The EAW is unconstitutional. Here is how it can be struck down

Not just EAW arrests are unconstitutional, but so are all arrests **made on no evidence**.

This is the chief difference between an arrest made on a domestic arrest warrant and an arrest made on a European Arrest Warrant.

A domestic arrest warrant must be backed by evidence already collected, under our UK laws on Habeas Corpus, based on Magna Carta sec.38 (see below).

In contrast, under the Napoleonic-inquisitorial systems used in continental Europe, a suspicion based on clues held by the investigator (who usually wears a judge's robe), is enough to order an arrest and an imprisonment. Then they seek evidence, while the suspect may languish in prison for months, with no right to a public hearing during this time. See details in my speech at the House of Lords, given on 15th March 2017. In this speech I also dealt with the inadequacy of the European Convention on Human Rights in this regard.

The injustice of the EAW when issued against a person in Britain is that the British court **is not allowed to ask to see any evidence.** Often there is none, or so flimsy it would not stand up for 5 minutes in a UK court. When our MPs passed the Extradition Act of 2003 they surely assumed that all our EU "partners" must have a requirement for evidence similar to ours. The assumption was unfounded, as various cases since then have demonstrated, e.g. Andrew Symeou, or Colin Dines, a British judge forcibly transported to a prison in Rome.

This is the nub of the case of the **Catalan Professor Clara Ponsati**, and which, it is to be hoped, will be at the heart of the debate to be held in the Sheriff's court in Edinburgh on April 12th next, or perhaps subsequently.

Here, in summary, is my suggestion as to **how the EAW against her can be dismantled**:

1. She is accused by the Spaniards of "violent rebellion" and "misuse of public funds". (It is clear that Prof. Ponsati has never used nor advocated violence, the use of the term shows bad faith on the part of Spain's judiciary, an intention to smear her character before public opinion.)
2. She should ask the prosecution to produce evidence of this.
3. The court will respond that under the terms of the Extradition Act 2003 this is not necessary, these are matters that will be dealt with by the Spanish courts, and her request will be refused.
4. At this point she can quote Habeas Corpus and Magna Carta sec. 38, which stipulate that no legal proceedings can be started against anyone without evidence (see details below).
5. The court will reply that the Extradition Act 2003 dispenses with the need for the foreign judicial authority to produce evidence to a British court, and its provisions supersede the earlier ones in Habeas Corpus and Magna Carta, by implied repeal.
6. At that point she can say that Habeas Corpus and Magna Carta are CONSTITUTIONAL LAWS, which are not subject to implied repeal, quoting the precedent of the Metric Martyrs judgement by Lords Laws and Crane (see details below).
7. It then becomes apparent that the EAW is unconstitutional, repugnant to our Constitution, and invalid in the UK.

I cannot see how the Court can answer this. They might wish to refer it to the European Court of Justice, which of course will have no regard for our Habeas Corpus or Magna Carta safeguards (unknown in continental Europe), but at that point the matter takes on enormous public interest, not just in Scotland and Catalonia, but world-wide.

Two contrasting legal systems will be seen to be in conflict. Our Magna Carta based heritage, versus the Napoleonic-inquisitorial heritage of continental Europe (adopted in toto in the EU's "Corpus Juris" proposal for a single EU-wide criminal code, which was rejected by the UK in 1999. The EAW is the first step towards Corpus Juris).

Domestic arrests, whether made in England, Scotland or Northern Ireland, have to be supported by evidence of wrong-doing already collected by the investigators beforehand. To make sure that this happens, Habeas Corpus stipulates that an arrested person must appear in open court within hours, or at the most a few days (or in very extreme terrorist cases, 28 days), and there charged formally with a precise accusation. And if so required, the prosecution must be able to produce their evidence of a prima facie case to answer, at that hearing.

This fundamental right, which protects innocent people who are wrongly suspected of crime, descends from Magna Carta, section 38. This (usually unnoticed) section is the basis of Habeas Corpus, which prevents people from being arrested and imprisoned arbitrarily, on no evidence.

In their incredible and foresightful wisdom, 800 years ago, our forefathers laid down, in Latin – and the Latin is important – in just fifteen words, the basis of our freedom from arbitrary arrest and prosecution or persecution and harassment by officers of the State. It says:

"Nullus balivus ponat aliquem ad legem, simplici sua loquela,

sine testibus fidelibus ad hoc aductis.”

In English:

“No legal officer (balivus, originally “bailiff”) shall put anyone to the law ie shall start legal proceedings against anyone (NB “anyone” “aliquem” – this is a universal human right, not limited to “free men”), on his own mere say-so, without reliable witnesses who have been brought for the purpose.”

