"A Nordic academic perspective" to the European Criminal Policy Initiative. A Manifesto for European Criminal Procedure Law

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The aim of the contribution is to give some comments on the Manifesto for European Criminal Procedure Law from a Nordic academic perspective. As the basis for the contribution is "academic" it also contains some criticism. However, the general assessment is very positive: The Manifesto is a very important piece of scientific work and criminal policy making. The criticism concerns a number of points where the Manifesto with advantage could have been more detailed and developed. Such points have to do with the question of criminal jurisdiction, the potential problem with forum shopping, the rights of the victim of a crime and as a more general point, the fact that the manifesto only deals with criminal proceedings in its most traditional form and not with all proceedings in a more simplified form.

I. Introduction

Let me begin by expressing my satisfaction at – or even my admiration for – the initiative to assemble an impressive group of gifted scholars from many European countries for the mission to critically study the recent development of criminal procedure laws in the European Union. The initiative was very welcome and the result, the Manifesto for European Criminal Procedure Law, is a very important piece of scientific work and criminal political thinking. The researchers involved in the project deserve praise and appreciation.

But the purpose of developing a manifesto for European Criminal Procedure Law cannot be considered performed without a solid discussion about the published document. The discussion must be carried out in a serious manner as such an approach shall be critical. I regard this contribution as a necessary part of such a discussion. That said, it will impossible to comment on every question which deserves discussion. I shall, instead, make a number of observations.

II. Demands in the Manifesto

The manifesto contains a number of demands. The full list of demands is as follows:

- Limitation of mutual recognition through the rights of the individual as well as through the Member States' national identity and their ordre public on the basis of the principle of proportionality;

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- Balance of the increasingly supranationalised European criminal proceeding;
- Respect for the principle of legality and judicial principles;
- Preservation of coherence;
- Observance of the principle of subsidiarity;
- Compensation of deficits in the European criminal proceeding.

The stylistic move in the manifesto to put demands gives rise to a first reflection: Which is the ultimate aim of the manifesto and who is its addressee? Many responses are possible. One obvious answer is that the manifesto is directed at the EU legislature. Proof of this is the declaration in the manifesto, that "the ECPI urge the EU legislature to respect the different demands stated in the Manifesto".[2]

Other answers are also possible. It might be that the manifesto has a number of aims, and that it is not only directed at one "addressee" but rather several. At least the following potential addressees can be mentioned: The national lawmakers in the Member States, when implementing the EU directives into national law, the national law-courts and the other national law-enforcement authorities, especially prosecutors, when they apply EU-laws in practice, and the academic milieu for purpose of research and teaching.

My firm opinion is that the manifesto has different aims and several audiences at who it is directed. The purpose cannot be to influence the EU legislature alone, but instead to be of a manifold nature. At the same time, it is obvious that the various parts of the manifesto are of differing importance in respect of its distinct aims and audiences. The preamble consists of a general declaration regarding the intention the research group behind the manifesto and its intent regarding the whole European Criminal Policy Initiative. Part I ("Fundamental demands to the Union legislator") is directly addressed to "the Union legislator". However, is Part II ("Explanatory notes on the demands of the European Criminal Policy Initiative") also addressed (or at least deemed to be potently important) to other addressees, such as those who apply EU-laws at the national level and the academic milieu?

Especially where part II is concerned, I have to some extent a critical academic assessment. Part II, containing explanatory notes on the demands, is important for the significance of the manifesto. The explanations and references in this part must be firm and convincing. The analysis and the argumentation could noticeably have been more developed and detailed, and have contained more specific references as to the different existing legal instruments. This would have been preferable especially for the purpose of new research and academic teaching.

III. Limitation of mutual recognition

It is obvious that the manifesto is structured in a way which indicates the importance given to and the order of precedence of the six different demands. The

[2] A Manifesto on European Criminal Procedure Law.ZIS 11/2013, p. 430.

intention of the research group has probably been that the first demand, "*limitation of mutual recognition"*, is the most important.

