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What Limits to Harmonising Justice?

Chrisje Brants

Introduction

In the social, legal and political context of any society, crime, justice and culture are interconnected. Crime is constructed by the response of criminal justice agencies (Nelken, 1994), while the response itself is constructed by what is defined, legally and socially, as crime; both are inextricably linked to, and by, normative, cultural and historically formed ideas about what law is and how and when it should be used (Brants 2010: 11-20; Lacey 2002). Like crime, justice is a social construction and as such it is self-evident to those who live it, to the 'insiders' (Nelken 2000: 10-11). Within socio-legal studies, justice is most usually studied from the perspective of legal culture, defined as a dialectical relationship between society, the political arrangements that shape the organisation and practice of justice, and the (criminal) law that determines its normative limits (Brants 2011: 50). It makes a difference whether we approach criminal justice as a manifestation of legal culture or as a social construction. The former is primarily concerned with law and legal tradition, in particular procedure, the latter more with the interaction between definitions of social problems and practice than with law.

Despite the difference in focus, it is useful to view each perspective as part of, and complementary to the other. The concept of legal culture can help explain the existence and consequences of differences between legal systems and is particularly useful for understanding the significance of tradition in enduring procedural divergence (Field 2009, pointing to, among other things, the conservative nature of legal culture). On the other hand, a social constructionist perspective can provide insight into why societies are both highly conservative, clinging to their own ideas of what are best justice practices including what should and should not be criminalised, and are yet amenable to change as the law, different power groups and public opinion interact in a changing social, political and legal context (Brants and Field 2000).

This article is concerned with how tradition and change affect differences between jurisdictions within the European Union, where supranational legal structures and ideologies appear to leave little room for the 'insider perspective'. The principles of mutual recognition and harmonisation of criminal law and procedure in Member States have created a legal sphere transcending the national. It presupposes a common legal order in which a shared conception of fair trial is the norm and provisions of substantive law are, if not identical, then at least totally compatible and based on common notions of harm. Whether or not harmonisation is desirable is not the issue here. My concern is with the assumptions that underlie an ongoing process and their effect on criminal justice in the national sphere. Can we assume a common legal order of criminal justice in which conceptions of fair trial and harmonised substantive law are shared across the European Union? Or do different social constructions and legal cultures at the national level (and the resulting supranational political compromise) pose limits to how far we can approach

this purportedly ideal state of affairs? And, if that is the case, how do they make themselves felt and what are the consequences?

A European legal culture?

A common legal order of European justice, the area of Freedom, Security and Justice to which the EU originally simply aspired (Articles 2 and 29 ff. TEU) but which it now 'shall constitute' (Article 67-1 TFEU), implies a common legal culture and shared social construction of justice. Indeed, the principle of mutual recognition (Art 67-3 TFEU), mainstay of EU criminal policy, simply *assumes* shared values and practices on the basis of which states can and must trust each other in order to promote a common goal of efficient criminal justice that will serve common interests. The European Arrest Warrant, with its expeditious surrender procedures and no questions asked, is a case in point.¹ But the very fact that it obliges Member States to surrender a suspect without resort to the usual guarantee of dual criminality (Article 2-1 EAW) is proof that substantive criminal law across Europe does not reflect shared notions of harm or shared constructions of what constitutes a crime. And that fellow Member States are to be trusted on due process rights because they are signatories to the European Convention on Human Rights and Fundamental Freedoms, is gainsaid by the decisions of the European Court of Human Rights – where every Member State has been found wanting on some issue of fair trial.²

Where states continue to base justice practices on their own norms and procedures, obligations to cooperate and substantive and procedural harmonisation are seen as essential for mutual recognition. Therefore, Article 82-2 TFEU gives the European Council and Parliament the power to establish minimum rules to facilitate police and judicial cooperation and mutual recognition of judgments and judicial decisions. The EU was quicker to expedite European crime control and require harmonisation of substantive law (for example with regard to money laundering and terrorism) than to start work on European-wide safeguards and fair trial rights (Brants 2005: 104) and a Proposal for a Council Framework Decision on procedural rights in 2004 died a lingering death in some Brussels drawer.³ This, however, has now been followed by a 'roadmap' for strengthening procedural rights in criminal proceedings (drawn up by the Council in 2009 and appended to the Stockholm Programme in 2010).⁴ It provides for a step by step approach through Directives concerning specific procedural rights.

This EU initiative complements Article 6 of the European Convention on Human Rights and Fundamental Freedoms that has been around for much longer, and is not

¹ *Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States*, according to which (Preamble 10) 'the mechanism of the European Arrest Warrant is based on a high level of confidence between Member States.'

² In signing up to the ECHR, there was a general feeling among states that they were doing so in order to improve the others' criminal process – theirs, of course, already complied with the obligations of the Convention (Swart 1997).

³ *Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union*, Brussels 28.4.2004, COM(2004)328 final.

