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## **IS IT POSSIBLE AND WORTHWHILE TO PROMOTE A WORLD-WIDE MODEL OF CRIMINAL PROCEDURE?**

The aim of this paper is to present some of the limitations and possible negative consequences of globalization of criminal procedure. Due to its limited scope the paper does not aspire to be a comprehensive systematic study of the problem. The references to specific examples in this paper assume generally the framework of the legal systems of the European Union and its member states. This, however, is done with the idea in mind that at least some of the remarks made here could be also relevant in a wider international context, when other legal systems are taken into consideration. In the paper, particular attention is paid to possible negative consequences of globalization tendencies. Assuming this perspective was intentional, in order to draw the reader's attention, I refer to those issues which are especially important from the point of view of legal certainty of an individual but seem to attract less attention in the literature on the subject than general analyses of the phenomenon of synergy of legal systems and the benefits stemming therefrom.

The development of standardization tendencies in criminal procedure seems to be a worldwide process, which should not be expected to stop, and even less reverse. Wherever the progress of globalization can be seen and social, political and economic contacts between different countries become more intense, leading to closer and closer cooperation between them, there the need also arises for wider and better mutual adjustments of procedural regulations necessary for the application of criminal law. Thus, unless some unexpected extraordinary events reverse the trend and lead to a substantial setback in international cooperation, it should be expected that it will be considered in the best interest of individual states to harmonize their regulations in this area of law in order to combat crime more effectively. It is a well-known observation, so much so that it has become a cliché to say that criminal law and, consequently, criminal procedure, must keep pace with the globalization of criminal activity. The development of the mechanisms of international cooperation in the sphere of criminal procedure is a direct consequence of the development of trans-border crime, which is to a large extent attributable to the negative side effects of the development of economic relations between different countries.

A very good example of promoting and improving cooperation in the sphere of criminal procedure is offered by the European Union. It is not possible within the scope of this paper to even briefly characterize the development of legal institutions in this area. It is however unquestionable that in recent years, the most visible manifestation of this process has been offered by the work on the European Public Prosecutors Office, whose aim is to prosecute offences against the financial interests of the European Union<sup>1</sup>. Although the draft EPPO regulation does not propose a common criminal procedure, but relies on national regulations, it introduces a catalogue of harmonizing procedural principles and instruments of automatic mutual recognition<sup>2</sup>. The importance of such instruments lies not only in that they directly regulate the issues which they refer to, but also in that they create grounds for further unification of criminal procedure regimes between European Union member states. The philosophy supporting the idea of creating a common supranational prosecutorial agency within the European Union is based on the assumption that breaching financial interests of the Union should be treated as a problem of the whole community and not merely as a sum of individual problems of its member states. Therefore, financial offences affecting the European Union should be investigated throughout its whole territory, with the possibility of taking direct actions by one specialized agency, possessing possibly uniform investigation powers. Such an approach of the European Union officials may be clearly observed if one analyses the characteristics of the offences against the financial interests of the Union, which become significantly more supranational, benefiting very broadly from the European Union's four freedoms and composed of networks largely exceeding territories of individual member states<sup>3</sup>. Applying a traditional, purely national attitude to the prosecution of such criminal activities may result in grasping only fragments of the full picture of a crime<sup>4</sup>. Instead of looking for the sources of criminal activity and fighting it swiftly according to the common supranational interest, it may just

<sup>1</sup> See the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, July 17, 2013, COM/2013/0534 final – 2013/0255 (APP).

<sup>2</sup> See Article 30 and Articles 32–35 of the EPPO proposal (visited July 17, 2013).

