EU Criminal law and the UK: where do rights come in?
Challenges from a Scottish perspective

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(A shortened version of this presentation was given at a joint UKAEL/Glasgow University School of Law Workshop on 13th May 2011)

Ladies and Gentlemen,

I will, as you would expect, preface this talk by saying that no expressions of opinion which may emerge are to be taken as representing the views of the Scottish Government, or the Scottish Law Commission (except where specifically mentioned). For better or for worse, it is all my own work!

I would like, this morning, to look briefly at how the position of Scots criminal law as a free standing, independent system, reflecting the customs and attitudes of the people of Scotland, is liable to be affected by the various constitutional changes which have taken place before and after the coming into force of the Treaty of Lisbon. But that Treaty is only the latest in a series of measures which have affected our criminal law, and how it is defined. The most obvious milestones are on the slide.[1] I suppose I should add two riders. The first is that my talk is focussed on criminal law. The engagement of the European Union in civil matters may well be very beneficial. You will be aware that the European Commission is actively pursuing an optional instrument in relation to the draft common frame of reference. That project, if it comes to fruition, will have, over a period, the potential greatly to facilitate commerce between businesses across Europe. The second is that while criminal law has

[1] Act of Union
European Convention on Human Rights
European Communities Act 1972
Scotland Act 1998
Human Rights Act 1998
Treaty of Lisbon 2009

historically largely escaped the formal attention of the European legislator, that has changed, is changing, and will change more in the future.

I intend to talk more about the influence, present and future, of European law, than about the past, but it is important to set modern developments into a historical context. So I start with the Act of Union.

The Act of Union did not interfere with the substance of Scots criminal law. Indeed, it included a package of measures to ensure the continued preservation and independence of our system. First, it provided that "no alteration be made in Laws which concern private Right except for the evident utility of the subjects within Scotland".

Second, it provided for the continuation of the Court of Justiciary in its then form subject to any legislation which might thereafter be passed by the new Parliament.

Third, it provided that there should be no appeal from the courts in Scotland to any English court. The appeal in civil cases to what eventually became the Appellate Committee of the House of Lords was seen, before the Union, as an appeal to Parliament, but there had never been provision for an equivalent appeal in criminal matters. After the Union, probably from the case of Bywater in 1781, and certainly by the case of Mackintosh, in 1876, it was clear that no appeal lay from the High Court of Justiciary to the House of Lords.

That did not, of course, prevent the new Parliament from altering the law of Scotland in relation to criminal matters. A certain amount of harmonisation took place. In 1708, the new Parliament passed "an Act for improving the Union of the Two Kingdoms", which did several interesting things.

First, it provided that with effect from 1st July 1709 the English law of Treason – and only that law – was to apply in Scotland. It accordingly reduced the status of various Scots treasonable offences to mere capital crimes. Whether this made much practical difference at the end of the day, at least to those convicted, is not clear. It also provided that the penalties for treason in Scotland were to be the same as the penalties in England, and made some new provision as to the procedure to be followed.

The Act did not, however, condescend upon what the English law of Treason actually **was**, or what the penalties were for breaking it. Both of those pieces of information might have been thought to be for the utility of the subjects in Scotland. Perhaps an early example of an ambulatory reference?

But it was not all bad news. Whatever argument there might be as to whether the provisions as to treason were "for the evident utility of the subjects in Scotland", there can be little doubt that section 8, which provided that "no person accused of any capital offence or other crime in Scotland shall suffer or be subject or liable to torture", met that test. And it is to be expected that there was a rumble of applause among the judges at the provisions of section 11, which stiffened up the law about murmuring of judges by providing that "if any person shall slay any of the lords of session or lords of justiciary sitting in judgment in the exercise of their office within Scotland that the doing thereof shall be construed and adjudged to be high treason."

After that first fling the Parliament of Great Britain stopped harmonising criminal legislation. You will be relieved to hear that I do not intend to go through all the legislation of the eighteenth and nineteenth century. The overall impression is of Scots criminal law developing at its own pace and

without outside pressure. Certainly, from time to time changes were made. The Criminal Procedure (Scotland) Act of 1887 is an obvious example. But they tended to be done in response to pressure from Scotland – the 1887 Act was the brainchild of JHA McDonald, the then Lord Advocate.

That is something which is worthy of remark. This was a period when essentially English institutions were being imposed upon very large numbers of the world's citizens, usually in place of their existing ways of doing things. Nevertheless, a United Kingdom Parliament with some of the most centralised, executive-friendly decision making processes in the world allowed really quite different practices to be followed within its own immediate purview.

