SUBMISSION TO HOUSE OF LORDS COMMITTEE
ON UK'S OPT-OUT AND OPT-INS RE EU PROVISIONS ON
CRIMINAL JUSTICE AND POLICING

SERIOUS RISKS

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EXECUTIVE SUMMARY

INTRODUCTION - Commissioner Reding says it would be "crazy" for the UK to exercise the faculty granted by the Treaty to opt out of the 135 Justice and Home Affairs measures. If that is their attitude, what will they say to Cameron's demand to repatriate powers where the Treaties offer no such option?

BACKGROUND

1. The importance of JHA.
Justice and Home Affairs comprise the power to use the coercive power of the police, and put people in prison. It is therefore a crucial area of government – the key to control of the State.

2. The deep differences between the JHA systems used in the UK and those of our EU partners.
Our systems of justice and theirs took separate paths 800 years ago (Magna Carta for us, the Inquisition for them). To this day Habeas Corpus and Trial by Independent Jury, to name two particular British safeguards, are enjoyed nowhere in continental Europe. Their criminal laws are administered entirely by a professional career judiciary, an unaccountable body with vast and fearsome powers, unknown to us.

3. The somewhat volatile political history of our EU partners.
The UK has been a stable democracy for over 350 years. Many if not most of our continental partners have known tyranny and violent upheaval within living memory. Is it wise to bind our destiny indissolubly to theirs, in a union where we are a minority? Or better for the UK to keep a free hand?

THE EU PROCESS OF JUDICIAL INTEGRATION

4. The Corpus Juris proposal.
In 1997 a single code, in embryo form, for all Europe is prepared and unveiled by the Commission. It will do away with Habeas Corpus and Trial by Jury, and our safeguard against double jeopardy. In 1999 it was rejected by the House of Lords.

5. Mutual recognition
At Tampere in 1999 it was decided that each member state should give recognition to the judicial decisions of other member states, considering them as just and as fair as their own. The main outcome of this approach has been the European Arrest Warrant.

6. Safeguards for basic rights?
The government appears to consider the European Convention, and the EU Charter as adequate yardsticks for measuring the respect for basic rights of the signatory states. It fails to consider that neither the Convention nor the Charter mention the practical safeguards of individual freedom which are basic for the people of Britain, such as Habeas Corpus and Trial by Independent Jury. They are therefore not fit for purpose for the UK.

7. The irreversible ratchet.

Once we accept the jurisdiction of the European Court of Justice and the enforcement powers of the European Commission in the crucial area of JHA, our sovereign right to withdraw unilaterally, hitherto upheld by our courts and governments, will have been abandoned.

8. The 135 JHA measures – opt-out, opt-back-in?

It will be far more sensible to follow policies of cooperation amongst equals with our neighbours than to hand control of our affairs over to them. It is impractical for us to lay down conditions for accepting the EAW, for that would mean in effect asking our partners to revolutionise their own internal systems, not just to change the terms of the EAW itself. The EAW must be replaced by returning to earlier extradition legislation, where UK courts retain the right to examine the prima facie evidence against the prisoner.

THE MERGING OF ENFORCEMENT AGENCIES

9. Eurojust, Europol, CEPOL

These are stepping-stones to a single unified pan-European system, as statements from the likes of Helmuth Kohl have made clear.

10. Our traditions of policing and theirs – the Eurogendarmerie

We have radically different concepts of policing from those of our neighbours. Unlike ours, their police forces are lethally-armed at all times, paramilitary, centrally recruited and controlled. The EU has set up a European Gendarmerie on that model. Our government must give an assurance that it will never ever give consent to their deployment on UK soil, or we will risk ending up under a paramilitary occupation controlled from Brussels.

CONCLUSION In conclusion I therefore urge the House of Lords Select Committee, and the House of Lords itself, to support the opt-out from the 135 JHA measures, already voted by the Commons, and the government and Parliament not to opt back in to any of them, in particular to repudiate the European Arrest Warrant, which the Conservative Party officially opposed at its inception in 2003. Otherwise it should trigger a referendum.

APPENDICES: A1 & A2 –Article in New Law Journal, 22 June 1990;
B1 & B2 – Seminar programme for Corpus Juris, April 1997;
C – Hansard, extract debate on EAW, 21 Jan 2003.

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INTRODUCTION

Ms Viviane Reding is the EU's Commissioner for Justice. She is opposed to the UK using the faculty granted to us under the Treaty of Lisbon to opt-out of 135 measures on criminal justice and policing.

In an interview with the Daily Telegraph (28/12/2012), she warned: "Do you want criminals and paedophiles running around freely on the streets? Is that really in the United Kingdom's interest? It is crazy."

Such dismissive and contemptuous language in the mouth of someone holding a position of such power and responsibility, when referring to the British government's stated policy, must have been intended to have a strong, indeed an intimidatory, effect on the debate being held on this issue in Britain. Nobody will want to have their mental health put in question by a personage of such authority. The general tenor of her statement and the use of the term "crazy" suggests a haughty

disregard, not to say pre-conceived hostility, for any arguments that the British side may wish to produce, before they have even been heard.

I say "intended" for we must presume that her statement was not an emotional outburst but the fruit of a sober assessment and calculation.

However we are confident that the Members of Parliament elected by the British people, and the noble Lords in the Upper House, will not be swayed by the Commissioner for Justice's intemperate use of words, but will fearlessly consider the issue on its merits.

It might be said, in passing, that if the EU Commissioner says that we are "crazy" to use a faculty *already granted and provided* by the Treaty to repatriate powers, this does not bode well for any future negotiations with our partners to repatriate powers where no such faculty is granted by the existing Treaties, as the Prime Minister has said that he intends to do.

BACKGROUND

1. The importance of JHA.
2. The deep differences between the JHA systems used in the UK and those of our EU partners.
3. The somewhat volatile political history of our EU partners.

SECTION I

The crucial importance of the area of criminal justice and policing.

This area has a special significance, which sets it apart from others, such as health, education, taxation, transport, etc. It is in fact the heart of State power, for it comprises the *power of physical coercion over the bodies of the citizens*.

We are perhaps less aware of this than people on the continent are. Unlike most continental countries, Britain has had a history of continuous and peaceful constitutional development going back hundreds of years. The last significant armed conflict in mainland Britain was the Jacobite rebellion of 1745. Disputes have been settled and power has passed from one government to another essentially by voting (with an ever-increasing franchise) ever since the end of the civil war and the restoration in 1660. The losers have accepted the verdict of the voters without recourse to violent protest and rebellion. The English revolution of 1688 was glorious and – uniquely – bloodless. This historical background may lead some British commentators to overlook the central role of physical force in the maintenance of state power.

It is with the apparatus of criminal justice and policing (or Justice and Home Affairs – JHA) that physical force – prisons and policemen – is applied to citizens by the State.

In normal times this power of coercion is used only to catch and neutralise murderers and robbers and other criminals. But it is the self-same apparatus which in times of emergency can be used to exercise control over the people, and which can be used to suppress opposition and dissent.

In fact in countries where they have had violent changes of government in modern times, the first thing the insurgents try to do after taking the Presidential palace and the radio/TV station, and after neutralising any loyalist armed forces, is to occupy the Ministry of the Interior (what we would call the Home Office). It has been centuries since we have had any experience of anything remotely like this, not since Cromwell's soldiers marched into Parliament and cleared out the members by main force.

In many, if not most, major European countries violent changes or attempted changes have happened within living memory.

The shift or drift towards "ever-closer union" over the last decades since we joined the European "project" in 1972 has seen many small steps, each one of apparently little significance, and we have always thought that they could, if necessary, be reversed.

We must remember however that the transfer of control over our JHA is not a small step, on a par say with health & safety or agriculture. JHA is the "control panel" which governs all the others. Once control over the powers of enforcement has been handed over to some other body, there is no guarantee that it will ever be handed back. It is in these powers that lies the essence of sovereignty. Once transferred, it cannot be regained, as King Lear discovered to his cost.

