

**HOUSE OF LORDS SELECT COMMITTEE ON THE EUROPEAN UNION  
SUB-COMMITTEE E (LAW & INSTITUTIONS)**

**IMPACT OF THE REFORM TREATY  
IN THE AREA OF FREEDOM, SECURITY AND JUSTICE**

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The Third Pillar was not an area of EU activity that came before me when I was a judge of the ECJ and I have not studied it in any detail. My evidence is perhaps impressionistic rather than the product of deep study and reflection.

In presenting my evidence, I have relied heavily on Statewatch Analyses Nos 1 (version 3) and 4 prepared by Professor Steve Peers, and on the consolidated provisional text of the Treaties as amended by the Lisbon Treaty prepared by the (Irish) Institute of International and European Affairs.

As regards matters of technical detail, there is little I can add to the evidence of Professor Jo Shaw.

I address the following points:

- 'Communitarisation' of the Third Pillar;
- The involvement of national Parliaments;
- The role of the European Court of Justice;
- The UK opt-outs.

**'Communitarisation' of the Third Pillar**

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In my opinion, there are two reasons why it is important to bring the Third Pillar activity of the EU into the Community system. The first is that the line of demarcation between Third Pillar activity and Community activity under the EC Treaty is becoming increasingly difficult to draw. This is illustrated by Cases C-176/03 and C-440/05 (on which I comment below).

It is true that, even after incorporation of Third Pillar activity in the Community system, questions are liable to arise as to the legal basis of particular measures, affecting the procedure to be followed, the safeguards and the opt-outs. Nevertheless, the institutional context (and therefore the 'constitutional' context) within which measures are adopted will be clearer and the nomenclature of the measures adopted will be uniform. This may assist public understanding.

The second, and more important, reason for bringing FSJ within the Community system is to ensure that the measures adopted are subject to proper Parliamentary scrutiny and judicial control.

Measures taken in the area of FSJ are liable directly to affect the liberty of the individual. At the moment, Third Pillar activity is essentially inter-governmental and, as Professor JDB Mitchell observed, "There is a need for discipline in government. ... Governments and governmental bodies have as many reasons for conniving among themselves as they have for opposing each other."<sup>2</sup>

We have recently discovered in this country how important it is to have adequate parliamentary scrutiny and judicial control of measures falling within the scope of FSJ. In particular, we have discovered the importance of adequate measures to protect personal data held by governmental agencies, and this will be even more vital in the context of cross-border exchanges of data.

Lord Falconer recently contended (at an event at the Royal Society of Edinburgh) that "We must be guided by principle developed by collaboration between politicians and the courts". I respectfully agree.

### **Involvement of national Parliaments**

The involvement of national Parliaments, albeit indirectly, seems to me to be a further strong argument in favour of the proposals. I am aware of disquiet amongst judges and lawyers, academic and professional, in other Member States, including states with a 'Napoleonic' judicial system, about failure to "establish the facts on the ground" before making proposals that affect the working of the

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<sup>2</sup> Inaugural Lecture as Salvesen Professor of European Institutions at the University of Edinburgh, "Why European Institutions?" 3<sup>rd</sup> November 1968.

national judicial systems. (The 'continental' judicial systems are quite as disparate as are the 'common law' systems of England & Wales, Scotland, Northern Ireland and the Republic of Ireland, if not more so.)

National Parliaments could play a significant role in ensuring that FSJ proposals take due account of the needs and particularities of national systems.

It should, however, be noted that the proposed Article 63 TFEU would impose a *positive obligation* on national Parliaments to *ensure* that the proposals submitted under Chapters 4 and 5 (judicial co-operation in criminal matters, and police co-operation) comply with the principle of subsidiarity. Failure adequately to perform that duty might affect the admissibility of arguments at a later stage to the effect that particular measures infringe the principle of subsidiarity.

This would entail, not only further development of the 'internal' (UK) parliamentary scrutiny arrangements, but also the development of close co-operation between the scrutiny committees of the UK Parliament and the Parliaments of other Member States.

Within the UK, and particularly as between England & Wales and Scotland where the judicial system comes almost entirely within the competences of the Scottish Parliament, it would be essential to put in place effective machinery to ensure that Westminster is fully informed as to the potential effects of FSJ proposals for the working of the different internal judicial systems. If Parliament is to exercise its role (and duty) effectively, this cannot be left to civil service departments.

### **The role of the European Court of Justice**

There is much misunderstanding in this country of the role of the Court of Justice and, in particular, of the effect of the judgment in Case C-176/03. The issue in that case was essentially whether the power to provide for criminal penalties in respect of serious environmental breaches fell within the powers of the EC institutions under the First Pillar or exclusively within the powers of the Council under the Third Pillar. It was not in dispute, in colloquial terms, that 'Brussels' had the power to require the Member States to criminalise certain types of conduct – the issue was “which Brussels?”

