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ONE EUROPE BUT TWO SETS OF CRIMINAL LAWS : IS HARMONISATION POSSIBLE ?

by

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Overview

Whether one likes it or not, the fact remains that a judge will handle one's case differently depending on whether one lives in a country where Roman law or common law prevails. Even though the civil and commercial laws of countries which respect the westernised legal system recognise the supremacy of organisations and international and community standards, these countries still cling to the repressive prerogatives of their national laws. Can globalisation really continue despite such discrepancies ? On a European level, the idea of harmonising criminal law is no longer taboo, and several indicators show a slow but inexorable convergence linked to the need to fight cross-border crime while also protecting the fundamental rights of all European citizens.

TALK : Thomas Cassuto

British law and European law

British law has common roots with Roman law. The French motto of the British Royal family, 'Dieu et mon droit', drew its inspiration from a Romano-Germanic tradition introduced by William the Conqueror in the 11th century. However, British law differs greatly from European law.

Common law

At the end of Tom Wolfe's novel 'The Bonfire of the Vanities' (1987), the judge presiding over the case in question realises that justice was almost held to ransom by the two parties, and says 'the law is not a creature of the few or of the many'. This phrase reveals that law, in British eyes, is an extremely broad and dynamic idea which cannot be reduced simply to 'the law' as is the case in France or most European countries. In British law, certain offences are not defined by the law, but by judges. For example, murder or manslaughter have been dealt with under common law since the 14th century, and are punished according to a system of sentencing which is not defined by the law in the literal sense as we understand it in continental Europe.

Continuity and change

Another difference is that British institutions, like American institutions, have developed over the long-term through continuity, whereas European institutions have developed as a result of confrontation and change. Ideas from the Enlightenment period were introduced ruthlessly by French revolutionaries before spreading across the European continent. In France, it was the French Revolution which, in its distrust of the courts of the old regime, forbade judges from being informed about administrative proceedings. This explains why there are two jurisdictional orders in France, the judicial order and the administrative order. Under the pretext of abolishing privileges, the Revolution also decided to establish circular appeals and abolish patents. On a European level, criminal law has changed as a result of the social movements and revolutions which swept the continent throughout the 19th century.

The role of the State

In the United Kingdom, criminal law is considered to be a form of abnormal intrusion of the State into relationships between individuals when contractual or extra-contractual standards are violated. The trial is fundamentally about two sides, and the idea of equality prevails : the prosecutor is a lawyer chosen by the Crown to defend the interests of the Crown and has the same rights as the defence. In France, the prosecutor comes under the authority of the Justice Minister.

These are very important differences which have an impact on the regulations regarding evidence. In a system where the prosecutor has the authority of the law and can launch legal proceedings, he is the person who leads the inquiry, brings together the various elements, refers matters to the court, repeats the law and announces and carries out the sentence. He is the central figure in the chain that ensures an appropriate criminal verdict. In the British system, the prosecutor is just a plaintiff and has the same resources as the defence : both debate the evidence in front of the judge.

The different position that the State occupies in the two systems is particularly well illustrated when one sees how acts of terrorism are handled. In mainland Europe, there is a judicial response : the State initiates measures, there are judicial proceedings, there is a judgement, and acts of terrorism are punished according to a principle of common law. In the United States, the judgement on serious acts of terrorism was handled by military commissions. This in itself

shows the State's fundamental distrust of the judicial system which was considered unfit to deal with particularly complex proceedings, and unable to pursue investigations fully in order to reach a judgement. In the end, these military commissions were abolished by the Supreme Court.

The role of the judge

In the European legal system, the judge has a more important, dynamic and intrusive role than in the British system where he is solely responsible for arbitrating the discussions and solving questions of law. The judge's neutrality and impartiality can, however, be open to question when there is inequality between the two sides.

The emergence of an international criminal justice system

These two legal systems evolved each in its own way until the middle of the 20th century. The United Kingdom was not proactive because it was preoccupied with its empire, and the United States devoted its energy to opening up the American West. Europe was the scene of numerous wars. At the end of the First World War, when the idea was put forward to prosecute Prince Wilhem of Germany for having broken the laws of war by invading Belgium without declaring his intention to do so, the attempt failed. It nevertheless served as the basis for the emergence, at the end of the Second World War, of an international criminal justice system with the agreement of the United Kingdom.

