STRENGTHENING PROCEDURAL SAFEGUARDS: THREE RECAPITULATIONS

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1. INTRODUCTION

There is little doubt that the process of strengthening the procedural safeguards of suspects and the accused in criminal proceedings within the EU law is a priority. The need to secure procedural rights is embedded in Art. 82(2) of the TFEU. Prescribing minimum rules on the rights of the individual in criminal proceedings is required "to the extent necessary to facilitate mutual recognition of judgements and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension." As the number of instruments that facilitate the mutual recognition principle and judicial cooperation increases, the need to maintain mutual trust underpinning these processes requires that a minimum set of rules fostering fair trials be adopted as well.

Current developments show that the time for a comprehensive body of rules on procedural safeguards is now. While the Stockholm roadmap envisaged a step-by-step harmonisation of the rights of suspects and the accused in criminal proceedings, the set of criminal law powers regulated by EU law is becoming very centralised. The negotiations on the establishment of the European public prosecutor's office (hereinafter: EPPO) are a paradigmatic example of these processes. The enthusiasm surrounding the organisational aspects of the EPPO and the seeming ease with which the Commission's proposal (and later drafts) invested substantial investigatory powers in the EPPO, should be contrasted with the scarcity and ambiguity of provisions relating to procedural safeguards of suspects and the accused, referring to directives that are yet to be adopted.[1]

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[1] Art. 32(2), EPPO Regulation Proposal: "Any suspect and accused persons as well as other persons who are a party in the criminal proceedings of the European Public Prosecutor's Office shall, as a minimum, have the procedural rights as they are provided for in Union law, including directives concerning the rights of individuals in criminal procedures, such as: (a) the right to interpretation and translation, as provided for in Directive 2010/64/EU /.../, (b) the right to information and access to the case materials, as provided for in Directive 2012/13/EU /.../, (c) the right of access to a lawyer and the right to communicate with and have third persons informed in case of detention, as provided for in Directive 2013/48/EU /.../, (d) the right to remain silent and the right to be presumed innocent as provided for in Directive 201x/xx/EU /.../, (e) the right to legal aid as provided for in Directive 201x/xx/EU /.../"

The asymmetry in the development of criminal law powers in relation to the development of procedural safeguards is quite realistic. Nevertheless, this process is hardly straightforward. On the contrary, the effects of these processes are many. While some developments truly seek the advancement of procedural safeguards in EU Member States, others aim at consolidating the existing common rules. What should trouble us most is that these developments also have a negative effect: the downgrading of procedural safeguards.

2. STRENGTHENING AS ADVANCEMENT

Indeed, strengthening procedural safeguards is typically understood in terms of increasing and advancing the level of protection afforded to suspects and the accused. It appears as if the area of procedural safeguards has stagnated in recent years. The body of law regulating procedural rights on an abstract level has been left very much undisturbed since the adoption of the European Convention on Human Rights (hereinafter: ECHR). While it is certainly possible to contest such a claim,[2] the focus nowadays appears to be on the need to enable individuals to exercise their rights *effectively*. The developments under EU law follow the warnings of the European Court of Human Right (hereinafter: ECtHR) that Convention rights are meant to be practical and effective, not "theoretical and illusory." The policy to further the effective exercise of well-established procedural rights is reflected, for example, in the principal provisions of Directive 2012/13/EU on the right to information in criminal proceedings: "Member States shall ensure that suspects or accused persons are provided promptly with information concerning at least the following procedural rights, as they apply under national law, in order to allow for those rights to be exercised effectively /.../"

The provisions adopted under EU law are, to some extent, innovative - at least in the European context. For example, the already cited Directive 2012/13/EU requires that the suspects or the accused be informed of the right to remain silent. The ECtHR has, to my understanding, reserved any judgement on whether a so-called *Miranda* warning is a constituent part of the privilege against self-incrimination. Even the *Brusco*[3] judgement, finding a breach of the right to remain silent, rests strongly on the circumstances of the case, where the police required the suspect to tell the truth and postponed his access to a defence lawyer (who could have informed the suspect of the right to remain silent). In the recent *Turbylev* case,[4] the Court relied on national constitutional principles and the failure of national authorities to provide adequate

