

EUROPEAN CONSTITUTIONALISM AND THE EUROPEAN ARREST WARRANT – IN SEARCH OF THE CONTRAPUNCTUAL PRINCIPLES’ LIMITS

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1. Introduction – national constitutional courts and their perspectives on the European constitutional order

1.1. *Setting the scene: problems with the European Arrest Warrant*

European Arrest Warrant Framework Decision (“EAW Framework Decision”)¹ is a problematic instrument in an ever growing Area of Freedom, Security and Justice.² Three constitutional courts in Europe have (so far) found its implementation to national law unconstitutional,³ while the fourth showed that there might be ways how to reconcile sometimes rigid constitutional provisions with its requirements.⁴ Interestingly, the Court of Justice is now deciding on legality of the EAW Framework Decision itself in a preliminary ruling procedure initiated by the Belgian *Cour d’Arbitrage* (court with constitutional jurisdiction).⁵ The questions referred concern a possible conflict of abolition of the dual criminality requirement in case of some criminal offences laid down in the framework decision with fundamental human rights and a question

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¹ 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190 of 18.7. 2002, p. 1.

² See generally Walker, “In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey” in Walker (ed), *Europe’s Area of Freedom, Security and Justice* (Oxford, 2004).

³ Polish Constitutional Tribunal, judgment of 27 April 2005, P 1/05, available in English at <http://www.trybunal.gov.pl/eng/summaries/summaries_assets/documents/P_1_05_full_GB.pdf>, hereinafter referred to as the PCT’s *EAW Judgment*; German Federal Constitutional Court, judgment of 18 July 2005, 2 BvR 2236/04, available in English at:

<http://www.bundesverfassungsgericht.de/en/decisions/rs20050718_2bvr223604en.html>; Supreme Court of Cyprus, judgment of 7 November 2005, Ap. No. 294/2005. The decision in Greek with a short English summary is available as a Council document No 14281/05 of 11. 11. 2005. For a short information on it see Mitsilegas, “The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU”, 43 CML Rev 1277 (2006), p. 1298.

⁴ Judgment of the Czech Constitutional Court of 3 May 2006, Pl. ÚS 66/04, English (shortened) translation of the judgment is available at <http://test.concourt.cz/angl_verze/doc/pl-66-04.html>, hereinafter referred to as the CCC’s *EAW Judgment*.

⁵ Case C-303/05 *Advocaten voor de Wereld*, OJ C 271, 29.10.2005, p. 14. For more information on the case see Council document No. 11518/05 of 4.8. 2005.

examining the very legal basis of the framework decision. The proceedings before the ECJ therefore tackle some of the issues, which were at stake before the constitutional courts.⁶ At this moment, only Advocate General Colomer's Opinion has been delivered⁷ relying in some parts on the constitutional court, which alone was merciful with the EAW - the Czech Constitutional Court (CCC).

This article will put these three decisions into a wider perspective, benefiting from the discussions, which have already emerged.⁸ It will use the problem of the EAW as a laboratory of the European constitutionalism to examine how European courts (with an emphasis on plural) understand their role therein. We will see that the questions arising there do not only concern the relationship between various legal (constitutional) orders. What shall not be overlooked, they also ask where the limits of law are and how far the judicial function in a system of democratic constitutional governance reaches. M. Maduro's "contrapunctual principles"⁹ and M. Kumm's "principle of best fit"¹⁰ are used as a background for this examination. This article will try to point out some of their problematic aspects.

Before looking specifically at the EAW Framework Decision, it seems appropriate to briefly describe how these three courts view the relationship of their respective constitutions to the constitutional order of the EU.

1.2. *European integration viewed by the constitutional courts*

There is probably no constitutional court in Europe, which is so vigilantly observed as the German Federal Constitutional Court (FCC). Much has been written about its most important judgments in *Solange I*¹¹ and *II*,¹² *Maastricht*¹³ and *Banana Dispute*.¹⁴ There is no need for repetition here.¹⁵ Essentially, the FCC regards itself as the final arbiter of the EU competences

⁶ Concretely, before the CCC and the FCC.

⁷ Opinion of A.G. Colomer of 12 September 2006 in Case C-303/05, *Advocaten voor de Wereld*, not yet reported.

⁸ See particularly case comments of the Polish decision - and Leczykiewicz, 43 CML Rev, (2006), 1181-1191 and the German decision - Hinajeros Parga, 43 CML Rev. (2006) 583-595 and Sadurski, "'Solange, chapter 3': Constitutional Courts in Central Europe - Democracy - European Union", ■■■. Kühn, "Constitutional Monologues, Constitutional Dialogues or Constitutional Cacophony? European Arrest Warrant Saga in Germany, Poland and the Czech Republic", not yet published paper presented at the "Cross-cutting workshop 'Integration or Absorption? Legal discourses in the enlarged Union'", Hannover University, 28.-30.9. 2006, on file with the author, provides a very interesting comparative perspective on the three decisions, focusing at other aspects of them.

⁹ Maduro, "Contrapunctual Law: Europe's Constitutional Pluralism in Action", in Walker (ed), *Sovereignty in Transition* (Oxford, 2003), 501-537.

¹⁰ Kumm, "The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty", 11 ELJ 262 (2005).

¹¹ Judgment of 29.5. 1974, 2 BvL 52/71, BVerfGE 37, 271, in English A. Oppenheimer, *The Relationship between European Community Law and National Law: the Cases. Volume I* (Cambridge, 1994) at 440.

¹² Judgment of 22 October 1986, 2 BvR 197/83, BVerfG 73, 339, in English Oppenheimer 1994, op. cit. n. 11 at 461.

¹³ Judgment of 12 October 1993, 2 BvR 2134 and 2159/92, BVerfGE 89, 155, in English Oppenheimer 1994, op. cit. n. 11 at 526.

¹⁴ Judgment of 7 June 2000, 2 BvL 1/97, BVerfGE 102, 147, in English Oppenheimer, *The Relationship between European Community Law and National Law: the Cases. Volume II* (Cambridge, 2004)

¹⁵ See particularly Mayer, "The European Constitution and the Courts - Adjudicating European constitutional law in a multilevel system", The Jean Monnet Program Working Paper 9/03, available at <<http://www.jeanmonnetprogram.org/papers/03/030901-03.html>> at 12-18, Kumm, "Who is the final arbiter of constitutionality in Europe?: three conceptions of the relationship between the German Federal Constitutional Court

viewed from the perspective of the German Constitution. According to the *Maastricht* judgment, the FCC may ultimately determine whether the actions of the EU institutions remain within the scope of the competences transferred by the Federal Republic of Germany. It also underscores that some competences can never be transferred to the EU because they are part of unassailable principles determined by Article 20 BL. The FCC also reserves the control whether the human rights protection standard remains structurally equivalent to that afforded by the German constitution.

