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Can a Judicial Authority Refuse to Execute a European Arrest Warrant Due to the Situation of Spanish Prisons? – On the Catalan *Procés*

Abstract

The ECJ judgment of 5 April 2016 (joined cases Aranyosi y Caldararu) admitted limitations on the principles of mutual recognition and mutual trust. The ECJ recognized these limitations in the context of inappropriate prison conditions in the issuing Member State, provided that an individualized and particular risk of breach of fundamental rights is proved. With this starting point and bearing in mind the European prison standards, this paper focuses on whether prison conditions in Spain could be an obstacle to judicial cooperation in criminal matters in the Area of Freedom, Security and Justice.
Keywords: Prison overcrowding; Inhuman or degrading treatment; prison conditions; European prison standards; European arrest warrant.

I. Introduction

The so-called Catalan independence process has uncovered an issue that in Spain had been regarded, until now, as a distant problem: Spanish prison conditions can hinder the implementation of European Union (EU) judicial cooperation instruments.

The claim that the state of Spanish prisons or the conditions of detention may breach fundamental rights of arrested persons has arisen on top of the complex debate related to the issuance of a European Arrest Warrant (EAW) by a Spanish judicial body regarding the former Catalan President, Carles Puigdemont, and some of his *consellers* (Heads of Regional Departments) once they travelled to Belgium.[1] It was precisely in Belgium where a spectre began to haunt Spain: the spectre of fundamental rights violations of accused persons in the face of their eventual transfer to Spanish prisons. This became an additional element to be assessed by judicial authorities. On 13 November 2017, the Belgian Public Prosecutor's Offices requested the Spanish High Court (*Audiencia Nacional*, AN) more information regarding the situation of Spanish prisons

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1 Court order issued by the Spanish High Court (*Audiencia Nacional*) on 3 November 2017.

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and detention conditions. In particular, the Belgian prosecutor inquired about the specific prison establishments where the accused persons would be held if they were surrendered, the size of the cells, and whether or not they would share a cell. The inquiries also related to access to showers, solitary confinement, access to medical care, recreational activities in prison, the amount and quality of food, conditions for visits of relatives and lawyers, the risk of being exposed to violence, and protective measures.[2]

Leaving aside the tortuous road leading to a final decision in this judicial proceedings against the persons charged with organizing the Catalan *procés*, this independence movement has shown that if detention conditions are considered not to meet European prison standards, such non-compliance can seriously hinder the execution of an EAW. And this regardless of whether such conclusion has been reached by the executing judicial authority itself -or at the behest of the public prosecutor's office- based on reports providing evidence of this non-compliance or on prior rulings against the relevant Member State, or if the said conclusion results from a lawyers' defence strategy.

The European Court of Human Rights (ECtHR) has not ruled against Spain for breaching Article 3 of the European Convention on Human Rights (ECHR) regarding Spanish prison conditions, and much less has it subjected Spain to pilot judgment procedures concerning prison overcrowding. However, Spain has experienced a significant issue of prison overcrowding in the last few decades that has worsened conditions of detention. This has been put forward by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in its various reports on Spain.[3] Nonetheless, the most recent report welcomes the fact that prison overcrowding has been mitigated since 2009, and encourages public authorities to keep the number of prisoners below the country's prison capacity.[4]

In spite of this, the request for additional information on conditions of detention in Spain did cast some doubts abroad regarding the Spanish prison system. This distrust is opposed to the principles of mutual recognition and mutual confidence underlying judicial cooperation, and it can undermine the application of two main judicial cooperation instruments: Framework Decision (FD) 2002/584/JAI, of 13 June 2002[5] on the EAW, and Framework Decision 2008/909/JAI of 27 November on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

2 Source: *El Mundo* and *El País*, 16 November 2017.
3 In its visits on 1998 (CPT/Inf (2000) 5), 2003 (CPT/Inf (2007) 28), 2011 (CPT/Inf (2011) 11) or 2012 (CPT/Inf (2013) 8).
4 Visit on 2016 (CPT/Inf (2017) 34).
5 In its amended version under FD 2009/299/JAI, of 26 February 2009.

