Common Law and Civil Law Interactions in Criminal Justice at Judicial Level in Western Europe

A Pilot Study on Horizontal Judicial Dialogue

1. INTRODUCTION

This article explores the judicial interactions between a common law country and a continental-civil law country in criminal justice, and considers the position of the two supranational agencies, the European Union (EU) and the Council of Europe (CoE). The paper investigates the extent to which judicial dialogue between senior judges of domestic criminal justice systems exists at the national level, or, the extent to which it is feasible, considering, on one hand, the English and Welsh criminal justice system as an example of a common law country, and on the other hand, the Italian criminal justice system, as an example of a continental civil law country. The existence or the lack of dialogue between national judges is tested against the possibility of true cross-national judicial cooperation in criminal justice matters other than transborder crime. This paper aims to discuss the level of existing judicial dialogue, to then argue that this dialogue should be further emphasised and developed: as it emerges from this pilot study, it is insufficient and is not spread widely enough.

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1 This article has benefited from discussions with Prof. David Smith, Lancaster University, and from the feedback received at the 2003 British Society of Criminology Conference.

2 For simplification reasons, I will refer to the English and Welsh criminal justice system as the English criminal justice system.
1.1 Background: criminal matters, the European Union and the Council of Europe

Until very recently, exchange of opinion about judicial interpretation of the application of law to internal matters seems to have been a non-existent problem. \(^5\) Criminal law and the organisation of criminal justice is essentially a home-matter: historically, this field has been considered an internal issue. \(^6\) However, with the increasingly important role played by the two supranational agencies, the EU and the CoE, and their Court, internal matters, like criminal issues, are growing into wider issues. With the prospective expansion of the EU member states into an increasingly large borderless area, issues related to transborder crime were evaluated and discussed at the end of the nineties. Following discussions around the 1997 Amsterdam Treaty and the 1999 Tampere Summit, a number of round-tables were established and Police and Judicial Cooperation in Criminal Matters (the former area of Justice and Home Affairs) was a core topic of the EU’s so-called Third Pillar, \(^7\) and the role and competence of the European Court of Justice (ECJ) was enlarged. Yet, while collaboration, exchange of information and sharing of data are considered ‘legitimate’ when ‘respectful’ of national borders, domestic matters are considered ‘sensitive issues’ to be dealt with by ‘domestic hands’. \(^8\)


\(^8\) For instance, the political reaction to the EU Green Paper on criminal suspects’ rights, issued by the European Commission and adopted in February 2003 is a clear sign that criminal matters are still considered an internal issue *European report* 2753, ‘EU Green Paper on Criminal Suspects’ Rights’, COM (2003) 75 final, [http://europa.eu.int/comm/justice_home/doc_centre/criminal/recognition/docs/gp_proc_safeguards_en.pdf](http://europa.eu.int/comm/justice_home/doc_centre/criminal/recognition/docs/gp_proc_safeguards_en.pdf) (14/09/03). This Green Paper exacerbated the debate on the role of the EU in this field, when more than transborder issues are under the EU’s lens, raising reactions on national sovereignty and the subsidiarity principle. The EU principle of subsidiarity