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Fostering Integration in AFSJ: Assessing the Effectiveness and Legitimacy of European Criminal Law. The Case of the European Arrest Warrant

Vincenza Falletti and Maria Nizzero**

Abstract: The European Union's political and economic integration project has always raised questions about its legitimacy, effectiveness, and shared values. While effectiveness may be considered as a yardstick to justify actions, it also opens up a larger debate on whether effectiveness alone is sufficient to ensure legitimacy or whether something else is needed in the long run. In the field of European criminal law, such a discussion assumes particular relevance, since the use of force has always been a core competence of nation-states. The paper explores traditional justifying methods for the use of criminal sanctions relied upon by the nation-state in the EU supranational context. By looking at the so-called utilitarian and deontological methods, where the legitimising factor is respectively the efficacy of an action or the 'rightness' of the incrimination, it devotes its efforts to understanding which form of legitimacy the European Union should adopt in view of further integration. Drawing from this analysis, it explores the application of the European Arrest Warrant. The latter relies on the principle of Mutual Recognition. Although the underlying rationale of Mutual Recognition is aimed at effectiveness, this cannot work without 'mutual trust' between MS. Mutual trust, however, presupposes a shared understanding of values, so a paradox arises. Efficiency cannot be fully achieved in this area without a common basis of values. The paper finally explores the case of Carles Puigdemont as an emblematic example of how, in the criminal law domain, probably a mixed approach to legitimacy is needed.

Keywords: European Union, legitimacy, integration, Area of Freedom Security and Justice, European Arrest Warrant, European values, efficiency.

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Introduction

The European Union (EU) political and economic integration project's gradual progress towards a supra-national EU polity has always accompanied questions about its legitimacy, effectiveness, and shared values (Risse, 2014). The more the European Union assigns values that directly affect European citizens, the more it demands legitimacy. However, legitimacy is a condition for the EU's long-term effectiveness and stability, and, while it needs to be proportional to the degree of political and economic integration, it is also conditioned by the constitutional structure, sovereignty, and national identity of EU Member States (EUMS). So far, EU action has been mainly justified in light of its effectiveness. While a valuable and indispensable parameter, it goes along with a more extensive debate on whether it is enough to guarantee legitimacy or whether something else is needed in the long run.

Against the backdrop of the alleged European Union's contemporary legitimacy debate, the Area of Freedom, Security, and Justice (AFSJ), European criminal law, and Police and Judicial Cooperation in Criminal Matters (PJCC) are the domain where this better manifests. The reason is two-fold. On the one hand, since the first cooperation mechanisms were established in the late 1970s, the debate surrounding the matter of pool of sovereignties with regards to law enforcement has been tied with the EUMS' reluctance to give up on their monopoly over the legitimate use of force and to trust each other's methods and capability of bringing the guilty before justice. On the other hand, the application of criminal law directly affects human freedoms, and this prerogative has always been seen as the most important one of nation-states. To tackle these obstacles the Lisbon Treaty required 'harmonisation' or 'approximation' of EU Criminal Law within the supranational framework of judicial cooperation in criminal matters (Schroeder, 2020). However, due to the hesitations by some EUMS, aided by the lack of shared values and common practices, the principle of 'mutual recognition', which is implicit in harmonisation itself, has become the standard praxis in this domain. Indeed, it is a middle ground between aspirations of European integration and EUMS' protective attitudes and, so far, it has guaranteed the effectiveness necessary to ensure action while, at the same time, providing measures to approximate the Member States' laws in several areas. Yet, other conditions must be met for mutual recognition to be an appropriate instrument for integrating criminal law.

The paper aims to analyse issues surrounding the legitimacy of EU Criminal Law and mechanisms for cooperation in police and judicial matters. The discussion seeks to understand whether current methods that operate on the

principle of mutual recognition, and thus guarantee a type of instrumental legitimacy based on effectiveness, are sustainable in the long term. The critical point is that, whereas mutual recognition is considered an effective instrument, it also gives rise to a series of issues among EUMS about so-called 'mutual trust', which may hinder the already-trembling ideological foundations of the European Union. In place of instrumental legitimacy stands a substantive type of legitimacy - where the ultimate aim is not efficiency, but rather shared values - which might enable stronger cooperation and promote integration. However, this result is not yet fully applicable, as the values espoused by the member states have not yet matured.

