Focus

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Rebellion and Treason: The Family Demons of Europe and the European Arrest Warrant

Abstract

All criminal codes describe criminal offences that incriminate the actions that the Constitutional order seeks to deter or punish. The legal precepts that punish those acts are not always the same as each country will do so in coherence with the obsessions or *family demons* that their national history has cultivated. This paper focuses on the understanding of the crimes of rebellion and treason in different Member States and how such differences cannot justify the refusal of execution of mutual recognition legal instruments. The question is nowadays under debate in the Courts of Brussels and Schleswig-Holstein in relation to the *putsch* of the Catalan government.
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All criminal codes describe criminal offences that incriminate the actions that the Constitutional order seeks to deter or punish. The legal precepts that punish those acts are not always the same as each country will do so in coherence with the obsessions or *family demons* that their national history has cultivated[1]. Let us recall that criminal law as a power and a code was thought to be the most essential bulwark of a State, as much as the national currency. European currency has been harmonised as has a large swathe of its national criminal legislations. European law extends to what has not been harmonised, by establishing automatic mutual recognition from a broad range of offences and quasi-automatic recognition over the rest through the Framework Decision 2002/584/JHA, art. 1, ap. 2 and 4, in order to ease judicial cooperation in the prosecution of crime. And this is the question under debate in the Courts of Brussels and Schleswig-Holsteinin relation to the *putsch* of the Catalan government.

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1 Cohn, N.: *Europe's inner Demons,* University Chicago Press, Chicago, 1973 y 2nd 1993.

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In Spain, the chief *family demons* are crimes of rebellion and sedition against the constitution and public order. The main issues for the Spanish constitutional order since 1812 have been military revolts and insurrections, which have shaken Spanish history throughout two centuries[2]. Spain has lived with stability in its domestic legal order and full validity of its fundamental rights since 1978 and 40 years thereafter, with only two attempts at rebellion; the military coup of 23 February 1981 and now a civil coup, or, as we shall see, a civil police-based coup: the uprising of pro-independence Catalonia. It is a rebellion of the worst of our all too well-known Spanish demons. The summary that Jordi Solé Tura and Eliseo Aja completed some 40 years ago in their work on the history of Spain *Constituciones y períodos constituyentes en España 1808-1936,* of 1976, made it evident that the tragedy of our system and political structure carried with it a change in the Constitution for each profound political change, through force, violence or civil war[3]. And the fact is that the *natural state* of the Spanish – and likewise the very history of all Europeans- has never been solid democracy but civil war. From the contrast with that fateful future arises the grandeur of the period that started with the democratic transition and the Constitution of 1978; the longest and most fruitful democracy of the history of Spain.

The other national Spanish demon par excellence is nationalism, with separatist tendencies in some regions. In constitutional democracy, we believe we have institutionally reconciled nationalisms with the widest political autonomy, especially profound in the Basque Country and Catalonia. But we have seen another reality in Catalonia, where one half has sought to impose itself on the other and the rest. Curiously, the rift was closed when the Criminal Code of 1995 was approved: neither advocating independentism nor declaring it as the purpose, and the way forward was punishable. On the contrary, independentism was punishable when it sought to impose itself violently by force, violating the Constitution and the Statutes of Autonomy, that is, illegally substituting a legal order for another by force -or by astuteness- which is Hans Kelsen's definition of a *coup d'état*[4].

The national demons of Germany are very different[5]. German constitutional history shows the stresses and strains of a plurality of States with tensions within that great pan-Germanic expanse- Prussia, Austria, Bavaria and the rest -which throughout present history have lived in permanent war between each other or against the other European countries. Fundamental to that history has been national fealty and therefore against treason. The principal demon for a nation at war, the enemy of its exis-

2 A history of rebellion and sedition in Spain is provided by García Rivas, N.: *La rebelión militar en derecho penal. La conducta punible en el delito de rebelión*, UCLM, Cuenca, 1989 and "La represión penal del secesionismo", in *La Ley*, 29 de septiembre 2017.

3 Solé Tura, J. and Aja, E.: *Constituciones y periodos constituyentes en España (1808-1936)*, Siglo XXI, Barcelona, 1977.

