Notes from Durbuy Seminar, 8th-9th July 2010

All across Europe, Ministries of Justice and Probation Services are trying to work out the implications of the Framework Decision (FD). The recent initiative of the incoming Belgian Presidency of the Council of the EU created the opportunity for Justice officials and Probation managers to get together and try to map out issues, questions and strategies related to the FD. I had the privilege of attending the seminar as an academic observer, at the invitation of the Belgian Presidency; so, here are some observations.

For me, any and every question about the implementation of the FD must be resolved in the light of the purposes and overarching principles enshrined in the decision itself. For this reason, the opening address by Dr Hans-Holger Herrnfeld, one of the architects of the FD, was particularly important and, for me, mostly reassuring. Dr Herrnfeld explained the origins of the FD as resting in the increased mobility that European citizens enjoy; and the unwelcome but perhaps inevitable consequence that more crimes (most often minor crimes) are being committed by non-nationals in Member States (MS)(though it would be useful to see some statistical analysis of this). Crucially, Dr Herrnfeld described the FD as an instrument *to benefit offenders*; one that allows them to undertake a community sanction or measure (CSM) 'at home'. Creating this opportunity is linked to ensuring that the supervision of compliance with the CSM in the 'receiving state' is possible. The objective is to improve the prospects of the person's 'social rehabilitation' and to ensure effective supervision and public protection. Another important intention is to reduce the un-necessary, disproportionate and inequitable use of custody for foreign nationals.

The meaning of 'social rehabilitation' is perhaps a little unclear. Rehabilitation, of course, has many meanings and interpretations, even within jurisdictions, let alone across them. The term 'social' is perhaps used to distinguish it from judicial (or legal) rehabilitation – the latter relates to the formal erasing or setting aside of a criminal record. From my perspective, social rehabilitation refers here not to 'treatment' or 'intervention' per se; rather, it refers to the effort to restore an individual's place as a citizen of a given society; not in the legal sense relating to their formal status, but rather in the sense of the individual's social integration. The question of 'protecting the public', in my view, comes second and should be understood as a consequence that flows from effective social rehabilitation, rather than as a separate objective.

This may all sound a little philosophical, but I think it absolutely crucial (and highly practical!) since, as I have said, the interpretation in law and practice of the FD must surely have regard to this core purpose. Let me illustrate the point with reference to just three of the many complex issues that were discussed and debated at Durbuy; consent, adaptation and enforcement.

In response to a question from the floor, Dr Herrnfeld made clear that the person must consent to the transfer, but that this need not mean that they consent to the order itself (as readers will be aware, not all MS require consent for all CSM). So, let's imagine that I am offered a transfer. What does my consent mean, and what would fully informed consent entail in this context? Clearly, I would need to be told the legal conditions under which I would be supervised, but what about the details of *how* I will be supervised? The order may say how many hours of unpaid work I must do, but in most Member States it won't say what kind of work or how hard the work must be (or whether I have to wear a uniform that identifies me as an offender). The order may say that I must submit to probation supervision, but it won't say how many times I

have to be seen, or where. Equally importantly, from my point of view, the legal conditions in the order don't determine the professional cultures and working practices that influence my supervisor and shape her practice. Can I legitimately expect sympathetic and helpful supervision, or is it just bad luck if the local probation culture is more punitive or enforcement focused?

In a sense these questions concern neither the formal *legal adaptation* of CSM by the receiving state (which the FD allows for in some cases), nor the legal interpretation of the meaning of a CSM made in the sentencing state by the executing authorities in another; they relate rather to questions of *practical and cultural adaptation*. For a sociologically-minded penologist (and a former practitioner), of course, this is very interesting – much more interesting in fact than the technical legal arguments! Comparing CSM with prison sentences, it is easy to see that adaptability is both their greatest strength (in that it allows for their tailoring to best serve their purposes) and their greatest weaknesses (in that it leaves their 'real' effects almost entirely in the hands of the supervisors who 'invent' or create the actual meaning of the CSM, case-by-case).

The downside of this equation comes into sharpest relief in relation to enforcement, of course. The FD poses problems in this regard especially where some jurisdictions (like my own) allow both wide discretion in the interpretation by the supervisor of what constitutes 'actionable' non-compliance *and* wide discretion in the consequent sentencing decision. How might a French JAP, for example, feel about transferring a suspended sentence (with a suspended but pre-determined custodial penalty) to Scotland, where the consequences of non-compliance with the adapted CSM are entirely for the Scottish sentencing judge to determine – and may range from doing nothing at all to imposing imprisonment?

So, are there remedies for these problems? Well, yes, I think so. But first, let's not overstate the extent of the problem. All of the issues I have just raised – which are basically related to the practical 'realities' rather than the legal meanings of consent, adaptation and enforcement – apply just as much *within* jurisdictions as they do *between* them. Indeed, if we are honest about it, they apply to the differences of interpretation that exist even within individual offices! It follows that the challenges of delivering fairness and attending to human rights when we think about the FD are precisely the same challenges that we face when we think (properly and deeply) about our practice 'at home'.

The remedies are the same too. While we need procedures that protect rights, and especially that allow for judicial review of related decisions, we also need an underlying moral commitment to the 'spirit' of the FD. In any and every decision, the complexities that have to be addressed seem to me to boil down to two questions: (1) Will doing what is proposed promote the social rehabilitation of the offender? (2) Will doing what is proposed ensure that the principle of proportionality is not violated?

The trust on which mutual recognition depends absolutely requires that all of us involved in the broader project of mutual recognition establish clarity about the values and principles that drive our practice – and perhaps the European Probation Rules provide some help here. But it also requires all of us to constantly interrogate whether we mean the same thing even when we use the same words – 'social rehabilitation' being the key term here. Maybe it is time for CEP conference that allows us to enhance and develop this kind of dialogue and understanding...