Whoever controls the machinery of criminal justice and policing in a country, controls that country, and can bend it into a new shape. Whoever controls the power of policing and imprisonment of a State can control its politics, and its economics.

Precisely because the machinery of criminal justice and policing has this power whereby a citizen may be stripped of his or her rights – essentially rights of property (with fines and judicial confiscations), freedom (with prison), not to mention life (in States where capital punishment is applied), and indeed physical integrity (judicial maimings as in sharia-law States even today), it can be, and over history it often has been, used as an intrument of pure power, to repress political opposition, and ultimately to oppress those who fall out of favour (for any reason) with those who wield this power.

SECTION II

The profound and persisting differences between our (Anglo-Saxon) systems of criminal justice and traditions of policing, vs their (continental) systems and traditions.

This is important because the 135 measures we are opting out of have been described as "stepping-stones" towards a harmonisation, and then an amalgamation of the different systems, resulting ultimately in a single system for the whole of Europe, under a single supreme court. This Court – the ECJ – already exists, and the stepping-stones will enlarge its areas of jurisidiction. Are we to stumble blindly into an irreversible embrace with other systems which may or may not be fair and just, but which are essentially *unknown* to us?

As far as I have been able to ascertain, there is no chair of comparative criminal procedure in any university in Britain, nor has the present nor any previous government undertaken any detailed research into the workings of the criminal law systems and procedures of our EU partners. And yet we have been signed up to a series of treaties that envisage "ever-closer union" with these foreign states.

Their criminal-law systems are radically different from ours, and the differences go back many centuries.

Eight hundred years ago in England there arose a movement to limit the overweening power of the State – at that time the King – and to ensure that the power to punish was only used for purposes of justice, and that justice itself should be administered with fairness.

In 1215 King John was prevailed upon by the assembled barons and others to give his assent to Magna Carta.

This established certain limits on the power of the King, later to develop into limits on the power of the State, vis-à-vis the rights of his subjects. What is perhaps not widely appreciated in England is that this happened nowhere else. At that time in fact there was an inverse tendency in Europe. In Rome Pope Innocent III was setting up the Holy Inquisition. I cite the late Professor Italo Mereu, who held the Chair of the History of Law at Ferrara University, and was a regular contributor to Il Sole 24 Ore (Italy's leading financial daily paper, equivalent of the Financial Times). In his detailed, monumental, history of the Inquisition from its beginnings to the present day, "Sospettare e Punire – Storia dell'Intolleranza in Europa" ("To suspect and to punish – a history of intolerance in Europe") (Milan 1979) , Mereu documented how that Pope wrote letters to the English prelates who had signed Magna Carta, telling them they had done something "abominable" and "illicit". And he describes how the Holy Inquisition was established throughout Europe, ravaging its countries and peoples for centuries, and only England escaped its grip.

In 1215 there began a dispute and an implicit conflict – or debate – which continues to this day, as the paths of criminal justice in the British Isles and in continental Europe diverged, never to meet again.

And indeed Magna Carta did create a dichotomy with the Inquisition, for the great innovation of the Inquisition, as analysed by Professor Mereu, was to take the role of prosecutor and that of judge and bundle them together, into the figure of the Inquisitor. The suspect is suspected, investigated (interrogated, originally under torture), and accused, by a member of the judiciary, who then judges him, thus reversing in effect the burden of proof, and creating a system which to us seems lop-sided. This lop-sidedness lives on in the "inquisitorial" systems that are practised to this day all over continental Europe. Further details are given in an article I published in the New Law Journal ("Confessions in Evidence, a look at the inquisitorial system" – June 22, 1990, pp 884-885. Attached hereto as Appendix A1 and Appendix A2).

After the French Revolution of 1789 a new form of State emerged. This was stabilised by Napoleon, who based it on his codes of law, which still underpin the legal systems of most if not all continental European countries today. Essentially, Napoleon did not overturn the Inquisitional method of criminal justice to replace it with something else. Instead he adopted and adapted it. He reoriented it from serving the Church and made it into an instrument in the service of the State. He maintained the closeness between the prosecutor and the judge, who, even if today they are no longer the same person, are both salaried civil servants often working cheek by jowl, and separated them from the defender, who is a private professional working for a fee.

Hitherto each nation state in Europe has made its own laws and has had its own national system of criminal justice, with its own distinct features. However they can be grouped together into two large families of systems, each with its common tradition. The two families are sharply different from one other. They are the "common-law" jurisdictions, and the "civil-law" jurisdictions. As regards

their criminal procedures, the "common-law" systems are called "adversarial" or "accusatorial", as against the "inquisitorial" systems.

Within the EU the only jurisdictions that can be said to belong to the common-law family are the "island jurisdictions" of the UK (including the English-and-Welsh, the Scottish and the Northern Irish), Ireland, Malta and to some extent Cyprus. All those on the mainland follow the civil-law tradition. The UK is the only country in Europe which preserves (somewhat) different jurisdictions within its borders; each of the others has only one uniform set of laws for all its inhabitants. Outside Europe our system is used in the USA and other English-speaking commonwealth countries, but as far as I have been able to ascertain, nowhere else.

Within the EU, we are in a minority. Under a system of QMV, we would have to accept the decisions of the majority of countries, who follow the Napoleonic-inquisitorial tradition.

Here are some notable differences between the two families of systems (over the last thirty years I have conducted studies in depth of the inquisitorial system as used in Italy; which is a fairly typical sample of the Napoleonic-inquisitorial systems):

Here are three significant differences between the two systems, regarding who decides what.

	British (English)	**Continental (Italian)**
Who decides on guilt or innocence?	In serious cases where the maximum penalty can be more than a few months, or in either-way cases, where the defendant opts for trial at the Crown court, *the jury* has exclusive and sovereign power of decision over the verdict, or, for minor cases, this function has been carried out mostly by *lay magistrates* (more recently being replaced by District judges…?). The Crown court judge has no power over the verdict. He delivers his summing-up to the jury *in open court*, explaining to them the law applicable to the case, and summarising the facts as heard from the witnesses. If he gives his own opinion and it is an opinion of guilt, a subsequent guilty verdict from the jury can be overturned on appeal on grounds of "undue	*A professional career judge or judges* decide guilt or innocence as well as the sentence in case of a guilty verdict. Where ordinary citizens are involved in the judgement, as they are occasionally, though only in the very most serious cases, they have to go into the jury-room with two professional judges. The "summing-up" by the judges to the jury is thus delivered *in private*. The verdict is decided by a majority vote of the two professional judges with the six jury-people (or lay assessors). A written motivation for the verdict must be produced. So if the six jury-people disagree with the two professionals and outvote them, the defendant will be acquitted there and then. But it is one of the professional judges who writes the motivation, and if s/he disagrees with the majority verdict as voted by the lay jury-people, they can write the motivation in such an illogical way as to give good grounds for the verdict to be overturned on appeal (in the trade, this is called a "suicide motivation"). The *prosecution can*

