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## CRIMINAL LAW IN FEDERAL STATES: A LESSON FOR THE EU

### Abstract

*The article discusses the issue of the federalization of criminal law in the UE. The models of federal criminal law legislation are presented with a focus on the US and Australia. Then the author looks at the competences of the EU in the area of criminal law. The recent establishment of the European Public Prosecutor's Office is given due attention as a step towards the federalization of investigation and prosecution. The advantages and disadvantages of having a federal system of criminal law are presented. The author is of the opinion that the federalization of European criminal law is inevitable, however there are also numerous problems related to the process. Therefore the experience of federal states should be taken into consideration while creating the EU federal or quasi-federal system.*

### Keywords

*European Union – criminal law – federal law – US – Australia*

## INTRODUCTION

One of the key problems of the creation of a federal state is the distribution of competences between the states and federation, including competences in the field of criminal law and criminal justice. It is a very sensitive

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matter, connected with the problems of sovereignty, local tradition, social problems, financial capacities, and many others. The relation between states and federation in the area of criminal law is to a great extent determined by the concept of federation and constitutional regulations. This issue is very interesting from the European perspective, having in mind the development of criminal law legislation. Therefore it is worth looking at contemporary federal states and trying to answer what could be the perspectives and added value of the possible federalization of criminal law and criminal justice in the EU.

## THE MODELS

There is no such thing as one single model of criminal law in federal states. The models vary, sometimes significantly. If we look at the level of federalization<sup>1</sup> of criminal law, we may put on one side Germany, on the other side the United States and Australia.

Germany has a unified system of criminal law and criminal justice, with a federal criminal code and a federal code of criminal procedure. In practice, criminal law is a matter of federation despite the fact, that under art. 74 of the Federal Constitution both federal and state legislators are competent and that under art 72 II of the Constitution federal actions in the fields where the legislative powers are concurrent shall be subsidiary.<sup>2</sup> The German model is followed by Switzerland where substantive criminal law was unified long time ago<sup>3</sup> and criminal procedure was unified recently<sup>4</sup>. On the contrary, in the US and Australia there is a very visible division between federal and state law.

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<sup>1</sup> According to H. Lensing, federalization in the field of criminal law and criminal procedure means that “the federal and state systems each have criminal jurisdiction with their own enforcement agencies, either at federal or state level”. H. Lensing, “The Federalization of Europe: Towards a Federal System of Criminal Justice”, *European Journal of Crime, Criminal Law and Criminal Justice*, 1993, no. 1, p. 229.

<sup>2</sup> *Ibid.*, p. 216.

<sup>3</sup> Code pénal suisse du 21 décembre 1937, RS 111.00.

<sup>4</sup> Code de procédure pénale suisse du 5 octobre 2007, available at <http://www.admin.ch/ch/f/ff/2007/6583.pdf>.

Between the two opposite systems, there is a place for Canada. In that country, as a rule competence in criminal law was vested in the federation<sup>5</sup> with the exception of the establishment of courts of criminal jurisdiction. Section 92 of the Canadian Constitution Act 1867 also lists the exclusive competences of the provinces and provides that the provinces may impose punishment in order to enforce any law in relation to any matter coming within any of the classes of subjects enumerated in the section.

Observations of the models in the context of European integration and the creation of European criminal law lead to the thesis that the most likely models to follow are Australian and American, because it is unlikely that the Member States would be prepared to resign completely from their competences in the area of criminal law and to transfer them to the EU level. Such a scenario of course cannot be excluded, but it takes many years to become as visible as it is in the Swiss example. Therefore the above mentioned two federal states are worthy of closer analysis. After that, the comparison with the EU will be made.

## AUSTRALIA

Article 51 of the Commonwealth Constitution lists the legislative powers of the Commonwealth Parliament, and article 52 of the Constitution describes the exclusive powers of the Commonwealth. Criminal law is not explicitly listed in the articles, but article 51 does mention the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States, the recognition throughout the Commonwealth of the laws, the public acts and records, and the judicial proceedings of the states and the influx of criminals. However, these matters are connected rather with criminal procedure.

The competence of the Commonwealth in the field of substantive criminal law is based on the assumption that in order to fulfil the obligation in non-criminal matters, criminal legislation is sometimes necessary. In *R v. Kidman*<sup>6</sup> the High Court Chief Justice Griffith expressed the opinion

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<sup>5</sup> Article 91 (27) Constitution Act 1867. Both substantive and procedural criminal law were regulated in the Criminal Code 1985.

<sup>6</sup> *R v Kidman* [1915] 20 CLR 425.

that “the power of the Commonwealth Parliament to enact criminal laws is to be found in pl. XXXIX. and nowhere else, and is a power to enact them as sanctions to secure the observance of substantive laws with respect to matters within the legislative, administrative, or judicial power of the Commonwealth, and in that sense incidental to the execution of such powers”. Therefore it is assumed<sup>7</sup> that federal offences must be “incidental” to any of the existing heads of power. However, this is interpreted by the High Court broadly. For example it was decided that penalizing unlawful associations is within the scope of article 51 because “To prevent persons associating together for the purpose of destroying the Constitution is a matter incidental to maintaining it”<sup>8</sup>. In *Viro v. R*<sup>9</sup> the High Court underlined that the “Commonwealth has full power (which it has freely exercised) to make criminal as well as non-criminal law with respect to the subjects on which it is empowered to legislate”. Many criminal offences are created on the base of fulfilling international obligations coming out of ratified international treaties.