N.B. Note the use of the past participle “aductis”: the witnesses, the evidence, must have already been collected BEFORE any legal proceedings, such as an arrest, are started. In continental jurisdictions they can, and often do, order suspects to be arrested first, and then, AFTERWARDS, they seek evidence. They are allowed to do this under the provisions of their own Napoleonic-inquisitorial systems, which are alien to our own Magna Carta heritage. This procedure, also called “fishing expeditions”, is NOT ALLOWED under Magna Carta and Habeas Corpus laws.

This means that nobody can be subjected to any legal act, like arrest or detention, without previously collected EVIDENCE.

Most people think the EAW is just about catching criminals. It is not. It is potentially a tool for tyranny. It is a threat to the freedom of the innocent. It can be wielded by the British authorities against suspects in Europe, but also by any European judiciary – however reputable or however dodgy – against any of us.

Here are some details of the case judged on Appeal which gives us the useful precedent, whereby Habeas Corpus and Magna Carta can trump the Extradition Act 2003 even though they were passed earlier.

It was a famous case some years ago, when some market traders in Sunderland were convicted and given a criminal record for

having sold bananas by the pound weight instead of by the kilogram as had become compulsory under an order complying with an EU directive, issued under the legal force of the European Communities Act 1972 (ECA72). The defendants of this absurdly unfair conviction became known as “The Metric Martyrs”. They appealed against their conviction, but their appeal failed.

We must look at the reasons given, why their appeal was turned down.

When the Appeal Court Lords Laws and Crane confirmed the conviction of the Metric Martyrs, they gave a novel answer to the defence’s arguments: the defence had argued that the 1985 Weights and Measures Act (WMA85), which allowed market produce to be sold in lb and/or kg, was subsequent to the ECA72 (under whose provisions the order criminalising the sale of fruit by the pound weight instead of by the kilogram had been issued). Therefore, argued the defence, the WMA85 over-rode that part or that effect of the ECA72 under the doctrine of implied repeal, whereby if there be a conflict between laws then the subsequent law is deemed to have over-ridden and annulled the provisions of the earlier law.

Not so, said their Lordships. They said that **the ECA72 had the status of a “constitutional act”, and so could not be over-ridden by subsequent legislation under implied repeal, but only if the repeal was explicitly spelt out in the text of the subsequent Act.**

Since the WMA85 did not explicitly repeal any provisions of the ECA72, which it might have done by including words like “any provisions in or deriving from the ECA72 notwithstanding”, but didn’t, then in this case the earlier ECA72 must be held to prevail over the later WMA85. They even added, as a consolation “sop” to the defence, that Parliament is in any case free to repeal the ECA72 whenever it wishes, as long as it does so explicitly.

The Metric Martyrs now presented an appeal to the House of Lords, but it was thought that their appeal was not worthy of consideration, so the decision of the Appeal Court acquired the status of LEGAL PRECEDENT, which as every law student knows, is now binding on subsequent decisions.

This "innovation" by Laws and Crane can be summarised in general terms as follows:

1. There are now two levels of law in the United Kingdom: a) Constitutional laws and b) Ordinary laws. There are different rules applicable if Parliament wishes to repeal any of them.
2. In cases where there is a conflict between two ordinary laws, the later law is deemed to annul those provisions of the previous law in conflict with it, under the well-established doctrine of "implied repeal", whereby that part of the earlier law, if found to be in conflict with the later, is declared null and void.
3. In cases where there is a conflict between an ordinary law and a previous constitutional law, then the constitutional law is held to prevail over the ordinary law, UNLESS the subsequent ordinary law EXPLICITLY repeals a provision in the preceding constitutional law. Parliament can repeal any constitutional law by simple majority vote, for one bedrock rule of our constitution is that No Parliament Can Bind Its Successors. This is also the basis for the doctrine of implied repeal.
4. So, what Laws and Crane established is **the principle that Parliament cannot change the constitution by implied repeal.**
5. By the same token, if there is a conflict between two "constitutional laws", then it must surely follow that UNLESS the subsequent constitutional law EXPLICITLY repeals a provision in the preceding constitutional law, then the preceding constitutional law prevails.

Therefore if the Extradition Act of 2003 had been intended to

over-ride Habeas Corpus and Magna Carta sec. 38, it should have said so explicitly. In fact it did not abrogate section 38 of Magna Carta! Indeed section 38 is hardly ever talked about because, in the English-speaking world at least, it is considered too obvious that you need evidence of wrong-doing before starting legal proceedings against anyone.

To get round this, a UK court would have to deny that Magna Carta and Habeas Corpus had constitutional status, or Parliament would have to repeal them. It is highly doubtful that either would have the heart and stomach to do so. The wave of public anger and indignation would be overwhelming.

That the European Arrest Warrant is in fact incompatible with Habeas Corpus is dealt with by Jonathan Fisher QC in his learned Opinion (para. 4 page 2, and para.s 70-85 pages 19-22):