	influence by the judge on the jury". The defence can appeal, or ask for leave to appeal, against a guilty verdict. The *prosecution cannot appeal against an acquittal*, under our doctrine of Ne bis in idem – that nobody shall be tried more than once for the same offence.	*always appeal against an acquittal,* just as the defence can appeal against a conviction, right up to the final decision by the supreme Court of Cassation.
Who decides on imprisonment before trial? (Habeas Corpus)	Committal to trial on remand is decided by a *bench of lay magistrates in open court*, or by a sole, stipendiary magistrate (who has been a lawyer and as such has acted for the defence and for the prosecution), always *in open court*. The same court will decide on bail, to which the defendant has a right, in the absence of reasons to the contrary brought by the police and argued by the prosecution. Habeas Corpus prevents anyone from being imprisoned without charge, since a suspect, if arrested, must be brought before the magistrates in open court within hours, and charged with an offence. The prosecution can be required to produce prima facie evidence of guilt there and then. This means that *the **evidence** has to have been collected beforehand*.	"Precautionary custody" is decided and ordered by a *prosecutor and a "judge of the preliminary investigations"*. The prosecutor requests an arrest warrant which is then validated (or sometimes not) by this judge. The prosecutor, who like the judge is also a member of the career judiciary, conducts the investigations while the role of the police is simply to carry out his instructions. One problem the Italians have is that the police may have the detective's specialist know-how, but they have no responsibility or power over the conduct of the investigation, while the prosecutor has that power, but is not trained in investigative techniques. He was given his post purely on the basis of his knowledge of the law. This may be why many cases are never solved satisfactorily. These two, judge and prosecutor, may work in tandem on several cases in succession. They are essentially colleagues, and during his career a member of the career judiciary may perfom judging functions, and then prosecution/investigatory functions, and then again judging functions. He or she will never be a defender, however. Very often the first step in a criminal investigation is to lock up the main suspect. He is then questioned in prison. *There is no requirement to find hard evidence of a prima facie case to answer before a suspect is*

		arrested. Italian law prescribes that there be serious and concordant "indizi" of guilt – indizi means "clues" – so that a warrant can be issued. After arrest the prisoner will be interrogated by the judge who ordered his arrest, and his defender may be present, but it is not in public. This is done in a special interrogation room in the prison. The prisoner is expected to "justify himself". The procedure is regarded as an "opportunity for the defence". His first appearance in a public hearing may take place months or even years later.
Can a person be tried more than once for the same charge? (Ne bis in idem)	*No.* A defendant may appeal against a conviction. However a verdict of acquittal by a jury in England is traditionally absolute. There have been some recent modifications in this, in particular a re-trial in a serious case may be allowed after an acquittal if "new and compelling evidence" has emerged subsequently.	*Yes.* Under the Italian constitution all parties – both prosecution and defence – have a right to appeal, from the court of first instance to the Appeal Court, and then up to the supreme court of Cassation. This right of appeal is standard in all cases, and grounded simply on arguments that the lower court gave the wrong answer. There is no requirement for "new and compelling evidence". The Appeal Court may hear the case all over again, with witnesses etc. The court of Cassation is supposed to only review the application of the law in the lower courts, as in our Court of Appeal. When I interviewed the late Giuliano Vassalli (at the time he was President of the Italian Senate's justice committee, later he became President of the Constitutional Court), for the Financial Times (a reduced form of the interview was published in 1986), he told me that Ne bis in idem is also true for Italy, except that the "trial process" there is viewed as including all three degrees of judgement. Once they have been completed, then a re-trial is not possible, unless serious new "proofs" (we would say "new and

		compelling evidence") has come to light. This shows that the Italian and the English systems have quite different ways of categorizing judicial reality.

There are many more differences between our system and the systems used on the continent. One major difference is that in Britain, the various functions of criminal investigations and trials are entrusted to different and separate bodies, viz:

- the ***police*** investigate, and have ample powers of investigation but comparatively limited powers of coercion on their own initiative;

- (traditionally) ***lay magistrates***, who are not trained lawyers and who work part-time, as unpaid volunteers, hear and decide minor cases and decide committals and bail for more serious charges;

- the ***prosecution*** in court is conducted traditionally by a ***lawyer*** (a barrister or sometimes a solicitor), who is a free professional working for a fee, just like the ***defender***; they are on an equal footing, even though some of the rules are tilted in favour of the defence, to compensate for the advantage of the prosecution which has the investigative powers of the State at its disposal;

- the ***judge*** is a former barrister (or nowadays in some cases solicitor), who in his career will have acted as prosecutor in some cases and as defender in others, so is expected to have a balanced and impartial view. He regulates the conduct of the case in court, arbitrates in procedural disputes between prosecutor and defender, sums up the facts and the law for the benefit of the jury, and hands down the sentence when the verdict is Guilty. The judges in the appeal courts are promoted from the lower courts, and they may go on to the supreme court, and become Law Lords.

- the ***jury*** gives the verdict, over which it has complete and sovereign control. It can even defy the law, if it thinks
  that to apply it in the case before it would be unfair or oppressive.

In Italy and in continental jurisdictions in general, it is ***salaried career judges*** who carry out **all** of the functions mentioned above. The first chapter of the Italian criminal code deals with "Crimes against the personality of the State". They therefore tend to see their mission as being primarily to uphold the supremacy of the State over the citizens.

There is a difference in emphasis, reflected in common legal maxims. An English maxim is that "Justice must not only be done but be seen to be done" ie not only seen but understood, and understood and approved by ordinary people – so much so that we call on ordinary people to say the decisive word with the verdict. A significant legal maxim used in Italy is, in contrast, "Dura lex sed lex", meaning "It may be a harsh law, it may even seem unfair to ordinary people, but it is the law". Since the State is deemed to be democratic (with free elections to Parliament, which writes the laws) this is considered to be fair and just.

Members of the career judiciary **also** supervise the execution of sentences and the treatment of prisoners in the prisons, and they occupy the top staff positions in the Ministry of Justice, surrounding the Minister of Justice, and conditioning his

actions (rather like Sir Humphrey Appleby in "Yes Minister"), as the late Senator Vassalli explained to me in an interview, shortly before he himself became Minister of Justice.

The Italian constitution says "The judiciary are subject only to the law". And as I pointed out in an article published in the Financial Times during the attempts by the Italian Parliament in the 1980s to reform their criminal procedure, they are the only ones who can give coercive interpretations of the law. So in practice they are a "law unto themselves". They are also protected by specific laws that punish "vilification of the judiciary". They say "criticism is acceptable, but not vilification". Yet in any particular case, the distinction between the two is decided by…. a judge.

The reform of Italy's code of criminal procedure, enacted in 1989, did nothing to reduce the vast collective powers of the career judiciary. When I asked Senator Vassalli why this had not been attempted by Parliament, he said "They wouldn't let us". I said "Who wouldn't let you?" He replied "The career judiciary wouldn't let us". I asked, "What about the sovereignty of Parliament?" He then sighed and said, "Well, we have a sort of 'limited sovereignty' here, limited by the power of the career judiciary". (This, said in 1986, was a clear, partly ironic, reference to the "Brezhnev doctrine", with which the Soviet leader had justified the invasion of Czechoslovakia in 1968). This part of the interview was published in the Financial Times.

Indeed a few years later, in the early 1990s, the career judiciary of Italy, with its famous"clean hands" campaign against political corruption, decimated the entire governing political class, destroying the Christian Democrat and Socialist parties who had governed the country up until then, and forcing Bettino Craxi, the longest continually serving Prime Minister since Mussolini, to flee the country in order to avoid jail. Very recently they have convicted Silvio Berlusconi with a definitive sentence, and maybe more to come. He could then face prison. He is the leader of the centre-right grouping in Parliament, which received 10 million votes in the last election.

It can well be argued that the career judiciary in Italy did the right thing on both occasions. But in any case, the Italian career judiciary hold a monpoly of the use of coercive force over the citizens, and, whether they use this power for good or for ill is entirely up to their consciences. They cannot be dismissed, nor punished save by other members of the same brotherhood. They are unaccountable to the people (they are selected by competitive examination amongst law graduates), and there is no countervailing force to check their actions.

In contrast, the British system, by having juries and lay magistrates say a decisive word before a person's rights are removed and he is put in prison, involves the ordinary people directly, so we do not have this loose cannon aboard the ship of state. The wisdom of our arrangements goes all the way back to Magna Carta.

A career judiciary concentrates what to us seems a fearsome amount of power in its collective hands. Their CVs never (save quite exceptionally) include a period when they might have acted as attorneys for the defence, for their career path starts straight after a university law degree. If a law graduate wishes to enter this career, they sit a competitive state exam, and if passed, they are attached to a tribunal where they follow an established professional judge for about a year as "uditore" (a sort of apprenticeship). Then they may be appointed as a prosecutor, or a judge sitting in a lower court (pretura) and deciding guilt or innocence, and sending people to prison, in the lowest courts of first instance, for as much as eight years. One may be incarcerated on the orders of a 25-year old.