⁴ See The Stockholm Programme – an open and secure Europe serving and protecting citizens, 2010 *OJ* C115/1.

without its harmonising effects either. Lacking the 2nd paragraph that allows limitations to most other Convention rights, it appears to brook no exceptions. Decades ago this had already forced several countries to change, for example, how they deal with witness evidence.⁵ Indeed, it has been suggested that the European Convention and the emphasis on effective crime control in Europe may render traditional difference obsolete (Spencer 2002: 20; Jackson 2005). Yet, provisions of substantive criminal law, procedural rules and the legal culture and social constructions from which they spring and which sustain them, still diverge across Member States, in some cases widely.

The preamble to harmonising Directives has a standard phrase: '[T]hough the Member States are party to the ECHR and to the ICCPR, experience has shown that that alone does not always provide a sufficient degree of trust in the criminal justice systems of other Member States' – a polite way of saying that ECHR compliance is neither complete and nor has it led, in practice at least, to a common norm of fair trial. This is hardly surprising given that the European Court of Human Rights does not prescribe a particular form of criminal process or organisation of criminal justice. There is no single model to which the Convention aspires, no *paradis procedural* (Pradel and Corstens, 2002:302), and in considering whether the 'procedure as a whole' is fair, the Court essentially holds each system to the guarantees of its own procedural traditions. At the same time, according to Article 67-1 (TFEU) the Union 'shall constitute an area of freedom, security and justice with respect for [...] the different legal systems and traditions of the Member States.' Article 82-2 (TFEU) adds that rules of criminal procedure established by the EU should 'take into account the differences between the legal traditions and systems of the Member States.'

Nevertheless, states have obligations deriving from EU directives, not only procedural but also to prosecute and punish behaviour they may not regard as particularly harmful or wish to deal with in another way, while the European Convention requires that prosecution, trial and punishment comply with international human rights norms. At the same time, neither the European Court of Human Rights nor the European Union can simply impose definitions of criminal behaviour or fair trial. Even after the Treaty of Lisbon, which abolished the third pillar with its state sovereignty in criminal matters, replaced unanimity with majority vote in Council decisions, gave the Parliament greater influence and turned Framework Decisions into Directives, the latter must still be thrashed out in political compromise and are then only binding as to results.

States must ensure they meet certain minimum standards, but are free as to how they achieve that end; the same applies to decisions by the European Court. Finally, the end result has to be translated into action in a national context. Paper, as a Dutch saying goes, is patient: practice rooted in legal cultures and self-evident social constructions may be less amenable to change than the letter of the law or the professed willingness to cooperate suggests. The following two sections take a closer look at this issue, using two examples from the Netherlands. The first concerns the influence of the European Court of Human Rights and the EU on the right to have a lawyer present during police questioning,⁶ the second the harmonisation of substantive law regarding hate crime.

⁵ See e.g. *Kostovski v the Netherlands*, 20.11.1989 (11454/85) and *Unterpertinger v Austria*, 24.11.1986 (9120/80).

⁶ A Directive to that end forms Step C of the Stockholm programme.

The right to a lawyer during police questioning in the Netherlands

Despite common Convention principles, in practice legal assistance varies significantly across Member States. Given that the right to effective legal assistance is regarded as crucial to a fair trial (Article 6-3 ECHR), such differences could form an obstacle to cooperation and mutual recognition. It was therefore one of the rights contained in the proposed Framework Decision on procedural rights, though it proved impossible to formulate it in unequivocal terms that were acceptable to Member States (Brants 2003). In 2008, however, the European Court of Human Rights found a breach of Article 6-3 ECHR in a Turkish case concerning police interrogation of a minor without a lawyer present and the subsequent use of his confession in evidence.⁷ Other cases successively broadened the scope of ‘the right to access to a lawyer’.⁸ Although the so-called *Salduz*-doctrine (after the first case) seems to include the right to have a lawyer present during police questioning (this is implied in particular in the *Busco* and *Navone* decisions), the Court never actually used the words ‘physical presence’ and the judgments leave room for restrictive interpretation. Not so, however, the new EU Directive⁹ that establishes the right of suspects or accused persons to effective and confidential legal assistance, including ‘the right for their lawyer to be present and participate effectively when questioned’ (Article 3.3b).

One of the Member States still not in compliance with this requirement is the Netherlands. Since the introduction in 1926 of the current Dutch Code of Criminal Procedure, anyone remanded in custody has the right to confidential legal assistance. During pre-trial interrogation by the investigating magistrate, the suspect has the right to have a lawyer present. This has always been interpreted to mean that, *a contrario*, no such right exists during police interrogations (Fijnaut 1987). Over the decades, attempts by the Bar to force change produced nothing. As late as 2004, an influential study, though advocating that suspects be given the right to consult with a lawyer prior to interrogation, was adamant that ‘police questioning must start without delay and be geared towards truth finding. We therefore do not recommend that a lawyer be present.’ (Groenhuijsen and Knigge 2004: 78-79). It was a stance shared by most academics and legal practitioners other than criminal defence lawyers.

