

as global resources have been concentrated in certain regions of the world. Criticisms of border policing stem from the exclusion of individuals from opportunities in destination countries and the manner in which apprehended immigrants are treated. The greatest challenge of border policing involves finding ways to competently secure national borders while also being responsive to individual rights.

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- U.S. Customs and Border Protection Main Site: www.cbp.gov
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- Europol Main Site: www.europol.europa.eu

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56 Challenge and Transition

POLICING DEVELOPMENTS IN THE EUROPEAN CRIMINAL JUSTICE SYSTEM

Conor Brady

EVOLUTION OF THE NEW EUROPE

A description of current and recent developments in European policing necessitates, by way of preface, some outline of the political structures that are evolving in the EU. It was Henry Kissinger who posed the question – when you want to “phone Europe, who do you call?” That was more than thirty years ago. Europe – or the European Union, to be exact – was then a very much smaller place. It comprised nine countries with a population of less than two hundred million using four major languages. Today, the European Union is twenty-seven countries, with more than six hundred million people with twenty-three official languages. How can such a disparate collection of peoples and nations, run a criminal justice system or operate effective policing structures? How can it operate to enforce criminal law across frontiers that have existed in some cases for one thousand years?

Three times more than one hundred years, the nations of Europe went to war against one another and scores of millions of people died, great cities were razed to the ground, whole countrysides were left a wasteland. After the devastation of World War II, a number of far-seeing political leaders, principally Maurice Schumann and Jean Monnet, resolved that Europe would never go to war against itself again. They believed that the best way to ensure this was to build a Europe where resources were held in common, where prosperity of one would be the prosperity of all.

In 1956 the European Coal and Steel Community was created, putting France’s and Germany’s heavy industry into the common ownership of the two countries. There would no longer be any reason for a war between the states since they were now partners.

In 1960, the European Economic Community grew from the ECSC. In the Treaty of Rome, six countries came together to form a common market and a free trade area. They were Germany, France, Italy, Belgium, the Netherlands, and Luxembourg.

In time, the six became nine, when Britain, Ireland, and Denmark joined. Then the nine became the fifteen, when they were joined by Spain, Portugal, Greece, Sweden, Finland, and Austria. The fifteen became the twenty-five, in 2004 with new members Poland, the Czech Republic, Hungary, Latvia, Estonia, Lithuania, Malta, Slovenia, Slovakia, and Cyprus. In 2007 Bulgaria and Romania joined the Union, bringing membership to twenty-seven.

As the economies grew and became more closely integrated, it became clear that there was a need for parallel harmonization in social policies, in education, health care, human rights, law – and, in the latter case, for policing, for criminal justice and for judicial procedure (Glavey, 2000).

In the Treaty of Maastricht in 1992 and the Treaty of Amsterdam 1996, the European Communities became the European Union. By then, the Communities had a European parliament, elected directly by the people: a Commission – which is, in effect, the executive; a Council of Ministers, which represented the political oversight of the Community. The Council of Europe had also afforded Europeans a court of final appeal, to which any citizen or litigant could turn if he or she believed that local, domestic law was in conflict with one's rights under the European Convention on Human Rights.

In 2004, the heads of governments of the EU states agreed on a new draft constitution for the Union. This has yet to be ratified by the member-states. Some have mistakenly begun to see this process creating a United States of Europe. This is to misunderstand the reality. Europe had no single government, no army. Yet the EU has recognized that if there is common economy there has to be a harmonization in other areas. If borders and frontiers are abolished, economic activity will spread. But so also will criminal activity.

THE "THREE PILLARS" OF THE EUROPEAN UNION

The EU is described as being supported by three distinct "pillars."

The first is the economic pillar. Without a doubt, this has been an extraordinary success. The EU has created an economic zone that exceeds the US in GDP. It has created a free market in goods and services. It achieved harmonization of key economic policies. It now uses a common currency, the Euro. The term "free market" is generally preferred by commentators in European media.

