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ARTICLE

Relationship of the EU Framework Decision to the ECHR: Towards the fundamental principles of criminal procedure*

Boštjan M. Zupančič** · **Johan Callewaert*****

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Abstract This article discusses the desirability of EU action to complement the protection offered by the European Convention on Human Rights to suspects in criminal proceedings. Implementation of the mutual recognition principle should not tip the balance too far in favour of law enforcement and prosecution interests. The authors argue that increased efficiency in the protection of basic procedural rights is also urgently needed as a pre-condition for further mutual recognition of criminal judgments. The article also theorises on the harmonisation of criminal procedure in the light of considerations relating to the 'equality of arms'. Such equality is not naturally present in the criminal process, particularly during police questioning and investigations. Decisions about how far to restrict state power in criminal investigations will depend on the attitude to authority in a particular country.

Prof. Dr. Boštjan M. Zupančič
European Court of Human Rights
Allée des droits de l'homme, F-67075 Strasbourg, France
e-mail: bostjan.zupancic@echr.coe.int

Dr. Johan Callewaert
European Court of Human Rights
Allée des droits de l'homme, F-67075 Strasbourg, France
e-mail: johan.callewaert@echr.coe.int

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** Boštjan M. Zupančič, dipl.jur.(Lab.), LL.M., S.J.D. (Harv.), Professor of Law (U.S. and Slovenia), former Vice-Chairman of the U.N. Committee against Torture, former Judge of the Constitutional Court of Slovenia, since 1998 Judge of the European Court of Human Rights in Strasbourg – President of the Third Section. The lecture style of the paper has been maintained.

*** Johan Callewaert, Dr. iur.; Deputy Grand Chamber Registrar, European Court of Human Rights, Strasbourg; Lecturer at the German University of Administrative Sciences, Speyer.

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1. Introduction

This paper is composed of two parts. The first part, Section 2, is concerned with the currently topical and politically relevant relationship of the EU Framework Decision on certain procedural rights in criminal proceedings (FD) to the European Convention on Human Rights; The second part, Section 3, addresses what might be called the central dialectic of criminal process. It is hoped that by engaging in this critical analysis, some deeper appreciation will be obtained of the issues underlying current political debates regarding minimum standards in criminal proceedings. We also hope that some guiding principles for future harmonisation debates might emerge from our discussion.

2. Relationship of the EU Framework Decision to the ECHR

On the question of the relationship of the EU Framework Decision on certain procedural rights in criminal proceedings to the European Convention on Human Rights, two different aspects should be addressed: first the question of the added value of the FD and, second, its compatibility – or harmony – with the Convention.

2.1 Added Value of the FD

No one can escape the question why there should be a FD in the first place, knowing that about 90 % of its present content is to be found already in the European Convention on Human Rights, which is binding on all EU Member States. The remaining 10 % – which represents a real added value in terms of scope and substance of fundamental rights – consists of some more explicit information rights, along with the extension of the procedural rights concerned to procedures designed to enforce European Arrest Warrants and certain other procedures. Do we really need a whole new FD, with 90 % copied from the Convention, knowing that, at the same time, the FD leaves out about 90 % of all procedural rights laid down in the Convention?

Let there be no misunderstanding. The European Convention on Human Rights is primarily a subsidiary instrument and thus not opposed in principle to being implemented or even extended by means of domestic or even European legislation. From a Convention point of view, however, the question is whether this or other Framework Decisions represent an *appropriate* or *useful* implementation.

It has also been suggested that another important part of the added value of the FD lies on the efficiency level, as a result of the fact that the rights stated therein would be better complied with because they would be harmonized among EU Member States and set out in an instrument designed to be made the subject of binding interpretations by the European Court of Justice (ECJ), whose preliminary rulings on criminal procedures would moreover be available in all Member States languages. There is no doubt some force but also a good deal of speculation in this argument. It basically

confronts us with the shortcomings of the Strasbourg system in terms of its lack of efficiency. But here again, the question is whether the FD is the right response to this problem.

In this respect, let it just be mentioned that some 60 % to 65 % of all violations found in the cases examined in Strasbourg on the merits are structural or systemic violations occurring in so-called 'repetitive cases', i.e. cases identical to previous ones in which the Court made already clear determinations but which keep coming to Strasbourg pending the general measures which ought to be taken by national authorities. In other words, we are confronted with serious failures on the part of the Contracting States regarding the execution of judgments. Can we be so sure that everything will be better with a FD? And how about the fact that in any event, even with a FD, there will be nothing to prevent accused persons from coming to Strasbourg after a final determination of their case by domestic courts in the light of the case law of the ECJ (even though the presumption of equivalence recently established by the Strasbourg Court in the *Bosphorus* case[1] might be of some help here)? Thus, the total length of proceedings might further increase.