Then the European Court of Human Rights produced *Salduz*. The Dutch government immediately recognised that this would require an amendment to the law and police practice.¹⁰ Meanwhile, the Dutch Supreme Court interpreted *Salduz* as minimally as possible: a suspect had the right to consult a lawyer prior to the first police interrogation, to be informed of that right, and, barring an unequivocal waiver or other

⁷ *Salduz v Turkey*, 27.11.2008 (36391/02).

⁸ *Panovits v Cyprus*, 11.12.2008 (4268/04); *Shabelnik v Ukraine*, 19.02.2009 (16404/03); *Plonka v Poland*, 31.03.2009 (20310/02); *Pishchalnikov v Russia*, 24.09.2009 (7025/04); *Dayanan v Turkey*, 13.01.2010 (7377/03); *Zaichenko v Russia*, 18.02.2010 (39660/02); *Brusco v France*, 14.10.2010 (1466/07); *Navone and others v. Monaco*, 24.10.2013, (62880/11, 62892/11, 62899/11).

⁹ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, *OJ* L 294.

¹⁰ Letter from the Minister to Parliament, 15 April 2009, *Kamerstukken II* 2008-2009, 31 700VI, no 117.

urgent reasons connected with the investigation, to be able within reasonable limits to exercise it. Statements by the suspect without his having enjoyed the (relevant) right and other evidence found as a direct result of such statements should be excluded. But the Supreme Court did not infer a general right, other than for minors, to a lawyer during questioning.¹¹ Much remained unresolved and, with legislation not expected for some time, it was left to the prosecution service to fill in the details by issuing binding instructions to the police.¹² The ensuing prosecution directive gave minors the right to have a lawyer present (although explicitly stating: ‘the lawyer’s attitude should be one of restraint so as not to delay or influence the interrogation’), but adults were only to be informed on arrest of their right to *consult* a lawyer *prior* to the first interrogation.

Whether or not this situation complied with ECHR requirements is a moot point, for it certainly contravenes the EU Directive. Moreover, despite the ideological resistance in criminal justice circles to the presence of lawyers during police interrogations, the stream of decisions emanating from Strasbourg and the threat of EU-legislation had already undermined the Dutch position. Even the Minister of Security and Justice grudgingly conceded that probably ‘in future the rights embodied in Article 6 will include the right to not only consult a lawyer prior to and during police interrogations but also to have one present in the interrogation room’.¹³ The head of the prosecution service called on government and courts to give up their ‘last ditch stand’ and to accept and prepare for ‘the inevitable’.¹⁴

Now, six years after *Salduz*, legislation to implement the EU-Directive in the form of amendments to the Code of Criminal Procedure, is in the final stages of parliamentary procedure. Replacing an earlier and less far-reaching proposal, it introduces a (waivable) right to have a lawyer present, although it provides for as many exceptions as possible negotiated by the Member States (and especially the Netherlands). In particular, it makes full use of Article 3,6 of the Directive which allows, in exceptional circumstances and only at the pre-trial stage, temporary derogation from the application of the rights provided for in paragraph 3.¹⁵ At the same time, a new government decree restricts the lawyer to certain interventions and allows him questions only at the beginning and the end of the police interview.¹⁶ Presumably this is regarded as compliance with Article 2,3b of the Directive: ‘participation [of the lawyer] shall be in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned’. On the other hand, for reasons too technical to be explained here, the government found it ‘impossible’ (some regret in the terminology

¹¹ Hoge Raad 30 June 2009, *Nederlandse Jurisprudentie* 2009, 351

¹² ‘Aanwijzing rechtsbijstand politieverhoor (2010A007)’, *Staatscourant* 2010, 4003

¹³ Letter to the Second Chamber of Parliament from the Minister of Security and Justice, dated 16 November 2010 (DDS5673300), at www.rijksoverheid.nl/bestanden.

¹⁴ Procurator-General Harm Brouwer, head of the Dutch Prosecution Service, speech Rotterdam 24 February 2011.

¹⁵ Such derogation is only legitimate ‘to the extent justified in the light of the particular circumstances of the case’, i.e. if there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person or if immediate action by the investigating authorities is imperative to prevent substantial jeopardy to the investigation.

¹⁶ Article 5 Besluit inrichting en orde politieverhoor (13-02-2014). All this proposed legislation to be found at: www.rijksoverheid.nl/nieuws/2014/02/13/recht-op-bijstand-van-raadsman-tijdens-politieverhoor

there) to include the exception for minor offences sanctioned by an authority other than a court, or where deprivation of liberty cannot be imposed.