The reasons for that tolerance are, on one level, not hard to find. First, there was and is a strong feeling among practitioners in Scotland that criminal law is essentially a product of the common law, best developed by the judges. Common law is good, and statute law – and in particular codification – is bad. Second, legislative time at Westminster, after the essential matters have been allowed for, is allocated on a departmental basis, within the general framework of the Government's manifesto commitments and political priorities. In such a system the very broad range of policy matters for which the then Scottish Office was responsible meant that its choices were more difficult than those of other departments.

That said, there is no evidence that necessary – as opposed to desirable – Scottish legislation was prevented from reaching the statute book by the limitations of the Westminster system.

But, perhaps the most fundamental reason for the lack of interference with the way in which Scots criminal law worked was that criminal law was simply not

seen as affecting the major aims of creating a single unitary state. It did not, like a single currency, a single system of weights and measures, and common access to markets, interfere with the proper operation of Great Britain.

Be that as it may, the picture, from 1707 until devolution, was that Scots criminal law was allowed to develop largely as a matter of common law, but with as much statutory intervention as Ministers in Scotland thought it sensible to put before Parliament.

The European Convention on Human Rights and the United Kingdom's entry into the European Community did not have much immediate effect on Scots criminal law. The Convention tended to reflect the rights accorded to citizens in Scotland in any event. And in 1972 the European Community had no major influence on criminal matters.

Internally, since devolution, the Scottish Parliament has been able to do more. There have been a series of useful reforms in the procedure of the different levels of the criminal justice system, as well as some welcome clarification of the law in matters such as sexual offences. (That was a plug for the Scottish Law Commission!)

With regard to human rights, the principles of our criminal law, like those of English law, informed the drafting of the European Convention on Human Rights. And now the European Court on Human Rights usefully plays back to us modern interpretations and developments of those principles. I do not include the *Salduz* decision in that category.

Finally, on this part, and by way of general comment, I would reiterate that no-one seems to have found that the lack of uniformity of criminal law throughout

Great Britain stood in the way of the unity of the Kingdom or posed any obstacle to the freedom of movement of persons, goods or capital, or to the freedom of establishment.

European Law

I turn to the effect of European law. I am of course conscious that I will, in the space of a few minutes, be trying to do justice to a subject upon which books could be and indeed have been written; so my choice of examples will be somewhat eclectic.

I start with one or two general observations as to the effectiveness of the institutions in relation to legislation. The institutions are the Commission, the Council, the Parliament and the Court of Justice. All are, of course, committed to the aims and ideals of the Union. But the Commission and the Court are purely European Union bodies, while the Council and the Parliament owe duties, and are responsible also to, the electorates which have put them in place. In legislative terms, the Commission has an almost exclusive right to initiate legislation, while the Court has an absolutely exclusive right to interpret it. The Council and the Parliament, both of which are, as I have said, bodies subject to political influences of one sort or another, are sandwiched in between. It is possible that, in extreme cases, the Council's position will be an attempt to arrive at a welding together of as many points of view as there are Member States. On the other hand, I am told that, perhaps surprisingly, the Parliament generally manages to adopt a firm policy line in relation to most pieces of legislation, and to maintain it throughout the negotiation process.

The net effect is that the legislation is conceived by a body which knows precisely why it is there, adjusted and amended by two further bodies, one at least of which is likely to be singing from a variety of song-sheets, and interpreted by another body with a clear idea of its functions and priorities and,

essentially, no formal external limit on its powers. Further, while there are no doubt various ways in which pressure can be placed on the European Commission, once legislation has been made by the Council and the Parliament, it is unrealistic to envisage the possibility of the Member States co-operating to reverse a decision of the ECJ as to what the legislation means.

Against that background, I would like to look first at the peripheral impact of the European Union on our criminal law and procedure, second, at what I might describe as a "creeping competence", in the sense that we can now in some circumstances be ***required*** to use criminal law to implement European obligations and, third, and most importantly, at the implications of the emergence of a clear Union competence in relation to criminal law and procedure.

General impact

There was nothing in the treaties as originally entered into which mentioned criminal law, and that position still maintained when the United Kingdom joined in 1972. That subject was simply outwith the scope of formal Community activity. But, even immediately after our entry in 1972, there were various ways in which our arrangements for prosecuting crime might be affected.