The Polish Constitutional Tribunal (PCT) took a more radical approach in its *Accession Treaty Decision*,¹⁶ using much harsher wording.¹⁷ The scope of this article does not allow analysing the decision in detail,¹⁸ what is however relevant here is that the PCT expressly stated that two constitutional provisions must be balanced: one establishing the supremacy of the Polish Constitution (Article 8 (1)) and the other stating that Poland shall respect international law binding upon it. The latter is translated by the PCT as a ‘requirement to respect and be sympathetically predisposed towards appropriately shaped regulations of international law binding upon the Republic of Poland’.¹⁹ This means that the Constitution shall be interpreted in a manner sympathetic to EU law. However, this interpretation is limited, since

[i]n no event may it lead to results contradicting the explicit wording of constitutional norms or being irreconcilable with the minimum guarantee functions realised by the Constitution. In particular, the norms of the Constitution within the field of individual rights and freedoms indicate a minimum and unsurpassable threshold which may not be lowered or questioned as a result of the introduction of Community provisions. Such a collision may *in no event* be resolved by assuming the supremacy of a Community norm over a constitutional norm. Furthermore, it may not lead to the situation whereby a constitutional norm loses its binding force and is substituted by a Community norm, nor may it lead to an application of the constitutional norm restricted to areas beyond the scope of Community law regulation. In such an event the Nation as the sovereign, or a State authority organ authorised by the Constitution to represent the Nation, would need to decide on: amending the Constitution; or causing modifications within Community provisions; or, ultimately, on Poland’s withdrawal from the European Union.²⁰

and the European Court of Justice”, 36 CML Rev 351 (1999) at 362-374 and Aziz, “Sovereignty lost, sovereignty regained? Some reflections on the Bundesverfassungsgericht’s Bananas Judgment”, 9 Col JEL 109 (2002).

¹⁶ Judgment of 11 May 2005, K 18/04, English summary available at <http://www.trybunal.gov.pl/eng/summaries/documents/K_18_04_GB.pdf>.

¹⁷ It was described as ‘unconditional national constitutional sovereignty’. See Chalmers et al, *European Union law: text and materials* (Cambridge, 2006), pp. 199-201.

¹⁸ For a more detailed discussion of this judgment see Sadurski, op. cit. n. 8, pp. 23-28. An earlier version of my article examined the “Accession Treaty Decision” in detail and was published as “Pluralismo constitucional europeo tras la ampliación. Un análisis de la jurisprudencia comunitaria del Tribunal Constitucional polaco” *Revista española de Derecho Europeo* No 16/2005 (transl. D. Sarmiento).

¹⁹ *Accession Treaty Decision*, PCT op. cit. n. 16, point 2.1, cf. para. 10 of the English summary.

²⁰ *Accession Treaty Decision*, PCT op. cit. n. 16, point 6.4, quote taken from paras. 13 and 14 of the English summary, emphasis added. The summary must be read with great caution since it has a different structure of argumentation than the original decision.

In the last sentence the PCT stresses the importance of political process for resolving constitutional conflicts. It played an important role in the PCT's decision concerning the implementation of the EAW Framework Decision, as we will see further.²¹

The Czech Constitutional Court took a somewhat middle-way approach, much closer to the FCC than the PCT. To quote the most recent formulation of its view on the relationship between the Czech Constitution and European Union law:

In its judgment no. Pl ÚS 50/04 of 8 March 2006, the Constitutional Court refused to recognize the ECJ doctrine insofar as it claims absolute primacy of EC law. It stated that the delegation of a part of the powers of national organs upon organs of the EU may persist only so long as these powers are exercised by organs of the EU in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the substantive law-based state. Understandably that, unless such an exceptional and highly unlikely eventuality comes to pass, the Constitutional Court, guided by the above-mentioned ECJ doctrine, will not review individual norms of Community law for their consistency with the Czech constitutional order.²²

In the judgment referred to by the CCC (delivered earlier than this one),²³ the Court formulated the relationship somewhat differently. While here it firmly states that it 'refused to recognize the ECJ doctrine insofar as it claims absolute primacy of EC law', in the previous judgment, to which this sentence refers, the CCC stated that it was not 'obliged to give its view on this ECJ doctrine'.²⁴ Subsequently it only mentioned other constitutional courts' practice (Italian, German, Irish and Danish constitutional and supreme courts) without actually denying the ECJ's version of primacy so openly (although it actually did so implicitly in another part of the judgment).²⁵ This may suggest that the precise formulation of the relationship is not yet settled at the CCC and that particular judges may differ in their views.²⁶

²¹ See section 3.1.2. *infra*.

²² *EAW Judgment*, CCC, *op. cit.* n. 4, para. 53.

²³ For a more detailed discussion of this judgment see Sadurski, *op. cit.* n. 8, pp. 7-11.

²⁴ Judgment of 8 March 2006, Pl ÚS 50/04, available in English at <http://test.concourt.cz/angl_verze/doc/p-50-04.html>, *Sugar Quota Judgment*, part V, section A). Unfortunately, only recently the CCC has started to divide its judgments into numbered paragraphs. Therefore, more precise reference cannot be provided.

²⁵ *Ibid.*, in part V, section B): '[...] the delegation of a part of the powers of national organs may persist only so long as [sic!] these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the substantive law-based state. Should one of these conditions for the transfer of powers cease to be fulfilled, that is, should developments in the EC, or the EU, threaten the very essence of state sovereignty of the Czech Republic or the essential attributes of a democratic state governed by the rule of law, it will be necessary to insist that these powers be once again taken up by the Czech Republic's state bodies; in such determination the Constitutional Court is called upon to protect constitutionalism [...]. As concerns the essential attributes of a democratic state governed by the rule of law, according to Art. 9 para. 2 of the Constitution of the Czech Republic, these remain beyond the reach of the Constituent Assembly itself.

²⁶ Recently, a current ECJ judge and former CCC justice Jiří Malenovský call on the CCC to change it: Malenovský, "K nové doktríně Ústavního soudu ČR v otázce vztahů českého, komunitárního a mezinárodního práva" ["As to the New Doctrine of the Czech Constitutional Court Concerning the Relationship Between Czech, Community and International Law"], *Právní rozhledy* 21/2006, 774-783. As will be seen below, there are other ambiguities in the CCC's approach; see the text accompanying n. 150.

