The Right to Remain Hatted: Unwritten Normative Orders of Europe, Normative Autonomy and the Limits of State Criminal Jurisdiction

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Abstract

European legal history is conventionally narrated as the history of the state: custom first, then the court, then the code, and finally the solemn proclamation of a state monopoly over justice. Yet ordinary people have never lived by the code alone. They live simultaneously by the rules of the family, the religious community, the neighbourhood, the profession, the local custom and their own conception of justice, and these rules sometimes assist the state, sometimes compete with it, and sometimes demand precisely what the criminal law forbids. This article presents the conceptual architecture of a planned monograph and international comparative project on the unwritten and mixed normative orders of Europe. Its working formula is that the state does not hold a monopoly over the human sense of justice, even where it holds a monopoly over the lawful infliction of criminal punishment.

The article introduces a systemological view of the normative order of society. The uniqueness of the persons involved, the mosaic of normative sources that act upon them and compete with one another, and the diversity of situational parameters combine into a tangle, a kind of cocktail, which the institutions of investigation and adjudication are as a rule unable to unravel, because those institutions are built to process legal facts and not configurations of competing obligations. On this basis I advance the idea that criminal law is itself mosaic in character: it is a composition of elements of different origin, held together by the frame of legality, and it is through the joints of this composition that unwritten norms enter the assessment of motive, guilt, consent and sentence. It also places the project against the singularity of criminal law, the condition in which private parallel regulation neutralises the public prohibition. The mosaic is read against its material background, the conditions of dignified life in wartime, because formally recognised rights may survive the loss of the capacity to exercise them.

The article argues that the decisive line does not run between the "state" and the "traditional". It runs between arrangements that preserve voluntariness, proportionality, the safety of the victim, the possibility of exit and freedom from retaliation for appealing to an independent court, and

arrangements that do not. I propose the comparison of concrete institutions, never of peoples, across three analytical categories: historical normative orders, community mechanisms of dispute resolution, and illegitimate systems of coercion used to organise criminal activity. The project is anchored in my earlier concepts of Collective Intuitive Criminal Policy, the Risk–Justice Paradox, criminal non-law and victim agency, and it culminates in a set of testable criteria for assessing normative autonomy, together with recommendations for Ukrainian criminal policy and restorative justice.

The metaphor of the title, drawn from a Soviet animated film of 1955 based on Selma Lagerlöf's tale of Nils Holgersson, is used to name the project's normative core: the right of a person to retain dignity before any power, whether public, communal, familial or criminal. That right does not exempt anyone from responsibility; it requires every authority to justify its demands. The evidentiary standard is explicit: each case is tied to identifiable sources, and a source-by-source statement of what each source can and cannot establish keeps the study of cultural normative orders apart from claims about criminal organisations.

Keywords

legal pluralism; customary law; unwritten normative orders; systemology of normative order; mosaic nature of criminal law; singularity of criminal law; normative autonomy; limits of criminal jurisdiction; restorative justice; victim; Collective Intuitive Criminal Policy; Risk–Justice Paradox; criminal non-law; comparative criminal law; Valencian Water Tribunal; organised crime; Ukraine

1 Introduction: a hat, a king and a question about power

In the Soviet animated film *Заколдованный мальчик* (The Enchanted Boy), produced in 1955 at the Soyuzmultfilm studio and directed by Vladimir Polkovnikov and Alexandra Snezhko-Blotskaya (Polkovnikov & Snezhko-Blotskaya, 1955), the condition for breaking the spell is formulated in a single line: the enchantment will end when the king uncovers his head while the boy remains covered. The line belongs to the screen version, and it is worth keeping that attribution straight, because the film makes the condition appear in a form the child viewer finds impossible. A king bares his head; a small boy keeps his hat on. The arrangement of the figures promises the opposite outcome. The great commands and the small obeys; the bronze pursues and the living flees. The fairy tale nevertheless allows the impossible to happen.

The film is an adaptation of a work whose full title in the original Swedish is *Nils Holgerssons underbara resa genom Sverige* (Nils Holgersson's Wonderful Journey through Sweden), published by Selma Lagerlöf in two parts in 1906 and 1907 (Lagerlöf, 1906–1907). It appeared in English as *The Wonderful Adventures of Nils* in the translation of Velma Swanston Howard (Lagerlöf, 1907), and the Russian edition that I use carries the title *Удивительное путешествие Нильса*

Хольгерссона с дикими гусями по Швеции (The Wonderful Journey of Nils Holgersson with the Wild Geese through Sweden), in the translation of L. Yu. Braude, who also wrote its preface (Lagerlöf, 2008, pp. 11–12). The premise of the tale, set out at the opening of that edition, is that a boy who torments animals is shrunk to the size of his tormented creatures by a small household sprite and is carried across the whole of Sweden on the back of a domestic goose. The hat, the bareheaded king and the bronze monument are the invention of the screen adaptation, and it is from the film, not from the book, that I take the image on which this article rests.

For me, a legal scholar, the scene opens something beyond the fairy-tale liberation. It asks whether a person possesses something before which even a king must stop. This need not be a privilege. It need not be a charter, a tablet of safe passage or an indulgence. It may be a duty owed to another human being, a religious precept, the memory of a family, the rule of a community, or a private conception of justice that does not coincide with the official one. The question concerns the structure of authority: what remains of the individual when every authority, from the sovereign to the clan, presents its demand with the same grave expression.

Criminal law has an institutional answer prepared for such a question, and the answer is legality. Only the state may define crime, and only the state may punish. I do not dispute the value of that answer; the principle of legality is among the most important achievements of European legal civilisation. My claim is narrower and, I believe, more productive. The monopoly of the state over lawful punishment is a different thing from a monopoly over normative life, a distinction familiar from the sociology of law and associated with Ehrlich's (1936) notion of living law. Before a case reaches a prosecutor, a person has already been told by family, faith, neighbourhood and profession what is required, forbidden and shameful, and those messages shape how an act is understood, whether guilt is admitted, how punishment is perceived and whether a victim dares to ask for protection.

The article has five purposes. It states the research problem and the claim of novelty. It sets out a systemological view of the normative order of society, together with the idea of the mosaic nature of criminal law, and places both within the theoretical frameworks I have developed elsewhere. It defines the comparative method, the three analytical categories and the criteria of legitimacy by which institutions will be assessed. And it presents the structure of the monograph and the research programme from which it will be written. It is a programmatic text. It does not claim to have completed the empirical work that the project proposes to carry out, and statements about particular institutions below should be read as the framing hypotheses and source-directed questions of that work, to be verified against primary materials during the research.

2 The research problem

The received picture of the European criminal-law tradition describes the gradual formation of state jurisdiction, the codification of criminal legislation, the institutionalisation of courts and the consolidation of the principle of legality. That picture is doctrinally persuasive, but it does not exhaust the mechanisms through which human conduct is actually regulated. A person lives in several normative spaces at once. The state demands compliance with statute. The family demands loyalty. The religious community demands observance of precepts. The professional community demands adherence to its ethic. Local tradition demands recognition of the authority of elders. An organised criminal network, in its turn, may demand silence, participation and readiness for violence. These demands may coincide, compete or collide head-on, and a single act may therefore be at once required by one order, tolerated by another and forbidden by yet another.

Contemporary criminal-law scholarship has a highly developed vocabulary for the elements of an offence, the components of a criminal composition, guilt, punishment and state coercion. It has devoted far less systematic comparative attention to the normative orders that precede the resort to a state court, coexist with it or seek to replace it. Legal pluralism, as developed by legal anthropology and sociology of law, has described the coexistence of overlapping normative systems for decades (Bohannan, 1965; Griffiths, 1986; Merry, 1988), and the literature on order without law has shown how close-knit groups resolve disputes without invoking formal rules (Ellickson, 1991). Yet these literatures have rarely been brought into a sustained dialogue with the specific questions of criminal responsibility: how a customary duty bears on *mens rea* and motive, how a group's pressure bears on voluntariness of consent to settlement, how a victim's position is affected when the pressure to remain silent originates inside the community that is supposed to protect her.