For example, we tended to enforce our implementing measures by means of the criminal law: that had – and has – implications for our freedom of manoeuvre in these matters. One of the most cherished principles in the enforcement of the criminal law in Scotland is that the Lord Advocate has and exercises an independent discretion to prosecute – or not to prosecute – in the public interest. And in this context the "public interest" is very widely defined. The Lord Advocate's independence is recognised by the courts, and has been frequently re-affirmed. Of course the Lord Advocate, as a Minister exercising

powers in the public interest, is accountable to Parliament – previously the Parliament at Westminster and now the Scottish Parliament. But Parliament itself exercises a kind of self-denying ordinance in that regard. Only in the most extreme circumstances will the Lord Advocate be asked to comment on a decision to prosecute or not to prosecute, or on the reasons why a particular prosecution has not succeeded.

No doubt that discretion is as unfettered today as it was before we joined the Community in 1972. But the existence of a discretion does not mean that it is only the general public and the Parliament which have a legitimate interest in the Lord Advocate's exercise of his or her prosecutorial functions. Any public body whose functions include the investigation and, in England, the prosecution, of offences has an interest in whether particular offences, or kinds of offence, are prosecuted. The Financial Services Authority is only one of many examples. In a recent Court of Appeal judgment[2], since affirmed by the Supreme Court[3], the Court held that the FSA's powers of prosecution were not limited to the express powers conferred upon it by statute. It also enjoyed all the usual English powers of private prosecution. This reads strangely to Scottish eyes. But, if a similar case were to occur in Scotland, it would be idle to say that the FSA did not have a legitimate interest in whether or not a prosecution might take place, however much the final decision was reserved to the Lord Advocate

Accordingly, because we tend to use the criminal law to enforce Community obligations, we have effectively added the European Commission to the list of stakeholders to whom our prosecution system, and the Law Officers, are accountable. If, for example, it were thought that we were not enforcing the

[2] R v Rollins; R v McInerney [2010] 1 Cr. App. R. 14.
[3] [2010] UKSC 39

Common Fisheries Policy adequately, it would not be a sufficient answer to complaints from Brussels that the Lord Advocate had an untrammelled discretion as to whether or not to prosecute.

I can give a concrete example of this in operation. You will no doubt be familiar – through advertising if not by personal experience – with a nutritious spread known as "I can't believe it's not butter". It is one of a large number of such products, which look like butter, taste as good as, if not better than, butter, but do not cost as much to produce, and are accordingly said to be much butter value for money. Well, when "I can't believe it's not butter" was first produced, the caring, paternal European Commission were concerned that the docile and gullible British public might be duped by its name into thinking that it actually **was** butter, and they wanted the United Kingdom Government to prosecute the producers. Common sense eventually prevailed – people spent some time inventing new names for the stuff, each to be used as the previous one was banned, to the accompaniment of vast amounts of free publicity in the outraged media. But arguments about the independence of the prosecutor did not cut much ice.

Second, the Court has intervened when rules of criminal law have an adverse effect on some fundamental principle of community law. When Mr Cowan was beaten up in Paris, the French Government denied him compensation for the injuries he sustained because he did not qualify under their criminal injuries compensation scheme. He complained to the Court, and the Court held that this was contrary to the prohibition of discrimination laid down in what was then Article 7 of the EEC Treaty. The fact that Mr Cowan's disqualification was part of French criminal law was irrelevant.[4]

[4] Cowan v Tresor Public [1989] ECR 195

Third, we have the example of the Technical Standards Directive. This Directive was designed to prevent Member States from subverting the aims of the Community by underhand regulations as, for example, by providing that electronic goods could be sold in that particular state only in boxes of a particular composition of cardboard, that being a composition which no other state used. By requiring the standard in question to be advertised around the Community, the Directive strangled this sort of measure at birth.

In order to make the Directive work, the Court has taken a strong line as to the effect of non-compliance. In particular, in the case of CIA Security International[5] at paragraph 54 the Court said that:

"Directive 83/189 is to be interpreted as meaning that breach of the obligation to notify renders the technical regulations concerned inapplicable, so that they are unenforceable against individuals."

The Court therefore held that individuals may rely on those provisions in proceedings before the national Court which must accordingly decline to apply a national technical regulation which has not been notified in accordance with the Directive.

This has certainly had an effect upon legislative practice in the United Kingdom. You will be aware that Scottish legislation on so homely a subject as the length of knife blades has been notified under the Directive. And, before we consolidated the legislation in relation to salmon fishing in Scotland we notified the provisions concerning the use of gaffs[6]. We, like other legislatures, try to avoid problems.

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[5] Case C-194/94

[6] "An instrument for catching fish consisting of a large hook fixed to the end of a handle. It can only legally be used as an auxiliary to rod and line fishing, to land a fish already caught." (T.W. Beak: Salmon and Trout Fishing Law of Scotland, 1954, at page 32.

