

Replacing and Displacing the Law: The Europeanisation of Judicial Power

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Abstract

This paper looks at the consequences of the social and political process of the Europeanisation of judicial power. The creation of arrest and judicial mechanisms at the European level represents an important aspect of European security, characterised by a multiplicity of political, social and judicial mobilisations, the most central instruments of which are the Eurojust Unit and the European Arrest Warrant (EAW). Drawn up and negotiated before 9/11, these two legal instruments were adopted in the name of the 'global war on terror' following the attacks on New York. The adoption of such political measures has important consequences for the legal form of these new mechanisms, the study of which allows us to explore the constitutional ramifications of counterterrorism policies in European democracies. We see that the European Union has modified its legal approach in the name of the fight against terror, in effect displacing and replacing the law at this level.



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This project assesses the relations between the European Union (EU) and Canada in the area of Justice and Home Affairs (JHA). It aims at facilitating a better understanding of the concepts, nature, implications and future prospects related to the Europeanisation of JHA in the EU, as well as its role and dilemmas in the context of EU-Canada relations.

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1. A pragmatic and negotiated process by judicial regime

European judicial matters are a construct that is the outcome of political events; a sharing of political representations in the fight against transnational crime, and the configuration of European institutions characterised by competition and collaboration between national authorities, the European Council and the European Commission.

If we analyse the process of specialisation and expertise of the high civil servants and judges involved in judicial cooperation during the 1990s, we see the link between the *policy stream* (common ideas within the community of public policy) and the *political stream* (choice of the various institutional actors).¹ These professional actors play an important role as political entrepreneurs and judicial experts at the crossroads of national and transnational legal processes.² It is their orientations, in favour of a pragmatic and operational approach to judicial cooperation that are at the basis of projects such as the Eurojust Unit and the European Arrest Warrant (EAW). The understanding of these dynamics and the social interaction between them allow us to make sense of the organisational and normative shape of the European judicial regime.³

The focus of the talks on legitimisation in the fight against transnational organised crime and the terrorism of 2001 is not without consequences for the mechanisms of cooperation.⁴ The sharing of an operational approach towards judicial cooperation in the name of the fight against crime strongly influences the organisation of Europe's judicial regime. Structured by these representations, as well as by the international and European political agenda, the negotiations focus on the adoption and implementation of arrest and punishment measures while at the same time a global legal approach that takes into account arrest procedures and those concerning the guarantee of defendants' rights are most often blocked.

The example of the European Arrest Warrant illustrates this institutional and political dynamic. In response to the 9/11 terrorist attacks, European governments decided, extraordinarily quickly, to introduce a new European procedure of extradition. Under pressure from member states to hasten the discussions, the proposal concerning the rights of defence within the European

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¹ John Kingdon, *Agendas, Alternatives and Public Politics*, Boston: Little, Brown and Co, 1984.

² Didier Bigo, "La mondialisation de l'(in)sécurité? Réflexions sur le champ des professionnels de la gestion des inquiétudes et analytique de la transnationalisation des processus d'(in)sécurisation", *Cultures et Conflits*, No. 58, 2005, pp. 53-100.

³ Didier Bigo et al., *The Field of the EU Internal Security Agencies*, Paris: L'Harmattan, 2008.

⁴ Monica den Boer (ed.), *Organised Crime: A Catalyst in the Europeanisation of National Police and Prosecution Agencies?*, European Institute of Public Administration, Maastricht, 2002. Bill Gilmore and Valsamis Mitsilegas, "The EU legislative framework against money laundering and terrorist finance: A critical analysis in the light of evolving global standards", *International and Comparative Law Quarterly*, Vol. 56, 2007, pp. 119-141.

Commission project were marginalised in order to reach political agreement.⁵ Those political and legal choices will result in resistance from the national courts concerning the normative form of the new extradition instrument.

A better understanding of the social and institutional relations that led to the creation of the Eurojust Unit and the EAW demonstrates the investment of an increasing number of actors in the realisation of a European judicial space.⁶ In this perspective, the judicial field is characterised by both competition and collaboration among numerous actors holding different standpoints. The consequence is a competition in the respective fields of competence between the different cooperation mechanisms. This fact gives rise to an accumulation of solutions with uncertain orientations.⁷ The institutional relations between OLAF, Eurojust, the Liaison Magistrates and Europol reflect such a configuration.⁸ Hence, unlike the representation of a progressive formalisation and homogenisation of EU rules, European judicial cooperation is mainly characterised by informal and heterogeneous cooperation practices.

