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The EU leverage: The EU Law reception in the Spanish legal system

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Abstract

The EU modifies the national legal system of the member states. Before the adhesion, a candidate state is required to accept some values, to adopt the Market Economy and to adapt its legal system to a democratic rule of law. After the adhesion to the EU, the member states must include into their national legal systems the measures adopted in Brussels. Besides, they have a time limit to do it, if they don't want to be fined by the European Executive. Usually, those new rules are intended to improve the citizens' lives. Apart from the principle of primacy of Union law, it is necessary to include such criteria in national legal system.

The tendency is to unify the 27 legal systems, at least in those areas which are exclusive competences of the Union, but also in those other which are shared with the member states. Step by step, the EU is becoming a political union and not only a common market. The enlargement of the Union to other countries is an evolving, living process to engage more and more countries, although there are several levels of partnership.

This study will be focused on the reception of the EU Law in the Spanish legal system in the last five years, analysing how the outbreak of the pandemic affected this process.

Finally, the author analyses the "Puigdemont case", related to the European Detention Order against the former regional President of Catalonia.

Short bio

Antonio Alonso Marcos, PhD, is a professor on Keys of Contemporary History at the Universidad San Pablo CEU (Madrid, Spain). He graduated in Political Science at the Complutense University of Madrid (UCM), where defended his doctoral thesis *"The Islamist Movement Hizb Ut Tahrir in Central Asia: a threat to security and stability (1995-2007)"*. His research areas are post-soviet space –especially Central Asia—, and jihadism and Islamism.

Prof. Alonso usually collaborate with the Spanish Ministry of Defense and Spanish Ministry of Foreign Affairs, apart from participating in the activities of several Spanish think tanks on security issues.

He was electoral observer in Uzbekistan (2023), Armenia (OSCE Mission, 2021), Uzbekistan (2016), Uzbekistan (2014) and Kazakhstan (OSCE Mission, 2012).

He usually appears in mass media making comments on current international affairs.

1. Introduction

The implementation of EU rules in EU member countries is one example of how to shape the world according to international standards. After a long process, all the 27 member countries need to adapt their legislation to specific rules originated in Brussels. It is important to note that EU

institutions are usually accused of not accomplishing democratic standards or just lack of legitimacy, because the Ordinary Legislative Procedure begins with a legislative proposal from the European Commission. European Parliament is elected every five years by EU citizens, but who chose the candidates to be selected as members of the Commission? Of course, the European Parliament examine the candidates, their profiles, and they need to pass a tough interrogatory, even they can reject those candidates –as they did it with Rocco Butiglione in 2004—, but usually the deputies accept those candidates.

Anyway, under the Lisbon Treaty the new EU rules need to be read by two institutions, the Commission and the Parliament. The codecision process is used to transform the member states legal system. This is made following a centripetal dynamic, which enforces all the countries to adopt a rule with a determined deadline –Regulation and Decisions— or just get the same goal following different ways –Directives—.

As any legal system do, it provides not only a legal framework for activities, but also a set of values and principles to inspire people, to teach them what can be done, what is good, and what is not, accomplishing also a pedagogical mission.

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This pedagogical virtue of the law is not only used inside the EU, but also for the relationships with third countries. In this case, it is called the "EU leverage".

The EU institutions threaten EU member states with imposing penalties or not receiving European Funds[1]. Here it is needed to take into account two things: 1) one of the main attractive reasons to ask for be accepted as member of this club is receiving funds, as a kind of foreign aid to transform the infrastructures and modernize the economies, warranting somehow an extraordinary economic development; and 2) any European sovereign country willing to access the EU, needs to meet some conditions[2] and requirements[3]. How can one country know if it is in the right path to access the EU? The process is based on dialogue, so the EU designate a delegation to negotiate

[1] That is the case of Poland and Hungary for not accepting the LGTB agenda and for not respecting –supposedly— the division of powers. Other countries –such as Spain, where most of the judges of the Judiciary Power General Council are elected by the two main political parties— suffer also from the same disease, but don't receive such admonitions. See Bounds, Andy: "Poland and Bulgaria receive gas from EU neighbours after Russia cuts them off", *Financial Times*, 27 April 2022, at https://www.ft.com/content/f7945d42-9cbc-401c-939b-c331f4f359a2#post-25c2239d-368f-45bb-9112-6f1c7ebc3bac. See also Baczynska, Gabriela and Szakacs, Gergely: "In a first, European Union moves to cut Hungary funding over damaging democracy", *Reuters*, 18 September 2022, at https://www.reuters.com/world/first-eu-seen-moving-cut-money-hungary-over-damaging-democracy-2022-09-18/.