<sup>3</sup> For more details compare: The OLAF Report 2012 – Thirteenth report of the European Anti-Fraud Office, January 1 to December 31, 2012, at [http://ec.europa.eu/anti\\_fraud/documents/reports-olaf/2012/olaf\\_report\\_2012\\_en.pdf](http://ec.europa.eu/anti_fraud/documents/reports-olaf/2012/olaf_report_2012_en.pdf) (visited July 10, 2016). For a more general overview of the problem of trans-border crimes in Europe see U. Sieber, *Euro-fraud: Organised Fraud Against the Financial Interests of the European Union*, "Law and Social Change" 1998, Vol. 30, pp. 1–42; E. Velkova, S. Georgievski, *Fighting trans-border organized crime in Southeast Europe through fighting corruption in customs agencies*, (in:) E. Athanassopoulou (ed.), *Fighting organised crime in Southeast Europe*, New York 2005, pp. 64–77; M. Den Boer, *The fight against organised crime in Europe: a comparative perspective*, "European Journal on Criminal Policy and Research September" 2001, Vol. 9, issue 3, pp. 259–272.

<sup>4</sup> For analogical remarks compare: K. Ligeti, M. Simonato, *The European Public Prosecutor's Office: Towards a Truly European Prosecution Service?*, "New Journal of European Criminal Law" 2013, Vol. 4, p. 9.

concentrate on investigating the individual, national manifestations of the criminal conduct, leaving the very core aside<sup>5</sup>.

There is, however, an obvious and very big difference between strengthening procedural cooperation between individual countries in order to combat trans-border crime as well as protect common financial interests more efficiently and creating a common model of criminal procedure. While cooperation and, sectoral at least, mutual adjustments take place practically all the time, creating and establishing common comprehensive legal solutions of the status of law codification constitutes an extreme manifestation of the standardization and unification of the systems of criminal procedure. It is in this context that the question arises whether creating a common model of criminal procedure on a supranational scale should be considered a possible and worthy of pursuing goal. Putting the same question differently, we could ask if a common model of criminal procedure should be considered an optimal solution, an ultimate end that would be the crowning achievement of international cooperation in this sphere of law, or whether such far-reaching changes in the legal system are perhaps not at all necessary, or perhaps even not desirable, in the cooperation between different states.

In the first place, we should notice that any attempts to establish some common international model of criminal procedure that goes beyond the formula of purely theoretical fragmentary proposals will encounter a lot of obvious and fundamental problems ranging from those resulting from socio-cultural differences to basic constitutional issues concerning the sovereignty of individual states. As can be seen from the example of the European Union, in spite of very close international cooperation within the EU, standardizing rules of criminal procedure among its member states, even in a such relatively limited area as the prosecution of offences against the financial interests of the European Union, encounters serious difficulties, including direct opposition on the part of some of the member states against assuming additional responsibilities<sup>6</sup>. Consequently, we have no reliable reference point which could be used for estimating the odds of having such regulations introduced, and even less their quality and efficiency if they are adopted.

As far as socio-cultural differences are concerned, we can see already in the limited European context that a look at traditionally recognized major tradi-

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<sup>5</sup> For more detailed remarks compare: S. Pawelec, *Implications of Enhanced Cooperation for the EPPO Model and Its Functioning*, (in:) L. H. Erkelens, A. W. H. Meij, M. Pawlik (eds.), *The European Public Prosecutor's Office: An Extended Arm or a Two-Headed Dragon?*, Hague 2014, pp. 214–216.

<sup>6</sup> Cf. S. Pawelec, *Uwagi na temat zakresu kompetencji przyszłej Prokuratury Europejskiej*, "Palestra" 2014, issue 5–6, pp. 25–41. See also: *Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office – Report on the State of Play*, Council of the European Union, Interinstitutional File: 2013/0255 (APP), December 18, 2014, at <http://data.consilium.europa.eu/doc/document/ST-16993-2014-INIT/en/pdf> (visited July 10, 2016).