From this perspective, one can only welcome all practical measures which are being contemplated as a complement to the FD and which are designed to enhance awareness and implementation of the Convention in the Member States. They are certainly part of the answer to the lack of efficiency of the Strasbourg system.

The fact remains, though, that increased efficiency in the protection of basic procedural rights is urgently needed within the EU as a pre-condition for further mutual recognition of criminal judgments across the EU. This is definitely also an important goal worth pursuing as part of the ongoing efforts to combat trans-national crime.

Efficiency, however, has also a lot to do with legal certainty. One should therefore ensure that the benefit of additional, supposedly more efficient, legal instruments is not lost – or even outweighed – by the legal uncertainty inevitably resulting from the multiplication of relevant texts. In this respect, we should have in mind the difficulty facing domestic judges for whom the FD will represent the latest in a series of four different legal sources of fundamental rights to handle in parallel, in addition to their own domestic law,[2] the European Convention on Human Rights and possibly also the EU Charter on fundamental rights to which the ECJ has started referring in its judgments.[3] Actually, the more room is left for hesitation by domestic judges, the more room is left for litigation by potential plaintiffs. Everybody agrees that more litigation is the last thing we need in Europe.

So let us sum up. The FD will not replace the Convention, which will remain in force even with a FD. Thus, a FD represents no alternative to the Convention, it can at best be a good complement to it, but it can also, if ill-devised or ill-drafted, complicate matters even further with a weakened rather than an enhanced protection of procedural rights as a result. This brings us to the question of the possible harmony between the FD and the Convention.

[1] *Bosphorus* v. *Ireland* [Grand Chamber], No. 45036/98, 30. 6. 2005.

[2] See Case C-105/03 *Pupino* [2005] ECR I-5285: in 'Third Pillar' areas, domestic law is to be interpreted as far as possible in conformity with the relevant Framework Decisions. This case is discussed in more depth by Teresa Magno in this issue.

[3] Case C-540/03 *Parliament* v. *Council* [2006] ECR I-5769.

2.2 Relationship with the Convention

Not surprisingly, the relationship between the FD and the Convention has been a central issue throughout the drafting of the FD, the main concern being the compatibility between the two texts, which is a pre-condition to preserving legal certainty in this area. Much could be said on this topic, too, but here again let us confine ourselves to the essentials and proceed on the assumption that the question about the need for a FD has been answered in the affirmative.

In order to ensure coherence and consistency between the FD and the Convention, three basic requirements should be met. First, one should be clear about whether the FD should offer the same level of protection – in terms both of scope or substance – as the Convention or a higher one, knowing that a lower one cannot be envisaged as it would be in a breach of the Convention. Departures from the Convention should be clearly identified. Secondly, where the FD is to follow the Convention, it should do so *inter alia* by following its wording and structure as closely as possible, since different legal notions are supposed to have different meanings. Finally, as a kind of safety net, there should be a general clause referring to the Convention, as interpreted by the European Court of Human Rights, as minimum standard to be observed when interpreting the FD. Again, while all of this is not likely to simplify matters at grass roots level, it might at least make them legally consistent.

A lot of progress has been achieved in implementing these principles since the first version of the FD. This seems to be the result of a fruitful cooperation with the Council of Europe, a cooperation which was initiated by the Finish Presidency of the EU Council and intensified under the German Presidency. As a result, the last available version of the FD at the time of writing – the version dated 22 December 2006 submitted by the German Presidency[4] – goes a long way towards achieving harmony with the Convention. Much of the initial ambiguities regarding the nature of the rights and the scope of the FD have been removed, much of the Convention terminology has been taken on board and the general clause has been remodelled to follow the one appearing in the EU Charter on Fundamental Rights.

Even though one may wish to go into some of the issues that are still outstanding, it might still be too early for that, since negotiations on the draft FD are still ongoing and could possibly lead to quite different results. In the end, more cooperation with the Council of Europe might prove necessary as refinement or amendment continues.