Several arguments are presented for the request to limit the mutual recognition of judgments, legal decisions etc. The first set of arguments refers to the rights of the individual. The individuals belong to different groups of affected persons, namely the suspect, the victim of a crime and possible third persons. The second set refers to national identity and ordre public of the Member States, and the last argument used is a reference to the principle of proportionality.[3]

The basic provision on mutual recognition inside the EU can be found in Article 82 TFEU:

"Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83."

I completely accept the point of view that if you only have the possibility to choose between mutual recognition of judgments and judicial decisions on the one hand and "harmonization" (or "uniformity"), or "approximation" on the other hand, mutual recognition is preferable. But the principle of mutual recognition has, during the last decade, been stretch to an intolerable extent. I therefore agree with the research group behind ECPI in its demand to limit the scope of mutual recognition. My acceptance of the criticism presented in the manifesto regarding the present scope of mutual recognition also comprises the statements concerning the European Arrest Warrant.

In an earlier article concerning the European Arrest Warrant, I have critically scrutinized the impact of the EAW from a Nordic perspective.[4] In the article, I also express my view on the statement that the *"model for the system of the EAW was taken from the Nordic system and the positive experiences of that system."* This might be tough, but the state of affairs in the Nordic Countries was quite different from the situation in the European Union when the European Arrest Warrant was adopted. I quote:[5]

"Nordic cooperation and the positive experience of this existed already when the close cooperation in legal matters was formalized through Nordic legislation. Thus the legislation was firmly based on an existing and solid trust. There are good grounds to wonder whether that was also the case when the system with mutual recognition was adopted in the European Union. It is much more appropriate to claim that the introduction of the system with mutual recognition and the adoption of the EAW were political means used to shape and construct a common European sense of trust. All criticism against the European Arrest Warrant is proof of this."

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[3] The Manifesto ZIS 11/2013 pp. 430-431.

[4] Per Ole Träskman: Mutual Trust and Political Intentions: The European Arrest Warrant and The Nordic Arrest Warrant. Maria Bergström and Anna Jonsson Cornell.European Police and Criminal Law Co-operation. Swedish Studies in European Law. Volume 5. Oxford and Portland, Oregon 2014, pp. 126-143.

[5] Ibidem, pp. 141-142.

IV. Limitation of mutual recognition through the rights of the suspect and the problem of "forum shopping".

The first demand in the manifesto is the demand to limit mutual recognition. I quote the manifesto:[6]

"The Member State or Union interest in the efficient execution of a cross-border criminal proceeding on the basis of the principle of mutual recognition must not be absolute, but rather is to be limited in two respects. It must recede where the criminal proceeding would risk violating legitimate interests either of the individual or the Member State. The extent to which mutual recognition is to be limited is determined by means of a proportionality test. This must take into account both individual and national interests. Such a limitation of mutual recognition also reinforces mutual trust among Member States and citizens' trust in the Union."

In the Manifesto, the reasons to limit the mutual recognition with reference to the rights of the suspect are presented first (See section I.1).[7] The demand is founded in reasons, which are presented and analyzed in the Explanatory notes (See section II.1 aa).[8] I refrain from a detailed analysis of the demand and the reasons for it to be presented in the manifesto. I limit my comments to a simple statement. These parts of the manifesto contain strong and sound arguments and many good reflections made on the basis of references to the existing EU-regulation.

One of the problems dealt with in this part of the manifesto is the problem of *"forum shopping"*. I quote:[9]

"In every fair proceeding held in accordance with the rule of law, the suspect must be granted the status of a subject of the proceedings with comprehensive suspect's rights at the earliest possible opportunity and in any event before investigations are initiated or compulsion is used against him. This is necessary in order to satisfy the second paragraph of art. 47 of the Charter of Fundamental Rights and art.6 para.1 of the European Convention on Human Rights.

