MEP Briefing Notes on EU

Justice and Home Affairs Briefing Report

An EEA Lite Agreement would return control of Justice and Home Affairs matters to the UK, as it has done in EEA nations. It would make permanent the temporary option to opt out of 130 EU Justice and Home Affairs measures negotiated as a UK Protocol to the Lisbon Treaty, and which the UK Government is has to agree on within an EU deadline period, before the option is lost.

Currently, the EU is seeking to impose on the UK a single system of justice based around the Napoleonic Code. The planned system is even far more rigid and prescriptive than in federal states such as the USA and Canada.

The United States manages to incorporate fifty different legal 'bars' (only some of which reciprocally recognise lawyers) and, thanks to Louisiana, two different civil law traditions; Canada, thanks to Québec, also incorporates two legal systems. At the same time the states of the United States retain their 'sovereignty, freedom and independence' excepting that which has been delegated to the federal centre, where the federal capital is legally supreme. Such a federal model may fit Germany and its Lande States well but the nation states of Europe are not provinces.

The EU is forcing through a highly centralised system of government with extensive powers in policing, law and human rights that steamrollers over the respective judicial traditions of the member states. On the other hand, the United Kingdom was founded on the basis of respecting Scots Law as separate but integral within the UK. The EU has no such qualms or respect.

The EU is building upon the Strasbourg Courts of the Council of Europe, which is separate but intertwined with the EU, to develop its own additional and even more prescriptive Human Rights legal framework. This is intended to give legal substance to the concept of European (i.e. EU) Citizenship as set out in the EU's burgundy passport. Parallel to this, Brussels is also slowly integrating Justice and Home Affairs (JHA) elements to establish one 'area of freedom, security and justice': as it were, a single market in Home Affairs. This involves more integrated policing, judicial processing, and common rules on sentencing.

Combined, they mean closer integration of criminal courts systems alongside the slow harmonisation of key aspects of the civil courts. Ultimately, this will inevitably mean the establishment of one federal JHA system for combating EU-level crimes and networks that cross borders.

It is clear that as long as the UK remains within the EU, the process of assimilation of the courts and law enforcement will be ongoing. Time

honoured concepts, shared with the US, Canada and the Commonwealth, of habeas corpus, trial by jury, being innocent before being proven guilty, are all at risk of destruction within a Continental EU Napoleonic Code system of public prosecutors, an assumption of guilt and an acceptance of imprisonment without charge, of which the European Arrest Warrant is the very embodiment.

The Human Rights Fest

The intention behind providing legal protection for human rights was born of the Second World War and its aftermath, Nazism and Communism. A European Court of Human Rights was set up in Strasbourg as part of the structures of the Council of Europe and it was British lawyers who wrote the European Convention on Human Rights – *in order to give to many European states the kind of rights that we in the UK already enjoyed* – but are now ironically being undermined and invalidated by the very actions of this Court.

As such, the problems that have emerged mostly over the last thirty years fall outside the scope of the book, except that they are increasingly being incorporated into the EU's policy framework.

The key problem is that of Judicial Activism, and this enters into the realm of Jean Monnet-style supranationalism where technocrats, experts and lawyers rule the world not democrats. The ECHR has increasingly been invited to make rulings on controversial issues that are not matters of clear personal freedom involving unlawful imprisonment, physical torture, State killings, or sanctioned harassment. But now they spend too much of their time in areas of social debate and comparative ethics.

A critical element of this has been that British courts have a different world view to Strasbourg judges, leading to a large number of cases overturning UK rulings and causing embarrassment and outrage in the UK media. The Blair Government's response came with the Human Rights Act 1998 whose failings are legion and require a briefing document of its own.

In essence, the HRA merely masked the effect of wayward ECHR rulings by requiring UK courts to come up with the decision Strasbourg would have taken rather than what they would have taken themselves if left to their own legal judgement. This has reduced the number of times newspapers have spotted why outrageous decisions have been made, but has down nothing to end courts supporting criminals and ambulance chasers rather than victims.

Examples of the kinds of cases that have provoked controversy include rulings on giving the vote to Prisoners detention and deportations of genocide suspects, murders and terrorists; deportations of illegal immigrants abusing the NHS; numerous botched changes to the Courts Martial system; attempts to seize criminal assets; supporting journalists protecting their sources where no public interest was involved;; the disputed right what might be inferred from the decision of the accused to remain silent notwithstanding certain

circumstances; free legal aid for poll tax dodgers even in a magistrates' court; and many others.[1]

Loose interpretations of what constitutes Human Rights creates cost. An arduous audit by the TaxPayers' Alliance in 2009 concluded that the total compliance cost that had arisen from thirty years of contentious rulings, both one-off and as annual administrative burdens, had reached £17,332.8 million (£17.3 billion). £1,166 million (£1.1 billion) was the annual burden. About one half of this figure arises because of a single case, which may over the long term change. But this sum also excluded the costs arising from the compensation culture that had been generated largely as a result, which have been estimated in the business as £5 billion annually. So Human Rights is quite correctly identified as an 'industry', and carries with it significant costs. It is a burden that needs to be ended by breaking the HRA and the ECHR stranglehold, scrapping the HRA and replacing it with new legislation and leaving the ECHR. Neither of these which is necessary given the UK's strong genuine human rights traditions under Common Law and incuding the Magna Carta provisions which celebrate 800 years or more of application in 2015.

Human Rights and the EU

But 'Human Rights' has now been hijacked by the EU and in its twisted form has entered the EU system. It has become a precursor obligation for any EU applicant. The 1993 Copenhagen Criteria, as amended and built on, included a commitment to human rights that later became incorporated directly into the treaties. Article 49 TEU[2] states that, 'Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union.' Article 2 states that:

> 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

Consequently, these principles are established in the main body of the treaty and are 'judiciable' – i.e. they are also open to legal interpretation and liberal re-interpretation. This is further developed by Article 6 (1) TEU, which states that:

> 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.'

This Charter is more about prescribing social rights than civil rights: the right to marry and found a family, freedom for the arts and sciences for example. It is critically important to the future development of EU Human Rights law. A

Council meeting in Cologne in 1999 decided to set up a Convention to draft it. The meeting declared:

> ‘Protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy. The obligation of the Union to respect fundamental rights has been confirmed and defined by the jurisprudence of the European Court of Justice. There appears to be a need, at the present stage of the Union's development, to establish a Charter of Fundamental Rights in order to make their overriding importance and relevance more visible to the Union's Citizens.’
>
> ‘The EU Council believes that this Charter should contain the fundamental rights and freedoms as well as basic procedural rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and derived from the constitutional traditions common to the Member States, as general principles of Community law. The Charter should also include the fundamental rights that pertain only to the Union’s citizens. In drawing up such a Charter account should furthermore be taken of economic and social rights as contained in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers (Article 136 TEC), insofar as they do not merely establish objectives for action by the Union.’[3]

The MEP Rapporteur who drafted their response explained:

> “All those of us who work in the institutions, or who apply EU policy inside the member states, are in no doubt about the concentration of power that is found in Brussels. The Charter helps to safeguard the citizen from any possible abuse of that power.”[4]

The end document had seven chapters, covering in particular the areas of Dignity, Freedoms, Equality, Solidarity, Citizens’ Rights, Justice, and General Provisions, set out in 54 articles.