2. The transformation of the territories of justice and its relationship to the law

Understanding the dynamics that define the field of European judicial cooperation enables one to explain how justice is removed in its spatial dimension and in its relationship to the law.

Through the implementation of the Eurojust Unit and the European Arrest Warrant, we redefine the territories of legal action. During the Europeanisation of judicial power, various concepts of ‘a European space’ emerged to legitimise the adoption of new cooperation mechanisms. The mobilisations and projects in favour of strengthened judicial cooperation introduce variable-geometry approaches within a European judicial space. This definition is at the heart of the struggle between the projects in favour of an intergovernmental approach and those in favour of a community approach.

According to the promoters of the intergovernmental method, it is necessary to build a ‘European penal space’ defined through the 25 territories in a logic of ‘strengthened’ transnational cooperation. In contrast to this approach, the basic idea of the promoters of the second perspective is the concept of a ‘European judicial space’ through a logic of harmonisation that leads to uniform national systems and the creation of a European legal territoriality. The adoption of the Eurojust project and the rejection of *corpus juris* in favour of a European Prosecutor suggest that the logic of convergence is usually preferred over that of harmonisation.

Nevertheless, the creation of the Eurojust Unit and the European Arrest Warrant means a transnational extension of national judicial powers. The participation of the French judges from Eurojust in criminal affairs concerning one or several other states illustrates the transnationalisation of national judicial power, which remains entirely limited to the decision of

⁵ Antoine Mégie, “Généalogie de la coopération judiciaire”, *Cultures et Conflits*, Paris: L’Harmattan, No. 62, June 2006, pp. 7-42.

⁶ Jacques Commaille, *L’esprit sociologique des lois. Essai de sociologie politique du droit*, Paris, Presses universitaires de France, coll. “Droit, éthique et société”, 1994.

⁷ Jacqueline Domenach, “Le droit de l’espace judiciaire pénal européen : un nouveau modèle juridique”, in *Arrêter et juger en Europe: genèse, luttes et enjeux de la coopération pénale*, *Cultures et Conflits*, Paris: l’Harmattan, No. 62, 2006.

⁸ Antoine Mégie, “Mapping the Actors of European Judicial Cooperation”, in Didier Bigo et al., op. cit., 2008, pp. 67-96.

foreign national judges. More precisely, this dynamic concerns the recognition of foreign judicial decisions, through an acceleration of the procedures concerning the exchange of information and people. In the case of the European Arrest Warrant, this transformation is translated by the introduction of the principle of mutual recognition.⁹ For example, in a Belgian extradition procedure, a judicial decision taken by an Italian court takes on an equivalent legal authority to a decision taken by a Belgian judge. The implementation of new transnational judicial mechanisms signifies a deep transformation of the traditional territories of justice. Beyond such legal mechanisms, the most important issue remains the level of mutual confidence between the national judicial authorities.

In this new judicial territory, the institutional and practical relations between Eurojust and national judges are essential. The national judges also appear in the European judicial field as holders of ‘material power’. Research carried out in the sociology of law sheds light on the importance of judges in the construction and development of ‘the legal’ at the European level. It is usually assumed that the symbolic use of ‘the legal’ is still the prerogative of governments and legislators. However, judges are pivotal to a large extent to its technical dimension as operators. This aspect can be seen in cooperation mechanisms such as the Eurojust unit. It has been admitted by Eurojust’s representatives that their institution can only endure and produce concrete outcomes if national judges resort to it.

The standpoints of the national professionals thus vary between learning and resisting. Along with the obstacles related to cognitive issues (language, knowledge of foreign legal systems etc.), structural factors also seem to be crucial in the analysis of the logics of resistance. In the case of French judges, Europe appears as a far removed and complex issue. Therefore, the judges are reluctant to make use of the cooperation instruments such as Eurojust. Indeed these instruments do not, according to them, correspond to their objectives of efficiency as imposed by their national system. It would seem that personal and informal relations remain the judges’ preferred mode of action when dealing with a transnational affair. This mutual confidence is at the heart of the exchange of information and people between national jurisdictions. In light of this, the development of high standards concerning the protection of individual rights represents a crucial in the years to come.

