



EU Law Analysis

Expert insight into EU law developments

MONDAY, 6 NOVEMBER 2017

The EU and the Spanish Constitutional Crisis



Cecilia Rizcallah, Research Fellow at the Belgian National Fund for Scientific Research affiliated both to Université Saint-Louis Bruxelles and Université libre de Bruxelles

Background

Spain is facing, since more than a month now, a constitutional crisis because of pro-independence claims in Catalonia. These claims resulted in the holding of an independence referendum on 1 October 2017, organized by the Spanish autonomous community of Catalonia's authorities, led by its President Mr. Carles Puigdemont. According to Barcelona, 90% of the participants voted in favor of Catalonia's independency on a turnout of 43%.

Several weeks before the holding of the referendum, the Spanish Constitutional Court held that such plebiscite was contrary to the Spanish Constitution, and it was therefore declared void by the same Court. The Spanish central Government moreover firmly condemned this act and suspended Catalonia's autonomy, on the basis of Article 155 of the Spanish Constitution which allows the central Government to adopt "the necessary measures to compel regional authorities to obey the law" and, thereby, to intervene in the running of Catalonia.

EU's Incompetency in Member States' Internal Constitutional Affairs

During these events, a contributor to the *New York Times* wondered "Where is the European Union?". The *Guardian* stated "As Catalonia crisis escalates, EU is nowhere to be seen". EU authorities' restraint can yet easily be explained, at least, from a legal point of view. Indeed, the European Union has in principle neither the competence, nor the legitimacy, to intervene in its Member States' internal constitutional affairs. Article 4.2 TEU incidentally underlines that the EU shall respect Member States' "national

PAGES

[Studying EU Law: A Law Student's Guide \(updated Oct 2016\)](#)

[Follow this blog on Facebook and Twitter](#)

[Using this blog with Barnard & Peers, European Union Law](#)

[Blog contributors](#)

[Would you like to write for this blog?](#)

SEARCH THIS BLOG

FOLLOW BY EMAIL

BLOG ARCHIVE

▼ 2017 (55)

▼ November (2)

[The EU and the Spanish Constitutional Crisis](#)

[Who's responsible for what happens on Facebook? An...](#)

► October (2)

► September (8)

► August (3)

► July (3)

► June (3)

► May (4)

► April (1)

► March (10)

► February (6)

► January (13)

► 2016 (115)

► 2015 (131)

► 2014 (179)

POPULAR POSTS



[What happens to British expatriates if the UK leaves the EU?](#)

identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government" and that it "shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State". The President of the Commission, J.-C. Juncker **stated** that it was "an internal matter for Spain that has to be dealt with in line with the constitutional order of Spain" but however noted that in case of separation of Catalonia from Spain, the region would consequently "find itself outside of the European Union".

Puigdemont's Departure for Brussels

Theoretically, the EU has thus no legal standing to intervene in the Spanish constitutional crisis. Recent events have, however, brought the EU incidentally on stage.

Mr. Puigdemont, the deposed leader of Catalan authorities, left Barcelona for Brussels several days ago, where he declared he was not intended to seek asylum and that he would return in Spain if judicial authorities so request, provided he was guaranteed conditions of a fair judicial process. In the meanwhile, the State prosecutor decided to start proceedings against Mr. Puigdemont and other officials of the ousted Catalan government for rebellion, sedition and embezzlement and demanded to the judge in charge of the processing charges to issue a European arrest warrant (hereafter EAW) for Mr. Puigdemont and four other members of his former cabinet, after they failed to appear at the High Court hearing last Thursday. The EAW was issued by the Spanish judge last week. EU law has thus been relied upon by Spanish authorities to respond to its internal crisis, because of the departure of several Catalan officials to Brussels, which constituted, at the outset at least, nothing more than a lawful exercise of their free movement rights within the Schengen area.

Mr. Puigdemont and the other people subject to a EAW presented themselves to Belgian authorities, which decided to release them upon several conditions including the prohibition to leave the Belgian territory. A Belgian Criminal Chamber has as of now two weeks to decide if they should be surrendered to Spain or not.

The Quasi-automaticity of the European Arrest Warrant System

According to Puigdemont's **Belgian lawyer**, the former Catalan leader will agree to return in Spain provided that he will be guaranteed respect of his fundamental rights, including the right to an impartial and independent trial. He moreover underlined that Puigdemont will submit itself to Belgian judicial authorities which will have to assess whether or not these conditions are met.

