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The Foundations of Mutual Recognition and the Meaning of Dual Criminality

The arrest warrants issued in relation to the *Puigdemont* case represent a stress test for the European system of judicial cooperation. Although the notion of dual criminality, a purely technical issue, seems the epicentre of the controversy, there is a much more in-depth debate.[1] While some voices call for a restriction of cooperation in political cases[2], a sector of the public opinion in Spain has been frustrated in its expectations about judicial cooperation. The discontent caused by the refusal of Belgian and German judges may lead some Spanish judges to introduce hidden restrictions on judicial cooperation inspired by the logic of reciprocity. There is also the impression that some apparently technical decisions and adopted by Belgian or Scottish judges show little confidence in the Spanish institutions or the independence of their judges. It is difficult to understand that the first answer of the Belgian justice to the arrest warrant was to request information about the situation in Spanish prisons[3]. Even more difficult to explain is the last of their decisions: to consider that the arrest warrants contained a formal defect that prevented them from being processed.[4] This situation may jeopardise the system of cooperation based on mutual recognition and hence ultimately endanger the free movement of persons.

However, this crisis, whose dimensions we do not yet know, should serve to advance and improve the European Judicial Area. The purpose of this contribution is to rethink the dual criminality and the contents of the judicial function in these cases. This reflection will be carried out in the light of the constitutional significance of mutual recognition and the principles supporting it.[5]

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1 It is very illustrative of this atmosphere the debate that took place in the *Verfassungsblog* regarding the entry of Sarmiento D, *The Strange (German) Case of Mr. Puigdemont's European Arrest Warrant*, 11 Apr. 2008. (https://verfassungsblog.de).

2 Vid. Editorial, *European Criminal Law Review*, nº 3, 2017.

3 For reflections on how the EAW was conducted by the Belgium authorities, see Muñoz de Morales Romero, M. "¿Cómo funciona la orden de detención y entrega europea? El caso del *ex-president* y sus *consellers* como ejemplo", *Diario La Ley*, nº 9096, 2017.

4 Gonzalez Cuellar Serrano N., *Euro(des)orden: dos bofetadas. La endeble estructura de la euroorden ha hecho fracasar el espacio europeo de justicia*, El País, 23 Mayo 2018 (https://elpais.com/elpais/2018/05/22/opinion/1527007552_826812.html)

5 Despite de differences in many fundamental aspects, many of the following ideas, are based on the reading of Burkhard's Teaching Authorisation book, *Die Konstitutionalisierung der gegen-*

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Art. 82 TFEU implies that Member States transfer their powers to the EU to regulate judicial cooperation in criminal matters on the basis of the principle of mutual recognition. This is an important transfer because it affects sovereignty powers and foreign policy. Classical judicial cooperation, and extradition in particular, is a legal institution that regulates relations between sovereign states, based on the principle of equality between States. In this model the decision to cooperate is determined autonomously. Even if States sign bilateral or multilateral agreements, which embodied the terms by which they cooperate, the foreign policy aspects of extradition, and thus of the exercise of sovereignty, may appear at any time.

The situation is very different within the European Area of Justice. The States no longer cooperate as sovereigns and for this reason the political phase of cooperation disappears, and an exclusively judicial mechanism is established. Since this cession of sovereignty, judicial cooperation in criminal matters should be read and understood in the context of judgements such as *Melloni*, *Åkerberg Fransson* or *Taricco*. *Melloni* dealts with a case of judicial cooperation where legislative competence belongs to the Union and for this reason fundamental rights to be resected must be those of the European legal order. *Taricco* and *Akerberg* operates in an national legislative area affected by the law of the Union where the States are obliged to achieve results – to be effective in the fight against fraud – or where there is a shared competence. For this reason, the essential fundamental rights framework must be the national ones, supplemented by those provided for in the European legal order as a minimum standard. In other words, in the context of mutual recognition, citizens are no longer national citizens; the citizenship is the European citizenship.

