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Evolution of the European Criminal Norm

What about the "third pillar policies" from Tampere 1999 to Brussels 2004 ?

In accordance with Article 29 of the Treaty on the European Union, entered into force on the 1st of May 1999 and partly amended by the Treaty of Nice of December 2000, " … the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia.
That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through:
— closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol), in accordance with the provisions of Articles 30 and 32,
— closer cooperation between judicial and other competent authorities of the Member States including cooperation through the European Judicial Cooperation Unit ('Eurojust'), in accordance with the provisions of Articles 31 and 32,
— approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(e).

The European Council, in the Presidency Conclusions of its Tampere meeting, on October 1999, decided that "without prejudice to the broader areas envisaged in the Treaty of Amsterdam" with regard to national criminal law, efforts should be done to agree on common definitions, incriminations and sanctions in the first instance on a limited number of sectors of particular relevance, such as financial crime (money laundering, corruption, Euro counterfeiting), drugs trafficking, trafficking in

human beings (particularly exploitation of women), sexual exploitation of children, high tech crime and environmental crime.
The conclusions of the Tampere Council also considered that "serious economic crime" increasingly has tax and duty aspects, and called "upon Member States to provide full mutual legal assistance in the investigation and prosecution of serious economic crime". More over, the Tampere Council decided the implementation of a "special action against money laundering", which was considered, at that time by the Heads of States and the Chiefs of Governments, "the very heart of organised crime" that "should be rooted out wherever it occurs".

If we read the Presidency conclusions of the late European Councils (and particularly the one which was held in Brussels on the 17 and 18 June 2004) we can easily observe that everything has changed.
The only topics discussed in the Meeting and reported in the Presidency Conclusions in the area of Freedom, Security and Justice were: (a) illegal immigration, (b) drug abuse and drug trafficking and, of course, (c) terrorism. Nothing more, and especially, nothing concerning: racism and xenophobia, organised crime, offences against children, illicit arms trafficking, corruption and fraud, serious economic crime.
On the contrary, there were many provisions for: secrete intelligence activities, data control, and meetings of security forces. Everything "with a real sense of urgency in a number of priority areas (point 18 of the Presidency Conclusions)", but undoubtedly with a lack of strategic approach and without any consideration of the global issues of the area, particularly as to the respect of fundamental rights of European and non-European citizens and to "white collars" crimes.

It seems that not only the Tampere Conclusions, but also the Amsterdam Treaty has been changed during this five-years period.
What about financial crimes ? What about racism and xenophobia ? What did happen and why ?

Accelerating the third pillar policies

Everyone knows that terrorism is a real threat for democratic societies; September 11 and March 11 have given the evidence that there are people who are in condition to attack everywhere civilian targets. The existence of this kind of act undermines the people's sense of security, and is a powerful factor to reduce the common sense of the rule of law and the respect of human rights.

We also know that, almost everywhere, governments have taken September 11 as an opportunity to restrict their citizens' freedom and that "history suggests that temporary legislation has a funny habit of becoming permanent" (The Economist, November 15, 2001).

At the same time, we can say that the emotion and the world-wide reaction after September 11 was a great opportunity for the European Union to develop the policies in the area of Freedom, Security and Justice that, after the Amsterdam Treaty and although the Tampere conclusions, have been considered, during a long lasting period, as "children of a lesser God". In fact, during the two years between Tampere to September 11, only few steps were made in the third pillar policies.

If I have carefully read the list of relevant decisions taken by the European Council in the area of freedom, security and justice on the Union's web site, I have found only two or three framework decisions (the typical act of this matter) before the year 2002, and none of them are particularly remarkable. And also a large number of very important Conventions, signed by the representatives of the States but never ratified by many national Parliaments, stayed in that limbo. The fact was that national sensitivities about protecting old ways of doing things in criminal matters were more powerful than the idea of a real space of horizontal co-operation between national judges and prosecutors, capable to build up an European law.

After September 11, specially for the strong action of the Commission (and particularly of the Portuguese Commissioner Mr. Antonio Vitorino), which had a lot of proposals and unrealised dreams, everything went on faster, but sometimes randomly and forgetting some of the goals established in the Amsterdam Treaty and pointed out in the 1999 Tampere Conclusions.

A remarkable lack of strategic approach and direction

In my point of view there was, and still there is, a lack of strategic approach and of direction in this area.

For instance, while the proceedings towards the European Arrest Warrant were deeply accelerated, there was at the same time no significant step, although the efforts of the Commission and the Parliament, towards minimum and high level standards relating to the length and conditions of pre-trial detention in the EU, a fundamental condition in improving effective protection of human rights and in enhancing the mutual trust needed for mutual recognition.

Some topics are always open: i.e. access to legal advice both before the trial and at trial, access to free interpretation and translation, ensuring that persons who are not capable of understanding or following the proceedings receive appropriate attention, the right to communicate, *inter alia*, with consular authorities in the case of foreign suspects, and notifying suspected persons of their rights. But there are a number of other procedural rights that have not yet been addressed or are not adequately addressed in the proposals.

