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ADVANTAGES AND DISADVANTAGES OF THE PRINCIPLES OF HARMONISATION AND OF MUTUAL RECOGNITION AS A BASIS FOR PROGRESS IN CREATING A EUROPEAN JUDICIAL AREA

Abstract

The central question in achieving the creation of a true European judicial area in the future is how to generate substantial progress in the efficiency of cross-border prosecutions while at the same time ensuring the execution of the most important safeguards for the citizens, above all fundamental rights. This future development very much depends on the appropriate application of the two core principles in judicial cooperation among European member states: approximation and mutual recognition. The argument advanced by this paper is that a true European judicial area, which will be effective both in fighting cross-border crime and in guarantees of individual fundamental rights, can be created only if mutual recognition principle is supported by significant approximation of both procedural and substantive national legislation.

The paper first provides background on the key concepts it is based on and submits the justification for the limitation of the paper to judicial cooperation in criminal matters. The analysis proceeds through examining firstly the possible advantages and disadvantages of approximation and mutual recognition in case each of them was applied isolated. Next, the deficits in the current state of play in the application of the two principles are analyzed. Finally, the concluding part offers an insight into the desirable way forward in the application of these two

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principles, if substantial progress in the creation of a truly European judicial area is to be made.

Ključne reči: evropski pravosudni prostor, principi u sudskoj saradnji, usklađivanje i uzajamno priznanje, usklađivanje procesnih i materijalnih pravila u nacionalnim pravima.

Key words: European judicial area, principles in judicial cooperation, approximation and mutual recognition, approximation of both procedural and substantive national legislation.

INTRODUCTION

The Presidency Conclusions of the Tampere European Council (15-16 October 1999), dedicated exclusively to cooperation in justice and home affairs, state that "[in] a genuine European Area of Justice individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States."[1] The central question in directing the future developments towards a European judicial area is how to generate substantial progress in the efficiency of cross-border prosecutions while at the same time ensuring the execution of the most important safeguards for the citizens, above all fundamental rights. This future development very much depends on the appropriate application of the two core principles in judicial cooperation among European member states: approximation and mutual recognition.[2] The argument advanced by this paper is that a true European judicial area, which will be effective both in fighting cross-border crime and in guarantees of individual fundamental rights, cannot be created with the exclusive application of either of these two principles. Only if mutual recognition principle is supported by significant approximation of both procedural and substantive national legislation, can this end be attained.

In order to offer a comprehensible analysis of these issues, the following section provides background on the key concepts around which this paper revolves. The

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[1] Paragraph 28 of the Presidency Conclusions of the Tampere European Council, 15-16 October 1999, ***Europa: Official Documents***, <http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm#justice> (April 2005).

[2] For the purposes of this study, a view that harmonization, approximation and unification "represent only slight differences in degree of the same process" is adopted. See Susie Alegre and Marisa Leaf, "Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study—the European Arrest Warrant," ***European Law Journal*** 10, no. 2 (March 2004): 201 (footnote no. 3).

same section submits the justification for the limitation of this paper to judicial cooperation in criminal matters. Next, the paper proceeds through examining firstly the possible advantages and disadvantages of each of approximation and mutual recognition in case they were applied isolated. It then continues to analyse the deficits in the current state of play in the application of the two principles. Finally, the concluding part offers an insight into the desirable way forward in their application.[3] The overall objective is clearly to prove that an appropriate combination of approximation and mutual recognition principles is primordial if the achievement of substantial progress towards creating a European judicial area is intended.

