

Playing from the sidelines: the European dimension to criminal justice policy

Ed Cape considers EU law and why UK governments keep it at arms' length

If you examine the Ministry of Justice business plan, which sets out its plans and priorities for 2011–2015, you will search in vain for any mention of the European Union (EU). The Home Office business plan does refer to it, but exclusively in relation to migration. The Coalition agreement itself, whilst supporting expansion of the EU, states that EU legislation in the field of criminal justice will be approached 'on a case-by-case basis, with a view to maximising our country's security, protecting Britain's civil liberties and preserving the integrity of our criminal justice system' (HM Government, 2010). It may be that the Coalition partners could not agree on their relationship with the EU, but this lack of engagement with EU criminal justice policy is both disappointing and detrimental to British interests.

Law enforcement across the EU

Since the Maastricht Treaty in 1993 the EU has taken an increasingly active role in criminal policy. This was further entrenched by the Amsterdam Treaty of 1997, which created an area of freedom, security and justice, with emphasis being placed on police and judicial co-operation, and mutual recognition of judicial decisions. This led to a wide range of EU legislation on crime investigation, prosecution and enforcement mechanisms. This includes the creation of institutions such as Europol (supporting police co-operation) and Eurojust (supporting the investigation and prosecution of cross-border crime), and of mutual law enforcement

procedures – most notoriously the European Arrest Warrant (EAW), but also covering the mutual recognition of court judgements and sentences, the freezing of assets and the creation of a European criminal records system (Hodgson, 2011). Currently under discussion is a European Investigation Order which, as Steve Peers has pointed out, could mean that prosecutors could engage in 'blatant forum shopping', using police forces to gather evidence in jurisdictions that have wide investigative powers, and prosecuting in jurisdictions that most favour the prosecution (Peers, 2010). We have already seen the courts in England and Wales, where telephone intercept evidence is not admissible at trial, allowing the prosecution to adduce evidence from intercepts carried out abroad (*R v P* [2001] 2 WLR 463).

Attempts to match these developments by legislation that would establish minimum rights for suspects and defendants, which had wide support across Europe, were kicked into the long grass by a small minority of EU governments, led by New Labour under Tony Blair. Spurious arguments were thrown up. While Blair pushed through the EU legislation on the EAW in the wake of 9/11, his government argued that the EU did not have the legal competence to legislate on rights for suspects and defendants.

The Lisbon Treaty

Two developments have changed all that. The Lisbon Treaty, which entered into force in December 2009, introduced a system of qualified majority voting that means

that individual governments no longer have the power to veto EU criminal justice legislation. The Treaty also means that in future the European Court of Justice (ECJ) will be able to rule in individual cases on compliance with EU legislation governing criminal procedure. This will mean that it will have an important role to play in some criminal cases, including those that do not have a cross-border element. A major difference between the ECJ and the European Court of Human Rights (ECtHR), which decides on compliance with the European Convention on Human Rights, is that an accused can ask for an issue to be referred to the ECJ during the course of a case rather than, as with the ECtHR, first having to exhaust all domestic remedies. Moreover, there are much stronger mechanisms for ensuring that ECJ judgements are complied with. Although by no means alone in this respect, we have seen the UK government prevaricate and delay for years following adverse ECtHR judgements (for example, on retaining fingerprint and DNA data relating to people who are not prosecuted or who are acquitted, and on denying votes to prisoners).

A rights 'roadmap'

The second major development is the 'Roadmap' for strengthening procedural rights of suspects and defendants, which was adopted by the EU in November 2009 (European Commission, 2009). Recognising that not enough had been done to safeguard the fundamental rights of individuals in criminal proceedings, the Roadmap adopts a staged programme of EU legislation establishing minimum rights over the period until 2014. Five measures are envisaged in the Roadmap:

- Measure A – a right to interpretation and translation
- Measure B – a right to information
- Measure C – a right to legal assistance and legal aid
- Measure D – a right to communication and
- Measure E – special safeguards for vulnerable suspects and defendants.