The establishment of high standards of procedural rights in the context of the EU is necessary both in order for the EU to put into practice the values that it espouses through Article 6 TEU, and to ensure that there is a sufficient level of mutual trust between Member States to enable effective judicial cooperation to combat crime.

There are a lot differences in the admissibility of evidence in different Member States and this raises a large number of questions about the standards of protection of rights across the EU as well as the effectiveness of prosecutions of serious forms of crime such as trafficking in human beings and terrorism which themselves result in grave abuses of individual rights.

There is, for example, no clear legislation excluding evidence extracted through torture or other ill-treatment. The use of such evidence indicates a tacit acceptance of the use of torture and other ill treatment which would have no place in an EU founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law.

We should be worried if a Court of an European Country has evaluated an evidence obtained, maybe, by torture as admissible because "the means by which information is obtained goes to its reliability and weight and not to its admissibility, and that is how we have considered it" (judgment of 29th October 2003 of English Special Immigration Appeals Commission in the case of Ajouaou and A, B, C and D, appellants, vs. the Secretary of State for the Home Department, Respondent). In my point of view some boundaries should be fixed, and very soon.

Professor Mirelle Delmas Marty, in her Report to the national Congress of the Italian Magistrates Association that was held in Venice last February, wrote:

D.M. L'illusion politique se traduit inévitablement par l'incohérence des pratiques. Et d'abord leur discontinuité, car le projet d'intégration, qui reste inscrit dans les traités fondateurs des communautés européennes, est défendu par la Commission et le Parlement, alors que les Etats, toujours soucieux de préserver leur souveraineté, privilégient la coopération, au risque d'évolutions en zigzag, comme il s'en voit en différents domaines…

De même en droit pénal, où la surabondance, à la fois normative et institutionnelle, conduit à cet autre paradoxe de multiplier les normes et les institutions tout en affaiblissant la garantie judiciaire,

car aucune autorité judiciaire ne contrôle vraiment les organes d'enquête européens. La multiplication tient sans doute à la confusion des objectifs évoquée ci-dessus : tantôt la coopération (Europol créé par convention en 1995, puis les magistrats de liaison et le réseau judiciaire européen par action commune, 1996 et 1998, l'OLAF par règlement en 1999, Eurojust par le traité de Nice en 2000) ; tantôt l'harmonisation (convention de 1990 relative au blanchiment, convention PIF de 1995 sur la protection des intérêts financiers de l'UE, décision-cadre sur la contrefaçon d'euro en 2000, décision-cadre sur le mandat d'arrêt européen en juin 2002 et sur le terrorisme en juillet 2002, etc…) ; tantôt l'unification partielle des règles de procédure pénale et de fond, lancée en 1996 avec le projet dit Corpus juris comportant la création d'un procureur européen (formule reprise par un Livre vert de la Commission en décembre 2001). Mais le paradoxe s'explique surtout par le climat d'hésitations, voire de conflits politiques…

Sans aller, comme on l'a parfois dit, jusqu'à « dissoudre la Communauté dans l'Union », cet enchevêtrement d'institutions et de règles à vocation internationale (Eurojust et Europol, RJE et magistrats de liaison) et supranationale (OLAF et le futur procureur européen) est difficilement compréhensible.

I can entirely subscribe these comments.

The main issue is that the creation of an area of freedom, security and justice has been left, by the Treaty, in the inter-governmental field and that, after September 11, the interests of the European Governments (mostly only electoral interests) are about security, and less (or sometimes nothing at all) on freedom and justice. The European Council, that is the "master" in this area, can decide when and what it wants, so that the legislative process is in this area opaque and discretionary, outside of the real control of the Parliament and the Commission itself, which has a power of proposal but not a power to check the follow up of the framework decisions and decisions. And even the Court of Justice has very poor opportunity to revise the legitimacy of the Council's decisions, so that we can't find one judgement about third pillar matters.

I want to give you an example of the opacity of the decision making method. A Commission project of a framework decision on fighting racism and xenophobia should be one of the main goals of the Union as to article 29 of the Treaty. The project was published on the Official Journal of the EU n. C/075 of March 26, 2002, but was never examined by the Council, and nobody can know "why?".

Informally, someone is saying that this was due to the strong opposition of the Italian Government, whose Minister of Justice is, as everyone knows, a member of the *Lega Nord* party, a movement that was sometimes suspected to be xenophobe. I don't know if this hearsay is true, but it's sure that in the Justice and Home Affairs area we have the least level of transparency of the whole Union's law-making.

The role of the Commission and the European Parliament

In the period that we are considering, the Commission and the Parliament have played a different, and often very difficult, role.

