

ANOTHER SLICE OF THE SALAMI

**How the European Criminal Code
is being introduced by stealth**



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Another slice of the Salami:

How the European Criminal Code is being introduced by stealth

Render unto Brussels

One of the defining aspects of a nation in the classical sense is that a nation is free to set laws and restrictions with reference to its own peculiar historical cultural and legal traditions, without let or hindrance. This is a basic aspect of what we understand by the 'rule of law'. Recent developments in Brussels have thrown this into disarray. A technical decision made by the European Court of Justice has turned the constitutional development of all EU member states on their head. The Commission has taken upon itself the right to overrule both the European Parliament and the Council of Ministers by reference to judgements of the highly partisan and activist European Court of Justice (ECJ). In this way the executive and the judiciary have coalesced to destroy the balance of power within the European Communities.

Today we have a new European Union, the final destination of which is known to no one.

- Solemn Treaty obligations have been rewritten
- The will of democratically elected governments steamrollered by the unelected executive
- Open ended jurisdiction

By using the ECJ as its battering ram there is no longer a division of powers.

Areas of criminal law now under EU control

- Environmental Law

Areas which are left in legal limbo, but will become EU competences

- Counterfeiting the euro
- Non cash fraud (credit cards etc)
- Money laundering through banks
- People trafficking
- Private sector corruption
- Computer hacking
- Marine pollution

Areas of law currently being considered

- Fraud involving EU funding
- Intellectual property rights
- Racism and Xenophobia

How did this happen?

On September 13th of this year the European Court of Justice in Strasbourg made a decision. As one leading commentator put it,

"The Commission had adopted a proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law based on Article 175 of the EC Treaty. But the Council refused to adopt it because it claimed that the Community could not prescribe criminal penalties and instead adopted its Framework Decision. The Commission claimed that the Framework Directive fell within the proper scope of the European Community's powers on the environment".

Of the pre-enlargement European Union 11 out of 15 countries were happy with the status quo. Criminal offences, they believed should remain firmly in the control of the national governments, courts and Parliaments. It had always been one of the fundamental safeguards for the member-states. This decision drove a great breach through those safeguards.

There were the usual strenuous denials from Her Majesty's Government that anything significant was happening. The typical broad welcomes, however, came from the EU loyalist MEPs. One called Ria Oomen-Ruijten, a Dutch member of the European Peoples Party (EPP/ED) and ally of the Conservatives in the European Parliament, rushed to the barricades in support of the ECJ decision,

"The Court of Justice ruling was an absolute breakthrough in EU law. Actually enforcing EU laws is now part of the co-decision procedure. It is an extension of the competences of the EP and the EU."

However those who would keep us ignorant quoted with confidence the Commission's statement at the time, "We are not creating a community criminal code".

So what precisely did happen then just two months later? On the 23rd of November this year the Commission put out a press release, titled "Commission welcomes Court of Justice judgment recognising the exclusive competence of the Community to adopt criminal law measures to ensure the effectiveness of Community law"². What in fact has occurred was a huge step towards a central European Criminal code. As former Commission President, Romano Prodi might have said 'You can call it Margaret, you can call it Mary-Anne, it is still a criminal code' call it what you will. Astonishingly what it is saying is simple, "In some cases, however, it is necessary to direct the action of the Member States by specifying explicitly (i) the type of behaviour which constitutes a criminal offence and/or (ii) the type of penalties to be applied and/or (iii) other criminal-law measures appropriate to the area concerned."³ Essentially, as a result of this judgement the Commission, in the specified areas (see Annex) can decide:

- What constitutes a crime,
- What the penalty should be and disturbingly,
- What else should be done about it,
- Having decided this the Commission then plans to inform the UK and other Nation States of its decision and demand that they comply with it.

Astonishingly the nine areas of law already enacted are effected, one has already been annulled by the Court (Environmental Law) and the other eight seem to have become illegal according to the ECJ judgment, but with a sleight of hand as impressive as Houdini's they have proposed to make the illegality disappear by back dating the decision, in one case by almost 15 years.