Before turning to these courts' judgments concerning implementation of the EAW Framework Decision, let us briefly touch the issue of extraditing own nationals, which was at the heart of all the three cases.²⁷

2. The EAW Framework Decision and the problem of extraditing own nationals

The EAW Framework Decision has been regarded as the first and most striking example of the extensive judicial cooperation in criminal matters adopted within the third EU pillar.²⁸ It arose from the need to respond to the danger of terrorism and transborder crime, something that has been felt more acutely after 11 September 2001. Its main purpose is to simplify and expedite procedures for extradition of persons convicted or accused of crimes between the EU Member States. It took the procedure from the hands of politicians and made it a purely judicial matter whereby only the courts of the Member States cooperate without the need to turn to the executive, which traditionally participated in the process of extradition.²⁹

However, the implementation of the framework decision caused constitutional problems in several Member States, mainly because their constitutions prohibited extraditing their own nationals³⁰ as required by the framework decision. It is questionable how deeply this restriction is embedded in constitutional traditions of European states; it has never developed in the Anglo-Saxon legal tradition³¹ as opposed to the continent.³²

As M. Plachta observed, '[t]he justification of the rule of non-extradition of nationals largely derives from a jealously 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'.³³ Conversely, the criminal justice cooperation within in the Area of FSJ is based on the Member States' mutual trust in their systems of criminal justice.³⁴ The CCC's

²⁷ For a more comprehensive analysis of the Framework Decision's constitutional problems see Mitsilegas, *op. cit.* n. 3, pp. 1286-1289.

²⁸ See Alegre and Leaf, "Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant", 10 *ELJ* 200 (2004), Douglas-Scott, "The rule of law in the European Union - putting the security into the Area of freedom, security and justice", 29 *ELR* 219 (2004), Wouters and 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 *CML Rev* 909 (2004) and Mitsilegas, *op. cit.* n. 3.

²⁹ As Douglas-Scott points out (see n 85 at 224), the extradition procedure is political in nature, which was shown e.g. by the case of general Pinochet – see *Case R. v Bow Street Metropolitan Stipendiary Magistrate and Others Ex p. Pinochet Ugarte (No.2)* [2000] 1 A.C. 119.

³⁰ See for an extensive analysis of this rule in national and international law Plachta, '(Non-)Extradition of Nationals: A Neverending Story?', 13 *Emory International Law Review* 77 (1999). For a list of European countries, which had had this rule in their constitutions before they implemented the EAW Framework Decision see *ibid* at 109.

³¹ It has been expressly rejected in the United Kingdom in 1878 by a special Royal Commission on Extradition. In the US see judgment of the Supreme Court in *Neely v. Henkel*, 180 U.S. 109, 123 (1900). See Plachta, *op. cit.* n. 30 at 86-87.

³² This applies with some exceptions: e.g. Nordic countries do not prohibit extradition of own nationals among them (Plachta, *op. cit.* n. 30 at 99-100).

³³ Plachta, *op. cit.* n. 30 at 88. The issue of prohibition on extradition of own nationals has also been controversial on international plane and the debate was even more fuelled by establishment of the International Criminal Court. See Deen-Racsmany, "A New Passport to Impunity? Non-Extradition of Naturalized Citizens versus Criminal Justice", 2 *Journal of International Criminal Justice* 761 (2004). It is also questioned whether the prohibition is a rule of international law: Plachta, *op. cit.* n. 30 at 77.

³⁴ See Tampere European Council Presidency Conclusions, 15 and 16 October 1999, para. 33, EAW Framework Decision, 6th and 10th recital of the Preamble, Joined Cases C-187/01 and C-385/01 *Gözütok and Brügger* [2003] ECR

decision itself contains a comprehensive and quite compelling historical overview of extradition's development, which is based on the same considerations.³⁵ While the 1996 convention on extradition between the Member States³⁶ (a measure which preceded the EAW Framework Decision) allowed a refusal to extradite nationals by way of reservations, the EAW Framework Decision did not make this possible any more. Some Member States changed their constitutions in order to be able to fully implement the framework decision, as was the case of Germany.³⁷ Poland nor the Czech Republic nevertheless was not amongst them.³⁸ The Polish Constitution³⁹ states in Article 55 (1) that '[t]he extradition of a Polish citizen shall be forbidden', while Article 14 (1) Czech Charter of Fundamental Rights and Basic Freedoms⁴⁰ formulates the prohibition in much more open terms: 'No citizen may be forced to leave his homeland'.

The following part shall provide material for a more abstract analysis of Maduro's contrapunctual principles and Kumm's principle of best fit. It takes the decision one after another, focusing only on aspects, which will be relevant for that abstract discussion.⁴¹

3. Facing the conflict: constitutional courts compared

3.1. *The Polish Constitutional Tribunal: taking European commitments seriously?*

3.1.1. The limits of a consistent interpretation according to the PCT

It had not taken long for a question of constitutionality of the relevant provisions of the Criminal Procedure Code to arise before the PCT. It was the Regional Court of Gdańsk, which submitted the question to the PCT on 27 January 2005 in connection with a procedure concerning the surrender of a Polish citizen for criminal prosecution against her in the Netherlands.⁴²

When facing the issue, the PCT examined the scope of the constitutional prohibition on extradition. It wondered whether the duty of consistent interpretation exists also within the third pillar in case of framework decisions. We must bear in mind that at the time when the PCT was deciding the case, the ECJ's ruling in *Pupino* confirming the PCT's opinion was yet to be delivered; only Advocate General J. Kokott's opinion had been already published.⁴³ The PCT did

I-1345, para. 38. See Mitsilegas, op. cit. n. 3 and also Alegre and Leaf, op. cit. n. 28 and Wouters and Naerts, op. cit. n. 28 at 919-923.

³⁵ *EAW Judgment*, CCC, op. cit. n. 4, para. 68 and 69. A very comprehensive historical overview may be also found in Kühn, op. cit. n. 8.

³⁶ OJ 1996 C 313/12.

³⁷ See the text accompanying n. 70.

³⁸ It was expected that it would put the implementation of the EAW Framework Decision in doubts as regards its constitutionality. See Weigend and Górski, 'Die Implementierung des Europäischen Haftbefehls in das polnische Strafrecht', 117 *Zeitschrift für die gesamte Strafrechtswissenschaft* 193 (2005) at 196-197.

³⁹ English translation available e.g. at

<http://www.trybunal.gov.pl/eng/Legal_Basis/constitution.htm>.

⁴⁰ English translation available e.g. at <http://test.concourt.cz/angl_verze/rights.html>.

⁴¹ For a more complete discussion of particular decisions see their comments, n. 8, and "Contrapunctual Principles in Disharmony".