II. Exceptions to judicial cooperation on grounds of fundamental rights violations regarding conditions of detention: ECJ Judgement of 5 April 2016, Aranyosi and Caldararu case[6]

In its judgment on the Aranyosi and Caldararu joined cases of 5 April 2016,[7] the Court of Justice of the European Union (ECJ) opened up the possibility of not surrendering the arrested individual, beyond the grounds for refusing to execute the EAW or for the recognition of judgments and enforcement of sentences laid down in the relevant framework decisions (FD).[8] In this judgement, the ECJ rules on the possible limits to the principles of mutual recognition and mutual confidence under "exceptional circumstances" in case of a serious risk of fundamental rights violations. In particular, this case examined the risk that the individuals concerned could be subject to inhuman and degrading treatment in the issuing Member States within the meaning of Article 4 of the Charter of Fundamental Rights. This ruling also dealt with a potential breach of Article 3 ECHR due to the significant prison overcrowding in Hungary and Romania.

Accordingly, the ECJ's judgment clarifies when this breach occurs and how to assess this situation.[9] As for the "when," the Court of Justice refers to the detention conditions "*prevailing*" in the issuing Member State, demonstrating "*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*." To that end, the relevant judicial body must rely on "*information that is objective, reliable, specific and properly updated*." Amongst other possible sources, the judgment lists the following: "*judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN*". This situation must be subject to a twofold assessment. First, there must be a general appraisal of the detention conditions prevailing in the issuing Member State, thereby leading to conclude "*that there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing Member State*." However, this does not suffice; such general evaluation must be supplemented by a specific and precise assessment of the individualized risk to which the individual concerned would be subject if he was surrendered to the issuing Member State. To that end, the executing judicial authority should make "*a further assessment, specific and precise, of whether there are substantial*

6 In Joined Cases C-404/15 and C-659/15 PPU.

7 Triggered by two preliminary rulings submitted by the German judicial body receiving two EAW from Hungary (Aranyosi case) and Romania (Caldararu case).

8 Articles 3 to 4 bis FD 2002/584/JAI, of 13 June 2002, and 9 FD 2008/909/JAI, of 27 November 2008.

9 On this ruling, see the following scholarly works: M. Muñoz de Morales Romero: "`Dime cómo son tus cárceles y ya veré yo si coopero`. Los casos Caldararu y Aranyosi como nueva forma de entender el principio de reconocimiento mutuo". *InDret* 1/2017; M. Ollé Sesé, E. Gimbernat Díaz: "Orden europea de detención y entrega y tratos inhumanos o degradantes", *La Ley* no. 40, 2016; C. Rodríguez Yagüe: "¿Pueden ser las condiciones de reclusión en España un obstáculo para la ejecución de una orden de detención y entrega? A propósito del `procés catalán`". *Revista General de Derecho Penal* (RGDP) no. 29, 2018.

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."

Following both assessments, the ECJ recalls that the executing judicial authority shall request from the issuing judicial authority, as a matter of urgency, all the necessary supplementary information on the detention conditions envisaged for the individual concerned -what Belgium did in the case at stake. This request can also be intended to find out whether the issuing Member State has national or international mechanisms or procedures to control or to monitor prison conditions. If, upon assessing the information, the said real risk is confirmed, according to the ECJ "*the execution of that warrant must be postponed but it cannot be abandoned*." Otherwise, if the information leads to conclude that there is no real risk of inhuman or degrading treatment for the arrested person, the EAW must be executed. Finally, if the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.

III. The conditions of detention in Spain subject to the European prison standards: Is there a breach of Article 3 ECHR?

The ECtHR has conceded that the prohibition of inhuman or degrading treatment under Article 3 ECHR could be breached if the conditions of detention (or, more broadly, of imprisonment) are so poor that they could raise the question of whether the State has failed to comply with its duty to protect the prisoner's life. Additionally, poor conditions of detention can also result from systemic situations, such as prison overcrowding, leading to human dignity violations.[10] According to the ECtHR's case law and the CPT standards,[11] the assessment of whether conditions of detention in Spain entail a breach of Article 3 ECHR must revolve around a set of factors: on the one hand, material enforcement conditions, such as the minimum living space, hygiene and living standards, or healthcare. On the other, prison life must be examined, particularly concerning outdoor exercise for at least an hour or the possibility of engaging in activities outside the cell.

As for prison infrastructure, Spain has two models of prison establishments. The first one is linked to the enactment of the Organic Act on Prisons (*Ley Orgánica General Penitenciaria*, LOGP) in 1979. This first model encompasses small prisons (350-500 prisoners) close to the cities, built with a focus on facilities intended for inmate activities (workshops, schools, libraries, sports facilities or gyms).[12] However, this model was replaced in the 1990s. As prison population increased due to the tightening of the Spanish Criminal Code, the need for new prison places arose. Therefore,

10 In this regard, please see D. Van Zyl Smit, S. Snacken: *Principles of European Prison Law and Policy. Penologie and Human Rights*. Oxford University Press, 2009.