2 Among important recent developments is, no doubt, the *Salduz* judgement of the ECtHR and its offspring.

3 Brusco v. France, 1466/07, 14 Oct 2010.

4 Turbylev v. Russia, 4722/09, 6 Oct 2015.

information on procedural rights; again, with emphasis on the right to access to a lawyer. Indeed, it is the information on the right to a defence lawyer that remains a prerequisite of a valid waiver of the right to remain silent - and not information on the right to remain silent itself.[5]

The Directive's requirement for Member States to provide information on the right to remain silent, by means of a letter of rights in the case of apprehended suspects, is, indeed, a welcome development. It demonstrates that EU law is capable of furthering the scope of procedural safeguards beyond the currently minimum standards formed within the framework of the ECHR. In particular, the abstract approach to codifying procedural rights at a supra-national level may reduce the ambiguities of the casuistic approach so often adopted by the ECtHR under the "totality of circumstances" approach.[6] This being said, we should not indulge in "normative idealism"; the tools chosen (e.g. codifying the duty to provide information or the letter of rights) may not prove adequate in the every day practice of criminal law.[7]

3. STRENGTHENING AS CONSOLIDATING

The assumption of mutual trust between Member States relies strongly on the belief that Member States (should) share a common set of minimal rules on procedural safeguards. Approximation and harmonisation of procedural rights on a supra-national level are the tools that are commonly perceived as the path towards increased confidence in criminal justice systems across the EU. As Recital 8 to Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings puts it: "Common minimum rules should lead to increased confidence in the criminal justice systems of all Member States, which, in turn, should lead to more efficient judicial cooperation in a climate of mutual trust and to the promotion of a fundamental rights culture in the Union."

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5 *Ibidem*.

6 The principle is, for example, reiterated in the recent judgement of Gafgaz Mammadov v. Azerbaijan, 60259/11, 15 Oct 2015: "74. The Court reiterates that Article 6 of the Convention guarantees the right to a fair hearing, and the Court's task is to ascertain whether the proceedings as a whole, including the way in which evidence was obtained and heard, were fair, in particular, whether the applicant was given the opportunity of challenging the evidence and of opposing its use; and whether the principles of adversarial proceedings and equality of arms between the prosecution and the defence were respected."

7 See, for example, Gorkič, Primož: *Qualitative report: Slovenia*. In: Schumann, Stefan (ed.), *Pre-trial emergency defence : assessing pre-trial access to legal advice*, (Schriftenreihe der Vereinigung Österreichischer StrafverteidigerInnen, Bd. 16), Wien: Intersentia: NWV Neuer Wissenschaftlicher Verlag, 2012, pp. 319-350; Jager, Matjaž: *Miranda - zadostna rešitev problema psihične prisile? [Miranda - sufficient remedy for psychological coercion?]*, Zbornik znanstvenih razprav, 64 (2004), pp. 181-200.

The roadmap devised under the Stockholm programme to foster procedural rights is a step in the right direction, albeit a slow and uncertain one. The progress so far has demonstrated a resolve to develop a coordinated, comprehensive set of rules applicable across the EU. It remains uncertain, however, whether the method chosen will in fact achieve the goals envisaged. The contrast between the desire to unify[8] rules on the prosecution of criminal offences, reflected in Art. 86 of the TFEU, and the satisfaction with a harmonising approach to procedural rules, is quite striking. The positive effects of consolidating rules on procedural rights at the EU level will be mitigated by the fact that the Directives leave plenty of room for different levels of implementing minimal requirements set forth by the adopted Directives.