The second pillar deals with foreign policy and defense. It is a crucially important area for the future development of the Union. But it does not touch directly on the subject of this paper.

The third pillar seeks to establish an "area of freedom, security and justice" within the EU. The development of an EU policy on Justice and Home Affairs began with the Treaty of Maastricht which came into operation in late 1993. It could be said that flesh and blood were added to the bones of the Maastricht Treaty in the Tampere declarations of October 1999 and brought to life in the (Second) Treaty of Amsterdam, also in 1997 (Swallow, 1994). It was clear that an effective and efficient policing and criminal justice system could not operate across the Union without significantly overhauling existing linkages and structures. The countries of the EU, heretofore, had a liaison system that operated through Interpol at its headquarters at Lyon, France.

For many years, at political level, the EU had a loose and somewhat informal forum for cooperation on issues of justice, home affairs, law enforcement, and crime. This was the Trevi Group, established in 1976. In 1984 it took the form of regular meetings between EU Ministers for Justice. (In the aftermath of the 2004 terrorist bombings in Madrid, however, a EU antiterrorist coordinator, Mr. Gjis De Vries, was appointed.) But until 1999 there was no police or law-enforcement system, specific to the EU. A police officer in one part of the Union who wanted information from another, was in exactly the same position as an officer calling from an African or a South American police service. Operationally, the Schengen accords proved very inadequate, leaving police officers on the ground frustrated.

In developing new structures for policing and law enforcement, the EU has had to advance slowly, sensitively, and with a constant awareness of the necessity of balancing efficiency and effectiveness against individual freedoms and rights. Thus, it was decided that in addition to the development of new policing and judicial linkages, there should also be a new European Charter of Fundamental Rights in order to underpin personal freedoms. The Charter was signed into law in October 2000 (Walsh, 2000).

In 1992, under the terms of the Maastricht Treaty, the EU established the first specifically law-enforcement agency of the Union. From 1992 to 1994 it remained largely an idea on paper but in 1994 it became a reality as the Europol Drugs Unit (EDU).

THE SETTING UP OF EUROPOL

In 1995, the EU Council of Ministers provided for the establishment of the European Police Office or Europol. By 1999, Europol was up and running

as a fully-fledged, multipurpose policing agency. Europol is located at The Hague, in the Netherlands, and each country of the union has officers on permanent attachment there. They are essentially an intelligence and information-clearing operation and are supported by high-level information systems, linked to each member states' security and police institutions.

Europol's priorities are:

- Illegal drugs and narcotics and linked criminal activity
- Terrorism and terrorist activities
- Human Trafficking
- Money Laundering
- Forgery, counterfeiting, and fraud (the organization has a special mission to protect the integrity of the Euro)
- The control and transporting of nuclear and other hazardous materials.

The development of this new policing instrument, however, has to be seen in the context of other, linked initiatives. In 1995, the EU promulgated what has become known as the Schengen Area, an initiative named from the city in which it was agreed. Some EU countries were "foot dragging" but the impetus for Schengen came from within the main EU states – even if it was not shared or supported by all members.) The Schengen Area defines a single border around the EU; it has common rules on visas, on asylum seekers, on border checks and on the movement of persons. The border in part runs inside Europe – along the English Channel, to be precise, and currently, to some extent, between EU member states in Central and Eastern Europe. A further development was the advent of the Schengen Information System which shares information across the EU on persons and objects that may be of interest in issues of public security.

A principal instrument of Schengen is the Sirene system of linked databases, operating in each state and providing detailed information on travel and movement in and out of and within the Union. Other initiatives included the establishment of EURODAC, an EU-wide fingerprinting database.

A European Police Chiefs Operational Task Force was established. This now meets regularly to define and agree action on operational issues across the Union. A European Police College – CEPOL – was established. This is a network of European Police Colleges that share expertise, serving the needs of law-enforcement agencies right across the Union.