The cession of sovereignty that the states have made to the Union through Art. 82 TFEU is a conditional transfer. The EU must regulate cooperation in accordance with the principle of mutual recognition and not in any other way. It imposes a material limit on directives or regulations based on Article 82 TFEU. If the EU lawmaker decides to backtrack and regulate judicial cooperation with rules that depart from this principle, its regulation would be contrary to the Treaty. Art. 82 also requires judges to interpret the various legal texts implementing judicial cooperation in accordance with the principles of mutual recognition. An interpretation of the arrest warrant with the old *Denkbrillen* of the extradition is contrary to the Treaty. This constitutional dimension is crucial in understanding the interpretation of the principle of double criminality provided for in Art. 2(4) of the Framework Decision on the European arrest warrant. That is why it is necessary to go further and explain in some detail the basis of the principle of mutual recognition.

The first basis is equal treatment: Country A's legal decisions seeking cooperation should be treated in a similar way to domestic judicial assistance decisions. Similarly, it does not mean of identical nature. Absolute equality of treatment – as it founds in *ne*

seitigen Anerkennung. Zur justiziellen Zusammenarbeit in Strafsachen zwischen den Mitgliedstaaten der Europäischen Union im Lichte des Unionsverfassungsrechts, München, Habilitation an der Ludwig-Maximilians-Universität (2015).

bis in idem principle – would have meant that judges in country A could have addressed to the police or the administration of another state directly for assistance. In light of this possibility and due to the fundamental interests at stake, it has been considered appropriate to maintain the need for judicial intervention in the state of execution. However, this judicial activity is, in light of the other fundamentals of the principle, extraordinarily limited and qualitatively different from that which takes place in the classical model of cooperation.

The second feature of the principle of mutual recognition is its automatic nature, which is essential in order to shorten the time taken for judicial cooperation and ensure its effectiveness. The automatic character has led to the maximum reduction of the information that the judges of the issuing State must proportionate to those of the executing State in order to have access to the cooperation. To fill out a form as judiciary activity, instead of arguing, represents the symbol of mutual recognition. As the *EU Arrest Warrant Manual* itself indicates for the execution of an arrest warrant, any request for further information must be exceptional[6]. The automaticity has led to the reduction of control and grounds for refusal, which should be easy to check. Any restriction of automaticity significantly affects the efficiency of the principle and must therefore have a very strong justification.

The third foundation is respect for the autonomy of each system. Mutual recognition involves giving validity to judicial decisions from another country even if there are differences in the law on which they are based. Mutual recognition is a different option from harmonisation. It must be applied despite the lack of homogeneity, and that is precisely its virtue. Logically, autonomy must stop some counter-limit. Even in the free movement of goods, their most genuine area of mutual recognition, there are limits: consumer protection, environmental protection, health protection, etc. As we will immediately see, one of the central problems of mutual recognition is the establishment of the interest that justifies such counter-limits.

In order to understand the extent or intensity of these counterweights, it is necessary to consider the fourth foundation of mutual recognition – the division of work. Mutual recognition is fast and secure because it is grounded on a trust-based division of tasks: judges assume that their counterparts are competent and develop their activity in accordance with the rule of law. The common umbrella of the European Convention on Human Rights and its Court helps this trust. Of course, trust can be questioned, but only in exceptional circumstances, such as the ECJ has established in *Aranyosi-Caldararu*.[7] The division of tasks explains why it is not up to the executing judicial authority to check the validity or quantity of evidence. The Schlewisg Holstein

6 Commission notice, *Handbook on how to issue and execute a European Arrest Warrant*, Brussels, 28.9.2017 C(2017) 6389 final, p. 27.

7 For an in-dept analysis of the *Aranyosi and Cadararu cases*, see Muñoz de Morales Romero, M.: "Dime cómo son tus cárceles y ya veré yo si coopero. Los casos Caldararu y Aranyosi como nueva forma de entender el principio de reconocimiento mutuo", in *Indret. Criminología y Sistema de Justicia Penal*, 1/2017.

court has, therefore, wrongly demanded more and more evidence from Spanish judges about the constituent elements of the *Untreue*.