The Nuremberg trials

The Nuremberg trials, the purpose of which was to judge Nazis criminals, played a very important role in bringing together the different legal systems. The American, British, French and Russian judges who sat at these trials had to agree beforehand on the rules governing the procedures. The British rules prevailed. This meant that the legal proceedings and concepts specific to British criminal law were largely made known to the general public. One of these principles found elsewhere in European case law is that not only should justice be done but that it should be seen to be done. One has to demonstrate that one has gone beyond the formal application of the rules of procedure, and that the very idea of justice – using concepts such as a fair trial or equal terms – has been respected.

The European Court of Human Rights

International criminal law was strengthened after the signing of the European Convention on Human Rights which was drawn up by the Council of Europe in 1950. This convention helped the European Court of Human Rights in Strasbourg to develop guiding principles which go further than the ideas that were the inspiration behind the original statutes. For example, Article 3 on the prohibition of torture and inhuman treatment now serves as a guiding principle for detention conditions. Article 6 on the right to a fair and independent trial gave rise to a great deal of case law which plays a major role in the current debate about access to lawyers for people suspected or accused of a crime. The extremely dynamic law practised by the European Court of Human Rights allows both national judges to use the European Convention to apply domestic law, and law-makers to modernise their statutes.

The International Criminal Court in The Hague

The International Criminal Court in The Hague, created in 1998 to prosecute people accused of genocide, crimes against humanity and war crimes, has begun to establish itself. It can issue international warrants for arrest which can be enforced and thus give considerable weight to this body. This Court, like the International Criminal Tribunal for the former state of Yugoslavia, has particularly strict rules regarding legal procedure and helps to establish 'legal benchmarks' which can later motivate international law-makers.

The Court of Justice of the European Union

After the Treaty of Lisbon, which incorporated the idea of justice, freedom and security into Community law, the Court of Justice of the European Union (CURIA), whose aim is to make sure that the law is properly respected in the interpretation and application of treaties, is regularly called upon to restate criminal law. Recently, for example, the Court made a decision on the principle of 'Ne bis in idem' (whereby nobody can be tried and sentenced twice for the same offence, otherwise known as 'Double Jeopardy'), thereby contributing to a harmonisation of this idea which is applied differently within the EU member states.

The recent intrusion by the European Union into the field of criminal law is likely to have important effects on economic life, notably by enabling a harmonisation of rules concerning tax fraud, and environmental crime. These measures are essential for ensuring equality in a competitive field. For example, a company that pollutes the environment with complete impunity in its native country would be at odds with competitors who are forced to pay money in order to prevent pollution and damage to the environment.

Co-operation between States

As well as the emergence of an international criminal legal system, the influence that one law may have on another is also the result of the co-operation which has built up over time between the judges of different countries. As a magistrate, I often saw people in my profession providing mutual assistance, and tried to do so myself by encouraging foreign colleagues.

From mutual assistance to mutual interest

The aim of co-operation is to ensure there are no longer any barriers between the various legal systems or to the circulation of people, goods or capital. This rapprochement took place in a number of stages. The principle of reciprocity implied that in return for mutual assistance, one might receive support for another topic or dossier. As a result of this, the idea of mutual recognition emerged. This consists of responding to a foreign request as if it were a national request. These days, the tendency is for mutual interest. Even when one is applying the law on a national level, it is part of a wider interest on a European scale.

Elements to encourage co-operation

A certain number of new elements to enable this form of co-operation have emerged. The European arrest warrant, which has been in force since 2004, enables a person to be arrested and taken into custody very quickly anywhere in Europe, and without allowing his native country to put in a plea on his behalf, or giving it the right to exercise authority in the case.

Eurojust, an agency of the European Union dealing with judicial co-operation in legal matters, was set up in 2002, and plays a very important role in encouraging international legal mutual assistance and executing extradition requests.

The Treaty of Lisbon intends to harmonise measures and bring about rapprochement in the following areas : strengthening the criminal procedural rights of citizens, the rights of victims, and the rules of co-operation. It also envisages the creation of an independent European prosecutor, unattached to any national court, who could order legal proceedings within different Member States, thereby ensuring a unified, global approach in the fight against organised crime, and against cross-border crime more generally.