There are a number of other radical differences, some of which I discussed in an article published in the Italian law journal "La Difesa Penale" (Year IV, April-September 1986, pp 139-158). I wrote it in Italian, under the title "Processo inquisitorio, processo accusatorio e legge delega", comparing the proposed reform of Italian criminal procedure to the English system of criminal justice, as expounded by Dr David A. Thomas of Trinity Hall, Cambridge, author of "Principles of Sentencing", in a talk at the Palace of Justice in Rome which I had been asked to arrange by the Rome Bar Association in October 1985. My article has never to my knowledge been translated into English. It was quoted in a debate in the Italian Senate by Senator Franco Corleone, a member of the Radical party, who later became the Parliamentary under-secretary at the Ministry of Justice.

SECTION III

The **political volatility** of the continental states in recent history, compared to ours.

We are accustomed to thinking of the continental states which are members of the EU as democracies. Yet it has not always or long been thus for most of them, even within living memory.

Moreover it could be argued, and is argued here, that their systems of criminal justice are not democratic even now. Our system is not content to let the ordinary people decide only who shall write the laws, by electing the lawmakers in elections to parliament. The British system also insists that at the point where the laws impinge most violently on the life of a citizen, by putting him or her on trial, the ordinary citizens should again have a decisive word – serving as they do as lay magistrates and on juries. We have what I call a "two-legged" democracy. Our continental cousins have only a "one-legged" democracy, they vote for the lawmakers, but are not allowed to participate (save very occasionally and under tutelage) in the application of the laws.

Our political histories are very different. When we were developing Parliamentary democracy in the seventeenth and eighteenth centuries, they were establishing absolute monarchies, typified by France's Sun King - "I am the State". However, after the French revoluton, more than a few had some form of democratic government in the 19th and early 20th centuries. Then as the twentieth century went forward, movements arose in some of them – starting with Italy, then Germany and then Spain – that swept away their young and evidently fragile democracies, replacing them with dictatorships, and even totalitarian dictatorships. After WWII the Western European states, having been conquered by the Anglo-American armies, returned to democracy, but those in the East were subjected to new dictatorships. In fact, were it not for the Anglo-American victories in WWII and later in the cold war, it is fairly likely that few of them would be democratic even today.

As we have seen, criminal justice is the ultimate "control panel" of power in a State. The amalgamation of our systems of criminal justice is therefore an irreversible process. So is it wise to tie our destiny *indissolubly* to theirs? Or would it not be wiser for the UK to maintain friendly relations, but keep a free hand?

THE EU PROCESS OF JUDICIAL INTEGRATION

4. The Corpus Juris proposal
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6. Safeguards for basic rights?
7. The irreversible ratchet.
8. The 135 JHA measures – opt-out, opt-back-in?

SECTION IV

The Corpus Juris proposal

When Jacques Delors announced in 1989 the intention of creating a single currency, it became apparent that the aim of the "Common Market" or EEC was to transform itself into a sovereign state, as, since time immemorial, only sovereigns have the right to mint their own coin. To lose,or to give up, this right is to lose sovereignty. From being a mere pious aspiration (as it was often dismissed in the UK) , it was now clear that the goal of "ever-closer union" would now be an operational objective. As an important step in this process, the single currency was agreed at Maastricht, albeit without British participation.

After the Maastricht Treaty was passed, I also predicted, in an article published in the European Journal (November 1993, pp. 14-15), that "If, as is very likely, there is then a move to unify the legal systems, and create a European legal system, a real risk will arise of our system, with Habeas Corpus and Trial by Jury, being done away with". Being familiar with the Napoleonic mindset underlying the continental conceptions and doctrines of the State, I thought it was obvious that the new European State would want to have its own criminal laws and procedures, and its own apparatus for applying and enforcing them, and would not tolerate the continuation of different and contrasting systems within its borders.

I was therefore not too surprised when I was invited, as a guest of the Commission, to a seminar in Spain in April 1997, where the "Corpus Juris" project, promoted by the XX Directorate General of the Commission, was unveiled. It is in the form of a book, published by Editions Economica in Paris in 1997 (ISBN 2-7178-3344-7), with English and French texts on facing pages. It consists of a draft criminal code of substantive law, and a code of criminal procedure, valid for the entire territory of the EU.

On the face of it, its scope is limited to dealing with crimes of fraud against the financial interests of the EU. However it establishes a mighty apparatus – with an EU Public Prosecutor (EPP) in Brussels who is to have delegates in every member state. National Prosecutors are to be "under a duty to assist the EPP" (article 18.5), ie to carry out the EPP's instructions, in a relationship of hierarchical subordination. The laws of the Corpus are also to override the national laws, which continue to operate only in the lacunae not covered by the Corpus laws. .

Although Corpus Juris has not been mentioned much in more recent years, the proposal has never been officially withdrawn by the Commission, and it gives us very revealing evidence of the *intentions* of the architects of the ever-closer union of Europe.

And although its promoters, in Britain – including, surprisingly, a recent edition of Private Eye attacking opponents of the establishment of a European Public Prosecutor – attempt to present it as limited to matters of fraud against the EU, the programme distributed at the seminar (attached in Appendix as B1 and B2) states clearly that it "has been conceived as an embryo European criminal code". A message to the seminar from the then President of the EU Parliament, Don José Maria Gil Robles, was even more explicit, spelling out how it was hoped and expected that the Corpus Juris method would be extended to deal with all sectors of criminal activity, which were listed, including homicide, robbery, drug dealing, arms trafficking etc etc and even religious "sects" (it was explained to me that some sects, such as Scientology, were actually illegal and banned, for instance in Germany).

And as I had predicted four years before, Trial by Jury (and Lay Magistrates) and Habeas Corpus are specifically done away with in the Corpus Juris proposal.

Article 26.1 of the draft Corpus Juris code says "the courts must consist of professional judges… and not simple jurors or lay magistrates". These courts can hand down sentences of many years in prison. So juries and lay magistrates are ruled out.

Our Habeas Corpus vouchsafes the right not to be imprisoned even provisionally without prima facie evidence to support a charge having been potentially exhibited in a public hearing. This right is also removed by Corpus Juris in article 20.3.g , which grants the EPP the power to order that a *suspect* be imprisoned "for a period of up to 6 months, renewable for 3 months" (without even specifying any limit on the number of renewals allowed). The mere suspicion by the EPP, with the approval of another member of this proposed EU judiciary, a so-called "judge of freedoms", is enough to order this incarceration, *before* any hard evidence has been gathered against the person, as is typically the case in France, Italy, and other Napoleonic-inquisitorial jurisdictions, which are prevalent in Europe. Article 24.1.b furthermore gives the EPP the power to "instruct"a national judge to issue a European Arrest Warrant against anyone anywhere in the EU, who may then be transported to any other State "where he is required to be". Article 25.2 says that the "judge of freedoms", appointed by each member state, must check the legality of the acts of the EPP. However nowhere does it say that this must be done in a public hearing, and nowhere is there any reference to any need to look at prima facie evidence.

A third British safeguard which will be swept away with Corpus Juris is the right of the accused not to be tried again for the same offence. In other words in Britain (unlike on the continent), the prosecution may not traditionally appeal against an acquittal, and even since recent reforms "new and compelling evidence" is required to order a re-trial. Yet article 27.2 of Corpus Juris says "In the case of total or partial acquittal, appeal is also open to the EPP as prosecuting party". There is no mention of any need for "new and compelling evidence".