Once we have analysed the pillars of mutual recognition and its constitutional meaning, it is time to think about their importance in the judicial interpretation of the legal provisions of mutual recognition and in particular in the dual incrimination regulation.

For some, the problem of double criminality generated by the arrest warrant on Catalan politicians should be solved with greater harmonisation[8]. Increasing homogeneity is also the answer that others propose for lack of trust. I am not opposed to harmonisation, but as I have indicated, mutual recognition is a strategy that goes in the opposite direction. The homogenisation of the special part of the CP, reaching figures such as the rebellion, falls outside the EU's competence, as well as being an almost impossible task. Nor does increasing mutual trust depend on greater harmonisation. Trust serves to guide our actions in situations where there are unknown risks. The legal system of a country is not something in which one can have confidence or not because one can know exactly what the existing regulation is. Trust tackles purely factual, not normative, issues such as the capacity of judges (but not the law they apply) or the state of prisons (but not prison law). Increasing confidence should, therefore, be sought through initiatives other than harmonisation, such as providing more information or promoting contacts between European judges.[9]

As I said earlier, the main shortcomings of the current system of mutual recognition is to discover the basis of its limits. In other words: what are the legitimate reasons for introducing restrictions into a cooperation model that must be agile and effective? Only when we know the basis of the limits, we will be able to know what the particular limit of dual criminality means in this new system of cooperation. We need to establish functional equivalents to the limits that have been operating for years in other areas of mutual recognition. In a cooperation model based in mutual recognition, we are still waiting for our *Cassi Dijon*.

National identity, respects of EU fundamental rights and proportionality are the basic limits of mutual recognition model. [10] In our case, the first of these is the decisive one. Art. 4.2 TFUE gives constitutional legitimacy to limits based on national identity. This concept is not stranger to the freedom to provide services, as demonstrated by the ECJ in the famous *Omega* case, which involved recognising the singular understanding of personal dignity in the German Constitution in order to oppose the commercialisation in Germany of a video game that pretended to kill human lives. In particular, in the field of mutual recognition, national identity is the principle that would give sense to the requirement of dual criminality.

8 Olle M., *Las contradicciones de la orden de detención*, El País, 17 Apr. 2018.

9 Cfr. Caeiro P., *Una nota sobre reconocimiento mutuo y armonización penal sustantiva en la Unión Europea*, en Arroyo Jimenez L./Nieto Martín A., El reconocimiento mutuo en el derecho español y europeo, Marcial Pons, 2018.

10 See European Criminal Policy Initiative (2014): *A Manifesto on European Criminal Procedure Law*, Stockholm, Skrifter utgivna av juridiska fakulteten vid Stockholms Univesitet.

As the European Court of Justice stated in *Advocaten voor der Wereweld*, the basis for double criminality does not lie in respect for the principle of legality (*nullum crimen sine lege*)[11]. Judicial cooperation is assistance in the exercise of the *ius puniendi* of another State whose legal system must guarantee the principle of legality. It follows from the "help" nature of the State's involvement that the control of dual criminality cannot consist of checking whether the facts would be exactly punishable under a similar offence (*in concreto* test of dual criminality). Such an interpretation would only make sense in an interpretation guided by the principle of legality of dual criminality.

The meaning of double criminality is none other than to leave out of cooperation facts that could in no way be considered criminal under the law of the executing State, because they do not entail any kind of legal censure and, furthermore, cooperation would be an infringement of basic principles and choices of criminal policy in a State. National identity justifies, for example, the limits to cooperation in cases involving children, when in the state of enforcement it would not be possible to prosecute them under any circumstances. National identity also explains why even in the case of the positive list of offences it is indicated, for example, that States may refuse to surrender for murder when the facts under their system constitute a case of lawful euthanasia or abortion.

Understood as affirmation of national identity, the nature of the judiciary activity checking out dual criminality is qualitatively different from the traditional operation of subsuming the facts into a criminal description. The ECJ has started to outline in its *Grundza* and *Piotrowski* cases how double criminality should be checked. In both cases, it is opposed to an *in concreto* test, which would only be possible if the principle of legality were the basis for double criminality. However, the above decisions do not resolve all possible situations that may arise in the future. Nor is the legal formula contained in Article 2(4) of the Framework Decision, which has been transposed into mostly national transposition legislation, capable of resolving the problem given its considerable ambiguity.