Unequal results

My practical experience has shown that efforts to co-operate are not always successful, and that success is dependent on the national culture of the country involved. Co-operation can be very successful with the British if one understands the way that they envisage co-operation, and if one

decides to play according to their rules. When this is not the case, and especially when they do not have any particular interest in co-operating, there is no hope of any action. In continental Europe, there is a spirit of mutual assistance which encourages judges to co-operate and to look for solutions that are not even written in texts.

Possible and essential harmonisation

In conclusion, the harmonisation of laws and European criminal procedures is far from complete, but I think that it is possible. It is essential not only to make the laws easier to apply but to establish equality between European citizens by giving them the same rights, to protect economic participants and individuals against illegal activities which could affect free competition, and also to present a united front in the face of international criminal activities.

TALK : Gualtiero Michelini

I too am optimistic as far as the harmonisation of European criminal law is concerned.

For example, there are a number of common points between France and Italy. We share the legacy of Roman law and the Napoleonic Code ; we have both adopted a written constitution and separation of power, and we have organised our judiciary in the same way (with career magistrates, entrance-level competitive examinations, and we do not have national prosecutors' offices).

Generally speaking, all European countries belong to the European Convention on Human Rights which upholds fundamental principles such as the ban on capital punishment. They also signed the Charter of fundamental rights of the European Union which has the same significance as the European treaties, and can either be applied directly by national judges or via a preliminary ruling of the Court of Justice in Luxembourg. The International Criminal Court applies procedures which are common to countries where civil law and common law is practised. The Treaty of Lisbon, which came into effect at the end of 2009, changed the procedure of European criminal law. Now the new rules and directives in criminal cases are approved by a qualified majority vote, whereas before 2009 the proceedings were intergovernmental. Finally, the European arrest warrant (a purely judicial procedure) has replaced the extradition system (a procedure which is both political and judicial).

Even though there is a long way to go before harmonisation can be achieved, enormous progress has been made. When I started to work in European affairs in Brussels about twelve years ago, it was unthinkable to even utter the term 'harmonisation' in a criminal context. Today, this term features in the Treaty of Lisbon : Article 69 B outlines harmonisation measures for 'the definition of criminal offences and punishments in areas of criminality which are particularly serious, and have a cross-border dimension resulting from the nature of the incidence of these offences or of a particular need to oppose them on a common basis. These areas of criminality include terrorism, human slavery and sexual exploitation of women and children, illegal drug trafficking, illegal arms trafficking, money laundering, corruption, counterfeiting the method of payment, computer crime, and organised crime.'

The Eurojust agency (which has already been mentioned), is an intergovernmental structure made up of representatives from member states. The Treaty of Lisbon plans to give this agency specific new powers, notably the ability to carry out and co-ordinate investigations, and to decide the relevant court of justice for judging a case. These powers may be granted by means of a ruling on which a vote has been taken according to the ordinary legal procedure, in other words, the qualified majority vote.

Article 69 E of the Treaty of Lisbon also considers the creation of a European public prosecutor's office which will be able to exercise the law in relation to offences which infringe

the financial interests of the European Union in the experienced courts of European member states. Setting up this prosecutor's office will be a major challenge. It will require unanimity from the member countries, or a greater degree of co-operation between at least nine of them for the approval of a ruling on the status of the European prosecutor's office according to the conditions by which it carries out its functions, the rules of procedure applicable to its activities and those governing the admissibility of evidence, as well as the rules applicable to jurisdictional monitoring of acts of procedures which it will define when carrying out its functions. Finally, national criminal procedure codes will have to be changed in order to allow the European public prosecutor's office to exercise the law. Even though there is still work to be done, the creation of the European prosecutor's office has been written into the treaty, and numerous experts are already working on it, notably the French Court of cassation (the French Supreme Court).

Bilateral agreements already existed between the United States and European countries with regard to extradition and legal mutual assistance. They were completed and put together in an agreement made between the United States and the European Union which came into force in January 2010. This agreement stipulates common rules, for example about capital punishment. It excludes any form of extradition to the United States of people who have committed crimes which carry the death penalty. The agreement also states common rules for cyber-crime, even if this comes up against practical obstacles such as the Internet providers being mainly located in the United States, there is a much greater flow of requests from Europe to the United States rather than in the opposite direction. The agreement nevertheless offers a common framework for negotiation and co-operation in specific cases.