In this framework, the paper explores three interlocked problems. First, at the theoretical level, the need to trace the exercise of criminal law to one type or another of legitimacy, whether it be instrumental or substantive. Second, the necessity to understand how and which legitimacy model is being adopted today by the EU legal system. Third and last, whether the tools in place are effective and, whether this effectiveness, could be a sufficient condition to justify mechanisms under European Criminal Law in the long run.

The first section of the paper will be devoted to presenting a theoretical background analysis, indispensable for a proper comprehension of the rationale behind the EU's approach to criminal law. The section draws from classical theories of political philosophy, how these would interpret matters of general criminal law and the role of the European Union, to explore the relationship between instrumental and substantive legitimacy approaches. The second part of the paper looks at the evolution of police and judicial cooperation in criminal matters within the AFSJ. As it explores the mechanisms of cooperation heightened by the evolution of transnational crime alongside European integration, the paper's last section will narrow down the analysis on the European Arrest Warrant (EAW). This simplified cross-border judicial surrender procedure has been in force since January 2004 to ensure and fasten prosecution or the execution of a custodial sentence or detention order for transnational crimes. Based on the principle of mutual recognition, EAW implementation has insofar been the preferred measure of cooperation in criminal matters. However, it has also led to controversy and has challenged EUMS confidence in each other's criminal justice systems. Additionally, the European Arrest Warrant gives rise to a debate on its applicability long term if the goal is to ensure legitimacy.

As it scrutinises these critical pieces of information, the paper attempts to assess the effectiveness of this mechanism under European criminal law, the benefits of enhanced European cooperation, and the challenges to the legitimacy of EU institutions. The project assumes particular relevance not

only because it questions the effectiveness of European mechanisms in criminal matters, but also because it addresses the matter of legitimacy of the EU legal system by testing the effectiveness of a measure that relies on the controversial principle of mutual recognition. Consequently, it also gives scope for analysis on whether mutual recognition, and therefore instrumental legitimacy, could be a sufficient condition to justify today's mechanisms under European criminal law. The ultimate goal is to explore whether, while a necessary quality, effectiveness alone is enough to ensure legitimacy. Other ingredients may need to be part of the equation in view of the European project aimed at an ever-increasing integration and cooperation.

Theoretical Background

In the wake of physical borders dismantling, defining criminal law is a difficult challenge. While most crimes can be observed in different penal codes, criminal law varies significantly across national and socio-cultural contexts. Therefore, a universal recognition of what constitutes a 'crime' is a demanding ambition. Whereas until relatively recently, criminal law and procedures in penal matters were primarily within the purview of national sovereignty, the fight against crime now desperately calls for stronger supranational cooperation. Even more so, the European territory, by virtue of its supranational nature and its freedom of movement, is a scenario in which transnational crime, its conceptualisation, and its study have now become indispensable. In the light of its strict attachment to statehood, criminal jurisdiction is an excellent means for a supranational entity to claim state-like characteristics and, thus, increase its political legitimacy.

Criminal law poses essential questions of both legitimacy and political legitimacy. From a normative point of view, political legitimacy is the people's acceptance of the rule's validity, of the whole political system, and of the rulers' decision. When tackling the punitive dimension of political legitimacy, a double challenge arises in establishing at the same time the legitimate content of penal law and who has the legitimate authority to use it. Indeed, the peculiarity of criminal law lies in its significant impact on the 'right to liberty', understood as freedom of movement. While other legal provisions may affect some fundamental human rights, the mere imprisonment – and thus the penal law under which it is provided – physically denies individual freedom. If the essence of the criminal law is difficult to delineate, its punitive function, precisely because of its considerable impact on human freedom, imperatively demands a rationale. Extensive work already exists on the legitimacy of criminal law in general (Luban, 2008; Faganm, 2008) as well

as the legitimacy of a supranational authority (Lindseth, 2010; Moravcsik, 2002, 2004; Follesdal and Hix, 2006). However, the reason behind the choice by a non-state authority to appropriate the prerogative of punitive function is not yet self-evident (Wieczorek, 2020). In this regard, the requirement for legitimation is two-fold: first, the attribution of the use of force to a supranational authority needs to be adequately defensible, and second, there is a need to understand whether the ground upon which this kind of legitimacy is based is sufficient.

The debate surrounding the defence of individual freedom and the consequent discussion on how to justify punitive law, dates back to the 18th century. In the political philosophy domain, two main approaches are employed for a justificatory criminal law theory: utilitarian and deontological (Roberts, 2014).