Twice in 430 words on the press release the Commission claims that this action would, much like their claims for the European Constitution be, "beyond all doubt an important step forward for European democracy"⁴.

Bigger better Democracy: The Communautaire method

So how is democracy to be improved? In plain words the European Parliament, (famously elected on a turnout of 45.6% of the European population⁵, including those countries with compulsory voting), will have some effect by bringing criminal law into the Co-decision procedures. These procedures are where Commission proposals are agreed by the Council of Ministers and the European Parliament. However there must be a new entry into the lexicon for this particular act of Euro-democracy. Shall we call it re-enforced democracy or post-democracy?

According to the Commission's Communication,

"One approach would be to review the existing instruments with the sole purpose of bringing them into line with the distribution of powers between the first and the third pillar as laid down in the Court judgment. In such a case, the Commission's proposals would not contain any provisions which differed in substance from those of the acts adopted, even where the Commission felt that these acts were not satisfactory. This option offers a quick and easy solution. It allows the substance of Community legislation to remain unchanged and ensures legal certainty with regard to provisions that are important to the realisation of an area of freedom, security and justice"⁶.

Or in other words, we will backdate the legislation to ensure that any prosecutions that have already taken place are not illegal.

"This solution would work only if Parliament and the Council agree not to open discussions of substance during this special procedure. Such an approach accordingly requires the prior agreement of the three institutions"⁷.

However if either the Parliament, rejoicing in the "strengthening of parliamentary control"⁸, or the Member States in the institution of the Council of Ministers were to disagree there would be problems so decisions should be taken before public debate. As a Lib Dem MEP pointed out in a Committee discussion on a related subject on 29th November, the European Parliament should not create public disagreement with the Commission at this "delicate phase of European integration."

The Commission Communication went on to explain what would happen if either institution, Parliament or Council, had the temerity to object.

"If such an agreement could not be reached, the Commission would make use of its power of proposal in order not only to restore the correct legal bases to acts which have been adopted but also to prioritise substantive solutions in line with what it judges the Community interest to be"⁹.

So in the event that the newly empowered Parliament or even the governments of the Member States refuse to accept the Commission's position it reserves the right to go ahead and do it without them. In this looking glass world, stating that something is democratic seems to make it so.

Responses

The politics of the issue then has become heated with the website *EUObserver* describing this development, *"that, for the first time in legal history, a member state government will no longer have the sovereign right to decide what constitutes a crime and what the punishment should be."* *The Times* weighed in saying that the decision *"would represent a huge transfer of power from national capitals to the EU"*.

British legal opinion was left standing by the decision, Philip Ruttley, a partner in the EC/competition department at Clyde & Co, a London law firm was seemingly ignorant of the content of the Commission position when he said:

"The European Court's ruling does not give the Commission powers to jail people for 'green crimes'. Any laws involving criminal sanctions will have to be adopted and passed by the national parliaments of each member state. All the Commission can do is to propose new laws for the member states to adopt."

To *The Times*, Michael Renouf, the EU expert at the Law Society said that while it is not a question of legislation being imposed by the Commission itself, it was also a different position from that in which member states had power to decide what criminal sanctions they would impose themselves.

He also added that beyond the immediate areas of law mentioned by the Commission, it could go on to looking at the Common Agricultural Policy, fisheries' policy, transport, intellectual property and trademarks, the production of cosmetics and a wide range of health and safety matters¹⁰.

Meanwhile in America Professor Ronald Band of the Pittsburgh University Law School had warned, only in June of these eventualities, when he wrote,

"The fact that the European Court of Justice applies Community conventions and regulations seems at first glance to be consistent with the trend toward multilateralism in private international law. But if the result is simply to make the rules on a different level, but then apply them in a fashion that fails adequately to consider the interests of private parties and of states outside the Brussels system, then the process represents the elevation to a new level of the application of the type of private international law analysis that states otherwise have rejected. Modern private international law is in the process of leaving behind such bygone concepts of sovereignty. The mere fact that the sovereign may now be the European Union rather than one of its Member States does not justify this approach".

