

# European Arrest Warrant and Constitutional Principles of the Member States: a Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems

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## A. Introduction<sup>1</sup>

“No one would accord the status of extradition to legal assistance for the surrender of an accused between a court in the *Land* of Bavaria and a court in the *Land* of Lower Saxony, or between a court in the autonomous community of Catalonia and a court in the autonomous community of Andalusia, from which it follows that assistance should not be regarded as extradition where it takes place in the context of the European Union.”<sup>2</sup>

The analogy, perhaps a bit strained, was made by Advocate General Jarabo Colomer<sup>3</sup>, in his final attempt to trace as sharp as possible the boundary between

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<sup>1</sup> The present article is a revised and specific part of the broader and different paper “EU Enlargement and European Constitutionalism through the looking glass of the interaction between national and supranational legal systems”, forthcoming in a changed and revised version in *Yearbook of European Law* (2009) and as a working paper in the series of the Jean Monnet Center for International and Regional Economic Law & Justice, NYU School of Law (<http://www.jeanmonnetprogram.org/>). Another version of the same article is forthcoming on the *European Journal of Legal Studies* ([www.ejls.eu](http://www.ejls.eu)). All my thanks to Wojciech Sadurski and to Christina K. Kowalik-Banczyk for their very helpful comments on an earlier draft of the Paper. I would like to thank also Erna Fütö for her very helpful support in researching the relevant German literature.

<sup>2</sup> See conclusions to C-303/05 *Advocaten de Wererd VZW c. Leden Van de Ministerraad*, para. 45, fn. 40

<sup>3</sup> See conclusions to C-303/05 *Advocaten de Wererd VZW c. Leden Van de Ministerraad*, following the preliminary reference of the Belgian *Cour d'Arbitrage*, with regard to the alleged Community illegitimacy of framework decision 2002/584/JHA on the European arrest warrant. The relevant decision of the Court of Justice dated 3 May 2007, is available at: <http://curia.europa.eu/jurisp/cgi->

the European arrest warrant, which is mainly a judicial tool aimed at granting legal assistance in criminal matters among Member States, and extradition, an intergovernmental procedure having a political goal, as provided in a number of international<sup>4</sup> and European conventions, with the latter being adopted under article K 3 of the Maastricht Treaty<sup>5</sup>, and which were all replaced as of 1 January 2004, by framework decision 2002/584/JHA (the Justice and Home Affairs Council) relating, specifically, to the European arrest warrant (the “Framework Decision”).

It seems, instead, that the above mentioned boundary line should have not been clearly perceived by the Supreme and Constitutional and Supreme Courts of Warsaw, Karlsruhe and Nicosia, if, in 2005, with their judgments respectively issued on 27 April<sup>6</sup>, 18 July<sup>7</sup> and 7 November<sup>8</sup>, they annulled the respective Polish,

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<sup>4</sup>European Convention on extradition dated, 13 December 1957 and supplementary protocols of 15 October 1975 and 17 March 1978 and European Convention for terrorism repression of 27 January 1977, for the part concerning extradition.

<sup>5</sup>Convention on streamlined extradition procedures among European Member States of 10 March 1995 and the Convention on extradition among European Member States of 27 November 1996.

<sup>6</sup>*Trybunał Konstytucyjny* (Polish Constitutional Court), ruling 27 April 2005 (P 1/05), available in a vast summary in English at: [http://www.trybunal.gov.pl/eng/summaries/summaries\\_assets/documents/P\\_1\\_05\\_GB.pdf](http://www.trybunal.gov.pl/eng/summaries/summaries_assets/documents/P_1_05_GB.pdf) last accessed, 1 October 2008.

<sup>7</sup>*Bundesverfassungsgericht* (German Federal Constitutional Court), ruling 18 July 2005 (2236/04) in *Diritto&Giustizi@*, available at: [http://www.bundesverfassungsgericht.de/entscheidungen/rs20050718\\_2bvr223604en.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20050718_2bvr223604en.html), last accessed 1 October 2008.

<sup>8</sup> Cyprus Supreme Court, ruling 7 November 2005 (294/2005), available only in the Greek language at: [www.cylaw.org](http://www.cylaw.org). With that decision, the Court noted that the national regulation for the adoption of the framework decision establishing the arrest warrant, was incompatible with art. 11.2 (f) of the Constitution, according to the original wording of which: “no one can be deprived of their freedom except for those cases provided for by the law.” According to the disposition, those cases comprised solely the extradition of foreigners, thus ruling out the possibility that a Cypriot citizen could be extradited. Particularly, the Cypriot Court recalled, as a ruling of 1991 had already clarified how the extradition of a Cypriot citizen was banned by art. 11.2 F of the Constitution. The ruling, in fact, made express reference to the *Pupino* case, therefore recalling the discretionary freedom left to the single national judges, as regards assessment of the national regulation’s compliance to a framework decision adopted in the third pillar. On the strength of this ruling, art. 11 of the Constitution was reviewed and today it provides that: “the arrest of a citizen of the Republic aimed at surrender following the issue of an arrest warrant, is possible only with regard to facts and actions subsequent to Cyprus’ adherence to the European Union.”

German and Cypriot national law implementing Framework Decision 2002/584, due to their alleged conflict with the respective constitutional prohibitions against extraditing nationals.

In chronological order, the fourth national Constitutional Court to rule over the compliance between the national regulation implementing the Framework Decision and the constitutional system, has been the Court of Brno<sup>9</sup>. In manifest opposition with the above-mentioned current trend, on 3 May 2006, the said Court rejected the constitutional issue, thus declaring the Czech criminal code dispositions adopted following the transposition into national legislation of the European Framework Decision on the European Arrest Warrant (EAW), not in contrast with article 14 (4) of the Constitution, according to which: "no Czech citizen shall be removed from his/her homeland."

However, a number of issues trouble this scenario: advancements in and sudden stoppages relating to the European integration process regarding the third pillar; Member States' reluctance to yield sovereignty in criminal matters; the effects and binding character of the framework decisions adopted under article 34 (2)(b) EU, and settlement opportunities for inter-constitutional conflicts. The above are only a few of such issues.

Therefore, an in-depth study of the outlined issues appears necessary, starting from the evolution and state of the art of the European integration process within the third pillar, along with a brief description of objectives and features of Framework Decision 2002/584 establishing the European arrest warrant. The study will then move on to a comparative analysis, using a case law based approach, concerning the delicate question of constitutional compatibility entailed in the adoption of the framework decision at the Member State level, to eventually conclude, after examining the European Court of Justice's reasoning in its recent European Arrest Warrant, with an attempt to consider the different judicial stances in the context of the current state of European constitutionalism.

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<sup>9</sup>Czech Constitutional Court (*Ústavní Soud*) ruling 3 May 2006 (Pl. ÚS 66/04), available in English at: [http://angl.concourt.cz/angl\\_verze/doc/pl-66-04.php](http://angl.concourt.cz/angl_verze/doc/pl-66-04.php), last accessed: 1 October 2008

## B. The Evolution of European Integration in Criminal Matters: From Nothing to the Amsterdam Treaty

In 1977, the then French President Valéry Giscard d'Estaing, was among the first<sup>10</sup> to envisage a form of Member States cooperation also in criminal matters<sup>11</sup>, when, in his famous declaration at the European Council of Brussels, he urged the need for a European judicial area of security and justice, pointing out that although, "the Treaty of Rome, in its economic-oriented view made no reference whatsoever to these issues, it was high time, in order to safeguard the four fundamental freedoms at the heart of the European economic constitution, especially the one relating to the free movement of persons, to put in place suitable standard conditions of security and justice within the European judicial area, to be accessible to all."..At the same time, the European Commission proposed common measures to counter Community-wide frauds and official corruption.

The sole achievement worth noting from those first years was the Dublin agreement of 4 December 1979, relating to the implementation among Member States of the European Convention of Strasbourg of 27 January 1977, concerning repression of terrorism. The following years have been characterized by a halt in Member States' cooperation activities in criminal matters. Only in the mid-1980s,

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<sup>10</sup> The very first time that proposed cooperation in criminal matters at a European level was advanced was in 1975, in concurrence with the establishment of the Trevi Group, an intergovernmental forum to improve interstate cooperation in counterterrorism matters within the EC.

<sup>11</sup> For an overview on the evolution and state of the art of the cooperation process in criminal matters, and more generally on the institutional evolution concerning the third pillar, see for the Italian doctrine: C. Tracogna, *La tutela della libertà personale nel procedimento di consegna attivato dal mandato d'arresto europeo*, in RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE, 988 (2007). Also the broad bibliography mentioned, among which: *La cooperazione in materia di giustizia e affari interni tra comunitarizzazione e metodo intergovernativo*, in IL DIRITTO DELL'UNIONE EUROPEA 481 (1998); E. Gatti-A. Venegoni, *La cooperazione giudiziaria in materia penale dal "Terzo Pilastro" alla Convenzione*, in QUEST. GIUST. 407 (2003); B. Piattoli, *COOPERAZIONE GIUDIZIARIA E PUBBLICO MINISTERO EUROPEO* 65 (2002); L. Salazar, *La cooperazione giudiziaria in materia penale*, in GIUSTIZIA E AFFARI INTERNI NELL'UNIONE EUROPEA. IL "TERZO PILASTRO" DEL TRATTATO DI MAASTRICHT 133 (N. Parisi-D. Rinoldi eds. 1998). For comparison with foreign literature, see Mitsilegas, *The constitutional implications of mutual recognition in criminal matters in the EU*, in 43 COMMON MARKET LAW REVIEW 1277 (2006); G. De Kerchove, *L'Europe Pénale: Bilan et Perspectives*, in POLICE AND JUDICIAL CO-OPERATION IN THE EUROPEAN UNION 335 (A. Moore ed. 2004); P.J. Kuijper, *The evolution of the third pillar from Maastricht to the European Constitution: institutional aspects*, in 41 COMMON MARKET LAW REVIEW 609 (2004); EUROPE'S AREA OF FREEDOM, SECURITY AND JUSTICE (N. Walker ed. 2004).

and even then merely at the intergovernmental level, the European Single Act provided for a European political cooperation plan.<sup>12</sup>

If the creation of an autonomous pillar (the third one) aimed at Member State cooperation in matters of justice and home affairs (JHA) occurred in 1992 with the Maastricht Treaty, it was only in 1997 with the Amsterdam Treaty that such pillar, which was renamed “police and judicial cooperation in criminal matters,” acquired its proper juridical dimension. The amendment to former article K 1 (currently article 29) EU, aims in fact, at the adoption of common measures also in the field of “judicial cooperation in criminal matters” through closer and mutual assistance among police forces, customs and judicial authorities. Furthermore - and wherever necessary - *Member States’ criminal laws* could be harmonised in order to “ensure the citizens a higher level of safety in an area of freedom and justice.” The latter objective is officially listed among the aims of the European Union, as set out in article 2 EU.

In other words, the Amsterdam Treaty is extremely innovative, as compared to the Maastricht Treaty, firstly for adding to the scope of Member State intergovernmental cooperation the mutual assistance in civil and criminal matters. Secondly, and more importantly, it is innovative since it expresses, for the sake of, “a higher level of freedom in an area of security, liberty and justice which grants prevention and fight against crime<sup>13</sup>” an unprecedented will to “harmonise Member States’ national legislations in criminal matters<sup>14</sup>.” According to article 31(e), this alignment could lead to the progressive adoption of “measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.”

The Amsterdam Treaty, as compared to Maastricht, opens a new scenario also in terms of the sources available to European institutions as regards the third pillar. The generalised and weaker resolutions of the Maastricht Treaty are replaced, in fact, by a wide range of viable instruments, among which figures the framework decisions provided for by article 34 (b) EU, with the precise goal of harmonising Member States’ regulatory and legislative laws and regulations in criminal matters as well. The juridical nature and the effects of the Framework Decision that

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<sup>12</sup>M. CALMIERI, MANDATO DI ARRESTO EUROPEO, LA COOPERAZIONE COMUNITARIA IN MATERIA PENALE (2005).

<sup>13</sup> Art. 3 EU.

<sup>14</sup> Art. 29 EU.

represents the *nomen iuris* of the act inspiring the very discipline of the European arrest warrant will be discussed later on.

The third remarkable novelty brought about by the Amsterdam Treaty was to confer, for the first time, the Court of justice with interpretative powers in the field of cooperation *in criminal matters* also. It is therefore evident how the new competence, whose function is to foster dialogue between European and national Courts, also relating to sensitive matters of constitutional relevance such as security, freedom and justice, is aimed at conferring on the Court of Justice the power, optional for the Member States<sup>15</sup>, to make preliminary rulings on the validity and interpretation of the framework decisions adopted as per article 34 EU.