From the beginning federal criminal law in Australia was very limited. A visible development took place in the 1980s because of the fight with drug trafficking and tax offences. These required the establishment of new law enforcement bodies and the creation of new offences<sup>10</sup>. In 1995 the Commonwealth Criminal Code was adopted.

Although the criminal law is not within the exclusive powers of the federal parliament, it must be remembered that in case of conflict with state law, federal law prevails<sup>11</sup>. Therefore the federal and state parliaments may create criminal law separately and criminalize the same behaviour, but if the state regulation is inconsistent with the federal, it may be declared void. The case of Tasmanian sodomy legislation is a good illustration. In 90s of the XX century Tasmania was the only

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<sup>7</sup> S. Bronitt, B. McSherry, *Principles of Criminal Law*, Sydney 2005, p. 91.

<sup>8</sup> *R v. Hush*, 48 CLR 487 (1932).

<sup>9</sup> *Viro v. R*, 141 CLR 88 (1978).

<sup>10</sup> M. Weinberg, *The Current and Proposed Criminal Jurisdiction of the Federal Court*, A paper presented at the Federal Criminal Law Conference, Sydney, Friday 5 September 2008, p. 2.

<sup>11</sup> Article 109 of the Commonwealth Constitution “When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid”.

Australian state penalizing homosexual acts between consenting male adults. Tasmania refused to change the legislation which in the view of the federal government was incompatible with ICCPR. In response the federal Human Rights (Sexual Conduct) Act of 1994 was adopted declaring that “sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Right”. In 1997 the High Court decided that the Tasmanian legislation was contrary to this act, and therefore article 109 of the Constitution applied<sup>12</sup>. The federal legislation prevails also when there is a discrepancy between punishment in federal and state criminal law for the same conduct<sup>13</sup>.

However, in Australia the criminal law is primarily a matter of states and territories. They have their own courts, criminal procedures, and sentencing rules. The federal system does not have a well-developed structure of criminal courts. According to section 71 of the Australian Constitution “The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction”. Section 77 of the Constitution further declares, that with respect to matters mentioned in sections 75 and 76, Parliament may make laws vesting any court of state with federal jurisdiction. Therefore the federal jurisdiction is with some exceptions indicated below vested in state or territory criminal courts<sup>14</sup>. This was explained as done on economic grounds, because creation of the separate level of courts was not justified by the number of federal cases. Such a concept is regarded as an “autochthonous expedient”<sup>15</sup>. On the contrary, a state cannot vest the federal court with the state jurisdiction<sup>16</sup>.

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<sup>12</sup> Croome v. Tasmania, (1997) 191 CLR 119.

<sup>13</sup> S. Joseph, M. Castan, *Federal Constitutional Law. A Contemporary View*, Sydney 2006, p. 239–241.

<sup>14</sup> See section 68 (2) of Judiciary Act 1903.

<sup>15</sup> Term used by the High Court in *The Queen v. Kirby; Ex parte Boilermakers’ Society of Australia*, (1956) 94 CLR 254.

<sup>16</sup> *Re Wakim; Ex parte McNally* (1999) 198 Criminal Law Reports 511.

The High Court has original jurisdiction in relation to federal offences but does not exercise the jurisdiction and acts only as a court of appeal. The Australian Federal Court was created in 1976<sup>17</sup>. The Court deals mainly with civil cases. Its criminal jurisdiction was originally limited to a number of summary offences and exercising judicial review of decisions taken in criminal proceedings and in an extradition process<sup>18</sup>. Several years ago it was proposed to vest the federal court with jurisdiction over indictable offences<sup>19</sup>. It was argued, that the jurisdiction of the federal court should be concurrent rather than exclusive in order to allow joint trial of federal and state offences when appropriate<sup>20</sup>. One of the reasons was also the overload of state courts. The widening of the jurisdiction of the Federal Court took place in 2009<sup>21</sup> and nowadays the Federal Court has jurisdiction also in relation to some indictable offences. The decision whether for a federal crime the accused should be tried by state or federal court is taken by the committal court on the advice of the public prosecution service (article 68A of the Judiciary Act 1903). The procedure is based on the rules of the federal court supplemented by state law (article 68B and 68C of the Judiciary Act 1903).

The lowest federal court in the hierarchy – the Federal Circuit Court does not have jurisdiction in criminal matters<sup>22</sup>.

Jurisdiction is conferred on the state courts notwithstanding any limits as to locality of the jurisdiction of that court under the law of the state or territory with an exception provided for summary jurisdiction, when the court may decline to exercise its jurisdiction over an offence committed in another state. Therefore almost all federal offences are prosecuted in state or territory courts<sup>23</sup>.