[2] "Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union" (art 49 Treaty on European Union, TEU). As a consequence, every candidate should comply with all the EU's standards and rules, have the consent of the EU institutions and EU member states, and also of their citizens –expressed through approval in their national parliaments or by referendum—.

[3] According to the "Copenhagen criteria" adopted at the: "Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union". See the Conclusions of The Presidency, European Council in Copenhagen - 21-22 June 1993, 7.A.iii), at https://www.europarl.europa.eu/summits/copenhagen/co_en.pdf, p. 12.

with that third country; besides, there is an established roadmap –the so-called 35 chapters— to review the economic and political situation in that country, to examine if that is acceptable form the EU point of view.

For example, in 2004, the EU launched the European Neighbourhood Policy (ENP), and in 2009 it launched the Eastern Partnership (EaP) for Armenia, Azerbaijan, Belarus, Georgia, the Republic of Moldova and Ukraine. That partnership doesn't mean that those countries are EU candidates, but it means that they have especial relationship with EU, receive European funds, have access to visa facilitation, among other advantages. On the other hand, they are under EU scrutiny, and they are "accountable" for every political development in the country. If Ukrainian government was lacking transparency, or was accused of corruption or embezzlement, or not respecting the judiciary independency, it was mentioned at the meetings with the EU representatives. Ten years after the launching of the EaP, the European Council adopted a new reform agenda entitled "20 Deliverables for 2020", based on four main policy areas: (1) stronger economy; (2) stronger governance; (3) stronger connectivity; and (4) stronger society. The conclusions of that especial meeting for the tenth anniversary were really negative and pessimistic.

Apart from that, the EU takes into consideration the opportunity to enlarge this community, whether that is convenient for the cohesion of the current members, or the EU economic capacity to absorb new members –with its problems—[4].

The candidacy is a long and exigent process, exclusive for European countries. Those in another continents, but they can establish trade relations. Even if they cannot or don't want to be an EU member state, but they want to sign any kind of agreement with the EU, those third countries need to accept they have to adapt their legislation to democratic and human rights standards, and to market economy sooner or later. For example, the Republic of Korea signed a Free Tarde Agreement in 2010. According to its chapter 13, the Republic of Korea should adapt its legislation on labour to international standards –set by International Labour Organization (ILO)—. As EU review the situation of workers in South Korea, and the chapter 14 establishes a set of instruments to review the disagreements, they initiated the process to negotiate the legislation South Korea should adopt to fit the international standards.

Besides, every year, the Commission is reviewing all the EU agreements with third countries and the agreements EU members want to sign with other third countries –as trade policy is an exclusive EU competence—. The EU institutions check if those countries fulfil the international standards. It is the so-called "screening" on Human Rights. Is that a new kind of ideological colonialism? Is a way to improve the human lives abroad and expand our European model of welfare and democracy? This debate remains open.

Moreover, that EU leverage is working inside the EU not only with the penalties explained some paragraphs earlier, but also with the transposition of EU legislation. For example, in Spain, roughly 75% of our Laws are based on European legislation[5]. Only in 2022, 42 over 73 laws

[4] "The Union's capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries". *Ibidem*.

[5] That was stated by Hans-Gert Pöttering –the then EP President—, ahead of the June 2009 EP elections: "Elections will decide the composition of the European Parliament for the next five years. Today approximately 75% of the European Union legislation is decided by the European Parliament together with the Council of Ministers and has a direct impact in our daily lives". See EP press release, 4 June 2009, as mentioned at "How much legislation comes from Europe?", *House of Commons Research Paper*, 10/62, 13 October 2010, at https://researchbriefings.files.parliament.uk/documents/RP10-62/RP10-62.pdf, p. 51.

passed by the Spanish Legislative derived in one way or another from EU decisions[6]. If national parliaments don't implement these EU norms, EU member states can be condemned by European Court of Justice to pay a daily penalty. The quantity is studied on a case-by-case basis[7].

Besides, the Spanish Government was visited by the CONT –the Budgetary Control Committee of the European Parliament— by February 2023. Three months later, Spanish Government didn't answer the questions asked by the CONT[8]. In spite of that, European Commission didn't threaten Spain to not receive more European funds or to return the already received.

According to the head of this CONT mission to Spain: "The CONT Committee has zero tolerance against corruption and has enquired the government about the recent changes to the penal code. We asked the Spanish government to guarantee that its legislation is aligned with this principle of zero tolerance and to ensure that there is no exception" [9]. As it is possible to see here, the conditionality to receive more European funds is clear: not only to prove that the amount already received is well spent, but also the modelling of our democratic system according to EU standards.