It was this procedure that brought the European framework decision establishing the arrest warrant to the "attention" of the Court of Justice, as will be seen in due course, when the discussion will focus on the decision that the EU judges rendered last May "in order to answer" the preliminary questions raised by the Belgian *Cour d'Arbitrage* (Arbitration Court). It should be noted that the underlying theme of the raft of implementation measures pursuant to the third pillar might be identified with the affirmation and consolidation of a *securitization ethos*.

Consequently, and to a much greater extent after 9/11<sup>16</sup>, a new awareness has emerged in terms of EU security, initially, to ensure the appropriate safeguarding and fulfilling of the four fundamental freedoms, and later on, under the Maastricht Treaty, as an autonomous achievement of the Union, which, after the creation of a European single market, has set priorities of an enhanced political nature. From an external point of view, this led to a greater credibility on an international level, whilst in terms of *home affairs*, it led to the development of a common judicial area where the circulation of people, capital and goods was accompanied by the fight against organised crime through a further cooperation between Member State

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<sup>15</sup> Currently, to our knowledge, only Spain, Hungary, Austria, Czech Republic, Finland, France, Germany, Greece, Italy, Luxembourg, Holland, Portugal, Slovenia and Sweden have subscribed the declaration provided by art. 35 EU, conferring the power to rule over preliminary questions to the Court of Justice. This means that the other Member States, although willing, could not address the Court of Justice for a preliminary question concerning any third pillar-related issue. For an in-depth study, see M. Fletcher *The European Court of Justice, carving itself an influential role in the EU third pillar*, paper submitted for presentation at the MONTREAL INTERNATIONAL CONFERENCE 17-19 May 2007 and available at: [www.unc.edu/euce/eusa2007/papers](http://www.unc.edu/euce/eusa2007/papers). See Also T. Tridimas, *Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the preliminary Reference Procedure*, 40 COMMON MARKET LAW REVIEW 9 (2003).

<sup>16</sup> J. Wouters and F. Naerts, *Of arrest warrants, terrorist offences and extradition deals: an appraisal of the EU's main criminal law measures against terrorism after "11 September"*, 41 COMMON MARKET LAW REVIEW 909 (2004).

jurisdictional authorities, the mutual recognition of judicial decisions, as well as by taking a step back in terms of interstate political relations of an intergovernmental nature.

### C. Rules, Regulations and Aims of the European Arrest Warrant Framework Decision

The events of 9/11 were followed by an urgent need to carry out these objectives in the shortest time possible. The acceleration is evident: only a few months after the attacks, and in light of the fact that it had been years since the EU produced any legislative response to the European diplomacy<sup>17</sup> declarations, the European Council speedily adopted, pursuant to article 34 EU and following a rather limited debate among national Parliaments and within the European one<sup>18</sup>, the Framework Decision on the Arrest Warrant and surrender procedures between Member States, with the explicit intent to replace all existent extradition-related<sup>19</sup> instruments within the European judicial area.

As provided for by article 1 of the above-mentioned regulation, the European arrest warrant is a judicial decision issued by a Member State based on the arrest or surrender by another Member State, of a requested person for the purposes of conducting a criminal prosecution or the carrying out of a custodial sentence or detention order. It is, therefore, a cooperation mechanism of a strictly judicial nature, which permits the practical-administrative assistance among Member State<sup>20</sup> executive bodies, thus leading to the free circulation of criminal decisions, grounded on a system of *mutual trust* among the Member States' legal systems<sup>21</sup>.

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<sup>17</sup> See the CONCLUSIONS OF THE PRESIDENT OF THE EUROPEAN COUNCIL GATHERED IN TAMPERE, FINLAND on 15-16 October 1999, which reads as follows: "the strengthening of the mutual recognition of the judicial decisions and the necessary harmonization of the legislations, would ease the cooperation among authorities as well as the judicial protection of individual rights."

<sup>18</sup> See Mitsilegas, *The Constitutional Implications of mutual recognition in criminal matters in the EU*, 43 COMMON MARKET LAW REVIEW 1277-1283 (2006).

<sup>19</sup> See whereas 1 and 11 of the framework decision 2002/584. For an in-depth study of its most innovative and complex aspects, see S. Alegre, M. Leaf, *Mutual recognition in European judicial cooperation: A step too far too soon? Case study - the European Arrest Warrant*, in 10 EUROPEAN LAW JOURNAL 200 (2004).

<sup>20</sup> Whereas 9 and art. 7 of Framework Decision 2002/584.

<sup>21</sup> See for comparison whereas 5, 6, 10 and art. 1 n. 2 of Framework Decision 2002/584.

The legal translation for such *mutual trust* is the principle of mutual recognition – as provided for by article 1 n. 2 of the Framework Decision – on the obligation binding on all Member States to carry out arrest warrants issued by another EU Member States.

It has been noted that, “given its adoption as a response to 9/11 events, a striking feature of the European Arrest Warrant is that its scope is not limited to terrorist offences<sup>22</sup>.” In effect, the arrest warrant may be issued by any Member State for an act punishable under its legislation which involves a custodial sentence or a detention order for a period of at least twelve months, or where a sentence has been passed or a detention order has been made for sentences of at least four months.

The implementing State may set, as a condition for the surrender, a requirement that the facts pursuant to which the warrant was issued represent an offence under its legal system as well. This faculty of enforcing the double criminality rule however, does not apply – and this is one of the most innovative and complex aspects of the discipline in exam – in respect of a *numerus clausus* of 32 offences listed under article 2 (2) of the Framework Decision. It is enough, in fact, that the said crimes be provided for by the criminal law of the State issuing the arrest warrant, on condition that they are punishable with a maximum detention period of at least three years<sup>23</sup>.

Another relevant innovation about the discipline which has drawn a number of constitutional complaints from the Member States is the permissibility of an arrest warrant issue also for a citizen of the implementing Member State, against the general practise explicitly codified by many EU Members’ Constitutions according to which state sovereignty does not permit the extradition of nationals<sup>24</sup>. Within the Framework Decision, *au contraire*, the faculty awarding the executing Member State with the power to hinder the surrender of a citizen (or resident), is considered a mere exception, and namely provided for by article 4 (6), according to which, “if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law.”

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<sup>22</sup> MITSILEGAS, *supra* note 17, 1284.

<sup>23</sup> For this and the other outlines concerning the discipline of the decision on the European arrest warrant, see the broad study by C. TRACOGNA, *supra*, note 10.

<sup>24</sup> M. Plachta, *(Non) extradition of nationals: a never ending story?* 13 EMORY INTERNATIONAL LAW REVIEW 77 (1999).



The derogation logic at the basis of the power conferred to Member States to eventually refuse the surrender of a citizen is corroborated by another paragraph, under article 5, of the Framework Decision. Under this article, additional guarantees must be provided, in specific cases, by the issuing Member state when, “a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State<sup>25</sup>.”

It is evident, as Advocate General Ruiz-Jarabo Colomer pointed out in his conclusions to the aforementioned C-303/05 case, that there exist substantial differences between extradition and the European arrest warrant. The extradition procedure implicates the relationship between two sovereign states: the first one requesting cooperation from the other, which in turn decides to grant it or not on the grounds of non-eminently judicial reasons, which rather lie, in fact, in the international relations framework, where the principle of political opportunity plays a predominant role<sup>26</sup>.

As for the arrest warrant, instead, it falls into an institutional scenario where judicial assistance is requested and granted within an integrated transnational judicial system. In so doing, the States, by partially giving up their sovereignty, transfer their competences to foreign authorities which have been endowed with regulatory powers.

Furthermore, the AG continues arguing that such a mechanism, “which falls within the scope of the first pillar of the Union, also operates in the third, intergovernmental, pillar – albeit with a clear Community objective, as was demonstrated in *Pupino* – by transferring to framework decisions certain aspects of the first pillar and a number of the parameters specific to directives<sup>27</sup>.” In spite of all

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<sup>25</sup> In this particular instance, the additional guarantees are represented by the power to subject the surrender to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.

<sup>26</sup> For an in-depth study on the extradition principle at both a national and international level, refer to *supra*, note 23. Namely the author points out how «the justification of the rule of non extradition of nationals largely derives from a jealousy guarded conception of national sovereignty, and it presupposes the existence of sharp contrasts in the administration of criminal justice between states, resulting in potentially unfair treatment” (*supra*, note 23 at 99,100).

<sup>27</sup> See, *infra*, note 2, AG’s conclusions.

the differences the doctrine<sup>28</sup> may emphasize, highlighted as well in certain national legislation for the adoption of the Framework Decision<sup>29</sup>, that it is clear that both measures have as their goal the surrender of a requested person to a Member State authority, for the purposes of prosecution or the carrying out of a criminal sentence.

A number of Member States have wanted to avoid the application of such a measure to one of their own citizens. In fact, before the Framework Decision's adoption, thirteen of the (then) twenty-five Member States provided for constitutional dispositions forbidding<sup>30</sup>, or, somehow, limiting<sup>31</sup> the extradition of nationals. No wonder, then, that the innovations of the European arrest warrant provisions caused, at the time of their adoption<sup>32</sup> in Member States, unavoidable "constitutional disturbance." Some countries, such as Portugal<sup>33</sup>, Slovakia<sup>34</sup>, Latvia<sup>35</sup>

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<sup>28</sup> M. Plachta, *European Arrest Warrant: revolution in extradition*, 11 EUROPEAN JOURNAL OF CRIME, CRIMINAL LAW AND CRIMINAL JUSTICE 193 (2003); O. Lagodny, *Extradition without a granting procedure: the concept of surrender*, in HANDBOOK OF THE EUROPEAN ARREST WARRANT, 41 (T. Blekxtoon and W. Van Ballegooij eds. 2005); I. Jegouzo, *Le mandat d'arret europeen ou la premiere concretisation de l'espace judiciaire europeen*, in GAZETTE DU PALAIS 2311 (2004).

<sup>29</sup> As the Advocate General pointed out in the mentioned conclusions, the preamble to the Spanish law dated 14-3-2003, on the EAW and surrender procedures (BOE n. 65 of 17-3-2003, 10244), highlights how: "the EAW changes the classical extradition procedures so radically that one can safely say that extradition as it once was no longer exists in the framework of the relationships between Member States in matters of justice and cooperation."

<sup>30</sup> In the pre-amendment version of the constitutional texts, the inadmissibility of nationals' extradition was ratified by the German (art. 16, para 2), Austrian (art. 12, para. 1), Latvian (art. 98), Slovak (art. 23, para. 4), Polish (art. 55), Slovenian (art. 47), Finish (art. 9.3), Cypriot (art. 11.2) and to a lesser extent, by the Czech (art. 14 of the Fundamental liberties and rights' Charter) and Portuguese Constitutions.

<sup>31</sup> Other constitutional texts provide, as sole exception to the extradition ban, that a different measure be imposed by an international treaty (art. 36.2 Estonian Const.; art. 26,1 Italian Const.; art. 13 Lithuanian Const.).

<sup>32</sup> Italy was the last European country to transpose the Framework decision through its adoption, on 22 April 2005 of the 1 n. 69. See F. Impalà, *The European Arrest Warrant in the Italian legal system between mutual recognition and mutual fear within the European area of Freedom, Security and Justice*, 2-1 UTRECHT LAW REVIEW 56 (2005). It is worth noting how some very authoritative doctrine had already highlighted, before the adoption of the Framework decision's final version, its incompatibility with the constitutional principle, among others, of the preemptory nature of crime. See Caianello et al., *Parere sulla proposta di decisione quadro sul mandato di arresto europeo*, in *Cassazione penale* 462 (2002).

<sup>33</sup> Under art. 33 para. 3, of the Portuguese Constitution, which followed the review: "the extradition of Portuguese citizens from Portuguese territory shall only be permissible where an international agreement has established reciprocal extradition arrangements, or in cases of terrorism or international organised crime, and on condition that the applicant state's legal system enshrines guarantees of a just and fair trial."

and Slovenia<sup>36</sup>, revised their respective constitutions before the relevant Constitutional Courts had a chance to rule on the alleged unconstitutionality of the implementing act, as what actually occurred in Poland, the Czech Republic and Cyprus.

Germany, instead, faced quite an unusual scenario: the constitutional<sup>37</sup> amendment, in fact, was carried out shortly before the adoption of Framework Decision 2002/584 to allow, under certain circumstances, the previously utterly banned<sup>38</sup> extradition of a citizen, but it did not avoid the intervention of the Karlsruhe<sup>39</sup> Federal Court over the national regulation for the adoption of the Framework Decision.

#### D. The *Pupino* "Acceleration"

Before dwelling on the implications arising within the above-mentioned constitutional courts' decisions concerning the relationship between interconnected legal systems, it is relevant to point out the unexpected acceleration of European integration in the areas of freedom, security and justice, brought about by a well-

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<sup>34</sup> Before the review of 2001, art. 23 para. 4, provided the right for the Slovak citizens: "not to leave their homeland, be expelled or extradited to another state." The review brought to the elimination of the reference to the right not to be removed.