Let us look at two examples in order to explain the judicial activity concerning to dual criminality. If a German court were to request cooperation from Spain for an incest offence, which still exists under German criminal law, the Spanish judge should check first whether the acts could be classified as sexual abuse or any other type of crime against sexual freedom. If this operation were negative, they could refuse to cooperate if the case at stake were consensual sexual relations between adults. The criminalisation of these relations represent a radical attack on the foundations of Spanish criminal policy in sexual criminal law. Another example: Germany could apply to Spain for an arrest warrant for a tax offence involving less than €120,000 of fraud. According to the Spanish Penal Code, there is only a tax offence when the amount defrauded is greater than this amount. Therefore, the facts for which surrender is re-

11 On this question, deeply, see Muñoz de Morales Romero, M. "Doble incriminación a examen: Sobre el caso Puigdemont y otros supuestos", Cuadernos de Política Criminal, forthcoming in 2018.

quested constitute an administrative offence. Despite this circumstance, the Spanish judge should agree to surrender because the facts are wrongful, there is a similar devaluation. The amount expresses a criminal policy reason that does not affect national identity[12]. Sanctioning an administrative offence that is in essence identical to criminal conduct cannot affect national identity, except where this concept covers anything.

A second consequence of national identity as the basis of dual criminality is that the judge in the issuing State must refrain from carrying out analyses of the complex elements used in the description of the crime. A complex element is one that requires a very open judicial assessment. In Spain, for example, the crime of fraud – *Betrug*- requires that the deception be "enough", which means that certain deceptions are not criminal in nature. It is very likely that many fraud cases are punishable under the German fraud offence but not according to Spanish judicial interpretation. The complexity of the element and the judicial margin of appreciation in these cases is so important that even within the Spanish system there can be different judicial decisions. It would also be meaningless in a reckless homicide where there are doubts about the causal link between the action and the outcome if the judges of the executing country were to come in to verify the existence of objective attribution of criminal liability. The important thing is that it does not affect national identity to judge cases of fraud or reckless homicide; although in the concrete case, the punishment could be open.

A *in concreto* test collides also with the basic foundations of the principle of mutual recognition. First, it affects to the respect of the autonomy of the singular legal orders. Each country may set the contours of any offence such as fraud in different way or as happens in the example of tax fraud different criteria for separating criminal law from administrative penalties may be used. A specific analysis would also violate the division of tasks based in mutual trust. The issuing judges are the ones who should be in charge of establishing the causal link, perhaps they have different theories, but this is a task that corresponds to them.

The decision of the German judges to analyse in detail the occurrence of the term "violence" in the context of the crime of rebellion contains a similar mistake to analysing the causal link in the homicide or the "enough" character of deception in fraud offence. Once the identity of the Spanish and German criminal description of rebellion has been established, the work of the judge in the state of execution must end. The punishment of the facts of the *Puigdemont* case cannot be considered in any way an attack on Germany's national identity. It is difficult to imagine a country where it can be considered legal and without any kind of legal or criminal disregard to organise a referendum that absolutely contravenes legality, using to ensure it realization thousands of the members of Catalonian police officers.

An entirely different question is whether these facts, or those that arise at the end of the investigation, are ultimately a crime of rebellion under the Spanish Criminal Code.

12 Example extracted from Muñoz de Morales Romero, M. "Doble incriminación a examen: Sobre el caso Puigdemont y otros supuestos", Cuadernos de Política Criminal, forthcoming in 2018.

This is something that many of us discuss and even deny. However, this is a task for Spanish judges. The refusal to hand over the former President *Puigdemont* for the rebellion crime violates the autonomy of Spanish law, the division of tasks based on the principle of mutual trust and it is therefore in contravention of Art. 82 TFEU and the principle of mutual recognition.