The utilitarian approach takes its roots in the works of Mills and Bentham (Bentham, 2000; Mills, 1974, 1979). The general utilitarian notion aims to maximise the well-being of all people, or, of the greatest possible amount. Accordingly, an institution's legitimacy is measured on its capacity to boost the collective utility (Bentham, 1982 *in* Wizoreck, 2020). In the realm of criminal law, the utilitarian theory of punishment is nothing more than a general application of the utilitarian approach to the specific case of punishment. As such, it does not significantly matter which version of utilitarianism is adopted (Bagaric, 1999). Thus, the State or public authority act legitimately in restraining individual liberty on the grounds of its contribution to collective utility. In this case, the theory of punishment is forward-looking. Indeed, the mere commission of an offence does not justify punishment; on the contrary, the act of punishing is warranted only when some good can be derived from such action. In this sense, the utilitarian doctrine is consequentialist; in other words, its moral force derives from the effect caused by the action of punishing. However, two main luminaries of utilitarianism, Beccaria, and Bentham, refuse to consider the issue of punishment as a proper moral concern. According to them, the only efficiency is the primary source of political legitimacy and decision-making, yet this is not a moral issue. Nevertheless, the open issue remains whether the usefulness or efficiency of action needs to be a value shared by society. A great debate already exists in the literature on this (f.e. Posner,1980). However, in criminal law thinking, we shall assume that collective utility is maximised when a general sense of security is achieved (Wizoreck, 2020).

In contrast to the utilitarian model above, an alternative traditional view of punitive prerogative legitimacy relies upon the deontological model. In its most straightforward formulation, the core thesis of deontological doctrine could be as follows: the rightness of an action is a consequence

of whether the action is required, prohibited, or permitted by a moral rule. The categorical imperative by Immanuel Kant is the central philosophical foundation of deontology. The latter determine the existence of a supreme principle of morality to account for, whereby the outcome of an action is no longer of overriding importance (Forschler, 2013). Thus, a deontological decision values the morality of one's action and does so regardless of its consequences. The duty must be done for duty's sake. To a certain extent, if an act or a rule is right or wrong is a matter of the moral characteristics inherent in that particular type of act. Under criminal law, a deontological approach assumes that no action can be criminalised unless it reflects a violation of a moral value. It follows that, provided that human dignity is an absolute value to be protected in any political system, a state will only act legitimately by restricting an individual's freedom if it is necessary to prevent harm to another person and, thus, safeguard their freedom. Consequently, under this view, only behaviour that harms (directly or indirectly) human freedom, or any value equivalent to it, is legitimately punishable. Whenever the need arises to consider whether or not to criminalise behaviour, the legislator must carefully ascertain which interests are threatened. Should such interests be essential to ensure someone's freedom, then the punishment of such conduct will be considered reasonable.

The deontological perspective opens up profound reflections as well. Of particular importance is determining which method or principle allows the identification of the list of duties, rights, and permissions within the scheme of deontological moral theory serving to determine punishable actions. This matter can hardly be addressed without an unequivocal perception of what is considered the 'right or the wrong'. Therefore, the central assumption for pursuing a deontological approach to criminal law is that a shared understanding by the whole community of essential values is necessary.

The utilitarian and deontological approaches reflect two antithetical conceptions of statutory justification and, for this reason, the understanding of political legitimacy for punitive action changes considerably accordingly. To a certain extent, we assume that these two notions convey the distinction between what we will call respectively an "instrumental" and a "value-based" type of legitimacy. On side, the instrumental model favours deterrence-oriented policing strategies, and suggests that "the public abide by the law and cooperate with the police when the benefits of such behaviours outweigh any costs" (Lee, Choo, 2019). What matters is the result achieved – citizens' security – and thus, the rational assessment of the usefulness of an authority describes to what extent an authority responds to 'shared needs'. On the other hand, substantive legitimacy or value-based legitimacy is a more abstract normative judgment, responding to 'shared values'. Supposing that

what is legal means relying on what is 'good', a common understanding of 'the good' and 'the wrong' is needed. For this conception, the use of coercion is legitimate if it is supported by shared values, substantive reasons that all persons can be expected to endorse.