But occasionally they do occur. In the case of Lemmens[7] in 1998, Mr Lemmens, rather engagingly, "noted" that the breath testing apparatus which the Dutch police had used to determine that he was over the safe driving limit had not been notified in accordance with the Technical Standards Directive, and "wondered" what the implications of that failure would be for his case.

The Netherlands government's plea that this was a matter of criminal law which fell outside the sphere of community law was summarily dismissed. On the other hand, the Court did not want to undermine the operation of drink-driving legislation in the Netherlands. They came to a somewhat Jesuitical conclusion at paragraph 35 of the Judgment –

"While failure to notify technical notifications, which constitutes a procedural defect in their adoption, renders such regulations inapplicable in as much as they hinder the use or marketing of a product which is not in conformity with them, it does not have the effect of rendering unlawful any use of a product which is in conformity with regulations which have not been notified."

The other case which I should mention, in rather more detail, is the case of *Regina v Nicholas Budimir and Nicholas Rainbird* and the related case of *Interfact Ltd v Liverpool City Council*.[8] These cases concerned the enforceability of the Video Recordings Act 1984 which, broadly, seeks to control the dissemination of pornographic videos. In 2008 the parties had been found guilty of a number of offences under the Act. In 2009 the Government announced that offences under the 1984 Act and the related regulations were technical regulations which should have been notified under the Technical Standards Directive. Prosecutions then in progress were halted and no further

[7] Case C- 226/97
[8] [2010] EWCA Crim. 1486

prosecutions were undertaken pending the passage of legislation which had been properly notified in terms of the Directive.

The convicted parties applied for leave to appeal out of time. It was agreed by all concerned that, had they taken the point as to non-notification during their respective trials, the regulations could not have been enforced against them. The question was whether that lack of enforceability should be taken as requiring the Court to allow a late appeal. The relevant European right was identified as the right to say that the statute was unenforceable.

The application failed. A strong bench headed by the Lord Chief Justice pointed out that it had certainly been open to the convicted persons to take the point as to the unenforceability of the 1983 Act during their trial. If the point had been taken then the prosecution would not have proceeded. But it had not been taken, and the principles of legal certainty, which were recognised by the European Court of Justice, did not require special measures to be taken to enable European rights to be recognised. The national rules in play in this case did not render ineffective the protection of Community rights.

The Court also drew attention to the case of *Barth v Bundesministerium fur Wissenshaft und Forschung*[9] in which the ECJ had similarly respected national rules as to time bars, even where the late application was the result of a failure by the Member State to comply with Community obligations. Professor Barth, an Austrian, had been employed as a professor first in a German university and then in an Austrian university. The relevant Austrian legislation expressly provided that long service increments were payable only to those who had served fifteen years service as a professor in an Austrian university. That provision of Austrian law was found to be incompatible with Community law.

[9] Case 542/08

Once that had been settled, the Professor applied for the increments, but was met with a plea of time-bar. The Court of Justice held that reliance on the limitation period did not infringe the principle of equivalence or the principle of effectiveness.

Finally, the Lord Chief Justice drew attention to decisions of the European Court of Human Rights with regard to the retrospectivity of judgments of that Court and of national Constitutional Courts. In the case of *Marckx v Belgium*[10] the European Court of Human Rights said:

> "58. …… The principle of legal certainty, which is necessarily inherent in the law of the Convention as in community law, dispenses the Belgian state from re-opening legal acts or situations that antedate the delivery of the present judgement. Moreover, a similar solution is found in certain contracting States having a Constitutional Court: their public law limits the retroactive effect of those decisions of that court that annul legislation".

A similar approach was taken by the European Court of Human Rights in the later case of *Walden v Liechtenstein*[11].

I note in passing that the Canadian Supreme Court was asked in 1985 whether the fact that the Manitoban legislature had failed, since 1870, to translate its legislation into French, rendered that legislation of no force and effect in accordance with the relevant constitutional legislation[12]. The Supreme Court confirmed that that was the case, but effortlessly went on to "deem" the legislation to be effective for the minimum period necessary for translation, re-enactment, printing and publishing. So that was all right. AP Herbert would have been proud of them.

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[10] [1979] 2 EHRR 330.
[11] Decision of 16th March 2000, No. 33916/96.
[12] Re Manitoba Language Rights, [1985] 1 S.C.R. 721

That calm arrogation of authority to fill a *lacuna* in the law stands in some contrast to the care taken by our Supreme Court, in the recent case of *Cadder*[13], to recognise the limits of its competence. I note, finally, that the appellants in the *Budimir* case were refused leave to appeal to the Supreme Court, and the case is not therefore going to find its way to Luxembourg.