1. CONCEPTUAL BACKGROUND

1.1. Defining the concepts

When discussing the ways to move towards the creation of a European judicial area, one needs to start from the definition of the European judicial area itself. However, although much literature makes reference to this concept, a researcher on this subject encounters a deficit in definitions of the European judicial area. Nevertheless, some of the main requirements for its achievement have been listed. Thus, one view is that a European judicial area should be created "with higher standards for citizens' access to justice, basic harmonisation of certain areas of civil law and automatic recognition and enforcement of court decisions across the EU."[4] In addition, it has been argued that such an area should furnish its citizens with legal equality implemented in practice.[5] Arguably, if the European judicial area is to contain this element, it might require a more ambitious agenda than the one suggested in the first definition. Naturally, a prerequisite for the attainment of any of these goals is substantial cooperation among the judiciaries of the EU member

[3] The changes offered by the Constitutional Treaty are excluded from discussion due to the uncertainty of their actual adoption.

[4] Jörg Monar, "The Dynamics of Justice and Home Affairs: laboratories, Driving Factors and Costs," ***Journal of Common Market Studies*** 39, no. 4 (November 2001): 757.

[5] "Finnish Minister of the Interior and Minister of Justice at European Parliament hearing: The agenda of the Tampere European Council entering the final straight," ***Press releases***, Finish Presidency of the EU website, <http://presidency.finland.fi/netcomm/news/showarticle 778.html> (April 2005).

states. Thus, the objective of "increasing European citizens' access to justice" is central to judicial co-operation.[6]

The European Commission defines approximation as a "core principle of European Community law, meaning the shaping of national rules in a comparable way throughout the European Union in order to meet common objectives."[7] Hence, approximation implies changes in national law with the objective of diminishing the differences between national legislations. Its implications can differ immensely depending on whether it targets national procedural or substantive law given the profound sensitivity of substantive law to change.

The mutual recognition principle, however, does not imply changes in national substantive law, although changes in procedural law might be necessary in order to implement the principle itself. It is defined as the duty that "judicial decisions in one Member State must be recognised and enforced by judicial authorities in other member states."[8] The underlying understanding necessary for the functioning of this principle is that, even though national legal systems are indeed different, "the results reached by all EU judicial authorities should be accepted as equivalent."[9]

1.2. Justifying the choice of criminal matters

Civil and criminal law are areas where member states diverge immensely. In this respect, both the member states' procedural and substantive law contain great differences.[10] Judicial cooperation among the EU member states has evolved in both of these areas. However, this paper deals substantially with judicial cooperation in criminal matters, while cooperation on civil matters is largely excluded from the discussion. This is not to imply that judicial cooperation on civil matters is less important for the creation of a European judicial area. Nonetheless, the limited scope of this study calls for a focus on one of these two areas.

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[6] Jörg Monar, "Justice and Home Affairs," Annual Review, ***Journal of Common Market Studies*** 42 (2004): 125.

[7] Glossary — Justice and home affairs — European Commission, EUROPA web site <http://europa.eu.int/comm/justice_home/glossary/wai/glossary_a_en.htm> (April 2005).

[8] Susie Alegre and Marisa Leaf, "Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study—the European Arrest Warrant," ***European Law Journal*** 10, no. 2 (March 2004): 200-1.

[9] Alegre and Leaf, 201.

[10] Procedural law is defined as "that law which governs the operation of the legal system, including court rules and rules of procedure," and as such is distinguished from substantive law which "establishes rights and obligations" and "governs the manner in which rights are enforced and wrongs rectified." Definitions have been taken from the ***Glossary of the Lawschool.Westlaw.com***, <http://lawschool.westlaw.com> (April 2005).

Even so, it must be acknowledged that judicial cooperation on civil matters is in great need for a stimulus which would urge a more ambitious agenda concerning approximation. Although Tampere European Council introduced a discussion about the possibility of introducing approximation of even national substantive civil law,[11] mutual recognition has remained the main instrument in the area, due to which important problems of legal equality of the EU citizens persist.

The choice of criminal matters in this study has been triggered partially by the perceived higher sensitivity it has for the security in a Europe involved in the fight against terrorism, which also renders it more controversial. Moreover, with the transfer of the Title IV to the Treaty establishing the European Community, judicial cooperation on civil matters was communitarised, while police and judicial cooperation in criminal matters has remained the only part of the JHA still governed by the inter-governmental method. This change signified an accelerated progress in adopting legislation in the area of judicial cooperation on civil matters,[12] while criminal matters still have to rely on external stimuli for maintaining it high on the political agendas. Finally, civil law has significant connections with internal market (direct spill-over of the single market program),[13] as a result of which a much more comprehensive study, involving numerous legal considerations, would have to be performed if judicial cooperation on civil matters were to be treated properly.