The long-standing Dutch resistance to a fair trial guarantee that many European states regard as self-evident can only be understood if we take into account Dutch inquisitorial legal culture that has always informed legal thinking on the suspect in pre-trial process and places unquestioning faith in the criminal justice authorities, in particular the prosecution service (Brants and Field 2000). These ideas were strongly reflected in the Code of Criminal Procedure of 1926. Although it has been amended many times, not least because of ECHR requirements, the deeply rooted underlying ideas have not disappeared: the state must search for the truth by all appropriate means, the suspect is primarily an object of investigation and a source of information, and the prosecutor, who is in charge of the police, can be trusted not only to seek the truth impartially but also to act, as it were, for the suspect and take his interests into account.

From this perspective, pre-trial rights, including legal assistance, have no added value; on the contrary, they merely hamper the whole exercise as actually using them would probably impede the investigation. Thus, provisions granting such rights always have a second paragraph: ‘...unless in the opinion of the investigating magistrate (or the prosecutor, or even sometimes, the police) the interests of the investigation make the exercise of right X, Y or Z undesirable’ (or some such formulation). The matter of legal assistance is seen as part of the search for the truth, made more difficult if false confessions or statements put the police on the wrong track; the interests of the suspect – except in the truth – are almost an afterthought and take second place to the interests of the investigation.

That was always the view and is the view still. In a recent decision, after both *Novone* and the advent of the Directive, the Dutch Supreme Court still refused to budge, despite the learned advice of the Advocate General (a member of the prosecution service) that a right to the presence of a lawyer could no longer be denied. It merely repeated that the European Court of Human Rights did not unequivocally require more than prior consultation, adding that the Directive provides for a transitional period until 2016 before national implementation is required.¹⁷ Until such time, it is obviously not prepared to abandon the entrenched traditional position. This attitude is rather ominous as far as the future scope of the new legislation is concerned. Although the amendments are, even if reluctantly, revolutionary in the Dutch context, it remains to be seen how the Dutch Supreme Court will eventually interpret them. (What, for example, will it regard as ‘exceptional’ to warrant excluding the lawyer from police questioning?) Paper can be very patient indeed.

Substantive criminal law on hate crime¹⁸

Since the 1970’s, the UN International Convention on the Elimination of All Forms of Racial Discrimination (better known as CERD),¹⁹ the Durban Declaration²⁰ and

¹⁷ Hoge Raad 01.04.2014, ECLI 770.

¹⁸ This section is based on three studies of hate speech and hate crime in the Netherlands: Brants *et al.* 2007, Van Noorloos 2011 and Grijzen 2012 and 2013.

recommendations by the Council of Europe's Commission against Racism and Intolerance (ECRI),²¹ have called for the criminalisation of 'hate crimes'. Most of these organisations provide minimum standards to be adopted in national criminal law. Nevertheless, differences continued to exist among EU Member States. The aim of the 2008 EU Framework Decision on Combating Racism and Xenophobia was to end that situation by harmonising legislation in all Member States.²² Article 3 of the Framework Decision obliges Member States to ensure that hate speech (including instigation, aiding and abetting) is punishable by effective and deterrent penalties of between at least 1 and 3 years. Hate speech is public incitement to racial violence or religious hatred, or disseminating such material, and includes publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes in a manner likely to incite to such violence or hatred. Article 4 refers to hate crimes (offences motivated by racial hatred) and obliges Member States to ensure that racist and xenophobic motivation is considered an aggravating circumstance, or that such motivation may be taken into consideration by the courts in sentencing.²³

Again we have an obligation requiring that domestic law of the EU Member States be changed with a view to harmonisation. The reluctance and procrastination encountered in the Netherlands with regard to the right to have a lawyer present during police interrogations is easily understood in terms of Dutch inquisitorial procedure that, traditionally, has no room for such a right. The situation with regard to the substantive law that is the target of the Racism Directive, however, is very much more complicated. In theory, Dutch law already complied with the Directive and no legislative changes have been necessary. However, in the Netherlands, the social construction of hate speech and hate crime and the practice of prosecution and sentencing are very different to what the EU-Directive envisages. So different, in fact, that its very terminology is hardly appropriate in the Dutch case. The following describes the legislation, its traditional position in Dutch legal and political culture and the changes in the political and social context that have occurred in recent years. These have brought about disagreement between and within the police, the prosecution service and the judiciary as to the best way of dealing with what the Directive refers to as hate crimes, and political and social uncertainty about the criminal nature of hate speech. In that light, what may look like perfectly harmonised legislation on paper may turn out to be nothing of the sort in practice.

¹⁹ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660,195, at: www.unhcr.org/refworld/docid/.

²⁰ United Nations, *Durban Declaration and Plan of Action, Adopted at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Violence*, 8 September 2001, at: www.unhcr.org/refworld/docid/.