<sup>35</sup> In Latvia, two acts promulgated respectively on 16 June 2004 – and in force as of 30 June 2004 – and 17 June 2004 – in force as of 21 October 2004 – introduced the necessary amendments to implement the constitutional modifications to art. 98 and the other relevant parts of the code of criminal law, in order to execute the EAW of Lithuanian citizens.

<sup>36</sup> In the original version, art. 47 of the Slovenian constitution, provided the extradition ban of its citizens. Following its review, occurred with the *Constitutional Act 24- 899/2003*, the notion of surrender was added, as autonomous constitutional concept, compared to extradition. Today, art. 47 of the Slovenian constitution, states verbatim that: "no Slovenian citizen may be extradited or surrendered (in execution of a EAW), unless the said extradition or surrender order stems from an international treaty, through which Slovenia has granted part of its sovereign powers to an international organisation."

<sup>37</sup> The German constitution, in its original wording, utterly banned the extradition of a German citizen. The 47<sup>th</sup> review to the fundamental act of 29 November 2000, added to the unconditional ban provided for by 16 (2), the disposition according to which: "no German may be extradited to a foreign country. The law can provide otherwise for extraditions to a Member State of the European Union or to an international court of justice, as long as *the rule of law is upheld (Rechtsstaatliche Grundsätze)*."

<sup>38</sup> Prior to the 2000 review, art. 16 of the Basic Law was rather strict: "no German citizen may be extradited abroad."

<sup>39</sup> See, *supra* note 6.

known ECJ ruling. By manipulating the relevant EU treaty provision related to the effect of the framework decisions and reducing the gap between the Union's first and third pillar, *Pupino*<sup>40</sup> has contributed to exacerbate the tension at a constitutional level, with specific regard to the Member States' national implementation of the EAW Framework Decision. Precisely, the controversy originated in the request of an Italian Public Prosecutor to an Investigating Magistrate to take the testimony of eight children, witnesses and victims of abuse of disciplinary measures and grievous bodily harm, offences which Mrs. Pupino was charged with. The evidential episode, in fact, in light of an earlier collection of evidence, was not provided for under the criminal code provisions relating to the crimes being investigated.

The Investigating Magistrate, while holding that the evidential incident was a special judicial instrument whose application must be restricted solely to the cases provided for by law, and therefore that the public prosecutor's request should be rejected, pointed out the procedural drawback of this mechanism. It was noted, in fact, how limited application of the special evidential incident procedure within Italian law could actually be in breach of the provisions of Council's Framework Decision 2001/220 JHA, relating to the victim's role within the criminal proceedings adopted as per article 34 EU (the same legal basis at the heart of the arrest warrant's framework decision), according to which, if the victims are particularly vulnerable subjects, they may benefit from special treatment to best respond to their needs (articles 2 paragraph 2 and 8 paragraph 4 of Framework Decision).

It was the opinion of the Italian judge addressing the ECJ as per article 35.1 of the Treaty on the European Union (TEU) that the said special treatment should ensue in derogation to the primary rule which confers value of evidence only to witness brought before the Court, and the faculty of the judge, as opposed to the Italian legislation's provisions, to rule out the option of public testimony if this would affect the victim called as witness. However, if the conflict between the Italian and European legislation was evident, even more explicit is article 34 (b) TEU in its wording, where it says that the Framework Decisions "shall not entail direct effect."

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<sup>40</sup> ECJ, ruling of 16-6-2005, C-105/03 in ECR, I-5285 among which see at least: V. Mazzocchi, *Il caso Pupino e il principio di interpretazione conforme delle decisioni quadro*, QUADERNI COSTITUZIONALI 884 (2005); P. Salvatelli, *La Corte di giustizia e la comunitarizzazione del terzo pilastro*, QUADERNI COSTITUZIONALI 887 (2005); and E. Spaventa, *Opening pandora's Box: some reflections on the constitutional effect of the decision in pupino*, 3 EUROPEAN CONSTITUTIONAL LAW REVIEW 5 (2007).

According to the Court of Justice, within the third pillar and in respect of framework decisions, it would be possible to extrapolate, on the basis of article 1 TEU<sup>41</sup>, and being the wording of article 34 (2)(b) EU closely inspired by article 249 (3) of the first pillar of the European Community (EC), an obligation on national judges to interpret the national regulation in conformity with the European discipline, relying on the cooperation principle between the Community and the Member States, as stated in article 10 EC. Looking at this carefully, it would entail, on the European judges' part, a bold application by way of analogy, within the third pillar intergovernmental dynamic, of the EC first pillar's jurisprudence providing for an obligation of consistent interpretation of domestic law regarding the directives not having direct effect.<sup>42</sup>

To make it 'worse', the express EU Treaty provisions deny any framework decisions direct effect. Notwithstanding, and almost to counterweigh this notable *ouverture*, the Luxembourg judges remarked that, "In other words, the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*." (paragraph. 47)<sup>43</sup>.

Although the conflict between European and national legislation was rather evident, the European judges did, nonetheless, contemplate the possibility of a harmonization between national law and the Framework Decision, and therefore asked the Italian judge to make a further effort in terms of consistent interpretation of the domestic law, as much in line with the European provisions. Quite obviously, such decisions came in for criticism among those who held the intergovernmental pillar free from the activist aims of the European Court of Justice (ECJ) that, in so doing, brought framework decisions much closer in essence to directives, therefore substantially reducing the Member States' discretionary power in the phase of the European provision's implementation. All this exactly just as the Member States were preparing for the implementation of the controversial arrest warrant framework decision, which lays its foundations, as already highlighted, in

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<sup>41</sup> According to which: "the present Treaty marks a further step in the process of the creation of a closer union of the peoples of Europe, where decisions be taken for the citizens' sake and in the name of transparency."

<sup>42</sup> WCJ ruling 13-11-1990, C-106/89, *Marleasing* in ECR, I-4135.

<sup>43</sup> In this regard, objections were raised by the Italian, English and Swedish governments intervening in the debate, who remarked within the EU Treaty regarding the lack of a provision similar to EC Treaty's art. 10 concerning the loyal cooperation between Member States and the Community, standard feature in the ECJ jurisprudence and therefore *sine qua non* condition to set out the principle of consistent interpretation of the national legislations to EC law. See also MAZZOCCHI, *supra*, note 39, 886.

the mutual trust in the area of judicial cooperation in criminal matters among Member States.

It is precisely this principle that some of the Member States' (constitutional or supreme<sup>44</sup>) Courts did not fully accept, as was the case for the Karlsruhe and Warsaw Courts when they declared the Framework Decision's national implementing legislation unconstitutional. Although the Polish decision (on 27 April 2005) came out a few months before the German one (on 18 July 2005), the jurisprudential analysis will start from the latter, as the Polish ruling appears best suited for a comparative study with the Czech Constitutional Court's decision (rule 3-5-2006), which, on the basis of similar constitutional parameters, came to the opposite conclusion.

#### E. The German Case

As previously mentioned, shortly before the implementation of the Framework Decision on the European Arrest Warrant, article 16 (2) of the German Constitution had, "thanks to a prophetic intuition", already been revised. The new provision permits derogation to the ban on extraditing a German citizen to allow his surrender to a European Union Member State or international Court, on condition that the fundamental principles of the *rule of law* be respected. In 2003, the German Minister of Justice had rejected the request of extradition to Spain submitted by the Spanish police authority against a German and Syrian national accused by the Spanish authorities of participation in a criminal association and terrorism which were committed in Spanish territory. The reason for the decision was that back then the legislation for the implementation of the new provisions under article 16(2) of the Constitution, had not yet been issued, and therefore, the application of the article's previous version, unconditionally forbidding the extradition of a German citizen, could not be possibly questioned.

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<sup>44</sup> Perhaps, it may be worth noticing how the British *House of Lords*, notwithstanding its reputation of "eurosceptical" judge, immediately welcomed the *Pupino* outcome - expressly quoting the ruling of the ECJ in its reasoning - declaring it binding on all national judges. Namely, in the recent case *Dabas (appellant) v. High Court of justice, (Madrid) (Respondent)*- UKHL, dated 28-2-2007, Lord Bingham of Cornhill, with regard to the framework decision's adoption procedures, stated as follows: "a national authority may not seek to frustrate or impede achievement of the purpose of the decision, for that would impede the general duty of cooperation binding on member States under article 10 of the EC Treaty." In light of such considerations, the English Supreme Court of Justice added that although a national judge may not, as the ruling clearly reads, attain to a *contra legem* interpretation of the national law: "He must do as far as possible in light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with article 34 (2) (b) EU." To support these statements, the mentioned passage expressly quotes the ECJ's *Pupino* case.

Following Germany's adoption of Framework Decision 2002/584 through the *Europäisches Haftbefehlsgesetz* (The Second European Arrest Warrant Act) of July 21, 2004, Hamburg's jurisdictional authorities granted the request for surrender of the individual to Spanish authorities on the basis of the new European regulation which, as anticipated, does not exempt Member States' citizens. After appealing against this decision before the competent national courts in vain, the German citizen subject to the arrest warrant appealed to the Constitutional Court asserting, *inter alia*, the alleged violation of provisions as per article 16 (2) of the Basic Law. The appellant claimed that the transposition act of Framework Decision 2002/584, lacked democratic legitimacy for having introduced into national legislation a provision potentially depriving one's personal liberty and the principle of legal certainty, such as, for instance, the derogation rule to the principle of double criminality. The federal Government intervened stating that the constitutional complaint was to be considered groundless, above all due to the binding nature of the decisions pursuant to the EU Treaty which, strikingly enough, if stressed by the German government, "must have unconditional supremacy over national law, including constitutional principles."

Moreover the German government pointed out a twofold aspect: on one hand, the innovation of the surrender procedure, with no particular limitations, of Member State citizens, brought by the Framework Decision compared to the extradition procedure carried out pursuant to article 16 (2) of the Constitution; on the other, the Government argued how the mentioned innovation determined the inapplicability of article 16 (2) as a constitutional parameter of the Framework Decision and its implementing act. Secondly, the federal Government noted how in case of any doubt about interpretation, the federal Court could always make a preliminary reference, although it had always refrained from doing so.

The German<sup>45</sup> constitutional judges<sup>46</sup> must have been of very different opinion, if, after having deemed the constitutional parameter pursuant to article 16 (2)

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<sup>45</sup> For an interesting comment on the relevant decision, see: F. Palermo, *La sentenza del Bundesverfassungsgericht sul mandato di arresto europeo*, QUADERNI COSTITUZIONALI 897 (2005). Also also C. Tomuschat, *Inconsistencies. The German Federal Constitutional Court on the European Arrest Warrant*, in 2 EUROPEAN CONSTITUTIONAL LAW REVIEW 209 (2006); J.P. Pierini, *Il mandato d'arresto europeo alla prova del Bundesverfassungsgericht tedesco: «schiaffo» all'Europa o cura negligente dei diritti del nazionale da parte del legislatore?*, in CASS. PEN. 237 (2006); J. Woelk, *Parlare a nuora perché suocera intenda: il BVerfG dichiara incostituzionale la legge di attuazione del mandato d'arresto europeo*, DIR. PUBBLICO COMPARATO ED EUROPEO 160 (2006); S. Molders, *Case note, The European Arrest Warrant in the German Federal Constitutional Court*, 7 *German Law Journal* No.1 45 (2006); N. Nohlen, *Germany: The European Arrest Warrant case*, 6 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, No. 1 153 (2008).

perfectly applicable to the implementing national law, declared it unconstitutional since, the German legislator did not conform to the provision pursuant to which the extradition of a German national is only admissible as long as the rule of law is upheld. In particular the German judges made it clear that the third pillar's intergovernmental dynamic may, in no event, fall within the EC *acquis* of the first, thus recalling how the EU Treaty's express provisions on the framework decision's absence of direct effect, is due to the Member States' precise willingness to avoid the ECJ conferring direct effect on these sources as well, as it had determined EC directives' interpretation.

Furthermore, the constitutional judges maintained that, notwithstanding the high level of integration, the European Union still embodies a partial legal system pertaining to the field of international public law. Accordingly, under a constitutional point of view and directly pursuant to article 16 (2) of the Basic Law, a concrete review on a case-by-case basis should be made to ascertain that the prosecuted individual is not deprived of the guarantees or fundamental rights he would have been granted in Germany, and that except for obvious language problems and a lack of familiarity with the criminal law of the destination country, this may, in no event lead, to the worsening of the individual's situation.

Seemingly, the underlying theme of the whole reasoning about the decision is a sense of ill-concealed distrust in the legal systems of the other Member States as to the safeguarding of the accused person. Therefore, the German legislator is blamed for infringing, by implementing the Framework Decision, the principle of proportionality, in that not having chosen the least restrictive among the possible options of the right for German citizens to be prosecuted and serve the sentence passed against them in their native land, and thus underestimating the citizens' special connection to their own state's legal order.