But its impact was limited by two factors: Firstly, the agreement was initially kept out of the main EU treaties and stayed on an intergovernmental footing. Secondly, the UK and new EU member Poland, added Protocol 30 which limited how the Charter was meant to apply to them by courts, especially on the subject of Solidarity. This led to the fatuous quote by then-Europe minister Keith Vaz, who suggested that the Charter would be “no more binding than The Beano”, meaning it would have the no more legal impact as the comic *The Beano*.

However, the rights set out are broader than those provided for under the ECHR, and thanks now to Lisbon Treaty have since been brought into the main EU Treaties, with the same legal force and as a direct source of law. It cross references for the first time the European Social Charter, a broad brush

1961 document of costly social rights that the UK had long kept out of the treaties.

Moreover, the UK opt out has limited effect for anything outside of the handful of Solidarity provisions in areas where there has been some EU legislating in the past and where some legal challenge has been raised by an EU national as to whether it goes far enough.

The key point is that the limitations remain legally uncertain and it will take court cases to settle what the UK opt out means. In each case it will be the integrationist ECJ that decides. This suggests the opt out is brittle.[5]

The actual effect of the Charter is severalfold. It has direct effect on the UK, albeit limited specifically to EU law, and limited 'vertically' i.e. cases brought by nationals versus the State rather than each other. Given the scale of EU activity however, this is not so limiting as might first appear, especially given that the Commission and MEPs both use the Charter as an inspiration and source document when creating and amending legislation.

In terms of practical effect, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs noted an impact already being felt, largely through the courts. There had been an increase in case law from two human rights cases in 2009 before the ECJ, to approaching 30 in 2011. The Council of Europe's Commissioner for Human Rights was meanwhile complaining that the European Commission had 'monopolised' discussion with the Hungarian government over the human rights aspect of its new media laws.[6] A change, therefore, is already under way.

Externally, the insertion of human rights influence is not happening haphazardly. As of June 2012, the EU has a corporate Strategic Framework on Human Rights and Democracy. This brings together 97 actions under 36 headings relating to EU activity undertaken globally. There is also now the innovation of the first thematic Human Rights Special Representative, who explains his role is to "enhance the effectiveness and visibility of EU human rights policy" with a "broad, flexible mandate, giving him the ability to adapt to circumstances," by which he means it is ill-defined.[7]

While commendable in terms of ensuring that real human rights abuses are not glossed over when doling out EU money to dictators and repressive regimes, it seems likely that more funds will be handed over to 'empowerment' programmes of questionable merit or genuine impact. There has been a budget of €1.1 billion over six years for the European Instrument for Democracy and Human Rights, spent in the context of 'civil, political, economic, social and cultural rights.' Incredibly €2.6 million has been reported spent supporting lobbyists in the United States opposing the death penalty there.

Two EU agencies are specific motors and undertake work which has a Human Rights Industry impact. FRA is the Fundamental Rights Agency. It previously

focused just on xenophobia, but has expanded into exploring how human rights can relate to poverty, immigration, healthcare, stereotyping, diversity training, media reporting, police training, and educating children. It has a staff of 90 and a budget of €20 million. EIGE is the European Institute for Gender Equality, with considerable thematic crossover with the above. It has a similar budget and staffing level to FRA.

The Impact of EU Laws

ECJ case law demonstrates where the trend is heading. In C-305/05 - *Ordre des barreaux francophones and germanophone and Others* – the ECJ ruled on whether human rights had been infringed by requiring Belgian lawyers to inform when discovering clients engaging in money laundering. In C-276/06 - *El Youssfi* – a foreign widow was recognised as inheriting the pension rights of a deceased retired worker.

In C-518/07 - *Commission v Germany* – the ECJ settled a dispute as to how independent an independent agency had to be from the State when dealing with certain personal data. C-553/07 – *Rijkeboer* – saw a peculiar argument between a citizen and his local council, where the latter had deleted data in order to comply with privacy laws and the individual wanted to access it. C-92/09 - *Volker und Markus Schecke and Eifert* – saw an attempt by CAP beneficiaries to try to keep their name out of the publically-available lists of recipients: it was partially successful and risks limiting transparency in EU funding.[8]

C-391/09 - *Runevič-Vardyn and Wardyn* – addressed how official documents should spell foreign names. C-415/10 – *Meister* – saw a jobseeker who didn't get an interview try to compare her CV with the successful applicant's CV. C-468/10 – *ASNEF* – prevented a national government from adding additional conditions to the EU list that governed the processing of personal data. C-70/10 – *SABAM* – stopped an internet provider from blocking pirated downloads as it meant filtering private IP addresses. C-571/10 – *Kamberaj* – resolved that non-EU nationals claiming housing benefit (a "core benefit") would be discriminated against if paid for by a separate budget that ran out.

Combined, these demonstrate how personal rights have complicated interpretation of EU law, and as the post-forward-slash submission date indicators show, they are a comparatively recent phenomenon.

Two cases have been particularly UK-specific: C-466/00 – *Kaba* – ruled that an asylum seeker who two years later married an EU migrant worker was not afforded equivalent rights, though this was superseded by Directive 2004/38. C-411/10 - *N. S. and Others* – related to an Afghan deported from Greece and detained in Turkey, who claimed asylum in the UK and didn't want to be sent back to Greece. Remarkably, the Court ruled that EU member states could not be assumed to uphold minimum Human Rights standards and it was up to the Home Office to validate claims. Equally tellingly, the Court

also ruled that the UK's opt out from the Charter of Fundamental Rights specifically did not apply.

The EU and Data Rights

The EU has gotten itself in a spin over privacy and the right of access. Freedom of information clashes with the right to privacy: the result has been regulation, red tape, and cost.

Freedom of information was not one of the original 'four freedoms'. However, in the context of the development of a common asylum policy, police coordination, the harmonisation of criminal law and the mutual recognition of civil and criminal judgments, it has grown hugely in importance. A considerable body of ECJ case law is developing over rights to access information and the right to privacy, such as whether an historian can access documents (*Kenedi v. Hungary*) or an individual can read documents holding details about them (*Haralambie v. Romania; S and Marper v United Kingdom*) or the extent to which convicted sex offenders could be obliged to pass on their details to the police (*Bouchacourt v. France*, *Gardel v. France* and *MB v. France*). Crucially, thanks to privacy issues, the ECJ now acknowledges it relies on ECHR principles, and by extension case law (*J.McB. v. L.E.*), which means that the Strasbourg Court is now actionable within EU law in a way that has not been the case previously.

This is just the latest in a trend of EU directives that has added to business and government paperwork burdens.

The EU Data Retention Directive 2006/24/EC

This Directive compels all internet service providers to store all communication information for a year. The privacy issues here are compelling, especially as the UK government will be able to apply, through the security services, for individual pieces of information.