The research problem can therefore be stated as a shift of the guiding question. The criminological tradition asks why people break the law. The project asks what competing conceptions of the proper determine a person's conduct when state law, custom, group loyalty and personal conviction make incompatible demands, and under what conditions an unwritten order deserves recognition as a legitimate mode of resolving conflict rather than suppression as a mode of coercion. Behind this shift lies a practical observation which section 3.2 develops into a theory: the institutions that are charged with investigating and judging such conduct are, as a rule, unable to disentangle the competing demands that acted upon the person, and they therefore decide on a simplified picture of the case.

The question matters because the age of an institution does not prove its justice. Communal justice may be historically older than the institution that now claims exclusive power to administer justice. But longevity establishes neither fairness nor suitability for conflicts that lie outside the institution's original sphere of competence. The research must therefore be able to honour the

achievements of customary institutions without romanticising them, and to criticise their abuses without treating tradition itself as suspect.

2.1 Contribution and positioning

The article makes three contributions that are meant to be separable, so that a reader can accept any one of them without accepting the others. The conceptual contribution proposes that the unit of comparison in the study of unwritten normative orders should be a documented institution in a defined place and time, and that the line between legitimate autonomy and coercive control should be drawn by testable procedural features and not by the opposition between state and tradition. Within this contribution it offers a systemological description of the normative order of society and the idea of the mosaic nature of criminal law. The methodological contribution attaches to every empirical claim an explicit statement of what its source can and cannot support, and the evidentiary matrix in section 5.5 applies that discipline to each case. The doctrinal contribution shows how customary duty, group loyalty and communal pressure should enter the assessment of motive, voluntariness of settlement and the position of the victim in criminal-law analysis, a task which legal pluralism and the sociology of law have approached far more often than criminal-law doctrine has.

The article is positioned against three bodies of literature. Legal pluralism and the sociology of law supply the account of overlapping normative systems but rarely connect it to criminal responsibility. The Spanish studies of traditional and customary courts that I have located, centred on the Water Tribunal of Valencia and the Council of Wise Men of Murcia, approach these bodies chiefly as institutions of water law and procedural history, and I have not found one that uses them as a comparative benchmark for criminal-law questions. The comparative and European criminal-law tradition, including the work of the Institute of European and International Criminal Law of the University of Castilla-La Mancha and the scholarship on complicity and collective criminality associated with IE University in Madrid, offers the doctrinal vocabulary of participation, harmonisation and collective responsibility which this project applies to non-state orders.

The research questions follow from this positioning, and each of them is formulated so that it can be answered by evidence and not merely argued. The opening question asks which features of an unwritten normative order distinguish voluntary, proportionate and reviewable settlement from coerced submission. It presupposes that the difference is not a matter of the institution’s age, of its cultural prestige or of the language in which it speaks, but of procedural properties that can be observed and recorded: whether the person may decline to take part, whether she is heard, whether the decision-maker is independent of the parties and their kin, whether the outcome is proportionate to the harm, whether the decision can be reviewed, and whether turning to a state court exposes her to retaliation. The expected result of this question is a profile of each institution, and not a verdict on it.

A further question asks how criminal-law doctrine should treat customary duty and group loyalty when assessing motive, guilt and consent to settlement. Here the project moves from institutions to doctrine. Criminal law already admits outside norms through the joints of its own composition, as the idea of its mosaic nature suggests, but it has not said in a principled way how much of an outside norm each joint may admit. The question therefore divides into three parts. It asks whether a customary or familial duty may explain a motive without justifying the act. It asks how pressure originating inside a community bears on the voluntariness of a victim's consent to settlement or of an accused person's admission of guilt. And it asks where the line falls between mitigation, which the law may allow, and the removal of individual responsibility, which it may not. The working position is that such factors may illuminate motive and bear on mitigation, but cannot justify violence, compel a victim's silence or dissolve the individualisation of responsibility, which belongs among the constants of the normative order.

The closing question asks whether criteria derived from historical and community institutions can also be used to evaluate the state's own consensual procedures and to guide criminal policy and restorative justice in Ukraine. The reasoning is reciprocal. If voluntariness, proportionality, the safety of the victim, the possibility of exit and freedom from retaliation are the right measures for a village tribunal or a communal mediator, they are equally the right measures for a plea agreement, a diversion scheme or a reconciliation procedure administered by the state, in which formal consent may likewise conceal dependence, threat or inability to seek protection. The same criteria then become an instrument of criminal policy: they allow proposals for community participation in criminal justice, including restorative programmes and local mediation, to be assessed before they are adopted, and they allow victims who are pressed to settle to be given concrete protection. This is the point at which the Risk–Justice Paradox enters the practical programme, since each proposal must be asked what it gains in the management of risk and what it costs in individual justice.

The three questions are bounded by commitments that the article states in advance. It does not claim that any institution examined is a criminal justice system in its own right, because the institutions that will be studied have different functions, different spheres of competence and different relations to the state, and many of them, such as the irrigation courts of Spain, concern disputes that lie outside criminal matters altogether. It does not attribute normative codes to peoples, because a people is not a configuration of documented rules, whereas an institution in a defined place and time is. And it treats every statement about a community as a statement about a documented practice in a place and time, supported by an identified source and by an explicit statement of what that source can and cannot establish. These commitments are not a precaution added to the research design. They are its method, and they are what allows the questions to be put to historical orders, to community mechanisms and to criminal organisations that imitate custom without confusing the three.

3 Novelty and conceptual framework

3.1 The claim of novelty

The novelty of the project lies in constructing a comparative legal and criminological model for the study of unwritten and mixed normative orders through their attitude to criminal liability, to the victim, to coercion and to the limits of jurisdiction. I propose to unite historical-legal, anthropological, criminological and criminal-law analysis around the notion of normative boundaries, meaning situations in which belonging to a group, recognition of its rules or subordination to its authority begin to compete with the requirements of state law and with the individual rights of a person.

The project does not presuppose a single “European traditional criminal system”. Its subject is a diversity of institutions that differ in origin, function, procedure, social base and relationship to the state. For that reason three analytical categories are separated from the outset: historical normative orders, community mechanisms of dispute resolution, and illegitimate systems of coercion employed to organise criminal activity. Comparing them reveals similarities in the way obligations are formed, such as reputation, mutual dependence and the expectation of reciprocity, without confusing legal autonomy with organised crime. A further task is to distinguish voluntary reconciliation from forced submission, compensation of harm from the purchase of silence, group solidarity from collective pressure, and social authority from factual power.

The model rests on two ideas that are, to my knowledge, not yet combined in the literature: a systemological account of why normative situations are so difficult to disentangle, and a mosaic account of how criminal law is composed and where it admits what lies outside it. Sections 3.2 and 3.3 present them in turn, and section 3.4 gives the material background against which the mosaic must be read; sections 3.4 to 3.8 then show how my earlier concepts operate inside the resulting framework.

3.2 The systemology of the normative order of society

By the systemology of the normative order of society I mean the study of that order as a system, that is, as a structured whole whose properties cannot be read off from the list of its rules. The elements of this system are of three kinds: the subjects who live within it, the normative sources that make demands upon them, and the situational parameters in which the demands are made. My central proposition is that the uniqueness of the subjects, the mosaic of normative sources and their competition, and the diversity of situational parameters together form a complex “cocktail”, or tangle, which the institutions of investigation and justice are as a rule unable to unravel. I use the vocabulary of systems analysis in a disciplined and non-metaphysical sense. It serves to name three sources of complexity, to separate what is constant from what varies, and to explain why a procedure designed for one kind of fact fails in front of another.

3.2.1 The three sources of complexity

One source is the uniqueness of the subjects. No two persons stand in the same relation to the same set of obligations. Each has a biography, a place in a family and a community, a degree of dependence on others, a language, a level of information, a sense of honour or shame and a set of fears, and these are not interchangeable attributes. The “reasonable person” of legal doctrine is an abstraction that deliberately removes this uniqueness, and it must do so if the law is to treat like cases alike. The cost of the abstraction is that the very features which explain why this particular person acted as she did are removed from view at the point where the legal assessment begins.

