

***Comment on Dagmara Kornobis-Romanowska –
Conceptual Changes in the Area of Freedom, Security and
Justice through the Constitutional Treaty***

*By Stephan Bitter**

A. Introduction

Dr. Dagmara Kornobis-Romanowska has analysed the developments in the Area of Freedom, Security and Justice (AFSJ) by comparing the present state of law with the future law under the Constitutional Treaty. She convincingly highlights the changes this area of law undergoes momentarily. In this comment I will concentrate on the question whether the current fragmentation of the law of the AFSJ (Section B) is reduced by the Constitutional Treaty (CT), and if there are guiding principles which allow for an evaluation of the law in this Area (Section C). The conclusion will be a short assessment of whether the Constitutional Treaty brings with it a conceptual change in the AFSJ (Section D).

B. The Area of Freedom, Security and Justice in the Present Treaties: “A Europe of Bits and Pieces?”¹

Dr. Kornobis-Romanowska summarises the current status of the law of the AFSJ and concludes that the supranational EC Treaty establishes strong intergovernmental features whereas the intergovernmental EU Treaty has some supranational elements. The supranational elements in Police and Judicial Cooperation in Criminal Matters are mainly the relatively extensive powers of the European Court of Justice (ECJ) and the obligatory consultation of the Parliament. The intergovernmental features of the policies related to the free movement of persons in Title IV EC Treaty are the predominance of unanimity voting, the non-

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¹ Deirdre Curtin, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, 30 COMMON MKT. L. REV. 17 (1993).

exclusive right of initiative of the Commission and the limited role of Parliament and ECJ.

Notwithstanding some possible critique concerning this classification,² it is submitted that it is exactly this complex distribution of rules and procedures which makes it all the more necessary to precisely define the Area of Freedom, Security and Justice. Because thereby we could identify an overall concept which establishes principles to be realised in and through the respective provisions in the Treaties.³ This would allow for an evaluation of the law as it stands with a view to the question whether it complies with this concept of the Area.

Following the Vienna Action Plan and the Tampere conclusions,⁴ Dr. Kornobis-Romanowska takes freedom as the free movement of persons, fettered by the guarantee of human rights; security as the right to live in a law-abiding environment protected by effective action of public authorities; and justice as full access to justice and cooperation in civil and criminal law matters. When we thus place free movement of persons at the heart of the AFSJ, this Area becomes something similar to the single market. Free movement is complemented by security and justice allowing for the exercise of this freedom. Thereby, the AFSJ is understood as a policy field rather than as an overarching concept. In this respect, the Constitutional Treaty takes some interesting - but probably not always sufficient - steps.

C. The Area According to the Constitutional Treaty: The Individual at the Heart of the Union's Activities?

I. Loyalty and Mutual Recognition as Guiding Principles

The main aspect of the changes in the AFSJ brought by the Constitutional Treaty is the abolition of the pillar structure leading to a structural unity with a common framework for action in this area.⁵ At the core of this concept, Dr. Kornobis-

² For example, if obligatory consultation really is a characteristic of supranational law-making.

³ See Peter-Christian Müller-Graff, *Der "Raum der Freiheit, der Sicherheit und des Rechts" im neuen Verfassungsvertrag für Europa*, in *EUROPA UND SEINE VERFASSUNG. FESTSCHRIFT FÜR MANFRED ZULEEG* 605, 610-611 (Charlotte Gaitanides, Stefan Kadelbach & Gil Carlos Rodriguez Iglesias eds., 2005).

⁴ See The Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, 1999 O.J. (C 19) 1; Presidency Conclusions, Tampere European Council, (Oct. 15-16, 1999), available at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00200-r1.en9.htm.

⁵ See Simone White, *European Constitution: What is new in the Area of Judicial Co-operation in Criminal Matters and Police Co-operation*, THE FEDERAL TRUST FOR EDUCATION & RESEARCH, July 2004, at 5, available

Romanowska finds the “individual and his fundamental rights.” This assertion is in compliance with the internal preamble to the Fundamental Rights Charter, where it is stated that the Union “places the individual at the heart of its activities ... by creating an area of freedom, security and justice.”

