ECBA Spring Conference – Potsdam, Germany, 27th-28th April, 2007

Legal aid as procedural safeguard in cross-border cases.

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INTRODUCTION

1. The subject of my speech is that there is a link between legal aid on the one side and procedural safeguards in cross-border cases on the other side.
   In order to demonstrate the relation between the two components I first will analyze the concept of legal aid, then the concept of procedural safeguards in cross-border cases and finally link them together not only in a theoretical but also a practical way.

LEGAL AID

2. For the origin of the concept of 'legal aid' I have to pass a few well known open doors. I go back to our common constitutional basis in Europe: the European Convention of Human Rights. We all know that in Article 6 a procedural human right is guaranteed: the right to a fair trial. Among the human rights that are specifically guaranteed in criminal proceedings there is Article 6 par. 3: the right to a defence.
   Three elements are mentioned there: the right to defend oneself in person, the right to counsel of one's own choosing, and the right to counsel at the expense of the State. With a latter the concept of legal aid comes in.

3. The right to a defence in a formal sense means the right to have the professional assistance and services of counsel. For my Belgium and Dutch colleagues I refer to the elaborate treatise of Taru Spronken on this subject (her thesis: Verdediging, 2001). For all of us I can recommend the handbook of Stefan Trechsel, former law Professor at the Zurich University, former President of the European Commission of Human Rights (Human Rights in Criminal Proceedings, 2005). As to the purpose of the right to a defence Trechsel distinguishes – next to a psychological, a humanitarian and a structural aspect – as the most obvious one the *technical* aspect: to provide the accused with the technical skills necessary to make full use of the guaranteed fundamental rights. The assistance of counsel is the key which opens the door to all the rights and possibilities of defence in a more substantive sense, that is: to act in your own favor, to defend your interests, to propose evidence, to challenge judges for bias, to question the credibility of witnesses, to plead, etc., etc. In short: the aim of the provision of Article 6 par. 3 sub c is to ensure that defendants have the possibility of presenting an effective defence (Jacobs and White, 2006, p.205).

4. A distinction must be made between two questions: how to get a lawyer and how to get free access to that lawyer.

   As far as I know, till now no judgments have been given by the ECHR as to the point in time of

the proceedings at which the right to legal aid arises. According to Trechsel the answer is quite simple: the right to a legal aid counsel arises as soon as there is any room for effective assistance. So it is particularly likely that assistance will be required if the accused is detained on remand (p.251), and that a person arrested is entitled to contact counsel as soon as technically possible (p.283). Not only the starting point is relevant, but also the criteria that determine whether a person is eligible for legal aid. Trechsel refers to the sad joke that 'the law, like the Ritz Hotel, is open to all' (a positive variation on the statement of Anatole France that the law forbids equally poor and rich people to sleep under bridges).
The right of a suspect to defend himself with the assistance of counsel is designed to counter-balance the fact that a defendant is surrounded by experts in the field of criminal proceedings, like police, public prosecutors or judges. In terms of equality of arms: to place the accused in a position to put his case in such a way that he is not at disadvantaged vis-à-vis the prosecution. The lawyer is also supposed to be able to supervise and control the activities of the authorities: his know-how is needed in order to ascertain whether the accused is treated correctly and whether the rules of procedure are respected. The accused's lawyer may also serve as the 'watch-dog of procedural regularity' (Harris, O'Boyle, Warbrick 1995, p.256).
Yet the right to defence with assistance of counsel will often be only a theoretical possibility because the accused is indigent and cannot pay for a lawyer. Here the paradox of legal assistance comes in: the State has a positive obligation to pay for a lawyer whose task will be to frustrate the effort of the public prosecutor who is equally paid by the State. That's why Trechsel compares the administration of criminal justice with a State-organized sporting event in which the State sponsors both teams (although in my opinion the funding is still quite unequal).