⁴² For more information regarding procedural and factual background of the case, see Leczykiewicz, op. cit. n. 8, pp. 1181-1183. See this comment, or "Contrapunctual Principles in Disharmony", pp. 9-13, also for a more detailed elaboration of some arguments not analysed here.

⁴³ Opinion of AG J. Kokott in Case C-105/03 *Pupino* [2005] ECR I-5285.

not find this obligation relevant in the present context, since it held that the obligation was limited by the ECJ itself: ‘it may not worsen an individual’s situation, especially as regards the sphere of criminal liability’.⁴⁴ Unfortunately, the PCT did not refer to specific ECJ’s judgments to show on what basis it constructed such a limitation to the principle of consistent interpretation. Some counter-arguments may be raised against such a simple conclusion.

Even if the Community principle of consistent interpretation had been applicable, such consistent interpretation, contrary to what the PCT stated, sometimes led to the “worsening of an individual’s situation” given its application also between individuals and its role in giving full effect to EC law.⁴⁵ It is true that the ECJ stated in *Arcaro* that consistent interpretation ‘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’,⁴⁶ however *Arcaro* concerned exactly such a situation.⁴⁷ This is related to another counter-argument: surrendering a person does not affect one’s criminal liability. A person is liable in criminal law of the State issuing the EAW regardless of whether s/he is finally surrendered or not. Cases which prohibited the imposition of criminal liability by way of consistent interpretation⁴⁸ did in no way concern procedural law,⁴⁹ to which surrendering pertains.⁵⁰ Thus when referring to the exclusion of consistent interpretation imposed by the ECJ, the PCT avoided the question too easily.⁵¹

However, it would have most likely reached the same conclusion given the limits imposed on consistent interpretation by the Polish Constitution itself. In the *Accession Treaty Decision* the PCT limited the effects of consistent interpretation inasmuch as it may in no event lead to a contradiction with the explicit wording of the Constitution where the constitutional standard of fundamental rights protection forms a particular “unsurpassable threshold”.⁵² Thus the interpretation of the concept of extradition would have had to be made by reference to the Polish Constitution alone anyway.

The PCT did not use yet another chance for an interpretation of the Polish Constitution in conformity with EU law. According to some arguments presented to the PCT, it was possible to find the ground for limiting the scope of constitutional ban on extraditing Polish nationals in Article 31 (3) of the Constitution. This provision allows limiting constitutional rights and freedoms by statute when it is necessary for the protection of democracy, public security or public order. Such limitations may nevertheless not violate the essence of rights and freedoms. It

⁴⁴ *EAW Judgment*, PCT, op. cit. n. 3, part III, point 3.4.

⁴⁵ See S. Prechal, *Directives in EC Law*, 2nd Ed. (Oxford, 2005) pp. 184 and 214-215.

⁴⁶ Case C-168/95 *Arcaro* [1996] ECR I-4705, para. 42.

⁴⁷ For arguments supporting the view that consistent interpretation may allow imposing obligation on an individual even by public authorities (i.e. amounting to a reverse vertical effect) see Prechal op. cit. n. 45 at 214-215.

⁴⁸ Case 80/86 *Kolpinghuis* [1987] ECR 3969 recently confirmed in Case C-60/02 X [2004] ECR I-651. See Prechal op. cit. n. 45 at 203-208.

⁴⁹ AG J. Kokott in *Pupino* also distinguished between substantive criminal law, determining criminal liability, where the consistent interpretation cannot be used, and criminal procedure, where it can. See para. 42 of her Opinion.

⁵⁰ That consistent interpretation is excluded only if it imposed criminal liability (as opposed to rules of criminal procedure) is expressly confirmed by the ECJ in *Pupino*: see paras. 45-46. It may be also added that because the consistent interpretation here concerns conflicting rules *within national law* as opposed to situations when it seeks to remedy missing or incorrect implementation of a Community norm into national law, the limits of the consistent interpretation may be more relaxed. See however FCC’s arguments described in the text accompanying n 76.

⁵¹ For a thorough analysis of the limits of consistent interpretation in criminal cases see Lenaerts and Corthaut, “Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law”, 31 *ELRev* 287 (2006), pp. 296-297.

⁵² See note 20 and the text accompanying it.

was submitted to the PCT that the essence of the right not to be extradited abroad lies in the right to protection afforded by the Republic of Poland. It was also submitted the Polish State must guarantee the fair and public trial before an independent and impartial court of law in a democratic state based on the rule of law. Extraditing Polish nationals to other EU Member States would therefore not violate that right's essence.⁵³ If we put this argument in the light of *Pupino*, where the ECJ held that while the principle of consistent interpretation cannot lead to a *contra legem* interpretation of national law, '[t]hat principle does, however, require that, where necessary, the national court consider the whole of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision', we may safely contend that the PCT could follow the interpretation suggested.⁵⁴ The PCT however did not do so arguing that the essence of the right not to be extradited is that a Polish citizen is prosecuted before a *Polish* court. Surrendering the citizen would, according to the PCT, amount to violating the essence of his right not to be extradited.⁵⁵

This PCT's conclusion may be supported by another consideration not mentioned by the PCT itself: the ban on extraditing Polish nationals is formulated rather as a straightforward *rule* than a *principle*.⁵⁶ As such it cannot be balanced in the same way as other constitutional rights, which are formulated structurally as principles; the ban simply applies in "all or nothing" fashion, it is not a simple optimisation command.⁵⁷ However, it can still be argued that the derogation rule contained in Article 31 (3) of the Constitution speaks about "the essence of the right", which must be protected when a legislator limits the scope of the right. Thus as with principally structured rights, also in case of rights structured as rules what is balanced is the *essence* of the rule and not the *rule itself*. And the essence extracted from the rule may then be formulated as a right to be prosecuted before a Polish court or a court in a democratic state observing the rule of law. As we see, this extracted essence is in structure much closer to a principle (on which the rule is based) and as such open to balancing.⁵⁸

Finally, the PCT rejected any relevance of the EU citizenship for the outcome of the decision.⁵⁹ It admitted that the content of the Polish citizenship has changed with Poland's accession to the EU. The PCT considers that in general the Union citizenship means that a citizen of any Member State is not, according to Community law, a "foreigner" in the other Member States. However, this cannot change the interpretation of the constitutional ban on extraditing Polish citizens. The citizenship is according to the PCT a fundamental criterion for considering the legal status of an individual. Any weakening of the legal meaning of the citizenship when reconstructing the State's obligations, particularly so categorically formulated as the ban on extradition, would lead to a reduction in the obligations of citizens related to the obligations of the State. A "dynamic

⁵³ *EAW Judgment*, PCT, op. cit. n. 3, Part III, point 4.1.

⁵⁴ *Pupino*, op. cit. n. 43, para. 47.