Privacy group Statewatch has said that mandatory data retention will effectively place everyone's emails and postings under surveillance. Open Democracy has criticised the ease with which third parties could abuse such private information obtained through data retention. The Open Rights Group has said that data retention endangers society's open communication and dialogue. Moreover, the UK government lost millions of pieces of private (HM Revenue and Customs) data in 2007, and other sensitive data has been lost on a consistent basis, whilst Edward Snowden's unauthorised releases of information do at least reveal the scale of surveillance.

The Freedom of Information Act 2000 and the Data Protection Act 1998 are interlinked with the Human Rights Act 1998. The DPA implements the European Data Protection Directive (95/46/EC), which sets out how personal

data is to be held. The Regulatory Impact Assessment by the Home Office assessed the business costs as coming in at £630 million per annum recurring, plus one-off costs of £836 million.

This was broken down into:

Manufacturing by large firms (320,000 p.a., £12 million one-off)
manufacturing by small firms (£122 million p.a., £153 million one-off)
financial service organisations dealing with individuals (£149 million p.a., £132 million one-off)
large organisations such as utilities, transport companies and large retailers which go in for "active marketing" as well as direct marketing firms (£302 million p.a., £451 million one-off)
retail newsagents (£140,000 p.a., £11 million one-off)
plus
charities (£37 million p.a., £120 million one-off)
local government (local taxpayers) (£26.9 million p.a., £97.3 million one-off)
schools (£2.2 million p.a., £6.7 million one-off)
central government (taxpayers) (£45.9 million p.a., £89.7 million one-off)

Consequently, the overall bill was higher than just the impact on business: a one-off bill of £1,150 million (£1.15 billion) and additional annual costs of £742 million.[9] To put this into context, there are estimated to be around 30,000 newsagents in the UK, a trade that has been declining badly over the last few years with around 500 closing a year. This regulation added £367 compliance cost to a corner shop's bill when it became law.

One law firm that provided notes on how a firm could ensure it was compliant produced a booklet for concerned parties. It runs to 115 pages.[10]

This does not take into account the ambiguous status of large amounts of internet data covered by the legislation, including emails and internet telephony, and which remain under threat paradoxically of being opened up to government snooping by making their content subject to required storage with all the technical costs that such would entail.[11]

The rules were introduced as a directive, resulting in different countries introducing a variety of different monitoring systems. The Commission itself estimates that the variety has meant a burden now to the EU economy of €2.3 billion a year, supported legal uncertainty, and fostered a lack of public confidence in data security.[12]

There are currently plans to modify the directive. This looks set to be a mixed blessing, taking the form of a Regulation with direct effect rather than a Directive. It intends to clarify how many data protection laws operate for businesses operating in more than one member state, but at the cost of adding burdens to companies not based in the EU but offering services there, including monitoring behavioural patterns, which might trigger a turf war with the US; it looks like adding extra layers of consent which will greatly change

UK direct marketing practice; it adds obligations to delete social media data that is in the public domain that the individual has decided he or she wants to pull (notwithstanding the implications for cost, technology and archiving); records will have to be kept longer and in more depth, with designated staff overseeing it; data processing agreements look set to become more complicated; fines of up to 2% of annual global turnover could be levied.[13] The proposals are stoking concerns as going beyond what is practical, cost-effective, reasonable and technologically intelligent.

But outside of the EU, the UK could determine a common sense approach to regulating for privacy and managing personal data that was less of a tick-box exercise and appropriately cost-effective rather than a £630 million annual burden.

Suppressing Freedoms

The 'Right to Oblivion' is especially controversial.[14] It is based on a French concept which allows criminal records to be erased from the public sphere, which notably led to major controversy when it emerged a French Commissioner had been convicted for embezzlement but whose conviction was struck off the books after a Presidential pardon. The regulations do not simply relate to what an individual has put on line themselves, but anything archived about them. It becomes legally problematic with regard to re-tweets and pasted material on secondary sites, for which the original site host appears to become liable. Search engines also are at risk of becoming liable for what individuals post about other individuals, including images. By aiming to protect one freedom, the EU is impinging upon another.

Notably, the draft Regulation exempts the EU servers and file managers from their own rules.

There have been more direct challenges to a free internet. The Audiovisual Media Services Directive was targeted at professional streamed media, but threatened small scale and amateur productions involving streamed broadcasts by tiny companies. This adds costs to such productions as take the form of the old '18 Doughty Street' online TV associated with Tim Montgomerie and ConservativeHome.

In this context, the furore over the threat to fine the UK Government for not sharing personal data with other EU countries is utterly bizarre. The UK under Labour signed the Prum Treaty (Schengen III), but the Coalition Government which is more sensitive to genuine privacy issues has been reticent in implementing it. The deal requires member states to supply personal data on the request of another, including DNA checks, fingerprint checks, and data held relating to vehicle ownership. However, there are concerns about the balance of evidence meaning that UK nationals could be extradited (through the European Arrest Warrant) on the back of an incorrectly remembered number plate with no recourse for the UK courts to intervene and apply national standards of requirement of proof. Dutch academics reportedly found

two thirds of basic DNA checks were in fact inaccurate, and the UK still has millions of innocent people's DNA on databases so it generates a legal calamity waiting to happen. The UK meanwhile could be fined millions if the Commission begins infringement proceedings for failure to pass into domestic law.

The EU was also responsible for introducing a Cookie Directive, amending the Privacy and Electronic Communications Directive 2003. This included problems for real-time auctioneering and marketing where time is at a premium for users, and put outside competitors not subject to the rules at an advantage. The UK approach was moreover to use implied consent rather than required agreement as most other EU countries have done, suggesting that a challenge may create considerable legal difficulties in time. A data consultancy, Qubit, estimated that the worst case scenario would be an industry bill of £10 billion.[15] A quarter of this was through loss of customers through the tedium of excessive cookie warning messaging; slightly less was through forced registration; £1.4 bn could be impact from standardisation of websites. This is a doomsday scenario and unlikely to materialise even through ECJ case law; however, the web analytical industry (worth £104 million in the UK) and the behavioural targeting industry and its associated marketing branches could all still lose effectiveness and see their revenues drop.

There is also the EU Cyber Security Directive COM (2013)48 and the context of the Strategy that it accompanies. Designed to address cybercrime and cyberwarfare, it threatens to add forced compliance costs on businesses since it introduces a legal requirement for IT security. Significantly, it states that net-based marketing is subject to the same level of regulation as the telecoms industry, introducing the idea of a "network operator" governing different areas of online marketing. This risks generating industry minimum standards, compliance-approved training and programmes (and with it a new compliance industry), and legal responsibilities for businesses responding to breaches, all of which may be subsumed by the operating costs of big companies but could cripple online services provided for by SMEs.[16]

Another drive is by the Commission to make the internet more available to people with disabilities. It is proposing a single set of rules to govern state websites to come in for 2015. The requirement for key public sector websites having to modify web pages to include large font options and written captions for audio files is authorised under European Commission technical harmonisation Mandate M376 (dating from 2005). It will include aspects of policing, university access, job searches, public libraries and a number of other public services. Many will already have such options, but those that don't will have to spend money to adapt. It also generates legal precedent for broader access rights to all public sector and public interest websites down to Parish Council level.