Due to all of the abovementioned, the following section offers an analysis of the implications of approximation and mutual recognition principles in the field of judicial cooperation on criminal matters.

2. JUDICIAL COOPERATION ON CRIMINAL MATTERS

According to the Article 29 of the TEU, the European Union, inter alia, aims at "[providing] citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States."[14] Presidency conclusions of the Tampere Summit reiterated this objective by stating that "People

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[11] For more detail on this, see title "Approximation of Member States' legislation in civil matters" of the 2385th Council meeting "Justice, Home Affairs and Civil Protection," Brussels, 16 November 2001, <http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/jha/DOC.68613.pdf> (April 2005).

[12] Gavin Barrett, "Introduction," in ***Creating a European Judicial Space: Prospects for Improving Judicial Cooperation in Civil Matters in the European Union***, ed. Gavin Barrett, vol. 30, Academy of European Law Trier, (Köln: Bundesanzeiger, 2001), 7.

[13] Barrett, 10.

[14] Article 29 of the Consolidated Treaty on European Union.

have the right to expect the Union to address the threat to their freedom and legal rights posed by serious crime."[15] In relation to this, the need for "joint mobilisation of police and judicial resources" was recognised.[16] Indeed, in an EU in which cross-border movement of persons goes on almost completely uncontrolled, a failure to remove state-border obstacle in the fight against crime would signify favouring those who breach the law and failing to ensure justice for the EU citizens.

A powerful incentive for boosting judicial cooperation on criminal matters came with the September 11, 2001 attacks. As a result, the European Arrest Warrant has been created and it has become "the first and most striking example of the principle of mutual recognition being put into practice."[17] The subsequent terrorist attacks in European states reminded the EU member states that these issues must remain on the top of their co-operation agenda.

This section of the study proceeds by firstly discussing the advantages and disadvantages of approximation and mutual recognition when regarded isolated, i.e. in case each of them were applied without being accompanied by the other. Thus, the argument for substantially combining the two principles is brought forward. Finally, this section examines the shortcomings of the current state of play regarding the application of the two principles in judicial cooperation in criminal matters, while the conclusion focuses on possible ways to improve that situation.

2.1. Advantages and disadvantages of approximation and mutual recognition when regarded isolated

Advantages of approximation

There are real and profound differences in substantive criminal law in different member states, often as a result of cultural diversity and questions of identity or even religion. Nevertheless, such differences should not prevent member states from achieving a "common view on the heinousness of particular crimes."[18]

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[15] Paragraph 6 of the Presidency Conclusions of the Tampere European Council, 15-16 October, 1999.

[16] Ibid.

[17] Alegre and Leaf, 201; Eurojust and the European Judicial Network are not covered by this study since they do not have implications for the development of the two principles under discussion, other that Eurojust supports the application of mutual recognition through its various forms of assistance to judicial cooperation among the member states. See Jörg Monar, "Justice and Home Affairs," Annual Review, ***Journal of Common Market Studies*** 44 (2003): 127.

[18] Peers, 26.

Narrowing down of the divergences among national criminal law through approximation is a way to prevent criminals from abusing the EU system (in particular the possibility of free movement) with the objective of operating on several member states' territories.

Another advantage of the approximation principle lies in the potential it purports for securing equal level of justice to all citizens of the EU. Indeed, if national legislation, both procedural and substantive, were approximated, each EU citizen could enjoy legal protection at the same level in every member state of the EU. Moreover, fundamental rights of the citizens in either purely domestic or cross-border proceedings would be safeguarded to an equal extent across the Union. In such a way, citizens of the EU would be given a common sense of justice, which is one of the prerequisites for creating a true European judicial area.