Apparently, according to the German constitutional judges, the legislator did not fully use the discretion allowed by the Framework Decision which permitted, in fact, judicial authorities to refuse execution where the European Arrest Warrant relates to offences: which, "are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or have been committed outside the territory of the issuing Member State and the law of the executing Member State

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<sup>46</sup>As the *obiter dictum* of the constitutional judge Gerhardt shows the Senat was not unanimous in its opinion. See NJW 2005, 2302.



does not allow prosecution for the same offences when committed outside its territory.”<sup>47</sup>

In such circumstances, according to the *Bundesverfassungsgericht* (German Federal Constitutional Court, FCC), a significant *domestic connecting factor* is established and “trust of German citizens in their own legal order shall be protected” (paragraphs 86-87). In the German literature it has been harshly criticized that the *Bundesverfassungsgericht* (based its reasoning mainly on historical arguments, thus overemphasizing the historically emerged close relationship between the German state and its citizens. As Ulrich Hufeld pointed out the Senate remained in an etatistic “Schneckenhaus” by focusing only on article 16.2 GG as would the *Grundgesetz* (Basic Law) in its literal shape reflect the meaning of the whole constitution.<sup>48</sup>

By reading the ruling from a different perspective, it is rather evident how, behind the attempt to verify the responsibility of the German legislator in the transposition activity, the Federal Court’s actual aim was to halt the acceleration process, which followed the EAW Framework Decision’s adoption, of European integration concerning the third pillar which, according to the same Court, “cannot overrule, given its mainly intergovernmental character, the institutional dynamic peculiar to a system of international public law.” It was opinion of the Karlsruhe judges that in light of the safeguards of the subsidiarity<sup>49</sup> principle, “the cooperation in criminal matters established within the third pillar on the basis of a *limited* mutual recognition of criminal decisions, does not presuppose general harmonization of criminal laws of the Member States; conversely, it is a way to preserve national identity and statehood within the uniform European legal space” (paragraph 77).

It has been correctly pointed out<sup>50</sup> that the key word in this crucial part of the reasoning is the adjective “limited” through which the Constitutional Court has

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<sup>47</sup>Provision as per art. 4 para. 7 of decision 2002/584/ JHA.

<sup>48</sup>U. Hufeld, *Der Europäisches Haftbefehl vor dem BVerfG* - NJW 2005, 2289, JuS 2005, 865, 866.

<sup>49</sup> As Francesco Palermo observed, the constitutional judges consider this principle as having been complied with, thus sorting out a difficult situation: “in fact, the non-recognition of subsidiarity, therefore of the urgent need for a European discipline on the European arrest warrant, would have hampered it forever. Conversely, the judges deem Germany’s participation in European judicial cooperation a significant step towards the administration of justice within an integrated context, which makes it not only possible, but desirable as well.” See, *supra* note 44, F. Palermo at 899.

<sup>50</sup> J. Komarek, *European Constitutionalism and the European Arrest Warrant: in search of the limits of the “contrapunctual principles”*, 44 COMMON MARKET LAW REVIEW 9, 24 (2007).

precisely set a limit to the “optimism” of European judges who, in the first ruling<sup>51</sup> dealing directly with the third pillar’s integration scope, expressly stated how “the *ne bis in idem* principle necessarily implies a high level of confidence between Member States and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied” (paragraph 33). The message sent from Karlsruhe proved, beyond all doubts, that any member State’s attempt to emulate first pillar’s procedures in such a constitutionally sensitive context, by definition part of its (remaining) hard core of sovereignty, would not have been tolerated by the *Solange* judges.

Although the majority of the Senate<sup>52</sup> makes no mention of the ECJ ruling of 16 June 2005, it is quite a direct response to the “acceleration”, by way of the third pillar, which *Pupino* embarked on thirty days before. It could have been expected from the German Constitutional Court to at least mention and get involved with the outcome of the *Pupino* decision even if it after having articulated the conflict would have finally deviated from the approach of the ECJ<sup>53</sup>.

### I. *A Comparison Between the Polish and the Czech Case*

To fully understand the implications related to the relationship between the European and the constitutional legal systems by the adoption of the Framework Decision on the European arrest warrant in Poland and the Czech Republic, as well as the ensuing jurisprudential reactions of the Warsaw and Brno Constitutional Courts, it is necessary to take a step back to the process which led to the adoption of the Czech and Polish Constitutions in 1992 and 1997, respectively. Both Constitutions are characterized by a number of clauses aimed at the protection of long sought sovereignty, attained after decades of subjugation to communist regimes, which make a distinction, as was the case for the constituent documents of most Central-Eastern countries, between internal and external sovereignty<sup>54</sup>.

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<sup>51</sup> ECJ 11-2-2003 in the joint cases C-187/01 e C-385/01 *Hüseyin Gözütok e Klaus Brügge*.

<sup>52</sup> Judge Gerhardt takes a dissenting opinion on the innovation brought about by the *Pupino* ruling asserting that the Court’s decision contradicts the ECJ ruling of June 16<sup>th</sup> 2005, where it is emphasised that the principle of Member States’ loyal cooperation in the area of police and judicial cooperation in criminal matters must also be respected by the Member State when implementing framework decisions within the third pillar. See C. Tomuschat, *Inconsistencies – the German Federal Constitutional Court on the Arrest Warrant*, 2 EUROPEAN CONSTITUTIONAL LAW REVIEW 209, 212 (2006).

<sup>53</sup> For a concurring opinion, see *supra*, note 47, 867.

<sup>54</sup> For a cross-reference to independence, see the preamble to the Czech Constitution and arts. 26 and 130 of the Polish Constitution: for the emphasis on state sovereignty, see art. 1 of the Czech Constitution, the

Further, the next aspect to be taken into account is the “low profile approach” typical of all Central-Eastern countries as regards the constitutional amendments leading to accession to the European Union.

Although a group of scholars maintains a difference between the two countries, qualifying as remarkable the constitutional harmonization level reached by the Czech Republic and only average Poland's<sup>55</sup> - owing as well to the public opinion's hostile response to their accession - with regard to the sensitive issue of the supremacy between EU law and the Constitution, both legislators only slightly amended the relevant constitutional parameters, leaving then to the respective constitutional Courts the heavy and ungrateful burden to find a solution to the inevitable conflicts between the constitutional and European dimension that such relaxed “super primary” parameters could but only worsen<sup>56</sup>. It is worth noting, to confirm that assumption, the flowery of decisions of the respective constitutional Courts concerning the relations between EC legislation and domestic law<sup>57</sup> in the years immediately following Central and Eastern countries' adhesion to the European Union.

In an attempt to summarise the judicial emerging trends, and notwithstanding the most pessimistic<sup>58</sup> predictions and the bitter, certainly non-eurofriendly<sup>59</sup> tones of

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preamble and arts. 104 para. 2 and 126 para. 2, of the Polish Constitution. For further reference see also: E. Stein, *International law in internal law*, 88 AMERICAN JOURNAL OF INTERNATIONAL LAW 427 (1994).

<sup>55</sup> See: A. ALBI, EU ENLARGEMENT AND THE CONSTITUTIONS OF THE CENTRAL AND EASTERN EUROPE (2005).

<sup>56</sup> As for the Czech Republic, in the 2001 revision of art. 10 a, a general and undifferentiated, clause of openness to international organizations was introduced, which made no mention of the EC system's peculiar features, or stressed, in any way, how the supremacy given to the Constitution could be combined with the doctrine of EC law primacy over domestic laws, as extrapolated, some decades ago, by ECJ caselaw which, as the rest of the European *acquis*, all the Central-Eastern European Countries have undertaken to follow pursuant to the Athens Adhesion Treaty of 2003. The same, more or less, applies to the 1997 Polish Constitution, the most recent among Central-Eastern European Countries', therefore already inclusive *ab origine* of the European clauses. Conversely, art. 91 para. 3, as opposed to the more international approach of the Czech Constitution, makes express reference to the EC system and particularly to the off-shoot European law, stressing its direct effect and supremacy over ordinary national regulations. Again, no mention is made of the relationship between Constitution and Community law, especially primary law.

<sup>57</sup> Besides the decisions herein examined of the Warsaw and Brno's constitutional Tribunal. For Poland see the Polish constitutional tribunal, K 18/04, *Judgment on Poland's Membership in the European Union (Accession Treaty case)*, 11.05.2005, *Procedural Decision no. 176/11/A/2006 on the Excise Duty Tax*, 19.12.2006. Ref. No.P 37/05; for the Czech Republic, Czech constitutional Tribunal, Pl. ÚS 50/04, 08.03.2006.

<sup>58</sup> Z. Kuhn, *The Application of European Union Law in the New Member States: Several Early Predictions*, in 6 GERMAN LAW JOURNAL No. 3, 566 (2005).

the Eastern Courts' reasonings, it appears plausible to note mainly encouraging signs of an increasing judicial dialogue crucial to maintain the delicate balance underlying the mechanism of mutual support between the national and supranational levels.

As to the specific question relating to the alleged constitutional invalidity of the EAW Framework Decision's implementing act, the constitutional Courts of Warsaw and Brno made direct judgements. Within the two legal systems, the implementing regulations did not bear notable differences, and the relevant constitutional parameters, as to the extradition ban on nationals, were very similar. The Polish Constitution was lapidary: article 55 stated, in fact, that, "the extradition of a Polish citizen shall be forbidden." Article 14 (4), of the Charter of Fundamental Rights and Liberties, which encompasses all rights and liberties protected by the constitution of the Czech Republic, states more generally that, "no Czech citizen shall be removed from his/her homeland."

Surely, one distinctive feature between the two systems has been the extent of the debate on the opportunity to amend the two above-mentioned provisions in view of the, at least back at that time, future accession to the European Union. If the Czech Republic never granted priority to the issue, in Poland, on the contrary, revision of article 55 of the Constitution had already been envisaged by a portion of the insiders who stressed how an unconditional extradition ban of nationals could potentially represent a hinder to the European integration process within the third pillar, which in turn - as already emphasized - had been gaining strength since the enforcement of the Amsterdam Treaty. Conversely, others thought that the conflict could be settled during discussions.

Finally, it was the second possibility to be opted for, given the highly symbolic value of article 55 which, in the Polish Constitution, enshrines those ideals of identity and sense of belonging deeply rooted within an ethnocentric oriented *demos* still bound to nationalistic<sup>60</sup> memories which characterise the predominant

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<sup>59</sup> As, for instance, the one underlying the Polish decision on the adhesion Treaty of 11-05-2005 k. 18/04 and that of the Hungarian constitutional Court (17/2004). On the first see: O. Pollicino, *Dall'Est una lezione sui rapporti tra diritto costituzionale e diritto comunitario*, DIRITTO DELL' UNIONE EUROPEA 819, (4/2006), on the second: K. Kowalik-Banczyk, *Should we polish it up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law*, 6 GERMAN LAW JOURNAL NO. 10 1360, and A. Lazowski, *The Polish Constitution, the European Constitutional Treaty and the Principle of Supremacy*, in, THE EUROPEAN CONSTITUTION AND NATIONAL CONSTITUTIONS: RATIFICATION AND BEYOND, 178 (A. Albi and J. Ziller eds. 2007).

<sup>60</sup> See A Sajo, *Protecting nation states and national minorities: a modest case for nationalism in Eastern Europe*, U. CHI. L. SCH. ROUNDTABLE 53 (1993).

view in Central-Eastern Europe. Clarifications having been made, it would be interesting to move on to draw a parallel of the actual *reasoning* of the Courts of Warsaw and Brno which, while starting from similar constitutional principles, and a practically equivalent object of the matter, reached opposite outcomes. The first judgement, in fact, annulled the national regulation; the second did not detect any constitutional illegitimacy. The Polish judges<sup>61</sup> had to establish whether surrender, substantive issue of the European arrest warrant, could anyhow be regarded as a subset of extradition, the latter being expressly forbidden by article 55 of the Constitution if the person concerned is a Polish national. The Court, answering positively to the interpretative dilemma, hold that the constitutional concept of extradition was so far-reaching to encompass also the surrender of a Polish citizen, necessary provision to implement the European arrest warrant, whose purpose, at least at the Framework Decision's level, is to replace within the European legal space, the bilateral, intergovernmental dynamic typical of extradition' mechanism.

After grouping under the same legal notion the two concepts of extradition and surrender, the second argument of the Polish constitutional Court was to point out how the admissibility of a national's surrender, provided for by the Framework Decision, undermined the rationale behind the ban as per article 55 of the Polish Constitution, pursuant to which the essence of the right not to be extradited is that a Polish citizen be prosecuted before a Polish Court. According to the Warsaw Tribunal, Poland's adhesion to the European Union brought about a radical change. Namely, its accession not only accounts for, but also necessarily implies, a constitutional revision of article 55, to conform constitutional requirements to EU provisions. The said constitutional revision, according to the judges, could not be carried out using a manipulative and dynamic interpretation of the relevant constitutional principle but needs, but needs an *ad hoc* constitutional action by the legislator.