Another is the mosaic of normative sources and their competition. Besides the statute and the decisions of courts, including those of the European Court of Human Rights, a person is addressed by the rules of the family, the precepts of a religion, the customs of a locality, the ethic of a profession, the code of a closed group, the pressure of a criminal organisation that imitates custom, and her own conscience. These sources differ in origin, in the form of their sanctions, in the speed with which they act and in the degree to which they can be challenged. They do not form a hierarchy that can be consulted in order. Their relative weight differs from person to person and from moment to moment, and they may converge, compete or collide. A source that is weak in general may be decisive in a particular household, and a source that is formally supreme may be practically irrelevant to a person who has never had access to it.

A further source is the diversity of situational parameters. The same person and the same set of sources produce different conduct depending on the stage of the conflict, the asymmetry of power between the parties, the information available to each, the presence of witnesses, the urgency of the choice, the credibility of threats, the resources for exit, the accessibility of independent protection and the surrounding conditions of public life, which in wartime include displacement, the loss of social ties and the weakening of ordinary institutions. These parameters are numerous, they change quickly, and they interact with one another. A small change in one of them can alter the meaning of the whole situation.

Taken together, the three sources make a configuration of such density that it deserves the name tangle. The point is not that each source is individually obscure. It is that their combination is non-additive: the effect of two competing obligations on a given person in a given situation cannot be inferred from the effect of each taken alone, and the same obligation may support lawful conduct in one configuration and an offence in another.

3.2.2 Constants of the system

A theory of a tangle would be useless if everything in it varied. The systemological view must therefore begin by separating what is stable from what is variable, and I start with the constants, because they are what make comparison across cases and across institutions possible. I identify five.

One constant is the person as the irreducible bearer of a normative position. However strong the pressure of any group, the final addressee of every demand is an individual who can understand it, comply with it, refuse it or be harmed by it, and this is why the project insists on the individualisation of responsibility. Another is the structural plurality of normative sources. The content of the sources varies, but the set of kinds is stable: state law, family, religion, community custom, profession, criminal governance and personal conscience are present, in some combination, in every society that the project will study. A further constant is the distinction between the monopoly of the state over lawful punishment and the absence of any monopoly over normative life, which is the formula on which the whole article rests.

Central among the constants is the minimal core of safeguards by which any order that claims to resolve conflicts must be judged: voluntariness of participation, proportionality of the outcome, the safety of the victim, the real possibility of exit from the procedure, and freedom from retaliation for turning to an independent court. This core does not change with the culture, the period or the type of institution, and it is the measure against which the variable elements are assessed in section 6. The remaining constant is the non-derogable character of individual responsibility. Neither extraordinary circumstances, nor tradition, nor popular support may replace it, and this holds for the state’s own consensual procedures as much as for communal ones.

3.2.3 Variables of the system

Against these constants the system has three families of variables. One family is the identity and position of the subjects: age, status within the family or group, economic dependence, residence, language, experience of displacement and the role in the conflict, whether that of the person who harmed, the person harmed or a bystander on whom the demand for silence or for testimony falls. Another is the configuration of normative sources: which of them are actually present in the case, how strongly each acts, whether they point in the same direction, and how each of them is perceived by the person herself. A further family is the set of situational parameters listed in section 3.2.1, to which must be added the effect of the procedure itself once it begins.

Each concrete case can then be described as a particular combination of values of these variables over the fixed background of the constants. This description accomplishes two things at once. It explains the uniqueness of the case, which lies in the combination and not in any exotic rule, and it keeps the case comparable, because it is always described through the same constants. It also supports

the methodological decision of section 4 to compare institutions and not peoples. A people is not a configuration of variables, whereas a documented institution in a defined place and time is one.

3.2.4 Why institutions of investigation and justice cannot untangle the tangle

The proposition that investigation and adjudication cannot, as a rule, disentangle such configurations is a hypothesis which the project will test, but its grounds can be stated. One ground is selection. A criminal file admits only facts that are legally relevant and procedurally admissible, whereas the tangle consists largely of facts that the law does not recognise as facts: an unspoken expectation of loyalty, the memory of an earlier insult, the fear of what will be said in a village. Another is binarisation. The decisive questions of the procedure are answered by yes or no: lawful or unlawful, guilty or not guilty, voluntary or involuntary. The legal system communicates in a binary code of guilty and not guilty, state and offender, which describes the outcome of a procedure well and the situation that preceded it poorly. A configuration of competing obligations of unequal weight does not fit into a binary, and where it is forced into one, the legally irrelevant remainder disappears from the decision.

A further ground is time. A procedure takes a snapshot of a moment, while the obligations that act on a person have been accumulating over years and often over generations. Proof supplies another. Unwritten obligations leave no documents, and those who know of them are inside the group and have every reason not to speak. The most important ground, and the least noticed, is this: the procedure is itself a normative source. Its arrival changes the configuration it is supposed to examine, because a witness who testifies, a victim who complains or an accused who admits guilt becomes exposed to the reaction of the group, and that reaction in turn alters what the witness, the victim and the accused say. Institutions therefore decide not on the tangle as it was, but on the tangle as it has been disturbed by their own intervention.

3.2.5 Systemic properties and their consequences for method

Three consequences follow for the method of the project. Because the configuration is non-additive, no inventory of rules, however complete, can describe the normative order of a place. The project must describe institutions in operation, with their procedures, sanctions and exits, and must attach to each description the evidence on which it rests. Likewise, because small differences in situational parameters may change the meaning of a case, the comparison must be graded and must report the profile obtained, not a verdict. Moreover, because the intervention of the state is itself a variable, the project must ask of every proposal for community participation in criminal justice, including restorative programmes, what the proposal does to the configuration of obligations that already acts on the persons concerned. These consequences are carried into the criteria of section 6.

3.3 The mosaic nature of criminal law

The systemological view has a counterpart in the doctrine of criminal law itself, and I call it the idea of the mosaic nature of criminal law. A mosaic is a composition made of elements that differ in origin, colour and size, which are held in place by a frame and by the material that fills the joints between them. The thesis is that criminal law, although it is presented as a unified and hierarchically ordered body of state norms, is in fact composed in this way, and that the composition explains both its strength and the place where unwritten orders enter it.

The elements of the mosaic are of several kinds. There are the provisions of the general and special parts of the criminal statute, which were enacted in different periods and under different conceptions of crime. There are the decisions of national courts, which add content to open concepts. There are the standards of international and European law, notably those of the European Convention on Human Rights, which are imported into national doctrine and alter the meaning of the elements already there. There are blanket and reference norms that incorporate rules of other branches of law and of professional regulation. And there are concepts which the statute uses but cannot define from within itself, such as motive, guilt, the reasonable person, public order, good faith, reconciliation with the victim, and the personality of the offender. Each of these concepts is a window through which something from outside the statute is admitted into the assessment of the case.

It is at the joints of the mosaic that customary duty, family solidarity, religious precept and group loyalty enter criminal law. They enter through motive and through the assessment of guilt, through the voluntariness of consent and of settlement, through mitigating and aggravating circumstances, and through the discretion exercised in sentencing and in the choice of consensual procedures. The state does not need to recognise these norms as sources of law for them to act, since the structure of the mosaic provides a place for them. What criminal doctrine has not yet done is to say, in a principled way, how much of an outside norm each of these joints may admit, and where the filling must stop.

The limit is supplied by the frame of the mosaic, which is the principle of legality together with the guarantees of the person. Elements from outside the statute may colour the picture, but they may not become tiles of their own: they may be relevant to the understanding of motive and to mitigation, but they cannot justify violence, compel the victim’s silence or remove the individualisation of responsibility. The idea of the mosaic thus works in two directions. It makes visible that criminal law is already open to unwritten norms, so that the question is never whether to admit them but how, and it protects the frame by showing that every admission must pass through a channel the law itself has made.

3.3.1 Meanings of the norm and the code as a system of permissions

A criminal-law norm has meaning at several levels, and the mosaic is read differently at each. At the associative and everyday level, a prohibition is what people believe it to be, and that belief is formed by upbringing, by the media and by the example of neighbours. At the level of legal practice, it is what the investigator, the prosecutor and the court make of the text. At the doctrinal level, it is what scholarly interpretation says. These meanings do not always coincide, and where they diverge the written text loses its capacity to guide conduct. I have approached the wider question of the social function of criminal law in conditions of disorder elsewhere (Tuliakov, 2017b); the point here is narrower.