Disadvantages of approximation

However, the principle of approximation alone cannot ensure effectiveness in the fight against cross-border criminal activities. The territory of the European Union is one where movement of people across borders has been made extremely easy (especially so on the Schengen territory where border controls have been abolished), which has also made cross-border activities of criminal groups much easier. At the same time, law enforcement jurisdictions remain as a rule divided along national borders. Hence, in the absence of an EU-wide jurisdiction for criminal law, national judiciaries must cooperate closely, if cross-border crime is to be prosecuted efficiently and effectively.

Indeed, in the early 90s it was realised that easy operation of organised crime on the EU territory is a result not only of the lack of legal approximation, but also of "poor communication between law enforcement authorities."[19] One may say that, even if member states of an area of free movement of persons, such as the EU, had very similar national criminal legislation, prosecution of cross-border crime would be impossible unless efficient judicial cooperation, unburdened with unnecessary obstacles, took place on a daily basis. Hence, it must be concluded that approximation alone could not bring about effective fight against crime in the EU.

In addition to the abovementioned, one must keep in mind the reasons due to which approximation, despite its positive implications, will be extremely hard to

[19] Stephen Jakobi and Sarah de Mas, "Achieving Balance among Liberty, Security and Justice: An Agenda for Europe," in ***Criminal Justice Co-operation in the European Union after Tampere***, eds. Peter Cullen and Sarah Jund, ***Academy of European Law in Trier***, vol. 33 (Köln: Bundesanzeiger, 2002), 88.

achieve in the area of criminal law or will evolve very slowly. These reasons cannot be considered as disadvantages of approximation ***stricto sensu***, but they do necessitate attention, as they in fact explicate the slow pace of evolution of integration in this area. To begin with, there is a particularly great diversity between national laws in the area of justice and home affairs.[20] These major differences between criminal justice systems of various EU member states make harmonisation extremely difficult.[21] For the same reason, the concept of harmonisation is perceived as particularly controversial in judicial cooperation. Finally, it must be kept in mind that this area is one of the most conservative and most sensitive to the issues of national sovereignty and territorial integrity, which has added to the perception of unattractiveness of harmonisation as an instrument in judicial cooperation.

Advantages of mutual recognition

The adoption of the principle of mutual recognition as a "cornerstone" of European judicial cooperation (on both civil and criminal matters) represented a victory for the position of the British government over the French position favouring harmonisation during the Tampere European Council.[22] Arguably, mutual recognition in criminal matters is necessary since in the EU "maintaining national legal borders, coupled with the facilitation of free movement of persons, frustrates a State's fundamental prerogative to ensure the application of its criminal law."[23] Indeed, if EU member states cannot obtain quick extradition, or a simple transfer, of suspects or criminals who committed an offence on their territory, or have otherwise damaged its interests, and have subsequently fled to another EU state, they will not be able to bring such persons to justice. What follows is that a European judicial area is unachievable without mutual recognition of judicial decisions and acts.

The principle of mutual recognition has undoubtedly had a positive impact in the fight against cross-border crime and terrorism, especially with its application in the case of the European Arrest Warrant.[24] The much-more-automatic extradition of

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[20] Jörg Monar, "The Dynamics of Justice and Home Affairs: Laboratories, Driving Factors and Costs," ***Journal of Common Market Studies*** 39, no. 4 (November 2001): 763.

[21] Gabriele Donà, "Towards a European Judicial Area: A Corpus Juris Introducing Penal Provisions for the Purpose of the Protection of the Financial Interests of the European Union," ***European Journal of Crime, Criminal Law and Criminal Justice*** 6 / 3 (1998): 290.

[22] Jörg Monar, "Justice and Home Affairs," Annual Review, ***Journal of Common Market Studies*** 38 (September 2000): 139-140.

[23] Peers, 24.