Another threat to media freedom comes from repeated calls to tighten ownership rules for single person holdings of media groups. This

coincidentally poses a greatest risk to more Eurosceptic owners such as Silvio Berlusconi and Rupert Murdoch.

Separately, in Sweden in 2004 there was controversy after a clergyman had been imprisoned for expressing personal but highly negative views on homosexuality. The right to express personal views is gradually being undermined by the growing predominance of the right not to be offended. The key battleground for this is likely to be on the internet.

Gender Impact

The Commission follows a plan of Gender Mainstreaming, or including gender rights issues across the legislative programme. It has backed the principle of "positive discrimination", exceeding the views of a number of member states that endorse equality of opportunity, by supporting a balance physically tipped in favour of one gender.

This was tested in the ECJ by the case of *Marschall v. Land Nordrhein-Westfalen*, C409/95, where it judged that "the mere fact that a male and a female candidate are equally qualified does not mean that they have the same chances," and thus that positive discrimination such as applied in this case may be deemed necessary.[17]

The area remains highly charged. In 2005, Slovakia's Supreme Court overruled a section of the Race Discrimination Directive as it authorised positive discrimination as opposed to equality before the law.

Equality rules and rulings have ironically sometimes had a negative impact. Previously, car and life insurance was tailored to be gender specific. As young males were more likely to crash a vehicle, their premiums were higher than other categories of drivers. However, changes generated through the EU instead of pushing prices down for young men instead drove prices up for young women. The change also adversely affected differential rates for annuities.

While the ECHR may have originally been behind the principle of businesses paying for equal pay for work deemed equivalent (sometimes controversially equating manual labour with a desk job), this is also an area of gender equality pursued through the EU. As a result of the ECJ, this extends to all associated benefits, including pensions, including non-contractual, future, indirect benefits. Thanks to maternity provisions this has started to generate paternity rights as well. The compliance costs for businesses managing new workers' rights have been particularly onerous for small businesses.

Surprisingly however, the overwhelming number of claims have been levied against the public sector, and in large numbers, as a review of equal pay measures by Government found in 2011.[18]

Breakdown of origin of Equal Pay Claims at tribunal 2008/9

	Number	Percentage
NHS	28,511	24.4%
Local Government	86,668	74.2%
Central govt and private sector	1,574	1.3%
Total	**116,753**	

Equal pay claims by economy sector 2008/9

	Number	Percentage
Public Sector	26,418	94%
Private Sector	1,405	5%
Voluntary Sector	281	1%

This additionally of course carries a cost to the Employment Tribunals Service. But what's also important is the result of the cases brought, because the above figures merely cover the Tribunals Service. 6.2% of all claimants are successful at the tribunal (1.5% aren't). But in 48.2% of cases the parties actually settle. So the above figures, and associated costs, are very much the tip of the iceberg. The figures also fail to take into account group impact, since a number of cases are in fact not brought by an individual but as multiples. The NHS and local government have suffered from a caseload surge of what amounts to localised 'class actions'.

EU gender equality law is set out under Article 141 EC (former Article 119 EEC). Member states were, notably, highly reluctant to incorporate the principle directly into national law until as late as 1975 (which of course was after UK accession to the EEC).

The EU's acquis includes the Directive on equal pay for men and women (75/117), the Directive on equal treatment of men and women in employment (76/207 as amended by Directive 2002/73), the Directive on equal treatment of men and women in statutory schemes of social security (79/7), the Directive on equal treatment of men and women in occupational social security schemes (86/378, as amended by Directive 96/97), the Directive on equal treatment of men and women engaged in an activity, including agriculture, in a self-employed capacity (86/613), the Pregnant Workers' Directive (92/85), the Parental Leave Directive (96/34), Directive on the principle of equal treatment between men and women in access to and the supply of goods and services (2000/113/EC), the Directive on equal treatment of men and women in the access to and the supply of goods and services (2004/113) and the Recast Directive (2006/54). The ECJ has also played a central role since the 1970s. The Amsterdam Treaty expanded the principle into gender mainstreaming, which was further bolstered by Articles 21 and especially 23 of the Charter of Fundamental Rights

It would correspondingly be a big mistake just to blame the ECHR for pushing equal pay for similar (rather than identical) work.[19]

Examples of tribunals finding work is “similar”

Primary school classroom assistant = library service driver messenger
School nursery nurse = local government architectural technician
Wholesale news distribution clerical assistant = warehouse operative
Cook = shipboard painter
Head of speech and language therapy service = head of hospital pharmacy service
Nursing home sewing room assistant = plumber
Motor industry sewing machinist = upholsterer
Canteen workers and cleaners = surface mineworkers and clerical workers

Source: Equality and Human Rights Commission

The costs have been varied. One pensions firm has calculated that the impact of the 2012 EU Gender Directive meant a total reduction in a man’s annuity payments of £10,000, since gender-specific annuities could no longer be offered (and since women live longer).[20] From a broader business perspective, it is simply impossible to determine what additional costs to business and to the taxpayer have arisen from increasing wages across elements and sectors of the workforce. But we can determine they have been substantial – and they have been underpinned by EU membership.

Crime

“For a long time, the EU has tried to build the European criminal justice area with one hand tied behind its back:

the unanimity rule, which required agreement of all EU governments for decision-making, often led to a 'lowest common denominator' approach;
the Commission did not have enforcement powers; and
parliaments and courts had little to say.

Progress in this field has therefore been limited, and the focus has been more on security issues.

With the Lisbon Treaty in force, a rebalancing between security and justice will finally be possible.”

European Commission, 2013[21]

Judicial cooperation in criminal matters entered the sphere of Brussels with the Maastricht Treaty. But this limited involvement in criminal affairs was limited to an intergovernmental role as part of the distinct "third pillar" at arms' length from the EU institutions. With Lisbon however, the pillar system has been scrapped and Home Affairs becomes part of the main EU structures (or as the Commission sees it with characteristic partiality, it "corrects the deficiencies of the former system").

After the Tampere and Hague Programmes, this was developed in particular by the Stockholm Programme in 2009.[22] To accompany the "Global Approach to Migration" and the "creation of a European Asylum System", more work was needed on JHA matters. The objectives include ensuring EU rights are transposed beyond EU borders (which by inference implies UK opt outs might not hold within them). A "Europe of law and justice" requires more harmonisation. An "internal security strategy" needs to be developed, including more use of the "Solidarity" principle (Article 222TFEU[23]) – the mutual defence clause in the event of a terrorist attack. There is to be more integration in the management of borders and of visitors. With a European Pact on Immigration and Asylum there will be "a forward-looking and comprehensive Union migration policy, based on solidarity and responsibility" building on a Common Asylum System. There will also be a worryingly nebulously-defined External Dimension to the EU's JHA work.

