IARS POLICY CONSULTATION

IARS response to 'Call for Evidence for the European Union Balance of Competences review of police and criminal justice'

IARS | Community-led solutions for a better society

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About Independent Academic Research Studies (IARS)

IARS is an independent social policy think-tank with a charitable mission to give everyone a chance to forge a safer, fairer and more inclusive society. We do this by producing **evidence-based** solutions to **current social problems**, **sharing best practice**, and by supporting **young people and the community** to shape decision-making from the bottom-up.

We deliver our charitable mission:

- ***By*** carrying out action research and evaluation that is independent, credible, focused and current
- ***By*** acting as a network that brings people and ideas together, communicates best practice and encourages debates on current social problems
- ***By*** supporting the individual (with an emphasis on young people) to carry out their own initiatives to shape decision-making
- ***By*** being an authoritative, independent and evidence-based voice on current social policy matters.

We are known for our robust, independent, evidence-based approach to solving current social problems, and we are considered a pioneer in user-involvement and the application of user-led research methods.

IARS has expertise in the fields of restorative justice, criminal justice, youth justice, public legal education, human rights and equality. For more information see www.iars.org.uk. If you require any further information please email contact@iars.org.uk.

About this consultation response

As an international organisation that receives funding from the European Commission, Independent Academic Research Studies (IARS) is closely tied to the work and ethos and human rights values of the European Union. Many of our projects are Europe-wide, based on EU policies, and involve collaboration with organisations in other EU-member states. IARS has benefitted greatly from the EU and European collaboration in its work.

No doubt, the structure of a criminal justice system expresses and represents its society's attitude and preferred response to crime. Probably that is why no system is meant to be identical to another. Countries have different ways of prosecuting, investigating and processing criminal cases. However, most usually systems follow basic principles that are shared by other systems and which may carry certain key similarities. It is within this context

that comparative lawyers and academics classify them into legal families. Having worked with the EU on various regional programmes we believe that while respecting country differences a shared vision for criminal justice is stronger than working in silos to combat and prevent crime. Crime is not a national concept and its boarders are limitless.
Below is a list of past and current projects which involved the EU and from which we draw experiencing in order to respond to this consultation:

- **Restorative Justice in Europe: Safeguarding Victims & Empowering Professionals (RJE) –** delivered in 5 EU countries (UK, Germany, Holland, Greece, and Bulgaria) through 5 organisations with 12 associate partners across the world, including in Belgium and Hungary. The aim of RJE is to produce practical results to influence policy makers at a national level on the implementation of the "Victims' Directive"– intended to raise standards and promote good practice among the European colleagues on the implementation of RJ within national policy. Training sessions offered in each of the 5 states – standardised practice – a united approach to policy implementation and practice.
- **3E Model for a Restorative Justice Strategy in Europe:** an EU-funded research and policy project that seeks to construct an effective, economic European strategy model for the diffusion of RJ as a response to crime. Consortium of organisations from seven states (UK, Greece, Bulgaria, Finland, Hungary, Spain, and Poland) – carried out study of 11 European countries to develop a coherent RJ strategy across Europe.
- **Restorative Justice and Domestic Violence:** two year, European-funded project with primary emphasis on the European Directive on Minimum Standards of the rights, support and protection of victims of crime in conjunction with five European partners. Aims to generate and pilot knowledge on practices on RJ in domestic violence cases and identify criteria for offering RJ in such cases. Working with partners in Austria, Denmark, Finland and Greece.
- **Youth in Action:** Youth programme, funded by European Commission Youth in Action Programme – 3 year project – aims to inspire a sense of active European citizenship, solidarity and tolerance among young Europeans and involve them in shaping the future of the EU. It promotes mobility within the EU, non-formal learning and intercultural dialogue, and inclusion of all young people.
  a. **99% Campaign:** Interlinked with Youth in Action – aims to connect and empower young people in the UK and the EU by employing digital participation tools to facilitate a youth perspective on policies affecting young people.

This submission draws on the experience and research undertaken by IARS It also draws from evidence having consulted with our user groups including our standing Youth Advisory Board. Therefore, we will focus on specific questions to answer.

Response

17. What are the advantages and disadvantages to the UK of EU action in the field of minimum standards in criminal law and procedure? You may wish to refer to specific examples

In the experience of IARS, there are clear advantages for the UK of EU action in maintaining and raising standards in criminal law and procedures. These are clear especially in relation to the Victim's Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012, which we are using here as an example. The Directive is an attempt to reposition the victim within the criminal justice system and promote their rights in accordance with the European Convention on Human Rights (see Budapest Roadmap for further information). Our involvement in research of the implementation and preceding meetings with organisations in relation to this, has created a vital tool in rallying support to be more responsive in line with the Directive and effectively address the rights of the victim, using the language of the Directive as a basis of justification for this. At the present time, no UK legislation speaks directly of victims' rights.