⁵⁵ *EAW Judgment*, PCT, op. cit. n. 3, Part III, point 4.2.

⁵⁶ On this distinction see Alexy, (Rivers transl), *A Theory of Constitutional Rights* (Oxford, 2002). See also review essay of this book, Kumm, "Constitutional rights as principles: On the structure and domain of constitutional justice", 2 *ICON* 574 (2004) at 576-578. I owe this argument to M. Kumm.

⁵⁷ See Kumm, op. cit. n. 56 at 579.

⁵⁸ This of course also depends on to what theory of constitutional rights the court subscribes. E.g. R. Dworkin excludes any balancing of rights with policies whatsoever. See Dworkin, "What Rights Do We Have?" in *Taking Rights Seriously* (Cambridge, Mass, 1978), 266-278. See also Dworkin's "Principle, Policy, Procedure" in *A Matter of Principle* (Cambridge, Mass, 1985), 72-103.

⁵⁹ *EAW Judgment*, PCT, op. cit. n. 3, Part III, point 4.3.

interpretation” cannot change the constitutional role of the citizenship. In conclusion, the PCT declared the relevant provision of the Criminal Procedure Code unconstitutional.⁶⁰

3.1.2. Temporal limitation of the decision’s effects as a case of balancing competing principles

Up to this point, the decision may be very much criticized because the PCT probably had interpretative ways to avoid the constitutional conflict and for some reasons did not use them. However, the efforts it then made in order to avoid an *actual* conflict and incoherence in the European legal order arising from its decision and the way in which it reasoned to reach this result may serve as an excellent example of what constitutional courts should do in cases of true irreconcilable conflicts between their constitutions and EU law.

The PCT found that the mere annulment of the conflicting provision was neither equivalent to nor sufficient for conformity of law to the Constitution. To achieve conformity, an action by the legislature was necessary. It referred to Article 9 of the Constitution, which states that ‘[Poland] shall respect international law binding upon it’.⁶¹ A mere annulment of the provision implementing Poland’s obligations stemming from the EAW Framework Decision would have inevitably led to a breach of this constitutional principle. Therefore a change of Article 55(1) of the Constitution and subsequent reintroduction of the annulled provision into the Polish legal order were considered necessary for attaining the full conformity with the Constitution.⁶²

The PCT found a way out: prospective temporal limitation of effects of the decision so that the constitutional legislator could adopt the necessary amendments to the Constitution and subsequently reintroduce the annulled provision into the Polish legal system, while the provision temporarily remains in force. The PCT stressed that such temporal limitation of the effects of the decision ‘activates a duty of immediate initiation of legislative activities by the competent authorities’⁶³ and that it also means that courts continue to be under a duty to temporarily apply the annulled provision.⁶⁴

The PCT limited the effects of its decision for a maximum period allowed by Article 190 (3) of the Constitution – 18 months. In order to justify the maximum limitation it referred to constitutional values,

According to the Tribunal, above all the constitutional obligation of Poland to observe the international law, which binds it, but also care to assure security and public order, the assurance of which is enhanced by the surrender of indicted persons to other states, so as to make them face trial, and also due to the fact that Poland and other Member States of the European Union are bound by the community of principles of the political system, assuring proper administration of justice and trial before an independent court of law, are constitutionally justifying the prolongation of the application of [the contested provision], even if that is connected with the deprivation of Polish citizens of the guarantees resulting from the prohibition of extradition within the scope, which is necessary for the implementation of the institution of surrender on the basis of the EAW. Argumentation in

⁶⁰ *EAW Judgment*, PCT, op. cit. n. 3, Part III, point 4.4.

⁶¹ See n 19 and the text accompanying it.

⁶² *EAW Judgment*, PCT, op. cit. n. 3, Part III, point 5.

⁶³ *EAW Judgment*, PCT, op. cit. n. 3, Part III, point 5.3, second paragraph.

⁶⁴ *EAW Judgment*, PCT, op. cit. n. 3, Part III, point 5.5.

favour of this is provided additionally by due care to realise the value consisting of Poland's credibility in international relations, as a state respecting the fundamental principle of such relations, namely that *pacta sunt servanda*.⁶⁵

Here the PCT put its decision into the European context, seeing the importance of functional cooperation among the Member States. It is submitted that although the PCT probably could escape the constitutional conflict by interpreting the prohibition of extradition in a more EU-opened way,⁶⁶ when it came to the conclusion that the conflict cannot be avoided by way of interpretation, it used all its powers to avoid negative consequences of such a conflict.⁶⁷ As we will see, the FCC was not so careful about the consequences of its judgment for the European legal order.

3.2. *Federal Constitutional Court's reservations to the mutual trust between the Member States*

It is ironic that the case before the FCC arose from a constitutional complaint lodged by a person suspected of being an active and important member of a terrorist organisation, which committed the terrorist attack of 11 September 2001 that later boosted extensive cooperation of the EU Member States in criminal matters. Mamoun Darkazanli, having both German and Syrian citizenship, was prosecuted in Spain.⁶⁸ He was suspected of being a key person in the European offshoot of Al-Quaeda. Allegedly, he had financially supported Al-Quaeda's network and connected its members in Europe. On 16 September 2004 the central local court No. 5 of the *Audiencia Nacional* in Madrid issued the EAW against him and asked for his surrendering from Germany. After an ordinary court had confirmed the EAW, Darkazanli lodged a constitutional complaint with the FCC.

The FCC considered the complaint to be well founded and declared the implementing legislation void. It also reversed the original extradition decision of the ordinary court. The suspected terrorist was therefore not finally surrendered to Spain. Although the FCC did not challenge the framework decision itself, one line of its objections against the implementing legislation undermined the whole approach to the judicial cooperation in criminal matters within the third EU pillar, based on mutual trust among Member States. The next part of the article will examine it in details.

3.2.1. The purpose of protecting German nationals from extraditing in the view of the FCC – rights stemming from the citizenship

Article 16 BL originally prohibited extradition of German citizens. This provision was amended in 2000⁶⁹ and now reads: '[n]o German may be extradited to a foreign country. The law can

⁶⁵ *EAW Judgment*, PCT, op. cit. n. 3, Part III, point 5.2, first paragraph.

⁶⁶ See particularly arguments discussed in the text accompanying n 53.

⁶⁷ See Leczykiewicz, op. cit. n. 8, pp. 1189-1190 for potentially disapproving reaction of ordinary courts (as they may decide to "apply the Constitution directly" and not respect the temporal limitation) and p. 1191 for a legislative proposal submitted to the Polish Sejm.