What this demonstrates is how Justice and Home Affairs integration is closely associated to the removal of internal borders, itself triggered by the removal of trade borders. In practical terms, the JHA plan involves establishing European Training Schemes "In order to foster a genuine European judicial and law enforcement culture", and generating an EU-level ethos by getting as many professionals on these courses as possible. Civil Society is also to be co-opted as part of this process. Meanwhile, the EU's international presence in the legal field is to be explicitly expanded. The EU is already since 2007 a member of the Hague Conference on Private International Law for example – of the 72 members, it is the only non-country to have that status. It resolves that there should be a clear division of tasks on how EU countries and the EU itself handle internal security strategy, which amounts to a call for a federal division of competences. A PR budget needs to be spent to explain why this is a good thing to critical Europeans out there, since the strategic plan should include "the aim of making citizens aware of the importance of the Union's work to protect them". The EU will work on encouraging mutual trust between national counterparts (which may be hard in some cases), part of developing a "genuine European law enforcement culture".

The crimes the EU institutions see as particularly 'EU' ones are:

Serious and Organised crime
Human trafficking
Child exploitation
Gender violence

Narcotics
Cyber crime
Intellectual property crime
Smuggling, particularly cigarettes
VAT fraud
Corruption
Fraud involving the EU budget
Counterfeiting the Euro
Money laundering
Terrorism
Funding of the above
Gun controls
Domestic violence
Gangs
Explosives
Youth crime
WMD threats
Outlaw motorcycle gangs

That just about leaves parking and shoplifting to local authorities and agencies to handle, though then there is the catch-all of victim support to cover those. But even crime prevention at a local level is deemed to merit EU level action, since it interferes with the quality of life of European citizens. That means an Observatory for the Prevention of Crime, a new Euroquango, was planned for 2013.

> "The European Council encourages Member States to devise mechanisms that gives [sic] incentives to professionals for taking up duties related to cross-border cooperation and thereby favour the creation of a Union-wide response at all levels."
>
> Stockholm Programme

It need hardly be stressed that this threatens the independence of EU member states to manage their own policing and judicial affairs. This becomes evident with the planned changes already being set out over the short term. The EU is expanding its interpretations on human rights into criminal affairs, both for the victim and even more controversially the criminal. These latter cover the right to interpretation and translation, the right to information about rights, the right to legal advice, the right for a detained person to communicate with family members and employers, the right to protection for vulnerable suspects, and mooted rights for pre-trial detention. As concepts they are fine, but then they already exist in Common Law. The problem appears where they provide additional rights and costs or where they come from a different legal tradition and therefore clash. New rules on the presumption of innocence put at risk in English law the adverse inference that

might be drawn if an individual fails to mention information that in certain circumstances might be reasonably offered, and also perhaps the obligation to supply police with the key to decrypt data.

The Green Paper on the application of EU criminal justice legislation in the field of detention, COM (2011) 327, brings EU involvement to counteract the highly interpretable issue of "inhuman and degrading treatment" into the prison service, an area which has proven costly and damaging even just at Strasbourg level. Incarceration is under the EU spotlight, in part because of a human rights interest in juvenile detainees and in official occupancy levels that are exceeded in 14 countries (in Italy by half), and also because of large numbers of non-nationals in jail (21.7% as an EU average for 2010, 12.9% in England and Wales). Given that the European Arrest Warrant is cited as an associated justification for legislation, there will be increasing pressure through the ECJ to apply any new legislation to the UK, including the development of the 2006 European Prison Rules which are currently not binding.

The money committed to DG Justice for 2013 runs to €218 million. While but a fraction of the CAP budget, this is still larger than the operating budgets of the DG responsible for running the Internal Market and the one that runs Competition combined. It also excludes the quite separate budget for DG Home Affairs, which runs at €1.3 billion, which is on a par with Energy and Health/Consumer Protection combined and has latterly increased by 40% during this spending cycle.

Internal Security

In 2010, the European Council published its draft Internal Security Strategy (5842/2/10). It first of all defines the action area to be as follows:

The concept of internal security must be understood as a wide and comprehensive concept which straddles multiple sectors in order to address these major threats and others which have a direct impact on the lives, safety, and well-being of citizens, including natural and man-made disasters such as forest fires, earthquakes, floods and storms.

This is not, however, simply prepping for the next time Vesuvius blows, or a repeat of the 1908 Messina Earthquake, since "Europe's Internal Security Strategy must exploit the potential synergies that exist in the areas of law-enforcement cooperation, integrated border management and criminal-justice systems." Fundamental to this is identifying and then protecting critical infrastructure. Astonishingly, the report also manages to include road traffic accidents as an area of common European concern that falls under this rubric, demonstrating how elastic it is and how it will be used in the future to justify EU activity within member states.

Central to the project is the sharing of intelligence, which in turn leads to a common EU database. Currently there are several. Not counting the IT systems of other DGs (Customs and Taxation for example manage 15 databases), for JHA there is EURODAC (asylum seekers' fingerprints), SIS II/III (Schengen, on criminal data and requests), VIS (Schengen visas), plus the Europol Information System, and the Prüm Treaty biometric database. An example still on the way is the mooted Passenger Names Record, intended to create a database of everyone flying into or out of the EU and such information as where they booked and how they paid.

Such a consolidated JHA database will also need bigger and more powerful EU agencies to handle it, which is already being lobbied for, and an EU law to govern its application under EU human rights principles.

Other aspects include common preventative strategies, in effect leading to the pooling of the UK's PREVENT schemes, which have already proved controversial in subsidising extremists against militants. However, the ambition is broader yet:

Co-operation should therefore be sought with other sectors like schools, universities and other educational institutions, in order to prevent young people from turning to crime. The private sector, especially when it is involved in financial activities, can contribute to the development and effective implementation of mechanisms to prevent fraudulent activities or money laundering. Civil society organisations can also play a role in running public awareness campaigns.

This policy will also be applied to giving the EU a security role specifically in the areas of energy shortage, pandemics, and ICT breakdown. It is further intended that the EU has a part in resilience amongst the general public; in other words, Brussels will be printing millions of booklets in future on what to do in an emergency and how many bottles of water you need to store.

More dangerous however is the threat to civil liberties. The idea is to provide far greater interoperability between all the EU databases and to allow this to be more easily transmittable across the member states. A Standing Committee on Operational Cooperation on Internal Security (COSI) has already been set up, linking in with the EU JHA agencies and Sitcen, the 24 hour EU intelligence analysis centre monitoring threats and which has the long term potential of becoming a federal intelligence agency. It may also not be entirely reassuring to know that the EU institutions already possess their own in-house embryonic counter intelligence staff.