In the course of a criminal prosecution where several Member States cooperate on the basis of mutual recognition, this status may be withheld from the suspect and the attendant rights may be weakened or granted to him too late. Similarly, due to the legal and factual differences that continue to exist between the Member shopping."

This statement deserves a comment. Is there liable proof for the existence of forum shopping? What do we really know about existing ""forum shopping" already now in practice as a result of cooperation between Europol, Eurojust and different national authorities? The present EU legislation and the scope of mutual recognition contain certain temptations for the authorities in respect of forum shopping and I would not be at all surprised if forum shopping takes place. But it is

[6] Manifesto ZIS 11/2013, p. 430.
[7] Manifesto ZIS 11/2013, p. 430-431.
[8] Ibidem pp. 433-436.
[9] Ibidem pp. 430-431.

not possible to declare that forum shopping has been adopted into the system. In this respect, there is an obvious need for objective, empirical and critical research.

V. Criminal jurisdiction

I shall also refer at this point to all the problems connected to the question of criminal jurisdiction of the Member States. The development – at least in the Nordic countries – seems to be that the States have continually widened their jurisdiction in criminal matters, for instance has the universality principle obtained a much larger use than earlier. This might be an advantage in some instances, but it also has a number of undesired consequences. A widespread jurisdiction is the breeding ground inter alia for forum shopping and all the problems connected to "ne bis in idem". There are, therefore, good reasons to try to create an international set of rules in order to regulate and restrict the criminal jurisdiction of different States. This is especially the case within the European Union. The European Criminal Policy Initiative could – even if the problems are discussed – have devoted much greater attention to this question.

One can, of course, always discuss the proper classification of the rules concerning criminal jurisdiction. Are they a part of criminal procedure law or do they belong to Substantive Criminal Law? However, the problems connected with criminal jurisdiction are dealt with in the Manifesto, but under the third demand: respect for the principle of legality and judicial principles in European criminal proceedings.

It is – quite correctly – established that "where several Member States have criminal jurisdiction over an offence, there is a danger of parallel proceedings which not only cost time and money but also put a significant burden on the suspect."[10]

This statement is – even when it is correct – an obvious understatement. The choice of the State for the proceedings in a case and the possibility for parallel proceedings is not only a significant burden on the suspect but of importance for a number of key issues of great importance for all parts involved. What can be mentioned is inter alia the importance for: the Code of Procedure, which will be applied, and the Criminal Code, which will be applied (which criminal provisions, which penalty scales, the severity of the concrete penalty).All this has consequences for the proceedings with respect to the rights and tasks of the public prosecutor, with respect to the rights of the suspected person and the rights of the victim as well as of third persons, or, in short, for legal safeguards and legal safety in general.

VI. The criminal jurisdiction and the problems with ne bis in idem

In the manifesto it is a well-grounded observation that many problems are connected to the question concerning "ne bis in idem". One of the statements is the following:[11]

[10] Ibidem p. 432.

"As the current provisions on ne bis in idem follow the principle "first come, first served", it is largely a matter of chance which substantive and procedural law is applicable in the end."

It is also stated that:[12]

"Furthermore, some of the conditions under which basic rights may be interfered with in the course of judicial cooperation within the Union are unclear, and they are laid down in a multiplicity of legal instruments which often are only partially implemented by the Member States."

And the conclusion in the manifesto is that:

"The Union legislator, therefore, must create a clear set of rules governing which Member States may exercise criminal jurisdiction over an offence and thereby prevent conflicts of jurisdiction."

What is lacking is a serious discussion of the priority of different principles of jurisdiction. It is quite obvious that the territoriality principle always has the first priority. But then, how should one rank the active personality principle, the passive personality principle, the State Protection principle and all the other principles? Is such a ranking wise or even necessary or can we find other solutions for the problems connected to the jurisdiction question?