A closer look at the statute shows that its elements are less prohibitions than permissions. The Criminal Code of Ukraine does not say “do not kill”. It defines a crime as a socially dangerous guilty act provided for by the Code (Criminal Code of Ukraine, 2001, art. 11(1)) and attaches to it a rule of punishment. Read in this way, the Code describes models of undesirable conduct and forms of social reaction to them, and in doing so authorises and conditions the application of state coercion. The prohibition that citizens perceive is largely an effect of interpretation and internalisation, and not a sentence of the text. This is the sense of a formula familiar from Spanish criminal-law doctrine, according to which the criminal code is the negative constitution of a country: it marks the places at which the state may act against the person. For the mosaic the consequence is important. Each element is a condition under which the state may punish, and the joints at which outside norms enter are therefore the places where the conditions of punishment are filled with content.

3.3.2 The open boundary of the mosaic

The boundary of the mosaic is not drawn by the code alone. In *Engel and Others v. the Netherlands* the European Court of Human Rights held that a person may be treated as charged with a criminal offence by reason of the nature of the offence and the severity of the measure at stake, however national law classifies it (European Court of Human Rights, 1976). Administrative delicts that carry severe measures of state coercion, such as deprivation of liberty or heavy fines, thereby enter the mosaic even though the code does not contain them, and the field of conduct that the state treats as impermissible takes shape from criminal and administrative elements together. The mosaic is therefore a relatively open and developing system, which reproduces itself in the process of its application, either by extending old prohibitions to new situations through interpretation or by changes in legislation that create new elements. Whoever describes it must be ready to include tiles that the code does not name.

3.3.3 Singularity: when private regulation neutralises the public element

The openness of the mosaic has a pathological limit, which I have called the singularity of criminal law. It denotes a socio-legal condition in which the imperative concept of public-law protection of the rights and freedoms of the person is restricted by the dispositive privacy of parallel regulation (Tuliakov, 2016). The hypothesis behind the concept is that a public prohibition works only when it receives a subjective evaluation and is internalised by individuals or communities. Where a parallel reality of communicative images and meanings creates new possibilities of individual or collective conduct, traditional prohibitions cease to act: they are replaced by permissions, or are provoked by the state or by other actors in hybrid forms. With the aid of the practice of the European Court of Human Rights, it can be shown that the effectiveness of criminal-law influence is blocked by private-law means of resolving legal conflicts (Tuliakov, 2016). The related policy question, how the criminal-law response to new forms of conduct may be optimised without multiplying prohibitions that the population will not internalise, is addressed in my study of the matrix of neo-criminalisation (Tuliakov, 2017a).

The present project does not identify singularity with mediation or with restorative justice. Singularity concerns the formation of personal rules of reaction to prohibitions, rules that bypass the public frame altogether. The unwritten orders that the project studies are, by contrast, structured arrangements with procedures, authorities and, in the best cases, safeguards. The criteria of section 6 are designed to tell the two apart: a community settlement that preserves voluntariness, proportionality, protection of the victim, exit and access to an independent court supplements the public frame, whereas private regulation that removes these features displaces it.

3.3.4 Fragmentation and the European layer

The mosaic is not only layered; at the European level it is also fragmenting. The meanings of European criminal law may be distinguished on three levels. There is the contextual meaning of the convention norms and of their interpretation by supranational courts, a meaning that is dynamic and often contradictory. There is the image of criminal law in the legal consciousness of ordinary citizens, formed to a great extent in networks of social communication. And there is the individual level, at which each person evaluates her own security and the demands addressed to her. Cultural differentiation between the common-law, Romano-Germanic, customary and Byzantine types of regulation fits a tendency towards fragmentation in countering local crime, so that the material criminal law of Europe is better described as an informational construct with normative inclusions than as a uniform and binding instrument, while procedural forms such as the European arrest warrant continue to develop.

This observation supports the method of the project. If the meaning of a prohibition is shifting from general jurisdictions to communities, networks and individuals, then the study of normative orders must descend to the level of documented institutions in defined places, and it must not proceed from an imagined European whole.

3.3.5 Four limits of admission at the joints

The joints of the mosaic are not open without limit. I propose that the admission of an outside norm into the assessment of a case, and equally the introduction or change of a prohibition, be governed by four moral limits. One of these is complementarity, the recognition that criminal coercion is the final and strictly formalised means in the system of state influence on conduct, which does not mean that it is dispensable: the punitive core of criminal law makes possible the functioning of other institutions and protects fundamental freedoms. Proportionality requires that the scale of state coercion be differentiated according to the persons affected, the gravity of the offence and the needs of the victim, third persons and the state. Solidarity concerns the extent to which the norms and the doctrine correspond to the stage of development of the society and to its moral and psychological condition, since a prohibition that is widely regarded as morally permitted becomes ineffective. Respect requires that the quality and quantity of prohibitions correspond to the moral expectations and traditions of the population. Excess in one direction produces over-criminalisation; deficiency in the other produces anomie, abuse of rights and legal nihilism.

These limits give content to the frame of the mosaic that was described above. They explain why customary duty may colour the assessment of motive, since respect for the moral expectations of the community is one of the limits, and why it may not compel silence or violence, since proportionality and the guarantees of the person bound it from the other side.

3.3.6 The two ideas together

The two ideas of this section fit together. The normative order of society is the larger mosaic, composed of many sources, and the criminal law is a smaller mosaic cut out of it and framed by legality. A court sees only those tiles of the larger composition which the smaller one allows it to see, and this is the structural reason, beyond those listed in section 3.2.4, for which the tangle cannot be disentangled in the courtroom. The remedy is neither to dissolve the frame nor to pretend that the larger mosaic does not exist, but to describe the larger composition with enough precision that the choices made at the joints of the smaller one can be justified.

3.4 The material background of the mosaic: legal order and the conditions of dignified life in wartime

The mosaic of criminal law does not hang in the air. It rests on a material substrate, and the way its elements work in a given case depends on whether the persons concerned have the practical means

to use them. War exposes this dependence with particular force. It shows a fundamental weakness of legal order: a person may retain formally recognised rights while losing the material capacity to exercise them. Housing, food, water, energy and healthcare are not merely objects of consumption; they sustain the possibility of agency. I therefore treat the conditions of existence as the background against which the normative mosaic is to be read, and as part of the situational parameters of the systemological account in section 3.2.3.

I use the expression “the right to proper life” as an analytical expression for the conditions of dignified existence and not as the name of a newly established autonomous legal right. Its legal foundation lies in existing rights to an adequate standard of living, to health and to non-discrimination, together with the obligation of the state to take steps to the maximum of its available resources (United Nations, 1966, arts. 2, 11–12). The choice is deliberate. It keeps the argument inside the frame of legality, which section 3.3 identified as the frame of the mosaic, and it prevents the material background from being presented as a source of criminal liability in its own right.

3.4.1 Three ways of approaching ideology

Three recent contributions approach the relation between legal order, ideology and material conditions at different analytical levels, and the differences between them must be preserved. Kolomiiets (2019) examines criminal-law ideology as the organisation of criminal-law protection around values and meanings, an organisation that can guide legislation but can also turn it into a symbol of legislative demagogy. Weber identifies a contradiction between democratic self-government and the subordination of essential needs to corporate profit-seeking, and proposes the reorganisation of essential sectors around affordability and sustainable production (London School of Economics and Political Science, 2026). In her interview with Segalov (2026), markets, public ownership, regulation and investment appear as instruments rather than competing articles of faith. Cacicedo (2026), judging from the publisher’s annotated account on which I rely here, applies a materialist critique to the categories of criminal law themselves, examining their role in reproducing relations of domination.