The type of question that arose in Case C-176/03 (involving the respective powers of the institutions) has frequently arisen in the context of the First Pillar. The underlying issue has normally been preservation of the prerogatives of the Commission and the European Parliament, representing the peoples, vis-à-vis

the Council, representing the governments of the Member States. The approach adopted by the Court has been to insist that the respective prerogatives of the institutions, granted by the Treaties, must be respected. The basic principle is that the governments of Member States having contracted to act together in a particular way, and having created institutions for that purpose, cannot then bypass or override those institutions.

The limited effect of Case C-176/03 is shown by the subsequent judgment in Case C-440/05 which (paragraph 70) preserves the power of the national system to determine the type and level of criminal penalties. The reasons for the distinction are very fully explained in the Opinion of Advocate General Mazák of 28 June 2007.

In the event of Third Pillar activity coming with the Community system, the function of the ECJ would be its normal function of resolving inter-institutional (or inter-Member State) conflicts and issues of *vires*, and ruling on the interpretation of legislative and regulatory measures. Since such issues are brought before the Court by others and cannot be sought out or invented by the Court itself, it is difficult to see in what way the exercise of this normal judicial function in the field of FSJ would, as the *Economist* put it in a recent article, provide opportunities for the Court to 'meddle'.

Having said that, I foresee two potential difficulties in bringing FSJ measures fully within the jurisdiction of the ECJ.

The first concerns the degree to which the members of the Court can be expected to deal with an ever-growing range of legal subject-matter. The problem does not, as I see it, arise in direct actions but rather in references from national courts. Normally, a case before a court of last resort such as the ECJ will have been considered by two or more courts below. Even where the ultimate court does not have detailed expert knowledge of the legal subject-matter, this will normally have been explained and the issues clearly defined by proceedings in the courts below.

By contrast, the ECJ is quite often faced with references in which there has been no detailed discussion of the issue in any national court, and the document referring the case written by the national judge may contain little or no explanation of the factual or legal background. This could present a serious problem in a field as technical and nationally oriented as criminal law and procedure.

The second problem will arise in cases concerning accused persons in custody. The proposed new fourth paragraph of Article 234 requires the Court to "act

with the minimum of delay". The delays involved in preparing and translating submissions, oral hearings, deliberation and judgment could, with the best will in the world, stretch to a significant number of months. I am told that discussions are in progress to find a way of cutting down the time taken, but it depends very much on the willingness of Member States to forego their normal right to intervene in writing and orally. The obligations of Member States (and therefore of the EU) under Article 6 of the ECHR must be weighed against the advantages of uniform interpretation of FSJ acts.

Even the minimum possible delay would present a serious problem for observance of the 110/140 day rule in Scotland, and would require legislation by the Scottish Parliament.

### **The UK opt-outs**

I am allergic to the proliferation of opt-outs. It is true that, with 27 and possibly more Member States, some degree of variable geometry is almost inevitable. But a combination of opt-outs and schemes of enhanced co-operation would be bound to impair both prompt and efficient action and also the transparency, objectivity and impartiality of the system.

This is particularly so where, on the one hand, the EU and its Member States are faced with growing threats that call for prompt and efficient action and, on the other hand, the measures to be taken inevitably affect the rights of the individual. One must, in the latter connection, have in mind the problems of comprehensibility that are likely face a national lawyer who is asked, perhaps at very short notice, to represent a person who is (or may be) affected by, or entitled to rely on, an FSJ measure – let alone the problems faced by a local judge.

Although the subject-matter of Cases C-77/05 and C-137/05 (*UK v Council*) was somewhat special, the Opinions of Advocate General Trstenjak in those cases illustrate the wider political difficulties that opt-outs may create.

Nevertheless, given the special characteristics of our systems of criminal justice, it may be safer that the UK should opt out of the FSJ provisions in the way it has. The 'emergency brake' system might not prove sufficient to avoid the adoption of a measure that would create serious difficulties for our legal systems. For clarity, it seems better that the extent of the opt out be enlarged as now proposed, by contrast with the partial opt out negotiated earlier in connection with the Constitutional Treaty.

Lastly, the possible advantages of a policy of opt-out rather than reliance on the emergency brake procedure can be illustrated by the uncertainties hidden behind four of the provisions in the FSJ Title:

- Article 69e(2), second paragraph under (a): “the mutual admissibility of evidence” has a very different connotation in the common law systems from that of *l’admissibilité mutuelle des preuves* in the French system. How, in practice, would the contents of the *dossier* in a French criminal process become “evidence” in a UK court?

- Article 69e(2), second paragraph under (c): “the rights of victims of crime”. Many continental systems provide for victims of crime (or their families) to be represented in criminal proceedings and, in some cases, to seek civil remedies in the same proceedings. Our systems do not, for the time being at any rate.

- Article 69d(2)(h) and Article 69e(1)(c): “training of the judiciary and judicial staff”: the practicalities of such training are quite different in our system as compared with systems that have a professional judiciary and legally trained officials (who are often members of the judicial corps themselves).

- Article 69i(2): “The European Public Prosecutor’s Office ... shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences”. Application of this principle would raise very serious problems in England and, in a different way, in Scotland, quite apart from other Member States.

These problems are not insurmountable, but it may be unwise to assume that they can always be negotiated away.