tions of criminal procedure<sup>7</sup> reveals a whole range of considerable discrepancies between one another. Apart from the fundamental division into *common law* and continental regimes, already at the level of preliminary proceedings we can notice how different approaches there can be in particular legal systems to the problem of maintaining the balance between providing procedural guarantees for individuals and the need to ensure the realization of investigative and control powers by state organs. In recent years, convergence of national systems of criminal procedure has been a subject of vigorous research which generally shows that no member state of the European Union has preserved any of the traditional models of criminal procedure (inquisitorial or accusatorial) in its pure form. Rather, there are all kinds of mixed, or hybrid, systems<sup>8</sup>. However, as far as predictions about the future development of the process of convergence between different legal systems are concerned, opinions vary. As has been aptly pointed out in the literature on the subject, apart from the voices expressing belief in unlimited levelling of systemic differences, there are also opinions that the convergence between different models of criminal procedure will reach some kind of saturation point, which no system will go beyond for fear of losing its fundamental features<sup>9</sup>. Not only would it be very difficult to reach agreement on such a text of common codification which would be adjusted to social and cultural needs of a community rich in its multiple legal traditions and aware of them, but even more discussion and practical problems, apparently, would be caused by, for example, the question of choosing an appropriate model for such codification. The legal act adopted would necessarily have to be either some kind of a midway compromise between the solutions functioning in all countries becoming party to the agreement, or it would have to be similar to one of the already functioning systems of criminal procedure. In the first case, all countries would carry a similar burden of adjusting their national legal system to new solutions. What is more, adopting a “midway” model would carry the risk of the unknown, self-evident in a situation where a system brought to life is a conglomeration of various legal procedure regulations which have never before functioned together. In the latter case, where one of the already existing codifications is adopted as a model for a new common codification, a disproportionately huge burden of adjusting their legal systems to the new regulations would be placed on those countries for which such a legal exercise would be foreign to their legal tradition. Bearing in mind these circumstances, it stands to reason that any hypothetical common model

<sup>7</sup> As for further characteristics of those traditions compare: E. Cape, J. Hodgson, T. Prakken, T. Spronken, *Suspects in Europe. Procedural Rights at the Investigate Stage of the Criminal Process in the European Union*, Antwerpen, Oxford 2007, pp. 5–8.

<sup>8</sup> Cf. M. Rogacka-Rzewnicka, *Oportunizm i legalizm ścigania przestępstw w świetle współczesnych przeobrażeń procesu karnego*, Warszawa 2007, p. 15.

<sup>9</sup> Cf. H. Kuczyńska, *Wspólny obszar postępowania karnego w prawie Unii Europejskiej*, Warszawa 2008, p. 21.

of criminal procedure could be successful only if it were different from a traditionally known code, understood as a comprehensive set of binding detailed provisions applying to all aspects of criminal procedure. In order to gain general acceptance, both in a legal and in cultural and political sense, a hypothetical model would rather have to be limited to basic rules, constituting a set of common minimal standards which no particular national regulations could stand in contradiction to. Naturally, both the extent of such codification and how detailed it would be remains open for debate. Apparently, the solutions adopted should fall somewhere between the two extremes: on the one hand, the model adopted should be free from excessive, purely formal richness of detail, not touching the nature of main institutions of criminal procedure. On the other hand, the solutions adopted within the common code should not be so general that they would constitute merely a set of recommendations for the conduct of criminal procedure, a kind of a very general framework that could be filled with almost any content. The experience of the difficulties encountered during the work on the proposal for the establishment of the European Public Prosecutor's Office shows also that even on the level of integration between member states of the European Union, not to mention the broader international context, a hypothetical common model would have to focus on promoting common normative solutions within the existing, already functioning, systems of criminal justice, rather than promote the ideas of establishing some supranational institutions, possessing wide procedural competences, replacing the position of national police and prosecutorial agencies, not to mention the judiciary, which would be much more difficult to implement. The reason is that taking the latter path would be tantamount to adopting solutions of a strictly federal character, which would in turn mean that the states willing to be part of the agreement would have to be ready to completely transform the political relations among them.