Although we recognise that the Directive does not have the legal weight to hold parties to account, moreover it is because of its comparative nature that in application it identifies shortfalls and signifies the progressive nature of the member state. It is our belief that victims' rights are fragmented and the Directive can be a guided framework, ensuring standardised practice that the victim can then apply to the European Commission if this has not been applied sufficiently. In our research and meetings, practitioners in the UK have been extremely receptive to the Directive and EU law on victims rights, for the fact that outside the bureaucratic tendencies of the UK- where uniformed victims' rights should be paramount, however as mentioned, these have not yet been addressed at a national level.

The Directive and other EU regulations also highlight the need for this type of legislation to be informed by a pool of research and expertise, meaning practice is less introverted and based in evidence. This is beneficial to measure the place of the UK in relation to its peers and counter-parts, and offers a comparative perspective of the UK position. We also appreciate that there needs to be an engagement at a European level of victims' rights and that compels states to comply with European standards.

18. To what extent is EU action in this area effective in raising standards, or enhancing cooperation? And to what extent is it necessary? And to what extent is the EU the most appropriate level for action in the field of minimum standards in criminal law and procedure?

Exploring new areas and helping to raise standards with information sharing and capacity building is extremely necessary for successful practice. With all of our European projects we seek to include a range of European partners-German, Dutch, Bulgarian, Greek, Austrian and Finish.

For example, in the area of our Restorative Justice in Europe project, one of our partners includes Restorative Justice Nederland who has been key in strategically mapping restorative justice processes in Europe. This is important in assisting the Victims' Directive. With European action in particular areas of criminal justice, such as restorative justice, we can learn from each other's experiences. This does not only strengthen our own work, but also ensure we are implementing services that are consistent throughout Europe, one of the leading establishments in terms of fair and open justice processes. In the example of mapping, this was important to establish an overview of what practises and processes should resemble.

As with the above, it is important to increase cooperation with like-minded parties through dialogue and learning. Within The Restorative Justice in Europe project, IARS has been involved in training practitioners in Bulgaria. This not only raises standards but also increases a wide spread of standardisation in practises.

This is also important in exploring new processes, when we consult with others we can establish a consensus on how best to apply these. For example in our project Restorative Justice and Domestic Violence, we are led by a Dutch institution- The Verwey-Jonker Institute who are considered at the forefront of the practice. In this area particularly, the practice is contentious, however by sharing best practice we can assist each other in its navigation. This is essential for not only implementing new practises but also being realistic in its usage- sometimes it is simply to have a collective realisation that the practice is not working.

19. Could the EU use its existing competence in this area in a different way which would deliver more in the UK national interest?

In our view no, and in fact we sense that the question is biased towards generating a negative response. We urge the current government and any future administration to proceed with policy making that is detached from political agendas and which focuses on the strengths and vision of a unified Europe.

In terms of rights, there needs to be a collective consciousness that surpasses the needs and demands of the state. As suggested by Lord Chief Justice Thomas in his commentary of the aforementioned Victims' Directive;

> *"It seems to me that this cultural change will also involve the adoption by those bodies responsible for the governance of the police, the prosecution and the judiciary of* ***their own responsibility for ensuring that the rights of victims are properly observed****. This is not only a question of bringing about a* ***major cultural change, but there should be regular evaluation of what has been achieved*** *by the bodies responsible for the governance of the police, prosecutors and judges"*

This cultural change is recognised as a fundamental realignment in the reposition of the victim in the criminal justice system. We suggest that this is not possible through mere national legislation, but a change in the overall approach to the victim which surpasses state collectives. Additionally, although it is important for the UK to follow guidelines, victims need to be able to seek enforcement through a higher body than that of the state.

The biggest challenge for the Directive is its sufficient implementation. Although the UK opted into the Directive- it is an ambitious task. As mentioned above by Lord Chief Justice and through our own belief, the Directive offers realignment for the victim in criminal justice processes. If we are to be true to victims rights and give them an opportunity to become an established rhetoric within the UK Criminal Justice System then we must enforce an accountability system, something that the EU provides through the European Court in Strasbourg.

For criminal justice processes, Europe-wide action is essential for knowledge sharing and capacity building. This in recognition that there is differing expertise in each member state and those examples from other countries can act as a blue-print for victim services and the higher collective of rights for victims. This is also essential to apply evidence-based processes into national contexts. Finally, we can only see our involvement in Europe as an overwhelming advantage.

21. Are there any other general points in relation to this area that you wish to make which are not captured above?

Yes. We are surprised that this Consultation response does not encourage reflectnio and feedback on the role of human rights, EU human rights instruments and EU policy on criminal law and criminal law procedure. The EU as an institution is a signatory to the European Convention on Human Rights (ECHR) and all member states must also be signatories in their own right. The UK was one of the original signatories and indeed drafters of this convention which was incorporated into the domestic legal order through the Human Rights Act 198.