[24] Another outstanding example of the application of mutual recognition to judicial cooperation on criminal matters "in its most far-reaching form" is the framework decision on the execution

wanted individuals, even though it fell short of the "simple transfer" announced in the Tampere Presidency Conclusions, has impeded the mobility of criminals and terrorists on the EU territory and has facilitated prosecution of cross-border crime.[25] Hence, the application of the principle of mutual recognition has had very positive implications for the attainment of effectiveness in the fight against cross-border crime. Moreover, it has depoliticised the issue of extraditions by giving the decisive role in the transfer of the indictees to the judges instead of politicians.[26]

Disadvantages of mutual recognition

The application of the mutual recognition principle is based on the assumption that EU member states trust each others' criminal justice systems.[27] The basis for that trust should be found in their common respect for the democratic values such as fundamental rights and freedoms and the rule of law, which are stated in the Article 6 of the Treaty on the European Union. Moreover, it must not be forgotten that mutual recognition is meant to bring about, not only "an improvement in the level of trust and cooperation in the EU," but also substantial amelioration of the individual fundamental rights protection.[28] However, if this principle alone is applied to a system of states whose national criminal laws are very different from each other, the principle might fail both the test of mutual trust and of human rights safeguards. Namely, member states might soon realise that the differences among their legal systems cannot at all times justify mutual trust since fundamental rights will not be protected uniformly across the system precisely as a result of those differences.[29]

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of orders freezing property or evidence in the framework of criminal proceedings. See Monar, "Justice and Home Affairs," (2003): 125-6. However, this example is not discussed in this paper due to constraints in space and the scope of the study.

[25] The Commission's first report on the functioning of the European Arrest Warrant reveals many problems, but also recognises significant progress. For details see Commission document COM(2005) 63 final (23/02/2005) http://www.europa.eu.int/comm/justice_home/doc_centre/criminal/doc/com_2005_063_en.pdf>

[26] Alegre and Leaf, 216. In addition, see the Commission's report on EAW, COM(2005) 63 final, p. 3.

[27] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, Council document, (2001/C 12/02), ***Official Journal of the European Communities.*** (15.01.2001), 10.

[28] Joanna Apap and Sergio Carrera, "European Arrest Warrant: A good Testing Ground for Mutual Recognition in the Enlarged EU?" ***CEPS Policy Brief*** no. 46 (February 2004): 1.

[29] According to Alegre and Leaf, several EU member states have been scrutinised by Amnesty International for alleged breaches of fundamental rights. In addition, many of them have recently had judgements against them by the ECHR. See Alegre and Leaf, 216.

To return to the example of the mutual recognition principle as applied to the European Arrest Warrant, it can have very significant implications for the enforcement of individual rights. By the same token, its implementation has strong potential for revealing whether the principle of mutual recognition is based on sound grounds in EU judicial cooperation. To illustrate, the rights of a person wanted by a member state with a low profile in the domain of protection of human rights will be infringed if the executing member state (the state to which he/she has fled or where he/she resides) protects those rights in a particularly strong manner. Thus, the lack of justification for the use of the principle of mutual recognition in the area of judicial cooperation can easily be revealed in the practical application of the principle.

With the most recent enlargements of 2004 and 2007, the principle of mutual recognition is even further undermined since the diversity of national legislation is considerably increased by the advent of the CEE countries. Do the old member states really know the legal systems of the newcomers to the Union? In reality, they can only base their trust on the regular reports of the European Commission published in the course of the negotiations for these countries' accession into the EU. Moreover, the new member states, do not have a strong record in their recent history regarding the protection of human rights, being (almost all of them) former communist authoritarian states. Hence, the argument has been submitted that:

"The Mutual Recognition of Criminal Judgments […] can only be truly implemented if practical measures concerning minimum national standards are previously put in place. There is a need to create mutual confidence and esteem first."[30]

Nevertheless, if the creation of a European judicial area with the element of equal status of EU citizens before justice is sought, even complete implementation of common minimum standards is insufficient. Indeed, substantial approximation of national substantial law is indispensable for ensuring equal justice for all EU citizens.