Two principles can be found by which this objective shall be achieved: Solidarity between the Member States and the principle of mutual recognition.

Compared to Dr. Kornobis-Romanowska’s assumption, I would not think that it is the principle of solidarity as enshrined in Arts. I-43, III-329 CT which is instrumental for creating the AFSJ. I suggest it is rather the principle of loyalty as provided for in Art. I-5(2) CT (or Art. 10 EC Treaty respectively) which fulfils this function. With the police and judicial cooperation in criminal matters now drawn under the common constitutional framework by the Constitutional Treaty, the duty to cooperate loyally eventually applies beyond doubt not only to the law which is at present governed by the EC Treaty but also to the law under the EU Treaty. For the current law, this has only recently been explicitly recognised by the ECJ in its *Pupino* judgment.⁶ Starting from the principle of solidarity thus understood as the duty to cooperate loyally, one can see that the other guiding principle is closely related to solidarity.

With the principle of mutual recognition we actually find an old principle in new clothes. Based on mutual trust, the Member States shall respect and recognise decisions made by the authorities of their fellow Member States so that these decisions may be applied throughout the Union. We know this concept from the law of the internal market,⁷ and see it now being applied to criminal law.⁸ This is

at http://www.fedtrust.co.uk/uploads/constitution/07_04.pdf; Daniel Thym, *The Area of Freedom, Security and Justice in the Treaty Establishing a Constitution for Europe*, WALTER-HALLSTEIN-INSTITUT FÜR EUROPÄISCHES VERFASSUNGSRECHT, Dec. 2004, at 4, available at <http://www.rewi.hu-berlin.de/WHI/deutsch/papers/whipapers1204/index.htm>.

⁶ Case C-105/03, *Pupino*, 2005 E.C.R. I-0000, paras. 39-42, available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62003J0105.

⁷ Case 120/78, *Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649 (concerning free movement of goods). The application of this principle was later extended in secondary law to the free movement of persons. See Council Directive 89/48, 1989 O.J. (L 19) 16 (on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years’ duration).

⁸ Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*, 2003 E.C.R. I-1345, para. 33 (The ECJ already applies the concept of mutual trust in criminal matters).

indeed something very innovative.⁹ A Community of law is to a good part based on mutual trust between its members rather than on mere coercion.¹⁰ From the free market jurisprudence we have learned that mutual recognition is a means to further the freedom of the market citizen. Yet, in criminal law matters, the European legislator¹¹ still has to show its willingness to further individual instead of executive freedom.¹² The main recent example is the European Arrest Warrant,¹³ which the *Trybunał Konstytucyjny* (Polish Constitutional Tribunal) and the *Bundesverfassungsgericht* (German Federal Constitutional Court) have just dealt with.¹⁴ As an instrument of the proper functioning of the administration of justice, the Arrest Warrant is rather an element of loyal cooperation between the Member States than a tool to further individual rights.¹⁵ The same applies to the most recent example of mutual recognition in criminal law: the Framework Decision on the mutual recognition of financial penalties.¹⁶ The general statement in Art. 3 of this Framework Decision that it shall “not have the effect of amending the obligation to respect fundamental rights and fundamental legal principles,” does not lead to a fully-fledged protection of the individual against possible infringements of his or her rights.¹⁷

⁹ But see Steve Peers, *Mutual Recognition and Criminal Law in the European Union: Has the Council Got it Wrong?*, 41 COMMON MKT. L. REV. 5 (2004).

¹⁰ See Stephan Bitter, *Zwangsmittel im Recht der Europäischen Union: Geteilte Rechtsmacht in Europa, in EUROPA ALS RAUM DER FREIHEIT, DER SICHERHEIT UND DES RECHTS* (Rainer Hofmann & Stefan Kadelbach eds., forthcoming 2005).