He goes on with devastating clarity, *"Recent cases of the European Court of Justice interpreting the Brussels Convention demonstrate a federalization of Community law, with the Court clearly trying to unify private international law principles within the Community structure"*.¹¹

So what have our MEPs themselves said? Remarkably little.

There was no comment whatsoever from the Labour Party in the European Parliament. Nothing came out of the Liberal Democrats either. However Chris Davies, the Liberal Democrat leader in the European Parliament, said at the time of the September Judgement that:

"Europe needs an umpire to ensure fair play between member states and to dismiss the cheats. The commission is the only body that comes close to fitting that role and this court ruling gives it more teeth with which to bite."

A couple of days later Davies laughed as he told me that *"I fired off the press release without reading the judgement, I felt it was important to support the Commission's position"*. He was joined in the press release by his group leader Graham Watson who left this hostage to fortune, *"Today's Court judgement, annulling a Council Framework Decision in the field of the environment (2003/80) will have far-reaching implications for European jurisprudence and may well force Member States to pay more attention to what they agree to in Council, especially when it is not*

*subject to democratic scrutiny*¹².

Of course now we know that it doesn't matter what either the Council of Ministers or the Parliament say on the subject counts for nothing, the Commission will have its way anyhow.

The silence from those who one might suspect might support this was as telling as the comments from the Conservatives and the United Kingdom Independence Party, who at least did seem to agree about what the Commission is now threatening.

Timothy Kirkhope, current leader of the Conservative MEP's went into knee jerk mode with his comments

"It was clear from the Commission's delight after the Court's ruling in September that it would waste no time in making full use of this massive extension of its powers.

"Many EU countries, including Britain, are vigorously opposed to the Commission's intrusion into criminal law. Far from being a shot in the arm for EU democracy, this is a serious blow to our right to decide these matters for ourselves."

Meanwhile UKIP leader Roger Knapman spotted the anti-democratic nature of the action pointing out that this was a *'blatant misuse of its powers'*, it was *'using its blunders as an excuse to extend its powers at the expense of member states'*.

"It is simply unacceptable that the Commission makes a fundamental error, and then effectively blackmails the European Parliament into agreeing fresh legislation".

Ramifications

By applying this precedent defining criminal offences and penalties no longer falls within the remit of national legislators but comes under the jurisdiction of Community law, which will have a direct effect, and prevail over, national laws, including, according to another decision of the Court, our constitutions. Meanwhile in parallel with this judicial communitarisation of criminal law, the Commission has already launched, without the slightest mandate or legal basis, a project for a 'European Civil Code', which is being drawn up by a certain 'Von Bar Group'¹³ with a grant of €4,400,000 under the 'Cordis' programme, on an issue where a reference indicative framework would certainly be useful to aid comparison of national laws (along the lines of the 'restatements' in the United States), this unification project, in contrast, is preparing the destruction of the different national civil legislations in fields as diverse as contract law, liability law, family law and security law.

Of course the battle has not been lost, yet, but the efforts to extricate the UK from this mess will, with every day become more and more difficult. Anthony Browne put it very well in *The Spectator*, *"What is even more awe-inspiring is how the EU capital's determination to gain power always — one way or another — trumps the national capitals' rather limp insistence on the need to keep it. The French and Dutch 'No' votes may have killed off the constitution. They certainly didn't kill off European integration*¹⁴".

Footnotes

¹ http://eulaw.typepad.com/eulawblog/2005/09/criminal_penalt.html

² MEMO/05/437 - Commission welcomes Court of Justice judgment recognising the exclusive competence of the Community to adopt criminal law measures to ensure the effectiveness of Community law.

³ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the implications of the Court's judgment of 13 September 2005 (Case C-176/03 Commission v Council)

⁴ *Ibid* MEMO/05/437

⁵ http://www.elections2004.eu.int/ep-election/sites/en/results1306/turnout_ep/graphical.html

⁶ *Ibid* - COMMUNICATION FROM THE COMMISSION para 16

⁷ *Ibid*

⁸ *Ibid* MEMO/05/437

⁹ *Ibid* - COMMUNICATION FROM THE COMMISSION para 17

¹⁰ <http://www.timesonline.co.uk/article/0,,13509-1888123,00.html>

¹¹ Ronald A. Brand, "Balancing Sovereignty and Party Autonomy in Private International Law: Regression at the European Court of Justice" (June 2005). *University of Pittsburgh School of Law Working Paper Series. University of Pittsburgh School of Law Working Paper Series*. Working Paper 25.