The system of the EAW, however, entails a quasi-automaticity of the execution by requested authorities of any Member State. Indeed, because it relies upon the principle of mutual trust between Member States, requested authorities may not, save in exceptional circumstances, control the respect by the requesting State of fundamental values of the EU, including democracy and human rights. The Council **Framework Decision 2002/584** of 13 June 2002, which establishes the EAW includes a limitative list of mandatory and optional grounds for refusal which does not include a general ground for refusal based on human rights protection (Articles 3 and 4). Indeed, only specific violations or risk of violations of fundamental freedoms justify the refusal to surrender, according to the Framework Decision. As far as the right to a fair trial is concerned, the Framework Decision does not include possibilities to rebut the presumption of the existence of fair proceedings in other Member States except when the EAW results from an *in absentia* decision and only under certain conditions (Article 4a).

A strong presumption of respect of EU values underlies EU criminal cooperation and the ECJ has, as of now, accepted its rebuttal on grounds of human right not included in



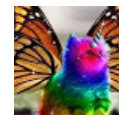
What would happen to EU nationals living or planning to visit or live in the UK after a UK exit from the EU?



What next after the UK vote to leave the EU?



The Refugee Crisis: What should the EU do next?



Hard Brexit Benefits? Change Britain's £24 billion of unicorns

ABOUT THE EDITOR



Steve Peers

I'm a Professor of EU and Human Rights Law at the University of Essex. Follow me on Twitter: @StevePeers See my academia.edu profile: <https://essex.academia.edu/StevePeers>

[View my complete profile](#)

TOTAL PAGEVIEWS



3,273,716

EU LAW BLOGS



gavc law
The Brussels International Business Court – BIBC: Some initial thoughts.
1 hour ago

EJIL: Talk!
Those Who Live in Glass Houses....
4 hours ago



Free Movement
The immigration rules for adult dependant relatives: out

the main text of the Framework Decision only where a serious and genuine risk of inhuman and degrading treatment existed for the convicted person in case of surrender (see the *Aranyosi* case, discussed [here](#)). In that respect, the lawyer of the other Catalan ministers who are already in jail has **lodged** a complaint for mistreatment of them, but more elements will be required to refuse the execution on the EAW on this basis.

Indeed, according to the Court of Justice, “the executing judicial authority must, initially, rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention”. Moreover, the domestic judge must also “make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State” before refusing the execution of the EAW (*Aranyosi*, paras 89 and 92).

Furthermore, the possibility to refuse to surrender persons convicted for political offences – which is traditionally seen as being part of the international system of protection of refugees – has been removed from the **Convention** on Extradition between Member States of the European Union concluded in 1996 – which is the ancestor of the current EAW system – precisely because of Member States’ duty to trust their peers’ judicial system. Interestingly, the removal of this ground for refusal had been required by Spain when it faced difficulties to obtain the extradition of Basque independentists who were seeking for protection in Belgium. The Spanish government pleaded that the ground for refusal for political infractions constituted a hurdle to criminal cooperation within the EU which was at odds with the trust that Member States should express to each other (see *E. Bribosia and A. Weyembergh*, “Extradition et asile: vers un espace judiciaire européen?”, R.B.D.I., 1997, pp. 69 to 98).

In the current state of EU law, no option for refusal of execution of the EAW concerning Mr. Puidgemont seems thus to exist. It is noteworthy, however, that the EAW system may, as a whole, be suspended, when the procedure provided for by **Article 7 TEU** is initiated if there is a (clear risk of) violation of the values referred to in **Article 2 TEU** on which the Union is founded, including human rights, democracy and the rule of law. Although some people have called for the initiation of this mechanism, the reliance on Article 7 is very unlikely to happen politically: it needs at least a majority of four fifths at the Council just to issue a warning, and the substantive conditions of EU values’ violations are very high.

Nonetheless, Belgium has included in its transposing legislation (**Federal Law of 19 December 2003** related to the EAW) an obligatory ground of refusal – whose validity regarding EU law can seriously be put into question – if there are valid grounds for believing that its execution would have the effect of infringing the fundamental rights of the person concerned, as enshrined by **Article 6(2) of the TEU** (Art. 4, 5°). Triggering this exception will however result, in my view, in a violation of EU law by the Belgian judge since the ECJ has several times ruled that the grounds for refusal included in the Framework Decision were exhaustive and that a Member State could not rely upon its national human rights protection to refuse the execution of a EAW which respects the conditions laid down in the Framework Decision (*Melloni*). Another option for the Belgian judge will be to make a reference to the ECJ for a preliminary ruling in order to ask whether, in the case at hand, the presumption of conformity with EU fundamental rights in Spain may be put aside because of the specific situation of Mr. Puidgemont.