¹¹ Joined Cases C-187/01 and C-385/01, *Gözütok and Brügger*, 2003 E.C.R. I-1345, para. 34 (The European judicature applied the principle of mutual recognition for the benefit of the individual).

¹² Peter-Alexis Albrecht & Stefan Braum, *Deficiencies in the Development of European Criminal Law*, 5 EUR. L. J. 293, 294 (1999); EUROPEAN UNION COMMITTEE, *THE HAGUE PROGRAMME: A FIVE YEAR AGENDA FOR EU JUSTICE AND HOME AFFAIRS*, 2004-5, H.L. 24, at paras.10-11, available at <http://www.publications.parliament.uk/pa/ld200405/ldselect/ldcom/84/84.pdf>.

¹³ Council Framework Decision 2002/584, 2002 O.J. (L 190) 1 (JHA) (on the European arrest warrant and the surrender procedures between Member States).

¹⁴ Judgment of the Polish Constitutional Tribunal of April 27, 2005, P 1/05, available at http://www.trybunal.gov.pl/eng/summaries/documents/P_1_05_GB.pdf; BVerfG, 2 BvR 2236/04 of July 18, 2005, available at http://www.bverfg.de/entscheidungen/rs20050718_2bvr223604.html.

¹⁵ Peers, *supra* note 9, at 24.

¹⁶ Council Framework Decision 2005/214, 2005 O.J. (L 76) 16 (JHA) (on the application of the principle of mutual recognition to financial penalties).

¹⁷ See Sionaidh Douglas-Scott, *The Rule of Law in the European Union - Putting the Security into the “Area of Freedom, Security and Justice,”* 29 EUR. L. REV. 219, 226-227 (2004). Concerning the European Arrest Warrant, these concerns appear to be at least partially justified as recent Austrian-German cases seem to illustrate. See DER SPIEGEL No. 23/2005, 106, 118-119.

On the other hand, a Framework Decision on procedural rights in criminal proceedings is currently being negotiated.¹⁸ This instrument may prove helpful in the construction of a European criminal law which is effectively concerned with the individual's rights.¹⁹ Yet, it is still too restricted in its scope to be hailed as a powerful instrument to defend the freedom of European citizens. To this end, the inclusion of the Fundamental Rights Charter in the Constitutional Treaty with the consequence of its then legally binding character and the accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms will be the more effective means.²⁰ For future developments, it is important to note the creative, yet not less welcome, approach of the *Oberlandesgericht* (Higher Regional Court) Stuttgart to the first European Arrest Warrant in Germany, which issued a surrendering order only after scrutinising the request on the basis of a "European *ordre public*"-reservation as found in § 73 of the *Gesetz über die Internationale Rechtshilfe in Strafsachen* (Law on International Legal Assistance in Criminal Matters)²¹ in connection with Art. 1(3) of the Framework Decision.²²

Thus, it can be concluded that the principles of loyalty and mutual recognition may and will show their effectiveness to further the judicial cooperation in these matters. However, it still remains to be seen if the individual can truly be found at the heart of the Union's activities.

II. *Applying the Constitutional Standard Case in the Area and the Justification of Deviations*

The Constitutional Treaty takes the most innovative step by introducing as a general rule the ordinary legislative procedure in this area - the "constitutional

¹⁸ *Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings Throughout the European Union*, COM (2004) 328 final (April 28, 2004).

¹⁹ Jan Wouters & Frederik Naert, *Of Arrest Warrants, Terrorist Offences and Extradition Deals*, 41 COMMON MKT. L. REV. 909, 924-925 (2004).

²⁰ Maria Kaiafa-Gbandi, *Europäisches Strafrecht - Die Perspektive des Grundrechtsschutzes nach dem Verfassungsentwurf für Europa*, KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 3, 20-22 (2004).

²¹ *Gesetz über die internationale Rechtshilfe in Strafsachen*, Aug. 24, 2004 BGBl I 1748, 1749, available at <http://bundesrecht.juris.de/bundesrecht/irg/inhalt.html>.

