
Cooperation with and Protection of (Criminal) Witnesses

Prof. Dr. Gert Vermeulen

International Conference 'Penal Reform in Mexico -
Sovereign Criminal Law Systems and
Integration from a Comparative Law Perspective'
Mexico City, 30 September 2004

Structure

- › background: IRCP
- › choice of the subject
- › Belgian federal system and criminal law
- › EU institutional/policy texts re criminal law
- › cooperation with/protection of witnesses
- › conclusion

Background: IRCP

- > scientific research on criminal policy
 - > vertical issues
 - > drugs, organized crime & corruption, trafficking in human beings, sexual exploitation of children and prostitution
 - > horizontal issues
 - > EU justice and home affairs, national, international and comparative criminal law and criminal justice
- > policy-oriented research & evidence-based policy advise
 - > national ministries
 - > European Commission
 - > EU Presidencies (Belgium 2001 -The Netherlands 2004)
 - > police-LE services/Europol/Eurojust
 - > (inter)national NGO's

Choice of the subject

- > request organising committee
 - > present an issue of criminal procedure of your country that poses a special challenge to its federal system and/or to European integration, given the diversity of existing sovereign criminal law systems
- > cooperation with & protection of witnesses
 - > challenge to Belgian federal system
 - > due to non-existence sovereign criminal law systems
 - > challenge to European integration
 - > due to existence diverse sovereign criminal law systems

Belgian federal system and criminal law

- > federal state result of deconstruction national state
- > process of defederalisation since 70'ies
- > federal level however still having almost exclusive powers re criminal law issues
- > growing disagreement between political parties from North and South also re issues of criminal law and criminal policy
- > persisting refusal by dominant political party in the South (French-speaking) on introduction system of 'collaborators with the judicial system' probably one of best examples of challenges to federal criminal law model
- > in the medium to long term only two options feasible
 - > defederalisation of (aspects of) criminal law
 - > passing an EU decision binding upon the EU member states

EU institutional/policy texts re criminal law

- > Treaty on European Union
- > Vienna Action Plan
- > Tampere European Council
- > OC 'Millennium' Strategy
- > Mutual Recognition Programme
- > EU and harmonisation of criminal law
 - > concept of 'harmonisation' – as for the EU
 - > scope/degree approximation criminal law
 - > approximation procedural criminal law
 - > harmonisation preferred over unification

Treaty on European Union

- > EU competence regarding criminal law
 - > enhanced police cooperation in criminal matters
 - > enhanced judicial cooperation in criminal matters
 - > limited 'approximation' in the area of criminal law
 - > progressive adoption of measures establishing minimum rules
 - > relating to constituent elements of criminal acts and penalties [i.e. substantive criminal law issues]
 - > in the fields of organized crime [container concept], terrorism and illicit drug trafficking

Vienna Action Plan

- > December 1998
- > Council/Commission action plan
 - > on how best to implement the provisions of the Treaty on an area of freedom, security and justice
- > Para 10
 - > the aim of the Treaty is not to create a common territory where uniform detection and investigation procedures would be applicable to all law enforcement agencies in Europe in the handling of security matters
 - > = rejection
 - > of unification ideology
 - > also of harmonization idea as far as procedural criminal law is concerned

Tampere European Council

- > 1st European Council dedicated to justice and home affairs only
- > October 1999
- > principal decisions [selection]
 - > efforts to agree on common definitions, incriminations and sanctions should be focused in the first instance on a limited number of sectors
 - > mutual recognition (infra) must be the future cornerstone of judicial cooperation in criminal matters
 - > also common procedural criminal law minimum standards where necessary to facilitate the principle of mutual recognition, respecting the fundamental legal principles of the member states

OC 'Millennium' Strategy

- > adopted by JHA Council March 2000
- > = EU strategy for the beginning of a new Millennium' in the field of prevention and control of organised crime
- > setting the lines/goals/recommendations/target dates to be followed/achieved/implemented/complied with in this area in the coming years
- > highly relevant as regards: substantive criminal law, procedural criminal law and international co-operation in criminal matters
- > recommendation 25 (infra)
 - > cooperation with and protection of (criminal) witnesses

Recommendation 25

- > a proposal shall be prepared for an instrument on the position and protection of witnesses and of persons who participate or have participated in criminal organisations and who are prepared to cooperate with the judicial process by supplying information [...]
- > the proposal should consider the possibility, in appropriate cases, inter alia, of mitigating punishment of an accused person who provides substantial cooperation in such cases
- > an EU model agreement should be developed, taking into account the experiences of Europol, and used on a bilateral basis

'Mutual Recognition' Programme

- > adopted by JHA Council November 2000 - very ambitious
 - > earlier final judgements
 - > ne bis in idem; individualized sanctions (principle int'l reoffending); European criminal records database
 - > pre-trial orders
 - > freezing assets & evidence; European arrest warrant; ...
 - > decisions to prosecute
 - > sentencing
 - > fines; fast track surrender procedures; ...
 - > post-sentence follow-up
 - > disqualifications, incapacities ... + European register
- > 'blind' mutual recognition, based on common HR acquis
- > comes close to US 'full faith and credit' clause

EU and harmonisation of criminal law

- > concept of 'harmonisation'
 - > process in which diverse elements are combined or adapted to each other so as to form a coherent whole while retaining their individuality
 - > mechanism by which things can be made to run smoothly and free from conflict, while leaving differences intact and individual preferences intact
- > as for the EU
 - > no separate federal legal order based on unification, but:
 - > 'approximation'
 - > setting binding common minimum standards
 - > where necessary to support/facilitate
 - > mutual recognition, to which it is ideologically equivalent
 - > = denial unification + pre-existence divergencies