Apart from semantic discussions between supporters of mutual recognition, regulatory rapprochement and harmonisation, I think that the Treaty of Lisbon opens up important possibilities for bringing together European legal systems, whether in regard to Euro-crime, a European prosecutor's office, or directives in criminal justice. All these possibilities were totally inconceivable just ten years ago. Their implementation is a challenge for those of us who work in the profession, but this harmonisation is really in the common interest because it will play a major part in European integration.

TALK : Simon J. Horsington

In Molière's 'Les Femmes Savantes' (Act II Sc1), when Bélise asks her servant Martine whether she intends to keep making grammatical errors for the rest of her life, she replies 'Who is talking about offending Grandma (grammar…) and Grandpa ?' Even the most conscientious institutions sometimes suffer from similar misunderstandings. In the legal field, one of these misunderstandings concerns the idea of common law, which I would like to clarify. Firstly, however, I shall remind you of the four jurisdictions which are present in the United Kingdom.

England

It is often forgotten that before common law was developed, England had lived under Roman Law for a long time between 54 B.C. (when Julius Caesar invaded England) and 410 A.D. (when the Romans left England). Furthermore, Christianity appeared in England in the 4th century. In 597 Saint Augustine founded the archdiocese of Canterbury and later York. He established canon law which was inspired by Roman law and still exists today in the courts of the Anglican Church with final appeal to the Supreme Court.

In 439, the Anglo-Saxon Chronicle (which documents the history of the Anglo-Saxons), the one surviving manuscript of which is in the Parker Library of Corpus Christi College, Cambridge, mentions the arrival of Hengist and Horsa, two brothers who had arrived from the Jutland area of Denmark to help King Vortigern of Kent. These two brothers occupy a special place in my heart as my surname, Horsington, comes from Horsa. In fact, they were the younger sons of farmers from Europe who wanted land and so were the early ancestors of migrants from the European

Union. The Anglo-Saxons remained where they were until the Vikings pushed them out to south-west England. England was thus occupied by the Celts, Romans, Anglo-Saxons and Vikings, and so is a very European country !

On Saturday October 14th, 1066, the Anglo-Saxons were defeated by William the Bastard (more commonly known as William the Conqueror), Duke of Normandy, at the Battle of Hastings. This signalled the end of the Heptarchy, the collective name given to the seven Anglo-Saxon kingdoms which were different from other kingdoms because the king of the Heptarchy was elected democratically. Certain traditions from this period still exist today such as the acclamation of the monarch at the coronation ceremony because this is how the monarchs were once elected. There is also an attempt to revert to another tradition from this era, namely that the ruling sovereign does not have to be the first-born son but may now be a first-born son or daughter : after one thousand years, this is a sign of the times !

On the other hand, we have kept a custom started in 1066 by the illiterate, William the Bastard. When a bill was approved by the different chambers, it still had to be approved by the king or queen before it was made law. This assent was given orally by the lords commissioners who were endowed with 'letters patent' which authorised them to act in the name of the monarch. Each new statute was read aloud, and then the lord commissioner said in Old French 'La Reyne le veult'. All laws in England are still passed today in Old French ! If the Queen refused to give her consent, the lord commissioner would say, 'La Reyne s'avisera'. The last time that this happened dates back to the beginning of the 18th century during the reign of Queen Anne.

In 1085, William the Bastard ordered a survey of the population and their assets in the kingdom. It is worth noting that in just twenty years, only about 10 important Anglo-Saxon 'seigneurs' out of the some 132 who existed in England and Wales before 1066 (covering a geographical area of 97 % of the kingdom) remained. The Normans helped themselves to the riches of the entire country and imposed their legal, military, feudal and Christian system of government.