3. The Puigdemont case

One example of the centripetal process, or the homogenization process of EU member states legislation is the Criminal Code, which is being transformed step by step into a European Criminal Code. The European Investigation Order (EIO) and the European Arrest Warrant (EAW) are two instruments to support that process.

In short, the European Arrest Warrant (EAW) is aimed to abolish the extradition procedures among member states, as the EU Is determined to create "an area of freedom, security and justice"[10]. In Spain that Council Framework Decision was adapted first in 2003[11] and later modified in 2014[12]. According to article 1.1 of the Framework Decision: "The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order".

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[6] See "El 57% de las leyes aprobadas en España en 2022 deriva de directrices y decisiones europeas", *Oficina del Parlamento Europeo en España*, 13 January 2023, at https://www.europarl.europa.eu/spain/es/prensa/communicados_de_prensa/pr-2023/001-enero/congreso.html#:~:text=Es%20decir%2C%20el%2057%25%20de,adoptadas%20por%20el%20Parlamento%20Europeo.

[7] See Ortega Dolz, Patricia: "Europa multa con 89.000 euros diarios a España por no trasponer a tiempo la Directiva de Protección de Datos", *El País*, 10 May 2021, at https://elpais.com/espana/2021-05-10/europa-multa-con-89000-euros-diarios-a-espana-por-no-trasponer-a-tiempo-la-directiva-de-proteccion-de-datos.html.

[8] See Ribagorda, Carlos: "La jefa de los 'hombres de negro' estalla: «Aún no sabemos dónde han ido los fondos europeos en España»", *OK Diario*, 10 May 2023, at https://okdiario.com/economia/jefa-hombres-negro-estalla-aun-no-sabemos-donde-han-ido-fondos-europeos-espana-10893387.

[9] See "Press statement by Head of Delegation Monika Hohlmeier", 22 February 2023, at https://www.europarl.europa.eu/resources/library/media/20230222RES76231/20230222RES76231.pdf.

[10] See the Council Framework Decision 2002/584/JHA, of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002F0584.

[11] See Ley 3/2003, de 14 de marzo, sobre la orden europea de detención y entrega, at https://www.boe.es/buscar/act.php?id=BOE-A-2003-5451&tn=1&p=20141121.

[12] See Ley 23/2014, de 20 de noviembre, de reconocimiento mutuo de resoluciones penales en la Unión Europea, at https://www.boe.es/buscar/act.php?id=BOE-A-2014-12029#ddunica.

This mechanism is working only for grave international 32 offences, such as (art. 2.2): participation in a criminal organisation; terrorism; trafficking in human beings; sexual exploitation of children and child pornography; illicit trafficking in narcotic drugs and psychotropic; substances; illicit trafficking in weapons, munitions and explosives; and corruption, among others. One of the advantages of this EAW is that these offences, "without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant". In other words, a double check it is not necessary, as confidence and trust among EU member states legal systems and rule of law are fundamentals and a *prius* for the relationship among them.

A source of further problems is the lack of coincidence between the two legal systems –the one which is asking for the transfer of the arrested person, and the other which needs to evaluate and answer the other country—. That is seen in Art. 2.4: "For offences other than those covered by paragraph 2, surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described".

However, it is clear that the judicial authority of the Member State of execution –the "executing judicial authority"— shall refuse to execute the European arrest warrant in very specific situations (art. 3) and in other exceptional ones (art. 4), but the general rule to be followed continues to be the starting of the EAW procedure without any dely. This simplified cross-border judicial surrender procedure is reducing the length of traditional procedures –extradition—year by year[13]. Besides, the European Court of Justice is publishing judgments which help to clarify the implementation of this EAW[14].

Although Spain executes every year dozens of EAW, the request for Carles Puigdemont has been considered different or especial2, as he is a politician. Puigdemont was elected as President of the Regional Government in Catalonia in January 2016. In June 2017 he announced a referendum on the independence of Catalonia for 1st October. He was warned by the Spanish Constitutional Court several times and prevented from wasting public money in organising such event. However, in spite of listening the clear warning by Constitutional Court, he ordered to hold the referendum and organise that illegal journey. That day, a wide deployment of National Police and Guardia Civil tried to avoid thousands of convinced supporters for independence voted –some of them, several times in different polling stations as shown in pictures and videos—. On 27th October 2017 he declared the independence of Catalonia solemnly for only twenty seconds.