The *Pupino* judgement, which reasserts the obligation for national Courts to a consistent interpretation of the Framework Decisions pursuant to article 34 (b) EU, was yet to be adopted by the ECJ. Nevertheless, AG Kokott's conclusions regarding the judgement, had already been published<sup>62</sup>. The Polish constitutional judges, without directly mentioning it, considered the possibility of an obligation of

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<sup>61</sup> One of the first studies on the decision is by S. Sileoni, *La Corte costituzionale polacca, il mandato arresto europeo e la sentenza sul trattato di Adesione all'UE*, QUADERNI COSTITUZIONALI 894 (2005). Now also A. Nußberger. Poland: The Constitutional Tribunal on the implementation of the European Arrest Warrant, 6 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW NO. 1 162 (2008)

<sup>62</sup> AG Kokott's conclusions to case C-105/03, *Pupino*, in *Racc.*, I-5285.

consistent interpretation. However, they did not find it relevant in the current situation since, according to the Warsaw Tribunal, the obligation was limited by the ECJ itself, as it may not worsen an individual's condition, especially as regards the sphere of criminal liability<sup>63</sup>.

As has been recently noted<sup>64</sup>, the Polish judges did not refer to specific judgements to show on what basis they had construed such an argument. The relevant ruling to which the Polish Tribunal should have deferred, the *Arcaro* case from 1996<sup>65</sup>, didn't perfectly apply to the arrest warrant procedure, the implementation of which is conditional on the surrender of an individual whose question of criminal liability is pending before the Member State issuing the European arrest warrant: this liability remains untouched: it cannot be expanded or diminished whether the person requested is finally surrendered or not.

According to the constitutional judges on the other hand, while national legislation is bound under article 9 of the Constitution to implement secondary EU legislation, a presumption of the implementing act's compliance with constitutional norms cannot be inferred *sic et simpliciter*.

The Tribunal easily concluded how, by permitting the prosecution of a Polish citizen before a foreign criminal court, the national regulation implementing the Framework Decision would have prejudiced the constitutional rights granted to Polish citizens, and therefore, it could only be found to be unconstitutional.

In spite of the clarified unconstitutionality of the matter, the Tribunal found that the mere annulment of the provision would have led to breach of article 9 of the Constitution, according to which, "Poland shall respect international law binding upon it," and whose application, according to the constitutional judges, also encompasses Poland's obligations stemming from accession to the European Union. Therefore, in order to fully comply with such obligation, a change of article 55 was suggested by the Polish judges considered necessary to provide for the possibility,

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<sup>63</sup> Polish Constitutional Tribunal, ruling. cit., part. III, point 3.4.

<sup>64</sup> J. KOMAREK, *supra* note 49, 16.

<sup>65</sup> C-168/95, *Arcaro*, 1996, in *Racc.*, I-4705, which at para. 42 reads: " However, that obligation of the national court to refer to the content of the directive when interpreting the relevant rules of its own national law reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed or, more especially, where it has the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive' s provisions"

departing from the general extradition ban of nationals, of enabling such persons' surrender to other Member States in execution of a European arrest warrant.

Meanwhile, the Tribunal, by enforcing article 190 (3) of the Constitution, set a deadline for the decision's effects - 18 months - to give the constitutional legislator time to adopt the necessary amendments while the provision remained temporarily in force, and for the constitutional revision to be in line with the Framework Decision on the European warrant<sup>66</sup>. One year later, the Czech constitutional judges founded their reasoning on a completely different set of grounds. After recalling the decision issued barely two months earlier, (decision 8-3-2006), where they had carried out an express *revirement* of their own jurisprudence in order to meet the interpretation criteria required by the application of the equality principle as interpreted by the ECJ<sup>67</sup>, the judges were faced with the sensitive issue of the binding nature, and related discretionary margin left to the legislator regarding cooperation in criminal justice matters, which were to be attributed within the scope of the framework decisions pursuant to article 34 EU.

Showing a further degree of openness and extensive knowledge of Community law, the Czech judges broadly touch upon the *Pupino* judgement, and although perhaps underestimating its added value, they pointed out how the obligation of national judges to interpret, *as far as possible*, national law in conformity with framework decisions adopted under the third pillar - and pursuant to such jurisprudence - would leave unprejudiced the issue relating to the enforcement of the principle of primacy of the EU law over (all) national legislation. Issue, the latter, which most of the scholars<sup>68</sup> have instead maintained inextricably linked to the obligation of consistent interpretation.

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<sup>66</sup> Amendments to art. 55 of Constitution were made within the deadline provided for in the decision, and as of November 7<sup>th</sup> 2006, Poland has agreed to the execution of European arrest warrants against its nationals, subject to two conditions, which do not appear to be in line with the EU regulation: the fact that the crime has been committed outside Polish territory and that it is recognised under and also capable of being prosecuted under Polish criminal law.

<sup>67</sup> See O. Pollicino, *Dall'Est una lezione sui rapporti tra diritto costituzionale e diritto comunitario*, in DIRITTO DELL' UNIONE EUROPEA 819 (April 2006).

<sup>68</sup> D. Piquani, *Supremacy of European Law revisited: New developments in the context of the Treaty Establishing a Constitution for Europe*, paper presented at the VII WORLD CONFERENCE OF THE CONSTITUTIONAL LAW INTERNATIONAL ASSOCIATION held in Athens - 11-15 June 2007, available at: <http://www.enelsyn.gr/papers/w4/Paper%20by%20Darinka%20Piqani.pdf>, last accessed: 21 September 2008; C. W. Herrmann, *Much Ado about Pluto? The Unity of the Legal Order of the European Union" revisited*, EUI Working paper, May 2007, available at: [www.iue.it](http://www.iue.it).

The Court of Brno, taking into account the doubts concerning the interpretation of the Framework Decision's nature and scope, seriously considered the possibility of proposing, evidencing once again<sup>69</sup> its will to dialogue with the EC's supreme judicial body, a preliminary reference in Luxembourg, though later ruling out the option due to the fact that the Belgian *Cour d'Arbitrage*, as anticipated<sup>70</sup>, had already addressed the ECJ regarding the same issue. The Czech judges faced with the dilemma of whether they should suspend judgement concerning constitutionality while "awaiting" the ECJ's answer, or rather rule on the matter, chose the second option, attempting to, and this is the most interesting aspect, find amongst all the potential interpretations of the relevant constitutional norm - article 14 (4) of the Czech Charter of Constitutional Rights - the one not which did not clash with Community law principles and the contribution of EU law secondary legislation. In particular, the judges highlighted how, without the support of an interpretation effort, the provision's wording of article 14 (4) according to which no Czech citizen shall be removed from his homeland, does not fully account for<sup>71</sup> the actual existence of a constitutional ban on the surrender of a Czech citizen to a foreign state, in execution of an arrest warrant, for a set period of time.

In the view of the Czech Court, two plausible interpretations exist. The first and literal one, even though it might lead to the ban's provision within the constitutional norm, would have at least two disadvantages. Firstly, it would not take into account the "historical impetus" underlying the adoption of the Fundamental Rights' Charter, and especially of article 14 (4). The Court stressed, in fact, how a historical interpretation of the criterion under discussion clearly explained that, based on the wording of the Charter between the end of 1990 and the beginning of 1991, the authors who drafted the ban of a Czech citizen to be removed from his homeland, far from considering the effects of the implementation of extradition procedures, had in mind "the recent experience of communist crimes" and especially of the "demolition operation" that the regime had perpetrated in order to remove from the country whoever represented an obstacle to the hegemony of the regime itself. Secondly, an interpretation of that sort would lead to a violation of the principle, clearly expressed for the first time by the

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<sup>69</sup> They had already done so many times with decision PI US 50/04, 8 October 2006. See, *supra*, note 66.

<sup>70</sup> Preliminary reference by the *Cour d'Arbitrage* dated 29 October 2005 case C-303/05, defined by the ECJ ruling, following the Czech judgement of 3 May 2007, available at: [www.curia.eu.int](http://www.curia.eu.int), last accessed 21 September 2008.

<sup>71</sup> As it did, instead, according to the Czech judges, the contribution of the corresponding art. 23 (4) of the Slovak Constitution which, prior to the constitutional review of 2001, made express provision of the extradition ban of Slovak citizens.



constitutional judges, according to which all domestic law sources, including the Constitution, must be interpreted as far as possible in conformity with the legislation implementing the European integration evolution process.

An obligation that the constitutional provisions be consistently interpreted in light of EC law, which the constitutional judges derived from the combined provisions of article 1 (2) of the Constitution, added in light of the accession to the Union and pursuant to which, “the Czech Republic is compelled to fulfil obligations originating under international law”, and article 10 EC on the principle of loyal cooperation between Member States and the European Union. On the basis of a teleological approach, the Czech judges went on to identify the constitutional norm’s most consistent interpretation of the implementing act, as well as of Framework Decision 2002/584, to the Czech Constitution.

It is not surprising then, that the Court managed to find constitutional grounds to almost all problematic Framework Decision dispositions. Noteworthy in this respect was the legislative omission which had induced the FCC to declare the framework decision’s implementing law unconstitutional and void, that is to say, the non-acceptance under national regulation of the possibility, pursuant to article 4 (7), to enhance the domestic connecting factor and allow a legitimate rejection of a European arrest warrant request by the implementing<sup>72</sup> judiciary authority. Actually, the provision had not been taken into account by the Czech legislator either in the implementation of the framework decision. Nevertheless, according to the Constitutional Court, the obstacle could be surmounted through the (extreme) application of the principle of consistent interpretation. They hold in fact that notwithstanding the legislative omission, the Czech system could not afford to lose the citizens’ trust in their own legal order, therefore, coming close to a *contra legem* interpretation of the relating provision, the judges concluded that any offence carried out within the national borders would continue to be prosecuted under domestic criminal law. In other words, under the same circumstances, the Czech constitutional authorities, would, most likely reject the request to execute a European arrest warrant.

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<sup>72</sup> As already stressed at the beginning, under art. 4 (7), the implementing judicial authority may refuse to execute the European arrest warrant if the latter relates to offences which, according to the law of the executing Member State, have been committed in whole or in part in the territory of the executing Member State or in a place treated as such. It also permits refusal of execution where the offences were committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.

Accordingly, it is plausible to infer that the Czech Court, in its firm intent to reach greater consistency between article 14 (3) of the Constitution and the European regulation, strained the verbatim content of both the constitutional disposition and the domestic law under discussion. The argument was that whereas the constitutional norm had been interpreted as mere ban on the surrender of a Czech citizen to the jurisdictional authority of another Member State, in light of prosecution for a crime committed in that territory, the grounds underlying the whole decision, would have ceased, i.e. the equivalence in terms of fundamental rights' protection among Union Member States, reflecting also a substantive convergence of the various criminal legislations and procedures.

Unavoidably, this led to the acceptance by the Czech Judges of the principle of mutual trust, rejected by their German judicial colleagues, in the criminal legislation of other Member States' legal systems, through the direct reference to *Gozutok* and *Brugge* by the Court of Justice, whose findings have been questioned by the "sceptical" approach of the Karlsruhe judges.

#### **F. The Awaited Decision of the Court of Justice on the European Arrest Warrant**

Owing as well to the great deal of interest aroused by the German, Polish and Czech constitutional Courts' decisions, there was long wait for the Court of Justice's decision, requested under article 35 EU by the Belgian *Cour d'Arbitrage*, on the validity of Framework Decision 2002/584. As the Advocate General stressed in his conclusions<sup>73</sup>, the referring court expressed doubts on the Framework Decision's compatibility with the EU Treaty on both procedural and substantive grounds.

The first of these questions related to the Council decision's legal basis. In particular, the referring Court was unsure that the Framework Decision was the appropriate instrument, holding that it should be annulled because the European arrest warrant should have been implemented instead through a Convention provided by art 34 2 d. In this case, in fact, according to the Belgian Court, it would have gone beyond the limits of article 34 (2)(b), pursuant to which framework decisions are to be adopted only for the purpose of approximation of the laws and regulations of the Member States.

Secondly, the *Cour d'Arbitrage* asked whether the innovations brought by the Framework Decision regarding the European arrest warrant, even when the facts in question do not constitute an offence under the law of the executing State, were

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<sup>73</sup> Conclusions in case C-303/05.

compatible with the equality and legality principles in criminal proceedings in their role of general principle of European law as enshrined in article 6 (2) EU. More specifically, the alleged infringement of the principle of equality would have been due to the unjustified dispensation with, within the list of 32 offences laid down in the Framework Decision, the double criminality requirement, which is held instead for other crimes.