An Internal Security Fund worth €4.6 billion over six years has been set up to accommodate the spending on IT, on top of the €800 million previously allocated, and also on top of the EU agencies' own budget over this period of €1.6 billion.[24]

EU Policing

The intergovernmental aspect of EU policing is currently based in Bramshill, for now at least. There are proposals to relocate the EU police training centre from its current site collocated with the British police training college. CEPOL is an EU agency, with a staff of thirty running 60-100 training courses a year. The common curricula cover a number of the areas of interest listed earlier, plus such issues as the Management of Diversity, and Police Ethics and the Prevention of Corruption.[25]

However, this approach is closer to the now-abandoned Third Pillar intergovernmental style. The way forward is through developing a federal agency, Europol. Europol currently has 800 staff and is growing at 5-10% a year. It needs the personnel as it is currently developing a First Response Network, an EU Bomb Data System (EBDS), the European Explosive Ordnance Disposal Network (EEODN), a Terrorism Finance Tracking Programme (TFTP), and a European Cybercrime Centre as well as such established activities as monitoring Hells Angels activities in the United States. Its officers enjoy diplomatic immunity which is more than FBI agents. However, they do not currently have local powers of arrest. The trigger will likely be European-level fraud and the work of OLAF, the EU's anti-fraud unit. Once a crime against the EU has been defined in law, OLAF will be the investigating federal unit; the door is then opened for the creation of other EU-level crimes that Europol can participate in investigating, and then increasingly become the lead.

Open integration has in contrast already occurred between several EU states with the establishment of the Eurogendarmerie, Eurogendfor.[26] This is a deployable police unit headquartered at EU level. It is intended to operate as a peacekeeping law enforcement force, in support of the civilian power or as an adjunct to a deployed military power. It has six principal contributing countries. The UK is not one of them as its officers are not routinely armed (except in Northern Ireland), which is a key precondition, and its county forces are considered too dissipated (which also suggests a long term threat to our police force structures as viewed from Brussels). The unit might conceivably be available for deployment in response to an Article 222 crisis referenced above, meaning it could be deployed in an EU state, though consent would be required.

Counter-Narcotics

Smuggling drugs breaches the Single Market. It impacts upon the fundamental rights of the end users, and in particular affects their health. Thus from a Brussels perspective there needs to be a common EU drugs policy.
Properly speaking it harms rather the victims of drugs-fuelled crime, and does so on a highly local level. But rather than purely focusing on ensuring that

police forces talk to each other and share intelligence, the Recommendation on the Prevention and Reduction of Health-Related Harm Associated with Drug Dependence sets out to justify the existence of a European Monitoring Centre for Drugs and Drug Addiction. The last EU Drugs Strategy (running to 2012) explains that the policy will operate:

'through the development and improvement of an effective and integrated comprehensive knowledge-based demand reduction system including prevention, early intervention, treatment, harm reduction, rehabilitation and social reintegration measures within the EU Member States. Drug demand reduction measures must take into account the health-related and social problems caused by the use of illegal psychoactive substances and of poly-drug use in association with legal psychoactive substances such as tobacco, alcohol and medicines'.[27]

In practice this has meant to date the EU funding programmes and handing over grants to civil society. In the process it has, however, supported a soft approach to drug abuse. Narcotic abuse is considered an illness, and its users victims. Marijuana use is barely more than a statement of fact – an approach perhaps necessitated by some member states recognising it as legal. The US tough love approach for addicts and zero tolerance attitude for pushers and users does not feature as part of the more 'complicated and mature' (and also failed) approach of the EU's social scientists. Given mixed approaches across the EU states, the EU itself has added an extra level of incoherence and hindered the prospect of introducing Michael Howard-style approaches in the UK to combating a real drugs problem.

Counter Terrorism

Considering nobody is interested in attacking the EU, an EU approach to combating terrorism is an anomaly. It adds an extra level of risk to civil liberties while generating new risks for the security of intelligence shared, meaning that it is less likely that the intelligence will be shared with the sharing state in the first place. In the UK's case, that puts at risk the country's special intelligence relationship with the United States.

The situation also ignores the detail that if an EU approach is needed because they cross borders, they also cross the external borders of the EU as well, so the solution needs to be bigger.

Regardless, the EU's Counter-Terrorism Strategy exists. Indeed, it mimics much of the UK's own domestic PREVENT and associated policies, and presumably those of other member states as well.[28] This includes such measures as "developing a non-emotive lexicon for discussing the issues" (including associating Islam with terrorism), measures to "develop a media and communication strategy to explain better EU policies", expanding biometrics to EU passports, developing compensation packages for terrorist victims, increasing contact between national victims' associations, six monthly

reviews of where the policy should go, and a role for the EU's Counter-Terrorism Coordinator.

The Commission considers its activities to be "holistic" and legitimate given the threat to the rights and freedoms of EU citizens, and more prosaically necessary given the free movement of people.[29] But in this context there is no limit to the EU's role. The EU Strategy for Combating Radicalisation and Recruitment to Terrorism gives as areas for policy involvement elements as varied as Community Policing, the internet, third party dialogue, prisons, schools, mosques, travel to training camps, and political dialogue.[30] The legal basis for EU activity in many of these is somewhat stretched. It is no coincidence that it was the same treaty article justifying these measures that was used and abused to force the UK to contribute billions to the first bail out of the Eurozone. For as long as the UK is part of the EU, Article 222 is a "rubber article" that leaks power to Brussels in areas literally of fundamental controversy and concern.

Big Picture Threats

The EU considers Home Affairs to go beyond the domestic, because JHA has a global role. The 2005 Strategy document for the external dimension of Home Affairs (14336/05) assigns the issues set out above a central role as part of the EU's foreign strategy, for instance as part of the European Neighbourhood Policy and of the TransAtlantic Dialogue. This promises a greater role for the EU in international fora.

A more immediate concern has proven to be the European Arrest Warrant (EAW). It is true that the mechanism has allowed UK courts to extradite criminals from other EU countries. However, this could have been achieved if the procedure had been drafted so as to allow some prima facie case to have been made to a reviewing national judge. Instead, British courts are powerless to prevent foreign judges taking away British subjects, to be locked away for what may be an indeterminate amount of time, while their case is investigated under a Napoleonic Code system that fails to presume innocence. Moreover, the triggers for extradition have been ludicrously varied, and the appetite for exploiting the procedure mixed.

People might be prepared to accept the risks were it not for a number of celebrated miscarriages that have already occurred. These have included an attempt to extradite a man who was at work in the UK on the day the crime took place in his home country; a conviction based on an unfair trial described as a "serious injustice" and "an embarrassment" by British judges and where a deportation had been subsequently turned into a jail sentence *in absentia*; a student who was deported to a grim Greek prison and spent 11 months there before being acquitted; an extradition to be held in jail for interview without charges brought; an attempt to extradite over an exceeded overdraft which had been repaid; and a twenty year old conviction of which the subject had been utterly unaware. Indeed, it took a number of years for the Arrest Warrant document to simply have a tick box added to it to indicate that the subject of

the warrant had been informed that an originating trial was taking place; in a number of cases the subject was simply out of the loop and had been unable to defend themselves.[31]

This is intended to be just the tip of the iceberg. The Commission has long harboured ambitions to create an overarching legal system to capture criminals who break EU-level law. An expert legal group was set up to this aim and drafted a document, which has now received a level of infamy, called *Corpus Juris*.[32] Regardless of the reputation, what the Green Paper actually says is that there are a number of offences that should be treated as EU-level crimes. These are:

> Fraud, or grossly negligent mismanagement of the EC budget
> Rigging markets
> Money laundering and receiving
> Conspiracy "harmful to the financial interests of the European Community"
> Corruption of national or European officials
> Officials who misappropriate funds
> "Abuse of office" that damages the financial interests of the EC (this has a rather broad remit and covers activities that might be perfectly legal and indeed sanctioned by national ministers, like withholding EU payments such as Margaret Thatcher once threatened)
> Disclosure of financial secrets (this could cover whistleblowers)

This would create the first common European crime of the "Eurofraud". The maximum tariff is five years in prison. Individuals can be fined according to the continental system of "day fines" based on income at up to 365 days of €3,000 per day, or up to €10 million for institutions. A ban from public office of up to five years could also be applied. In the public interest, the document says that the conviction could be press released. Aggravating circumstances however can extend these thresholds to seven years in jail, 540 day fines, and €15 million corporately.