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<sup>17</sup> Federal Court of Australia Act 1976 (Cth).

<sup>18</sup> Weinberg, *supra*, p. 7-9.

<sup>19</sup> *Ibid*, p. 10.

<sup>20</sup> *Ibid*, p. 28.

<sup>21</sup> See Federal Court of Australia Amendment (Criminal Jurisdiction) Act 2009.

<sup>22</sup> See <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/jurisdictions/>.

<sup>23</sup> M. Weinberg, "The Current and Proposed Criminal Jurisdiction of the Federal Court", A paper presented at the Federal Criminal Law Conference, Sydney, Friday 5 September 2008, p. 3.

The federal system also does not have a separate criminal procedure, but uses the procedures of the states. According to section 68 (1) of Judiciary Act 1903:

The laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences, and the procedure for:

- (a) their summary conviction; and
- (b) their examination and commitment for trial on indictment; and
- (c) their trial and conviction on indictment; and
- (d) the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith; and for holding accused persons to bail, shall, subject to this section, apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State or Territory by this section.

The system of different procedures for sentencing federal offenders is criticized for disparity in sentencing. Moreover, it is argued that different procedures lead to procedural unfairness for those defendants who are given fewer procedural guarantees. It should be also seen that even when the state and federal offence are similar, the penalty for federal offence is often more severe<sup>24</sup>.

The state jurisdiction and federal jurisdiction may overlap. The power of the Commonwealth to regulate certain subject matter is normally not exclusive, so a state or a territory may enact its own regulations as well. In *Hume v. Palmer*<sup>25</sup> the High Court held that “the same man may be punished by the Commonwealth and by the State for the same offence – not technically the same, but practically. The remedy is to be found – if the Commonwealth Parliament sees fit to adopt it – in some provision forbidding, either absolutely or conditionally, a prosecution by the Commonwealth where there has been a prosecution by the State.” Such regulation was included in the Crimes Act 1914 in section 4C (2) according to which:

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<sup>24</sup> D. Renton, “The federal criminal justice system: a new direction”, *Criminal Law Journal*, 2003, vol. 27, p. 67.

<sup>25</sup> *Hume v. Palmer*, 28 CLR 441 (1926).

Where an act or omission constitutes an offence under both:

- (a) a law of the Commonwealth and a law of a State; or
- (b) a law of the Commonwealth and a law of a Territory;

and the offender has been punished for that offence under the law of the State or the law of the Territory, as the case may be, the offender shall not be liable to be punished for the offence under the law of the Commonwealth.

This of course only precludes the Commonwealth from bringing a second prosecution and only in a situation where the person was punished. Therefore if the person was found not guilty by a state, the Commonwealth may still prosecute for the same act or omission. States are also free to exercise their jurisdiction despite earlier punishment for a federal offence. In practice double prosecutions are avoided by consultations between states and federal authorities and resignation from prosecution on the base of the opportunity principle. However in case of lack of specific legislation this depends solely on the decision of the authorities involved.

## UNITED STATES

The legislative power of Congress is regulated in article 1 section 8 of the US Constitution. Punishing counterfeiting of securities and coin as well as punishing of piracies and felonies on the High Seas and offences against the law of nations were explicitly mentioned. Besides, the competences of the federal government in the area of criminal law are implicitly derived from the power to provide general welfare and public health and morals. Occurrence of crime on federal land or property or commission of a crime by a federal employee, use of the mails, and interstate commerce are the bases for jurisdiction<sup>26</sup>. For most of the history of the US, the role of the federal government in criminal legislation was very limited. Legislation and enforcement in the field of criminal law was almost entirely left to the states as it has been always presumed that the criminal law is primarily

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<sup>26</sup> M. T. Scott, "Kidnapping Federalism: United States v. Wills and the Constitutionality of Extending Federal Criminal Law into the States", *The Journal of Criminal Law and Criminology*, 2003, vol. 93, Nos. 2-3, p. 762.



a responsibility of the states. Moreover, the federal government did not have general police forces and a prison system<sup>27</sup>. Up to the Civil War the legislation encompassed mainly crimes against the direct interests of the federal government such as the bribing of federal officials, perjury in federal courts, theft of government property, and revenue fraud<sup>28</sup>. As Beale<sup>29</sup> indicates, the first expansion of the federal criminal law took place after the civil war with the development of the rail and mail system which increased interstate commerce. But the number of federal offences was still quite modest.

This situation changed with the realization of the New Deal doctrine. Regarding states as unable to effectively prosecute certain serious crimes (mostly crimes against property with an interstate dimension), Congress enacted federal legislation to tackle the problems. The next movements were in the 60s and 70s of the XXth century due to expansion of drug crimes and in the 80s and 90s in relation to violent crime<sup>30</sup>. Title 18 of the US federal code was introduced in 1948. It is a federal criminal code dealing with substantive criminal law and containing also procedural regulations.