Their concerns are therefore distinct. Kolomiiets is concerned with the ideational foundations of protection, Weber with the material conditions of democratic resilience, and Cacicedo with the social relations that legal forms may conceal. These are not mutually exclusive answers but three layers of one composition, and their shared contribution lies in refusing to treat the existing order as inherently neutral. Yet critical scrutiny must extend to the alternatives they propose. Kolomiiets’s framework should be supplemented by asking how a rights-protecting system of values can be distinguished from an ideological justification of coercion. Weber’s programme should be supplemented by asking how essential needs can be secured without creating dependence on administrative discretion, and by remembering that affordability is neither a sufficient condition of

democracy nor an explanation of fascism: economic insecurity must be distinguished from its political mobilisation through exclusion, enemy construction and demands for unrestricted power. Cacicedo's materialist perspective should be supplemented by distinguishing between the use of a legal category to sustain domination and its potential to safeguard individuals against arbitrary power.

The last point is decisive for the idea of the mosaic. The historical origins of a principle do not exhaust its contemporary functions: legality, culpability and procedural safeguards cannot be discarded merely because their development was socially conditioned. Exposing the ideological uses of criminal law does not invalidate these guarantees, and critique must constrain arbitrary power and not supply a new justification for it. In the terms of section 3.3, the critique of ideology may re-examine the elements of the mosaic, but it must leave the frame standing.

3.4.2 War, exploitation and the design of institutions

Russian aggression can destroy the infrastructure through which essential goods and services become available. The reporting of the Office of the United Nations High Commissioner for Human Rights (2026) on attacks against energy infrastructure documents disruption to electricity, heating and other essential services. A lower tariff cannot restore a destroyed network, just as financial assistance cannot by itself recreate an inaccessible health service. Wartime protection must therefore address physical availability, continuity, safety and affordability together. This does not dilute the responsibility of the aggressor; it identifies the complementary obligations of institutions responding to the resulting harm.

The central criminological problem is not the supposed dangerousness of poverty, but the capacity of others to exploit constrained choices. The framework distinguishes direct harm from warfare, the subsequent exploitation of vulnerability and the institutional aggravation of harm. A displaced person may confront deceptive employment, abusive housing arrangements or demands for unofficial payment. These are research scenarios and not claims about their prevalence. Establishing criminal responsibility requires evidence and the elements of a particular offence, while identifying preventable vulnerability should not depend on waiting for a completed crime.

Institutional design matters equally. Compensation and assistance may exist in law but remain inaccessible when applicants cannot replace lost documents, correct registry errors or obtain reasons for refusal. Not every delay is unlawful, particularly under wartime constraints. Nevertheless, a procedure should be assessed by whether the affected person can actually use it. My proposition that the transformation of victim status into agency is an independent objective of the legal system becomes here a criterion of assessment: it requires meaningful participation, accessible information, review mechanisms and practical opportunities to restore independent living.

The same perspective limits punitive responses. Neither high prices nor profit alone establish wrongdoing, and competition enforcement, transparent procurement, social support and sector-

specific regulation must be distinguished from criminal prosecution. Where rights remain formally recognised but housing, healthcare, energy or effective remedies are practically inaccessible, legal order risks being experienced as a language of assurance and not as a reliable structure of protection, and criminal-law measures that do not address the relevant vulnerability may perform a predominantly symbolic function. This does not make symbolic recognition irrelevant, nor does it require every prosecution to resolve structural deprivation. It requires distinguishing the expressive value of criminal justice from its demonstrable protective effects. Whether such a discrepancy weakens institutional trust, and under which conditions, remains an empirical question and not a predetermined conclusion.

3.4.3 The international policy framework

The sequence of the United Nations Crime Congresses supplies a policy framework for this discussion, not an endorsement of a particular economic programme. The Doha Declaration of 2015 connected crime prevention and criminal justice with the wider United Nations agenda and sustainable development (United Nations Office on Drugs and Crime [UNODC], 2015). The Kyoto Declaration of 2021 continued this orientation through attention to the causes, including the root causes, of crime (UNODC, 2021). The Fifteenth Congress, held in Abu Dhabi from 26 September to 1 October 2026, linked crime prevention, criminal justice and the rule of law with protecting people and the planet in the digital age, and the account of the Abu Dhabi Declaration published by UNODC (2026) emphasises prevention, resilience, accountable justice and follow-up focused on measurable impact. These political commitments do not themselves create an enforceable entitlement to a particular price or ownership model. For Ukraine they suggest assessing protection through outcomes and not through legislative activity alone: whether assistance reduces the forced sacrifice of basic needs, whether compensation restores practical capacity and whether oversight prevents the diversion of essential resources.

The Sustainable Development Goals connect poverty reduction, health, water, energy and sustainable communities with access to justice and accountable institutions (United Nations Department of Economic and Social Affairs, n.d.). These connections must not turn social assistance into surveillance of supposedly risky populations. Support is grounded in dignity and rights, and any preventive effect is an additional empirical question. Research should separately examine normative legality, practical effectiveness and public confidence, since popularity cannot establish lawfulness and increased prosecution cannot establish reduced vulnerability.

3.4.4 Consequence for the mosaic

The consequence for the mosaic is a criterion that can be applied to every one of its layers, whether ideational, material or normative: does the individual acquire a genuine capacity to act, to

refuse exploitation and to seek the restoration of rights? The critique of ideology would then extend beyond exposure, economic policy beyond affordability, and criminal-law protection beyond punishment, and all three would be assessed by whether they reduce the individual's dependence on the arbitrary power of others. The thesis that follows is that wartime legal order should protect both the conditions of existence and the limits of public power. Its critical integration should neither replace accountability for aggression with social policy nor replace social protection with punishment, and its decisive test is whether people harmed by war regain agency and do not acquire new dependencies.

3.5 Collective Intuitive Criminal Policy

The conceptual centre of the project is my framework of Collective Intuitive Criminal Policy (Tuliakov, 2026a). By intuitive criminal policy I do not mean replacing law with subjective intuition. I mean the study of those ideas about the just, the obligatory, the forbidden and the shameful that form before any legal qualification of an act and that may influence the evaluation of an offence, the admission of guilt, the attitude to punishment and the readiness of a victim to seek protection. The word collective marks that these ideas are not private idiosyncrasies. They are transmitted and enforced by groups, and they acquire a quasi-normative character through repetition, reputation and the fear of exclusion.

The framework builds on, and seeks to extend into the study of group-enforced norms, the empirical tradition on community views of justice (Robinson & Darley, 1995). In the systemological account of section 3.2, it supplies the description of one family of variables, namely the way in which each source of obligation is perceived by the persons it addresses. The project applies the framework to a field in which its explanatory power can be tested against concrete institutions, since each unwritten order is in effect a store of collective intuitions about justice together with a procedure for enforcing them.

3.6 The Risk–Justice Paradox

The Risk–Justice Paradox, which I have developed in the context of actuarial approaches to criminal law, desistance and stigmatisation (Tuliakov, 2026d), describes the tension that arises when a legal system tries to manage risk and to do justice at the same time, because techniques of risk allocation tend to erode individualised assessments of fairness. The paradox acquires a fresh significance in the study of unwritten orders. Collective liability, group guarantees and communal sanctions are historically intelligible as risk-distribution devices: a community spreads the cost of harm across kin or neighbours so that conflict does not escalate into a feud. The same device sacrifices individualisation of responsibility.

The project will use the paradox as a diagnostic: wherever an unwritten order reduces the risk of further violence by means of collective responsibility, it must be asked what price in individual justice is being paid, and by whom. The same question applies to the state, whose own instruments of risk management, from preventive measures to consensual procedures, may purchase efficiency at the cost of individual justice in precisely the same way.

3.7 Criminal non-law

The concept of criminal non-law (Tuliakov, 2026b) denotes norms and practices which present themselves in the vocabulary of criminal law, such as prohibition, sanction and punishment, yet lack the guarantees that make criminal law law: legality, the right to be heard, proportionality and review. Extending the concept beyond the state, I propose to ask whether an unwritten order, or a criminal organisation that imitates one, can produce a non-law of its own, a system of sanctions that borrows the authority of custom while denying the person any means of challenge.

This is the point at which the three analytical categories of the project are separated: custom with safeguards, custom without safeguards, and criminal governance that merely counterfeits custom. In the systemological terms of section 3.2, criminal non-law is the case in which a source of obligation presents itself as part of the mosaic of legitimate orders while it fails the minimal core of safeguards.