The dangers to the consolidating effects of EU directives on procedural rights lurk in the use of the vague and open-ended wording in the Directives. The already mentioned Directives 2012/13/EU and 2013/48/EU provide plenty of examples. One such example is the fact that Directive 2012/13/EU says nothing about the scope of the rights the suspects need to be informed of. Instead, the duty to provide information applies to rights "as they apply under national law," leaving room for Member States to regulate the substance of such rights as they see fit (Art. 3). Similarly, the right to information about the accusation or the rights referred to in Art. 3 of the Directive is to be provided "promptly" and - in the case of non-apprehended suspects - "in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence" (Art. 6). Such wording inspires little confidence in the effectiveness of the harmonising approach. Even the word "promptly", while it may produce an impression of precision and determination, is widely open to interpretation, as we may learn from ECtHR case-law.[9] The fact that the Directives make reference to the ECtHR standards of "practical and effective" exercise of procedural rights (e.g. Art. 3 of Directive 2013/48/EU) makes their harmonisation a breeding ground for confusing interpretations that will hardly contribute to an increase in confidence between Member States.

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8 It remains open to debate whether the provisions of the EPPO proposal will, indeed, have a unifying effect, given their strong reliance on national legislations.

9 Brogan and others v. United Kingdom, 11209/84, 11234/84, 11266/84 and 11386/85, 29 Nov 1988.

4. STRENGTHENING AS DOWNGRADING: ENFORCING THE PRIMACY OF EU LAW

The third aspect to the process of strengthening procedural rights may appear counter-intuitive. It suggests that the regulation of procedural rights at the EU level may have an opposite effect, leading to the downgrading of the level of protection afforded by rules protecting procedural rights in Member States. Can consolidating procedural rules on a supra-national level lead to a regression on a national level, disallowing the application of national constitutional procedural safeguards?

These dangers were made evident in the *Melloni* judgement.[10] The Court unequivocally applied the principle of the primacy of EU law, finding that national courts cannot rely on Article 53 of the Charter of Fundamental Rights of the European Union[11] to apply national procedural safeguards exceeding those envisaged by EU law: "It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised."

The *Melloni* judgement applies to surrender under the execution of the European Arrest Warrant, where the framework decision on the EAW[12] strictly limits the grounds for refusing execution. The Court placed no weight on the fact the amendment to framework decision 2002/584/JHA left Recital 12 undisturbed, reading: "This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media."

Confirming the effects of the principle of primacy of EU law in the area of judicial cooperation and the mutual recognition principle sheds a different light on the attempts to consolidate rules on procedural rights. These rules may no longer represent "common minimum rules"; the term itself implies that rules exceeding commonly accepted standards are welcome. The *Melloni* judgement suggests otherwise. In particular, it leaves open to discussion the

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10 ECJ, C-399/11, 26 Feb 2013.

11 Art. 53: "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions." OJ C 326, 26.10.2012, p. 391–407.

12 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. OJ 2002 L 190, p. 1.

effects of the so-called non-regression clauses. Recently, they have become rather widespread.[13] It would be difficult to suggest that the reasoning in the *Melloni* judgement is applicable to non-regression clauses without any reservations. Non-regression clauses are nevertheless embedded in the normative part of the directives and help define the aim of the directives. It would therefore be difficult to argue (as the Court did in *Melloni*) that relying on non-regression clauses would cast doubt "on the uniformity of the standard of protection of fundamental rights as defined" in the directives, that "would undermine the principles of mutual trust and recognition" which the directives seek to uphold.

5. STRENGTHENING AS DOWNGRADING: NEUTRALISING STANDARDS OF CONSTITUTIONAL DUE PROCESS TO MAINTAIN JUDICIAL COOPERATION?

How might Member States react to the fact that higher-than-minimum national procedural safeguards undermine the mutual recognition principle and judicial cooperation in the EU? While it may be virtually impossible even to attempt an answer to such a question, an example may offer some insight. Slovenia is one of the Member State that has, to some extent, higher procedural safeguards protection than that of a common "European" minimum. In particular, the exclusion of illegally obtained evidence is currently understood to be an integral part of the equality of arms principle[14] and an element of the right of effective legal remedy against violations of human rights.[15] At this time, it has not yet been established what the nature of the exclusionary rule is (as required by the constitutional "due process" clauses). However, the legislative framework, in particular Art. 18(2) of the Criminal Procedure Act,[16] requires that any evidence obtained in violation of constitutionally protected human rights be excluded without further consideration.