The Quasi-Exclusion of the Asylum Right for EU Citizens

Besides asking for the refusal of his surrender to Spanish authorities, Mr. Puidgemont could – at least theoretically – seek asylum in Belgium on the basis of the **Refugee**

with the old...
4 hours ago



eutopialaw
The UK
Supreme Court
and EU law in
the Legal Year
2016–2017 –
Part 4
6 days ago

**European Law
Blog**
Affaires C-
168/16 et C-
169/16 : for
compétent dans
le secteur du
transport aérien
de passagers
2 weeks ago



**European
asylum and
human rights
case-law -
Highlights
from
Strasbourg |
Nikolaos
Sitaropoulos**
A fight before the
Strasbourg Court
for the voting
rights of Greek
expatriates
2 weeks ago



**Wishing on
Europe**
Brexit? That
missed long-term
opportunity...
1 month ago



**blog.coleurop
e.eu**
Can the abusive
exercise of a –
procedural- right
constitute an
abuse of
dominant
position?
5 months ago



**<<
Court of Justice
.EU >>**
Case C-202/13,
McCarthy
2 years ago

**EU 6.0 - by EU
Issue Tracker**
EU 6.0 Will Be
Back Soon In a
New Form –
Stay Tuned!

Convention of 1951, which defines as refugees people with a well-founded fear of persecution for (among other things) their political opinion (Article 1.A.2).

2 years ago

**KSLR |
European Law**

However, Spain also requested – besides the removal of the ground for refusal to surrender a person based on the political nature of the alleged crime in the European Extradition Convention of 1996 – the enactment of Protocol No 24, on asylum for nationals of Member States of the European Union, annexed to the Treaty of Amsterdam signed in 1997. This Protocol practically removes the right of EU citizens to seek asylum in other countries of the Union.

Founding itself on the purported trustful character of Member States' political and judicial systems and the (presumed) high level of protection of fundamental rights in the EU, the Protocol states that all Member States "shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters" (Art. 1). Any application for asylum made by an EU citizen in another Member State shall therefore be declared inadmissible, except if the Member State of which the applicant is a national has decided to suspend temporarily the application of the European Convention on Human Rights in time of emergency (Article 15 of the ECHR; note that it's not possible to suspend all provisions of the ECHR on this basis) or if this Member State has been subject to a decision based on Art. 7.1. or 7.2. TEU establishing the risk or the existence of a serious and persistent breach by the Member State of EU values referred to in Art. 2 TEU.

A Member State may also decide, unilaterally, to take an asylum demand into consideration at the double condition that it immediately informs the Council and that that the application shall be dealt with on the basis of the presumption that it is manifestly unfounded. This last derogation has been invoked by Belgium which has adopted a declaration stating that it would proceed to an individual examination of each asylum demand of a EU citizen lodged with it. To comply with EU law, it must however consider each application manifestly unfounded rendering the burden of the proof very heavy for the EU citizen asylum seeker. Belgian alien's law provides for an accelerated procedure for asylum when the individual comes from an EU country (Article 57/6 2 of the **Belgian Aliens Act**) but **statistics** nevertheless show that about twenty asylum demands from EU citizens were declared founded in 2013 and 2014 by Belgian authorities.

The EU Brought on Stage...

In both cases, the refusal to execute the EAW or the granting of an asylum right to Mr. Puidgemont would result from the consideration that the Spanish judiciary does not present the basic and essential qualities of independence and impartiality to adjudicate the case related to Catalan independence activists. This observation would likely result in a major diplomatic dispute between the two countries and, more widely, in the EU. Indeed, the consideration made by Belgium and/or the ECJ that Spain would not respect fundamental values of the EU in treating the case of Catalonia would jeopardize the essential principle of mutual trust between Member States, which is relied upon in criminal, asylum but also in civil judicial cooperation. The Spanish constitutional crisis could thereby potentially call into question the whole system of cooperation in the European Area of Freedom Security and Justice.

Barnard & Peers: chapter 25, chapter 26

JHA4: chapter I:5, chapter II:3

Photo credit: Pinterest

Posted by **Steve Peers** at 09:04



Labels: **asylum**, **Catalonia**, **EAW**, **European Arrest Warrant**, **Puidgemont**, **Spain**

No comments:

Post a Comment

Enter your comment...

Comment as:

Google Account

Publish

Preview

[Home](#)

[Older Post](#)

Subscribe to: [Post Comments \(Atom\)](#)

Picture Window theme. Powered by [Blogger](#).