On 29th he and some other politicians –the counsellors Antoni Comín (Health), Lluís Puig (Culture), Meritxell Serret (Agriculture) and Clara Ponsatí (Education)— fled to Belgium and Scotland to avoid the national arrest warrant. That's why, Judge Carmen Lamela issued an EAW against Carles Puigdemont and those four advisers on November 3[15]. Although some authors believe EAW cannot be used for political purposes[16], it is clear that this is not a political

[13] See "Report From the Commission To The European Parliament and the Council on the implementation of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States", COM(2020) 270 final, Brussels, 2 July 2020, at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A270%3AFIN.

[14] See "Case-law by the Court of Justice of the European Union on the European Arrest Warrant", *Eurojust*, December 2021, at https://www.eurojust.europa.eu/sites/default/files/assets/2021_12_08_cjeu_case_law_on_eaw.pdf.

[15] See Torres, Diego and Randerson, James: "Spain's Supreme Court issues new Carles Puigdemont arrest warrant", *Politico*, 14 October 2019, at https://www.politico.eu/article/spain-supreme-court-issues-new-carles-puigdemont-arrest-warrant/.

[16] See König, Julia; Meichelbeck, Paulina and Puchta, Miriam: "The Curious Case of Carles Puigdemont—The European Arrest Warrant as an Inadequate Means with Regard to Political Offenses", *German Law Journal* (2021), 22, at https://www.cambridge.org/core/journals/german-law-journal/article/curious-

persecution case[17] –as it happens under dictatorships—, but a case against corruption and breaking constitutional order.

However, the Belgian and the German courts rejected the extradition to Spain on the basis of rebellion, sedition or disobedience, but they accepted to do it on misuse of public funds grounds. That motivated the Spanish courts to suspend the EAW, until the European Court of Justice can resolve the problem with the supposed immunity of Carles Puigdemont and other counsellors elected as European Parliament deputies in 2019. As soon as the European Court rules over this issue, the Spanish courts will re-activate the EAW.

This episode has been –still it is— an interruption in this homogenization of legal systems process, in the "freedom of movement of courts' decisions" in EU territory. As this case is so delicate, it seems the European Court wants to adopt a decision without any trace of doubt or unfairness[18]. That future sentenced will be used in the future to interpret the implementation of EAW, but also to clarify the EU approach to rogue political parties, so all the eyes are on the court.

4. Conclusions

As conclusion, it is possible to say that the European Union started a process of homogenization of legal systems many decades ago. They began by setting the principle of the Primacy of EU law –also known as principle of precedence or supremacy—, clarified in further courts rules such as the *Van Gend en Loos v Nederlandse Administratie der Belastingen* (Case 26/62) in 1962, and *Costa v ENEL* (Case 6/64) in 1964.

They started in the 1960's this dynamic using several instruments: the EU accession process, the EU legislation, the rules of courts –national, but also international such as the European Union Court of Justice and the European Court of Human Rights (ECHR)[19]—, the supervision on how countries are spending European funds, among others.

After the Lisbon Treaty entered into force, this dynamic is even more clear as it was accelerated by the Treaty dispositions on getting the goal of the creation of a "the area of freedom, security and justice". That goal appears at the art. 3 of the Lisbon Treaty (Treaty on European Union, TEU), and developed by the Title V of the Treaty on the Functioning of the European Union (TFEU) (articles 67–89).

The Puigdemont case made the EU institutions to clarify whether there is really confidence among the EU members and tested if that goal set by art. 3 TEU is just a utopia or can be materialized. At the end of the day, this is rising the annoying question about the quality of the Spanish democracy –and the almost eternal topic whether Franco's dictatorship is still alive—.

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[17] The rest of politicians not involved in those acts committed on October 1st are not proscribed or prosecuted as criminals.

[18] In fact, the Court is analysing case by case the different situations of those people involved. See Słowik, Alicja: "Clarifications on the conditions of refusal of execution of an European Arrest Warrant in relation to the right to a fair trial", *Actualité du CEJE*, N.3/2023, 9 February 2023, at https://www.ceje.ch/fr/actualites/cooperation-en-matiere-civile-et-en-matiere-penale/2023/02/clarifications-conditions-refusal-execution-european-arrest-warrant-relation-right-fair-trial/.

[19] Although the ECHR is not an EU institution, but a Council of Europe (CoE) one, that court is esteemed as the main source of jurisprudence when dealing with Human Rights, as all the EU members are also member states of that organisation CoE.

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