Henri II of Anjou appointed travelling judges who gradually developed the system of juries, and a uniform case law throughout England. This was the beginning of the modern common law system. From the 13th and 14th century onwards, it was clear that common law had become too rigid and did not always provide a fair solution to disputes. The system of law was therefore supplemented by the system of 'equity'. This system was entrusted to a chancellor (who was a cleric until the Reformation in the 16th century) and drew its inspiration from the principle of canon law, namely to be fair and to act in good faith. The merger between courts which applied common law and courts applying equity law was established by the Judicature Act in 1875.

Wales

The development of the Welsh legal system resembles that of the English system in many ways. However, it had one unique feature : in the 10th century, the Welsh king Hywel Dda (Howell the Good in English) created a code similar to the then Romano-German codes in Europe.

When the Normans invaded Wales, the Anglo-Norman system was put in place. Henry VIII definitively put an end to the system of Welsh law in 1542.

In 1998, a Welsh government was created, and from 2012, it will have the right to pass important primary legislation. It is even possible that it will develop its own system including specific criminal procedures.

Northern Ireland

The original population of Ireland was Celtic, like that in England and Wales. However, Ireland was not invaded by the Romans until the arrival of the Catholic Church and St. Patrick in 428. In 1155, Pope Adrian IV published his Laudabiliter bull which authorised Henry II to invade Ireland. In a way, it was the beginning of the conflict between 'England' and Ireland.

The Good Friday Agreement, signed on April 10th, 1998, enabled the Northern Ireland legislative assembly to start a programme of co-operation between Northern Ireland and the Republic of Ireland, especially in fighting terrorism. This agreement had a similar effect on a regional scale to that of the Treaty of Lisbon on a European scale.

Scotland

Scotland was not invaded by the Romans or the Normans. Despite this, in the 11th century the King of Scotland decided to adopt the feudal system of common law, but his successors preferred Roman law. Thus Scottish law is a combination of civil law (with respect to commerce) and common law (with respect to crime). In 1707 the parliament in Edinburgh was merged with the parliament in Westminster.

A Scottish parliament was re-created in 1998, and in 2011, the Scottish Nationalist Party obtained a majority for the first time and announced its intention to hold a referendum on the issue of Scottish independence from the UK in the autumn of 2014. I mention this to demonstrate the UK's flexibility. I doubt that France would agree as easily to a referendum on the independence of the Basque Country, Brittany or Catalonia.

The experience of the Commonwealth

This historical résumé shows that British law is not purely Anglo-Saxon, but comprises some rather different aspects including some whose origins are in Roman law and canon law. This internal diversity gives it a flexibility which enables it to be very open to the idea of European harmonisation.

The Commonwealth countries' experience of harmonisation dates back longer than most of the other European countries in the variety of laws found. The United States has a mix of systems due to the existence of the Louisiana Code as well as common law. The same is true of Canada (where common law co-exists with the Civil Code of Quebec), and Pakistan also in a similar way applies Sharia law.

Lessons learned from 'War and Peace'

Until the Good Friday Agreement, the IRA (Irish Republican Army) generally found shelter from justice in the Basque Country, while ETA (Euskadi Ta Askatasuna) terrorists found the same in Ireland. Today, due to the existence of European Arrest Warrants, fleeing justice has become more difficult for them. This demonstrates the successful harmonisation of a procedure in the criminal system of the European Union.

The European Convention of Human Rights, the Treaty of Lisbon and the other European laws will gradually converge and one day this will lead to harmonisation. This is essential. Inspiration can be drawn from this passage of 'War and Peace' when an old Muscovite says to the main character Pierre Bezukhov '*so long as evil mem combine together to do evil things, so should good men combine to do good things and oppose them.*' Today, we should also work together to oppose people who want to harm the populations of our various countries and thus the 'European citizen' of the Treaty of Lisbon.

DISCUSSION

The two Williams

Question : *In France, the Duke of Normandy who won the Battle of Hastings is called William the Conqueror, but Simon J. Horsington refers to him as William the Bastard. Is compromise or harmonisation possible between a bastard and a conqueror ?*

Simon J. Horsington : This term has been authenticated by texts which existed at the time, and lawyers know that one must trust well-supported facts…

The principle of secrecy in pre-trial cases

Q. : *All three of you seem optimistic about the possibility of harmonisation of criminal law. However, keeping elements secret in pre-trial cases, a specific feature in France, does not seem compatible with practices which take place in other countries.*

Thomas Cassuto : If a judge asks for a search in a place which is known to hold incriminating evidence, and this is made public, it is obvious that the search will loose much of its relevance. This is why the confidentiality clause is part of mutual assistance conventions, for example with the United States. Naturally, this clause has to be properly applied. In the prosecutor's department, in the police department, or in the law courts, many people can be subject to requests from a foreign country.