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13 For example, Art. 10 of the Directive 2012/13/EU: "Nothing in this Directive shall be construed as limiting or derogating from any of the rights or procedural safeguards that are ensured under the Charter, the ECHR, other relevant provisions of international law or the law of any Member State which provides a higher level of protection." A similar clause has been included in Art. 32(3) of the EPPO Regulation Proposal.

14 Resolution of the Constitutional Court, Up-62/99, 4 July 2000.

15 Resolution of the Constitutional Court, Up-6/92, 4 Nov 1996.

16 Art. 18(2) of the Criminal Procedure Act: "(2) The court may not base its decision on evidence obtained in violation of human rights and basic freedoms provided by the Constitution, nor on evidence which was obtained in violation of the provisions of criminal procedure and which under this Act may not serve as the basis for a court decision, or which were obtained on the basis of such inadmissible evidence." The Official Gazette of the Republic of Slovenia No. 63/94 et seq. An unofficial translation is available at www.policija.si/eng/images/stories/Legislation/pdf/CriminalProcedureAct2007.pdf, accessed 17 Oct 2015.

Such an approach differs substantially from the European "common minimum." Even though the ECtHR has declined to provide a definite ruling on the scope of the exclusionary rule within the ECHR framework, it is evident that the court chose to rule separately on violations of Art. 6 and on violations of other Convention rights, for example violations of Art. 8.[17] Using evidence obtained in violation of Art. 8 of the ECHR will not necessarily lead to a finding of violation under Art. 6 of the ECHR.[18] Under the Slovenian approach, however, the fairness of criminal procedure is tightly bound to using legally obtained evidence. The question of using evidence obtained in violation of the right to privacy and the question of securing a fair procedure are one and the same.

The difficulties of the Slovenian system are quite evident. Even more so in the context of cross-border cases. Evidence obtained abroad, only to be used by the Slovenian courts, will be examined as to whether they comply with the standards required by the Slovenian Constitution, simply due to the fact that the courts are bound to act in accordance with the Constitution and the law. While the law and other regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia (Art. 8 of the Constitution), international treaties (for example, MLA treaties) do not override the primacy of the Constitution.

This is the very reason that accession to the EU required that Slovenia changed its Constitution in order to facilitate the principles embedded in EU law, in particular the principle of primacy.[19] The principle of primacy, if the EU chooses to regulate rules on the admissibility of evidence under Art. 82 of the TFEU, would require that national rules be set aside. While we may argue about the adequacy of provisions such as Art. 30 of the EPPO Regulation Proposal,[20] there is little doubt that the national Slovenian exclusionary rule will

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17 For a recent examples, see Dragojević v. Croatia, 68955/11, 15 January 2015.

18 Contrary to using evidence obtained in violation of Art. 3 of the ECHR, see Gäfgen v. Germany, 22978/05, 1. June 2010.

19 Art. 3a of the Constitution: "(1) Pursuant to a treaty ratified by the National Assembly by a two-thirds majority vote of all deputies, Slovenia may transfer the exercise of part of its sovereign rights to international organisations which are based on respect for human rights and fundamental freedoms, democracy, and the principles of the rule of law and may enter into a defensive alliance with states which are based on respect for these values. /.../ (3) Legal acts and decisions adopted within international organisations to which Slovenia has transferred the exercise of part of its sovereign rights shall be applied in Slovenia in accordance with the legal regulation of these organisations /.../" For an unofficial translation, see www.us-rs.si/en/about-the-court/legal-basis/constitution/, accessed 17 Oct 2015.

20 "Evidence presented by the prosecutors of the European Public Prosecutor's Office to the trial court, where the court considers that its admission would not adversely affect the fairness of the procedure or the rights of defence or other rights as enshrined in the Charter of Fundamental Rights of the European Union, shall [not be subject to/be admitted

have to give way to a more relaxed, flexible exclusionary rule as (if) adopted in the EPPO Regulation.