5. Article 6 par. 3 sub c guarantees the right to legal assistance where the defendant "has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require". So there are two prerequisites: an economic one (insufficient means) and a legal one (the interest of justice).
As to the determination of the means the Court relies primary on the rules of national law, giving the domestic authorities a considerable margin of appreciation. However, the decision whether a defendant has or lacks sufficient means to pay for legal assistance must be supported by a reasonably serious examination of the case and must also be accompanied by reasons (RD v. Poland, 18 February 2001).
The second prerequisite, 'the interest of justice', lacks clarity (Van Dijk, Van Hoof a.o. 2006, p.642). The decisive question is whether according to the Court the proceedings could still be regarded as 'fair' in absence of counsel for the defence. Here four criteria apply:
- the seriousness of the offence: specifically where deprivation of liberty is at stake (Quaranta v. Switzerland, 24 May 1991, Benham v. UK, 10 June 1996);
- the complexity of the case;
- the particularities of the proceeding: f.i. will the public prosecutor be represented (equality of arms
is at issue);
- the particularities of the accused: f.i. physical or mental handicaps.

6. After dealing with the questions why, when and under what conditions the accused is entitled to legal aid the question remains: from which moment the person under arrest is entitled to have contact with his counsel.
According to the Court the right to a fair trial should not be limited to the trial stage but should

apply to the proceedings as a whole, “in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply whit it” (Imbrioscia v. Switzerland, 24 November 1993, John Murray v. UK, 28 October 1994, Öcalan v. Turkey, 12 May 2005, and others). This extension of the principle of Article 6 into the pre-trial phase is in line with the landmark decision Texeira de Castro v. Portugal (9 June 1998): the incitement by the police and its use in the criminal proceedings meant that, right from the outset, the applicant was definitively deprived of a fair trial.

PROCEDURAL SAFEGUARDS IN CROSS-BORDER CASES

7. In my analysis of the concept of the right to defence there is no indication at all that these provisions should not apply in cross-border cases. There are even strong contra-indications for not applying the guarantees in obvious situations where (often indigent) persons are deprived of their personal freedom on behalf of the execution of an European arrest warrant. Yet there is little or no progress regarding the proposal for a framework decision covering the rights of suspects and defendants in criminal proceedings throughout the European Union. This is specifically bothersome since this proposal includes the right to legal assistance by a lawyer. It is more than shameful that there has been so little progress in the more than four years since the publication of the Green Paper on procedural safeguards. The imbalance which currently exists at the European level between the rights of the prosecution and the rights of the defence requires the development of equivalent standards for procedural rights in criminal proceedings in all Member States, but no such standard nowadays exists.

8. In addition to the absence of promoting procedural safeguards for suspects and defendants in criminal proceedings, there are a number of organizations which have been established to promote cooperation in the field of criminal law at a European level from a prosecution point of view – for example, Europol, Eurojust and joint investigation teams, with continuing discussions even on the creation of a European Public Prosecutor.
Last month both EU justice commissioner Franco Fratini and Eurojust President Michael Kennedy made a plea for strengthening Eurojust, giving it more powers to fight cross-border crime, and to pick up the idea of having a single European prosecutor.
It was in May 2005 that a Convention aiming to step up cross-border cooperation in combatting terrorism, cross-border crime and illegal emigration (the so called Treaty of Prüm) was signed by seven European States (Austria, Belgium, France, Germany, Luxembourg, The Netherlands and Spain). Eight further EU Member States intend to join the Treaty (in short a development similar to the Schengen-Agreements). And last February the Council agreed on integrating parts of the Treaty of Prüm relating to information exchange and police cooperation into the EU legal framework. The core element of the Treaty is the creation of a network of national databases to promote the exchange of information between law enforcement authorities.
There is no similar community activity regarding the creation of a defence institution (for instance, a European Criminal Law Ombudsman) which could promote cooperation with regard to issues encountered by defence lawyers when faced with cross-border activities and mutual recognition requirements.