In the case of the Europeanisation of judicial power, the second dynamic that reshaped justice involves the relationship between justice and law as a reference element and an instrument of action. The adoption of judicial mechanisms is the outcome of a process of negotiation that is characterised by a pragmatic approach in which the rules of organisation are usually preferred over normative content.¹⁰ This legal and political orientation has led to the construction of a European judicial space in which the objectives of cooperation and procedural norms seem to have prevailed.

This logic leads to a definition of the procedures of cooperation while fundamental rights issues are, at least at the beginning, still peripheral. As suggested by the example of the Eurojust Unit, the European Arrest Warrant and the uncertain adoption of the Charter of Fundamental Rights in Criminal Affairs, the instruments that strengthen the organisation of cooperation are privileged because their adoption does not mean a transformation of the judicial national systems. The refusal to realise the harmonisation project (harmonisation of judicial procedures in criminal affairs, *corpus juris*, European chief public prosecutor) illustrates this approach that

⁹ Valsamis Mitsilegas, “The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU”, *Common Market Law Review*, Vol. 43, 2006, pp. 1277-1311.

¹⁰ Pierre Lascoumes, “Normes juridiques et mise en œuvre des politiques publiques”, *l’Année sociologique*, Vol. 40, 1990, pp. 43-71.

results, partially, from the desire of the national executive and legislative authorities to protect their authority in criminal matters.

This consensus, in particular during negotiations, results in the introduction of foreign judicial elements into national orders. In the case of the European Arrest Warrant, these integrations are made up of heterogeneous modalities, depending on the countries. In certain cases, such as Germany or Poland, the transposition is opposed to national constitutional principles. More generally, the focus on the ‘organisational’ dimension of judicial power means that the legal bases governing judicial cooperation are adopted *a posteriori* to justify and legitimise the practices that already exist. The operational dimension is promoted as the main objective with regard to the legal coherence of the norms in the logic of Law in Action.¹¹ This approach rests on the idea that judicial coherence will develop through daily practice.

3. Resistance in the National Constitutional Courts

The marginalisation of the European and national legislative actors that characterise the construction of the European mechanisms of judicial control is also followed by a marginalisation of judiciary powers. The national constitutional courts, as well as the European courts, have no direct powers of decision-making or orientation on issues of judicial cooperation. This absence of court competencies in the field of the third pillar raises the issue of the constitutional control of European judicial mechanisms in criminal affairs. However, the national constitutional courts are increasingly making their voices heard through the European Arrest Warrant.

In fact, after its adoption and while the EAW framework decision was designated to reduce litigation before the criminal courts,¹² mostly in procedural matters, the constitutional dimension of the EAW soon appeared as a normative obstacle in the implementation at the national level¹³.

The Polish Constitutional Court was the first to raise it, declaring the enabling provision of the Polish Criminal Procedure Code unconstitutional. Based on article 31(3) of the Polish Constitution, the Court declared the new European extradition procedure incompatible with the ban on extraditing Polish nationals. For this reason, the Court set a transition period for its decision in order to enable constitutional reform without incurring a breach of EU law.

Along the same lines, on 7 November 2005, the Supreme Court of Cyprus reached a similar conclusion and declared national legislation implementing the EAW unconstitutional in light of the constitutional prohibition barring the extradition of Cypriot citizens.

The most significant act is probably the decision of the German Federal Constitutional Court. On 18 July 2005, the German Federal Constitutional Court took issue with the EAW by declaring the German European Arrest Warrant Act unconstitutional and suspending it. Article 16.2 of Germany’s Constitution expressly allowed the extradition of German nationals to member states of the European Union “provided that constitutional principles are observed”. In the case of M. Darkazanli – a person having both Syrian and German nationality – and who, according to the EAW, was due to be extradited to Spain on the basis of an EAW, the Constitutional Court refused to implement the act on the grounds of a breach of articles 16.2 and 19.4 of the German Constitution.