A network of prosecutors, magistrates, and police investigators called EUROJUST was created. This enables investigating magistrates and

prosecutors to work together across national boundaries in the investigation and prosecution of serious and organized crime.

It is important to understand that this is a system of networks or linkages that aims to improve efficiency among 120 police agencies across Europe. The structures are horizontal rather than vertical. They have secretariat services in one or other of the EU capitals, but they do not operate on a central, controlling basis.

DIFFERENT SYSTEMS WITH COMMON VALUES

Different countries have their own traditions, culture, and languages, and each has its own value system in relation to crime, law-enforcement, and criminal justice. For example, two quite different trial models operate in the Union: common law and the roman law.

Yet there are some values held in common. No state of the Union operates the death penalty. The principle of judicial review – the right of appeal, if necessary to the EU courts, is guaranteed. Due process is guaranteed – although some states, including Ireland, do retain the right, in certain circumstances, to operate military courts, rather than civil courts, where there is a threat to state security.

It is difficult to make an assessment of how the EU police and security services are effective against terrorist organizations and networks. The Madrid bombings represented a significant success for the terrorists. The London bombings of July 7th 2005 were also a success for terrorists although investigations indicate that the plot was virtually all "home grown" within the United Kingdom.

One also has to ask, what do Europeans actually want in their policing services? Generally, in Europe it is not easy to sell the concept of "zero tolerance." It is not a place in which one could as easily mobilize the sort of measures that the United States has put together in the "Homeland Defense" plan. Its cultural and historic inheritance is different. To strengthen policing systems in this climate is a difficult calculation. The most obvious gap in EU policing has been the lack of an operational, on-the-ground, unit or force that can discharge the same functions as the FBI does in the United States. However, in 2004 the gap was somewhat fulfilled by the establishment of Joint Investigation Teams (JITs) that operate along with officers from Europol, with what would be roughly equivalent to a federal authority. However, each state of the EU has had to pass legislation to enable officers from other jurisdictions to operate within their territory.

Linked to this development is the introduction of the European Arrest Warrant (EAW), which has been effective since January 1, 2004. Each state of the Union operates its own extradition systems and they vary greatly in complexity and emphasis. With the EWA, one judicial system will effectively surrender its authority to the other, recognizing its decisions as if they were its own. Nonetheless, there will be a court decision in every instance before an accused person can be taken from the jurisdiction. An EWA cannot be issued for investigative detention and it will apply to a list of schedule offences including murder, rape, drugs trafficking, and terrorism.

POSSIBLE FUTURE DEVELOPMENTS

Will the development of the EU's criminal justice and policing systems go further? It is difficult to say. There is division on the possibility of creating a EU-wide prosecutor service. Some take the view that if people are to be prosecuted it should be by their own countries and not by some vague, anonymous authority known as "Europe." There is also division over what is known as the "approximation" of European criminal law – that is effectively to harmonize offences, sentencing policy, and so on right across the Union. Some argue that this would be a good thing, bringing consistency. Others say, no, and argue that each country should define its own priorities.

SUMMARY AND CONCLUSIONS

Innovation and reform in the EU's policing and criminal justice systems are still taking place. They are being developed in parallel with Europe's increasing political, economic and social cohesion. It is a changing picture.

The "third pillar" of the EU, dealing with issues of "freedom, justice and security" is still under construction. Europol and other elements of the criminal justice system are now playing an increasing role in liaison with national law enforcement agencies across the Union's twenty-five member states.

EU states will have to decide to what extent they are prepared to accept the harmonization of criminal justice structures, perhaps at the expense of traditional national values. Certain EU states have more recently begun to question the speed and the depth of the European integration process. The Irish, by referendum, initially rejected the Treaty of Lisbon but accepted it in a second referendum late in 2009. Other European parliaments or leaders have hesitated over the Treaty, but by the end of 2009 it had passed all hurdles and was due to come into effect. Whether this more cautious

attitude will spill over into the development of the Union's "third pillar" remains to be seen.

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