In a very recent letter to CCBE (17th April 2007) EU justice commissioner Franco Fratini states that the Commission “has been supportive of the CCBE’s drive to examine the feasibility of

having a European Criminal Law Ombudsman", but no such supportive reaction ever reached CCBE. On the other hand mr. Fratini agrees with the CCBE "that there is no move at EU level to create a cooperation body focusing on defence rights."

9. How come? Since the conference in Tampere (Finland, October 1999) Europe became familiar with a renewed concept of international cooperation in the field of civil and criminal law: the so-called "mutual recognition of foreign judicial decisions".
It's an agreement to accept decisions taken in one Member State as valid in any other Member State and to act on them accordingly, regardless of whether that decision might have been taken in a different way or would even have had a different outcome in a national context.
This tolerance of diversity is in theory based on a presumption of mutual confidence and trust in each others legal systems. This sounds quite reasonable, since it requires recognition and execution of judicial decisions from other Member States *without* a national judicial test of their lawfulness or legitimacy (which is a new concept).
This logically also implies the existence of mutual recognition *beforehand* (a priori) that the foreign process in question meets all the requirements of the rule of law as understood by the executing State. Fair enough, since the mere fact that citizens, suspects, defendants have become involved in a criminal case in a Member State other than their own, should not imply that they *therefore* should enjoy less procedural rights. Or – as my Utrecht University colleague prof. Chrisje Brants put it – "mutual recognition à la Tampere is only feasible if all States can rely on decisions taken abroad meeting at least the minimum safeguards that their own procedure provide".
Well, unfortunately many comparative research-projects tell us that this is not the reality at all. And the European Court on Human Rights in Strassbourg provides us with the details, in a continuing increasing stream of cases that only shows us the top of an enormous European garbage-dump of violated human rights, including violated procedural rights.
Since Tampere (1999) all relevant documents and officials constantly repeat as a "mantra" the link between mutual recognition and mutual confidence and trust. But this *truïsm* is far from the truth, let alone the whole truth and nothing but the truth. And this is not a matter of a wishful theory versus an unruly practice.
A simple question: how come we have a European arrest warrant since 2002 and still in 2007 no procedural minimum rights (the other side of the same coin).
A simple answer: the arrest warrant is a convenient tool for crime control, but procedural rights on the contrary are an inconvenient item as long as you know that you cannot rely on the quality of each others criminal justice system.
So presupposing "mutual trust" means willingly using a device in order to cover up an undesirable and unacceptable situation that nevertheless is given far less priority than fighting crime and terrorism.

10. Now this is not a new problem. Everyone with some historical and legal background knows that in our Western culture the creation of a State and its political functioning and specifically the structuring of a criminal justice system is *not* based on confidence and trust, but openly and bluntly on the opposite: fundamental distrust.

Let's first look at the State-structure:
- Why do we have a *trias politica* system, a division of powers?
  Because we know that power corrupts and that absolute power corrupts absolutely.

- Why do we want to have a *check and balance* system?
  Because we don't believe in uncontrolled exercise of power.
- What is an important task of an elected parliament?
  To control the government.
- What is an important task for an independent judiciary?
  Also to control the government.
- What does the *rule of law* mean?
  That we prefer to be governed by law and not by men.
- Why do we insist on protection of human rights?
  Because we know from history that States are the biggest danger for violating and restricting human rights.