2.2. Scrutiny of the current state of play

Mid-1990s signified an important "qualitative change" in the development of the area of justice and home affairs, especially as hard legislation started to replace earlier soft-law measures and as a "more ambitious agenda" was adopted for the

[30] Jakobi and de Mas, 90-1.

future in this field.[31] As the EU was simultaneously developing into a community placing a strong emphasis on values and fundamental rights of its citizens, the developments in the JHA would essentially have to be in line with the EU values. Nevertheless, the JHA's "fast development also brought with it a number of potential problems or contradictions and exacerbated existing ones."[32] Arguments have frequently been forwarded that the balance between effectiveness in the measures developed under the JHA and the respect for fundamental rights and freedoms of the EU citizens has not been given sufficient attention.

New procedural legislation is called for by the Council in order to ensure easier functioning of the mutual recognition principle. However, in the area of substantive law, on which the real grounds for mutual trust among member states depend immensely, approximation is evidently not much welcomed. The Conclusions of the Tampere European Council call for a study by the Council on the approximation of substantive law, but only regarding civil matters legislation with the objective of ensuring "good functioning of civil proceedings."[33] For criminal matters, in the domain of substantive law, EU measures can create only minimum standards, which immediately puts into question the acceptability of automatic mutual recognition in the way it has been applied to some internal market areas.[34]

In the case of the European Arrest Warrant (EAW), one may question its potential to lead to any improvement in the "level of trust and confidence among the EU member states and each others' judicial and legal systems."[35] In many cases, actions which are criminalised in some member states do not have such a status in others. Where common EU measures have been adopted, they do not require setting up criminal liability, but instead usually offer definitions of crimes, which in certain cases tend to be rather broad and vague.[36] Thus, these measures cannot be considered as sufficient steps towards harmonisation, as the actual implications of committing a crime, even if a common definition exists, are not agreed among the member states. A positive development in the current absence of substantial approximation is the choice of two thirds of member states to expressly state

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[31] "The changing European Union: Justice and Home Affairs and internal security," proceedings of a seminar in a series of meetings on ***The changing European Union: Challenges and opportunities for the UK*** Centre of International Studies, Cambridge University, Pembroke College, Cambridge, 2 November 2001. <http://www.intstudies.cam.ac.uk/centre/news/fco2001/fco-jha-2nov.html> (April 2005).

[32] Ibid.

[33] Paragraph 39 of the Presidency Conclusions of the Tampere European Council, 15-16 October, 1999.

[34] Peers, 33.

[35] Apap and Carrera, 2.

[36] Peers, 31.

fundamental rights violation and discrimination as the grounds for refusal to grant the EAW, although the framework decision did not explicitly provide for that.[37]

Another positive development is the recent formation of the European Union Agency for Fundamental Rights. The Agency became functional as of 1 March 2007. Its actual impact is yet to be seen, but its main contribution should be to provide trustworthy information and analyses regarding protection of human rights in different EU member states. This means that such information should in the future be available through a single institution on the EU level, whose opinions will be trusted not only by other EU institutions but member states as well.[38] As a result, its findings should help prevent potential politicisation of the application of fundamental rights exception to the granting of the European Arrest Warrant. At the same time, in the future it should be easier to evaluate on the one hand the cases in which mutual recognition should be applied, and on the other hand those cases where more caution is needed in order to safeguard the citizens' rights.

CONCLUSION: WAY FORWARD?

The argument presented above should not be understood as implying that for sufficient harmonisation to be accomplished member states need to agree on same punishments for same crimes. Rather than that, member states could approach harmonisation by seeking to criminalise same offences wherever possible. Where such action proves impossible (e.g. due to deeper societal reasons which often translate themselves into constitutional norms, such as in the case of abortion in Ireland), mutual recognition should not be applied with the same degree of automatism as in cases where harmonisation has been achieved.[39] Minimum standards should be applied only in cases where an offence has already been criminalised by all member states. But even if higher standards are applied only to purely national cases (those not involving cross-border criminal activities),[40] while minimum standards are applied to all cross-border cases, the objective of giving equal sense of justice to all EU citizens cannot be reached. It is questionable whether this may be regarded as sufficient progress towards the creation of a true European judicial area.

