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The Case Puigdemont: The Stress-Test of the European Arrest Warrant

1.- On the morning of 25th of March, 2018, Mr. Carles Puigdemont, former President of the Generalitat de (Government of) Catalunya, was arrested while driving on a Schleswig-Holstein highway, a few kilometers after entering the territory of the German Federal Republic. Mr. Puigdemont – who moved to Brussels on 28th of October, 2017 in order to escape the arrest warrant of the Spanish Tribunal Supremo – had travelled to Denmark for a conference and was returning to Belgium via Germany. A European Arrest Warrant (EAW) had been issued against him for the crimes of rebellion ("*rebelión*": art. 472 and 473 of the Spanish Criminal Code) and misuse of public funds ("*malversación de caudales públicos*": art. 432 and 252 Sp. C.C.).

The higher regional court of the German state of Schleswig-Holstein (Oberlandsgericht of Schleswig-Holstein), with its decision (Beschluss) of 5th of April, 2018, rejected without hesitation the European Arrest Warrant request regarding the crime of rebellion: this offence does in fact not fall in any way in the "Scope of the European arrest warrants" described by art. 2 of the Council Framework Decision of 13th of June, 2002 "on the European arrest warrants and the surrender procedures between Member States" (2002/584/JHA) and also the extradition request appears at first sight inadmissible due to the lack of a double criminality.

On the contrary, the European Arrest Warrant request in relation to the second crime (misuse of public funds, "*malversación de caudales públicos*", "*Veruntreuung öffentlicher Gelder*") – according to the Court (OLG) of Schleswig-Holstein – would not be inadmissible, as it would be referable to the offence of corruption mentioned by the Framework Decision; but the request of the Spanish Tribunal Supremo – according to the Court of Schleswig Holstein – does not contain a sufficient description of the circumstances in which the crime was committed and of the grounds of the reproach that makes possible a sufficient link to the behaviour of Mr. Puigdemont. It still has to be proved that the Spanish State has been really charged with these expenses, specifically if they have been paid with funds of the Catalan budget and if Mr. Puigdemont has been responsible for it.

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The decision of the Court of Schleswig-Holstein is fully correct and convincing, on the basis of the European and national rules on the European Arrest Warrant and on extradition.

2.- As for the first and most important issue (the alleged crime of rebellion), it is quite clear that the requirement of the "double criminality" ("beiderseitige Strafbarkeit"), necessary to carry on the extradition request pursuant to section 3.1 of the Law on International Mutual Legal Assistance in Criminal Matters (Gesetz über die Internationale Rechtshilfe in Strafsachen, IRG), is not concretely present.

The behaviour of Mr. Puigdemont and the other independentist leaders throughout the whole political-institutional path that led to the referendum of 1st of October, 2017 and the subsequent unilateral declaration of independence of 27th of October would be, on the basis of a hypothetical application of the German law to the case, criminally irrelevant. The German crime of High Treason against the Federation ("Hochverrat gegen den Bund") – punished by paragraph 81 of the German Criminal Code with life imprisonment or with a prison sentence of no less than 10 years – requires that the separation of a part of the national territory has actually been pursued with violence or through threat of violence ("mit Gewalt oder durch Drohung mit Gewalt").

The Court of Schleswig-Holstein correctly refers to the German Federal Court (Bundesgerichtshof) case-law, which requires for the concrete application of such a serious offence – and also for the less serious offence of Coercion of a Constitutional Body ("Nötigung eines Verfassungsorgans") (paragraph 105.1 German Criminal Code) – that the violence used or threatened by the rebels has concretely annulled the freedom of decision in this specific case of the constitutional body to whom the violence is addressed. It is a fact – as the Court of Schleswig-Holstein correctly points out – that has never really taken place during the independence process in the past few months, neither against the Catalan nor against the Spanish Parliament.

But on a closer examination, the imputation made by the Spanish High Court (Tribunal Supremo) is totally not convincing also based on the Spanish law, which the Court of Schleswig-Holstein does not take into consideration, since such an analysis did not fall within its competence. The Spanish legal prevision of "*rebelión*"[1] (art. 472 and 473 Sp. C.C.) punishes with a very high penalty (imprisonment from 25 to 30 years, since the Tribunal Supremo charges Mr. Puigdemont and the other defendants also with the aggravating circumstance of having distracted the public funds from its legitimate investment) "those who rise violently and publicly for any of the following purposes", among which is expressly provided "declaring the independence of a part of the national territory" (art. 472 nr. 5th Sp. C.C.).

The only element of this serious crime that could reasonably be seen in the Catalan independence process is the result, i.e. the unilateral declaration of independence of 27th of October, 2017, in execution of the referendum of 1st of October (previously de-

1 About this crime see the very recent contribution of M. Cugat Mauri, *La violencia como elemento del delito de rebelión*, in *Liber Amicorum. Estudios Juridicos en Homenaje al Prof. Dr. Dr.h.c. Juan M. Terradillos Basoco*, Valencia, Tirant Lo Blanch, 2018, p. 567-582.

cleared illegitimate by the Spanish Constitutional Court). The presence of the purpose required by the Law for the existence of the offence of "*rebelión*" in Mr. Puigdemont and in the other defendants is unquestionable, but it is also clear the absolute non-existence of the conduct required by the Law for this serious crime, and above all, of any causal link between the conduct and the result that represents the objective of this illicit purpose.

Art. 472 punishes the fact of rising violently and publicly ("alzarse violenta y públicamente") to achieve one of the relevant purposes of the "*rebelión*" (such as the separation of Catalunya from the Spanish State). However, anyone who has been to Catalunya in recent months has been able to detect the absolutely peaceful nature of the independence process: the only violence was that of the repeated charges of the police on 1st of October aimed at preventing the exercise of the right to vote in what the Spanish Government and the Spanish Constitutional Court had defined as illegal and unconstitutional referendum.