Creeping competence

I now turn to areas where it might have been thought, upon an examination of the Treaties, that there was no room for the European Court of Justice to exercise a jurisdiction in relation to criminal matters, but where it has done so anyway. The ECJ has frequently stated that "as a general rule, neither criminal law nor the rules of criminal procedure fall within the Communities competence". The difficulty is that it normally makes those statements in cases where it is about to decide that the Community does in fact have competence in relation to criminal matters. This is what happened in the case of *Commission v Council*[14], in 2003. The background to the case concerned the enforcement of various environmental requirements by means of criminal sanctions. The Council, acting under Title VI of the then Treaty, had unanimously agreed a Framework Decision to put such sanctions in place, on the basis that it would not be competent to include such provisions in a Directive under Article 175 EC. The Commission challenged that decision. The Court said:

> "As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence--------However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers

[13] [2010] UKSC 43
[14] Case C-176/03

> necessary in order to ensure that the rules which it lays down on environmental protection are fully effective"[15]

A similar point was made in a further challenge by the Commission against the Council two years later[16]. So it would seem that our freedom, which we have rarely exercised, to enforce Community obligations by means of administrative rather than criminal sanctions may be about to be curtailed.

That is unfortunate, because, in the course of an investigation into Criminal Liability in Regulatory Contexts, the (English) Law Commission are considering a number of propositions, including one to the effect that unless conduct is really deserving of criminal sanctions, it should be enforced by administrative, civil means rather than by the criminal law; and that any truly criminal offence should be created only by primary legislation. You will be aware that successive UK Governments have used their powers under section 2 of the European Communities Act 1972 to create new offences in relation to EU law, and might be thought not to want to have to adopt a practice of using primary legislation for that purpose. But time will tell.

I turn now to the legislative activity of the European Union. There has of course been quite a lot of legislative activity in the past, before the Lisbon Treaty came into operation. You can see some examples – it is not a comprehensive list – on the slide[17].

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[15] At paras. 47, 48.
[16] Case C – 440/05
[17] Use of previous convictions: 2008/675/JHA
Protection of personal data: 2008/977/JHA
European Evidence Warrant: 2008/978/JHA
Records of previous convictions: 2009/315/JHA

But legislative competence in criminal matters is now based upon the provisions of Title V of TOFEU, which deals with an area of freedom, security and justice.

The opening part of that Title contains some fairly wide propositions. It enjoins respect for fundamental rights and the different legal systems and traditions of the Member States. It requires the Union to endeavour to ensure a high level of security through measures to prevent and combat crime. It requires the Union to facilitate access to justice, in particular through the principle of mutual recognition of judicial decisions and so on. There is plenty of room there for imaginative development of Union activity, and we will hear about one aspect of it, the European Arrest Warrant, later today.

Article 69 helpfully provides that national parliaments will ensure that any proposals made will comply with the principle of subsidiarity, in accordance with the subsidiarity protocol. It is of course early to say, but it may be that the principal effect of that provision will be to make it even more difficult than it is at present to mount a legal attack against European legislation on the ground that it does not comply with the principle of subsidiarity. It will be interesting to see how the national parliaments deal with their new responsibilities under that protocol. It is another part of the new Treaty arrangements where it is possible to speculate across a wide range of possible outcomes. Perhaps we will see a system of rapid responses building up across Europe, with national parliaments organising early, authoritative debates upon critical issues. Perhaps they will liaise efficiently within the appropriate timescales, taking account of one another's views. Perhaps they will develop an ability to create blocking minorities, or majorities, to oppose unpopular legislation. Perhaps.

Finally, there is further genuine innovation in Article 76, which enables a quarter of the Member States to propose measures in relation to judicial co-operation in criminal matters, and in relation to police co-operation. This is the first example of any body other than the Commission having the right to initiate legislation.

But, overshadowing all these developments, what is now certain is that Article 82(2) confers a clear, free-standing competence in relation to the rights of individuals in criminal procedure and indeed in relation to criminal procedure more generally. It begins "To the extent *necessary* to facilitate [various things] "in criminal matters having a cross-border dimension, the Parliament and the Council *may*-------establish minimum rules. Article 83 provides, in relation to particular areas of criminal activity, not only for harmonisation but also for approximation.

Measures proposed under both Articles are subject to the right of any Member State which considers that the measure concerned would affect fundamental aspects of its criminal justice system to request that the Directive be referred to the European Council. If consensus cannot be reached there, then the measure can be adopted by those states which want to play under the variable geometry provisions in the Treaties. This is, for those of you who are as old as I am, a sort of statutory Luxembourg Compromise.