⁶⁸ According to some sources, he was close to the hijackers of the planes in the New York and Washington attacks on 11 September 2001. See Bernstein, 'Court lets German linked to terror go', *International Herald Tribune* of 20.7.2005 available at

http://www.iht.com/bin/print_ipub.php?file=/articles/2005/07/19/news/germany.php (29.12.2005).

⁶⁹ 47th amendment, *Bundesgesetzblatt* 2000, part I, p. 1633.

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*.⁷⁰ The law allowing extradition of German nationals must therefore respect the limits imposed by the rule of law. What exactly it means is left to the FCC's interpretation. The FCC considered that in case of implementation of the EAW Framework Decision,⁷¹ the German legislator did not use the discretion allowed by the framework decision in conformity with the Basic Law, since it had not protected the special link that German citizens have to their domestic legal order, which was established by them. The FCC also upheld another ground for annulment submitted by the complainant, which was the lack of sufficient judicial protection in the surrender procedure.⁷²

From the special association of German citizens with their legal order the FCC derives the obligation of the German legislator to make extradition of German nationals conditional upon more stringent requirements than those actually made by the German legislator.⁷³ The framework decision allows (optional) grounds for refusal, which were not transposed by the implementing act. The FCC particularly stressed the possibility to refuse execution of the EAW if it relates to offences which are regarded by German law as having been committed in whole or in part on the German territory or which were committed outside the territory of the Member State requiring extradition and German law does not allow prosecution for the same offence when committed outside the German territory.⁷⁴ In such circumstances, a "significant domestic connecting factor" is established⁷⁵ and the confidence of a German citizen in the German legal order shall be protected. The implementing law does not provide for this ground for refusing to execute the EAW issued by another Member State and the German legislator therefore went beyond the limits of Article 16 BL.

According to the FCC, the implementing act also breached the principle of non-retroactivity of criminal laws, since in view of the FCC, substantive retroactivity of criminal law prohibited by the Basic Law may be equal to a situation whereby a German citizen, who has so far been absolutely protected from extradition, shall be prosecuted for acts which have no significant connecting factor to another country and which were at the time of their commitment not punishable in Germany.⁷⁶ It is fair to have in mind, however, that on this point the EAW Framework Decision was innocent, as it allowed in Article 34 for certain temporal limitations. Again, it was a failure of the German legislator to use this possibility in a proper way.

If this were the only justification for declaring the implementing act null and void, much less could be objected to the decision.⁷⁷ Where Member States have discretion in carrying out their

⁷⁰ Article 16 (2), emphasis added. English translations of the Basic Law are taken from Tschentscher, *The Basic Law (Grundgesetz): The Constitution of the Federal Republic of Germany (May 23rd, 1949)* (Jurisprudencia, 2002,2003), available at <<http://www.ecln.net>>.

⁷¹ Gesetz zur Umsetzung des Rahmenbeschlusses über den Europäischen Haftbefehl und die Übergabeverfahren zwischen den Mitgliedstaaten der Europäischen Union (Europäisches Haftbefehlsgesetz – EuHbG), Bundesgesetzblatt 2004, part I, p. 1748. The text is available at http://www.eurowarrant.net/documents/cms_eaw_14_1_EJN576.pdf.

⁷² For this argument, which will not be analysed here, see Hinajeros Parga, op. cit. n. 8, p. 586. See the FCC, op. cit. n. 3, paras. 102-116.

⁷³ FCC, op. cit. n. 3, paras. 64-101.

⁷⁴ Article 4 (7) of the EAW Framework Decision.

⁷⁵ FCC, op. cit. n. 3, paras. 85 and 86.

⁷⁶ FCC, op. cit. n. 3, para. 99.

⁷⁷ Judge Lübke-Wolff was of a similar opinion in her dissent – see FCC, op. cit. n. 3, paras. 182-184.

obligations under EU law, nothing should *in principle* prevent constitutional review of the exercise of this discretion.⁷⁸ However, the FCC did not limit itself to this. In its reasoning it made several objections against mutual trust which Member States should have in their systems of criminal justice.

3.2.2. FCC's distrust to other Member States' criminal justice systems

According to the FCC, the cooperation based on a *limited* mutual recognition within the EU third pillar, which does not presuppose general harmonisation of criminal laws of the Member States, is also - from the point of view of the principle of subsidiarity – a way to preserve national identity and statehood in the uniform European legal space.⁷⁹

The key word in the previous sentence was “limited”. While the ECJ stated in *Gözütok and Brügge* that ‘there is a necessary implication that the Member States have mutual trust in their criminal justice systems 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’,⁸⁰ the FCC takes a very different perspective.⁸¹

The FCC understands the condition that the extradition of German nationals must be made in accordance with the rule of law as ‘an expectation referring to the requesting Member State [...] in terms of structural correspondence, as has also been set out in Article 23.1 of the Basic Law. When permitting the extradition of Germans, the legislature must examine in this context whether the prerequisites of the rule of law are complied with by the requesting authorities.⁸² In the following paragraph, the FCC admits that - because every Member State must respect the principles listed in Article 6 (1) EU – a *basis* for mutual trust exists. However, in the FCC's opinion, this does not liberate the legislator from the duty to react if the trust is shaken, *regardless of the procedure pursuant to Article 7 EU*. Moreover, according to the FCC the Basic Law requires that in *every individual case a concrete review* of whether the rights of the prosecuted are respected should be made.⁸³ According to the FCC:

The legislature will have to revise the grounds for the inadmissibility of the extradition of Germans and will draft the case-by-case decision on extradition in such a way that it is an act of application of the law which is based on weighing. Admittedly, primary Union law raises the question of the homogeneity of the Member States' structures in Article 6 of the Treaty on European Union. The mere existence of this provision, of a mechanism for imposing sanctions that secures the structural principles (Article 7 of the Treaty on European Union) and the existence of an all-European standard of human rights protection established by the European Convention for the Protection of Human Rights and

⁷⁸ This is a point on which all constitutional courts concerned concurred: see *EAW Judgment*, PCT, op. cit. n. 3, part III, point 2.4 and *EAW Judgment*, CCC, op. cit. n. 4, para. 54. See also Hinajeros Parga, op. cit. n. 8, p. 589-590.

⁷⁹ FCC, op. cit. n. 3, para. 75. While the majority did not examine this principle in relation to the framework decision, Judge Broß's dissenting opinion proposes to declare implementing law void on this basis.

⁸⁰ *Gözütok and Brügge*, op. cit. n. 34, para. 33. See also n. 34 supra.

⁸¹ See also Mitsilegas, op. cit. n. 3, p. 1296.

⁸² FCC, op. cit. n. 3, para. 78.