On the other hand, this principle of French law has its limits. Some aspects of procedures, including in pre-trial cases, are made public today, such as certain decisions regarding detention. Under pressure from foreign or European constraints, there may be a change of mind : making closing submissions public guarantees that each side has an impartial hearing. We must safeguard the presumption of innocence, efficient investigations, and making cases public.

Gualtiero Michelini : Secrecy regarding aspects of pre-trial cases exists in most legal systems. However, we need to agree about timing, in other words the time when the details become public, the so-called 'discovery' or disclosure. In the case of crimes which cross national boundaries, there is a little known procedure called the Joint Investigation Team which enables the judicial authorities of two member states to carry out investigations together. This enables them to combine different procedures, and importantly to agree on when to make facts public, and the use of evidence taken from different jurisdictions.

Independence of the prosecutor's office and the appointment of judges

Q. : *Do you envisage any change of agreement regarding the independence of the prosecutor's office ?*

T. C. : The European Court of Human Rights made it very clear in the two Medvedyev warrants that the 'prosecutor of the Republic is not an independent 'judicial authority' (…). In particular, he lacks independence with regard to executive power.' For different reasons, France acts as if this independence were not necessary, and as if the prosecutor nonetheless constituted a judicial authority. However, inasmuch as the prosecutor controls the length of time the police can keep a person in custody (which is part of the measures considered to be detrimental to individual freedom), it is clear that true independence is essential. Some countries, including those which practise Roman law such as Italy, have adopted a system in which the prosecutor is independent. France will eventually do the same, even though this may take some time.

Q. : *In your opinion, what is the best system for appointing judges ?*

T. C. : In the United States and Switzerland, some judges and prosecutors are elected while others are acting in their professional capacity. This mixture is a problem because these people do not have the same legitimacy. Procedures where elected judges are assisted by professional judges may exist, but there is no solution which is totally satisfactory.

It is important that judges are independent, however this independence cannot be decreed. It is linked to the status of judges, but also from the way in which careers are determined.

British flexibility called into question

Q. : *A few years ago in the field of accountancy, international consultants suggested the idea of a common accounting standard in order to put an end to the dreadful variety of accountancy rules applied from one country to another. In fact, for the most part, everyone now applies American accountancy rules. I therefore have my doubts about the flexibility of the British, and I would gladly go along with Thomas Cassuto's analysis : when one concurs with the British point of view, everything is fine, but if one does not, there is little choice.*

S. J. H. : This is a very general rule. If you take a decision which meets your wife's approval, it will get implemented very quickly. However, if she does not agree, it will take longer ! In legal terms, I have had the same problem with the Greeks. When one agrees with them, things go more quickly than when one disagrees, as we can all see from current events…

T. C. : The Treaty of Lisbon nevertheless has an unusual rule, the opt-in/opt-out clause which allows three countries (the United Kingdom, Ireland and Denmark) to take part in the negotiation of a statute and therefore influence its development, while keeping the possibility of not adopting it in at all !

S. J. H. : The United Kingdom is a country full of old traditions which teach us that it is wiser to read what one is going to sign before signing it… especially if it is a question of a majority decision on criminal law.

The future of the examining magistrate

Q. : *If criminal law were harmonised, would the big loser be inquisitorial procedure as opposed to accusatory procedure ? In this case, what would be the future for examinating magistrates in France ?*

T. C. : One of the important principles of legal action in the European Union is subsidiarity. The European Union respects national laws and its action only has relevance when it corrects a situation which is unfavourable in comparison to other countries. In criminal matters, the EU is devoted to implementing the Stockholm road map on fundamental rights. At the end of 2010, it adopted a directive on the right to translate and to interpret services for people who were accused of a crime. More recently, it voted in favour of a directive for information rights. This directive will require changes in some national legal systems, notably in pre-trial secrecy. Finally, the European Commission is currently studying a directive project on access to lawyers.
These projects have caused a knee-jerk reaction not only in France, but also in Belgium, the Netherlands, Spain and the Czech Republic because even though they do not go as far as imposing one system rather than another, they question national legal systems. If one only takes into account one aspect of law that one wants to harmonise, such as the rules on police custody or the procedure for carrying out an investigation, one runs the risk of upsetting the entire system. It is obvious, for example, that revealing evidence does not have the same impact in accusatory procedures as in inquisitorial procedures.