The Commerce Clause, stating that, "The Congress shall have power [...] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes," in the US Constitution (article 1, section 8, clause 3), was interpreted very widely to encompass a large number of behaviours. In 1824 the US Supreme Court recognized that the Commerce Clause gave power not only to regulate commerce, but also activities necessary for commerce<sup>31</sup>. Following this view, for example interstate auto theft is regarded as affecting interstate commerce. Therefore stealing a car is a state crime, but transporting a stolen car into interstate commerce or

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<sup>27</sup> F. E. Zimring, G. Hawkins, "Toward a Principal Basis for Federal Criminal Legislation", in: J. A. Strazzella (ed.), *The Federal Role in Criminal Law*, The Annals of The American Academy of Political and Social Science, January 1996, vol. 543, p. 16.

<sup>28</sup> S. S. Beale, "Federalizing Crime: Assessing the Impact on the Federal Courts", in: J. A. Strazzella (ed.), *The Federal Role in Criminal Law*, The Annals of The American Academy of Political and Social Science, January 1996, vol. 543, p. 40.

<sup>29</sup> *Ibid*, p. 41.

<sup>30</sup> *Ibid*, p. 42-43.

<sup>31</sup> *Gibbons v. Ogden*, 22 US 1. See also M. T. Scott, *supra*, p. 763.

receiving a car stolen in another state is penalized as a federal crime<sup>32</sup>. The Supreme Court was also of the opinion that an attempt to set fire to a rental building was an activity that affected commerce because the owner was earning rental income from a two-unit apartment building and treated it as business property for tax purposes<sup>33</sup>. Punishment for racial discrimination in restaurants could be also justified under the Commerce Clause, because the restaurants “sold less interstate goods because of the discrimination, that interstate travel was obstructed directly by it, that business in general suffered, and that many new businesses refrained from establishing there as a result of it”<sup>34</sup>.

The success of the federal government in expanding the powers under the Commerce Clause was partly stopped in 1995 by the judgment of the Supreme Court in *United States v. Lopez*<sup>35</sup>. In this case the federal legislation prohibiting possession of weapons in schools under the Gun Free School Zones Act of 1990 was in issue. Lopez challenged his conviction for possession of a handgun at a school and argued that the regulations were unconstitutional as it was beyond the power of Congress to legislate control over public schools. The Government argued that “possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. (...) Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe”. The Government was also of the opinion “that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation’s economic well being.” It is easy to see that the links between the reasons given by the government

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<sup>32</sup> K. Brickey, “The Commerce Clause and Federalized Crime: A Tale of Two Thieves”, in: J. A. Strazzella (ed.), *The Federal Role in Criminal Law*, The Annals of The American Academy of Political and Social Science, vol. 543, January 1996, p. 28–29.

<sup>33</sup> *Russell v. the United States*, 471 US 858.

<sup>34</sup> *Katzenbach v. McClung*, 379 US 294 (1964).

<sup>35</sup> *United States v. Lopez*, 514 US 549.

to justify the prohibition and the interstate commerce were rather loose. That view was also taken by the majority of the US Supreme Court, which declared that the act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. The court using the “substantial effect” test underlined that if it accepted the reasons given by the government, it would be hard to find any area of activity of individual that Congress was without power to regulate. This would blur the distinction between matters truly national and truly local and allow federal legislation to enter into the areas where States historically had been sovereign. The strict view taken in *Lopez* was however not followed in subsequent judgments.

It could be mentioned that several years ago the problem of introducing cybercrime legislation at the federal level was solved by a statutory declaration stating that using of the Internet constitutes transportation in interstate commerce<sup>36</sup>.

In 2003 it was estimated that there were more than 4000 federal crimes<sup>37</sup>, in 2008 at least 4450<sup>38</sup>. The main groups of the crimes are crimes against the federal government itself or undertakings of great national importance, crimes with an interstate dimension, and crimes for which prosecution is complex and therefore the federal government is in a better position to tackle it<sup>39</sup>. It is also argued that one of the reason is to show the voters that the federal government is taking care of their safety and trying to protect them<sup>40</sup>.

The federal and state systems have separate criminal courts. The increase in federal crimes and prosecutions of course affects federal

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<sup>36</sup> J. R. Gray, “United States v. Schaefer and United States v. Sturm. Why the Federal Government Shall Regulate All Internet Use as Interstate Commerce?”, *Denver University Law Review* 2012–2013, vol. 90, p. 691–714.

<sup>37</sup> J. S. Baker, “Measuring the Explosive Growth of Federal Crime Legislation”, *The Federalist Society* 2003, p. 1.

<sup>38</sup> J. Baker, “Revisiting the Explosive Growth of Federal Crimes”, available at: <https://www.heritage.org/report/revisiting-the-explosive-growth-federal-crimes>.

<sup>39</sup> Compare J. B. Oakley, “The Myth of Cost – Free Jurisdictional Reallocation”, in: J. A. Strazella, *The Federal Role in Criminal Law*, *The Annals of The American Academy of Political and Social Science*, vol. 543, January 1996, p. 58–59.