⁸³ FCC, op. cit. n. 3, para. 119. The case-by-case examination is according to the FCC also necessary for determining whether the extradition would be proportionate. While the FCC allows presumption of proportionality in cases where a ‘significant connecting factor to a foreign country’ exists, ‘specific weighing of the individual case is required if the act has been committed entirely or partly in Germany but the result has occurred abroad’. (see para. 88).

Fundamental Freedoms do not, however, justify the assumption that the rule-of-law structures are synchronised between the Member States of the European Union as regards substantive law and that a corresponding examination at the national level on a case-by-case basis is therefore superfluous. In this respect, putting into effect a strict principle of mutual recognition, and the extensive statement of mutual confidence among the states that is connected with it, cannot restrict the constitutional guarantee of the fundamental rights.⁸⁴

As a result, in case of German nationals the whole of the EAW approach must be replaced by a procedure under the which all circumstances of the case and also the system of criminal justice of the requesting Member State will be examined. Therefore although the FCC did not review the obligations stemming directly from the EAW Framework Decision, the decision it reached may have the same or even worse effects. While the Polish Constitutional Tribunal forcefully call on the Polish constitutional-law maker to make appropriate changes to the Polish Constitution, the FCC considers the German Basic Law to be the standard against which all European cooperation in the field of criminal justice must be measured.

3.2.3. Consistent interpretation excluded

Before we move to the last court examining the EAW, we must make just a short note concerning a possibility to avoid constitutional conflict by way of consistent interpretation, as it is an important point for our more abstract analysis, which follows in section 4.3. In that regard the FCC was very succinct:

The constitutional prerequisites placed on the extradition of Germans and the principles of legal clarity and legal certainty require that the [implementing Act] is understandable by itself and that it sufficiently predetermines the decisions on applications for the grant of extradition. The expression in concrete terms, which is called for by the constitution, must manifest itself in the text of the statute; this cannot be achieved by interpreting the European Arrest Warrant Act in conformity with the constitution [...].⁸⁵

Although the FCC was deciding its case after the ECJ delivered the judgment in *Pupino*, it did not consider its relevance at all, which invoked criticism from one of the dissenting judges.⁸⁶ The Czech Constitutional Court, facing a very similar dilemma, opted for a consistent interpretation.⁸⁷ Its decision completes the picture offered by the Polish and German courts in a very interesting manner: it dealt with the very same issues, but in both instances, it found interpretative ways to avoid direct constitutional conflict.

3.3. *Saving a (non-diligent?) legislator - the Czech Constitutional Court*

The case arose from a petition lodged by a group of Parliamentarians, representing the Civic Democratic Party, which had opposed adoption of the implementing legislation from the very beginning of the legislative process. One head of their petition pointed out the alleged conflict of the possibility to extradite Czech citizens with Article 14 (1) Czech Charter of Fundamental

⁸⁴ FCC, op. cit. n. 3, para. 119.

⁸⁵ FCC, op. cit. n. 3, para. 118.

⁸⁶ Judge's Gerhardt's dissent, FCC, op. cit. n. 3, para. 189. For a detailed analysis of the FCC's avoiding consistent interpretation see Hinajeros Parga, op. cit. n. 8, pp. 586-593.

⁸⁷ See part 3.3.3. *infra*.

Rights and Basic Freedoms, which states ‘No citizen may be forced to leave his homeland’.⁸⁸ Amongst the other claims, important for our analysis here, was abolition of the double criminality requirement, breaching according to the petitioners the principle of legality of criminal sanctions.

3.3.1. The CCC and effects of third pillar law in the Czech legal order

Before the CCC actually reviewed the contested provisions, it had made a couple of more general statements regarding the position of EU law in the Czech constitutional order. Apart from the general formula, limiting “the absolutistic claim of primacy made by the ECJ”⁸⁹ and applying to the EU law in a narrower sense as well,⁹⁰ it stressed that the framework decision, which had to be implemented to the Czech legal order, was not ‘Community law in the classic sense’ and that it lacked direct effect.⁹¹ It somehow elaborated on the differences between Community and Union (in a narrower sense) law.⁹² The CCC reminded that “[t]he consequences of these differences for the current nature and status of such norms in relation to Member State legal orders, has not as yet been definitively and clearly settled in the case-law of the ECJ”.⁹³ From the point of view of the Czech constitutional order this is very important, as the CCC in its *Sugar Quota Judgment* stated that

If membership in the EC brings with it a certain limitation on the powers of the national organs in favour of Community organs, one of the manifestations of such limitation must necessarily also be a restriction on Member States’ freedom to determine the effect of Community law in their national legal orders [...].⁹⁴

In a way, the CCC admitted that it would have to “wait” until the ECJ, an ultimate interpretative authority, determines what effects third pillar law precisely had in the Czech legal order. While the CCC admitted that in *Pupino* the ECJ declared the obligation of consistent interpretation applicable also in the third pillar, it did not make clear whether the principle of primacy applies there as well.⁹⁵ The CCC however opined that it did not have to send a preliminary reference to the ECJ, since it found a way to interpret national law in conformity with the EAW Framework Decision. The question of primacy of Union law could therefore have left opened.⁹⁶

3.3.2. Extraditing Czech citizens: “EU citizenship brings responsibility as well”

As regards the first petitioners’ argument concerning prohibition to ‘force to leave one’s homeland’, it has already been mentioned that the CCC had much easier task than its Polish counterpart. There is not enough space to go into details of the CCC’s reasoning; what is

⁸⁸ See n. 40 supra.

⁸⁹ See the text accompanying n. 22 supra.

⁹⁰ This was severely criticized by the dissenting Judge Wágnerová.

⁹¹ *EAW Judgment*, CCC, op. cit. n. 4, para. 55.

⁹² *EAW Judgment*, CCC, op. cit. n. 4, para. 57.

⁹³ *EAW Judgment*, CCC, op. cit. n. 4, para. 58.

⁹⁴ *Sugar Quota Judgment*, CCC, op. cit. n. 24, part V, section B).

⁹⁵ *EAW Judgment*, CCC, op. cit. n. 4, para. 58.