²¹ ECRI, *General Policy Recommendation N°7 on national legislation to combat racism and racial discrimination*, 15 January 2003, CM(2003)8 Addendum II; ECRI, *General Policy Recommendation N°11 on combating racism and racial discrimination in policing*, 7 August 2007, CM(2007)116.

²² Council Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law 2008/913/JHA of 28 November 2008, *OJ L* 328/55.

²³ At the national level, hate crime and hate speech usually cover more than racial and religious hatred to include bias against homosexuals, the disabled, etc. International instruments, however, are almost exclusively concerned with race, ethnicity and related religious matters.

Since the 1930's, the Dutch Criminal Code contains the specific offences of both incitement to hatred or discrimination and moreover any public statement or distribution of material which involves 'group defamation'. A number of amendments over the years have extended the definition to include defamatory remarks referring to not only the race and religion of a social group, but also to hetero- or homosexual orientation and disability. It is important to note that what is normally referred to as 'hate speech' in other countries, the Dutch call 'discriminatory defamation' and that, in so far as there is no incitement to hatred or violence (which is a separate offence), Dutch anti-discrimination law criminalises only defamatory statements that can be construed as referring to a specific group as such; defamatory remarks about individuals that do not refer to a group constitute ordinary criminal insult (even if it is discriminatory). For example: the remark 'Dirty Moroccan' is criminal insult; 'Dirty Moroccan, you are all the same' is 'discriminatory defamation' because of the reference to the group. Trivialisation of genocide and holocaust-denial are not specific offences, but statements about such atrocities that can be construed as defamatory towards the Jewish or another population group constitute discriminatory defamation.

This legislation complies with the Framework Decision in the sense that it criminalises what the EU wants to see criminalised as far as speech is concerned (although the dissemination of material carries a maximum of six months, well short of the required year). However, on the one hand, the Dutch offences have a much broader connotation than in the Framework Decision and are not limited to (participation in) incitement. On the other hand, because they are construed as a form of discrimination, not hate or prejudice (although these may well be the underlying sentiment), biased motives are irrelevant to these crimes. The required intent is present and the offence is committed if, given the context, the words used can be assumed to be discriminatory.

Moreover, unlike the European concept that separates hate speech from hate crime, discriminatory group defamation is the primary form in the Netherlands and 'hate crime' as defined by the Directive does not exist. Obviously, crimes such as criminal insult, assault, causing grievous bodily harm, even arson and murder, are committed in the Netherlands for the simple reason that the perpetrator is prejudiced towards, wants to discriminate against or otherwise hates the victim because of his/her race or religion. But this only constitutes the Dutch form of hate crime if the grounds for that prejudice correspond to those for discriminatory group defamation. In that case, a prosecution directive, not the law, instructs the prosecutor to demand that the court impose a 50 – 100% enhancement of the penalty it would normally have given, although never more than the maximum allowed for the underlying crime.²⁴ The Dutch government argued (successfully) against the minimum penalties originally foreseen in the Framework Decision and for the much milder version of judicial discretion to take biased motivation into account.

Social and political context

²⁴ While every offence carries a minimum penalty of 1 day imprisonment or a fine of € 3, statutory maximum penalties in the Netherlands can be quite high. However, given the wide discretion of judges in sentencing, it is unusual for anything near the maximum to actually be imposed in all but the most serious cases.

While the Decision is binding only as to results and Dutch law seems to comply, the relevant offences in the Netherlands are best described as ‘criminal discrimination’: discriminatory group defamation and all the offences of the Criminal Code (including insulting an individual) that are regarded as more blameworthy if (as the prosecution directive has it) committed in a ‘discriminatory context’ (no mention of biased motives). The emphasis is on discriminatory group defamation, which is regarded as a public order offence: the harm it causes is primarily seen as to a democratic order based on tolerance and equality, and the first aim of criminalisation is to preserve decent, tolerant public discourse. Unlike other countries that were much worried about the effect of hate speech provisions on the freedom of expression, the Dutch saw no problem in the state defining the limits of public discourse on discrimination; the exception that no liability attaches for the professional distribution (journalism, academic writing) of what would otherwise be discriminatory or inflammatory material, is seen as more than adequate protection. There are two main reasons for this lack of concern.

Traditionally, in the typically Dutch political order known as ‘pillarization’, the stratification of society was along vertical lines of religious and political affiliation rather than horizontal class divisions. Political and social stability depended on the ability of the ruling elites of each pillar to both compromise on major issues and to persuade their constituents of the necessity of such compromise. In this socio-political climate of ‘pacification and accommodation’ (Lijphart 1968), the freedom to publicly disagree with what political leaders established as being ‘in the common good’ was not rated highly (to put it mildly). Second, while this was changing in the 1970’s and the Criminal Code was extensively amended to accommodate CERD obligations, at that point there was consensus that issues of freedom of expression were unlikely to arise since there would probably be no prosecutions – there was, it was thought, practically no discrimination, verbal or otherwise, in the Netherlands.

