To Sanction (or not to Sanction) Procedural Flaws at EU Level?

A Step forward in the Creation of an EU Criminal Process

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1 Why Sanctions Matter in Criminal Procedure

After the entry into force of the Lisbon Treaty, the EU adopted five directives under Article 82 para. 2 TFEU on various aspects of the criminal process (others are currently being approved). For the most part, they provide for

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2 Proposal for a Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings COM(2013) 821/2; Proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings COM(2013) 822/2; Proposal for a Directive on provisional legal aid for suspected or accused persons deprived of liberty and legal aid in European arrest warrant proceedings.
numerous rules on procedure, containing guidelines on how certain acts, parts, or phases of criminal proceedings should be conducted. However, they barely, if ever, provide for procedural sanctions.

The absence of legal consequences in case of procedural violations is rather unusual, and makes one wonder what is the real nature of these directives, and what might be their impact on national practices in the long run.

Paradoxically, one could wonder what is the difference between rules on criminal procedure and a book of recipes (or a music score). At first glance, they could be considered very similar, because they all explain — through a set of guidelines — the correct way to do something. Therefore, one could conclude that a procedural rule is a special recipe to make a good procedural act (or a special score to follow in a procedural activity).

On closer inspection, however, there is at least one element which creates an unfulfillable distance between procedural rules and the other two categories that is, procedural sanctions — or cases of invalidity (or, again reversible errors), depending on the definition adopted by the national system.3

In other words, any person with some experience in cooking — as well as any musician confronted with a music score — knows that the more experience s/he has, the more s/he is allowed to depart from the guidelines contained in the recipe (or in the music score). Famous chefs never merely follow a recipe, but rather they reinvent it; the same holds true for famous music players. At the end of a concert in the last years of his career, Alfred Cortot said that he made so many changes to the Chopin Ballades that he almost “rewrote” the scores during the concert. In general, critics consider these kind of departures from the original screenplay as a touch of the artist, by which the performer makes the result more original and

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3 It might be worth mentioning that, in some Continental systems, procedural mistakes — and the following nullification of the acts performed — are not conceived as “sanctions” by scholars. The concept of sanction recalls a reaction to a voluntary illegal behaviour, a form of punishment for an evil committed. By contrast, procedural nullifications, often occur independently from the fact that the person who conducted a certain procedural act voluntarily violated the rules. In other words, this way of representing the issue focuses on the mere violation of a legal provision, without looking at the mental state of the actor who violated the law.

In any case, I will use the expression “procedural sanction” to refer to all the cases in which a procedural system nullifies (or deprives of its effect, reverses, excludes, etc.), entirely or in part, a procedural act because of the violation of one or more of its rules.

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