11 See an analysis on detention conditions standard and prison overcrowding in C. Rodríguez Yagüe, *RGDP* 2018, pp. 16 *et seq*.

12 C. García Valdés: "La reforma del Derecho penitenciario español". *Estudios de Derecho penitenciario.* Tecnos, Madrid, 1982, pp. 153 *et seq*.

since 1991 there has been a shift towards a "standard" prison approach, with prison centres with greater capacity (950-1000 inmates) located in rural areas far away from cities; given that prison places can be doubled by using bunk beds, the capacity of these prisons can even reach 2000 inmates. These facilities have enhanced the standards of living through the configuration of spaces and through their resources and equipment.[13]

In both cases, prisons were based on the cellular or modular principle: 10.5m² for prisons built in the early 1980s and 13m² in 21st century prisons. Article 19 LOGP sets forth, as a guideline, that all inmates should live in single cells. Nevertheless, shared accommodation or cell sharing is allowed -this usually involves two persons living in a cell with a bunk bed- in certain cases. For instance, as a general rule there is often an insufficient number of beds for all inmates, at least temporarily, since the first response to prison overcrowding was multiple-occupancy cells. This led to a reduction of personal living space; the CPT's minimum standard is 6m² of personal living space for a single-occupancy cell, and 4m² of living space per prisoner in a multiple-occupancy cell.[14] Thus, we should put into perspective the information provided by Spain to the Council of Europe regarding the personal living space of inmates, set at 9.9 m². Indeed, information on the total number of cells was requested for the drafting of the last SPACE report. This information evidences the use of multiple-occupancy cells for the ordinary regime.

Table 1. Situation of Spanish penal institutions according to SPACE I Report[15]

Year	Population (1/1/2016)	Total number of inmates	Prison population per 100,000 inhabitants	Total capacity of penal institutions	Total number of cells	Surface area per inmate (personal living space)	Prison density per 100 places	Average of inmates per cell
2015	46,438,422	64,017	137,9	77,783	-------	9.9	82.3	------
2016	46,440,099	60,687	130,7	84,478	53,508	9.9	71.8	1.1

Notwithstanding the foregoing, the ECtHR only considers the lack of personal living space as a breach of Article 3 ECHR by itself under the most extreme limitations. The said breach due to the lack of personal living space usually goes hand in hand with additional factors, often resulting from overcrowding, and related to: substandard hygiene, cleanliness or health conditions in cells and communal spaces, non-access to medical care, or the effective inability to exit the cells for outdoor exercise and other activities.

13 According to journalistic information sources, the incarcerated persons as a result of the Catalan "procés" are held in three different prison establishments; two of them in new large prisons. Recently, in early July, they were transferred to prisons in Catalonia.

14 Recently reviewed to attain a higher standard, adding to the 6m² surface area of the single cell, 4m² per inmate. *Estándares sobre espacio vital en los centros penitenciarios*. CPT/Inf (2015) 44, paragraphs 16 and 17.

15 SPACE I Report 2016, PC-CP (2017) 10, p. 37 and 2015, PC-CP (2016) 6, p. 34.

As for Spain, prison legislation ensures adequate cleanliness and health conditions in all areas. Spanish rules and regulations in this regard require that hygiene, ventilation, lighting, access to drinking water at all times and heating be guaranteed. All cells have a sanitary annexe. Although old prisons include communal showers, in new prisons showers have been added to the cells. Furthermore, Spanish legislation provides for appropriate medical care, appropriate food for the inmates' situation and beliefs, toiletries and even clothing, if needed, since the use of a uniform is prohibited under the Spanish Organic Act on Prisons. In its last report on Spain, the CPT acknowledged that, generally, the visited penal institutions displayed good material conditions for the accommodation of inmates in ordinary modules. However, it noted certain shortcomings regarding solitary confinement modules. It also acknowledged that, as regards material conditions, access to natural light and ventilation were satisfactory, providing appropriate conditions to accommodate an inmate. Nonetheless, the CPT also pointed out that in order for cells to be suitable for double-occupancy, the sanitary annexe should be fully partitioned.[16]

Often, as ECtHR's case law highlights, violations of Article 3 ECHR stem from the lack of personal living space, alongside the impossibility to leave the cell and the obligation to spend almost 24 hours subject to overcrowding situations.