I published two articles about Corpus Juris and what I saw and heard at the seminar, in the European Journal (April and June editions 1997). The Foreign Office had not been informed, and I was told they were "gobsmacked" when I told the British Embassy in Rome about it on my return from Spain. In November 1998 the Daily Telegraph started a week of articles denouncing the threat of Corpus Juris, which was followed by Parliamentary Questions tabled by Patrick Nicholls MP and James Clappison MP. Kate Hoey, Home Office Minister at the time, promised Parliament that the government would veto it if it were ever formally presented.

In 1999 the House of Lords Select Committee produced a weighty Report (HL Paper 62) on Corpus Juris, rejecting it. Two witnesses, members of the EU Parliament, Frau Theato and Signor Bontempi, gave oral evidence to the Committee in which they said that the "protection of the

financial interests" was "a point of departure", which "may also open a way to the fight against crime". And they intended to bring it in under article 280 of the Amsterdam Treaty which provided for measures against fraud to be introduced by QMV. (op.cit. pp. 82-91) A second part of article 280 appears to give a safeguard to the "national administration of justice", although Frau Theato in the European Parliament said this would not affect the introduction of Corpus Juris by QMV. However Kate Hoey maintained that it would, and there was clearly going to be a furious row if the EU side had persisted.

Corpus Juris, though ostensibly limited to offences of fraud against the EU, is thus clearly intended as the thin end of a broad wedge, ultimately to bring all criminal justice under the jurisdiction of the EU's organs.

Further details about Corpus Juris may be learnt from the video of the debate I held against its British co-author Professor John Spencer Q.C., of Selwyn College, Cambridge. The video is in four parts and can be viewed on Youtube:
http://www.youtube.com/watch?v=5-HzMDO58MQ
http://www.youtube.com/watch?v=AX0znWdpPjg
http://www.youtube.com/watch?v=xxloF2yxiVo
http://www.youtube.com/watch?v=A0_i6iaA6LE

The debate took place in February 1999, in Churchill College, Cambridge, on a motion that "Corpus Juris is a threat to our civil liberties". I spoke in favour of the motion and Professor Spencer spoke against it. The motion was passed with 39 votes in favour and 4 votes against. Since then Professor Spencer has named me twice as the person chiefly responsible for having influenced the media and the government against Corpus Juris and having thus blocked its introduction ("The Corpus Juris project – has it a future?", Cambridge Yearbook of European Legal Studies,vol.2, Hart Publishing 1999, & "The EU policy founded on a myth", Parliamentary Brief, 17 January 2011).

The Corpus Juris proposal has not been mentioned much in recent times, but it is by no means off the table as far as the EU Commission is concerned. Its centrepiece, the establishment of a European Public Prosecutor's Office (EPPO), has been put forward more than once. Likewise the reinforcement and extension of the powers of Eurojust, which is one of the measures being discussed, and is seen as a stepping stone to setting up a EPPO. Once the principle of the EPPO has been accepted, the next step is necessarily to give him a procedural rule-book, and there we have Corpus Juris, made specifically to measure for that purpose.

SECTION V

Mutual recognition

Since however it did appear that the imposition of a single criminal code on all Europe would meet with serious opposition in the UK, a new route towards harmonisation was suggested, at Tampere in 1999, which was to be the "mutual recognition" of judicial decisions in one EU state by the judicial authorities in other EU states. The most visible fruit of this approach has been the European Arrest Warrant.

The **European Arrest Warrant** is one of the 135 measures that the government wishes to opt out of, but it is also one that the present government proposes to opt back into.

When it was first put forward in 2002, the Conservative Party in Parliament was opposed to it. A young MP called David Cameron was particularly active. I even had a brief exchange of emails

with him on the subject. Another Conservative MP, Nick Hawkins, read aloud a 5-page briefing paper which I had prepared, during the debate on the Extradition Bill in Standing committee D in the House of Commons, in January 2003, on aspects of Italian criminal procedure. The government's reaction showed that at that time they had not conducted any research in any depth on the very different – indeed alien to us – criminal law systems of the continent that British citizens in Britain were now being exposed to. For instance, the government stated that people would be extradited for prosecution purposes, but not for investigative purposes i.e. not for "fishing expeditions". My briefing showed that Italian criminal procedure makes no distinction, for an investigation is always *against* a suspect, who in serious cases is imprisoned from the outset, before enough evidence to prosecute has been gathered (see Hansard: http://www.publications.parliament.uk/pa/cm200203/cmstand/d/st030121/am/30121s03.htm) also in Appendix C.

Therefore if the EAW form asks "Is this arrest being sought for a prosecution against this person?" the Italian judicial officer will translate "prosecution" as "azione penale" (=literally "penal action") which includes both investigative and prosecutorial activities without distinction, and will tick the box marked "Yes". In that debate in Committee, the government spokesman Bob Ainsworth remarked merely that "The Italian justice system is very different from ours", but no notice was taken of the probable consequences and the Bill was passed regardless, thus rendering vain the government's stated intention.

The concept of *mutual recognition* has to be based on *mutual trust and confidence* in the fairness and justness of each other's judicial systems. This is clearly possible within the United Kingdom, where the differences between the English-and-Welsh system, and those of Scotland and Northern Ireland, are so slight as to be negligible when it comes to having confidence that they will not be oppressive or unjust. It could even be arguably possible to posit the existence of a basis for mutual trust and confidence between the jurisdictions of the UK and those of Australia, Canada and New Zealand, which after all are based on ours and share our traditions and values.

However I think I have shown that the differences between our system and those used on the European mainland are so profound and radical that we cannot take it for granted that a prisoner extradited to one of them will receive the same safeguards of his rights as he would in the UK itself, or that he will not be subjected to treatment that we would regard as oppressive and unjust.

Previous legislation governing extradition provided amongst other safeguards that the UK court could demand to see the prima facie **evidence** against a prisoner that the requesting state had already collected. This safeguard has now gone, on the grounds that the examination of evidence is now up to the (presumably trustworthy) foreign jurisdiction.

What is not appreciated is that whereas in the UK pretty hard evidence must be collected *before* a person can be arrested (and then may have to be exhibited in open court *within hours of arrest*), on the continent this is not so. The authorities there can attempt to build a case against a suspect *after* he has been locked up. This can take months. This is why there are time limits of several months (extensible) during which a suspect may languish in jail before any evidence has been marshalled against him – enough evidence to commit him to trial. NB the time limit is not for "remand in custody" which occurs in the UK *after* a prisoner has been committed to trial, ie after it has been established in court that there is a reasonably solid case to answer. This time limit, "pending investigation", refers to the period of imprisonment *before* the committal hearing. In Corpus Juris it is 6 months, renewable for 3 months at a time, which is fairly typical of continental jurisdictions. Then *more* months may be spent on remand before the prisoner is actually brought to the trial proper. The reformed Italian code of criminal procedure provides that the maximum time a person

may be lawfully detained before their final verdict of guilt or innocence is two-thirds of the maximum sentence for the crime charged. Very serious crimes carry a maximum penalty of 30 years, so in theory a person may lawfully spend twenty years in prison before his innocence is finally acknowledged, and this cannot be called a "miscarriage of justice".

As was explained in my briefing paper, read aloud by Nick Hawkins MP to Standing committee D in 2003 (see Appendix C below), Italian legal parlance does not even have a specific word for "evidence". English has three words covering three areas of meaning: clue, evidence, and proof. Italian has only "indizio" (=clue) and "prova" (=proof). When trying to convey the idea of "evidence", the Italian language has to make do with a phrase like "elementi di prova" (= elements of proof), or perhaps "testimonianza" (=witness statement), but this is not really very satisfactory, at least not to our way of thinking.

Italian law lays down that a person may be arrested and put in prison when there are "indizi gravi e concordanti" (=serious and concordant clues) pointing to guilt. We would consider that quite insufficient, and would say that they imprison people on very flimsy evidence. Italian jurists say that "La prova si forma nel dibattimento", which means that "proof" (or it could be evidence) is formed during the open-court debating phase of the trial-process. This can take place many long months or even years after the suspect's arrest and incarceration.

