Europe has the clout in struggle between privacy and safety

David Anderson

Surveillance once seemed a peculiarly European vice. As Sir Thomas Erskine May wrote in 1863: "Nothing is more revolting to Englishmen than the espionage that forms part of the administrative system of continental despotisms. It haunts men like an evil genius, chills their gaiety, restrains their wit, casts a shadow over their friendships, and blights their domestic hearth. The freedom of this country may be measured by its immunity from this baleful agency."

Twenty years later came the Fenian bombings of London — an early form of international terrorism, the Brooklyn Dynamite School its training camp. The basic apparatus of intelligence-gathering was revived after a 40-year hiatus. Two world wars, organised crime and a continuing terrorist threat have entrenched the use of investigatory powers by police and intelligence agencies.

There is still a contrast with Europe — but not the one observed by Erskine May. To the Germans, for whom intelligence has still-painful overtones of totalitarian misuse, modern Britain looks like a country unusually comfortable with surveillance. CCTV cameras are everywhere on our streets.

Police investigate fraud, sexual grooming and missing persons with the help of months-old information about calls, texts and emails. GCHQ leads Europe in the bulk collection and analysis of international communications, and has used it to safeguard this country and others as well. Most of us accept — if only grudgingly — that as life goes online and social media companies become more adept at monitoring our behaviour, so the state's detectives need the ability to do the same.

Those attitudes are reflected in our courts. The right to privacy never took root in English common law, as it did in the US. Privacy campaigners have relied instead on the European Convention on Human Rights, given force in our own Human Rights Act as well as by the European Court of Human Rights in Strasbourg. But it is European judges that have made the running.

Ten UK judges ruled under the Human Rights Act, without dissent, that the DNA of persons arrested but never charged could be retained indefinitely. Yet in Strasbourg a grand chamber of 17 judges unanimously took the other view.

The law on DNA retention was changed. But European challenges continue, both in Strasbourg and — increasingly — in the EU's own Court of Justice in Luxembourg. That court is armed with the latest instrument: the EU Charter of Fundamental Rights. Unlike the Strasbourg court, it can impose heavy fines on member states that resist its rulings. And its appetite has been sharpened by what a former judge recently described as a "power struggle" between the two courts to set the benchmark for human rights protection in Europe.

In recent cases, the Court of Justice has struck down the EU's own data retention directive, and cast well-established UK practices into legal doubt. Only last week, at the government's request, the English Court of Appeal decided to ask the EU court whether (as the High Court had already found) the powers contained in the UK's data retention statute exceed what was permitted by EU law. Luxembourg's ruling will be final.

The saga has already disproved the prediction of Keith Vaz, MP, a Home Office minister in 2000, that the EU charter would turn out to be "no more binding than *The Beano*".

Some view these EU judgments as a shot in the arm for liberties too long neglected at home. Others see a court with limited practical understanding, imposing needless curbs on vital powers. But the cases strike an undeniable chord in other parts of the post-Snowden world.

Similar privacy concerns are asserted in the US — not least (and not without a hint of double standards) by the Californian internet companies on which the UK increasingly depends to trace suspected wrongdoers.

Parliament will be soon be asked to debate, in unprecedented detail, some of the most sophisticated surveillance capabilities in the free world, to the benefit of democracy and the rule of law. But more is required. The new law will have an impact well beyond our borders. If it is to be accepted by those on whom its efficacy depends — whether in Luxembourg or Silicon Valley — it will need safeguards in which the world can have confidence.

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