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[37] Commission document COM(2005) 63 final (23/02/2005).

[38] Council Regulation (EC) No. 168/2007 of 15 February 2007, Official Journal of the European Union L 53/1 (22 February, 2007) <http://fra.europa.eu/fra/material/ pub/FRA/reg_168-2007_en.pdf> (6 September 2007).

[39] This principle should especially be applied concerning the eradication of the double criminality requirement. See Peers, 35

[40] Peers, 35.

In any case, approximation should be regarded, not as an alternative, but as a supplement of the "cornerstone" principle of mutual recognition.[41] The model applied to the internal market, "where mutual recognition is acceptable if the underlying national law is comparable," should be applied to judicial cooperation on criminal matters as well.[42] Comparability, where it does not exist, should be achieved through approximation. Nevertheless, human rights and discrimination should consistently, but prudently (in order to avoid abuse for political purposes), be applied as exceptions to mutual recognition, as long as national legislation in the area is not harmonised and levels of protection are not uniform. Indeed, the "balance between prosecution of the law, and defense of the individual as implied by the term 'Liberty, Security and Justice' is one which must be kept at all times."[43]

Finally, if a true European judicial area is to be created, citizens must be given the same standards of justice across the EU. This in turn can be accomplished only through an appropriate combination of approximation and mutual recognition principles. More approximation is necessary for the principle of mutual recognition to be fully implemented without inhibiting the protection of fundamental rights in the Union. An approach which would recognise and respect the divergence of national substantive criminal law instead of ignoring it, is the only possibility to ensure efficiency in prosecuting cross-border criminal offences without putting the fundamental individual rights of the EU citizens into peril.[44]

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[41] Alegre and Leaf, 201.

[42] Peers, 26.

[43] Jakobi and de Mas, 88.

[44] Peers, 36.

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PREDNOSTI I MANE PRINCIPA HARMONIZACIJE I UZAJAMNOG PRIZNAVANJA KAO OSNOVA ZA NAPREDAK U STVARANJU EVROPSKOG PRAVOSUDNOG PROSTORA

Rezime

Da bi se u budućnosti postiglo formiranje istinskog Evropskog pravosudnog prostora, centralno pitanje na koje treba dati odgovor jeste kako ostvariti znatan napredak u efikasnosti prekograničnih krivičnih gonjenja i istovremeno obezbediti najvažnije mere zaštite za građane, pre svega zaštitu njihovih osnovnih prava. Napredak ka tom cilju u velikoj meri zavisi od odgovarajuće primene dva ključna principa u pravosudnoj saradnji između država članica Evropske unije: harmonizacije i uzajamnog priznavanja. Argument u ovoj analizi jeste da istinski Evropski pravosudni prostor, koji će biti delotvoran kako u borbi protiv prekograničnog kriminala tako i u garantovanju osnovnih prava pojedinaca, može biti stvoren samo ukoliko je princip uzajamnog priznavanja podržan značajnom harmonizacijom procesnog i materijalnog nacionalnog zakonodavstva.

Ovaj rad najpre pruža uvid u ključne koncepte na kojima je zasnovan i daje obrazloženje za ograničenost na pravosudnu saradnju u krivičnim pitanjima. U analizi se najpre razmatraju moguće prednosti i mane kako harmonizacije tako i uzajamnog priznavanja, u slučaju da se ovi principi primenjuju izolovano. Zatim se analiziraju nedostaci trenutnog stanja stvari u primeni ova dva principa. Konačno, zaključak pruža uvid u to koji je poželjan put napred u njihovoj primeni ukoliko se želi postići značajan napredak ka kreiranju Evropskog pravosudnog prostora.

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