Two further features of the concept should be stated. Criminal non-law may take the form of a system of norms and rules of conduct that proceeds not from the state but from another social subject and illegitimately extends its influence over the regulation of criminal activity and over territory belonging to another competence. Such quasi-criminal laws are acts of authority that are illegitimate from the point of view of national and international law. And the concept connects with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which extends the notion of the victim to persons harmed by acts or omissions that do not violate national criminal law but violate internationally recognised norms on human rights (United Nations General Assembly, 1985). Non-law thus produces victims whom the criminal law of the state, taken alone, does not see.

3.8 Victim agency and safeguards

The remaining anchor is victim agency. The person who has suffered harm must remain a rights-bearing participant in any assessment of a normative order, rather than an instrument for restoring communal peace. A community mechanism may be valued for reconciling families, yet if it obliges the harmed person to accept a settlement, remain silent or refrain from approaching a state court, it restores order at that person’s expense.

The same Declaration is a reminder that informal mechanisms are not to be rejected out of hand: it states that mediation, arbitration and customary justice or indigenous practices should be used

where appropriate to facilitate conciliation and redress for victims (United Nations General Assembly, 1985). The condition “where appropriate” is the point at which the safeguards enter. The safeguards therefore concern informed and voluntary participation, the genuine ability to decline or withdraw, access to independent protection and justice, confidentiality where appropriate, and freedom from intimidation or retaliation. These requirements apply throughout the project: restorative outcomes are legitimate only where they protect the person’s agency and do not displace individual responsibility or access to lawful remedies.

4 Method: institutions, not peoples

The unit of comparison will be neither a people nor an ethnic group. It will be a concrete normative institution, practice or documented procedure in a defined place and time. This methodological decision is both scientific and ethical. It prevents the transfer of features of one institution to an entire population, and it blocks the use of ethnic affiliation as a proxy for evidence of criminal conduct or for the existence of a single normative system.

For comparison I will use a uniform set of analytical parameters, which are the operational form of the constants of section 3.2.2. These are the source of the norm’s bindingness; the body that makes the decision; the manner in which facts are established; the right of the parties to be heard; the character of the sanction; the allocation of responsibility among individuals and groups; the possibility of refusing to participate; the protection of the victim; the possibility of appealing to state justice; and the means by which a decision may be reviewed or challenged. For each institution the values taken by the variables of section 3.2.3 will be recorded in the same order, so that profiles can be placed side by side.

In work on criminal organisations, I will use exclusively verifiable sources that make it possible to distinguish established facts from police hypotheses, public stereotypes and unconfirmed generalisations. Each factual assertion will be accompanied by a recorded degree of reliability, and historical evidence will be kept apart from contemporary observation.

The working hypothesis is that the stability of a normative order is determined not only by the formal bindingness of its rules but by a combination of recognised authority, social interdependence, procedural fairness, the possibility of appeal and the availability of alternative protection, a combination consistent with the empirical findings on procedural justice and legitimacy (Tyler, 2006). It follows that the decisive difference between legitimate community settlement and a coercive system of control does not run along the line between the state and the traditional. It is defined by a set of testable features: voluntariness, proportionality, protection of the victim, the possibility of leaving the procedure and the absence of threats for turning to an independent court. This hypothesis

does not presuppose the superiority of any institution and will be tested against historical and empirical material.

5 Fields of comparison

5.1 Living institutions of community justice

The Tribunal de las Aguas of the Valencian plain is the natural starting point because it is not an exotic illustration of a theory of custom but a functioning institution. It resolves disputes over the use of irrigation water in connection with the irrigation communities of the Valencian huerta, proceeds orally and in the Valencian language, and relies on mechanisms that safeguard impartiality. In 2009 it was inscribed on the UNESCO Representative List of the Intangible Cultural Heritage of Humanity together with the Council of Wise Men of Murcia. According to the inscription, the Water Tribunal comprises eight elected administrators representing 11,691 members from nine communities, while the Council of Wise Men has seven geographically representative members and jurisdiction over an assembly of 23,313 landowners (UNESCO, 2009).

The lesson I draw is not that traditional justice is superior to state justice. It is the more complex observation that a durable order can rest on a combination of custom, elected representation, public trust, specialist local knowledge and procedural limits on power. The field also invites comparison with scholarship on the governance of shared resources, in which irrigation communities of this kind, including those of Spain, have long been studied as examples of rule-making by the users themselves (Ostrom, 1990).

The Council of Wise Men of Murcia and other documented institutions of this type will be examined in the same register, with a specific interest in the significance of election, oral procedure and local knowledge, and in the ways in which such bodies sit alongside the state judicial system without displacing it.

Spanish scholarship provides the institutional detail that the comparison requires. The Organic Law on the Judiciary recognises the Water Tribunal of the Valencian plain as a customary and traditional court (Ley Orgánica 6/1985), and the recognition of the Council of Wise Men of Murcia was added by a later amendment (Ley Orgánica 13/1999). The Valencian literature identifies the oral, concentrated and rapid procedure studied by Fairén Guillén (1988), and the defence of the Tribunal before the Cortes of Cádiz by Borrull y Vilanova, whose treatise of 1831 sought to exempt it from the unity of jurisdiction established by the Constitution of 1812, as reported in a study published in the *Revista Jurídica Austral* (Perilla Granados & Meza Prada, 2026; Borrull y Vilanova, 1831). Comparative treatments of traditional courts as procedural models, such as the study hosted by the University of Valencia (Los tribunales tradicionales y consuetudinarios como modelos jurídico-procesales, n.d.), and the account of the Council of Wise Men of Murcia and its Islamic-law

antecedents (El Consejo de Hombres Buenos de la Huerta de Murcia y el Tribunal de las Aguas de Valencia, n.d.), allow the two institutions to be read together.

These sources concern irrigation disputes. They show how custom, election and procedural limits sustain authority in one field of conflict, and they do not show that the same arrangements could be transferred to criminal matters, which is precisely the question the project asks.

5.2 Historical orders

The historical programme will reconstruct customary law and communal justice in selected European regions, fixing for every case the period, the territorial boundaries and the available sources. I propose to study Welsh institutions of compensation, in particular *galanas*, the payment associated with homicide, and *sarhaed*, the payment associated with insult to status, paying attention to the difference between compensation, status hierarchy, collective responsibility and the restoration of social peace. I will also study Cossack judicial and disciplinary orders, the customs of Bessarabia and of the Carpathians, the historical institutions of the Basque Country and Navarre, and certain Andalusian and Norwegian models of local normative regulation. Each of these regions will be treated as a specific historical case with its own sources, not as an illustration of a general theory of tradition.

The source base for these historical cases is deliberately tied to identifiable editions and repositories. For Welsh law I will work from the translation and edition of the Law of Hywel Dda by Jenkins (1986), together with the Latin redactions edited by Emanuel (1967) and Fletcher (1986), both located through the National Library of Wales account of the lawbooks (National Library of Wales, n.d.). For Cossack orders I will begin with the overview by Mishchanyn (2024), a short conference text that serves only as a pointer, and with the study of self-government in the Hetmanate by Horobets (2024), and then move to primary court records.

For the Carpathians, the Hutsul volume edited by Pavliuk (2020) provides an ethnographic starting point that must be supplemented with historical legal records before any conclusion is drawn about sanctions or institutional authority. For Bessarabia the principal text is the study of the local laws of the province by Shimanovsky (1887–1888), read against the chronology of the period of relative autonomy of Bessarabia in 1812–1828, which supplies institutional context but not customary criminal norms (National Museum of the History of Moldova, n.d.). For Navarre I will use the edition of Jimeno Aranguren (2016) and the compilation of Chavier, in its digitised edition of 1686 (Chavier, 1686) and in the modern edition of 2020 (Chavier, 2020), and for Basque materials the catalogue of the Sancho el Sabio Foundation (Fundación Sancho el Sabio Vital Fundazioa, n.d.).