<sup>40</sup> N. E. Marion, *Federal Government and the Criminal Justice*, Palgrave Macmillan 2011, p. 3.

criminal justice systems causing overloads in courts. The federal legislation penalizes many acts which are at the same time penalized by the states. This has led to overlapping of the legislations and double prosecutions for the same act. In the US the double jeopardy rule in the Fifth Amendment applies only in case of two or multiple federal or state prosecutions for the same offence within the same jurisdiction. It means that if the same criminal act constitutes state and federal offences, the alleged perpetrator may be prosecuted by both. This is the so called double sovereignty doctrine<sup>41</sup>.

To limit double prosecutions the US Department of Justice adopted so called Petite Policy. According to this policy, the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act(s) or transaction(s) is precluded “unless three substantive prerequisites are satisfied: first, the matter must involve a substantial federal interest; second, the prior prosecution must have left that interest demonstrably unvindicated; and third, applying the same test that is applicable to all federal prosecutions, the government must believe that the defendant’s conduct constitutes a federal offense, and that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact. In addition, there is a procedural prerequisite to be satisfied, that is, the prosecution must be approved by the appropriate Assistant Attorney General<sup>42</sup>.”

Also more than half of the states adopted legislations precluding prosecuting for the same offence, if the person had already been sentenced by a federal court.

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<sup>41</sup> The doctrine was recently reaffirmed by the US Supreme Court in *Gamble v. United States*, 587 U.S. \_\_\_\_ (2019).

<sup>42</sup> United States Attorneys’ Manual, par. 9 - 2.031.

## COMPETENCES OF THE EUROPEAN UNION IN THE FIELD OF CRIMINAL LAW

The European Union is not a federal state<sup>43</sup>. As P. Eleftheriadis<sup>44</sup> argues “Federal States constitute a single scheme of government and jurisdiction on the basis of a coherent set of constitutional principles. The EU is no such thing”. Nevertheless it has some features of a federal system<sup>45</sup> and sometimes is described as quasi federal or a federation of states<sup>46</sup>. One of these features is a quasi federal system of law (EU law and domestic law of the Member States). It is true that before the Lisbon Treaty it was visible mainly in the former first pillar, but the development of the former third pillar legislation in the post-Lisbon period must be also taken into account. Therefore it may be declared that quasi federal European criminal law did exist in the pre-Lisbon period.

It is obvious that the division of competences between the first and the third pillar was unclear<sup>47</sup> but the distinction was still important. Let us begin with the former first pillar. The ECJ judgment declaring void the framework decision on environment protection confirmed the competences of the EU in the creation of criminal law. In the landmark case *Commission v. Council*<sup>48</sup>, the Court summarized its position on

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<sup>43</sup> See discussion on the current status in: E. Cloots, G. De Baere, S. Sottiaux (ed.), *Federalism in the European Union*, Hart Publishing 2012. For discussion on federalization of EU law see R. Schütze, *From Dual to Cooperative Federalism. The Changing Structure of European Law*, Oxford University Press 2009.

<sup>44</sup> P. Eleftheriadis, “Federalism and Jurisdiction”, in: E. Cloots, G. De Baere, S. Sottiaux (ed.), *Federalism in the European Union*, Hart Publishing 2012, p. 63.

<sup>45</sup> Compare A. Nieto Martin, *An approach to current problems in European criminal law* [in] L. Arroyo Zapatero, A. Nieto Martin, *European Criminal Law: An Overview*, Universidad de Castilla – La Mancha 2010, p. 46–49; S. Dosenrode, *Assessing the European Union’s Statehood*, in: S. Dosenrode, *The European Union after Lisbon. Polity, Politics, Policy*, Ashgate 2012, p. 21–40.

<sup>46</sup> R. Schütze, *European Constitutional Law*, Cambridge University Press 2012, p. 79.

<sup>47</sup> See P. de Hert, “Division of Competencies between National and European Levels with regard to Justice and Home Affairs”, in: J. Apap (ed.), *Justice and Home Affairs. Liberty and Security Issues after Enlargement*, Edward Elgar Publishing 2004, p. 55–95 and judgment in the case *Ireland v. Commission and Council concerning the directive 2006/24*.

<sup>48</sup> C 176/03, judgment from 13 September 2005, ECR [2005] I – 7879.

the competences of the Community in the sphere of criminal law by recalling its judgments in *Casati*<sup>49</sup> and *Lemmens*<sup>50</sup> and stating that „As a general rule, neither the criminal law nor the rules of criminal procedure fall within the Community’s competence”. However, the Court underlined that “the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate, and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective”. By contrast, in other judgments the ECJ declared that the determination of the type and level of the criminal penalties to be applied does not fall within the Community’s sphere of competence<sup>51</sup>.

Therefore the ECJ inferred for the Union some supranational or federal power in relation to the states in its judgments concerning environmental law. This so called “common law power” seems to be now replaced by article 83 of TFEU<sup>52</sup>. The introduction of administrative penalties may also be regarded as a kind of federalization of punitive sanctions.