Conversely, the principle of equality would have been breached owing to the Framework Decision's lack of clarity and accuracy in the classification of the offences. It was opinion of the *Cour d'Arbitrage*, in fact, that should Member States have to decide whether to execute a European arrest warrant, they would not be in the position to know whether the acts for which the requested person is being prosecuted, and for which a conviction has been handed down, actually fall within one of the categories outlined in the Framework Decision.

The Advocate General, in his conclusions, had no doubts about the high relevance of the preliminary request which should have included, also in the light of the German, Polish, Cypriot and Czech rulings, when he states, "...in a far-reaching debate concerning the risk of incompatibility between the constitutions of the Member States and European Union law. The Court of Justice must participate in that debate by embracing the prominent role assigned to it, with a view to situating the interpretation of the values and principles which form the foundation of the Community legal system within parameters comparable to the ones which prevail in national systems."<sup>74</sup>

The decision's first reading could lead to much disappointment: it was opined, indeed, that the Court of Justice had failed to fully engage in undertaking the role of "protagonist" assigned to it by the Advocate General<sup>75</sup>. There are few doubts that the ECJ Court steered clear of protagonist leading roles, but given the inter-constitutional tension preceding the decision, it seems a right option than one which, in the light of low-profile approach therefore, through a succinct, moderate, and in some parts even apodictic *reasoning*, reached the conclusions that the legislative instrument of the EAW Framework Decision was, indeed, legally valid.

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<sup>74</sup> Conclusions in case C-303/05. para. 8. Of the same opinion is Alonso Garcia in *Justicia constitucional y Union Europea*, Madrid, 2005, expressly mentioned by AG in his conclusions.

<sup>75</sup> For a criticism of the judgment see now D. Sarmiento, *European Union: The European Arrest Warrant and the quest for constitutional coherence*, 6 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 171 (2008).

The European judges settled the dispute over the appropriateness of the Framework Decision as legal instrument to govern an EAW, stating that EU Treaty provisions may not be interpreted as granting the sole adoption of framework decisions falling within the scope of article 31 (1)(e) EU<sup>76</sup>.

It is true, the Court held, that the EAW could have been governed by a Convention as per article 34 (2)(d), but at the same time it stated that the Council enjoys discretion to decide upon the appropriate legal instrument, where, as in the case, the conditions governing the adoption of such a measure are satisfied.

With regard to the alleged violation of the principle of legality, the Court made clear that article 2 of the Framework Decision which abolishes the requirement of double criminality from the 32 offences' list, does not itself harmonise the criminal offences in question, in respect of their constituent elements or penalties to be attached<sup>77</sup>. "Consequently, even if the Member States reproduce word-for-word the list of the categories of offences set out in Article 2(2) of the Framework Decision for the purposes of its implementation, the actual definition of those offences and the penalties applicable are those which follow from the law of 'the issuing Member State' The Framework Decision does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract" (paragraph 52).

Accordingly, the European judges didn't lose the occasion to stress how the principles of legality and non-discrimination fall within the "supra primary" parameters on the basis of which ascertain the validity of an EC secondary law not only through the usual "transfiguration" of Member States' constitutional principles into common constitutional practice first, and EC law's general principles then, but also by the express acknowledgement of these principles, by articles 49, 20 and 21 of the Fundamental Rights' Charter, which is mentioned for the fourth time in a ruling by the Court of Luxembourg<sup>78</sup>.

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<sup>76</sup> With regard to the progressive adoption of measures for the setting of offences and their punishments' constituent elements in matters relating to organised crime, terrorism and drug trafficking.

<sup>77</sup> Under art. 2 (2) FD, the offences listed "if in the (issuing) Member State the punishment or the custodial sentence incurs a maximum of at least three years" provide for surrender pursuant to a EAW regardless the fact that the acts constitute an offence in both the issuing and the executing Member State.

<sup>78</sup> See para. 46. The other three references to the Nice Fundamental Rights' Charter may be found in the decisions, respectively, of 27 June 2006, 13 March 2007 and now 14 February 2008

In response to the third argument concerning the EAW alleged violation to the principles of equality and non-discrimination, owing to the unjustified differentiation between the offences listed under article 2 (2) providing for the abolition of double criminality requirement on one hand, and all the other crimes where surrender is conditional on the executing Member State's recognition of the criminal liability on which the arrest warrant is based, on the other hand, the Court of Justice has played, in just one passage, that protagonist role the AG referred to, in his conclusions. The ECJ in an attempt to justify the rationale behind the differentiation, made in fact express reference to the *mutual trust* between Member States as indispensable tenet at the heart of any third pillar's action – argument openly questioned by the FCC – thus stating that according to the classification as per article 2 (2) – “the Council was able to form the view, on the basis of the principle of mutual recognition and in the light of the *high degree of trust and solidarity* between the Member States, that, whether by reason of their inherent nature or by reason of the punishment incurred of a maximum of at least three years, the categories of offences in question feature among those the seriousness of which in terms of adversely affecting public order and public safety justifies dispensing with the verification of double criminality.” (paragraph 57).

### G. Comparative Jurisprudential Views: a Twofold Survey

To sum up the constitutional adjustments within the relationship between interconnected legal systems entailed by the European Arrest Warrant saga, which seems to have not yet faced the final curtain<sup>79</sup>, it is necessary to differentiate the two most affected dimensions. The first relates to the European one, the second to the

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<sup>79</sup> In the broader respect of judicial cooperation in criminal matters, along with the vertical conflicts involving Member States' legal system and EC law, there emerges within the European system a cross-pillar litigation, between the first and the third pillars. This is the case of the *Commission v. Council* in a dispute over the identification of the most appropriate legal basis for an act aimed at the harmonization of Member States' criminal laws in the field of two EC relevant areas – such as the environment and transportation. Noteworthy in this regard was the ECJ judgments c-176/2003 of 13-9-2005 and c-440/05 of 23-10-2007, which annulled the two framework decisions adopted under art. 14 (2)(n)EU, thus establishing that the most appropriate legal basis was to be found within the institutional dynamic of the first pillar. Accordingly, the Court clarified in the second of its rulings (par. 66) that “Although it is true that, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence (see, to that effect, Case 203/80 *Casati* [1981] ECR 2595, paragraph 27; Case C-226/97 *Lemmens* [1998] ECR I-3711, paragraph 19; and Case C-176/03 *Commission v Council*, paragraph 47), the fact remains that when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, the Community legislature may require the Member States to introduce such penalties in order to ensure that the rules which it lays down in that field are fully effective (see, to that effect, Case C-176/03 *Commission v Council*, paragraph 48).”

boundary line between the European and the Member States' constitutional Legal systems.

On the European front, one of the main challenges relates to the possibility to extend the first pillar's requirement of the Community law primacy to the off-shoot regulations of the third, and particularly to framework decisions which, as it has been observed, according to Article 34 (2) (b) EU, cannot create direct effect. However, would it be reasonable to gather that this absence of direct effect prevents national Courts from conferring priority on the said acts, even when they clash with a domestic, subsequent, law? It is, indeed, hard to understand why should EC law direct effect and primacy be considered so interwoven.

The European judges' elaboration of the first principle anticipating under both a chronological<sup>80</sup> and argumentative point of view the identification, the following year<sup>81</sup>, of the second, does not seem to be enough, as it never was for the EC legislation within the first pillar, to argue that primacy may be only acknowledged to EC law bearing direct effect, when the Luxembourg Court asserted the supremacy of the *whole* EC Law regardless direct effects<sup>82</sup> and notwithstanding under what pillar's scope<sup>83</sup>. On the same opinion is who recently stressed how: "to the extent that a national measure is inconsistent with the EC law, it cannot be allowed to apply over EC law. However, if we take inconsistency seriously, there is no need for identifying whether a provision confers rights on individuals. The only thing that matters is that EC Law, and by extension EU law, puts forward an identifiable result which cannot be thwarted by incompatible national measures<sup>84</sup>."

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<sup>80</sup> Court of Justice, ruling of 5-2-1963, case C-26/62, *Van Gend en Loos*, in ECR. I-1.

<sup>81</sup> Court of Justice, ruling of 15 -7-1964, case C-6/64, *Costa/ENEL*, in ECR I-1141.

<sup>82</sup> On the strength of what has been said, see the Court's reasoning in ruling *Francovich* ( 21-11-1991, C-9/90). Initially, the Court ruled out the possibility of conferring direct effect on the directive in question, (points 1-26), conversely, later on, it asserted the obligation of the defaulting Member State to pay compensation damages, thus grounding the said obligation on its precedent pursuant to the primacy of Community law (*Costa Enel*, cit. e *Simmenthal*, sent. 9-3-1978, causa C-106/77, in ECR I- 629).

<sup>83</sup> Article I-6 of the now old constitutional Treaty of Rome, stated that, as a general rule, the Union's legislation should prevail over domestic law. Although the latter rule has been "relegated" to a secondary plane along with the whole treaty, by the French and Dutch referendums, not to be restored anywhere in the draft Treaty of Lisbon's, its current relevance is evidenced above all by recalling that the declaration of art. I-6 attached to the constitutional Treaty, stressed how the latter provision reflected the relevant views of the First Instance Tribunal and the ECJ in their case law.

<sup>84</sup> K. Lenaerts and T. Corthaut, *Of Birds and Hedges, the Role of primacy in invoking norms of EU law*, 31 EUROPEAN LAW REVIEW No.3 287 (2006).

To support this contention, the focus may be shifted from a supranational -oriented perspective to another, domestic one, according to which in front of the Member States' constitutional Courts European law faces constitutional law. At a closer examination of the Polish and Czech Constitutional Courts' decisions on the European arrest warrant, two different expression of the same acceptance of the primacy of the third pillar EC legislation, with no direct effect, over domestic law, including the Constitution, can be identified.

In the Czech case, the judicial strategy leading to primacy was resorting to consistent interpretation, along with the manipulation of the wording of the relevant article 14 (4), so to provide constitutional validity to a European arrest warrant issued against a Czech citizen. In the second case, instead, the Polish Tribunal "tightened" in a constitutional parameter, which left no room to misunderstandings or creative interpretative ways, asserted Poland's respect for European law binding upon it in a different way. Accordingly, a constitutional change in the relevant parameter - which it possible to include within the fundamental principles at the heart of the Constitution - was considered necessary for attaining the full conformity with the EU law requirement.

Needless to say, if the primacy of European Union legislation over internal law can be in theory quite easily assumed with regard to the European dimension, its fulfilment on a national level is conditional upon the constitutional courts' acceptance and, in the end, openness to the "reasons of European law." It is possible to argue that, although the Czech and Polish Courts took a fundamentally different approach in reaching their conclusions, they both showed a certain willingness towards that openness. Conversely, the final outcome of the FCC's decision evidences the radically different, tough stance adopted by Germany as regards the European arrest warrant.

With regard to the final output of the decision, despite the constitutional parameter's predisposition to international and supranational pluralism would have allowed to somehow save the Framework Decision's implementing act, decided to annul it, coming in for much criticism, asserting the rule v. exception-ratio between article 16 (2)'s first and second passage.<sup>85</sup> Such an unconditioned, dismissive approach accounts for the FCC's presumption that European law - and particularly that stemming from the third pillar - may, in no event, override Basic Law.

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<sup>85</sup> The recent constitutional review of art. 16(2) added to the extradition ban of a German national the derogation rule of extradition to a Union Member State or before an international court, on the condition that the rule of law is upheld. (*Rechtsstaatliche Grundsätze*).

Such an output is not surprising. Unsurprisingly, as far as the counter-limit doctrine (*riserva dei controlimiti*) is concerned, the German Federal Court is in fact in good company in Europe, and recently also some Central-Eastern States' constitutional courts<sup>86</sup>, although with slightly different attitudes, have joined the club. What instead is truly amazing, as compared to that which emerged from the analysis of the Polish and Czech decisions, is the reasoning that led the German Court to declare the European arrest warrant implementing national law unconstitutional and void.

The FCC confined the power of the second paragraph of article 16 (2), introduced by the 2000 constitutional, providing - only under specific circumstances - for the possibility of a German national's extradition, to a mere exception to the rule embodied by the statement "freedom of extradition" granted to all German citizens, as per the first paragraph of article 16 (2). As has recently been observed<sup>87</sup>, the clause in the second paragraph of article 16 (2) differs significantly from the other derogatory clauses present within German Basic Law. The latter, in fact, serve the purpose of authorising strict restrictions to fundamental rights, whilst the former is instrumental to achieving the objectives set out in the European clause of article 23 (1) of the Constitution<sup>88</sup>. The axiological link between the paragraph added in 2001 to article 16(2) and the conditional opening to the supranational dimension, as codified in the first paragraph of article 23 of the Basic Law, appears, therefore, to be the main missing element in the FCC's legal reasoning which focused, instead, on another nexus, that between "the German people and their domestic law (point 67)" along with the need "to preserve national identity and statehood in the uniform European legal area (point 77)."