Following this careful analysis, it is nevertheless worth noting that both the deontological and utilitarian approaches have been used to justify a state prerogative to punitive powers. The analysis needs to be revisited in light of the transnational nature of crime within the European context to date. Nevertheless, the translation of this debate into the European transnational environment is not straightforward. Two major questions arise: what kind of legitimacy does the European Union invoke to justify its criminal law? Moreover, why should the European Union have access to criminal sanctions and not the Member States? Before arriving at a satisfactory answer, it is necessary to assess the European Union's powers in the criminal field. Only after will it be possible to have an idea of which kind of approach the European Union relies on.

The evolution of EU cooperation in police and justice matters.

National and supranational security and the fight against transnational crime have been topical issues in European affairs long before the establishment of an Area of Freedom, Security, and Justice (AFSJ). As the first cooperation mechanisms between the Member States developed in the late 1970s, the debate surrounding the matter of pool of sovereignty with regards to law enforcement has often been accompanied by a reluctance by the EU Member States to give up on their monopoly over the legitimate use of force and to trust each other's methods and capability of bringing the guilty before justice.

Officially introduced in 1992 under Title VI by the Maastricht Treaty as an intergovernmental pillar, Police and Judicial Cooperation in Criminal Matters (PJCCM), known until 1999 as "Justice and Home Affairs", dictated closer police and judicial cooperation across the Member States and 'approximation, where necessary, of rules on criminal matters in the Member States' (TUE 1992, Title VI, Art 29). The JHA pillar was the manifestation of previous mechanisms, such as the TREVI group, that had covered much of law enforcement cooperation matters since the 1970s. However, these first, rudimental, cooperation attempts among the Member States were mainly created to find common solutions to tackling organised crime and terrorist organisations and 'functioned as a loose intergovernmental coordination

framework outside of the legal and institutional framework of the [European Commission] and without any legal or financial instruments' (Christiansen and Duke 2016, 35). According to Monar (2001), three were main elements that pushed members of the then-European Community (EC) to cooperate: the 1972 terrorist attacks during the Summer Olympics in Munich, which highlighted the transnational threat posed by terrorist organisations, the need for closer cooperation in JHA deriving from a deepening of European economic integration, and the Schengen Agreement (1985), which abolished internal border checks, facilitating the free movement of goods and people, but of criminals as well.

When JHA was officially introduced in the European Union with the Treaty of Maastricht (1992), the Treaty's pillar structure placed these matters as "common interest" to the Member States. However, it did not transfer any competence to the level of the European Union and largely excluded EU institutions from policy-making in the area. Under many aspects, the Third Pillar, while opening the gate to JHA within the EU framework (Monar, 2012), did not provide clearly defined objectives and ways to achieve the new treaty-based JHA cooperation. As a result, it lacked accountability and transparency and represented a failed attempt of increasing cooperation in those matters.

The limitations of the JHA pillar mainly stemmed from a lack of consensus amongst the Member States on how they could achieve further cooperation, without being constrained by binding treaty objectives that would interfere with national interests in a highly sovereignty sensitive domain. Not every EU Member State perceived this deepening of European integration in the same way. To some, the pool of sovereignty required by the communitarisation of the third pillar was too intrusive from a sovereignty perspective, as they perceived internal security and police matters as a vital core area of a State's identity (Lavenex, 2007).

Further steps were made by the Treaty of Amsterdam (1999), which incorporated the Schengen rules into the EU legal framework and ended the intergovernmental regime in matters of asylum, immigration, external border controls, and civil law matters. More importantly, the Treaty of Amsterdam changed the 'rationale of cooperation' (Trauner and Servent, 2020, 3), as it introduced EU action in JHA matters as functioning to the objective of 'maintain and develop an area of freedom, security and justice' (Treaty of Amsterdam Amending the TEU, 1997, Art. 2) and made the principle of mutual recognition the focal point around which EU criminal policy revolved. After Amsterdam, the JHA domain was regarded as 'the most expansive and rapidly developing EU policy area' (Monar, 2006b, 4).

Finally, cooperation in criminal matters was given a new impetus with the Lisbon Treaty, which officially ensured 'a high level of security through measures to prevent and combat crime' (Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2010, Art. 67(1)) as one of the Union's objectives. The Lisbon Treaty introduced the capacity to 'harmonise' national criminal procedures of EUMS in specific areas

> 'To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension.' (Art. 82(2) TFEU).