Personally, I attach great importance to the status of the examining magistrate. I am extremely dubious that cases such as the Air France Concorde crash, the Mont-Blanc tunnel disaster or the sinking of the Erika oil tanker could have been judged to the very end in the United States or in Great Britain where there are no examining magistrates. Maybe there would have been an agreement between the two sides with no criminal ruling, but this would then have raised the

problem of discovering what really happened. Compromises reached between two sides before the facts are even established damage society inasmuch as they make it impossible for society to learn lessons from what has happened, and therefore to prevent similar, abnormal behaviour in the future.

We should not lose hope that the French model will be able to influence European harmonisation. When a French magistrate sits on the tribunal for the former Yugoslavia, for example, he is first and foremost a French judge, acting as if he were in a French court, and plays a very active role in the hearing. This has a positive effect, not only on those involved, but also on the prosecutors who have a culture of common law.

Should we work towards harmonisation ?

Q. : *Attempts are also currently being made towards harmonisation in the medical field for both diagnostic and therapeutic procedures. However, in some cases, there is the fear that harmonisation may make these procedures trivial or weak. Is harmonisation always necessary ?*

T. C. : There is certainly no ideal legal system, but it is the responsibility of every country to develop its own system and maybe even to draw inspiration from the systems of neighbouring countries. Denmark, which chose not to adopt new European methods in criminal law, is in the process of going back on this decision. With hindsight, the Danes have realised that by rejecting harmonisation, they risk weakening their own system both in terms of fighting crime and guaranteeing individual freedom. Because citizens cross national frontiers freely, they need to be able to benefit from a legal system based on minimum standards wherever they go. This is the essential reason behind attempts at harmonisation.

S. J. H. : You know the English expression 'A camel is a horse designed by a committee' which demonstrates the advantages of the opt-out clause. However it is also good to be able to correct certain aberrations. There is a British law, for example, which states that the silence of an accused person can be used to show that he had lied solely because he did not answer the question. This law was accepted, despite being contrary to Article 6 of the European Convention of Human Rights. I am all in favour of harmonisation if it enables us to avoid this kind of injustice.

G. M. : Harmonisation should not be considered an aim but a means. The real aim is European integration, pursuing offences and protecting the fundamental rights of citizens.

Presentation of the speakers :

Thomas Cassuto : magistrate, LLM (law). He was an examining magistrate for several years notably in economic and financial matters in Paris and then in Nanterre. He is the author of 'Les défis du vivant' (pub. Éditions Présaje, 2004) and 'La santé publique en procès' (pub. PUF, 2010). He is a national legal expert on secondment to the European Commission, and takes part in the development and negotiation of many aspects of criminal law in the European Union.

Gualtiero Michelini : magistrate since 1991. He worked as a judge in criminal affairs in Turin and in labour and social law in Rome. He is currently serving as a national legal expert on secondment to the European Commission. He is the author of works on international criminal law and European labour and social law.

Simon J. Horsington : barrister at Gray's Inn, London (1978). After he graduated with a BA in French and Medieval History, he studied international marketing. He wrote a thesis entitled 'Export Marketing to the CPR (China) – a Practical Approach' (1973). Having worked in industry (pharmaceutics and engineering), he became a lawyer and specialised in international law and European Union law in various fields (commercial, maritime, aeronautics, banks, finance, white-collar crime, and human rights). He was a partner in a law firm (bilingual English/French), a corporate lawyer (HSBC/Midland, Citibank, Fidelity, Allianz/PIMCO) and

legal advisor in a regulatory group (the Investment Management Regulatory Organisation). He is also the founder and honorary Vice-President of the Franco-British Lawyers Society. He was appointed a 'Chevalier dans l'Ordre du Mérite maritime' by the French government.
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