It is well known that very large percentages of the inmates of many continental jails, especially in Southern Europe, consist of prisoners awaiting the outcome of investigations or awaiting trial and in any case awaiting the definitive result of the proceedings regarding them.

SECTION VI

What safeguards are offered for the protection of fundamental human rights?

Looking at the list of the 35 measures that the government has announced it intends to opt back into, it can be seen that Command paper 8671 considers the "**fundamental rights**" of persons concerned for each of the measures in question.
It must be asked – what is the yardstick used to determine what these fundamental rights are? And it can be seen that the government has used the yardstick laid down by the European Charter of Fundamental Rights (ECFR); it also refers often to the European Convention on Human Rights (ECHR). The implication is that all the member states involved are signed up to both, and so that solves the problem.

I would contend that it certainly does not solve the problem.

Our traditional British conception of our civil liberties, rights and, most importantly, their *safeguards* (trial by independent jury, Habeas Corpus, etc) is different from that of our continental partners, who do not recognise these safeguards in their own laws. What is more, they are not contemplated by the ECHR nor by the ECFR (European Charter).

Taking article 47 of the ECFR, which repeats practically art 6 of the ECHR:

"Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law."

This begs the question of what is a "fair" hearing and what constitutes an "impartial" tribunal. For us in Britain an impartial tribunal has to be a *jury* of the defendant's peers, chosen by lot, who have no axe to grind and who know nothing about the case except what they learn in court (hence our restrictions on pre-trial media reporting), and who are not professional brethren and colleagues of the prosecutor. In Napoleonic-inquisitorial jurisdictions it is considered to be "fair" to be tried by case-hardened professional judges who will have been prosecutors but have never been defenders, and who may try case after case with the same prosecutor but always different defenders. These arrangements have never been contested in the name of "impartiality" for it is assumed that the judiciary are somehow impartial by nature… after all, they have become judges by passing a law exam.

A fair hearing for Britons also includes the right not to have previous convictions mentioned before the verdict. Previous convictions are always mentioned and considered by Italian courts when reaching a verdict. We also consider it fair to have hearsay testimony excluded, for the reported statement can become the testimony of an absent witness who cannot be cross-examined. On the matter of hearsay testimony, Italian procedure distinguishes between "sentito dire" testimony (= literally "hearsay", but in Italian judicial parlance it refers to when a witness reports an unattributable rumour), and "de relato" testimony, when a witness says "Mr So-and-so [not present in court] told me that….". The testimony of unattributable rumours is not admissible, the testimony of reported statements by a named third party is admissible. The impossibility of cross-examining the absent "witness" is not considered important. Until the reform of 1989 defence lawyers were not even empowered to call, examine and cross-examine witnesses at all, but could only respectfully suggest the names of witnesses to the judge, and then when witnesses were called, suggest questions to be put to them. The judge alone had to power to decide which witnesses to call and then actually to put questions to them. They can now call their witnesses and examine them and cross-examine those of the other side, although the judge still has the power to veto witnesses and any of the questions, and to put his own questions to them.

Lastly the "reasonable time" after which an arrested person can expect a public hearing is not specified by either the Charter or the Convention. For us in Britain is is within *hours*, whereas in Italy, and other continental jurisdictions, and in the Corpus Juris proposal which presumably is the collective distillation of the continental systems, it is considered "reasonable" to spend *six months* and more in prison before appearing in a public hearing.

It can be seen from this that the ECHR and the ECFR are very thin blankets which have to cover both our system and theirs, and can only do so by being very vague and indeterminate. Above all, these two documents merely state general principles, which it is then hoped will be applied by the judicial powers-that-be in each signatory state. Our British safeguards such as Trial by Jury and Habeas Corpus provide practical remedies to ensure that the rights of personal freedom and a fair trial etc will be effectively protected, without having to wait for a long time and then appeal to a distant European court against the judicial institutions of one's own country.

It has been noted that the ECHR was drawn up in 1950 largely by British lawyers to provide some sort of barrier against any future repetition of the horrors of the thirties and forties in Europe. Presumably they must have faced the question of whether to include matters like Habeas Corpus and Trial by Independent Jury amongst the basic human rights, but then realised that the countries where these rights were to be applied had completely different traditions that did not contemplate these safeguards which in Britain are taken for granted. For continental countries in the Napoleonic-inquisitorial tradition, the ECHR is, or should be, a step up. For Britain, if this became the sole arbiter of our rights, it would be a step down.

The incompatibility between the two systems can be seen if we consider the European Arrest Warrant: it is true that Section 21 of the Extradition Act 2003 requires the judge at the extradition hearing to discharge the person if the judge is of the view that execution of the EAW would result in the person's Human Rights as defined by the European Convention being breached. The reason why this has so far never been successfully used to stop an EAW extradition is that all the EU countries are signed up to the ECHR, and so are "presumed" to respect the rights therein defined. The trouble is that these systems do not respect what Britons have for centuries considered to be their rights – to trial by an independent jury, to no detention without a charge backed by evidence exhibited in open court, etc. And the ECHR makes no provision for them either. If Section 21 were to read "… if the judge is of the view that execution of the EAW would result in the person's basic rights, as defined by British law, being breached…" then it would be unacceptable to our continental partners. Likewise if we were to demand, as we should, that the ECHR be amended to include Habeas Corpus, Trial by Independent Jury, etc. there would be an outcry from our partners, for it would force them to adopt a profound and revolutionary transformation of their whole system.

The government's intention therefore, as stated in Command Paper 8671, to use the ECFR or the ECHR as a yardstick to see whether a particular measure is in conformity with *our* fundamental rights and civic liberties, as these have been established over hundreds of years of British constitutional development, is therefore totally inadequate and inappropriate.

SECTION VII

The irreversible ratchet.

If we fail to opt out of, or opt out but then opt back into, any of the 135 JHA measures, we will become **subject to the jurisdiction of the ECJ and the enforcement powers of the European Commission**. This will be a position from which, however uncomfortable it may become, the only retreat will be a complete British exit from the EU itself, with a unilateral repeal of the ECA1972.

At present the "enforcement powers" of the Commission consist in the imposition of fines on non-compliant member states. However it could well be that more stringent and coercive powers will be acquired in future (see below). Enforcement powers, as the word itself implies, include the application of force –even brute force – against those who do not comply.

When a key personage in the Commission which is to wield enforcement powers over us says, as the Commissioner for Justice has said, that we would be "crazy" (not "ill-advised", mind you, but "crazy") to want to opt out of any of the JHA measures, even though this option be specifically provided and allowed by the treaty, it may be reasonably anticipated that our position under the rule of her enforcement powers could well become uncomfortable.

That a unilateral withdrawal by Act of our sovereign Parliament is legally possible and legitimate has always been maintained, not just by anti-EU activists, but by the likes of Lord Denning, and even by Lords Laws and Crane in their judgement against the Metric Martyrs, as well as by Baroness Vernham Deane speaking for the government when, rejecting a motion by Lord Stoddart to include a codicil to the Treaties spelling out that the UK did retain the right to unilateral withdrawal, she said that it was obvious and did not need re-stating.

It has been said, drawing on the evidence of recent opinion polls, that a majority of the people of Britain would be quite happy to withraw from the EU. Indeed the present government has felt it

necessary to promise a referendum to put precisely that question to the people, at some stage in the future.

However the majority of members of the Lords' Select Committee are clearly of a different opinion, since they are asking the government not even to proceed with the opt-out.

I would invite them to ponder whether it be advisable to force the issue by accepting all 135 JHA measures? The present government's prospect of repatriating any powers at all after the next election would certainly be blocked if the JHA measures are accepted. Indeed it can and should be argued that opting-in to any of the powers is a transfer of competence from London to Brussels which must trigger a referendum under the vaunted "referendum lock" instituted by the present government.

As "ever-closer union" proceeds, a point comes when our institutions have to somehow merge with those of our partners. The 135 JHA measures are steps in this ongoing process. I think I have shown, after some thirty years of research "in the field", that our system (or systems) of criminal justice is incompatible with that of our continental partners.