Essentially, Article 82(2) TFEU proposed a harmonisation of domestic procedure that is 'only allowed 'to the extent that it is necessary to 'facilitate mutual recognition' (Oberg 2020, 34).

It is worth noting that the process of 'harmonisation' generally means reducing the differences between the various legislations by proposing new standards to align each national legislation. This legal process is not opposed to law unification; instead, it can be seen as a precondition. Harmonisation, however, may lead to a maximum or minimum law unification process, depending on its degree. Albeit it is considered a 'neutral process' – viz., that does not have its normative dimension –, the harmonisation of national legislation in criminal law could be justified on a different rationale. It can either promote a set of values or be used instrumentally to achieve objectives. Following this logic, the European Union could rely on an instrumental harmonisation model or a normative one. Thus, it can engage, respectively, a utilitarian or a deontological legitimising rationale.

Against this backdrop, the mutual recognition principle introduced in 2007 was perceived as a principle that offered a

> 'middle ground between the European Commission's desire to boost further European integration in criminal matters and the Member States' protective attitudes towards their national sovereignty' (Bloks, Brink, 2021, 48).

Indeed, mutual recognition increases efficiency in cross-border cooperation without requiring EUMS to harmonise their legislation while at the same time leading to a minimum systems integration through the so-called spillover effect. However, in this paper, we sustain that mutual recognition legitimacy stems from a utilitarian matrix. Indeed, justified harmonisation on this ground would require more liberal Member States to broaden their criminal law - and thus further restrict dignity and freedom - merely to allow the Member States with more repressive programmes to apply their criminal

law transnationally and catch fugitives abroad. In this case, there is no value meaning, but only instrumental towards the securitisation goal.

In reality, putting the *legislative dicta* into practice has proven to be a much arduous task. More than ten years after adopting the Lisbon Treaty, and despite several mechanisms being introduced to increase cooperation, EU police and judicial cooperation in criminal matters (PJCCM) still has to face accountability, effectiveness, and mutual trust issues. 'European cooperation in criminal matters is an area full of paradoxes' (Luchtman 2020). As Luchtman (2020) notes, claims of national sovereignty, of regaining control over territorial borders and of the fight against crime and identity have sparked intense debates all over Europe on the added value of European integration, also in the area of security and crime control.

However, the transnational nature of crime cannot be overlooked any further, and with it, the creation of an EU system would help the Union better cope with these threats. To fully function, a system like this would need to be built upon 'trust, a common narrative, dialogue, and a certain division of labour' (Luchtman 2020). As previously seen, 'prior to the Lisbon Treaty, the EU had only a very confined and indirect power to legislate on domestic criminal procedure' (Oberg 2020, 34). The principle of mutual recognition was supposed to function by relying on 'quasi-automaticity and mutual trust' (Oberg 2020, 34).

In this context, the major challenge stems from the attempts to separate national security issues, such as criminal laws and the power of decision over human freedoms, from matters of national sovereignty and monopoly over the legitimate use of force. The Member States are reluctant to accept to share tasks that directly affect their internal affairs - and for this reason, they reject harmonisation processes in favour of the more usual (and meek) mutual recognition.

The roots of this problem can be traced back to the dawn of the European Arrest Warrant (EAW), the first result of the Europeanisation process of justice and home affairs and the most used tool of mutual recognition in criminal matters. Described as 'the first and most symbolic measure applying the principle of mutual recognition' (Lavenex 2007, 772) and defined in Art. 1 of the Framework Decision as a

> 'judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, to conduct a criminal prosecution or execute a custodial sentence or detention order' (European Council 2002/584/JHA), the EAW has been in to force since 2004.

Traditionally, extradition procedures are based on a principle of international cooperation and rely on the fact that it is a voluntary choice between the sovereign states of recognising reciprocity in criminal matters. In contrast, the EAW represents a simplified cross-border judicial surrender procedure that ensures that individuals wanted in connection with significant crimes are extradited with less hassle between the EU Member States. Arrest Warrants issued by EUMS are to be recognised, and the receiving institution is expected to act swiftly on the request on the grounds of reciprocity. As a consequence of the EAW, 'the role of the executive has consequently been more or less eliminated from surrender procedures and the number of refusal grounds has been reduced' (Luchtman, 2020). Additionally, aside from reducing administration procedures and ensuring that those believed or found guilty are brought to justice, a critical advantage of this tool is that it does not require verification for 32 categories of offences, including terrorism.