4 Kelsen, H.: *General Theory of Law and State*, Harvard University Press, Massachusetts, 1945, p. 117.

5 For every State mentioned in advanced, see Javato Martín, A. Mª.: *El delito de atentado. Modelos legislativos. Estudio histórico-dogmático y de Derecho comparado*, Comares, Granada 2005 and "Las dificultades del delito de rebelión", in *El País* 12 de abril 2018.

tence, is not so much rebellion, but treason. Everything worsened in that sense following the inauguration after the last World War of the divided Germany. The principal enemy for the FRG up until the fall of the wall in 1989 was treason in favour of Eastern Germany and, the enemy, the communists of the East. And that I believe is why the criminal offences that protect the state against the most serious attacks are called "high treason" against the Federal Republic or one of its *Länder*. "Treason" as understood in German case-law and now cited by the High Court of Schleswig-Holstein in a case of angry demonstrations against the enlargement of Frankfurt airport, which the German public prosecutor qualified as high treason. The Court rejected the charge, not because there had been no treason at all, but because the strength of the demonstrators "was not sufficient to bend the will of the State". It went on to accept that the peace of the land had at least been broken, which in German is even more frightening: *Landfriedensbruch*. The Court added that the police of the state, where Frankfurt is the capital, having to call for reinforcements from neighbouring states, was insufficient in itself to uphold the concept of violence. Hardly comparable with the events in the Spanish case, in which, as we shall see later on, the problem was, no more no less, that the police force of the *Land* of Catalonia had been the key instrument in the conspiracy and the president of the *Land*, its principal perpetrator. In reality, the Court of Schleswig-Holstein would not have had to go so far as Frankfurt airport and it should have turned to the case of the Prussian Putsch of 1932, in which the *Reichskanzler* von Papen illegally dismissed the autonomous government of the largest *Land* of Germany and appointed himself *Reichskommisar* of Prussia and changed the chiefs of a police force that numbered some 90,000 members. The legitimate government resigned before the *coup d'état* to avoid a civil war, although that fragility opened the door some months later to the illegal appropriation of power on the part of Hitler. A matter that Hans Kelsen treated in defence of the constitution, before his expulsion by xenophobic national socialists, in stark contrast with the demonic role of the jurist Carl Schmitt, whose juridical science lent support to the *Reichskanzler*.

A case of similar characteristics is precisely that of Belgium, where before the first attempt to request the surrender of Puigdemont, it was surprisingly discovered that its legal order contained no crime of rebellion, but instead one of treason, like the Germans. And the explanation here is also very "national", as the chief demon in that country is in reality, the Duke of Alba aside, the division of the country into two parts: Flemish and Walloon. They in common uphold one and the same head of State and a little more than the Crown, yielding a fragile Government of national unity built, in reality, upon a cross-party coalition grouped around their two respective languages. The problem of Belgium is not the rebellions, but the separatist tendencies of the Flemish, who aware of the normally suicidal nature of attempted rebellion only commit treason and, only, when the Germans invade their territory as a consequence of European civil wars that the Germans themselves had organized up until 1945. However, there has only been one treason-related criminal proceeding, in 1918, after the First World War, against Flemish collaborators who joined the *Flamenpolitik* of their German occupiers. It prefigured the present political and territorial organization of

Belgium. In turn, as is known, Belgium has been the country that has arbitrarily refused more extradition requests, now in the mature democracy of Spain, citing members of the terrorist organization ETA.

Up until the last World War, France had had its concerns over State security half way between the Revolution and Monarchism. The least ordinary or typical form was always revolutionary or monarchist conspiracy. The maximum offence took the name of *complot*, equitable with the Spanish term *rebelión*. The term invoked such unease in the French judge from Nuremburg, Henry Donedieu de Vabres, as the *complot* had nothing to do with the word *conspiracy,* so much to the liking of the Americans. However, in the years after the II World War, the Algerian war of independence came to a head: the independence fighters, the organizations opposed to independence, a sort of civil war in France and another of liberation in Algeria, with terrorism and torture, plus the attempted murders of national statesmen. Under the criminal Code in the 1960s, almost everything took place: effacement of limits of interior and exterior security, between civil and military, between State military and civilian, and independence fighters. All with a profuse multiplication of death sentences and special procedures before Military Jurisdictions, until the creation of a special court of State Security. At that time, the crimes were above all treason, espionage, attempts against the security of the State, especially with regard to the independence of Algeria, and the *complot*, always serious or aggravated, with prison terms of 5 to 20 years, with no minor penalties for merely "declarative" or programmatic actions.

But the reform of the 1992 penal Code introduced by Mitterrand and Badinter changed the position of offences against the State in the Code as much as it did their definitions. Offences against the Nation, the State and public peace came after treason and espionage. The most serious were attempts and the *complot*, the former as a violent attack likely to endanger the Republic and affect national integrity; the latter, the *complot*, is an undertaking entered into by various people to commit an attack; in short, conspiracy to undertake a violent attack against the Republic or territorial integrity. The *complot* is punishable with a prison term of up to 20 years, and if public authorities take part, prison terms of up to 30 years. Adding to the confusion, the French Code foresees – like the Belgian one – an offence that it refers to as "rebellion" under Article 433, somewhere between the offences against the public administration committed by individuals: the act of violently resisting officials invested with public authority or in charge of a mission of public service in the exercise of their duties to enforce the law, the orders of a public authority, judgments and judicial decisions.