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<sup>86</sup> For an analysis of the tensions among the legal systems on fundamental rights, which seem to currently feature the supranational scenario, see Tizzano, *La Corte di giustizia delle Comunità europee ed i diritti fondamentali*, in *DIRITTO DELL'UNIONE EUROPEA* 839 (2005).

<sup>87</sup> TOMUSCHAT, *supra* note 44, 209, 212.

<sup>88</sup> According to which: "With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union, that is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end, the Federation may transfer sovereign powers by law, subject to the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of article 79."



The ruling makes clear that the only standards the German constitutional court is willing to uphold are, precisely, those relating to national identity and statehood which touch upon the core of society's fundamental values, and which establish that strong sense of belonging, though somewhat ethnocentric, so dear to Karlsruhe<sup>89</sup>'s judges as well. Accordingly, their distrust as to the scope of the protection of individual rights granted under the other legal systems in the European Union, merges with a firm belief that the right to a commensurate protection from those different criminal law systems, which cannot protect the legal rights of a person under investigation, is the exclusive right of German citizens themselves. In all likelihood, the gap between this rationale and the European arrest warrant's basic underlying values could not have been greater.

Firstly, as regards the above-cited distrust, both the Framework Decision and its interpretation by the European Court of Justice have called for mutual trust and solidarity among Member States, stressing their paramount importance as funding elements to the continuation of the European-wide cooperation in criminal matters.

Secondly, as to the exclusive nature of the protections granted to German citizens, the essence of the European framework decision, based on a pluralistic, open concept of citizenship, is to grant additional guarantees to those, regardless their nationality, having a special connection with the European arrest warrant's executing State, as witnessed under the previously mentioned article 5 of the Framework Decision. This article indeed, whilst specifying the guarantees to be granted by the State in particular cases, expressly provides for additional guarantees in the event that "the person subject to the arrest warrant for the purposes of prosecution is a national or resident of the executing Member State<sup>90</sup>", as well as by article 4 (6), of the same decision<sup>91</sup>.

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<sup>89</sup> In reference to the FCC decision of 12 October 1993, *Maastricht Urteil*, see particularly, J.H. Weiler, *Does Europe need a constitution? Demos, Telos and the Maastricht German Decision*, in 1, EUROPEAN LAW JOURNAL 219 (1995).

<sup>90</sup> In this case, the additional guarantees arise where the surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State to serve the custodial sentence or detention order passed against him in the issuing Member State. It may be noteworthy how numerous Central-Eastern European legal systems have come to share such an open and pluralistic concept of citizenship, regardless the strong influence in terms of national identity and ethnocentrism typical of the *idem sentire* in Eastern Europe. Suffice it to say that art. 411 letter 'e', of the Czech Criminal Code, as amended after the framework decision's adoption, provides, among the grounds for refusing to execute the EAW, the condition that the person being investigated "is a Czech citizen or a resident of the Czech Republic."

<sup>91</sup> As already pointed out, "the executing judicial authority may refuse to execute an arrest warrant issued for the purposes of execution of a custodial sentence or detention order, where the requested person

## H. Models of Conflict Settlement Between Legal Systems and Final Remarks

In the attempt to provide a conceptual conclusive framework of the different approaches of the German, Polish and Czech constitutional judges, the three decisions appear to be the expressions of their courts' different ways of tackling the delicate issue concerning the relationship between EU law and Member States' constitutional legal systems.

With the ruling on the European arrest warrant, the FCC proved that it advocates a certain "democratic statism", as defined by Mattias Kumm. This is, to state more clearly, "a normative conception of a political order establishing a link between three concepts: statehood, sovereignty and democratic self-government"<sup>92</sup>. Statehood and sovereignty<sup>93</sup> constitute, indeed, the *leitmotif* of the entire argument underlying the German judgment.

A decision based on such cornerstones could not but lead to the annulment of the national implementation of the EAW Framework Decision, as well as, more generally, as has emerged from the decision's analysis, to the refuse of any idea to "communitize" the European area which mainly reflects statehood and sovereignty among Member States: i.e. the cooperation in criminal matters entailed by the Union's third pillar. In such a state-oriented view of the European integration process, the Constitution represents the supreme *grund norm* conferring validity on any other, internal or external source of law, including European law, namely through the *Solange* jurisprudence's codification of article 23 of the Basic Law<sup>94</sup>.

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*is staying in, or is a national or a resident of the executing Member State and the State undertakes to execute the sentence or detention order in accordance with its domestic law."*

<sup>92</sup> M. Kumm, *Who is the final arbiter of constitutionality in Europe? Three conceptions of the relationship between the German federal constitutional court and the European Court of Justice*, 36 COMMON MARKET LAW REVIEW 351, 366 (1999).

<sup>93</sup> For a recent contribution on the primary role that sovereignty plays within the European scenario which is characterized, more and more, by conflicts arising within legal orders, see A. Jakab, *Neutralizing the sovereignty question*, 2 EUROPEAN CONSTITUTIONAL LAW REVIEW 375 (2006).

<sup>94</sup> With regard to the FCC decision, Julio Baquero Cruz is very critical when he stresses how «the German Constitutional Court saw the case through the exclusive prism of German Constitution, misinterpreting the framework decision». See J. Baquero Cruz, *The Legacy of the Maastricht Urteil decision and the Pluralist Movement*, EUI working paper, 2007/13.

The focus on the concept of *Staatsvolk*, giving rise to *objective ethnic factors*<sup>95</sup> as legitimate grounds for the Constitution's supremacy has, needless to say, further repercussions, beyond the relationship between Germany and the EU, on horizontal dimension which connect the European Union Member States. The most evident of these repercussions is that sense of poorly-hidden distrust, which permeates the entire judgement, of the other European legal systems' ability to secure an adequate level of rights protection. The sole guarantee left to the German citizen is the certainty of being, as far as possible, prosecuted, judged and eventually convicted by a domestic German court.

On the opposite side, to a closer look, The Polish Constitutional Tribunal did exactly what the most extremist "pro-Community activist" would ask for in case of an irreconcilable conflict between the Constitution and EU law. Does the Framework Decision clash with the constitutional norm of a Member State? Fine, we thus suggest to amend the Constitution and, meanwhile, the annulled provision remains temporarily in force. EC law 1 – Constitutional law 0; and *game over*.

It is not by chance that the Polish doctrine observed how the legislator's request to review the Constitution and the temporal limitation of effects of the decision proves that "the Constitutional Tribunal in fact recognized the supremacy of EU law. [...] It thus accepted that the Constitution itself was no longer an absolute framework for control- if it hinders the correct implementation of EU law, it should be changed. [...]...it seemed that in this judgment the Tribunal went further than the existing practice - it implicitly accepted the supremacy of EU law over constitutional norms<sup>96</sup>."

At a closer look, the two approaches considered herein (the German and Polish ones), while so different in their identification of which is the supreme law source of reference (in the former, the Constitution, in the latter, EU legislation), have something in common: the fact that they focus on identifying a supreme source of law. In other words, in both decisions, the game is played out on the field of the

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<sup>95</sup> Judge Kirchhof, according to many, the "mind" behind the Maastricht decision of the Federal Constitutional Court in 1993, encompasses these factors within a common language, a shared culture, with common historical roots. *Supra* note 92 at 367.

<sup>96</sup> See K. Kowalik-Banczyk, *supra*, note 58 at 1360, 1361. On the some line Angelika Nußberger, the judgment might seem to suggest that the tribunal denies the supremacy of EU law and is adopting an euroskeptical position, in fact, the opposite is true. - See A. Nußberger, *Poland: The Constitutional Tribunal on the implementation of the European Arrest Warrant*, 6 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW NO.1 162, 166.

sources-based theory delimited by the identification of hierarchical, predetermined and unassailable relations among the norms involved. Correspondingly, such an idea of the relationship between EC law and national constitutional law is neither flexible nor open to comparisons. It is not flexible because it is determined by a clear-cut, "once and for all" definition of these relations, which does not permit derogations and force upon the judicial interpreter the solution for the relevant conflict settlement. It is not open to comparisons because of the tendency to solve said conflicts by solely referring to the domestic constitutional landscape.

In this respect, it is worth noticing how both the Polish and German judgements, 1) did not recall relevant ECJ jurisprudence, 2) did not refer to decisions adopted by other European constitutional courts attempting to solve similar conflicts, and 3) never considered the possibility of a dialogue with the Court of Justice through a preliminary reference<sup>97</sup>. Conversely, the three elements do converge in the Czech decision and represent specific and concurring clues to demonstrate that the Brno Court opted to play the game of conflict settlement between domestic and EU law in a field characterised by an interpretation-based theory<sup>98</sup>, rather than a sources of law- hierarchical based theory, as it seems has been favoured by their colleagues in Karlsruhe and Warsaw.

A field, that one chosen by the Czech constitutional court, characterised from a substantive point of view, by the acceptance of the idea of constitutional pluralism as paramount parameter for the constitutional conflicts settlement, while, as to

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<sup>97</sup> Actually, Warsaw's Constitutional Tribunal wouldn't have been in the position to use the preliminary procedure's instrument provided for by art. 35 EU anyway, owing to the not particularly eurofriendly attitude of the Kaczynski twins' government, which, needless to say, had not carried out the (optional) jurisdiction attribution declaration to the ECJ, as per the same article of the Maastricht Treaty. The awaited change of strategy promised by the Civic Platform's leader Donald Tusk, who won the last political elections in October, has yet to come.

<sup>98</sup> In Italy, one of the most extensive study of this issue was done by Antonio Ruggieri. Amongst his numerous papers dealing with this subject, see at least the following, A. Ruggieri *Prospettive metodiche di ricostruzione del sistema delle fonti e Carte Internazionali dei diritti, tra teoria delle fonti e teoria dell'interpretazione*, *Ragion Pratica* 63 (2002); A. Ruggieri, *Tradizioni costituzionali comuni e "controlimiti", tra teoria delle fonti e teoria dell'interpretazione*, in *DPCE* 102 (2003). Such an axiologically-oriented view seems to share the reconstructive bases of MacCormick and of those supporting the constitutional pluralism rule in the framework of the relationship between the constitutional and supranational legal orders. See N. MacCormick, *Beyond the sovereign State*, 56 *MODERN LAW REVIEW* 1 (1993); N. MACCORMICK, *QUESTIONING SOVEREIGNTY, LAW STATE AND NATION IN EUROPEAN COMMONWEALTH* (1999); M. P. MADURO, *CONTRAPUNCTUAL LAW: EUROPE'S CONSTITUTIONAL PLURALISM IN ACTION*, (2003); N. Walker, *The idea of constitutionalism pluralism*, 65 *MODERN LAW REVIEW* 317 (2002).

methodology and procedure, the application of a dialogic and communicative theory of inter-constitutional law.

From a substantive point of view, the Czech court, although never fully giving up focusing its reasoning on the classical concept of sovereignty, limited transfer to the supranational system and the counterlimit doctrine's application, attempted to convey on an axiological basis, and without any idea of hierarchicalization between different but interconnected legal systems, the ultimate rationale behind the European arrest warrant implementing national law on the one hand, and the constitutionally protected values on the other. To sum up, the judges found that the fact that the Framework Decision does not always apply the double criminality requirement, does not infringe the constitutional principle of legality in criminal law, as the absence of the latter rule does not affect the principle "in relationship among the Member States of the EU, which have a sufficient level of values convergence and mutual confidence that they are all states having democratic regimes which adhere to the rule of law and are bound by the application to observe this principle<sup>99</sup>."

The process of ascertaining conformity of national rules implementing EU norms to the Constitution is not carried out through a strict application of the unassailable rule of EU law primacy over the whole domestic law, nor by assuming unconditioned supremacy of the Constitution over any other source of law, but rather with the objective of identifying the best solution to fulfil "the ideals underlying legal practice in the European Union and its Member States<sup>100</sup>." With regard to the second, methodological based, aspect, the Czech court fits its reasoning with in a much broader normative framework than a relevant constitutional parameter's literal interpretation would require. Through certain word-for-word quotes of European and comparative constitutional jurisprudence, far from giving evidence of "constitutional arrogance", has shown the willingness to be part in that project of *cooperative constitutionalism*, which seems to represent one way out from constitutional conflicts between the Community order and Member States' constitutional systems. Certainly enough, it is not the easiest road to take, but it is most likely the only one having a chance to strike the right balance

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<sup>99</sup> M. Kumm, *The jurisprudence of Constitutional conflict: constitutional Supremacy in Europe before and After the Constitutional Treaty*, 12 EUROPEAN LAW JOURNAL 262, 286.

<sup>100</sup> *Id.*

between different but interconnected legal systems, and to find consequently an “harmony in diversity”<sup>101</sup>.