Out of the three regimes provided by Spanish legislation -closed regime or isolation, open regimen and ordinary regime, most prisoners are usually placed under the latter.[17] The ordinary regime should also be the default regime for individuals surrendered pursuant to an EAW. The strictest regime, isolation for first degree prisoners, is intended for extremely dangerous inmates or for those prisoners blatantly un-adapted to coexistence. The already exceptional placement of inmates under this regime -except for certain categories such as terrorists- has progressively gone down to 1.9% in 2015 overall. Under this regime, inmates remain in a single cell for 21 hours a day, and under the strictest version of this regime, prisoners are allowed to go out to the yard for 3 hours.

The ordinary regime rests on the notion of overnight isolation in the cell -with the limitations of shared cells- and normal coexistence during the day with the remaining inmates living in the same module. Therefore, except for a justified reason, inmates do not spend time in the cell other than during resting hours overnight and after lunch. During the day, inmates interact with each other in communal spaces within the module, i.e. among others, workshops, the school, the gym, or the yard. Although access to remunerated work is fairly limited, there is a wide range of activities on offer in prison establishments: vocational courses along with cultural, sports and occupational activities. The involvement of NGOs in prisons has allowed for broadening and diversifying such offer. In fact, in light of the scarcity of resources and staff in the prison system (resulting from the economic downturn and austerity policies), inmates are often asked to help others with these activities. In this regard, the last CPT report on Spain empha-

16 CPT/Inf (2017) 34, paragraph 52.
17 Both prisoners categorised as second degree inmates as well as remand prisoners.

sizes that the delegation was impressed by the wide range of activities on offer for inmates in the socio-cultural facilities of the visited prisons.[18] In certain establishments or modules for remand prisoners there is a lesser offer and, in any event, the range of activities on offer is not as wide for inmates placed under a closed regime. Thus, even during the years of greatest prison overcrowding in the early 21st century, the generalization of the ordinary regime has mitigated the detention conditions, since the ordinary regime guarantees that inmates spend most of their time outside of their cell.

Furthermore, it is worth noting that in the last few years, most prisons in Spain have implemented a new coexistence scheme: the so-called respect modules (*módulos de respeto*).[19] These have become a useful tool for inmates who do not purely qualify as prison population or who require protective measures. Respect modules are a life regime within the prison intended to create an appropriate atmosphere to achieve positive coexistence and implement intervention models. Respect modules are separate units within a prison where inmates can be voluntarily placed as long as they commit to abide by a set of rules, particularly regarding hygiene, good and non-violent interpersonal relations with staff and inmates, as well as involvement in activities and care for the environment. Further, respect modules encourage inmates' involvement and responsibility regarding the module's daily life, as well as a certain degree of self-management through thematic groups or committees made up of the inmates themselves. These modules have evidenced an enhanced coexistence and greater "liveability" within the prison, thereby reducing conflict. In its last national report, the CPT has positively assessed these respect modules.[20] Additionally, they can be useful, along with other possibilities provided by legislation (such as regime limitations or changing modules or prison establishments), to protect inmates from other prisoners' threats.

Unquestionably, the prohibition from being subjected to torture or to inhuman or degrading treatment can stem from subjecting one or more inmates to substandard or humiliating conditions. However, this situation more often arises from overcrowded modules or prisons, or even from an overcrowded prison system altogether, which degrades prisoners' living conditions and affects a large number of individuals. When assessing whether the Spanish prison system is currently undergoing an overcrowding issue, there are various aspects to be differentiated.[21]

First, Spain has had, and still has, a serious overcrowding problem in terms of a high incarceration rate, i.e. the number of inmates per 100,000 inhabitants. In spite of its steady decline from 2009, the Spanish incarceration rate remains surprisingly high, giv-

18 CPT/Inf (2017) 34, Summary.

19 Where, according to the news, several former Catalan *consellers* have been placed, such as the former Vice-president. Some others have been held in first degree modules, which are also low conflict modules. Source: *La Vanguardia*, 3 November 2017.

20 CPT/Inf (2017) 24, par. 57.

21 For a more comprehensive analysis, see C. Rodríguez Yagüe: "Un análisis de las estrategias contra la sobrepoblación penitenciaria en España a la luz de los estándares europeos". *Revista Electrónica de Ciencia Penal y Criminología* no. 20-5, 2018.

en that it has a lower crime rate than other surrounding countries, compared to the incarceration rates of other Council of Europe countries.

Although incarceration rates are a fairly accurate reflection of a country's criminal law policies, it is not a useful parameter to determine whether conditions of detention breach human dignity standards. Such an assessment must revolve around the occupancy level and the prison overcrowding rate, supplemented by an analysis of inmates' living conditions.