The trend of federalization was visible also in the third pillar. The number of instruments adopted in the period 2002 – 2009 is considerable. Most of the instruments focused on interstate cooperation, but some of them were concerned with substantive criminal law. It must be observed that some of the legal acts which were adopted for the enhancing of cooperation introduced new instruments such as the European Arrest Warrant, often claiming that it is only the harmonization of the existing provisions. Therefore it is justified to say that the EU took some competences from the states also in the former third pillar.

After the Treaty of Lisbon, the distinction between the pillars disappeared. At the same time the treaty strengthened the competences

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<sup>49</sup> Case 203/80 *Casati* [1981] ECR 2595

<sup>50</sup> Case C226/97 *Lemmens* [1998] ECR I3711.

<sup>51</sup> Case C-440/05.

<sup>52</sup> See T. Tridimas, “Competence after Lisbon. The elusive search for bright lines”, in: D. Ashiagbor, N. Countpuris, I. Lianos (ed.), *The European Union after the Treaty of Lisbon*, Cambridge University Press 2012, p. 70.

of the EU in the field of the criminal law. The area of freedom, security, and justice is within shared competences of the EU (article 4 (2) j of the TEU).

The treaties, as amended by the Lisbon Treaty have also a specific legal basis for competences in the field of criminal law. Article 83 (1) TFEU stipulates: "The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime are the following: terrorism, trafficking in human beings, and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime, and organized crime. On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament". There is an important provision also in article 83 (2) TFEU which provides that "If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned".

Moreover, according to article 325 (1) TFEU "The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices, and agencies". As Mitsilegas<sup>53</sup> observed, article 325 TFEU does not contain the last sentence of art. 280 (4) TEC which states that the measures adopted shall not concern the application of national criminal law or the national administration of justice. This

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<sup>53</sup> V. Mitsilegas, *EU Criminal Law*, Hart Publishing 2009, p. 109.

may be regarded as a possibility of adopting criminal laws on fraud in a way independent of article 83<sup>54</sup>. Having in mind that articles 82 and 83 mention the directive as a legal instrument to be adopted, the lack of this indication in article 325 may lead to the opinion that in the latter not only directives, but also regulations could be used. Would it therefore be a new step in the development of European criminal law? The Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law<sup>55</sup> establishes only minimum rules concerning the definition of criminal offences and sanctions, but it cannot be excluded that in the future more far reaching instruments / could be presented.

Summing up this part, it could be observed that presently in EU law there is a legal base for the harmonization of listed criminal offences and in specific areas. Besides, there is competence to regulate crimes against the financial interest of the EU, which may be regarded as a basis and starting point for the introduction of EU criminal provisions consisting of a general and a special part.

One may argue that the Treaty of Lisbon gives clear boundaries for EU competences in criminal matters limiting in this sense the approach taken by the Court of Justice in environmental cases. There is a list of crimes in relation to which the criminal law provisions may be adopted. But having in mind that the list of offences could be expanded, it is possible that the new competences will be even more used than those in the former third pillar<sup>56</sup>.

As to the procedural provisions, according to article 82, 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

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<sup>54</sup> For controversies between art. 325 and 83 see European Parliament, Report on 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)0363 - C7-0192/2012 - 2012/0193(COD)), 25.3.2014, A7-0251/2014. See also M. Kaiafa-Gbandi, *The EU and US criminal law as two-tier models: A comparison of their central axes with a view to addressing challenges for EU criminal law and for the protection of fundamental rights*, Swedish Institute for European Policy 2016, vol. 4, p. 44-46.

<sup>55</sup> OJ L 198, 28.7.2017, p. 29-41.

<sup>56</sup> Compare V. Mitsilegas, *EU Criminal Law*, Hart Publishing 2009, p. 107-113.



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;
- (c) the rights of victims of crime;
- (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

Besides, the general competence of the EU for the harmonization of national laws was regulated in article 114 TEU.

As A. Klip<sup>57</sup> argues: “the Treaty of Lisbon reduces the discretion of Member States to maintain their district criminal justice systems, by introducing across the board competences for the European Union to influence both national criminal law and criminal procedure. There is no aspect of criminal law that is excluded from the possible influence of Union law”. Having in mind the idea of shared competences and an explicit basis for adoption of legislation, this view is justified.

Although the competences of the EU shall be rather for harmonization of criminal law than its creation, in practice many regulations are introducing new institutions and crimes. One example is the European Arrest Warrant.

## WHAT SYSTEM OF CRIMINAL LAW AND CRIMINAL JUSTICE OF THE EUROPEAN UNION?

Many years ago Corpus Iuris proposed federalization of substantive and procedural criminal law by introducing crimes against the financial interests of the EU, establishing a set of procedural rules for the prosecution of those crimes and the creation of the European Public Prosecutor who

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<sup>57</sup> A. Klip, *European Criminal Law. An Integrative Approach*, Intersentia 2012, p. 478.

would be able to prosecute the crimes in the courts of the Member States. Under this model, the creation of a separate system of EU criminal courts was therefore not proposed. The Green paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor<sup>58</sup> advocated the establishment of a European Public Prosecutor, the unification and harmonization of certain aspects of substantive law, and the harmonization of some institutions of criminal procedure (e.g. freezing orders).