<http://law.bepress.com/pittlwps/papers/art25>

¹² <http://www.libdemmps.org.uk/news/76.html>

¹³ <http://www.sgecc.net/>

¹⁴ Anthony Browne: *Brussels Bites back. The Spectator*, 24/11/05

Annex

These are the pieces of EU legislation affected by the ECJ judgment to-date
(Case C- 176/03)

LEGISLATION	PRÉCIS OF LEGISLATION
Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law (Official Journal (OJ) L 29, 5.2.2005, p. 55)	The original case that caused the ECJ decision, this deals with what are described as Environmental Crimes. Deliberately polluting, land, sea or air; or trading in protected flora or fauna.
Council framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (OJ L 140, 14.6.2000, p. 1) and Council Framework Decision of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (OJ L 329, 14.12.2001, p 3).	General provisions on the counterfeiting of the Euro
Council Framework Decision 2001/413/JHA combating fraud and counterfeiting of non-cash means of payment (OJ L 149, 2.6.2001, p. 1)	The specific areas include fraud using credit cards, eurocheque cards, other cards issued by financial institutions, travellers' cheques, eurocheques, other cheques and bills of exchange, which are protected against imitation or fraudulent use, for example through design, coding or signature.
Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ L 166, 28.6.1991, p. 77) and Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (OJ L 182, 5.7.2001, p.1) and	The use of banks and building societies for money laundering, The second has this tantalising aspect "with regard to national criminal law, efforts to agree on common definitions, incriminations and sanctions should be focused in the first instance on a limited number of sectors of particular relevance, such as financial crime.
Directive defining the facilitation of unauthorised entry, transit and residence and Council framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence of 28 November 2002 (OJ L 328, 5.12.2002, pp. 17 and 1).	People trafficking
Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (OJ L 192, 31.7.2003, p. 54)	"Along with globalisation, recent years have brought an increase in cross-border trade in goods and services. Any corruption in the private sector within a Member State is thus not just a domestic problem but also a transnational problem, most effectively tackled by means of a European Union joint action." Of course this does not, by definition include the activities of State owned enterprises.
Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems (OJ L 69, 16.3.2005, p. 67)	Computer hacking and associated cyber-crime
Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements and Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution (OJ L 255, 30.9.2005, pp. 11 and 164)	Deliberate or negligent dumping by ships of pollutants in the territorial waters of any Member state or "the High Seas".
PROPOSALS PENDING	
Proposal for a Directive of the European Parliament and of the Council on the criminal-law protection of the Community's financial interests (PIF), (OJ C 240E, 28.8.2001, p. 125)	Fraud involving EU funding, both in receipt and expenditure thereof
Proposal for a Council Framework Decision on combating racism and xenophobia (COM proposal of 29.11.2001, OJ C 75 E, 23.6.2002, p. 269):	As it says including "insults and threats" the scope covers some areas not currently British law "Racism and xenophobia will mean belief in race colour, descent, religion or belief, national or ethnic origin as a factor determining aversion to individuals".
Proposal for a European Parliament and Council Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights and for a Council framework decision to strengthen the criminal law framework to combat intellectual property offences (COM (2005) 276 final)	"criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale".

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The Bruges Group spearheads the intellectual battle against the notion of “ever-closer Union” in Europe. Through its ground-breaking publications and wide-ranging discussions it will continue its fight against further integration and, above all, against British involvement in a single European state.

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Contact us

For more information about the Bruges Group please contact:

Robert Oulds, Director
The Bruges Group, 216 Linen Hall, 162-168 Regent Street, London W1B 5TB
Tel: +44 (0)20 7287 4414, **Fax:** +44 (0)20 7287 5522
Email: info@brugesgroup.com



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