When issuing an EAW, the Member State should carry out a proportionality check that keeps into account the seriousness of the offence, the potential penalty that would be imposed if the person was to be found guilty, the likelihood that the guilty individual would be detained after being surrendered, and the interests of the victims (European Council 2002/584/JHA). Article 4 of the Council Framework Decision on the European Arrest Warrant and the surrender procedures between the Member States also states further reasons that would lead an executing judicial authority to refuse to execute an EAW, including the lack of a similar offence under the EUMS law, or whether their Member State is deciding on whether to prosecute the individual for the same crime (European Council 2002/584/JHA). However, when these reasons or proportionality are not ensured, a country can refuse to surrender, and issues of mutual trust, recognition, and legitimacy of the criminal offence may arise.

These issues have been a problem to European cooperation since the very introduction of the EAW. For instance, in its decision in relation to the case of Mamoud Darkanzanli, a double German -Syrian citizen who was arrested in 2004 on terrorism charges and the subject of an extradition request, the German Constitutional Court, in refusing his extradition, stated that

> 'the cooperation that is put into practice in the "Third Pillar" of the European Union in the shape of limited mutual recognition, which does not provide for a general harmonisation of the Member States' systems of criminal law, is a way of preserving national identity and statehood in a single European judicial area' (BVerfG 2005).

Therefore, the lack of harmonisation in criminal matters can also stem from, and generate even more, a lack of trust between Member States (Bures 2016, 103-104). Allegations of corruption and slow bureaucracy are often a reason to avoid sharing information or convince a Member State to prosecute an individual on the spot rather than allowing extradition. Attention should also be drawn to the fact that the absence of legislative harmonisation also implies that crimes could be considered serious criminal acts in one Member State, but not in another. In these cases, the Member State receiving the EAW request needs to carry out, aside from the mandatory proportionality check, a double criminality check which, in some cases, may not lead to extradition. For example, the aggravating circumstance 'use of mafia methods', an essential aggravating circumstance in the Italian penal system, are often refused and complicates the extradition of alleged mafia members to Italy. Similarly, when a charge is of political nature, or believed to be politically motivated, it could give rise to double criminality checks and refusal of extradition on the grounds of lack of recognition.

As analysed at length above, the EAW and its underlying principle of mutual recognition, supposedly serve as a mechanism grounded in a utilitarian approach. However, unravelling the argument, the fragilities of this assumption become evident. Indeed, it is not always possible to achieve efficiency and execute the mandate. In fact, frequently, the EAW is liable to a deontological analysis by the member state, which subjectively evaluates and therefore makes value judgments before executing what the appointing State requires. What does this entail for the legitimacy of EU criminal law?

The European Arrest Warrant, legitimacy and effectiveness: the Catalan case.

So far, the paper has argued that mutual recognition is a vehicle to avoid ceding state sovereignty and at the same time achieving effectiveness in the criminal field (hence its intended legitimacy is instrumental and its approach utilitarian). However, praxis has proven that the reasoning behind it is not straightforward. The assumption of the mutual trust principle behind mutual recognition raises far-reaching issues. Mutual recognition cannot succeed unless there is trust in other judicial systems. Though, there is a need for a shared, or at least recognised, acceptance of a crime's categorisation by other state entities for this to happen. This conception presupposes a certain degree of value considerations, values being the reference by which the seriousness of a crime is or is not defined. For this reasoning to be clear,

what follows is an analysis of a practical case from which the constraints under consideration emerge.

Considering the scepticism of many EU Member States there are mixed feelings regarding the efficacy of the European Arrest Warrant and its capability of bringing legitimacy to European Criminal Law. Statistics show that out of 168,104 European Arrest Warrants issued between 2005 and 2017, around 50,000 (49,322) were executed (European Justice, nd.). This means that less than 30% of all the EAWs issued over a 12-year period followed their present course. Theft and corruption were the most common categories for which the Warrants were issued, and the average extradition time has significantly accelerated, moving from one year on average pre-EAW adoption to forty-three days on average. To some authors, this shows success in tackling cross-border criminality and harmonising the extradition process and, thus, 'the EAW has justified its existence because such offences require effective judicial cooperation' (König, Meichelbeck and Puchta 2021). However, the logic and implications underlying the European Arrest Warrant are much more complex than the ones described so far. Despite the encouraging statistics, many balances are unhinged in the event of a failure to execute a European Arrest Warrant. Additionally, the overall number of Warrants does not in itself tell us how effective it is and, more importantly, if it is effective, in what terms it is so. An emblematic example of the adverse ramifications of the European Arrest Warrant is the case of Carles Puigdemont.