So far the basis of our national constitutional framework: mistrust mainly vis-à-vis the State.
But also a criminal justice system is in essence based on distrust, not only regarding the State, but also towards the citizens themselves:

- Why do we base our criminal law on the legality-principle (nulla poena sine lege)?
  In order to avoid discretionary application by the State of criminal sanctions (being measures that deprive or restrict human rights like right to freedom, property or privacy).
- Why do we define so many various acts as crimes?
  Because we know in advance that citizens constantly will commit them all.
- Why do we base criminal proceedings on 'suspicion' and 'suspects'?
  Because we know we cannot fully trust all citizens.
- Why do we call a Criminal Procedure Code 'organized distrust'?
  Because on the one hand we provide the police and prosecution with powers ('*means of coercion*'), but on the other hand we limit the exercise of power by imposing restrictions and granting procedural rights to suspects and defendants.
- Why do we insist on due process and fair trial principles?
  Because we want a fair balance between the prosecutorial power on the one side and the procedural rights of the defendants on the other side (so-called "equality of arms").
- Why do we have defence-lawyers?
  Among others: to control the police, the prosecutors and the judges.

It's this type of legitimate distrust that through the ages has generated the traditional basic and fundamental guarantees and safeguards of our national political, constitutional and legal systems.
It's also this type of legitimate distrust and critical dimension that almost totally has been absent in nowadays European criminal law-development.
In order to restore the balance that has been disturbed in the last years the discussion on a practical and effective introduction of procedural rights in criminal proceedings should – as it used to be – be based on an openly recognized, fair and healthy amount of honest *distrust*.
So I call for 'a mobilization of distrust'. Or, in the words of Oliver Cromwell (1650): "Put your trust in God, but mind to keep your powder dry".

THE LINK

11. How can legal aid as a procedural safeguard be realized in cross-border cases? Many national bars and law societies in the past have participated in building up national legal aid schemes, duty solicitor systems etc. as a professional way of expressing their loyal distrust in the national criminal justice systems. Why shouldn't they do the same regarding cross-border cases? National bars and law societies should take up their responsibility and should not only provide legal aid in national cases, but also in cross-border cases their distrust should be made operational. Just because through history distrust has proven to be very productive and effective in producing safeguards, traditionally also in the protection of procedural rights in criminal proceedings.
As to the construction they should follow the examples that other professions, like police and prosecutors, have demonstrated already: organize a system of mutual cooperation between legal aid lawyers, create a network of practitioners in the various countries, build databases with relevant information on national law, facilitate the exchange of information between the various national bars and law societies, make it possible that the lawyers in both national systems can communicate with each other (so a kind of extension of the arrest warrant-project of the ECBA). In short: make a link between the national legal aid systems in order to guarantee access to a transferred client, to the file, to interpreters, to courts in both countries involved. By doing so you can prevent that a client and his case will disappear in the gap between two different national criminal systems.

12. The idea – initiated by Han Jahae and myself – is that a cross-border pilot project should be set up by the national bars and law societies themselves: bottom up. Both the CCBE Criminal Law Committee and the ECBA agreed to support this initiative. Since the idea originated in the Netherlands it could involve two Dutch neighbour-bars, f.i. in the UK and in Germany. This is mainly based on their substantial representation within ECBA, being at first sight an available basic-element to build up a practical cooperation. [So the selection is not at all meant to 'a priori' exclude f.i. the other direct neighbour, i.c. the Belgium Flemish and Wallonian bars. They likely will be contacted to participate as soon as extension of the project looks realizable.] Anyhow, a pilot-study must be kept feasible, i.e. no more than two or three participants to start with. In the mean time the Dutch national bar seems positive to participate, the Law Society and the Criminal Law Solicitors Association are going to work with us on the initiative. Both German lawyers organizations (BRAK and DAV) have been approached an we expect their reaction soon.
As to the costs: the cross-border legal aid in criminal proceedings should function within the national organization and within the budget of the national legal aid scheme's involved. A similar construction is used in the Council Directive on cross-border legal aid in civil proceedings (2002/8/EC of 27 January 2003). For additional project-costs we look for special funding by the EU.
On the basis of the evaluation of the pilot project in the future other countries could participate until finally all over Europe legal aid by European lawyers will be available as a procedural safeguard in all European cross-border cases.
There is a Chinese proverb: even the longest journey starts with the first step.