VII. Limitation of mutual recognition through the rights of the victim of a crime

The problems for the victim of a crime when the proceedings are carried out outside the victim's country of residence are with good reason mentioned in the Manifesto. It is stated, that "the legitimate interests of a person who presumably has been harmed by a crime (victim) are to be taken into account in a criminal proceeding. However, the balance of the criminal proceeding must not be impaired thereby."

It is added that problems arise, when the criminal proceedings take place outside the victim's country of residence. These problems are to a certain degree caused by differences between the Member States with respect to the rights of the victim of a crime.

The present situation can be described by noticing that the protection of victims pre, during and post criminal trial is – and has been during the last decade – at the forefront of the agenda of the European Commission. A result of this is the Council Framework Decision on the standing of victims in criminal proceedings from 2001 established minimum standards to address the rights and needs of victims in criminal proceedings within the EU. However, the implementation reports on the Framework Decision have concluded that EU legislation has not been effective in ensuring adequate protection for victims across the EU. This fact has resulted in a new

[11] Ibidem, p. 432.
[12] Ibidem, p. 432.

directive establishing minimum standards on the rights, support and protection of victims of crime. The aim of the Directive 2012/29/EU of 25 October 2012, establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA (Victims' Directive) is to take the protection of victims of a crime a step forward within the EU.

The protection of victim rights in the EU has recently been studied in a report elaborated by the Centre for European Constitutional Law, Themistokles and Dimitris Tsatsos Foundation, Institute for Advanced Legal Studies of the University of London.[13] The report contains inter alia the following observations about the new directive:

"The Directive introduces profound changes in the rationale and function of criminal justice systems. In several European countries, criminal justice systems are built around the accused and his/her rights. These systems now have to become 'polycentric' and make room for another actor with distinct needs and, in most cases, a less clear role. A major challenge for member states lies in delineating clearly the role of victims in all phases of criminal proceedings."

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My personal opinion is that the Manifesto on European Criminal Procedure Law could have focused more on the victims' rights and the problems for victims of a crime caused by the lack of homogeneity of the legislation in different EU States combined with the EU legislation.

VIII. The Nordic States and the Article 82 TFEU

The purpose of this contribution is to look at the Manifesto on European Criminal Procedure Law from a Nordic perspective. I shall therefore briefly touch on the provision in Article 82 TFEU:

"To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern:

(a) mutual admissibility of evidence between Member States;

(b) the rights of individuals in criminal procedure;

[13] Protecting victims' rights in the EU; the theory and practice of diversity of treatment during the criminal trial. See cecl2.gr/index.php/en/projects/research/430-protecting-victim-rights-in-the-EU.

(c) the rights of victims of crime; […]"

The provision contains a request, that "such rules shall take into account the differences between the legal traditions and systems of the Member States". It can be discussed if this demand also applies to procedural rules. I cannot see any reason as to why this should not be the case. This statement gives cause to ask if there is anything in the "Nordic" legal traditions and systems which should be taken into account when establishing such minimum rules.

However, the problem is that the procedural rules in the different Nordic countries are in many respects rather unlike. I therefore cannot point to any legal tradition or system within the area of criminal procedural law, which is specific for the Nordic countries and different from the rest of Europe.

IX. A general point of criticism of the European Criminal Policy Initiative

It seems to me that the Manifesto only concerns criminal proceedings in its most "traditional" form: proceedings in a court with one or more judges, proceedings in *"full"* with all the relevant parties (the prosecutor, the victim of a crime, the defense lawyer, the assistant of the injured party, third parties etc.) present. As such, the Manifesto falls short here, given that currently, the main part of the proceedings in criminal matters are restricted to different forms of summary proceedings.

X. Conclusion

I can understand that someone may be of the opinion that the present contribution is too critical and that I am grumbling without good cause. To this I can only reply that the Manifesto on European Criminal Procedure Law is too good and exiting to be ignored even in critical discussion. It is an essential opus for the future of the EU legislation in this field.