But even if there had been public demonstrations of violence in the weeks and months prior to the referendum and the subsequent unilateral declaration of independence, and even if it had been possible to demonstrate that the acts of violence were referable to the decisions taken by the former President of the Generalitat (Catalan Government) and by the leaders of the separatist parties and movements – as the provision of the Spanish Higher Tribunal tries to demonstrate – what would be non-existent and impossible to prove in any case is the causal link between the acts of violence (element of the offence of "*rebelión*") and the result of the unilateral declaration of independence of Catalunya.

The declaration of independence has in fact derived from a vote expressed by the majority of the Catalan Parliament on 27th of October, 2017 in execution of the result of the referendum of the 1st of October, and the parliamentary majority was exactly that corresponding to the seats achieved by the independentist parties in the last Catalan elections. The separatist parties (Junts x si and CUP) had expressly declared already in the electoral campaign the intention of promoting a referendum on independence, despite the firm and repeated opposition of the Spanish Government and the Spanish Constitutional Court. The vote of the Catalan Parliament of the 27th of October, 2017 is nothing but the natural and coherent consequence of the Catalan elections of 27th of September, 2015, and is absolutely not influenced by the hypothetical violence that the Spanish Higher Court attributes to the political action of the former President of the Generalitat and of the other independentist leaders.

In conclusion, therefore, the crime of "*rebelión*" provided by the Spanish criminal code cannot be referred to Mr. Puigdemont and to the other defendants. Among all the elements of the crime only the purpose to separate Catalunya from the Spanish State described by the Law can be demonstrated. A purpose, on the other hand, declared publicly, pursued consistently and perhaps achieved, but in an absolutely ephemeral way, more symbolic than in real terms. Too little, evidently, to consider that the facts constitute the very serious crime that the Spanish legislator had thought and described

keeping in mind events of a completely different nature, such as an attempted coup, an armed insurrection, a raising of military or paramilitary groups, etc.[2]

The evident interpretative forcing performed in the reconstruction carried out by the Spanish Tribunal Supremo is probably the basis of what the Court of the German State of Schleswig Holstein does not mention in its decision, but seems to implicitly consider: the failure in the case under examination of the principle of mutual trust among legal systems that underlies the Framework Decision on the European Arrest Warrant and the whole system of European judicial cooperation and the conviction (also implicit) that in Spain there would be no conditions today for a fair trial against Mr. Puigdemont for the crime of "*rebelión*". An implicit belief that is confirmed by the fact that for many months, many exponents of the decayed Catalan Government and other independence leaders have been in preventive prison for the same charge of the crime of "*rebelión*".

3.- Finally, as regards the second point of the decision of the Court of Schleswig Holstein, some perplexity arises from the statement – upheld in the European Arrest Warrant request performed by the Spanish Tribunal Supremo and mentioned in adhesive terms by the decision of the German Court – according to which the crime of misuse of public funds ("*malversación de caudales públicos*", "*Veruntreuung öffentlicher Gelder*"), that Mr. Puigdemont and the other exponents of the decayed Catalan Government have been charged with by the examining magistrate (Juez Instructor) of the Tribunal Supremo, may be claimed equal to the offense of corruption embodied in the catalogue of crimes included in the European Arrest Warrant.

In fact, it cannot be sustained that the 2003 UN Convention on Corruption and other international initiatives intends to use the concept of corruption in a broad and a-technical sense, including also other public sector related criminal offences, such as the misuse of public funds ("*malversación de caudales públicos*"). One thing is in fact an international convention that – in the general political intent to fight corruption understood in the most broader sense (i.e. in the sociological rather than legal-criminal sense) – asks national legislators to incriminate other offences than the actual cases of corruption; a completely different thing is a Framework Decision which – involving the adoption of personal freedom restrictive measures in the form of the European Arrest Warrant – must be interpreted in a technical and restrictive sense with regard to the "Scope of the European arrest warrant" embodied in art. 2 of the Framework Decision.

However, the international judicial cooperation tools could in any case have been usefully activated in the form of an extradition request, since there is no doubt, in the case under examination, on the existence of the double criminality requirement: the misuse of public funds provided by art. 432 and 252 Sp. C.C. finds correspondence in

2 Such as the intent of a military coup d'etat that took place on the 23rd of February, 1981 in which a part of the Spanish Army entered and occupied the Parliament during the vote to elect a Prime Minister, invaded some streets of Valencia with tanks and soldiers and intended to adress a Tank Division towards Madrid to occupy it.

the more general legal provision of the German "*Untreue*" (paragraph 266 StGB), which is applicable also in the public sector in the presence of conducts of "*Veruntreuung öffentlicher Gelder*".

The request of the Spanish Tribunal Supremo, however, is not to be accepted – as already mentioned at the beginning of this comment – because the applicant authority gave an insufficient description of the circumstances on the basis of which the responsibility of the accused would be sustained[3]. This may be a further and evident symptom of the implicit lack of trust of the German Court on the reasonability of the accusation built by the examining magistrate of the Spanish Tribunal Supremo against the leaders of the independence process.

4.- Upon conclusion: after this interlocutory decision – that has been followed by a renewed request by the Spanish judicial authorities, which firmly insist on the claim to bring the former President of the Generalitat Mr. Carles Puigdemont to trial – we are awaiting the final decision of the Court of Schleswig Holstein. Whatever the final decision will be, it will nevertheless be a milestone – one way or another – in the history of the European Arrest Warrant and European judicial cooperation.

3 Also in consideration of the public statements made by the same Spanish government authority (former Minister of Finance Montoro) who had at the time recognized that no funds from the public budget had been used to implement the Catalan independence referendum.