Scope/degree approximation criminal law

- > substantive criminal law
 - > terrorism
 - > illicit drug trafficking
 - > organised crime
 - > container concept for virtually unlimited list of other offences
- > general principles of criminal law
- > procedural criminal law (infra)
- > national legislation regarding international (judicial) cooperation in criminal matters

Approximation procedural criminal law (1)

- > not foreseen in Treaty – mere result of policy making
 - > OC 'Millennium' Strategy'
 - > mutual recognition principle (Tampere)
- > through framework decisions mainly
- > issues
 - > joint investigation teams
 - > freezing of assets and evidence
 - > reversal burden of proof for confiscation of assets
 - > position victim in criminal procedure
 - > procedural safeguards defendant
 - > special police/investigation techniques
 - > cooperation with and protection of (criminal) witnesses

Approximation procedural criminal law (2)

- > WG X
 - > proper legal basis is currently lacking
- > Article III-171, under 2) future EU Constitution
 - > creates specific legal basis
 - > more limited than current practice (!)
 - > possibility to adopt minimum rules concerning
 - > mutual admissibility of evidence between MS
 - > the rights of individuals in criminal procedure
 - > the rights of victims of crime
 - > any other specific aspects of criminal procedure which the Council of Ministers has unanimously identified in advance by a European decision

EU prefers harmonisation over unification

- > i.e. preference (until date) for
 - > coordination model (vs hierarchical model)
 - > see also Europol and Eurojust (vs EFBI and EPP)
 - > bottom-up model (vs top-down model)
 - > horizontalism (vs verticalism)
 - > intergovernmentalism (vs supranationalism)
 - > subsidiarity (vs dominance)
 - > pragmatism (vs unfounded scepticism & ideology)
- > = balanced, cautious approach
 - > respecting sovereignty/identity national systems
 - > avoiding dual (federal and state level) legal order
 - > whilst also giving necessary impetus for progress
 - > federalisation/unification only long-term option, if need be

Cooperation with/protection of witnesses

- > vast soft law and (non-compelling) treaty acquis
 - > UN (International Tribunals, UN TOC Convention)
 - > G8 (recommendations)
 - > Council of Europe (R (97)13 and ETS 182)
 - > EU (resolutions 1995 & 1996, Europol practice)
- > recommendation 25 OC 'Millennium' Strategy
- > IRCP AGIS research project (2004-2005)
 - > framework decision on anonymous witnesses
 - > framework decision on collaborators with justice
 - > EU model agreement for international cooperation
- > issues at stake too complex to deal with via unification
- > overview hereafter

Cooperation with criminal witnesses

- > important to have some cooperation & incentive
- > conditions regarding 'substantial' cooperation?
- > deals involving (partial) immunity prosecution?
 - > difference mandatory and discretionary prosecution
- > promises of mitigated punishment?
 - > also touching upon substantive criminal law
- > promises of leniency in execution of sentence?
 - > different competences re execution sentences

Protection of witnesses

- > for both criminal and non-criminal witnesses?
- > common criteria for danger requiring protection?
- > procedural protection (anonymity)?
 - > mandatory introduction likely to be incompatible with fundamentals legal system of some MS
- > physical protection?
 - > wide variety of possible measures
 - > including possibility of hearing from a distance (closed circuit television or videoconference), either with distortion audio/video signal or not
 - > acquis through EU Convention May 2000
 - > distortion may conflict with disclosure rules some MS
 - > sometimes requiring identity change and relocation
 - > terribly complicated, requiring use of MoU's

International dimensions (1)

- > mutual recognition information/evidence obtained by other MS having recourse to cooperating, anonymous, shielded and/or protected witnesses?
- > willingness to respect immunity from prosecution, granted in other MS
 - > mandatory in context enhanced 'ne bis in idem' rule, in as far as same 'stream of conduct' is concerned and decision to grant immunity is barring further prosecution
 - > quid where 'stream of conduct' is different or only partially the same?
 - > need to prevent such conflicting interests of prosecution
 - > EU-wide database of pending prosecutions required
 - > international coordination/management/transfer of prosecutions required (role for Eurojust?)

International dimensions (2)

- > international effect protection of witnesses?
 - > quid (new) offences committed by protected witness/family, especially where identity has been changed?
 - > which state decides on lifting protection?
 - > which will be commonly agreed conditions therefore?
 - > quid with international recidivism?
 - > solution in context of future EU criminal records database?
 - > quid with former identification items in international police/judicial databases (various national criminal records databases, Europol, Eurojust, Interpol, ...)?
 - > need to be able to relocate protected witnesses abroad, in other EU member states
 - > requires EU model grid, to be used on bilateral bases
 - > including legal, practical, policy and financial aspects

Conclusion

- > respecting sovereignty existing systems important
- > dual (federal and state level) legal order
 - > does not solve cooperation and compatibility problems between various state legal orders
- > unification and federalisation
 - > primarily resulting from ideological choice, rather than
 - > to serve actual needs/solve identified problems
- > however: federal impetus for progress necessary
- > harmonisation = attractive concept
 - > could be based on mutual recognition
 - > and on minimum approximation, where necessary to facilitate or promote the mutual trust on which mutual recognition should build, of aspects of both substantive and procedural criminal law

Questions and discussion