Legislative activity under Article 82 builds upon the Resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, adopted by the Council on 30th November 2009. You can see the matters dealt with on the slide[18].

- [18] Translation and Interpretation
- Information about Rights and Charges

The first Directive, on the right to translation and interpretation in criminal proceedings, has already been adopted. So, we now have a Directive requiring Member States to provide a minimum level of translation and interpretation services to persons accused of crimes. However unnecessary it may be, in terms of securing rights which would not otherwise be available in Scotland, it is unlikely to require any alteration in the procedures currently used in Scottish proceedings.

But the same cannot be said of the next proposal, which deals with the right to information in criminal proceedings, and which is worth examining in a little more detail.

In recent years the Crown's duty, in Scotland, to disclose information to the defence has been subjected to detailed consideration judicially, administratively and in legislation. First, there have been a number of decisions in the Judicial Committee of the Privy Council and latterly in the Supreme Court, as a result of which changes were made in Crown Office practice. Second, Lord Coulsfield was commissioned to do a report on disclosure. He duly produced a report in 2007, which has been commended by the Judicial Committee, and formed the basis for a new Crown Office Disclosure Manual. The Manual provided for a higher degree of disclosure than the Privy Council had said was necessary. Third, the Criminal Procedure and Licensing (Scotland) Act of 2010 contains a new statutory code on disclosure, running to sixty or so sections – the equivalent of a medium-sized statute. Each of those operations has involved the relevant people in a great deal of work. It is of course necessary work, if it is what is required to enable us to comply with our obligations under the Convention. And there are reasonable grounds for optimism that we have achieved such compliance with these new arrangements.

- Legal Advice and Legal Aid
- Communication with relatives, consul
- Safeguards for vulnerable persons
- Green paper on pre-trial detention

Be that as it may, following upon its successful intervention in the vexed matter of translation and interpretation, the Commission has produced a draft Directive, under Article 82(2), in relation to the right to information in criminal proceedings. The draft Directive is currently being examined by the European Parliament. The draft is accompanied, and justified, by an Impact Assessment[19] which sets out the rationale not only for this measure, but for all those envisaged by the Roadmap. In particular, it sets out why this is necessary. At paragraph 3 it asserts:

> "There is insufficient trust between judges and prosecutors of different Member States"

although, at paragraph 3.1, it also states:

> "They [the judges and prosecutors] stress that the difficulties in the application of EU cooperation measures can be felt in day to day practice *but are not always translated into a higher number of refusals to surrender persons requested under European Arrest Warrants."* (emphasis added)

At paragraph 3.2, the paper says:

> "The Roadmap points the way for EU action and gives the Commission a mandate to act on a series of measures which, taken together, will create a high standard of fundamental rights going well beyond the protection currently offered by Arts 5 and 6 ECHR. Taking this course will also give a specific EU meaning to the fair trial safeguards enshrined in Arts 47 and 48 CFREU."

So the aim appears to be to go beyond Article 6(3) of the Treaty of European Union, with its fuddy-duddy references to the fundamental rights guaranteed by the European Convention, and which result from the constitutional traditions

[19] {COM(2010) 392 final}

common to the Member States. The final, clinching argument comes at paragraph 3.3, where the impact assessment says:

> "Insufficient trust in Member States' legal systems and the inadequate protection of fundamental fair trial rights ***may*** deter EU citizens from exercising their right to move and reside freely within the territory of other Member States guaranteed by Art. 21(2) TFEU. -----Provisions of the EU Treaties relating to free movement are intended to facilitate the pursuit by EU citizens of activities ***of all kinds*** throughout the EU, and preclude measures which might place them at a disadvantage should they wish to pursue an activity in the territory of another Member State."

On one view this reference to activities of all kinds might be taken to include criminal activities. Certainly it will be beneficial to criminals wishing to pursue their activities in a number of Member States, if the various criminal regimes can be harmonised. But, even on the assumption that these activities are not intended to include criminal pursuits, this rationale is somewhat less than compelling. It strikes a chord with the ECJ's statement, in the Belgian care insurance case[20], that:

> "In any event, *it is not inconceivable*, given such factors as the ageing of the population, that the prospect of being able or unable to receive dependency benefits such as those offered by the care insurance scheme at issue in the main proceedings should be taken into consideration by the persons concerned in exercising their right to freedom of movement."[21](emphasis added)

And it stands in stark contrast to the pragmatic, perhaps even statesmanlike approach of the drafters of the Treaty of Union in 1707.

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[20] Case C-212/06 – Government of the French Community and Walloon Government v Flemish Government
[21] At para. 53.