If ours is a round hole, theirs is a square peg. The two simply do not fit together.

Ever-closer union can therefore only go ahead if their peg becomes round, so as to fit into our round hole, or our hole becomes square so that their square peg can fit inside it.

Could we persuade our continental partners to adopt the central features of our system of criminal justice? Twenty years ago I wrote to the then Lord Chancellor, Lord Mackay of Clashfern, suggesting that the UK should raise this issue with our European partners. He did not reply. I asked Lord Peter Taylor the Lord Chief Justice, whom I had the honour and the pleasure to meet when we spoke from the platform of a conference in Florence in 1993, to remind him to reply, and he did so, but I still never received a reply. The British political class as a whole seems to have preferred to ignore this vast discrepancy between our and their judicial systems and the problems arising from it for the EU project.

Returning to the specific example of the European Arrest Warrant, since coming into effect it has been heavily criticised for having caused extraditions with no-questions-asked to jurisdictions where some innocent British citizens had to wait long months in terrible jail conditions with no public hearing before then being discharged as having no case to answer, there being no hard, safe evidence against them at all (the case of Andrew Symeou springs to mind).

When the EAW was being debated in the European Parliament in 2002, the late Neil McCormick MEP, QC, foresaw such a potential outcome, and proposed as a remedy a "Euro-Habeas Corpus" provision. This is the only official attempt I am aware of to introduce some element of basic British justice into continental procedures. It failed miserably, for his motion was voted down by a crushing majority of MEPs. The reality is that Habeas Corpus is not provided in any European Charter or Convention of Rights and is not thought to be necessary or desirable by our continental partners. The **serious risk**, or indeed **likelihood**, is that if we allow ourselves to be carried forward in this general process to merge our systems together with theirs, we will be required to give it up.

During the 1980s the Italian Parliament, after some judicial scandals including one colossal miscarriage (the Tortora case) which was likened to the Dreyfus case, was attempting to reform their code of criminal procedure which was the one inherited directly from Mussolini and still being

used. There was talk of introducing the "Perry Mason mode of trial" into Italy (Italians were all familiar with the TV series).

If this had happened it would have been a momentous event, for the homeland of the Holy Inquisition to adopt the principles and practices of the Magna Carta tradition. But it did not happen, the reform turned out to be mild and timid. Some of the rules of procedure were changed, but the powers and the composition of the career judiciary were left intact, as explained to me by Senator Vassalli in the interview for the Financial Times which I cited above.

In fact the career judiciary has an Association, it commands a majority in the Supreme Council of the Judiciary by which it is regulated, so it is a very powerful lobby at the national level, and, together with similar bodies in other countries, at a European level. There have been calls in Italy to at least separate the career of prosecutors from that of judges (they form a single body with one career path), so as to obtain a greater degree of independence of the judicial from the prosecutorial function. These calls, even supported by the Berlusconi government when he and his allies commanded a clear majority, have never met with success.

What is more, the countries that follow the Napoleonic-inquisitorial tradition are the majority in Europe, so under any QMV decision-making we could find ourselves forced to face the alternative of either accept their decision, however unpalatable it might be to us, or simply to pull out of the EU by repealing the ECA72.

SECTION VIII

The 135 JHA measures we are being asked not to opt out of, and the 35 measures we are being asked to keep.

We are being asked not to opt out of all 135 JHA measures, by Commissioner Reding and by the House of Lords' Committee. We also being asked by the government to accept opting-back-in to 35 of them.

They cover many areas of judicial and police activity, and they all increase the areas of jurisdiction of the European Court of Justice and subject us to the enforcement powers of the European Commission.

In neither of these bodies will the UK have a veto. Nor, even if we combined with the other two or three states who share something of our legal traditions (Ireland, Malta and Cyprus), will we be able to form a blocking minority. We shall therefore be obliged to accept the rulings of judges who grew up and were trained and educated in a tradition, or traditions, that do not share our values.

What is more, the ECJ has a mission statement, which is to favour the "ever-closer union of the peoples" of Europe. Its decisions must tend towards that aim. Some criticise it for this, and say it is not a true court of law, if it has to favour one pre-set side in any argument.

We have seen with the Corpus Juris proposal that the general aspiration of the architects of the European project in this field is to arrive eventually at a single system valid for the entire EU territory. Many of the 135 JHA measures have been described as "stepping-stones" towards a single system. In view of the UK's negative reaction to the Corpus Juris proposal (in particular by the Select Committee chaired in 1999 by Lord Hope of Craighead), it has been soft-pedalled, the

alternative of "mutual recognition" has been put forward instead for the time being, as the original proponents have bided their time.

Others, in particular Dominic Raab MP, writing for Open Europe, have been through the list of 135 measures one by one. In each case Mr Raab sees no practical need to accept the jurisdiction of the ECJ and the enforcement powers of the EU Commission. He suggests bilateral or multi-lateral agreements or Memoranda of Understanding between States, where each retains its sovereign power of decision. He suggests "cooperation, not control" and this seems eminently sensible. There is surely cooperation in trans-border law enforcement between the United States and Canada, but nobody has suggested that both should subject themselves to the over-arching jurisdiction of a common supreme court in order for this to be possible or in order for it to work. Nor indeed for both governments to be subjected to its enforcement powers, renouncing their national sovereignty.

Mr Raab suggests opting back in to the EAW but for us to put conditions to be met before we do. Three of the conditions he suggests however do not pertain to the EAW itself, as he appears to think, but to the very nature of the Napoleonic-inquisitorial systems used on the continent. They are:

- "Stronger preliminary evidence to be required" from the requesting State. This would mean that each of the other States in the EU would have to adopt our requirement that some solid prima facie evidence be assembled *before* an arrest is made. In many or perhaps most of these states there is no such requirement, neither for arrests made within their borders nor for arrests requested elsewhere. They are simply not geared to operating their detective work in the way we are. Their career judiciaries are more accustomed to arresting a suspect as the *first* step in an investigation, and only then acquiring evidence, or "proofs", of his or her guilt. And as discussed above, our demand for them to produce "evidence" would easily get "lost in translation".

- "No double jeopardy." This would require the Italians, for one, to change their very constitution, which provides that any party (prosecution or defence) has a right to appeal against a verdict.

- "Extradition for prosecution but not for investigation purposes". As discussed above, this would be meaningless in jurisdictions like the Italian, where there is no conceptual distinction made between an investigation and a prosecution, both being subsumed under the general concept of "azione penale" against someone.

Mr Raab also touches on the matter of **convictions in absentia**. Should we extradite persons to serve sentences when their trial or trials and definitive convictions were conducted in their absence ? Should we extradite these persons to jurisdictions where they will have no right to any hearing in a court of law, where they may state their case and offer a defence?

There was a test case before the ECHR a number of years ago, Colozza vs Italy, where the person was convicted in his absence, never having been notified that there were proceedings underway against him. He was later traced by the authorities, arrested, and sent to serve his sentence, with no possibility of defending himself in any court. He died in prison but his widow won the case, and a small sum of money, and the European Court ordered Italy to tighten up its notification procedures.

What has not been tested, to my knowledge, is a case where a defendant was notified of the proceedings, but chose to abscond. It is generally assumed that if the defendant is then convicted in absentia, that is his own choice and his own fault, and so he deserves to serve his sentence without

being heard in a court of law. Now this argument may have some validity in a jurisdiction like Britain's.

