

Contextual Criminalization in European Criminal Law: From Security Paradigm to Value-Oriented Justice

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Traditional theory of criminalization, grounded in liberal principles of harm prevention and minimal state intervention, provides clear and objective criteria for determining the grounds of criminal liability. These criteria ensure predictability and legal certainty by dividing conduct into criminal and non-criminal on the basis of stable features, thus creating a solid foundation for law enforcement.

However, the modern world generates new challenges—transnational crimes, cybercrime, terrorism, and environmental offenses—which, due to their complex social, technical, and cultural nature, do not always fit within classical frameworks. This calls for more flexible and context-sensitive approaches that preserve legal certainty but are capable of adapting to diverse situations.

In this context, the concept of **contextual criminalization**, developed by Tuliakov and Savinova (2024), gains particular significance as an innovative approach to reshaping the architecture of criminal law. Contextual criminalization emphasizes the criminogenic role of the unified set of offense elements, highlighting that certain acts become criminal not merely because of their intrinsic nature but due to specific circumstances, purposes, or contexts that give them particular social harmfulness especially when they infringe upon individual rights and fundamental values.

Key features of contextual criminalization include:

- **Dynamism and flexibility:** Traditional binary distinctions between mandatory and optional elements give way to more adaptable structures that consider social and situational contexts.
- **Social harm and rights violations as criteria:** The assessment of social harm, particularly through the lens of rights violations, becomes the primary indicator of criminalization, acknowledging that such assessments vary with social, political, and cultural factors.
- **Preventive orientation:** Contextual criminalization combines punitive functions with preventive measures, enabling differentiated responses depending on the circumstances.
- **Legal certainty and balance:** While adapting to new contexts, the approach safeguards legal certainty to avoid arbitrariness, ensuring a fair balance between citizens' freedoms and the protection of society.

This approach gained resonance during the **High Level Forum on the Future of EU Criminal Justice**, organized by the European Commission and the Polish Presidency of the Council of the EU in March 2025. The forum provided a platform for strategic reflection on the future of EU criminal justice, gathering government representatives, practitioners, scholars, and civil society organizations. A key conclusion was the recognition of the need to shift from security-based and functional criminalization to a **value-based paradigm**, rooted

in the fundamental values enshrined in **Article 2 of the Treaty on European Union (TEU)** respect for fundamental rights, rule of law, democracy, equality, and human dignity.

Contextual criminalization of human rights violations fits seamlessly into this paradigm by integrating the principles of the **European Convention on Human Rights (ECHR)** and the **Treaty of Lisbon**. Specifically, it considers: freedom, security, and jurisdiction as baseline conditions for shaping criminal policy that bridges security and rights-protection; the **right to life** as an absolute value underpinning the criminalization of homicide and other threats to life (Mitsilegas, 2025; Human Rights Act, 1998); and **bodily integrity**, which requires the prohibition of torture and inhuman treatment through criminal law responses (EU Charter, 2024).

A deeper analysis of **Article 7 ECHR** is crucial for understanding the axiological (value-based) dimension of contextual criminalization. Article 7 establishes the principle *nullum crimen, nulla poena sine lege* (“no crime, no punishment without law”), prohibiting retrospective criminalization and ensuring legal foreseeability. This norm not only protects against arbitrary state power but also embodies the core values of the rule of law, justice, and human dignity that form the foundation of European legal culture.

In the EU context, criminal law, as Mitsilegas (2023) notes, has been evolving from a purely security-based model toward a **value-oriented model**, where Article 7 functions as an “axiological barrier” against over-criminalization. It allows preventive measures (e.g., against transnational threats) but only under the condition of a clear legislative framework.

Mitsilegas (2016) further emphasizes that Article 7 integrates with the principles of the EU Charter of Fundamental Rights, safeguarding trust in justice against vague norms, and balancing the protection of society with individual rights.

From a preventive perspective, Article 7 permits contextual adaptation (for example, in counter-terrorism or cybercrime), yet requires that any criminalization rests on accessible, precise, and foreseeable rules. This prevents what can be termed an “axiological deficit”—a situation where criminal law loses moral legitimacy due to inconsistency with European values.

According to the **ECtHR Guide on Article 7** (2025), the principle extends beyond national law to international law, enabling the criminalization of acts already criminal under customary international law (e.g., genocide) without violating the non-retroactivity principle. Thus, Article 7 strengthens the transnational dimension of contextual criminalization while preserving its axiological foundation.

This systemic integration of **security-based and value-based dimensions** reflects a synergy between punishment and prevention as dual instruments of contextual criminalization. It moves beyond the purely punitive function, becoming a comprehensive mechanism for protecting European values enshrined in both the ECHR and the Lisbon Treaty.

A distinctive element is the focus on **preventive criminal law measures**, which supplement punishment. This opens the door to the concept of “contextual penalization,” where punishment, in interaction with prevention, forms an effective security system in the transnational sphere.

Mitsilegas (2024), analyzing the reform of EU criminal law on the facilitation of unauthorized entry, stresses that such penalization must remain consistent with Article 7 to avoid conflicts with legal certainty—especially in migration contexts.

Overall, this reflects the growing impact of **risk-oriented criminal law models**, shifting attention from completed harms to potential dangers assessed within specific contexts. This enables more effective responses to modern challenges, such as transnational or cybercrime, while preserving the balance between public protection and individual rights.

Thus, **contextual criminalization** represents a progressive fusion of security and values, shaping a socially oriented criminal policy in line with European standards. It transforms the classical notion of criminalization into an instrument not only of punishment but also of human rights protection and societal security in the face of transnational and contextual threats. Prevention, as a key component, complements punitive measures by implementing the principles of the ECHR and the Lisbon Treaty.

In particular, **Article 7**, through its axiological essence, provides the ethical foundation for this transformation, ensuring that criminal law remains an instrument of justice rather than repression. This approach contributes to the creation of a fair, rights-based, and secure society where criminal law protects democratic values.

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