Both of these situations have changed (if indeed it was ever true that there was no discrimination²⁵). Pillarization gradually disappeared, although the politics of compromise and accommodation did not, and as the number of migrants increased, it became very clear that there was discrimination a-plenty. However, if from the 1970’s onwards people (and media) were more likely to engage in critical public debate, these were also the decades of multiculturalism. While in many other countries it was merely politically incorrect to speak disparagingly of ethnic minorities, in the Netherlands anti-discrimination law was used with increasing frequency, even against politicians for such seemingly mild statements as ‘the country is full’. In the new century, the discrediting of multiculturalism, the rise of anti-Islam populist politics (Pim Fortuyn and then Geert Wilders) and the murder of first Fortuyn and then Theo van Gogh (a popular journalist known for his extreme anti-Islam views) have brought sweeping changes to the once ‘tolerant’ Netherlands. With that has come a change in the social construction of discrimination as a crime; indeed, the populist leader Geert Wilders was acquitted of what would be, in other countries, incitement to hate and violence,²⁶ and a member’s bill has recently been introduced in parliament proposing to remove the provisions on

²⁵ Several studies show widespread verbal and practical discrimination against migrant labourers during the 1960’s and 1970’s. See e.g. Bovenkerk 1978a and 1978b.

²⁶ See Appeal Court Amsterdam, 21 January 2009, *Nederlandse Jurisprudentie* 2009,191; and District Court Amsterdam, 23 June 2011, *LJN BQ9001* (www.rechtspraak.nl/uitspraken). See also: Mudde 2007.

discriminatory group defamation and incitement to hate (though not violence) from the Criminal Code entirely.²⁷ While it may not make it through the legislative process, the very existence of this bill is indicative of the changes that have occurred.

The legal cultural context of policing, prosecution and sentencing

Paradoxically, the prosecution service has increased its efforts to bring criminal discrimination in all its forms (verbal and physical) to justice and many more such crimes now come to the attention of the police. Whether or not there is an actual increase in the crime rate is debatable. One could infer that, if journalists and politicians get away with calling Muslims ‘goat-fuckers’ (Theo van Gogh) and Islam a ‘retarded religion’ (Fortuyn), or with comparing the Koran to *Mein Kampf* and calling for the ‘removal of despicable elements’ (Wilders), ordinary people may not be too adverse to racially or religiously motivated insults or even assaults. On the other hand, so sensitized have the Netherlands become to issues of race and religion (in particular Islam), that the seeming rise in discriminatory crime may simply be a result of heightened awareness on the part of both victims and police. In any event, the prosecution and the police regard criminal discrimination as a serious and increasing social problem, but are divided as to how to deal with it. The roots of this situation lie in a combination of changing social definitions of discriminatory speech as criminal in relation to the freedom of expression, and overriding legal-cultural characteristics of both prosecution and sentencing: broad police, prosecutorial and judicial discretion, based on confidence in the criminal justice authorities and especially the prosecution service, coupled with the notion – reaching back to the consensual days of pillarization – that to prosecute is to invite further social conflict, so that more consensual ways of dealing with crime are to be preferred.

Few Member States give such wide and exclusive powers to the prosecutor as the Netherlands. This is particularly the case with regard to the prerogative to institute criminal proceedings (monopoly principle) and to waive prosecution ‘for reasons of public interest’ even if there is sufficient evidence for a conviction (principle of expediency). Waiving prosecution for reasons of public interest is the norm. Although this form of the expediency principle is under pressure because of growing public and political demands for law enforcement and the increasing influence of the European Union with its heightened focus on criminal law (*i.a.* Frielink 2010: 731), it is still viewed as essential to criminal justice by Dutch politicians and prosecutors (Brouwer 2010). The police can also drop cases or even shelve them without investigating, and without informing the prosecution service, a matter regulated in detail through binding prosecution policy directives. One such concerns criminal discrimination and it removes the discretionary power that the principle of expediency confers from both the prosecutor and the police. In other words, *mandatory* prosecution applies to all offences defined as discriminatory. The police must officially record all such cases and forward all reports to the prosecution service. The prosecutor may not waive prosecution for reasons other than insufficient evidence. In cases involving hate crime, or at least the Dutch version of it, the prosecutor must demand an enhanced sentence.²⁸

This prosecution directive has effectively created a new, but vaguely identified crime. While discriminatory group defamation and incitement are defined in law, any

²⁷ See: www.raadvanstate.nl/adviezen/zoeken-in-adviezen/tekst-advies.html?id=11609

²⁸ Aanwijzing Discriminatie (2007A010), *Staatscourant* 2007, 233.

other form of criminal discrimination covers a huge range of potential behaviour. The decision whether or not to identify a crime as discriminatory is therefore left to the discretion of the police officer handling the case and depends on the circumstances and the officer's own interpretation of what constitutes such an offence. His only guidance is the prosecution directive that provides no definition but simply mentions the 'discriminatory' context of a common crime, which may or may not be biased motivation, and links it to the grounds for prejudice characteristic of discriminatory group defamation. It is therefore the broader context rather than the offender's motive that determines what the EU-Directive calls 'hate crime'. That is consistent with an important Dutch legal principle that only deeds, not thoughts, may be the subject of criminal law. From the Dutch point of view it is not only exceedingly difficult to prove biased motive (a problem that all countries face), it is also highly undesirable to take it into consideration.

