¹¹²

As a constitutional principle, proportionality also brings constraints on investigative measures. The law enforcement would breach proportionality if it undertook measures which were too intrusive measures, by, for example, tapping a mobile phone without sufficient evidence that there was sufficient need for such measure in order to fight crime effectively. For example, the Swedish procedural law (*Rättegångsbalken*) governing the pre-trial phase clearly stipulates in Chapter 27 para 1 in the Law governing procedure (law 1942:740) that:

Legal force under this chapter may be used only if the reasons for the measure outweigh the infringement or otherwise which the measure implies for the suspected or for any other conflicting interest.

Similarly, the Swedish administrative law governing police action, '*Polislagen*' (1984:387) refers to proportionality as an overarching principle, or umbrella concept for all state action and police forces and has a clear constitutional dimension. The same is the case in many other countries in Europe, unlike for example the USA where proportionality is not as prominent in the constitu-

¹⁰⁹ Ibid.

¹¹⁰ Thorburn (n 70).

¹¹¹ Matthias Klatt, 'Justification and Proportionality' (paper on file with the author).

¹¹² Thorburn (n 70).

tional law set-up.¹¹³ However, the 4th Amendment protects US citizens ‘against unreasonable searches and seizures’. Targeted searching for information without individualised suspicion – without suspicion rising to the level of probable cause – has long been held unconstitutional. Given the increased US-EU co-operation to fight crime and terrorism, and the recent EU agreement on judicial redress for EU citizens with regard to data protection, also in the US when subject to their jurisdiction, this is constitutionally important for countries in Europe.¹¹⁴

In addition, proportionality could help strike the balance with regard to the so-called phenomenon of preventive justice by setting limits to how long suspects can be held in preventive detention without time limits. Even though proportionality, by itself, might not guarantee the full package of defence rights, it could work against indefinite detention, and this is extremely important in constitutional law.¹¹⁵

As Kumm points out, proportionality based judicial review institutionalises a right to justification that is connected to a particular conception of legitimate legal authority: this law’s claim to legitimate authority is plausible only if the law is demonstratively justifiable to those burdened by it in terms that free and equal citizens can accept.¹¹⁶

Again, EU law again serves a good constitutional example in the context of the procedure for investigating crime in the national constitutional context: in the recent case of *Digital Rights*, the Court annulled the 2006 Data Retention Directive, which was aimed at fighting crime and terrorism, which allowed data to be stored for up to two years.¹¹⁷ It concluded that the measure breached proportionality on the grounds that the Directive had a too sweeping generality and therefore violated, *inter alia*, the basic right of data protection as set out in Article 8 of the Charter of Fundamental Rights. The Court pointed out that access

113 Vicky C Jackson, ‘Constitutional Law in an Age of Proportionality’ (2015) 124 Yale Law Journal 3094; M Cohen-Eliya and Iddo Porrat, *Proportionality and Constitutional Culture* (Cambridge University Press 2013).

114 Umbrella Agreement EU-US, available at <http://europa.eu/rapid/press-release_MEMO-16-4183_en.htm?locale=en> accessed May 2018. Alec Walen, ‘Fourth Amendment Rights for Nonresident Aliens’ (2016) 16 German Law Journal 1131; Ian Brown and Douwe Korff, ‘Foreign Surveillance: Law and Practice in a Global Digital Environment’ (2014) 3 European Human Rights Law Review 243.

115 Ester Herlin-Karnell, ‘The Domination of Security and the Promise of Justice: On Justification and Proportionality in Europe’s “Area of Freedom, Security and Justice”’ (2017) 8 Transnational Legal Theory 79–102.

116 Kumm (n 72).

117 Case C-293/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources* [2014].

by the competent national authorities to the retained data was not made dependent on a prior review carried out by a court or by an independent administrative body whose decision sought to limit access to the data to what was strictly necessary for the purpose of attaining the objective pursued. Nor did it lay down a specific obligation on Member States designed to establish such limits. The EU legislator had provided insufficient justification – it was simply not good enough from the perspective of EU fundamental rights protection. The approach was confirmed in the recent *Schrems*¹¹⁸ case and *Tele 2 Sverige* case, where the Court held that:

legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data or to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter.

The consequence of these rulings is that national constitutions in Europe have to adapt to this reasoning or they are in breach of the EU Charter of Fundamental Rights.

Consequently, proportionality can be interpreted as a mechanism for ensuring that coercive state interference remains non-arbitrary.¹¹⁹ For Barak, due process and the right to a fair trial is a daughter-right of human dignity.¹²⁰ The next section will tentatively flesh out some main points about the right to dignity in the criminal law procedure context and its constitutional implications.

5 Dignity and criminal law procedure

Human dignity is central in German law, and also elevated to a European law principle proclaimed in the EU values, but it does not constitute a separate codified value in most European constitutions.¹²¹ Dignity is, however, very prominent in the constitution of Germany. Dignity is also prominent in the Israeli Basic Law, South African Constitution and Canadian Constitution.¹²² In Germany, dignity has a supreme constitutional value, reflected in Germany's rejection of the horrors of the Second World War and the severe violations of

¹¹⁸ Case C-362/14 Maximilian Schrems v Data Protection Commissioner [2015].

¹¹⁹ Daly (n 29).

¹²⁰ Barak (n 21) 301–302.

¹²¹ Or in any European civil law constitution except Germany, as far as this author knows.

¹²² Barak (n 21).

human dignity that characterised it.¹²³ The German Basic Law makes it clear that: 'To respect and protect human dignity shall be the duty of all state authority.' Moreover, the Bill of Rights in the German Basic Law states that:

Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order of the moral law.