Official data currently show that Spain does not have an overcrowding issue based on the occupancy rate. This rate, calculated as a ratio between the number of inmates and the number of available cells in the prison system, allows for examining the system's material capacity to accommodate the existing prison population. It is a relevant statistic to assess the conditions of detention as well as to determine if imprisonment conditions may qualify as inhuman or degrading treatment.

Up until 2009, Spain did have a serious overcrowding issue, which triggered a priority strategy: heavy investment in building new and large prison establishments. This significant increase in prison places, along with other variables (decrease in the crime rate, decrease of remand prisoners or an increase in the expulsion of foreign offenders), has placed the number of inmates in Spain theoretically below the overall prison system's capacity figures. Accordingly, the system as a whole does not have any chronic or systemic overcrowding issues, as has been acknowledged by the CPT in its last visit to Spanish prisons. In fact, the CPT has praised the significant efforts of Spanish authorities to put an end to prison overcrowding.[22] In any event, these are general data, which do not allow to ascertain if there are specific situations or moments (either in certain modules or within specific prisons) where these occupancy rates may be exceeded. Consequently, there is a need for a rigorous study broken down by prison establishments and modules regarding the actual situation in terms of prison overcrowding.

Therefore, the data provided by the Council of Europe in the SPACE I reports, along with the information supplied by the last CPT national report and the lack of ECtHR rulings against Spain for breaches of Article 3 ECHR regarding detention conditions, evidence that there are not any systemic or generalized shortcomings in terms of overcrowding that could entail an actual risk for the right to dignified detention conditions.

22 CPT/Inf (2017) 34, Summary.

23 Own elaboration based on the data provided by the SPACE I reports drafted by the Council of Europe up until 2016.

24 SPACE data are often broken down and not general data, since Spain has regional prison authorities (the Catalan prison system) and the national prison system. Over these years, "CAT" refers to Catalan prison authorities, whilst the "AGE" reference designates prison establishments in the rest of Spain under the Ministry of Interior.

25 Own elaboration based on the data provided by the SPACE I reports drafted by the Council of Europe up until 2016.

Table 2. Incarceration rate (per 100,000 inhabitants)[23]

Year	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Council of Europe median	-----	------	92,3	96,9	109,9	105,8	114,1	109,5	109,2	119,4	119,6	122	125,6	133,5	124	115,7	117,1
Spain	114	117	126,2	135,8	140,3	142,4	146,1	150,2 130,3 CAT[24]	159,7 133,6 CAT	173,1 138,5 CAT	164,8 143,2 CAT	158,3	147,3	145,7	141,7	137,9	130,7

Table 3. Occupancy rate (per 100 places)[25]

Year	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Council of Europe median	-----	------	93,9	95	97,4	98,6	98,7	96,7	95,9	96,6	97,5	99,1	97,8	95,5	93,6	91,8	91,6
Spain	106	-----	112,5	114,1	129,5	133,7	140	143,2 AGE 106,8 CAT	141,9 AGE 111,8 CAT	153 AGE 94,3 CAT	96,9 AGE 111,4 CAT	91,8	89,4	87,4	110,9	82,3	71,8

Finally, it is worth pointing out that Spanish prison legislation provides for various inmate rights protection mechanisms along with several means to monitor detention conditions. Hence, judicial review rests on the Prison Supervisory Judge (*Juez de Vigilancia Penitenciaria*), who can hear complaints, requests, and claims in addition to his/her direct monitoring duties by means of prison visits (Article 76 LOGP). Additionally, the Spanish Ombudsman (*Defensor del Pueblo*), who should also prevent torture under the 2006 UN Convention, in addition to hearing complaints or requests or acting on its own motion (*ex officio*), visits prison establishments, as the CPT and the UN Committee Against Torture (CAT) regularly do.

IV. Conclusion

As has been evidenced, the data show that Spain has a serious overcrowding issue if prison overpopulation is understood in terms of the incarceration rate. This shows how strict and harsh the criminal system is regarding penalties and enforcement. However, although an effective strategy is still to be implemented in order to reduce incarceration rates and while acknowledging that there is room for improvement in the Spanish prison system, Spanish legislation and enforcement comply with the minimum European and international prison standards in terms of detention conditions. Although there might be specific fundamental rights violations, there is no indication of a generalized systematic problem allowing for bypassing the application of the mutual recognition and confidence principles on which EU judicial cooperation is founded. In this connection, one must avert the risk that has seemingly appeared in this case: an assessment by the executing Member State of an EAW providing for maximum standards -instead of minimum requirements- regarding detention conditions that could not be met by most Member States -with greater overcrowding, and that could be deadly for the EU area of freedom, security and justice.