Because of this, and because discriminatory group defamation *is* defined in detail in the Criminal Code, in identifying hate crime police officers usually fall back on its most easily recognisable context factor: discriminatory speech. However, uncertainty about what the socially acceptable limits of free speech have now become and a traditional legal-cultural attitude to policing (and indeed to the criminal law) combine to undermine the idea of mandatory prosecution of criminal discrimination. The Dutch police regard themselves as much more than mere law enforcers, and their traditional powers under the principle of expediency provide a justification for autonomous decisions based on what they see as the public interest (and here the idea that prosecutions and criminal trials are more likely to exacerbate the social conflict that underlies discrimination than provide a solution, plays an important part). They do not, therefore, regard mandatory enforcement of the criminal law as the most effective way to deal with the social and political causes and effects of prejudice and hate. Research by Grijzen (2013) has shown that police officers are more inclined to try to mediate or to involve social services than to file a report with the prosecutor in discrimination cases; and they are slow to recognise hate crime unless it is accompanied by unequivocal discriminatory speech.

What goes for the police goes equally for the prosecutors who deal with hate speech and hate crime. They too struggle with biased motivation and are not always willing to prosecute or to demand the penalty enhancement that the directive requires, and regard mandatory prosecution of hate speech and hate crime as an inroad into the traditional discretionary powers conferred by the principle of expediency, which therefore undermines their ability to act in the public good. As part of a study of prosecution and sentencing in discrimination cases, Brants *et al.* conducted interviews and focus groups with police officers, prosecutors and judges and encouraged them to discuss different scenarios and the merits of mandatory prosecution and enhanced sentencing. They found that police officers generally doubted the efficacy of the criminal law in discrimination cases and were resentful of being deprived of the opportunity to deal with them in what they saw as more effective ways. Prosecutors were divided among themselves for the same reasons, with only a minority favouring mandatory prosecution. Finally, should criminal discrimination be brought to trial, there is no guarantee that a court will convict or hand down an enhanced sentence. Dutch courts enjoy exceedingly wide sentencing discretion between the general minimum and specific maximum per

offence, and have a wide range of alternative penalties. Although the prosecutor demands a certain sentence, it is at the court's discretion whether to follow that demand. The judges in this study showed themselves reluctant to convict ordinary people for making the same remarks as public opinion leaders have made without being convicted (or even remarks less damaging) and refused point blank to countenance the idea of sentence enhancement based on biased motivation (Brants *et al.* 2007: 187-210).

Conclusion

So, are there limits to harmonisation and how should we understand them? The two examples above concern only one country, but are indicative of more general issues. To start with, harmonisation is a problematic concept in so far as it implies that it is a process of which the end result is harmony because fundamental differences have been eradicated. That overlooks the fact that the laws and procedures of the different EU member states differ because they are not functional equivalents – in other words, they are not merely different solutions to a common problem. While there may be concepts and problems in the abstract that are supranational across the EU – such as fair trial and crime – national ideas about what is required to deal with specific issues in different countries depend on different definitions and constructions that are determined by different socio-political and legal-cultural circumstances and traditions. Countries define problems from different perspectives and consider them in different degrees of seriousness. Removing the differences in the way that countries express these idiosyncrasies in substantive laws and procedures alters surface appearances, but not the deep-seated attitudes and perceptions that are embedded in different legal cultures and social constructions of crime.

The Member States do not share a European legal culture or a European social construction of crimes – at least, not yet. At the same time, we should not lose sight of the dialectical process in which the definition of problems and their legal solutions are mutually reinforcing. From that perspective, harmonisation is a top-down mechanism, a tool, which has an effect on bottom-up changes in nation states regarding legal culture and social constructions of crime. Such changes, however, represent a slow and fundamental process that, in the context of the European Union, where the term harmonisation refers to no more than ironing out differences in laws and procedures, is better referred to as convergence. Legal systems and social constructions of crime may gradually come together to such an extent that, over time and at the level of essential characteristics, it no longer makes sense to regard them as fundamentally diverse and therefore as impediments a common legal order, even though (some of) their rules of positive law may differ (Brants and Ringnalda 2011:10). Convergence is not, therefore, dependent on harmonisation, but may be encouraged and hastened by it. It is also a less normative concept than harmonisation which implies the 'good' condition of harmony as its inevitable result.