5.3 Religious, ethnocultural and family orders

This part of the programme examines documented practices of Roma communities, of Sinti and of Irish Travellers, as well as Jewish religious-legal and communal institutions. For the former, the

analysis will concentrate on documented practices of mediation, internal resolution of disputes, the turn to state authorities and the consequences of refusing to submit to internal demands. For the latter, I will distinguish the religious norm, internal governance, mediation, disciplinary procedure and state jurisdiction in different historical and contemporary contexts.

The communities will not be presumed homogeneous. No ethnic identity will serve as a substitute for proof of criminal conduct, and no single normative system will be attributed to any of them. Where the sources reveal that pressure on an individual comes from within the community, that finding will be reported as a finding about a practice in a particular place and time and not as a trait of a people.

The documentary base for this part is assembled so that every claim stays specific. For Jewish communal institutions I will use Westreich (2012) on the jurisdiction and structure of Jewish judicial autonomy in nineteenth-century Jerusalem, and Michałowska-Mycielska (2008) on authority and social control in the communities of Poznań and Swarzędz between 1650 and 1793. The entry on the communal council in the *Jewish Encyclopedia* (Rosenthal, n.d.) serves as supplementary institutional detail, including its account of the three classes of communal judges recognised by the Kraków statutes of 1595, and not as a substitute for current historical scholarship. Each source supports a historically situated example and not a claim about all Jewish communities.

For the Sinti, Tribulato (2022) offers an ethnographic case study of autonomous norm-making through conflict avoidance and resolution among Italian Sinti families in travelling show business, and it will not be generalised beyond that setting. For Irish Travellers, McDonagh and O'Brien (n.d.) describe the culturally informed work of the Traveller Mediation Service, which is evidence of community-based dispute resolution and not, without further evidence, of a comprehensive or historically continuous Traveller legal system.

For Roma communities, Nafstad (2016) surveys the scholarship on non-state normative orders, including tribunals and private settlements and the variation between communities, and identifies the scarcity of Scandinavian research, which is itself a reason to avoid confident generalisation. The collection edited by Weyrauch (2001) on Romani legal traditions is the main anthology, and the review by Barnes (2003) in the *Marquette Law Review* is cited as a review and not as empirical research. The Norwegian material rests on Nafstad (2018), which examines how Norwegian and Swedish courts treat Roma normative systems, minority rights and equality before the law. It supports analysis of the judicial treatment of minority normativity and not the claim that Norwegian courts recognise an autonomous Roma jurisdiction. The Council of Europe portal on Roma and Travellers (Council of Europe, n.d.-b) remains only a contextual starting point.

The Andalusian case is bounded in the same way. Gamella and Sánchez-Muros (1996) reconstruct the killings at Loja in 1992 from documentary sources and ethnographic fieldwork,

discuss the judgments, and analyse how the conduct of particular families came to be attributed stereotypically to an entire ethnic community. The study supports a carefully bounded case and cannot support the proposition that Andalusian Gitanos follow a uniform customary criminal law.

5.4 Coercion, organised crime and normative imitation

A separate comparative strand will place the documented mechanisms of the 'Ndrangheta, of certain Corsican criminal networks and of family-type criminal structures in Germany beside the legitimate community institutions. The purpose is to identify the mechanisms of coercion, the securing of loyalty, the control of reputation and the obstruction of recourse to outside protection. It is not to criminalise ethnic or territorial communities. The point of placing these structures in the same analytical field is that they frequently borrow the language of honour, kinship and custom. Distinguishing real customary authority from its imitation is therefore the practical task of this strand, and my notion of criminal non-law supplies its principal instrument. The economic account of private protection offered by Gambetta (1993) is the reference point for the question of how such organisations substitute for, and counterfeit, the authority of the state.

The empirical base for this strand is built from case-level judicial material, and thematic scholarship is kept separate from it. Europol publications (European Union Agency for Law Enforcement Cooperation [Europol], n.d.-a) and the EU Serious and Organised Crime Threat Assessment (Europol, n.d.-b) establish context and typologies, while HUDOC (Council of Europe, n.d.-a) and CURIA (Court of Justice of the European Union, n.d.) are used to locate judgments.

For the 'Ndrangheta the principal source is judgment no. 27394/2017 of the Second Criminal Section of the Italian Court of Cassation, decided at the hearing of 10 May 2017 (Corte di cassazione, 2017). It concerns participation in a mafia-type association and the significance of affiliation and organisational insertion, and it engages with the earlier *Crimine* decision of the same court, no. 55359/2016. It is materially stronger evidence than an agency summary for claims about what courts inferred from intercepted conversations, affiliation and organisational relationships. A commentary in Diritto.it (n.d.) cautions that a judicial reconstruction of the organisation's unity should not be treated as an immutable universal finding, and it is used alongside the judgment and not instead of it.

For Germany the source is the decision of the Federal Court of Justice of 17 July 2025 in case 5 StR 465/24 (Bundesgerichtshof, 2025), read with the analysis by Markus Sehl in *Legal Tribune Online* (Sehl, n.d.). The case concerns the confiscation of property in a matter associated with the Remmo family and the treatment of property financed from mixed sources. It is evidence for a specific confiscation dispute and does not establish clan courts, an internal normative code or a general rejection of German law.

The Corsican entry is not yet substantiated. The procedural lead is the decision of the criminal chamber of the French Court of Cassation of 9 September 2020 (appeal no. 18-86.351), identified in

a later official judgment of 13 March 2024 (Cour de cassation, 2024) and reported in *Le Figaro* (2020), which quashed the conviction of Claude Chossat because of overlapping findings of guilt arising from the same conduct. That is a procedural matter and says nothing about Corsican internal adjudication, clan discipline or a parallel normative order, so no such claim will be made until the primary judgment and the trial findings have been examined.

The Spanish-language and Spanish-institution literature is used for doctrinal vocabulary and not as evidence about these organisations. The Code of European and International Criminal Law directed by Arroyo Zapatero and Nieto Martín (2008) collects European and international instruments relevant to participation and organisation offences. Aksenova's (2025) work on art, aesthetics and international justice adds a complementary perspective: representations of atrocity and justice can shape public understanding, but aesthetic or narrative force is not a substitute for legal proof or individualised responsibility. This perspective is useful here as a methodological caution when studying the language of honour, loyalty and collective identity.

The broader framework of postnational criminal justice discussed by Nieto Martín (2022), the principle of humanity in penal law developed by de la Cuesta Arzamendi (2011), and restorative-justice analysis by de la Cuesta and Germán (2022) help connect comparative institutional study to the limits of punishment, humane treatment and safeguards in restorative processes. Demetrio Crespo and Sanz Hermida's (2019) analysis of *in absentia* proceedings further underscores that procedural participation and human-rights guarantees remain central to criminal justice.

5.5 Evidentiary matrix

The evidentiary matrix states, for each case, what the principal sources can support and what they cannot. It is the working instrument by which every empirical claim in the monograph will be checked before publication. It is set out here in narrative form, case by case, so that the reasoning behind each limit stays visible.

For Valencia and Murcia, the principal sources are the UNESCO inscription, the Organic Law on the Judiciary and the Spanish studies of the Water Tribunal and the Council of Wise Men. They can support statements about the institutional and procedural features of two recognised customary courts in water disputes. They cannot support any claim about customary criminal adjudication or about the transfer of these arrangements to criminal matters.

For Wales, the Cossack lands, the Carpathians, Bessarabia, Navarre and the Basque Country, the principal sources are editions and catalogues of lawbooks, *fueros* and local laws, together with ethnographic volumes. They can support historically situated reconstructions with fixed periods and territories. They cannot support the existence of a single European customary criminal system, and they cannot support conclusions on sanctions drawn from ethnography alone.

For Jewish communal institutions, the principal sources are Westreich, Michałowska-Mycielska and the *Jewish Encyclopedia*. They can support statements about the jurisdiction, structure and social control of specific communities in specific periods. They cannot support claims about all Jewish communities or about contemporary practice.

For the Italian Sinti, the principal source is Tribulato, and it supports a statement about autonomous norm-making through conflict avoidance within one ethnographically studied setting. It cannot support a generalisation to all Sinti communities. For Irish Travellers, the principal source is McDonagh and O'Brien, which supports a statement about culturally informed mediation by a named service and cannot support the existence of a comprehensive or historically continuous Traveller legal system.