In practical terms, the draft Directive makes the kind of provision which one might expect. But there is one matter of particular interest to us. The draft Directive provides, at paragraph 7(2), that Member States shall ensure that an accused person or his lawyer is granted access to the "case file" once the investigation of the criminal offence is concluded. "Case-file" is not a term of art in Scots nor, I suspect, English law. I do not know what resonance it has on the Continent, although it appears from the Proposal that a number of Member States have them. I have been told that it is, in fact, a reference to the prosecutor's file of papers.

If that is what it means, the provision goes beyond what is required by Article 6 of the Convention, either on its face or as interpreted by the European Court on Human Rights. It goes beyond what has been required of prosecution authorities in this jurisdiction by the Judicial Committee and the Supreme Court. It goes beyond what was required by the Crown Office Manual and what is potentially required by the disclosure provisions in the 2010 Act.

It also goes beyond what is required by other jurisdictions which have considered the matter. You will be aware that the South African Supreme Court decided in the case of *Shabalala*[22] that legal privilege did not extend to the whole of the prosecutor's dossier, and that documents which might be important for an accused properly to adduce and challenge evidence must be disclosed. They then went on, in the case of *King*[23], to hold that that did not require the prosecutor to reveal his whole file, nor even an index of his file,

[22] *Shabalala and Others v Attorney-General of the Transvaal and Another* (CCT23/94) [1995] ZACC 12; 1995 (12) BCLR 1593; 1996 (1) SA 725 (29 November 1995)

[23] *Director of Public Prosecutions v King* (CC257/2005) [2008] ZAGPHC 118 (24 April 2008)

showing what had not been disclosed, and the basis for non-disclosure. There is no such limitation in the Commission proposal for a Directive.

On one view, this does not matter. We have to have a system, and if we must put in place a different system from that which we have now, then so be it. On the other hand, the system of disclosure in criminal cases, like the rest of our criminal law and procedure, is not some abstract philosophical exercise to which something can always usefully be added, where room can always be found for some further refinement. It is an essential and essentially practical rulebook, the aim of which is to ensure that the accused person has the information he or she needs to conduct a proper defence. Moreover, the people who develop the policy are not specialists in disclosure, with nothing else to do. There are lots of aspects of the criminal procedure system which require attention. Having arrived at a result which – so far as presently appears – satisfies the requirements of the Convention, we might be forgiven for thinking that that would suffice, at least for a time. We might reasonably have thought that, having put in place administrative measures to comply with the 2010 Act, we – by which I mean the administrators and lawyers in Government and Crown Office and the prosecutors and defence lawyers up and down the country who have to make the legislation work, could get on with operating the system, rather than agonising about what it should be.

We would be wrong.

Now, I don't know anything about the negotiating progress in relation to this proposal. It may be that lots of countries don't like it, or at least that provision of it. But it forms a useful basis to discuss what I may refer to as the real-politik of EU negotiations, from the point of view of Scots law generally, and Scots criminal law in particular.

First, it would, I suspect, be difficult for us to say that if we were required to give effect to this provision, whatever it means, that it would, in terms of Article 83, affect fundamental aspects of our criminal justice system. And if we did say that, I further suspect that it would be difficult for us to persuade the UK Government to agree with us to the extent of their using the nuclear option of referring the whole Directive to the European Council, and refusing to play any more. And the more of our European partners who found no problem with the provision, the more difficulty we would have.

We have to recognise that in the great European arena, where there is a vast range of political and policy priorities, with a multitude of overlapping and conflicting interests, the sensitivities of Scots criminal lawyers – or indeed any criminal lawyers – are fairly low on almost everyone's list of priorities. No-one will ever take us as seriously as we take ourselves. It is very rare for principled objections to substantive, let alone procedural, innovations in criminal matters to find their way on to a nation's "red lines", when a new Treaty is being negotiated. That is one of the reasons why we have provisions about a European Public Prosecutor in the Treaty.

Certainly, the United Kingdom Government has historically expended a lot of political capital securing a discretion as to whether or not to join in measures to do with criminal law. It has not often exercised that discretion in favour of staying out. Normally, indeed, it opts in. Even when a Treaty has been passed, and individual legislative measures are being examined, it is difficult to excite non-lawyers with representations as to the importance of some aspect of criminal procedure. It is even more difficult to get them to go off and disagree with other Member States on the subject. The default position of diplomats and politicians is consensus, not conflict. Whatever they tell us, they go into negotiations to get agreements, not to fight battles.