In these circumstances we can see that the bigger, geographically, the intended range of a common model of criminal procedure would be, the more limited and basic its content would have to be. Thus, a lot of money and organizational effort would be invested into calling into existence a legal act of extremely great generality, which by default would have to be implemented by the legal institutions of individual countries, which in turn would allow for dramatically different judicial interpretations. It seems then that in the sphere of international cooperation in the area of criminal procedure, rather than promoting such deep, sweeping reforms, a much more feasible idea, capable of producing tangible results, is to advocate focusing on selected problems or problem areas. The process is currently taking place on many levels, from traditional instruments of international cooperation, created on the inter-state level, to more and more developed mechanisms of direct judicial cooperation in criminal matters, observed in the European Union in the area of the former "third pillar". The scope of the present paper does not allow for any, even cursory, review of the legal regulations adopted under the heading of this

kind of cooperation, for example within the European Union itself. However, it can be assumed as a general and fundamental postulate that the development of this kind of sectoral cooperation should first and foremost focus on adopting, improving and promoting a common minimum catalogue of procedural guarantees for the accused, protecting the individual against adverse effects of the differences between the systems of criminal procedure in different countries. In particular, rather than putting a lot of effort into developing and establishing a complex model of a common criminal procedure, it seems a much more necessary goal, from the point of view of everyday legal certainty of citizens, to develop and promote common rules of admissibility of evidence. It should not happen that in the cases of criminal procedure concerning trans-border criminal activity, the differences between the levels of procedural guarantees in the legal systems of different countries are used against the suspect. As an example, one could point to the sphere of mutual admissibility of evidence, which raises the question of the possibility of the development of the practice of so-called *process laundering*<sup>10</sup>. This could happen, for example, in a situation where a certain way of obtaining evidence is accepted by the law of the country where it has been collected, but is against the law in the country where the proceedings are taking place. In such cases, a court's agreement to admit evidence on the basis of regulations of another country is tantamount to tolerating a violation of local regulations concerning the rules of evidence, which usually adversely affects the legal situation of the suspect<sup>11</sup>.

The need to focus on strengthening the position of individuals within the process of growing international cooperation in the area of criminal prosecution becomes even more obvious when we consider most common potential motivation behind the efforts to harmonize different legal systems. Globalization of criminal procedure is a self-evident, ongoing process. Nevertheless, one should beware of the direction of such integration which generally tends to realize the interests of the state, not the suspect. The synergy of criminal procedure institutions among such closely cooperating countries as the European Union member states is inevitable. But one should remember that such changes generally tend to better the position of the states themselves, not the suspects. At the same time, if countries do not agree to some proposals for the unification and strengthening of investigative measures in a criminal procedure on supranational level, it does not have to mean that such refusal is inspired by the needs of individuals involved in criminal proceedings. Such disagreements often stem from a need to protect particular, public, interests of the countries, not the rights of their citizens. An example of such a situation

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<sup>10</sup> Cf. C. Gane, M. Mackarel, *Admissibility of Evidence Obtained From Abroad Into Criminal Proceedings: The Interpretation of Mutual Legal Assistance Treaties and Use of Evidence Irregularly Obtained*, "European Journal of Crime, Criminal Law and Criminal Justice" 1996, Vol. 4, issue 2, pp. 112–115.

<sup>11</sup> Cf. P. Kruszyński, S. Pawelec, *European Code of Criminal Procedure*, "Przegląd Sądowy" 2009, Vol. 1, pp. 95–108 and the literature referred therein.



may be observed in the debate about the European Public Prosecutor's Office. General refusal of some European Union member states to take part in its creation and intense discussion among some other are based on various grounds, including also such basic legal problems as the lack of adoption of the directive on fraud to the Union's financial interests, which still remains a proposal<sup>12</sup>. Nevertheless, one of the most significant junctures of disagreement, which calls into question the establishment of the European Public Prosecutor's Office even through the enhanced cooperation procedure, is the presumed reluctance of at least some member states to give up some of their powers in the matters concerning the prosecution of offences aimed at public money and involving the activity of state organs<sup>13</sup>.