In addition, there is provision for a Green Paper on the right to review of pre-trial detention decisions. Hardly a revolutionary programme, but in view of the evidence of widespread absence of such rights, either in law or in practice, across many EU jurisdictions (Cape et al., 2010), it was a major achievement of the European Commission and the Swedish presidency to secure agreement to adopt the programme.

The right to interpretation

The case-by-case policy of the Coalition reflects the fact that the UK, along with Ireland, negotiated an 'opt-in' arrangement in respect of this part of the Lisbon Treaty, so that the government has to separately consider each proposed measure and decide whether the UK will participate in, and thus be bound by, the resulting EU legislation. So the government opted into Measure A, and an EU Directive on the right to interpretation and translation was adopted in October 2010. All member states (apart from Denmark, which has opted out of the whole process) must bring into force any laws, regulations and administrative provisions necessary to comply with it by October 2013. The government would have looked rather foolish if it had not opted in – it must be beyond dispute that fair trial is impossible if a suspect or defendant does not understand what is said to them or if any statement or evidence they give is not understood by the police or by the court. Having said that, the Ministry of Justice appears to have simply assumed that English and Welsh law and procedure are already in compliance, whereas for the most part the police and the courts appear to muddle through when dealing with a person who does not sufficiently understand or speak English. There is no legislation governing a right to interpretation or translation, but a hotchpotch of codes, practice directions and professional guidance.

The right to information

Measure B on the right to information, which was put out for consultation towards the end of 2010, is not so straightforward. It

requires that a person who has been arrested be given a written 'letter of rights', something which is largely already reflected by a requirement in a code of practice for the police to give suspects a written notice of their procedural rights on being detained at a police station. Rather more difficult is the proposed requirement that the accused be given access to the 'case-file' once an investigation is concluded. The 'case-file' is a concept that derives from continental inquisitorial criminal procedure and does not easily translate into the common law procedure of England and Wales. However, it conveys an important principle, and one that the current law on prosecution disclosure in England and Wales does not fully comply with – that the accused should have a right to see *all* material that has been collected by the police in an investigation. Nevertheless, the Ministry of Justice has indicated that the government will be opting in to this Directive.

The right to a lawyer

Measure C was originally to have covered both a right to legal advice and representation and a right to legal aid. However, there was considerable opposition from a number of member states to a Directive that would have the effect of requiring them to spend significant sums of money on legal aid, so when a proposed Directive was issued in June 2011, that part had been left out. In broad terms, the proposed Directive seeks to ensure that a person accused of a criminal offence has a right to the advice, assistance and representation of a lawyer. The most controversial part is that which states that this right applies from the time of arrest, and that a suspect is entitled to have their lawyer present during police interviews. In England and Wales such a right has been recognised by statute for over 25 years, but it has proved enormously controversial in a number of member states, such as France, Belgium and the Netherlands – and also in Scotland where a statutory right to legal advice at the police station was only introduced in October 2010 as a result of the UK Supreme Court decision in *Cadder v HMA* [2010] UKSC 43.

Playing from the sidelines

One of the things that is often forgotten is that EU legislation in this area is not simply about rights for 'foreigners' when they come to Britain. A significant number of British citizens live and work in other European jurisdictions, and a far greater number visit on holiday. They might be arrested there, and with the EAW, they could be arrested here on a warrant issued by a judge from another EU country and then extradited with only a limited right to challenge the warrant. Given that, one might reasonably expect the government to be enthusiastic about ensuring minimum procedural rights for suspects and defendants. Furthermore, the evidence suggests that in many ways the law and practice in England and Wales is at the leading edge of good practice when compared with many, if not most, other member states. The Roadmap provides a great opportunity for the British government to play a leading role in establishing high standards to the benefit of all EU citizens. As it is, the opt-in deal negotiated by the former New Labour government, and endorsed by the majority party in the Coalition, means that we are left playing from the sidelines. ■

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