The EU Investigation Order Directive 2010/0817 (COD) and related European Arrest Warrant Council Framework Decision 2002/584/JHA

These draft proposals, which the UK opted into in 2010, include plans for member states to order police and criminal investigations within other member states regardless of whether a certain act is a crime in that member state. This development is a massive transfer of power without a referendum.

Giving other EU member states the power to direct British police forces as agents of foreign courts places a huge burden on our police whilst not ensuring we can hold the decision makers in other EU member states to account. Rights groups such as Statewatch and Fair Trials International have

voiced strong concerns about the EIO, calling it “a measure that has serious implications for stretched police forces and civil liberties”.

This is in addition to the existing European Arrest Warrant (EAW) legislation, a law intended to secure the conviction of terrorists and cross-border criminals which, sadly, has infringed individual liberties and gone way beyond its intended scope. The EAW regards all EU legal systems as equally good and British judges are denied the opportunity to look at the ‘prima facie’ evidence, normal under former extradition processes.

For example, in June 2011 Andrew Symenou, who had been extradited to Greece under the European Arrest Warrant and held for a year in a Greek prison prior to trial, was found not guilty of the charges he was extradited on. The lack of evidence required for extradition will be likely to give other EU governments carte blanche to order investigations in the UK, with no safeguards by British judges to protect British people from overzealous action.

Key to this process is the setting up of a European Public Prosecutor (EPP). Unlike in the British legal systems which separate the roles involved in cases, the EPP is assigned the role of investigator, prosecutor, committer to trial, presenter of the prosecution case, and executor of the sentences. There is to be a European Director of Public Prosecution (EDPP) based in Brussels, with delegated prosecutors (EDelPPs) in each national capital or home of the relevant court. The EPP is considered “indivisible and inter-dependent” (Article 18.4) in that all its agents act as part of a single unit and count as interchangeable. Each EDelPP is under an obligation to assist his fellows; National Public Prosecutors are to be under an obligation to assist the EPP.

Notably, this includes an obligation to detain and extradite their nationals, which is precisely what has been already sanctioned through the EAW. The Corpus Juris document describes this as “particularly innovative”, which is an understatement. As the explanatory text explains, “This has the effect, at the level of the European Union, of suppressing the concept of extradition for offences defined in the *Corpus.*”

Naturally, if any jurisdiction issues arise, the ECJ decides.

These officials are intended to be independent. However, the EDPP is to be proposed by the Commission; and both the EDPP and EDelPPs are in fact to be nominated by MEPs, who can trigger their sacking on what are potentially loosely-interpretable grounds. Such ties are correspondingly likely to colour the successful candidate’s vision of European integration.

Very significantly, the EPP is obliged to consider convictions his suspect has already received from his national courts for the same crime. However, while national courts cannot retry an individual convicted by the EPP, the EPP is merely under an obligation to “take into account” the judgement of the national judges. In essence, this overturns the ancient legal tradition of *ne bis in bidem*: the concept that someone cannot be tried twice for the same effect.

Critically, the UK rules on pre-trial detention are also changed. Rather than a matter of days as set out under the ancient principles of *habeas corpus*, the suspect can be detained for up to nine months while being investigated, but without the formal charge.[33] Given the controversies raised over the detention of terror suspects even with specific court orders for 90 days, the implications are tremendous.

There is also the threat to the jury system. The paper also declares that the case should be heard by courts which "must as far as possible consist of professional judges, specialising wherever possible in economic and financial matters." There have been in some movement in recent years to introducing such specialist courts in the UK on the back of expensive mistrials involving juries covering extremely complicated financial cases; but these cases are of a different order and this obligation does challenge the traditional English use of twelve good men and true.

The process also establishes a new legal document, the "European Interrogation Report", and a new testimonial called the "European deposition". A "Judge of Freedoms" will be responsible for checking and authorising the EPP's powers.

This document remains a Green Paper and as such a set of proposals, but it is one that consistently resurfaces and remains the preferred option that MEPs cite as the next step. The Commission continues to support a European Public Prosecutor's Office (EPPO). Indeed, Manuel Barroso's third "State of the Union" address in 2012 explicitly called for its establishment and indicated a specific proposal was in the offing.[34] Article 86 of the TFEU authorises such an office to come into existence in the future, so there is a direct legal basis already in existence. Correspondingly, these are not empty concerns.

<u>EU Fraud</u>

This is not a book about how public finances disbursed through the EU have been misspent. For starters, that would have to be a weighty hardback periodical. The reader will already be familiar with many infamous cases that have reached the pages of the press. We do not therefore need to repeat them here.

We do, however, recommend to interested parties that they review the output of the European Court of Auditors, which is responsible for bringing into the public domain many of the most egregious cases, and whose reports are set out on its website.

Genres of Waste and Fraud

1. ORGANISATIONAL WASTE
   Administrative

Administrative costs, such as bids by universities that cost more than the

grants, or the existence of a second seat for MEPs

Strategic Failure

Cost-benefit failure, i.e. building items with little appreciable return such as observation towers in the Brandenburg woods

Failed incentives, i.e. investments where money would have been spent anyway, such as where farmers admit they would have built fences regardless of receiving any grant

Dysfunctional Planning, such as the border bridge over the River Prut which had a road running to only one side

Frills

Areas that are not key or even necessary, such as money spent on PR for the EU

Duplication

Unnecessary waste, such as the 6,000 wasted man hours for hired-in interpreters, or EU agencies duplicating the work of national counterparts

2. FRAUD

Local fraud

Organised fraud at a national level, such as half of Slovenia's suckler cows found to be imaginary

Ad hoc petty fraud with local grants being redirected locally, such as hiring out grant-aided farm machinery or building Olympic-sized swimming pools as tourist attractions

EU-level fraud

Fraud within the EU institutions, such as the delegation that bought cars from interest on accounts, or instances of nepotism/expenses fiddling/insider dealing

3. POLICY BURDENS

Extra costs

Burdens that arise due to

Direct regulatory and administrative costs of new laws, such as health and safety laws

Gold plating that is added onto EU laws by national civil servants

Policy consequential, i.e. effects coming from the policy itself, such as the impact of fisheries discards on the biomass, and by extension the industry and the coastal economy

Direct subsidy costs, i.e. cost to the taxpayer to support an industry

Secondary subsidy costs, e.g. the rise of food prices at the till due to CAP protectionism

From *The EU in a Nutshell*, Harriman House, 2012

Part of the issue lies in its scale. The Court of Auditors persistently refuses year after year to sign off the accounts for over 90% of the EU budget owing to high levels of irregularities of one form or another. 2013 was the nineteenth year in a row. The funds in question currently amount to around 4.8% of the budget – nearly £5.7 billion. It is a significant amount. The best that can be said is that is down from over 7% in 2006. But it is rising again after a low point in 2009.