The propositions were subsequently abandoned and a system of mutual recognition and more efficient mutual assistance were promoted instead. However, recently we observed a rebirth of the idea of a European Public Prosecutor based on article 86 of the TEU<sup>59</sup>. According to art. 86 (2) of the TEU the European Public Prosecutor's Office shall be responsible for investigating, prosecuting, and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences. There is also a possibility of extending the powers to include serious crime having a cross-border dimension (86 (4)). The Office is to perform its tasks using special procedure (art. 86 (1) and (3)).

Although some authors deny that the criminal law became an instrument of policy of the EU<sup>60</sup>, the Commission<sup>61</sup> uses the argument of fostering citizens' confidence in living in the area of freedom, security,

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<sup>58</sup> COM (2001) 715 final.

<sup>59</sup> European Commission, Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM (2013) 534 final and Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283, 31.10.2017, p. 1-71.

<sup>60</sup> E. Baker, "Governing through crime – the case of the European Union", *European Journal of Criminology*, 2010, vol. 7 (3), p. 206.

<sup>61</sup> European Commission, Communication from the Commission to the European Parliament, the Council, *The European Economic and Social Committee and Committee of the Regions. Towards an EU criminal policy: Ensuring the effective implementation of EU policies through criminal law*, Brussels, 20.09.2011, COM (2011) 573 final, p. 2. For a critique of the reasons for criminalization listed in the document see A. Klip, "European Criminal Policy", *European Journal of Crime, Criminal Law and Criminal Justice*, 2012, vol. 20, p. 3-20.

and justice to argue the need for criminal law provisions. Certainly the issue of European criminal law has a strong political dimension and the legal instruments proposed are sometimes not necessarily based on merits. It is also visible, that politicians often overestimate the role of the criminal law and treat it as a miracle cure for all crimes<sup>62</sup>.

The basic question which must be answered is whether we really need a system of federal criminal law in the EU and if such a system would have some added value as compared with purely national legislation. Therefore having in mind the principles of necessity and proportionality, one must look carefully at the arguments raised to justify new criminal legislation.

The above analysis of competences of federation in Australia and in the US shows that while a transfer of competences in criminal law to federation serves some sound purposes, it generates at the same time no less serious problems. Double sovereignty issues, reduced procedural guarantees, a two tier court system, disparity in sentencing: these are issues hard to resolve. This may make a European criminal lawyer a bit sceptic about the added value of federal criminal legislation. The unitary system is without hesitation of far greater value, but as was indicated in the beginning, it requires years of harmonization and work. The creation of federal criminal law can also be avoided by protecting EU interest using national legislation.

On the contrary, there are also some sound arguments for the creation of a federal criminal law: in comparison with the implementation mechanism, unification or harmonization make cooperation in criminal matters more efficient, and the existence of supranational bodies allows for looking at crime from a broader perspective, and prosecution of crime could be more effective.

Having found some argument for the adoption of the European federal law, let us look now at the differences between the federal states and the EU. It is important that the state legal systems of the two federal states described above are rooted in English law, therefore there are far fewer visible differences than in the case of the EU. An important difference between the EU, as compared with the US and Australia is also

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<sup>62</sup> A. Klip, *supra*, p. 11.

language. In the two federal states English is spoken in all the states while in the EU there are plenty of official languages, which from a practical point of view makes unification a much more difficult process.

On the other hand it must be underlined that in certain aspects the development of supranational law in the EU is more advanced than in the US and Australia. The best example of it is the European *ne bis in idem* principle regulated in article 54 of the Schengen Implementing Convention and in article 50 of the Charter of Fundamental Rights of the European Union<sup>63</sup>. Such guarantee for the accused or sentenced persons has not yet been adopted in the federal states despite the long history of federalization of their law. The next example is the European Arrest Warrant which is much quicker and effective than extradition procedures in the federal states.

Some of the concepts in the EU and the federal states are similar. First of all, the mutual recognition principle is similar to the American full faith and credit clause, although the latter is generally inapplicable to criminal cases<sup>64</sup>.

Of course federalization may be realized not only by creation of criminal law, but also by creating federal institutions empowered with investigation and prosecution powers. At this time such powers are not vested either in Eurojust or Europol, but the possibility is opened under the Lisbon Treaty. The first agency with such powers will be the European Public Prosecutor's Office (EPPO)<sup>65</sup>.

There are a few models which could be analyzed and discussed as possible scenarios for the EU. The first is the creation of an EU substantive criminal law. This is very unlikely. The opposite option is the preservation of the status quo which means all substantive law is national. The way between is creation of federal (EU) substantive criminal law concerning crimes which are directed against the EU as a whole, especially against its financial interests.