The political life of Italy is also reflected in its Criminal Code. The drawn out and bloody unification of Italy meant that the central criminal concern favoured national integrity and opposed separatism. But, as a consequence of the singular political arrangements in a country where, after the Yalta accords, the communists were not allowed to stand for election or hold power, the whole Italian penal scenario of the 1960s and 70s would be dominated, on the one hand, by the mafia and, on the other, by an alliance of extreme right-wing forces and intelligence services with its counterpart in the extreme left-wing, which against all "risks" of the communists winning the elec-

tions, subjected Italian society to furious terrorism, both mafia and lay terrorism. Mitterrand refused to approve the requests for extradition on the grounds of terrorism in Italy, and today the search for some of them, such as Cesare Battisti, are still active. There is little place in the Italian criminal and political scenario for rebellion and crimes against the security and the integrity of the State. The risk of fragmentation in Italy is only one aspect of its political crisis with the arrival of Berlusconi. Though it still remains.

In short, international judicial cooperation, whether for traditional extradition and, even more so, the European Arrest Warrant, can never entail an exact concordance of the facts with the specific criminal offences of the lawful Democratic State called on to extradite. It has to be a judgment based on the abstract criminality of the facts in accordance with the law of the country. But the "writs" of the judges are not usually transferable in their respective legalese[6]. Thus, after over one month without reply, the magistrate of the Supreme Court addressed his German colleagues on 26th April through a "prologue for Germans" in the style of the famous text of Jose Ortega y Gasset. It proposed that their colleagues in Germany qualify what had happened as if the facts had taken place there and presented the facts to them: a government constituted in a *Land*, which could be Bavaria, convokes seemingly plebiscitary elections and loses them. The elections concerned a pact for government that set out everything they believed necessary to impose independence. So, they set to work within the country and throughout Europe, they violated the national Constitution and that of their own *Land*, they violated more than ten judgments of the Constitutional Court and their own respective formal requirements to abstain from proceeding. Acting in concert with their own government, their administrations and political-cultural organizations, they called a referendum that was declared unconstitutional. Warned by their own regional police force, that depends on the aforementioned government, of the risk of violent clashes, they consciously assumed such risks and, with the collaboration of that police force constituted of 17 000 members and thousands of other municipal police, carrying arms, they urged one million citizens into confrontation with the forces of law and order of the State that might very easily have ended with blood on the streets. But the point is that, that blood is precisely what they sought to exploit, so as to present a demand for independence before Europe "à la Kosovo", with the blind desire that the European Union would recognize *de facto* independence and with it a supremacist and xenophobic dictatorship over all Catalans. This secessionist xenophobia represents the recently appointed president of the Generalitat very well, whose pearls of thought should also be urgently translated for Germans, as they are precisely those who would best understand their meaning and their scope. It would have been enough for them to have registered sufficient numbers of those really wounded

6 In addition to the papers in this Review, see also Gimbernat Ordeig, E.: "Alemania, obligada a entregar a Puigdemont por rebelión", in *El Mundo*, 16 de abril 2018; Kubiciel, M.: "Eine Ehrenrettung der spanischen Justiz", in *Legal Tribune Online*, 6 de abril 2018; Ambos, K.: "Kann Puigdemont doch wegen Rebellion verurteilt werden?", in *Legal Tribune Online*, 18 de abril 2018.

enough for them to request proceedings under article 7 of the Treaty of the Union reporting serious violations of the Rule of Law, like those initiated in Poland and Hungary. But they could not: although *fake news* could broadcast the figure of 800, the health system registered only 4.

Facing that panorama, imaginatively expressed by the magistrate in the "prologue for Germans", even with videos that showed more than enough violence to comply with the requirements of an uprising, it can be better understood that the referendum, rather than the offence, was the instrument of rebellion and the violence or threat of violence came not from the peaceful suffrage, but lay in the plan of the government that had at its service the armed police force of the conspirators. Some saw no police at the demonstrations if they were not positioned in front, but behind. The conclusion is now easy: these events in Germany and in any other civilized country would be treated as a serious crime and everybody would be taken into custody in prison. Only a trial in the country where the events took place will establish the specific offences that were committed and the responsibilities of the key players: Hochverrat/Rebelión,Landesverrat/Landsfriedenbruch/Sedición [High treason/Rebellion/Betrayal of country/Breaking the peace/Sedition] or conspiracy in the place of each one.

In short, the magistrate has detailed some facts that in Spain constitute rebellion or sedition, and that in Germany, likewise, constitute criminal offences – regardless of the term they are given – with equally serious sentences. In accordance with the European principle of mutual trust, which means that the decisions of others have to be respected as if they were one's own, and in accordance with the Framework Decision on the European Arrest Warrant, the surrender is mandatory. And it cannot be otherwise, as what European law excludes is surrender merely for minor offences or for any act that is not a crime, as would be the case of a request from Ireland to Germany for an abortion which – up until the recent referendum – was only considered an offence there.