Carles Puigdemont, Spanish semi-autonomous region Catalonia's former President and leader of the pro-independence party "*Junts pel si*" (Together for the Yes), was at the centre of a well-known case revolving around the European Arrest Warrant and matters of mutual recognition. On October 1, 2017, an independent referendum, backed and organised by Puigdemont and other exponents of the pro-independence movement, was held in Catalonia, recording a turnout of approximately 43% of the resident population and a result of 90% in favour of the independence (Euronews 2021). However, as the referendum had been held without approval from Spanish institutions and against the Spanish Constitution, it was rendered void by the Spanish Federal Constitutional Court.

On October 27, 2017, Puigdemont and his supporters went on declaring the independence of Catalonia. This act has led the Spanish government to dissolve the Catalan Parliament, to announce new elections while temporarily depriving the region of its semi-autonomous rights under Article 155 of the Spanish Constitution, and to charge Puigdemont and several other members of his cabinet of 'rebellion, sedition, and misuse of public funds' (Lee, 2017). Puigdemont escaped arrest and fled to Belgium. Since then, he has, multiple

times, been the subject to the European Arrest Warrant. The EAW against him was first issued on November 2, 2017, but was withdrawn a month later due to discrepancies between Spanish and Belgian law. A second time, it led to Puigdemont's arrest on March 23, 2017, as he arrived in Germany from Finland.

While the first time the EAW was issued did not even lead to a Court's decision, more can be said regarding the decision of the First Senate for Criminal Matters of the Higher Regional Court of Schleswig-Holstein (Oberlandesgericht Schleswig-Holstein; OLG). On April 5, 2018, the OLG Schleswig-Holstein ordered extradition detention while staying the execution of the EAW: regarding the crime of rebellion, the judges held that a surrender of the requested person under the EAW was inadmissible *ab initio*; as per the offence of misuse of public funds, the extradition was subjected to further review due to the insufficiency of the information submitted by the Spanish authorities.

On its second decision, on July 12, 2018, the German Court - which had already failed to meet the deadline of 60 days set by the EAW Framework Decision - updated its previous decision concerning the offence of embezzlement of public funds, extradition was declared admissible by the OLG following more evidence given by Spanish authorities. As per the rebellion, however, the April 2018 decision was upheld by the German Court due to lack of double criminality and on the grounds that, if the case had happened under German law, no case would have been made (Schleswig-Holsteinisches Oberlandesgericht, 2018). Ultimately, Spain dropped the EAW, allowing Puigdemont to return to Belgium, only reactivating it in 2019.

The decision of the Schleswig Oberlandesgericht in the Puigdemont case seriously undermines the effectiveness of the European Arrest Warrant and, perhaps, its future survival. As a manifest example of mistrust between Member State judges, it could be the last straw for the already-trembling foundations of mutual recognition and judicial cooperation. More importantly, the analysis of this emblematic case reveals the emergence of a paradox. So far, these authors have tried to explain how, due to the Member States' unwillingness to surrender their monopoly on criminal law and not to introduce complete harmonisation of legislation, mutual recognition has become the default procedure. This principle's legitimacy is grounded upon a utilitarian logic and, therefore, an instrumental type of legislative harmonisation. That seems to be in line with the general philosophy of the European Union, having always turned efficiency into its primary driving force. By employng mutual recognition and the EAW, the ultimate aim is thus to pursue efficiency within the criminal field, which would entail no reflection on the crime and thus on what values are at stake or need to be

considered before enforcing penal law. Following this logic, when the crime in question is not enumerated in the 32 common categories, one should trust the warrant's legislative authority and, proportionality check permitting, proceed with the arrest. Assuming a deontological approach to the matter, this would not be possible since the crime itself and the values it puts at risk would have to be analysed. However, the theory does not always follow the practice, and the Puigdemont case is the most striking demonstration of this.