The last and most general problem connected with the unification of criminal procedure and its possible negative consequences concerns the issue of its flexibility, its ability to evolve and susceptibility for improvement. In the first place, adopting certain solutions in criminal procedure at a high supranational level may have the effect of petrification thereof. This in turn may mean that when it becomes necessary to introduce corrections to the solutions adopted, due to the discovery of some flaws, for example insufficient protection of the suspect from the point of view of legal security of an individual, the path to amending it may be much more lengthy and arduous than in the case of a solution adopted at a local level. Taking again as an example the comparison between the European Union legal system and the legal systems of individual states, it is not difficult to imagine how much more time it would take to adopt amendments to a European regulation referring to a particular solution in the sphere of criminal procedure, than to introduce a change solely on a national level. Therefore, organizing details of criminal procedure on a supranational, European (or even broader) level, reveals a general difficulty of losing the flexibility of legislation and the ability to adopt changes which could allow for a quick improvement of demonstrably, or even obviously, imperfect solutions.

By way of a brief summary of the general considerations outlined above we should note that integration in the sphere of criminal procedure is an ongoing, constantly developing and – from what we can predict – inevitable process. Depending on the area and character of the already existing mechanisms of cooperation between particular countries it can assume a more (as is the case with

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<sup>12</sup> The proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, COM(2012) 363 final, July 11, 2012.

<sup>13</sup> Compare *inter alia*: *Transparency International Press Release: EU Still Deadlocked on New European Anti-Corruption Legislation*, posted by the Transparency International EU Office on October 21, 2015, at <http://www.transparencyinternational.eu/2015/10/press-release-eu-still-deadlocked-on-new-european-anti-corruption-legislation/> (visited November 27, 2016). As for more detailed analysis on adoption of the European Public Prosecutor's Office through the enhanced cooperation mechanism compare: S. Pawelec, *Implications of Enhanced Cooperation...*, pp. 209–227.

the member states of the European Union) or less intense course. However, if we accept that individual states will want to maintain their sense of identity, manifested also in their separate legal systems, and that no supranational structures of a federal character are likely to emerge in the foreseeable future, we should be sceptical about the chances of establishing a common model of criminal procedure, binding on many countries, which in its comprehensiveness and attention to detail would be comparable to the codifications of the countries of continental Europe. At the same time, in view of growing international cooperation in the area of criminal prosecution, we should remember about the need to respect not only the needs of the state, but also those of the individual. As a general concern we should remember that any international unification in the sphere of criminal procedure tends in the first place to better the position of the state, not the suspect or the accused. Therefore, the main effort should go not into developing and promoting the adoption of a time-consuming and unrealistic on a global scale model of uniform criminal procedure, but into developing a mechanism of ensuring minimum standards of procedural safeguards for individuals, with particular attention paid to promoting common rules of admissibility of evidence. And as a general concern connected with the proposals for establishing institutions of criminal procedure on a supranational level, we should point out the risk of adopting solutions which would be characterized by inherent systemic inertia and resistance to even obviously desirable legislative corrections of the established regulations. Thus, standardization of systems of criminal procedure on an international scale may, arguably, increase legal security of the individual resulting from greater similarity between particular legal systems and reduction of the risk of using the differences between them against the suspect, but such global solutions may be affected by insufficient flexibility and not be amenable to corrections necessary for meeting the needs for protection of the rights of individuals.

### Summary

This paper canvasses some of the limitations and possible negative consequences of globalization of criminal procedure. The references to specific examples in this paper assume generally the framework of the legal systems of the European Union and its member states. This, however, is done with the idea in mind that at least some of the remarks made here could be also relevant in a wider international context, when other legal systems are taken into consideration. In the paper, particular attention is paid to possible negative consequences of globalization tendencies. Assuming this perspective was intentional, in order to draw the reader's attention, references are made to those issues which are especially important from the point of view of legal certainty of an individual but seem to attract less attention in the literature on the subject than general analyses of the phenomenon of synergy of legal systems and the benefits stemming therefrom.



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## KEYWORDS

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