For the Roma and Norway, the principal sources are Nafstad and the volume edited by Weyrauch with its review. They can support a statement about the state of scholarship and about the judicial treatment of Roma normativity in Norwegian and Swedish courts. They cannot support the claim that Norwegian courts recognise an autonomous Roma jurisdiction. For Andalusia, the principal source is Gamella and Sánchez-Muros, which supports a bounded case study of the Loja killings and of the stereotyping of an ethnic community, and cannot support a uniform customary criminal law of Andalusian Gitanos.

For the 'Ndrangheta, the principal sources are Cassation judgment no. 27394/2017 and the commentary on it. They can support a statement about what the court inferred concerning affiliation and organisational insertion in the *Crimine* proceedings, and they cannot support an immutable finding on the unity of the organisation. For Germany, the principal source is the decision of the Federal Court of Justice in case 5 StR 465/24, which supports a statement about a specific dispute on the confiscation of property from mixed sources and cannot support any claim about clan courts, an internal code or a rejection of German law. For Corsica, the principal sources are the Cassation decision of 9 September 2020 and the later judgment that identifies it. They can support a procedural lead on overlapping findings of guilt, and they cannot support any claim about Corsican internal adjudication until the primary judgment has been examined.

6 Criteria for assessing normative autonomy

The synthetic aim of the project is to formulate criteria for the legitimacy of community resolution of conflicts. Such criteria must reflect, at a minimum, the voluntariness of participation, the right to be heard, the independence of the mediator or decision-maker from the parties and their kin, the real possibility of withdrawing from the procedure, the safety of the victim, and the accessibility of state justice without fear of reprisal. To these I add proportionality of the outcome and the absence of collective responsibility imposed on persons who took no part in the act. In the

terms of section 3.2, the criteria are the operational form of the central constant of the normative order, the minimal core of safeguards.

The criteria are designed to be applied as a graded instrument, not as a binary test. An institution may satisfy some criteria fully and others only partly, and the profile obtained will indicate where, in practice, it sits between a mechanism of restorative settlement and a mechanism of control. This design answers the systemological difficulty described above: a binary test would repeat the error of the courts, which force a configuration of unequal obligations into a yes or no, whereas a profile preserves the configuration.

The same instrument can be used for the assessment of formal state procedures such as plea agreements and diversion schemes, in which formal consent may likewise conceal dependence, threat or inability to seek protection. In that way the model avoids the assumption that the state is the neutral standard against which all other orders are measured.

The model also bears on substantive criminal law, at the joints of the mosaic described in section 3.3. Customary duty, family solidarity, religious precept and group loyalty enter the evaluation of motive, guilt, responsibility, sentencing and the restoration of violated rights. The project will examine how legal systems have treated such factors, and propose a principled position: they may be relevant to the understanding of motive and to mitigation, but they cannot justify violence, compel the victim’s silence or remove the individualisation of responsibility.

7 Significance for Ukraine

For Ukraine the question has an additional dimension. Wartime violence, forced displacement, the destruction of social ties and the need to rebuild trust demand careful analysis of forms of social solidarity, informal mediation and collective responsibility. The post-war period will require institutions capable of drawing on local legitimacy without surrendering the guarantees of individual responsibility and of protection of the victim. Neither extraordinary circumstances, nor tradition, nor popular support may replace the individualisation of responsibility. In the systemological terms of this article, war multiplies and destabilises the situational parameters, and it does so at the very moment when the ordinary institutions that would normally read them are weakened.

The practical output for Ukrainian criminal policy will therefore be an instrument for assessing proposals involving community participation in criminal justice, including restorative programmes, reconciliation procedures and local mediation, accompanied by guidance on protecting victims who are pressed to settle. The project also offers a vocabulary for discussing the position of religious and conscience-based claims before courts, and for distinguishing the legitimate claim of conscience from an attempt to evade responsibility, a distinction on which the national case law on wartime conditions has not yet settled into a stable doctrine. The wartime dimension of the problem, and in particular the

autonomy of duties as a criterion in assessing public-order risk, is developed in my earlier work (Tuliakov, 2026c), and the material conditions of dignified life that underlie it are discussed in section 3.4.

8 Structure of the monograph

The monograph is planned in six parts that correspond to the working packages of the research programme. The opening part presents the theoretical model of normative boundaries: legal pluralism, customary law, the systemology of the normative order of society, the mosaic nature of criminal law, intuitive conceptions of justice and the interaction of social norms with criminal responsibility, and it yields the conceptual model and the unified comparative matrix. The historical part contains the reconstructions of European orders, with fixed temporal and territorial limits. The part on living institutions analyses functioning institutions of community justice, namely the Valencian Water Tribunal, the Council of Wise Men of Murcia and other documented institutions, and compares models of local dispute resolution.

The ethnocultural part is devoted to religious, ethnocultural and family normative orders and builds a typology of mechanisms of autonomy, mediation, internal control and recourse to outside protection. The part on coercion compares legitimate procedures with the control mechanisms of documented criminal organisations and develops criteria for separating social authority, coercion and criminal governance. The concluding part synthesises the results, presents the model for assessing normative autonomy, and offers recommendations for Ukrainian criminal policy and restorative justice. A companion open research resource will describe the sources and the method of their comparison so that the analysis can be reproduced.

The expected scholarly outputs include the monograph itself, a series of articles in Ukrainian and in English, a comparative database of documented institutions and procedures, methodological guidance on assessing normative autonomy and an analytical report for Ukrainian academic and law-enforcement bodies. The monograph is conceived as suitable either as the basis of a doctoral dissertation prepared under my supervision or as the founding product of a future international consortium. The programme is also designed to be carried out as an individual research fellowship at a European host institution, since its comparative method depends on sustained access to Spanish and wider European archives, courts and scholarly communities; the choice of the host institution remains to be confirmed.

9 Limits, risks and ethics

The principal risks are the heterogeneity of sources, restricted access to some communities and archives, language barriers, gaps in the historical record and the danger of confusing cultural practices

with criminal structures. To reduce them I will apply a single protocol for describing sources, record the degree of reliability of each assertion, separate historical evidence from contemporary observation and decline to extend the characteristics of any particular organisation to the population of a region or to an ethnic group. A further risk is specific to the systemological approach: a description in terms of configurations can be mistaken for an excuse, as though the complexity of a case lessened responsibility. The constants of section 3.2.2 are meant to prevent this reading, since the individualisation of responsibility is among them.

Special attention will be given to the ethics of interviews, the protection of informants and the avoidance of stigmatising representations. The mention of a region in this article does not signify an agreed partnership. Partners, archival collections, access for fieldwork and the scope of international participation must be confirmed before any application is submitted, and a fixed budget is premature until the consortium and the extent of fieldwork are determined.

10 Conclusion

The project proposes to leave the familiar opposition of state law and social tradition. It aims to identify the conditions under which local normative orders sustain justice, help to resolve conflicts and restore damaged relations, and the conditions under which the same mechanisms turn into instruments of pressure. The Valencian water court, Welsh institutions of compensation, Cossack judicial practices, Jewish communal structures, documented practices of Roma communities, Carpathian customs and other historically and institutionally different materials permit one common question to be put without reducing them to one model.

The systemological view and the idea of the mosaic nature of criminal law give that question its structure. The normative order of society is a composition of unique persons, competing sources and changing situations; criminal law is a framed mosaic cut out of it; and the institutions of investigation and justice, which see only what the frame allows, decide on a simplified picture of a tangled reality. The task of scholarship is to describe the tangle with enough precision that the choices made at the joints of the mosaic can be justified, and to hold fast to the constants that no configuration may remove.

The right to remain hatted is not a right to escape responsibility. It is the right of a person not to lose dignity before any power, whether state, community, family or criminal. It does not release anyone from accountability, but it requires every authority to justify its demands. The project is about the person who must be able to understand the demand addressed to her, to challenge it, to refuse submission to coercion and to receive protection without renouncing her cultural belonging. If an expert should ask what the practical value of such research is, the answer is that we wish to learn how

to distinguish justice from coercion even when both come to a person with an equally serious expression.

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