As widely discussed and demonstrated, the principle of mutual recognition cannot act independently, that is, without trust between the Member States. The EAW's efficiency is based on the 'mutual trust' principle between the Member States and different judicial systems. The notion of 'trust' is a socio-political subject that escapes simple categorisation. As it appears evident from the Puigdemont case, the existence of mutual trust, especially when dealing with politically inspired offences, cannot be presumed since it does not exist *a priori*. If there is distrust between judicial authorities, one can legitimately expect them to refuse to fulfil their obligation of mutual recognition (Marguery, 2016). Hence, a drop in trust between the Member States may be perceived as a (non-explicit) limitation of mutual recognition. This jeopardizes not only the effectiveness of EU judicial cooperation, but also threatens any further development of the AFSCJ. The critical point to note is that the existence of mutual trust is closely bound up with Member States' respect for essential values, in particular respect for fundamental rights, which must or should be shared by the whole Union. Therefore, trust is conditioned by the premise that Member States endorse shared values, including fundamental rights.

The paradox is thus obvious: while the EU's criminal prerogative is expected to be based on the principle of mutual recognition - and thus on instrumental harmonisation and utilitarian legitimacy - this cannot work without mutual trust. The latter can be alleged only insofar as a body of fundamental rights is shared by all Member States. These rights should be adequately enforced and provide a high level of protection to individuals in the EU. In the criminal field (as in many others), the EU envisages a utilitarian solution, based on mutual recognition. Nonetheless, mutual recognition cannot exist without mutual trust between the different judicial systems and, therefore, necessarily also involves a deontological stance. Then, suppose the mutual recognition principle is "legitimised" on utilitarian grounds. In that case, it goes without saying, that it cannot function without a common ground of values - and thus without being complemented by a deontological approach.

Following this overview, the question spontaneously arises: in the context of increasing European integration, ranging from geographical to political, is a policy's effectiveness a sufficiently legitimising criterion? The statistics

above analysed are only partially positive, showing that solely the result-oriented approach is still not convincing enough. Therefore, even in view of a prolonged resistance to full regulatory integration, at least an integrated approach is necessary, addressing a value-based assessment.

Conclusion

The matter of legitimacy, specifically the criminal legitimacy of a supranational state, is challenging to address. The rationale motivating the deprivation of an individual's liberty by a non-state authority is even more troubling. In this analysis, an attempt has been made to highlight how, in view of a desirable future integration of the European Union, a solely efficiency based legitimate rationale is not possible.

This paper explored traditional justifying methods for the use of criminal sanctions relied upon by the nation-state in the supranational context of European Union cooperation mechanisms. By looking at the so-called utilitarian and deontological methods, where the legitimising factor is respectively the efficacy of an action or the 'rightness' of the incrimination, it also devoted its efforts to understanding which form of legitimacy the European Union, in light of its supranational entity, can adopt. Drawing from this analysis, it explored the application of one of the oldest and most used mechanisms of cooperation in EU cooperation in criminal and judicial matters, the European Arrest Warrant, in the attempt to answer the following question: what happens to a system theoretically based on a utilitarian approach, when dual criminality checks are needed?

In December 2020, the European Parliament published a report on implementing the European Arrest Warrant and surrender procedures (A9-0248/2020). The report, whose rapporteur was Spanish MEP Javier Zarzalejos, deemed the EAW a success despite the existing problems. However, it also highlighted the obstacles encountered in the implementation at the Member States level, its impact on protecting fundamental rights, and provided recommendations on overcoming these challenges. Among them, it requested to expand the list of 32 offences for which double criminality has been excluded, including crimes such as environmental crimes and offences involving the use of crimes against the constitutional integrity of the Member States. There is to wonder how different the Puigdemont case would have unravelled, considering this recommendation. However, adding crime after crime to justify effectiveness may give rise to fundamental rights, legitimacy, and rule of law issues.

The debate on the legitimacy of criminal law has been going on since the 19th century. However, in recent years the EU has witnessed a substantial change in the nature of the crime. Due to European economic and political integration, crime has become transnational. Consequently, the classical legitimacy canons underlying the use of criminal law by the nation-state no longer hold and must be revisited. The purpose of this paper was to show how, today and in a unique context such as that of criminal law, it is impossible to rely only on the efficiency of criminal law. If not accompanied by a broader discourse encompassing its underlying fundamental values, this very efficiency is undermined. The paradox of the legitimacy of criminal law thus highlights that the more resistance we make to value-based integration by relying on efficiency, the more we row against this same principle of efficiency. The canon we should start thinking about is a mixed approach that includes both utilitarian and deontological considerations. Only in this way will it be possible to have a just and effective criminal law capable of enduring in the long term.

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