The true "neutralising" effect on national procedural safeguards can at this time be observed in the field of mutual legal assistance and the use of evidence obtained abroad. The key question that a Slovenian judge must ask is whether the Slovenian Constitution has been complied with. The decision on whether there has been a violation will determine the decision on whether to exclude the evidence or not. This may prove a challenging decision to make, particularly in cases of evidence obtained by measures restricting the right to privacy. The Slovenian Constitution, for example, requires that the search of premises or surveillance of communications may typically take place only if a court order has been obtained beforehand.[21] *Ex post facto* judicial authorisation or even non-judicial (prosecutorial) authorisation in matters of urgency is simply not an option, unlike under ECtHR case law or in some EU Member States.

How to uphold the effectiveness of mutual legal assistance mechanisms, particularly in those cases where Slovenian authorities had no prior hand in obtaining legal assistance, thus not being able to verify if national standards were being upheld or not?[22] The solution currently debated is focused on whether we should set aside some elements of the Constitution, such as the requirement of ex ante judicial authorisation, and settle for an ex post judicial scrutiny of evidence obtained abroad.[23] The arguments do have some grounds in the case law of the Constitutional Court and the Court has requested that the criminal courts address this issue.[24] What is more important is that the argument does not rely on the requirements of EU law, not even on international treaties on mutual legal assistance. The argument relies on the fact that constitutional provisions are both substantive and formal in their na-

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in the trial without] any validation or similar legal process even if the national law of the Member State where the court is located provides for different rules on the collection or presentation of such evidence."

21 See, for example, the decision of the Constitutional Court Up-106/05, 2 Oct 2008.

22 Thus not being able to make use of the instruments implementing the *forum regit actum* principle, such as a request to observe formal requirements as prescribed by the laws of the requesting state.

23 See, for example, Gorkič, Primož: *Prepoznavanje in izločanje nezakonitih dokazov v kazenskem postopku: dokazi, pridobljeni v tujini [Recognising and excluding illegally obtained evidence in criminal procedure: evidence obtained abroad]*, in: Zbornik. 1st Ed. Ljubljana: GV Založba, 2009, pp. 184-194; Šugman, Katja: *Kako v kazenskem postopku vrednotiti dokaze, ki so bili pridobljeni v tujini [How to evaluate evidence, obtained abroad, in criminal procedure?]*, Pravna praksa, 31 (2012) 47, pp. II-VIII; Šugman, Katja, Gorkič, Primož: *Teritorialne meje ustavne zahteve po sodni odločbi: dva primera [Territorial limits to constitutional requirements of judicial authorisation: two cases]*, Pravna praksa, 32 (2013) 40/41, pp. II-V.

24 Decision of the Constitutional Court, Up-519/12, 18 Sept 2014.

ture. While the substantive elements must be complied with (and they hardly depart from the common "European" minimum, the formal requirements do have some inherent limitations; for example, they cannot address state bodies of other (Member) States). Consequently, no violation of the Slovenian Constitution can take place where they do not comply with the formal requirements set forth by the Constitution. Hence, the lack of ex ante judicial authorisation on surveillance can not by itself be sufficient to find a violation of the right to privacy of communication.[25]

6. CONCLUDING REMARKS

These developments in Slovenian law are nothing less than a *sua sponte* neutralisation of constitutional due process. The root cause of this development lies in a rigorous understanding of the principles of fair trial and the need to provide an effective remedy against violations of fundamental rights in the criminal trial itself. These values, upheld in Slovenian criminal procedure, have failed miserably in the face of interests underlying judicial cooperation between EU Member States. There is little (if any) hope of an upstream influence on the developments of EU criminal law. While the need to strengthen procedural safeguards in the EU may appear obvious, the process itself is obviously multi-faceted. Creating a comprehensive body of law regulating procedural safeguards on a supra-national level is both a necessary development (due to the increased competencies of the EU in the field of criminal law) and, given the ambition to squeeze out existing constitutional principles, a regrettable development.

[25] There are many facets to testing the legality of evidence obtained abroad in Slovenia. Dispensing with formal requirements does not mean dispensing with the substantial tests under Art. 8 of the ECHR, for example, including the test of whether a particular measure has been executed "in accordance with the law" of the Member State.