One thing is clear, however. Even with the best of cooperation with Strasbourg in drafting the FD, even with the best possible terminology, structure and general safety clauses, there cannot be any kind of full-scale 'automatic' or mechanical coordination between the FD and the Convention. Even the best FD cannot operate as a magic wand rendering superfluous the consultation of the Strasbourg case law and removing all doubts about the practical implications of a given fundamental right, for the simple reason that cases are never completely identical and that adjustments of the case

[4] Editorial Note: this document was made available by the Council and was discussed at the German Presidency/ERA symposium in Berlin: see Council document 16874/06 of 22 December 2006 and note the counter-proposal by the United Kingdom, and five other Member States, Council document 5119/07, of 17 January 2007, also made available in Berlin.

law may prove unavoidable. After all, the Convention is a 'living instrument', as the Court keeps reminding everyone in its judgments[5]. So the FD cannot be about 'fixing' and codifying uniformed standards once and forever. This is why, very wisely, the FD provides in its present version for the Strasbourg case law to be taken into account when implementing it.

Thus, the FD will represent no simplification either. For whether we like it or not, it will represent an additional layer over and above all the others, which will remain in place. And it will bring into play another European Court, the European Court of Justice, which under the terms of Article 35 of the Treaty on the European Union will be entrusted with interpreting the FD. In this respect, however, we can be entirely confident, since the ECJ has always been very concerned about maintaining the harmony between its own and the Strasbourg case-law. There is no reason why that should no longer be the case with a Framework Decision on procedural rights in criminal proceedings. On the contrary, given the excellent relationship between the two European Courts, there is every reason to be confident in this respect.

Let us now turn to what should be the material consideration when establishing those principles, doctrines and rules which, because they represent the hierarchy of the minimally shared values across the common European space, should also be reflected in the FD.

3. The Central Dialectic of Criminal Process

In terms of substance, or if you want, in terms of 'substantive due process' things are incomparably more complex – and more interesting. The best judicial and academic legal minds of the twentieth Century – and especially so in the 1960s and 1970s – have endeavoured to understand, to deconstruct and to remedy the Kafkaesque central contradiction in criminal process. In a truly Hegelian tradition, this central contradiction has hitherto been the motor of conceptual development of criminal procedure. In the United States, this development has been – largely due to the impact of the Rehnquist presidency of the US Supreme Court – arrested and downgraded.[6] In the meantime, as repeatedly and explicitly recognised by international academic observers, the development has been precisely at the ECHR – witness the latest such development in a case such as *Jalloh v. Germany*.[7] Witness also the fact that the central question of the exclusion of tainted evidence has been largely neglected.

This central dialectic derives from the antinomy between law and order on the one hand and the rule of law on the other hand: the logic of power and the power of logic mutually require and exclude one another. In criminal procedure, to put it simply, this boils down to the inherent contradiction between the inquisitorial and the adversarial models, i.e., between the law-and-order interest in truth-finding on the one hand and – just as in *Jalloh v. Germany* – the rule-of-law preoccupation with procedural due process, constitutional and human rights of the criminal suspect on the other hand.

[5] See, among many others, *Matthews* v. *United Kingdom* [GC], No. 24833/94, 18. 2. 1999, § 39.

[6] Chief Justice Rehnquist obtained the desired result by downgrading the privilege against self-incrimination to a police-deterrence device, i.e. by downgrading the prescriptive constitutional norm to an instrumental status.

[7] *Jalloh* v. *Germany* [GC], No. 54810/00, 11. 7. 2006.

What is the problem? There is one way of putting it succinctly. Criminal procedure, which in classical Roman law did not even exist, is a mutant of the historically and functionally paradigmatic and in this sense normal civil procedure. Ask yourself, if you please, why is it that in civil procedure the accentuated need for minimal standards, the constitutional and human rights problems, the need for subsidiary and international intervention etc., often does not even exist. How is it possible that on something as basic as the constitutional and human rights facet of criminal procedure the views of reasonable men and women can differ so much?

Reasonable men and women? Better to say different legal systems: we have the preponderantly inquisitorial model on the one hand and the preponderantly adversarial model on the other hand. The difference has to do, as one leading theorist has stated, with the different attitudes vis-à-vis authority, say German as compared to Anglo-Saxon.

If so, are the solutions, the minimal standards, the general principles etc. culturally determined? If they are, why does the same problem not arise in civil procedure? If they are, how will either Strasbourg or Brussels, for that matter, succeed in imposing the same general principles and thus the same minimal standards? Does the lack of technical consensus betray a confusing deeper issue? Is it because this deeper issue has not been doctrinally cleared up, that we are now in position where we accuse one another of arbitrariness?