Drafting its final Scoreboard of the JHA area (COM(2004) 4002 final - COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations), the outgoing Commission has written, in a very diplomatic way, that "Major practical progress has been made in the first phase of the area of freedom, security and justice. But the objectives set at Tampere have not yet all been achieved. Pending the results of the Intergovernmental Conference, the current institutional framework will cause (and have caused in the past, I mean) difficulties." More over, "the original ambition was limited by institutional constraints, and sometimes also by a lack of sufficient political consensus. The step by step approach was often the only possible way of moving forward."

The list of frustrated ambitions and difficulties is very long, but I would like to underline some among the Commission's remarks:

- The degree of effective implementation of the instruments adopted and their evaluation: I agree with the proposition. The Presidency Conclusions of the European Councils seem to be a shopping list for a Christmas Dinner prepared by the turkey: "States should improve …, States should adopt …., States should implement …); but the Council is an expression of European Governments, or not ? And who have controlled (and will control) the implementations of the Council's decisions, both at European and national levels ? The Commission, actually, has no real power.
- The respect of fundamental rights, the right to free movement, the respect of privacy and the rules related to data protection. The issue of data protection was considered by the late European Council in a very dangerous way.
- "Promote a genuine common policy of management of migratory flows There must be a realistic approach taking account of economic and demographic needs, to facilitate the legal admission of immigrants to the Union, in accordance with a coherent policy respecting the principle of fair treatment of third-country nationals". In my opinion it would be very difficult to find in this field more than a general closing of the external frontiers of the Union, and even of internal borders between old and new member Countries, so that the fair treatment of foreigners is an illusion.

Also the Parliament, that here has often a mere consultative role, has tried to play more incisively . For instance when it gave (april 2004) its negative advice on the "*Proposition de décision du Conseil concernant la conclusion d'un accord entre la Communauté européenne et les États-Unis d'Amérique sur le traitement et le transfert de données PNR par des transporteurs aériens au bureau des douanes et de la protection des frontières du ministère américain de la sécurité intérieure (COM(2004) 190 – C5-0162/2004 – 2004/0064(CNS) (Procédure de consultation).* Or when,, very lately, drafted its Report « *contenant une proposition de recommandation du Parlement européen à l'intention du Conseil et du Conseil européen sur le futur de l'Espace de liberté, de sécurité et de justice ainsi que sur les conditions pour en renforcer la légitimité et l'efficacité* (I have had only the first draft of the Parliamentary Commitee) , where you can read that : « *il n'est pas possible : de dissocier la mise en œuvre de l'ELSJ d'une politique de protection et promotion des droits fondamentaux et de citoyenneté au sein de l'Union et de dissocier le principe de la reconnaissance mutuelle d'une harmonisation minimale créant une confiance réciproque*.

If the framework of the Union will be in the next future the same, only the Council will have the last word in the JHA area, and only the approval of the New Treaty (which deeply reforms this matter) could change something.

Some possible solutions: back to the roots of judicial co-operation in Europe

In my point of view a strong and reliable judicial co-operation in Europe is absolutely necessary. Having built a common economic, social, and financial space in 25 Countries, it would be odd, and dangerous, to leave only justice inside national borders.
But the development of the JHA area should be cautious and respectful of the fundamental rights of our citizens; the level of protection obtained must be the best and always applied both in EU legislation level and, more generally, in all the States of the EU.
None should think that he/she has lost one of his/her fundamental rights respected at the national level because of the Union policies in this area.

In Europe, after the Second World war, we have established within a half of a century, a true and genuine continental tradition of respect and implementation of human rights. This have been possible,

particularly, through the action of the Council of Europe and the judgements of the European Court of Human Rights.
This heritage is part of the Union Law too, through Article 6 of the EU Treaty, the case law of the Court of Justice, the Charter of fundamental rights and the constitutional traditions of member States.
We should go "back to the future". We need "More Justice and Freedom to Balance Security", as it is affirmed in Amnesty International's Recommendations to the EU published few days ago, on September 27, 2004.

During the late period, although the difficulties that we have faced in front of the "spirit of emergency" that have conditioned the decisions of the European Council, often we have seen that the Commission and the Parliament have been able to recall our duties and our "good" traditions; as Medel, we will support any future effort in this direction.

In my point of view the first thing that should be done is to go back to the roots of the necessity of judicial cooperation; *i.e.* back to economic and organised crime.

Then, the European institutions should consider the opportunity of a larger involvement of Law professionals, such as judges, prosecutors and lawyers.
Until now the Council and even the Commission have always acted mostly with an intergovernmental method; the Commission, opportunely, has launched some wide European consultations (the Green Papers) on many issues, but at the European level there is no effective and frequent consultation of magistrates and lawyers.

I hope that in the future the Commission will have the opportunity to go forward. "The mutual recognition requires a common basis of shared principles and minimum standards, in particular in order to strengthen mutual confidence. In order to ensure the effectiveness of the European policy on judicial matters it will remain
necessary to maintain a high degree of involvement of those working in this field". I agree with the Commission because the role of the professional is necessary.