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<sup>63</sup> OJ C 326, 26.10.2012, p. 391–407.

<sup>64</sup> W. L. Reynolds, W. M. Richman, *The full faith and credit clause: a reference guide to the United States Constitution*, Preager 2005, s. 90–91.

<sup>65</sup> See the Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office, OJ L 283, 31.10.2017, p. 1–71.

The problem of procedural criminal law is even more complicated. Of course the problem arises only in situations when federal substantive law is adopted, as the creation of supranational agencies to deal with national crimes will not be justified. The probability of the creation of unified criminal procedure is very low because of the different legal cultures of the Member States, national needs, and other factors. Despite the harmonizing effect of judgments of the ECtHR the differences are still considerable, especially between the common law and civil law Member States. The second option is to try federal offenders using national procedures. It could be done by national or supranational authorities. This of course raises a problem if a supranational investigating or prosecuting body is created. Assuming that the body prosecutes transnational crime, it would be impossible to use for every suspect his or her national procedure. Therefore there would have to be rules for choosing the national procedure or separate procedure created. The above mentioned EPPO regulation does not create a completely autonomous procedure, but the relevant national law will also apply to the extent that a matter is not regulated by the regulation. (article 5 (3)). The problem also arises if the prosecuted act is at the same time a national and an EU crime, because in this situation the principle of *ne bis in idem* could apply if judgment was passed for either crime. It is true that article 54 of the Schengen Implementing Convention precludes double prosecution only if the person had already been finally judged in the other contracting state. Therefore it is doubtful if the article would apply also in the case of relations between the EU and the Member States. However, article 50 of the Charter of Fundamental Rights of the European Union stipulates that no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law. The expression "within the Union" may be surely applied both in horizontal relations (between the Member States) and vertical (between the EU and- the Member States). Assuming that the criminal act is to be tried before national courts, this problem may be easily resolved by jointly trying the offender for both crimes<sup>66</sup>.

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<sup>66</sup> See article 22 (3) of the EPPO Regulation. A separate problem is that not all the MS participate in enhanced cooperation. See A. Klip, "The Substantive Criminal Law

On the base of the experience of the federal states it must be observed that the use of national criminal courts for trying persons accused of crimes against the EU (or transnational crimes) may result in a disparity of sentences because the courts may have different sentencing practices or may even reach different decisions as to the guilt of the accused owing to different evidential rules and procedural standards. This of course may raise objections from the equality before the law point of view. Some of the problems could be resolved by establishing an EU criminal court and an EU court of appeal, but it is unlikely in the near future. Instead, creation of specialized national courts may be expected<sup>67</sup>. However the establishment of a pretrial chamber to deal with the different issues of proceedings conducted by the European Prosecutor is advisable<sup>68</sup>. One may agree that a great role for the federalization of European criminal law is to be played by the CJEU. It has some features of a constitutional federal court, such as the control of validity of EU law, the division of competences, although not all<sup>69</sup>.

## CONCLUSION

The comparison of the two federal systems and the quasi federal system of the EU leads to the conclusion that there is a tendency in all these three systems to infer broad competences in the field of criminal law from powers which are not directly related to criminal law. The US example is the most prominent and the government's reasons presented to justify the prohibition of guns at schools give a good illustration of how far this may lead. Australia is also a good example.

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Jurisdiction of the European Public Prosecutor's Office", *European Journal of Crime, Criminal Law and Criminal Justice*, 2012, vol. 20, p. 373-374.

<sup>67</sup> C. Gómez-Jara Díez, *European Federal Criminal Law. The Federal Dimension of EU Criminal Law*, Intersentia 2015, p. 255.

<sup>68</sup> According to article 42 of the EPPO Regulation, judicial review is to be exercised by the Court of Justice.

<sup>69</sup> M. Claes, M. de Visser, "The Court of Justice as a Federal Constitutional Court: A Comparative Perspective", in: E. Cloots, G. De Baere, S. Sottiaux (ed.), *Federalism in the European Union*, Hart Publishing 2012, p. 108.

The ECJ followed the tendency in its judgments, especially in the former first pillar. The Lisbon Treaty generally clarified the competences of the EU in the field of criminal law. The most unclear regulation is that in article 325 and it could be a base for a new step in the creation of the EU criminal law: however this is of course much more modest than in the above mentioned federal states. The new step in federalization is the creation of the office of European Prosecutor which will prosecute before national courts. Having in mind the problem of procedure, there could shortly be proposals to create a criminal court at EU level and a fully autonomous criminal procedure. And having done so, there would be without doubt pressure to extend the scope of such EU criminal federal law.

The scenario, which at this moment may seem distant, is however not unrealistic. The creation of a European federal criminal law in a longer perspective is inevitable. As described above, regulation of such a system is not an easy task and the experience of already existing federal states is invaluable in the matter. If the number of federal prosecutions would not be significant, the Australian model without a developed system of federal courts could be followed. Otherwise, the US model is more likely to be followed.