So, going back to disclosure, if the Directive were adopted, the net result for us in Scotland would be that we would have to put more effort into more procedures and more onerous disclosure requirements in order to comply with an obligation which, on any objective standard, is not necessary in order to protect the legitimate interests of persons accused of crimes.

As a general proposition, it is unwise to make general, detailed provision applying to a number of different and disparate systems, just as it is unwise to focus on any particular aspect of someone else's legal system as being out of step with generally recognised norms, because one does not know how that feature may be balanced by other aspects. It was Hume who said, in a passage in which he was being studiously nice about the English:

> "In short, the whole train of proceedings in this or any other country, must be taken into consideration, in judging of any part. And if upon a complex view of the entire process, the prisoner appears to have a fair and equitable trial, in which innocence runs no risk of being ensnared or surprised, it is all that a reasonable man can wish for, and all perhaps that is attainable to human wisdom."

From that perspective, any outside influence on particular aspects of our law and procedure, conceived without taking a "complex view of the whole process" runs the risk of upsetting the internal equilibrium which we hope that we have achieved. That is apparently a risk which the European Commission is prepared to run, in the interests of giving a distinctive EU flavour to the obligations imposed by the Charter of Fundamental Rights.

So, how do we protect the fundamental aspects of Scots criminal law and procedure? I think we have to start by identifying what they are. Our law and procedure are a complex mixture of substantive law, procedure and practice which, taken together, provides what we consider to be an appropriate

balancing of the interests of accused persons in a fair trial, on the one hand, and the efficient prosecution of crime in the public interest, on the other. Certainly, we should not assume that, simply because we have been doing something for a long time, it is a good thing to do, or that there is no better way of achieving that result. From time to time we need to re-examine our basic rules and assumptions, to test their validity. That is what the Law Commissions are there to do. Some of the things we do in this country no doubt look odd to others, but then lots of what others do looks odd to us. We should be alive to the possibility that their approach may as good as, or even better than, ours.

But let us suppose that at the end of the day we are persuaded, even after a close examination of other possibilities, that our system is best, or at least best for us. What do we do? In practical terms, as I have said, we have to recognise the limitations of our negotiating position. We are at one remove from a decision-making body comprising 27 separate states. So we need to find out as early as possible what is being proposed, and we must seek to influence matters in the early stages of any proposal, before minds become too set on the general parameters of the issue. That function is in fact being carried out by our Scotland Office in Brussels, which now has a Scots lawyer in-house, who liaises closely with UKREP and Commission lawyers; the Law Society of Scotland is also represented in Brussels. We are in a good position to keep abreast of developments, and to influence them so far as that may be possible. The truth is that our ability to influence them is not likely to be great.

We have come a long way from the days before the Act of Union, when – apparently – torture was still competent, whether as a punishment, or as an aid to interrogation, or both. Apart from that brief interference – which, even now, with the benefit of hindsight – I think was probably, on balance, for the best – we were largely left to our own devices.

As a result, our criminal law continues to reflect the wishes and instincts of our society as to the appropriate way in which to balance the differing public interests which are involved in a criminal justice system. So long as that system continued to provide a trial which was fair, there was no particular reason for us to look at other systems of law for inspiration. Our law has never defined itself by reference to that of other nations. Being Scottish – although I do not think we are unique in this regard – we could rest content with the idea that ours was – probably – the best criminal law in the world.

It looks as if that happy state is about to come to an end. Just when devolution has enabled us to pay proper attention to our criminal legislation, we are about to be overtaken by a series of harmonisation measures from Brussels, conceived apparently with the aim of establishing a "European" package of criminal procedural standards.

More generally, the consequence, intended or otherwise, of the way in which the criminal competence provisions in the Treaty of Lisbon are used may well be the end of any individual state's right to develop important areas of criminal procedure within the margin of appreciation hitherto recognised by the Court in Strasbourg. If this means that, in relation to criminal law, the constitutional traditions developed in Scotland over the years cease to be one of the sources from which the fundamental rights recognised in the Treaty are derived, then at least we shall not be alone.

I have to say that I find this a slightly depressing conclusion to have reached. It may be that conditions in other states are thought to make it essential for the Commission to produce legislation along these lines. I would not presume to speculate about that. But we in Scotland have co-existed with the English for three hundred years in a highly unitary state without having to harmonise our

law or procedure with theirs, and without compromising on the protection offered to anyone who comes into contact with the criminal law.

I have no doubt that other systems of criminal justice in Europe are equally, and equally justifiably, content with their observance of both of general principles, and of their obligations under the Convention. The long-term benefits of detailed regulation of these matters by the institutions of the European Union are unclear. The conceptual and practical disadvantages are immediate and obvious.

Thank you.

Patrick Layden