¹¹ Jacques Commaille, “La Justice entre *détraditionnalisation*, *néolibéralisme* et *démocratisation*: vers une théorie de sociologie politique de la justice”, in Jacques Commaille and Martine Kaluszynski (eds), *La fonction politique de la justice*, Paris: La Découverte, 2007.

¹² Rob Blextoon (ed.), *Handbook on the European Arrest Warrant*, Cambridge: TMC Asser Press, 2005.

¹³ Elspeth Guild (ed.), *Constitutional challenges of the European Arrest Warrant*, Nijmegen: Wolf, 2006.

In its decision, the Court considered that the German legislature did not make good use of the margin of discretion granted to member states by the EAW framework decision, particularly under two circumstances. The first concerned the case whereby a German citizen is accused in another member state of offences committed partly or entirely on German territory. Since Germany had not implemented the optional ground of refusal provided in article 4.7 of the EAW framework decision, the Court determined that such an omission was incompatible with the national constitution. The second circumstance concerned the question of the fundamental right and the respect of this right. The disposition introduced by the German government concerning an administrative procedure before the definitive execution of an EAW was considered unconstitutional because of its breach of the fundamental right of access to justice (article 19.1 of the Grundgesetz, the German constitution).

The Belgian Constitutional Court was presented with a similar case with the constitutional implications of having failed to observe the traditional requirement of double criminality. In a radically different approach to its counterparts, the Belgian Court made use of the preliminary reference procedure, provided in article 35 of the TEU, requesting the ECJ make a decision on the validity of the EAW framework decision.

The constitutional conflicts created by the EAW in the Polish, German, Cypriot and Belgian cases may have strengthened the role of constitutional courts in the third pillar. In all of these cases, national courts requested a new definition of the EAW in its national implementation while at the same time legitimising the normative design of the new European extradition procedure. This normative and social process (redefinition/legitimation) can be found in the position of the Canadian Supreme Court concerning the security certificate on immigration matters and Bill C 36, the new national counter-terrorism Bill.

On 18 December 2001, the new Canadian Anti-Terrorism Act, also known as Bill C36, was adopted just three months after the attacks on New York. Just as EU member states envisaged the adoption of the European Arrest Warrant and the European Action Plan to fight terrorism, the Canadian government decided to assert its diplomatic position in the new international coalition against terrorism.

Following its adoption, Bill C 36 has seen a reformulation due to numerous interventions and legal mobilisations. The bar of Quebec as well as the Association of the Canadian Bar (ABC) multiplied reports and press releases to review these new anti-terrorism measures. These actors explain that certain tools or procedures threaten the fundamental values that define the Canadian Criminal Code. According to these associations, the introductions of the Anti-terrorism Act in the Criminal Code introduce a strong incoherence and confusion with the already existing texts in national law.¹⁴ If the associations of lawyers are critics, the legal positions of the Supreme Court fluctuated between redefinition and legitimisation as national European Courts for the EAW.

On 11 January 2002, the decision rendered by the Supreme Court of Canada in the case of *Suresh v. Canada* is interesting. If the appeal had been introduced before 11 September 2001, the decision will be rendered after the adoption of the Bill C 36. In this case, the Supreme Court had to instruct the constitutionality of such legislation through the relation between the international Conventions and the Canadian Charter of Rights. While recognising the importance of the fundamental values of freedom contained in the Canadian Charter, the Supreme Court legitimised the new counterterrorism law and proclaimed the importance of referring to the international legal frame. This position finds a concrete illustration in the

¹⁴ Ronald Daniels, Patrick Macklem and Kent Roach (eds), *The security of freedom essays on Canada's anti-terrorism bill*, Toronto: University of Toronto Press, 2001.

Khawaja case, who is the first person to be accused thanks to the new Bill C 36. At the beginning of the trial, the Superior Court of the Ontario judged that the presence of "religious motives" in the definition of the "terrorism activity" act was inconsistent with the freedom of religion as guaranteed by the Canadian Constitution. If the Supreme Court of Canada confirmed this appeal decision with regard to the religious motivation aspect, at the same time it legitimised Bill C 36 and claimed the necessity of this new legal framework.

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