In eight EU countries, there were over 5% of people interviewed who said that they had been invited to pay a bribe over the preceding year. So it is quite fair to suggest that if the UK is increasingly to pool competences within the EU; to surrender British safeguards; to rely on the efficiency and even handedness of foreign officials and to depend on good faith rather than domestic legal safeguards, participation in the EU will have a negative effect on good government in the United Kingdom and other countries with a tradition of good government. The more the UK 'pools its sovereignty' within the EU, it is inevitable the lower the baseline level of standards will become.

Within the EU budgetary context, we should not be surprised if CAP money goes wandering in the Mediterranean since it is in no-one's interest to stop it, and indeed in some cases can be very harmful to the individual's health. Italian mafia groups, Balkans organised crime syndicates and the Provisional IRA are all amongst the groups that have benefited in the past. The capability and intent of central and local government to intervene varies massively.

Britain's JHA Opt Outs

The UK enjoys, as earlier stated, the right of opting out and opting into various EU proposals under Justice and Home Affairs. Thanks to the Stockholm Process and the shifting of JHA affairs into the EU itself, it now has the one-off right again to opt out of what it has to date already signed up to. What is not opted out of, the UK will forever remain signed up to.

This is of course a major opportunity. There are many areas where opting out would solve concerns without the UK having to leave the EU to rectify them. That still, however, leaves certain key problems:

- It relies on the Coalition Government agreeing to take this radical step, and the most likely end result is a fudge or compromise
- Future Europhile UK governments could opt back into them again at any stage, but this time for good, for as long as the UK is in the EU
- The ECJ may still consider that certain agreements carry crossover implications that should nevertheless be implied by the British Government when running policy

The agreements will be used to inspire other legislative proposals from the Commission and European Parliament
New proposals will still keep coming

The list needs to be submitted before the end of May 2014, and so it is too soon to judge how sweeping the rebalancing will be. The end result will need careful audit, but even if significant will not outlast the election of a government, however briefly, that is prepared to surrender them again. Worse, this time the ECJ will have a crucial role in reviewing how they are run.[35]

Conclusion

Some threats do cross or take place beyond national frontiers. But there is nothing new in this, as a review of the history of nineteenth century anarcho-terrorism, Balkan extremism, or indeed Fenianism for instance shows. Some threats today reach out from far beyond the EU's own external borders and show how limited in a global setting a single European system can be, and the added dangers that breaking down the compartments of national borders can bring.

The attempt to build a European criminal area is an inherent part of the process to establish a Europe without borders. It follows that if trade can pass freely, so too must citizens, and so too can criminality.

The EU response requires in the first place the direct cross-application of the jurisdictions of other member states, whatever their respective limitations in practice; and in the longer term the establishment of federal institutions and agencies to manage policing, intelligence gathering, border controls, and much of the criminal law system (and with it, the harmonisation of the more controversial parts of criminal law). Meanwhile, European citizens are to have fundamental common rights, defined centrally, protected communally, and superseding national law. This is a gradual process, one in which any legal system that develops through case law unfortunately naturally excels.

For as long as the UK remains a part of the European Union, and Brussels and London deal in anything more than the simple business of tariffs, our laws and protections – first outlined by Magna Carta - will be under constant threat from a foreign and overpowering legal force. Ancient Common Law is being diluted by European legislators acting on the whims of a season.
The Law Lords, once bowing to the lessons of centuries of English precedent, are no longer masters in their own domain.

Note: These MEP Briefing notes are provided for general information about the EU for constituents and UK citizens and draw on published and unpublished or original research.

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[1] The issue is explored, along with the costs, in considerable detail in the TPA paper *Britain and the ECHR*

[2] For much of the history of the Communities there have been two main parallel treaties. The TEC is the treaty covering the Communities; the TEU the Union. The former historically has covered the intergovernmental 'pillars' and the latter the elements that are more integrated.

[3] Annex IV, Conclusions of the Cologne Council, 4 June 1999

[4] Press release by rapporteur Andrew Duff MEP, 14 November 200
[5] A useful review of the weaknesses can be found at http://www.cpag.org.uk/content/eu-charter-fundamental-rights-dog-hasn%E2%80%99t-barkedyet, by the Child Poverty Action group which is interested in right to reside cases.
[6] http://www.theparliament.com/latest-news/article/newsarticle/eu-assigning-more-importance-to-fundamental-rights/
[7] http://eeas.europa.eu/policies/eu-special-representatives/index_en.htm
[8] It was in fact very successful, but the Court noted the volume of material already in the public domain, and decided to modify future methodology.
[9] The document is on the National Archives website at http://www.nationalarchives.gov.uk/ERORecords/HO/421/2/P2/CCPD/DPARA.HTM
[10] http://danskprivacynet.files.wordpress.com/2008/11/handbook_en.pdf
[11] http://p10.hostingprod.com/@spyblog.org.uk/blog/2009/03/the-data-retention-ec-directive-regulations-2009-come-into-force-on-6th-april-20.html covers the privacy issues in brief. Our concern lies less with law enforcement agencies and more with other authorised agencies, which have increasingly included quangos and council officials
[12] See Recital 7 of the draft amending Regulation
[13] http://plc.practicallaw.com/7-518-1997
[14] COM 2012(11)
[15] http://www.qubitproducts.com/company-news/nma-qubit-research-shows-eprivacy-directive-could-cost-uk-economy-10bn-if-not-implemented-correctly/
[16] *Computer Weekly*, 19 February 2013
[17] This followed the Kalanke case which ruled that positive discrimination had been too restrictive. The Commission correspondingly saw this as permitting the principle but not the specific methodology.
[18] *Legislative measures to promote equal pay (Impact Assessment)*
[19] See *EU Gender Equality Law*, Susanne Burri and Sacha Prechal, European Commission, 2008
[20] http://www.thisismoney.co.uk/money/pensions/article-2250523/Gender-equality-rules-cost-men-10k-annuity-income-retirement.html
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[32] http://ec.europa.eu/anti_fraud/documents/fwk-green-paper-corpus/corpus_juris_en.pdf
[33] Article 25quater explores the explanation of charges likely to be facing the accused who is now in detention without setting out the process of formally charging the individual, which is different.
[34] Confirming the key DG's intentions set out here: http://ec.europa.eu/governance/impact/planned_ia/docs/2013_just_007_eppo_for_protection_of_eu_financial_interests_en.pdf
[35] In this context we strongly recommend Batten/Stroilov's *Inquiry into the 2014 'opt-out' of pre-Lisbon Police & Criminal Justice measures*, a 2012 submission to the House of Lords Select Committee on the European Union. It also usefully cites a number of other cases of EAW controversy.