In its preamble, the ECHR stated that the aim of the Council is "the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realization of human rights and fundamental freedoms". Fifty-six years later, the Council remains faithful to this promise, while arguably the ECHR has now become the first or a new Bill of Rights for many of the Council's member States.

Irrespective of whether we are ready to adopt an optimistic or pessimistic attitude towards this view, the Convention simply cannot be considered a mere subchapter in the discussion on the relationship between public international law and national law. Its special character is evident in its many peculiarities. For example, it was designed to protect individuals against acts of States, establishing a regional judicial authority that is now bestowed with powers of a constitutional human rights court. This is the European Court of Human Rights (hereafter the Court or EcrtHR) which sits in Strasbourg. After the ratification of Protocol 11, the Court became the sole body that deals with applications from members' nationals (individuals or legal entities) who claim that one of their convention rights has been infringed by public national authorities. The Court's conventional powers have now been extended through its jurisprudence, which *inter alia* introduced the notion of *drittwirkung,* allowing the application of the Convention to legal relations between private parties. Moreover, decisions of the Court have often declared incompatibilities of national law with the Convention, calling States for immediate legislative and policy amendments. Even the very text of the ECHR often refers expressly to the internal legal order (e.g. 'in accordance with the law')**.**

Through the establishment of minimum human rights standards such as Article 3, Article 4 and Article 7, and their implementation through the Court's jurisprudence, the Council managed to introduce *regional ethical-legal* guarantees of a democracy. Examples that bear evidence to this claim as well as cases decided by the Court to implement these values will be examined in this paper.

For instance, in *Guzzardi v Italy* [(1980) 3 EHRR 333] the Court firmly repeated that the "Convention is interpreted in light of the conception prevalent in democratic countries", while in *Ireland v UK* {(1978) 2 EHRR 25] after condemning a behavior which was deemed to be inhuman and degrading, it said that this created "feelings of fear, anxiety and humiliation

to debase and eventually to break physical and moral resistance". Furthermore, in the notorious *Dudgeon v UK* [((1981) 4 EHRR 149], the Court defended the substance of this democracy which it named "tolerance and the spirit of openness".

Undoubtedly, the criminal process and the administration of criminal justice by State agents is the field of battle in which human rights are tested. Admittedly, the Convention was not conceived of as a criminal procedure text *strictu sensu*. Nonetheless, many of its Articles have now been interpreted to be strictly related to the criminal process (principally 5, 6 and 7). In fact, it is through the application of human rights provisions regulating the pre-trial and trial phases that the 46 member States are said to have developed convergent criminal justice systems.

The cementation of the Europe wide aspired regional peace is already under way through the promotion of a legalized European democracy that is being built decision after decision on human rights cases that are brought in front of the EcrtHR, and which ultimately change the policies and legislation of Europe. This gradually collapses traditional divides such as the one between criminal justice models, and harmonizes national legal systems so that they understand and apply human rights norms in the same way. Ultimately, this will hopefully create what Francesca Klug calls "human rights culture".

We ask that the current and future UK administration does not present blocks to the process of peacebuilding in Europe and that they remain objective and detached from political priorities.

James Madison once said:

> *"Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended from abroad" (Letter of James Madison to Thomas Jefferson, May 13 1798).*

How true these words sound when considering for example the most recent anti-terrorism legislation in the UK. The Terrorism Act 2000 and the Anti-terrorism, Crime and Security Act 2001 have exposed the British government to a number of criticisms mainly coming from international NGOs such as Amnesty International, Human Rights Watch and other national human rights groups such as Justice and Liberty (International 2002; Justice 2003; Liberty 2001; Watch 2001). More importantly, however, the exceptions included in these Acts brought the UK in front of the EcrtHR which was called to investigate claims that were primarily concerned with arrest and detention powers, detainees' rights to legal advice and contact with their relatives and entry and staying in the country.

To justify the harsh provisions of its new legislation, the UK used Article 15 to derogate from certain sections of Article 5. Article 15, however, can be used only "in time of war or other

public emergency threatening the life of the nation…", while measures can be employed "to the extent strictly required by the exigencies of the situation and provided such measures are not inconsistent with its other obligations under international law". In Section 5(1) of the Special Immigration and Appeals Commission Act, the UK government stated that the justification of the derogation from Article 5 is that "there exists a state of emergency threatening the nation. According to the government this is due to foreign nationals present in the country who are "suspected of being concerned in the commission, preparation or instigation of acts of international terrorism".

Independent Academic Research Studies (IARS) Publications

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IARS' vision is a society where everyone is given a choice to actively participate in social problem solving. The organisation is known for its robust, independent evidence-based approach to solving current social problems, and is considered to be a pioneer in user-involvement and the application of user-led research methods

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