

CONSTITUTIONALISM IN A PLURAL WORLD

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THEME area: European Union Law

TITLE OF THE PAPER: Freedom, security and justice area and the European Arrest Warrant: when (no) mutual trust on the conditions of detention justifies their non-implementation

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Abstract:

After defining its axiological identity, the European Union Treaty enunciates the aims. The Union affirms its intention to provide citizens with the realization of a space of freedom, security and justice, where it ensures the free movement of persons, in conjunction with the creation of measures aimed at controlling external borders, asylum and immigration, and prevention and combating crime.

Integrating the area of shared competences stating a triple strand: as an area of freedom of movement of persons, as a security space at the external borders, asylum and immigration and as an area of justice in the prevention and fight against crime.

Even if it is an acquired data that in this field applies the ordinary legislative procedure, as well as the common sources of secondary law, apply to administrative cooperation in the field of judicial cooperation in criminal and police matters, others continue to be excluded from that procedure.

The Treaty provides for the possibility for Member States to invoke safeguard clauses within the framework of judicial cooperation in criminal matters, such as where a State invokes the suspension of the adoption of a directive affecting fundamental aspects of its criminal justice system. Therefore, it is almost clear to point out that the implementation of this objective, nuclear to European constitutionalism, poses delicate problems linking to fundamental rights both by the European Union and by the Member States: respect for differences between constitutional traditions And the internal legal systems are particularly relevant here.

In a material area where the achievement of such objectives is based on the principle of mutual recognition, the high level of confidence between the Member States and the minimum harmonization of national measures, it should be emphasized that the reminiscences of state sovereignty can damage the Union's performance, so that measures of police and judicial cooperation between Member States are necessary. In this context, the reinforcement of EUROJUST, the desired creation of a European prosecutor and the approximation of criminal and procedural laws of the Member States are crucial for the construction of a European penal area of minimum guarantees. The establishment of an area of freedom, security and justice also involves (also) the free movement of judicial decisions in criminal matters and has led to the abolition of extradition and replacing it with a system of delivery between judicial authorities.

It is in this context that the European Arrest Warrant (EAW) arises, which is the core of judicial cooperation. This is a judicial decision issued by one Member State and addressed to another, which gives the order of detention and delivery of a person sought for the purposes of criminal proceedings or fulfilment of a penalty or a measure of private security of liberty, because that person is found in the territory of the executing Member State.

Being sure that the fulfilment of these warrants should be the subject to adequate monitoring, both at procedural level as in the level of the fundamental rights of the

persons sought the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the delivery procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 January 2009, contain normative provisions stating the grounds by which judicial authorities may refuse their non-enforcement.

So, in articles 1 and 4 of the Charter of Fundamental Rights of the European Union (CFREU), the judicial authority of the executing Member State of the EAW must appreciate whether the person in respect of which the warrant has been issued is in the serious and real risk of suffering the violation of those fundamental rights, which are the inhuman or degrading treatment in the issuing state, verifying compliance with the conditions of detention with the aforementioned rights.

Analyze in what terms the request for the provision of information to the issuing judicial authority should be made, to reflect on the practical feasibility of national judges to comply with this assessment and to conclude that such a duty of assessment may support an unsubstantiated refusal to implement the EAW - thus frustrating the spirit of mutual trust which should preside over the functioning of the institute - is the subject of the work which we have here presented. To this end, it will be necessary to briefly review the case law concerning the connection between this problem and the level of protection of the fundamental rights foreseen and guaranteed by the CFREU, and of the primacy and effectiveness of the EU law against the guarantee of internal protection. It is in this framework that the case-law *Aranyosi and Caldaru* justifies a return to the case-law *Melloni*.

In short, what we propose to reflect on is whether the need to subordinate the delivery of a convicted person subject to the condition of the existing detention conditions in the issuing Member State can not lead to the uniformity of the standard of protection of fundamental rights defined by the Framework Decision.

Keywords: case-law; European Arrest Warrant (EAW); European Union.

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