There is no doubt that the Belgian *Cour d'Arbitrage* adhered to the above mentioned of *cooperative constitutionalism* project, showing its willingness to interact with the ECJ through the recourse to the preliminary reference procedure, still too seldom used by Member States' constitutional courts<sup>102</sup>.

As the European arrest warrant saga has brought into focus, this dialogue can take on harsh tones if the referring constitutional court, as was the case of the *Cour d'Arbitrage*, questions the validity of a Community norm and, especially when dissenting opinions emerge on the issue between the national and European courts, but it can enhance the mutual exchange, both culturally and legally, on national and supranational levels, which is such an essential requirement for the creation of a truly common European legal area.

Finally, it should be observed how the constitutional court's fears of losing “the right to the last word” justifying the non-use of the “institutional” communication instrument with the Community judges, as provided under article 234 EC, prove to be excessive from both a technical and methodological standpoint in light of a more general reasoning on possible multi-level interactions among European courts in the new millennium.

With reference to the first (technical standpoint), as the reasoning of the Danish Supreme Court decision, *Colson and Others versus Rasmussen*<sup>103</sup> shows, where the misapplication by Danish judges of a Community act in which breaches the domestic constitutional system are conditional on a preliminary request to the Court of Justice, via article 234 EC, for the interpretation and validity of the Community norm, it is not true, as has been duly observed<sup>104</sup>, that initiating the preliminary procedure entails depriving the constitutional courts of all their

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<sup>101</sup> See V. Onida, «Armonia tra diversi» e problemi aperti. La giurisprudenza costituzionale sui rapporti tra ordinamento interno e comunitario, QUADERNI COSTITUZIONALI 549 (2002).

<sup>102</sup> Besides the *Cour d'Arbitrage*, only the Austrian, *VfGH*, 10 March 1999, B 2251/97, B 2594/97, the Lithuanian Constitutional Courts (decision of 8-5-2007) and very recently and surprisingly the Italian Constitutional court (ordinance of 14-2-2008) have had recourse to the procedure provided by arts. 234 EC and 35 EU.

<sup>103</sup> *Caso Carlsen*, judgement of 6-5-1998.

<sup>104</sup> S.P. Panunzio, *I diritti fondamentali e le Corti in Europa*, in I DIRITTI FONDAMENTALI E LE CORTI IN EUROPA 25 (Panunzio ed, 2005).

powers. Applying the method used by the Danish Supreme Court, the final solution to the problem, in fact, would still depend on such courts, which could, in the event that the Luxembourg judges' opinion was unconvincing, apply – in practical terms – the counter limits doctrine, and thus overruling *in parte de qua*, the Treaty article on which is founded the alleged unconstitutional EC piece of legislation.

As to the second standpoint, dealing with methodology, it is plausible to state, supported by eminent scholars<sup>105</sup>, that constitutional judges' concern "to have the last word" reflect a questionable methodological approach, i.e. an "old fashion" expression of the pursuit of the "final power", or even "Kompetenz-Kompetenz." Such a concept which lead back to old-fashioned struggles for unity and the attainment of an exclusive centre of gravity is destined to give way instead to a network of complex, "multi-centered" relations amongst courts, fuelled by the principle of loyal cooperation between Community and constitutional judges, and reluctant, by definition, to favour any sort of hierarchal process whatsoever. A second consideration relates to the fact that, in times of *judicial globalisation*<sup>106</sup> and the *European Community of Courts*<sup>107</sup>, in the framework of the relationship between

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<sup>105</sup> G. Morbidelli, *Corti costituzionali e corti europee: la tutela dei diritti (dal punto di vista della corte di Lussemburgo)*, DIRITTO PROCESSUALE AMMINISTRATIVO 285, 341.

<sup>106</sup> C. L'Heureux-Dube, *The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation*, 114 HARVARD L. REV. 2049 (2001) A.M. Slaughter, *A Global Community of Courts*, 44 HARVARD INTERNATIONAL LAW JOURNAL 191 (2003); A.M. SLAUGHTER, *A NEW WORD ORDER* (2004); S. Choudhry, *Globalization in Search of Justification: Towards a Theory of Comparative Constitutional Interpretation*, 74 INDIANA L. J. 821 (1999); A. McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD JOURNAL OF LEGAL STUDIES 499 (2000); A. STONE SWEET, *ON LAW, POLITICS AND JUDICIALIZATION* (2002); A. STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE*, (2000); E. ORUCU, *JUDICIAL COMPARATIVISM IN HUMAN RIGHTS CASES* (2003).

<sup>107</sup> G. Martinico, *Il dialogo fra le Corti nell'arena del Gattopardo: l'Europa fra novità costituzionale e nostalgia di comportamento*, in *GIURISPRUDENZA COSTITUZIONALE E PRINCIPI FONDAMENTALI, ALLA RICERCA DEL NUCLEO DURO DELLE COSTITUZIONI* (S. Staiano ed. 2006). F. LICHERE, L. POTVIN SOLIS E A. RAYANOUARD (ED.), *LE DIALOGUE ENTRE LE JUGES EUROPÉENS ET NATIONAUX: INCANTATION OU REALITÉ*, (2004); G. Zagrebelsky, *Corti europee e corti nazionali*, in *I COSTITUZIONALISTI E L'EUROPA: RIFLESSIONI SUI MUTAMENTI COSTITUZIONALI NEL PROCESSO D'INTEGRAZIONE EUROPEA* 529 (S.P. Panunzio ed. 2002); S.P. PANUNZIO (ED.), *I DIRITTI FONDAMENTALI E LE CORTI IN EUROPA* (2005); P. FALZEA, A. SPADARO E L. VENTURA, *LA CORTE COSTITUZIONALE E LE CORTI D'EUROPA* (2003); V. Onida, *La tutela dei diritti davanti alla Costituzionale ed il Rapporto con le Corti sovranazionali*, in *LA TUTELA MULTILIVELLO DEI DIRITTI, PUNTI DI CRISI, PROBLEMI APERTI E MOMENTI DI STABILIZZAZIONE* 105 (P. Bilancia e E. De Marco 2004.); A. Barbera, *Le tre corti e la tutela multilivello dei diritti*, in *LA TUTELA MULTILIVELLO DEI DIRITTI* 89 (P. Bilancia e E. De Marco 2004); V. Zagrebelsky, *I giudici nazionali, La Convenzione e la Corte europea dei diritti umani*, in *La tutela multilivello dei diritti* 99 (P. Bilancia e E. De Marco 2004.); R. Alonso Garcia, *Il giudice nazionale come giudice europeo*, *QUADERNI COSTITUZIONALE* 111 (2005).

interconnected legal systems, a growing distance is emerging between the law degree of openness towards supranational law in the CEE constitutions and the more generous tendency to accept the European law integration into domestic law which Central and Eastern European constitutional courts are currently showing.

In an attempt to be less obscure, let us apply this consideration to the European arrest warrant case.

Upon an initial, "static" reading of the relevant constitutional norms, it has often been pointed out in the paper how an *ex ante* evaluation of the European arrest warrant Framework decision provisions, as regards the binding obligation on the executing State, except for the cases strictly provided for, to surrender a national to the requesting Member State appeared more in line with German Basic Law regulating extradition, than it appeared to be capable of complying with the corresponding provision of the Czech Fundamental Rights' Charter.

More generally, while always maintaining the relevant constitutional norm's perspective, it is evident that the "sovereign" nature of the Eastern European constitutions, and specifically the Polish and Czech ones, left little room for the constitutional courts' pro-European "enthusiasm", when compared to the flexibility theoretically allowed the FCC under the Basic Law's relevant provisions, which was never noted for a marked "sovereignty-focused" character (also in light of the historical context in which it took shape). Moreover, one should bear in mind that the European clause introduced upon the ratification of the Maastricht Treaty in 1993, further acquired the already existing predisposition of the German Constitution to amendments stemming from the European and international experience.

Notwithstanding the advantage of Germany as to the relevant constitutional parameter's construal as compared to the Central-Eastern European legal systems, and especially to the Polish and Czech ones, the "leap" of Warsaw and Brno constitutional courts, which were just examined herein, not only cancelled out this advantage, but it enabled Polish and Czech constitutional jurisprudence, despite a "super primary" which was rowing against, to accept the European law penetration in domestic legal system to a much greater extent than the FCC proved with its decision. In other words, this new season of European constitutionalism seems to be marked by a sense of exploration in terms of new argumentative techniques and original judicial interaction between national and European courts, which follows novel "off-piste" routes from those outlined by the interpretative routes suggested by applicable constitutional parameters.



To simplify even more, what is emerging seems a constantly growing bifurcation between the static reading of the constitutional interconnecting legal systems clauses and their dynamic judicial interpretation by constitutional courts

One final remark should be made. If certain constitutional courts seem to take different views from their respective constitutional law-makers who construed the “super primary” benchmark norms, it cannot be denied, however, that the same courts when considering the implementation-stage of Community norms, very often ask the ordinary legislator for greater cooperation, as well as the constitutional law-maker during the phase of the harmonization of the domestic system with the new supranational provisions.

Apart from the Court of Brno, which managed to settle the dispute within its constitutional interpretation boundaries by (ultimately) resorting to the principle of consistent interpretation, the Polish and German judges reached out to the legislative approach, both at a constitutional (*ex post*) and ordinary (*ex ante*) level. The first ones expressly ask the constitutional legislator to amend, within an eighteen month deadline, the constitutional principle for attaining full conformity with the constitution; the second, instead, formally addressed the ordinary legislator, thus “punishing” him - through the annulment of national regulation for the adoption of a Framework Decision - for not using the discretion that the same legal provision allowed for, in order to safeguard the “domestic factor” connecting German citizens to their homeland.

That said, by observing these horizontal dynamics, which involve the judiciary and Member States’ lawmakers, what trend appears to be emerging? Perhaps, the time when the Community integration process could move forward solely based on national and Community courts activism (while, constitutional or ordinary, national and European legislators remained inactive) is over. The same judges, in fact, perfectly aware of the difficulties in order to succeed, as well as of the inconvenience (and why not, a lack of democracy as well) of having the European integration road map project’s advancement exclusively determined by judicial activism, increasingly ask for lawmakers’ involvement in the coming season of cooperative constitutionalism in Europe<sup>108</sup>.

However, for the legislator, being involved is not enough. As the European arrest warrant saga shows, member states’ constitutional courts, seem more and more

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<sup>108</sup> This view is at the heart of the recent paper of A. Albi, *Supremacy of EC Law in the New Member States Bringing parliaments into the Equation of ‘Co-operative Constitutionalism*, 3 *European Constitutional Law Review* 25 (2007).

concerned not only about the *an* of a legislative intervention in the EU relevant area, but also about the *quomodo* of that intervention, which as was the case of Germany, cannot simply consist in a mere “telegraphic transmission” of a European legislation within any domestic legal system. The crucial question concerning the third pillar and the continuous steps towards the predefined goal of an ever closer integrated European Union is to which degree each and every of these EU integrative steps on the rocky road of “communisation” should be subject to a full constitutional control under the patronage of 27 constitutional courts. It is predictable that without an effective judicial communication and through mutually ignoring each others and the ECJ judgements in this area the Member States constitutional courts could soon find themselves along very different roads, without the guarantee that all these roads “will lead to Rome”<sup>109</sup>.

Waiting for awaited qualitative legislative improvements two and a half years after the “knock out” French and Dutch constitutional referendums ‘the European treaties’ reform process started to move forward again at least at a Community-wide level, and last December 13<sup>th</sup>, twenty-seven Member States became signatories to the new Reform Treaty<sup>110</sup> in Lisbon.

In terms of liberty, security and judicial space, there is significant news as well. All the innovations already envisaged by the outdated constitutional Treaty of Rome have, in fact, been adopted, starting from the suppression of the pillared structure and the broadening of the scope of legal instruments’ enforceability provided for under the first pillar, as a replacement for the framework decisions and conventions currently in force in the area of judicial cooperation in criminal matters.

The most relevant resulting advantage is the increased effectiveness of the principle of judicial protection, not only because the ECJ’s preliminary jurisdiction will be binding on Member States and no longer merely optional, but also because the Commission will have the possibility, which had been refused until now, to initiate infringement proceedings against Member States failing to transpose, for instance, a framework decision<sup>111</sup> in the field of judicial cooperation in criminal matters. That is the good news. The bad news is that not only the United Kingdom will not enforce the new regulation as regards the Court of Justice’s preliminary jurisdiction and the Commission’s role as guardian of the treaties in the area of judicial cooperation in

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<sup>109</sup> Similar doubts are risen by U. HUFELD, *supra* note 47, 868.

<sup>110</sup> See J. ZILLER, *IL NUOVO TRATTATO EUROPEO* (2007).

<sup>111</sup> *Id.*, 60.

criminal matters, but also that the rules will not be immediately applicable to all the other Member States on the Treaty's entry into force, but only much later, (or perhaps not so much, depends on the future of the Lisbon Treaty), as of 1 January 2014.