As Barak points out, the absolute character of the right to human dignity is unique in German law.¹²⁴ Human dignity is limited if a person is subject to torture, degradation, discrimination or cruel punishment. Human dignity is *Kantian* in the way that it sees a person as an end not as a mere means or object.¹²⁵ From this, it follows that the idea of a fair trial must be respected and the presumption of innocence safeguarded. Any limitation of rights must be proportionate and necessary (to what can be expected) in a democratic society, and dignity can never be violated.

When the German Federal Constitutional Court conducts constitutional review of legal statutes, human dignity plays a major role.¹²⁶ Several specific basic rights, such as the right to privacy, the right to life and the right to bodily integrity (Article 2 of the Basic Law) represent human dignity at its core. Human dignity has been very prominent in the review of criminal law provisions, such as the criminalisation of abortion, life imprisonment as a criminal law sanction, as well as security detention without temporal limits.¹²⁷ As Gur-Arye and Weigend argue when reviewing criminal law legislation, the Federal Constitutional Court often prefers to leave a margin of appreciation to the democratic parliamentary process, although human dignity is the highest constitutional value trumping all other interests. In European civil law context, with the exception of Germany, the clearest expression of dignity is perhaps articulated in the EU values of Article 2 of the Treaty of the European Union and in Article 1 of the EU Charter of Fundamental Rights.¹²⁸ Because of the EU stance on dignity, it has migrated to other constitutions in the civil law countries in

¹²³ Ibid 231.

¹²⁴ Ibid 242.

¹²⁵ Ibid 235.

¹²⁶ Miriam Gur-Arye and Thomas Weigend, 'Constitutional Review of Criminal Prohibitions Affecting Human Dignity and Liberty: German and Israeli Perspectives' (2011) 44 *Israel Law Review* 63–89.

¹²⁷ Ibid 70.

¹²⁸ Article 2 TEU: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between men

Europe as a ‘general principle’. The ECtHR also uses dignity in its reasoning, although it is not found in the Convention itself, but, instead, in Protocol nr 13, on the right to life and the abolition of the death penalty in all circumstances. In the *Winter* case, regarding whether life imprisonment is unconstitutional, the ECtHR based its reasoning, *inter alia*, on grounds of ‘human dignity’, finding that the imposition of a life sentence could not be imposed without providing the offender with a ‘prospect of release’.¹²⁹

The notion of human dignity is paramount to due process. For Ronald Dworkin, for instance, human dignity is an organising idea, as it brings ethical principles under one roof of human dignity.¹³⁰ The multifaceted structure of dignity seems apparent.¹³¹ One of the peculiarities with criminal law, as compared to other areas of the law, is that the rights governing their application are absolute according to human rights law, and intrinsic in the concept of dignity. Torture or degrading treatment are banned in democratic societies based on the rule of law and democratic values (in the European context see eg Article 3 ECHR, Article 4 EU Charter of Fundamental Rights). Yet in determining the proportionality of the limiting right, the constitutional value of human dignity plays an important role. Moreover, as Barak observes, this is the case when determining proportionality *stricto sensu* of a limitation of a constitutional right in order to realise a public interest or protect another constitutional right, and is a balancing test of the marginal societal importance of fulfilling the public interest, such as in security, public safety, or of protecting another constitutional right.¹³² As Barak argues, the restrictions upon the right to dignity of various types of people are the product of the sub-constitutional law. The idea of due process, then, is an innate right to dignity which is institutionalised.

As mentioned, human dignity is also a value in European law. Both the margin of appreciation test concerning what national discretion states have when implementing convention rights, and the proportionality test will always operate within the ambit of the constitutional value of dignity.¹³³ The value of dignity is always at the heart of any discussions of what forms the criminal law

and women prevail’. Article 1 of the EU Charter of Fundamental Rights states: ‘Human dignity is inviolable. It must be respected and protected’.

129 *Vinter and Others v the United Kingdom* (2013) 66069/09, 130/10 and 3896/10; See Robert Spano, ‘Deprivation of Liberty and Human Dignity in the Case-Law of the European Court of Human Rights’ (2016) 4 *Bergen Journal of Criminal Law and Criminal Justice* 150–166.

130 Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011).

131 Barak (n 21).

132 Barak (n 21) 112–113.

133 Barak (n 21). And see the contributions in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013).

process. The criminal law process seeks to guarantee justice and fairness in the criminal law process, and dignity is an umbrella concept in this regard.

6 Conclusion

This paper has emphasised the many elements of constitutional law that have a clear impact on criminal procedure across European civilian traditions and beyond. In addition, the paper has tried to show how EU law and the ECHR have largely shaped the criminal law systems, even more so with regard to procedure than with regard to substance, and this has had a great constitutional significance for the civil law countries. Criminal law co-operation across the civilian traditions – arguably – represents a new era in the familiar and much needed process of increasing the robustness of due process and judicial safeguards through an integrative understanding of national and post-national systems. As this paper has also tried to show, when viewed through the prism of fairness, the question of the contours of the criminal law procedure automatically becomes one which is closely related to the important question of how to guarantee constitutional safeguards in the criminal law trial. The paper also highlighted the fact that the important principles of proportionality and dignity should, and do to a large extent, underpin all action in criminal law procedure matters in Europe. This is so due to the migration of ideas through ECHR, EU law obligations as well through comparative law inspirations of what it truly means to have a constitutional right to a fair trial in Europe.