Mechanisms of harmonisation - such as the European Court of Human Rights, Framework Decisions and Directives and the gradual reform of the infrastructure of justice in the European Union – certainly play a role in Europe, but it is important to distinguish between criminal procedure and substantive criminal law. Convergence is a

concept typically employed in socio-legal approaches and usually applied to procedural issues. Here, issues of convergence are often regarded as problematic, given the presumed predominant and particularly visible role of procedure in legal tradition and culture (Merryman 1985). The Dutch reaction to *Salduz* seems a case in point. In contrast there is little (political or academic) debate on the convergence of different social constructions of crime, perhaps because it is taken as given that, once states have agreed to enact more or less identical substantive provisions, the desired change has been achieved. It is, however, much more problematic to tackle the socio-political and intangible moral differences that affect the social construction of crime and the implementation of substantive law than to enact, albeit not unproblematic and gradual, changes in procedure.

One of the reasons is that enforcement mechanisms in the procedural field do exist and, however deficient, can combine to produce considerable external pressure. The European Commission regards the influence of the European Convention as insufficiently robust. States may amend their procedures and/or practices as a result of the European Court of Human Rights' case law, but this is usually piecemeal and ad hoc. Moreover, in taking account of differences in legal traditions and systems, the Court leaves room for states to interpret what are meant as exceptions as the minimum norm and therefore the rule, to which they then create their own exceptions, thereby gradually lowering the standard. Prime examples of this are the rules governing the right to directly confront witnesses – and *Salduz*.

However, an EU-Directive has added value in that it directly forces states into compliance. It is applicable before the domestic courts on transposition or to some extent under the doctrine of direct effect; it takes precedence, under the principle of primacy of EU law, over conflicting domestic provisions and also allows a preliminary ruling by the European Court of Justice. In the case of legal assistance, it has forced the Netherlands to amend criminal procedure to a far greater extent than the *Salduz* doctrine did. On the other hand, this will also, as the Commission recognises, be exceedingly costly for Member States. Whether the tens, in some cases hundreds, of millions that will be needed to bring each Member State to compliance with the Directive, will be forthcoming in these days of European austerity is a moot question: the protection of procedural rights is not the first thing states want to spend money on under any circumstances. These are practical considerations that will dilute convergence and slow it down. At the same time, issues of principle promote procedural convergence. Even if fair trial is a matter of definition, its (moral) desirability is not in question in Europe – to that extent Member States do share a European legal culture – and the definition itself is slowly converging. On the issue of the presence of lawyers during police questioning, Dutch procedure will change in the direction of what the majority of states already allow or will allow in future. The process is slow, always a compromise, and as a result, convergence is probably, by definition, on the lowest possible standard. But even if some countries have to be dragged there kicking and screaming, it is still convergence.

The factors that promote or limit convergence of substantive criminal law are less easily identified. As we have seen, despite the fact that Dutch legislation seems to comply with the requirements of the Framework Decision on Combating Racism and Xenophobia, reality is very different. This framework decision was already the result of considerable political negotiation and compromise, not least because most Member States

– but traditionally not the Netherlands – regard penalising forms of speech as highly undesirable given the overriding value of the freedom of expression. As a result, the Framework Decision identifies action against specific victims rather than undesirable speech in itself as the subject of criminalisation on the basis of the perpetrator's underlying motive. This forms a drastic departure from both the social construction of hate speech as the public order offence of discriminatory group definition in the Netherlands, and Dutch legal doctrine where motive is never a constituent element of a crime. At the same time, traditionally determined attitudes to the use of criminal law as a means of social control and the corresponding organisation and distribution of powers in the Dutch criminal justice system, have meant that the Netherlands, while complying *de lege* with European norms, could effectively refrain *de facto* from criminalising hate crime that does not involve discriminatory group defamation or incitement to hate or violence. And even the latter has been eroded in the specific socio-political circumstances and upheavals of anti-Islam populism and the related reappraisal of the freedom of expression that have undermined the traditional social construction of discrimination as a crime.

There is no reason to suppose that comparable, if different, issues have not arisen in other Member States. Convergence in the field of substantive criminal law requires compatible moral attitudes that are reflected in criminal policy. I would hazard a guess that it lags far behind the process of procedural convergence in Europe, if only because the European Court of Human Rights mostly concerns itself with procedural matters.²⁹ However, unlike procedural issues and legal culture, the social construction of crime and substantive criminal law seldom form the subject of comparative research, probably because it is so difficult to identify and understand the moral differences and ingrained attitudes to criminal law and its enforcement that produce and are produced by different social constructions of crime and justice in different societies. Perhaps a greater focus in this field would help us better understand the potential scope of and limits to what the European Union continues to call harmonisation.

²⁹ There are, of course exceptions, although even the (recent) doctrine of positive obligations is approached primarily from a procedural point of view.

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