One way of putting it, is that in the end any legal process – from the first instance civil case up to multifarious constitutional and human rights litigation – is nothing but a conflict-resolution device. The purpose of legal process is to preserve social stability. Thus the power of logic is to prevail over the logic of power: brutal physical, economic, political power etc. This is what we call justice and, clearly, this goes to the core of how efficient the rule of law is in a particular culture, i.e. how efficient it is in projecting the ideal of justice and in preserving social stability. When it comes to procedural conflicts other than those concerning a criminal suspect or an accused, the big picture remains relatively free of fundamental problems. Even before the European Court of Human Rights, curiously enough, the little phrase concerning the 'equality of arms' does hardly have to come into play, does hardly have to be accentuated. Why not? Because with the exception of criminal procedure, in most legal processes, the 'equality of arms' is naturally given.

If it is therefore true that much of the constitutional and human rights case-law in criminal procedure strives – somewhat artificially – to establish this 'equality of arms' – what purpose does this effort serve? Is it that in normal legal processes truth-finding serves the conflict resolution, i.e. truth-finding serves the adversariness? Even Kafka, who was an insurance lawyer, understood that in criminal process – even if it were to be genuinely adversarial – the reverse is true. In other words, in criminal procedure 'the equality of arms' is an artificially maintained instrument serving an extrinsic purpose. What is that purpose?

The purpose is to constrict into the natural legal process of pure conflict resolution something that does not naturally belong there. As Nietzsche, who in his "Genealogy of Morals" has said more than all legal theorists combined, understood it already: in order that there might be conflict, the parties must be approximately equal. Yet, how could Mr. Jalloh and the German police at that critical stage of the process be possibly 'approximately equal'? The Miranda series of US Supreme Court cases starting

with *Spano v. New York*[8] and ending in *Leon v. the US*[9] in 1984 deals with this precise problem. In one of these cases the then Justice Goldberg has observed that unless the constitutional/human rights of the suspect are preserved at the police station – all the rest is simply an appeal to what has happened there. Every policeman understands this.

Why does criminal procedure not naturally belong among normal legal processes of normal conflict resolution? Actually, we have already answered this question: because in criminal procedure there is no natural equality of arms. The latter is artificially created, so that we can aspire for criminal process to do justice. This, in turn, creates the inverted situation in which adversariness serves truth-finding – rather than vice versa, which would be natural. Justice Scalia was exceptionally right on that one occasion when he remarked that he was not impressed with the human rights aspect of European criminal procedures – as long as they have not assimilated the exclusionary rule. The exclusionary rule is the *alter ego* and if applied honestly the perfect remedy for the violations of the privilege against-self incrimination but it is, obviously, a partial sacrifice of the truth-finding function. There is a *quid pro quo* relationship between truth-finding and logical justice in criminal procedure.

If the purpose is to thrust into the natural legal process of pure conflict resolution something that does not naturally belong there, the question is why? Is the purpose genuine, sincere? Is it to do justice in a situation in which the powerless criminal suspect faces the omnipotent State? Or, is the purpose falsely to legitimize the arbitrary use of police power in order to enhance the so-called 'normative integration'?[10] In order to deconstruct this we might ask if we are not perchance caught in the self-referential circle in which the procedural use of power attempts to legitimize the substantive (and legislative) use of power in order to create the truth of a particular crime in the first place.

It can also be said that the sincerity and the legitimacy of criminal process can be measured. To the precise extent to which the 'equality of power' is in fact made operational in any model of criminal procedure – or more specifically to the precise extent to which the exclusionary rule is in fact operational concerning all evidence tainted by various violations of the privilege against self-incrimination – to this extent, the criminal procedure *is* legitimate.

Honesty is the best long-term policy, but in terms of short- and mid-term crime-suppression (law-and-order interest), can we afford this honesty? Clearly, the extent to which the State is willing to renounce power and sacrifice truth-finding in order to do *real* justice will depend on the attitude vis-à-vis authority in any particular legal culture. Again, since honesty is always the best long-term policy, the long-term positive impact of criminal procedure on normative integration will ultimately depend on this honesty, on this abolition of the Kafkaesque absurd. Such an approach also yields conceptual, doctrinal and operational consistency. The rest is cognitive dissonance. If we do not understand that, we cannot distinguish what in this process of harmonisation is essential and what is not.

[8] *Spano* v. *New York*, 360 U.S. 315 (1959).

[9] *United States* v. *Leon*, 468 U.S. 897 (1984).

[10] See, Zupančič, B.: Criminal Law and Its Influence upon Normative Integration, 7 Acta Criminologica, Spring, 1974 at http://www.erudit.org/revue/ac/1974/v7/n1/017031ar.pdf.