The law of criminal procedure – a comparative approach

The first symposium in The Law of Criminal Procedure – A Comparative Approach series was held at the OPCW (Organisation for the Prohibition of Chemical Weapons) headquarters in The Hague on 9 and 10 September 2006. Organised by the Dutch region of AIIC, this symposium was dedicated to the law of German and French criminal procedure.

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The first speaker, Wolfgang Schomburg, a judge at the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR, respectively), provided a comprehensive review of German criminal procedure in two morning sessions, covering the equivalent of an entire semester of material. Using excerpts from legal texts on German criminal procedure, Judge Schomburg described the different stages in this procedure, as well as several aspects relating to the ICTY.

Judge Schomburg opened his lecture by qualifying legal concepts from Anglo-American law and civil law, which do not operate as two opposing legal systems. International tribunals and courts of justice, such as the ICTY, are based on the Anglo-American system but are influenced by civil law as well. Judge Schomburg also compared the ICTY criminal procedure with German criminal procedure, of which the former applies the adversarial system (kontradiktorisches Verfahren). The two procedures differ in part in the role attributed to the Angeklagter (defendant) during the hearing. In the German procedure the defendant has a very active role and - even if he is assisted by legal counsel - has the right to speak for himself. The defendant is both literally and metaphorically at the centre of the hearing. Located near the judge, the defendant is thus exposed to the sunlight, which symbolises revelation of the truth (die Sonne bringt es an den Tag = the sun brings it to light).

When comparing the two procedures, Judge Schomburg critiqued the current procedure at the ICTY. He considers the exhaustive knowledge that German judges have of documents addressed during the hearing preferable to the partial knowledge of judges at the ICTY. In his critical assessment, he also mentioned that the ICTY appeals procedure could be more concise, along the lines of German criminal procedure.

Judge Schomburg manifested his interest in language by alerting participants to subtle linguistic differences (do not confuse Berufung [appeal] with Revision [appeal in cassation] or Schwurgericht [criminal court with a mixed bench of professional and lay judges] with Geschworenengericht [trial by jury]) and terminological advice (Rechtsmittel is preferable to Rechtsbehelf). He also asserted that the deluge of documents to be translated may jeopardise translation quality. By encouraging his audience to think of English translations for certain concepts in German criminal procedure (e.g. die
Erhebung der öffentlichen Klage), Judge Schomburg advocated that legal linguists become more involved in developing criminal law.

The second speaker, Dr Dominique Greff-Bohnert, magistrat de liaison for France in the Netherlands, started by confirming Judge Schomburg's thesis: she stated that French criminal procedure is a hybrid system comprising both inquisitorial and accusatorial elements. She provided a very meticulous review of the entire procedure, from the initiation of the prosecution through ordinary and extraordinary channels of recourse. Several of Dr Greff-Bohnert's linguistic observations during her presentation attested to her sensitivity in this area. Terms she urged the listeners not to confuse included: garde à vue and détention provisoire [remand in police custody and pre-trial detention], mandat d'arrêt and mandat de dépôt [arrest warrant and committal order], relaxe and acquittement [release and acquittal], jugement and arrêt [judgement and decision on appeal]. Her explanations of various legal concepts, such as témoin assisté [similar to a person of interest] (a witness with a special status in between that of a regular witness and one mis en examen [interrogated as a suspect]), revealed the subtleties of legal terminology. Among the other legal concepts addressed was the opposition between the magistrature debout or parquet [department of public prosecution] (known as such because the prosecutor stands while addressing the court) and the magistrature du siège [the judiciary].

Dr Greff-Bohnert concluded her presentation by describing some reforms in the French justice system that are currently in progress and were instigated by the d'Outreau affair. Invoking various arguments to substantiate her thesis, she explained why it would be wrong to assert that the French criminal justice system malfunctioned in this case, even though one might challenge the outcome. The justice system is not infallible, and the video recording of the hearing and interrogations of the examining magistrate, the most recent recourse to avert judicial errors, will not necessarily change this.

The revelations of the speakers at the symposium have provided food for thought about several current issues. At the end of his presentation, Judge Schomburg mentioned the debate about the interaction between national criminal justice systems and the criminal justice system at international tribunals and courts of justice, which will be addressed in a symposium of the Europäische Rechtsakademie in Trèves. Dr Greff-Bohnert, in turn, supplied the participants with instruments to improve their understanding of reforms currently in progress and of previous ones in the French criminal justice system. Thanks to the very clear interpretation into English by Olive McLoughlin and Andrew Constable, both staff interpreters at the International Criminal Court in The Hague, all participants were able to follow this fascinating symposium.

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English version by Lee K. Mitzman.

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