²² *Oberlandesgericht [OLG] Stuttgart*, NEUE JURISTISCHE WOCHENSCHRIFT 57 (2004), 3437, 3439; Nicola Vennemann, *The European Arrest Warrant and Its Human Rights Implications*, 63 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [HEIDELBERG J. INT'L L.] 103, 115 (2003) (suggesting this approach).

standard case.”²³ The most important deviations from this standard are the several provisions which differ in voting requirements: For action in the fields of family law and most aspects of criminal law, the Council has to decide unanimously after consulting the European Parliament. For the sake of the unity of the Constitution, the transparency of the Union’s decision-making procedure and the democratic accountability in this area, it would be preferable that the ordinary legislative procedure be introduced for all these areas. However, one has to accept, that the areas still under the unanimity-rule are highly sensitive in the Member States and take part in what might be described as the “national identity” of the States, where they fear the loss of competences crucial to their essential functions.²⁴

An interesting means to attenuate those fears in the judicial cooperation in criminal matters are the innovative provisions of Arts. III-270(3),(4) and III-271(3),(4) CT allowing for the European Council to be seized of the matter if a Member State thinks that a measure would affect fundamental aspects of its criminal justice system. If this does not lead to a new proposal, Member States are authorised to proceed with an enhanced cooperation in this area. Although we have to notice the obvious deviation from both the ordinary legislative procedure and the ordinary procedure for initialising enhanced cooperation, we may also conclude that this might be a workable compromise to meet the concerns of the respective Member States.

The same may hold for the future participation of national Parliaments - together with the European Parliament - in the evaluation and control of Europol and Eurojust. Although the participation of national Parliaments is not foreseen with the constitutional standard case, the democratic control of these institutions is imperative and finally found its way in the European legal order (Arts. III-273(1), III-276(2) CT).

D. Conclusion: Persisting Fragmentation and the Need for a Consistent Concept

With the concept of reflexive constitution we do have a means to appreciate these deviations as interim solutions which stand under higher pressure of justification for resisting change.²⁵ In some cases like the European Prosecutor we might see the

²³ See Jürgen Bast, *The Constitutional Treaty as a Reflexive Constitution*, in this volume.

²⁴ JEAN PRADEL & GEERT CORSTENS, *DROIT PÉNAL EUROPÉEN* 3-5 (1999); Albrecht & Braum, *supra* note 12, at 297-299; EUROPEAN UNION COMMITTEE, *supra* note 12, at para. 40.

²⁵ See Bast, *supra* note 23.

“not here” rationale at work.²⁶ In other cases, we will hopefully see the “not yet” rationale being applied, above all concerning the position of the European Parliament in the decision-making process in criminal matters. Its future participation in the control of Europol and Eurojust is but one important step.²⁷

To sum up, we can still see a difference between the policies concerning asylum and immigration, as well as judicial cooperation in civil law matters on the one hand, and judicial and police cooperation in criminal law matters on the other. The former is almost completely drawn in the field of application of the general rules, i.e. the constitutional standard case. The latter still keeps some of the more traditional instruments of intergovernmental cooperation. For now, these will be justified by the need to recognise national interests in the protection of their identity and autonomy in these highly sensitive areas. We will see which rationale future constitutional amendments will follow.

What we can conclude from the still persisting fragmentation is that the Constitutional Treaty still has no real underlying concept of the Area of Freedom, Security and Justice. It rather follows an eclectic approach thereby rendering the Area another Union policy instead of a conceptual idea to be realised throughout the Union in the interest of the individual’s freedoms.²⁸ The idea of an Area of mutual trust, however, may take us some steps forward in the right direction.

²⁶ See Thym, *supra* note 5, at 13-14.

²⁷ See Peter-Alexis Albrecht, *11 Propositions Toward the Development of Legal Foundations for European Criminal Law*, 84 KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 269, 275 (2001).

²⁸ Müller-Graff, *supra* note 3, at 610-611.