But in jurisdictions where there is no Habeas Corpus, and where court proceedings can drag on for many years, is this fair? In one case, a man was extradited to serve a sentence of 26 years on a conviction which he always maintained was wrong, for a crime that he did not commit. At the beginning of the penal proceedings against him, he sought refuge in another country. The proceedings dragged on for seven years, passing from the preliminary judicial investigation to the court of first instance, the court of appeal, and the final court of Cassation which confirmed his conviction. In his absence his lawyers did not conduct his defence as well as they might have done if he had been present. After his definitive conviction the State that had tried and convicted him demanded and obtained his extradition. He was then just bundled into jail to serve his sentence, with no right nor chance of any hearing in a court of law. His own lawyer (a new one) told him "Ah, if only you had returned to face your trial you would probably be a free man today". However, the reason he did not return to "face the music" was that under the rules on "precautionary custody" if he had returned, he would most certainly have been imprisoned at the start of the proceedings against him, and only released, as was quite possible, after seven years when and if the court of cassation declared him to be innocent. He faced a cruel wager: to return meant putting seven years of his life on the table, with the certainty that he would lose them, or at least some of them if he were cleared perhaps on appeal (as happened with Amanda Knox and Raffaele Sollecito in a well-known case in Perugia). That was the price he would have had to pay in order to have a chance of avoiding the 26 years' sentence he is currently serving, without ever having been heard in any court of the country that convicted him. Is that fair? As far as I know, this argument has never been put to any court, e.g. the European Court of Human Rights. It is another instance of the incompatibility between their system and ours, for we do not hold trials in absentia at all.

THE MERGING OF ENFORCEMENT AGENCIES

9. Eurojust, Europol, CEPOL,
10. Our traditions of policing and theirs – the Eurogendarmerie

SECTION IX

Eurojust, Europol, CEPOL, harmonisation etc.

A fair number of the 135 provisions, including those 35 that the government wishes to opt back into, concern Eurojust, Europol, CEPOL (the European Police College). It is important to consider

that not only are our judicial systems quite different from those of our European partners, but also our concepts, traditions, and methods of policing.

First, are Eurojust and Europol merely coordination offices, like say Interpol? At present this seems to be the case. The House of Lords' Committee denies that "harmonisation means that these are building blocks for a pan-EU justice system".

However as regards Europol, some 16 years ago, as I wrote in an article in the European Journal (February 1997), quoted in the House of Lords by Lord Stoddart, the German Chancellor Helmuth Kohl said that he expected Europol to develop into a European F.B.I. with operational powers. We may note that Kohl was the mentor of the present German Chancellor Angela Merkel. That was, and surely still is, the ultimate intention of these powerful Eurocrats.

If it is said "But Europol has no operational powers" we reply "Today no. But if we are to submit to an overarching decision-making authority, we must look to the intentions of those most likely to have a decisive influence on that authority, for once we have submitted we must accept whatever decisions it hands down."

Likewise Eurojust has been seen as a stepping-stone to the establishment of a European Public Prosecutor. Once we have accepted the jurisdiction of the ECJ and the enforcement powers of the EU commission over us in these matters, our destiny will lie in the lap of these bodies, over which we have little or no influence. And whose systems and concepts of criminal justice, as I have endeavoured to show, have little in common with ours.

The mere existence of a "European Police College" is surely hard evidence of the intention of creating a homogenous European police culture and set of values, and what is the point of that if not to then establish a unified European Police Force?

SECTION X

Our traditions of policing and theirs – the Eurogendarmerie

And here too we face a major difficulty, for the traditions of policing in the UK are very, very different from those in continental Europe.

As I wrote in a pamphlet, "The Coming Tsunami", published in 2010:

In Britain the police is normally *unarmed, civilian, locally recruited and locally accountable, and its priority task is to detect and prevent crime.* The maintenance of public order is a secondary task. The concept of "policing by consent" is considered paramount.

In continental nations, the police are *lethally armed at all times, paramilitary, nationally recruited and controlled by central government, and redeployed all over the national territory, and its priority task is to keep public order,* which means maintaining the supremacy of the State over the people. When it investigates crime it usually does so under the strict supervision of the investigative judiciary. The idea of "policing by consent" is alien to the value-systems prevailing on the continent, and would cause puzzlement. People there would say "but the police are necessary precisely when there is no consent to government policies."

As part of the transformation of the EU into "one country", as the German Chancellor Helmuth Kohl put it, the European Commission has set up not only Europol, with its head office in the Hague, but also an embryo European riot-police force, called the European Gendarmerie Force, explicitly in the service of the EU (though there have been attempts to mask this), stationed in barracks in Vicenza, N. Italy, for the time being. There are at present six participating states which each contribute their own Napoleonic-style armed paramilitary anti-riot gendarmerie force – the French their Gendarmerie, the Spaniards their Guardia Civil, the Italians their Carabinieri, etc. It has its own official website, www.eurogendfor.eu , with a lot of photographs which show exactly what it looks like.

Now since the EU has set up its own armed paramilitary police force, we must conclude that it is obviously intending to grow it and to expand it, and at some stage, to deploy it and to *use* it. So far six States are participating, and Britain is not one of them. Will we ever see the Eurogendarmerie on our High Streets?

At present this depends on the Treaty of Velsen, which gives the legal basis of the EGF. See http://www.eurogendfor.org/eurogendfor-library/download-area/official-texts/establishing-the-eurogendfor-treaty

Art. 6.3 of this treaty says the EGF may be deployed in any state with the "agreement" i.e. the consent of that state. UKIP asked the previous government in both Houses of Parliament for an assurance that our government would never give any such consent. That assurance was denied. This can only mean that that government intended to give its consent.

Moreover with the failure to exercise the opt-out, or opting in to the relevant measures, matters of Justice & Home Affairs now come within the EU's remit, so they can be decided by majority voting.

One measure of particular interest, which HMG has declared it intends to opt into, is Council Decision 2008/617/JHA
on the improvement of cooperation between the special intervention units of the Member States of the European Union in crisis situations. "Special intervention units" are obviously going to be units of the Gendarmerie, the Guardia Civil, the Carabinieri – ie the very components of the Euro Gendarmerie Force.

Whereas the previous government refused to answer the Parliamentary questions as to whether it would give consent to the deployment of the Eurogendarmerie on British soil, the present government received a similar question as follows:

Criminal Proceedings: EU Law

(Hansard, written answers for 11/06/2012)

Mr Raab: To ask the Secretary of State for the Home Department with reference to EU Council Framework Decision 2008/675/JHA, in what circumstances she envisages that the **UK would request special intervention units from other EU member states** to operate on UK soil. [110125]

James Brokenshire: The United Kingdom's response to any incident will be individually tailored to the nature and scale of that incident. Should we identify the need to seek the support of our allies in managing a crisis situation, **we would of course do so**. [emphases added]

The government should be warned that with this attitude it is recklessly playing with fire. The "special intervention units from other EU member states" that "of course" they would ask to intervene on British soil would be the very self-same units that make up the European Gendarmerie Force.

Unless we exercise the opt-outs now, and keep them, we will be "subject to the jurisdiction of the European Court of Justice, and the enforcement powers of the Commission". These powers could at some stage go beyond the power of fining non-compliant states, and could include command of the Eurogendarmerie, at present reporting to the Council of the Ministers of the participating states (CIMIN). The Commission could see an increase in the array of "enforcement powers" at its disposal, to include Europol and the Eurogendarmerie.

The point is that once the armed, paramilitary, Eurogendarmerie are inside the country, no British government can ever order them to leave, for they will only obey orders from their masters in Brussels. For the people of Britain it will feel like being under military occupation by a foreign power, imposing alien laws on us.

At that point British participation in the EU project will no longer be voluntary. Our sovereign right to withdraw, never denied by any British participants in the debate, will have gone.

CONCLUSION

In conclusion I therefore urge the House of Lords Select Committee, and the House of Lords itself, to support the opt-out from the 135 JHA measures already voted by the Commons, and the government and Parliament not to opt back in to any of them, in particular to repudiate the European Arrest Warrant, which the Conservative Party officially opposed at its inception in 2003.

Otherwise this will undoubtedly constitute a transfer of significant further powers from Britain to Brussels, that must surely trigger a referendum under the existing legislation.

Torquil Dick-Erikson, Rome, 11th September 2013