⁹⁶ *EAW Judgment*, CCC, op. cit. n. 4, para. 60. It is still somewhat unclear under what conditions the CCC would send a reference to the ECJ. Apart from the *Sugar Quota Judgment* (part V, section B)), where the CCC avoided to give a clear guidance, the CCC touched this in the judgment of 25 January 2006, II. ÚS 14/04, where it even seemed to deny that it would consider itself to be a court of last instance in a sense of Article 234 EC (this judgment was however delivered by a senate, not the plenum of the CCC).

however remarkable was the way in which the CCC posited the EAW into the European context, seeing the EAW's virtues for the particular Member States as well the Union as a whole:

If Czech citizens enjoy certain advantages, connected with the status of EU citizenship, then naturally in this context that a certain degree of responsibility must be accepted along with these advantages. The investigation and suppression of criminality, which takes place in the European area, cannot be successfully accomplished within the framework of individual Member States, but requires extensive international cooperation. The contemporary standard for the protection of fundamental rights within the European Union does not, in the Constitutional Court's view, give rise to any presumption that this standard for the protection of fundamental rights, through invoking the principles arising therefrom, is of a lesser quality than the level of protection provided in the Czech Republic.⁹⁷

The CCC denied comparative arguments presented by petitioners (referring to some other countries' constitutional amendments).⁹⁸ The CCC itself stressed that its position is fundamentally different from the Polish Constitutional Tribunal, since 'the Polish Constitution leaves no room at all for it to be interpreted in harmony with the state's obligations towards the EU'.⁹⁹

Perhaps the most interesting part of the CCC's reasoning, which concerns the alleged ban on extradition, dealt with the substance of the protection provided by the Czech Constitution. Contrary to the PCT, the CCC held that its core lied in the protection against surrendering 'for criminal prosecution to a state where the standards of criminal proceedings do not meet the requirements for criminal proceedings enshrined in the Czech Constitutional order'.¹⁰⁰ While the PCT insisted that a prosecution of a Polish citizen must take place before a *Polish* court,¹⁰¹ the CCC accepted that what sufficed was a fair trial before a court respecting the Czech standards. And in contrast to yet another constitutional court's opinion, this time the German FCC, the CCC trusted other Member States' systems of criminal justice, with an express reference to the ECJ's judgment in *Gözütok and Brügge*.¹⁰² Apart from the safeguard enshrined in the EAW Framework Decision, allowing for suspension of executing the EAW in case of an issuing Member State's 'persistent breach of the principles set out in Article 6 (1) EU, determined by the Council pursuant to Article 7',¹⁰³ the CCC mentions a possibility enshrined in the Czech law:

Section 377 of the Criminal Procedure Code can be considered as something of a safeguard, guaranteeing on the constitutional law plane the protection of Czech citizens. According to this provision, the request of a foreign state's organ may not be granted if its granting would constitute a violation of the Constitution of the Czech Republic or such provision of the Czech legal order which must be adhered to without exception, or if the granting of the request would damage some other significant protected interest of the Czech Republic.

This 'safeguard' proved to be crucial when the CCC considered the second major argument submitted by petitioners: the alleged breach of principle of legality of criminal sanctions.

⁹⁷ *EAW Judgment*, CCC, op. cit. n. 4, para. 71. See also para. 70.

⁹⁸ *EAW Judgment*, CCC, op. cit. n. 4, para. 73-78.

⁹⁹ *EAW Judgment*, CCC, op. cit. n. 4, para. 77.

¹⁰⁰ *EAW Judgment*, CCC, op. cit. n. 4, para. 85.

¹⁰¹ See the text accompanying n. 53-55 supra.

¹⁰² See n. 34 supra.

¹⁰³ Albeit this safeguard is mentioned only in the Preamble to the EAW Framework Decision.

3.3.3. Legality of criminal sanctions – consistent interpretation employed

Similarly to the implementation in Germany, the Czech legislator did not use the possibility to provide for additional grounds for refusing to execute an EAW, if it relates to offences, which would be committed in the Czech territory.¹⁰⁴

As we will see, the CCC was much more generous with the legislator, while the consistent interpretation was instrumental for saving the implementing legislation's constitutionality. The CCC denied that a procedural measure of surrendering a person without examining whether his conduct is punishable according to Czech laws would amount to the breach of the principle of legality. When surrendering a person, the Czech Republic does not exercise its own criminal jurisdiction. It only cooperates with other Member States in exercising their criminal jurisdiction. The list of offences provided in the EAW Framework Decision does not specify the offences themselves; it only indicates conducts, which are criminally punishable in particular Member States. It is only criminal legislation of particular Member States, which specify the offences, in line with the principle of legality.

The problem may arise, however, if a person commits an offence, which is not punishable according to the Czech laws on the Czech territory, but at the same time is criminal in another Member State that subsequently issues a EAW against him. This situation is covered by the provision of the EAW Framework Decision. However, the Czech legislator did not implement this (optional) ground for refusing to execute the EAW. Contrary to the German FCC, which excluded consistent interpretation of the implementing legislation, the CCC stated:

Although Article 4 para. 7 of the Framework Decision was not explicitly implemented into the Czech legal order, in accordance with the principle of the constitutionally conforming interpretation, Czech criminal justice organs must pay heed to Czech citizens' trust in the fact that their conduct within the Czech Republic will be governed by Czech criminal law. If Czech citizens remain within the territory of the Czech Republic, domestic law is applied to their conduct, from which also follows these persons' constitutionally protected trust that legal consequences laid down in Czech law will be attributed to their legal conduct. The general value of legal certainty finds expression, on the constitutional plane, in the principle formulated in Art. 39 of the Charter,^[105] and on the sub-constitutional plane is expressed in the general principle of § 377 of the Criminal Procedure Code, [...].¹⁰⁶

Czech courts, in cases where an execution of the EAW would be constitutionally intolerable, which would be the case mentioned above, may therefore (indirectly) rely on the EAW Framework Decision and refuse to execute the EAW. The CCC also stressed that this protection applies not only to Czech citizens, but also to 'other persons, authorized to stay within the territory of the Czech Republic'.¹⁰⁷ The Czech implementation of the EAW Framework Decision was therefore upheld.

* * *

¹⁰⁴ EAW Framework Decision, Article 4 (7).

¹⁰⁵ Which states: "Only a law may designate the acts which constitute a crime and the penalties or other detriments to rights or property that may be imposed for committing them".

¹⁰⁶ *EAW Judgment*, CCC, op. cit. n. 4, para. 111.

¹⁰⁷ *EAW Judgment*, CCC, op. cit. n. 4, para. 113.

The preceding has not been an autotelic comparative exercise. It should have prepared ground for the following test in our constitutional laboratory. How much are abstract concepts, formulated by M. Maduro and M. Kumm, useful for correct understanding of what actually happens in the European constitutional practice? Maduro's contrapunctual law principles are designed 'to guide ordinary state of affairs'¹⁰⁸ rather than situations of constitutional collisions. Kumm's investigation of such situations must be therefore taken as another indispensable framework for the present analysis. We will see that the principles may find their limits in practice as well as on a conceptual level.

4. The decisions in the light of Principles of Contrapunctual Law

4.1. *Pluralism, consistency and coherence, universalisability*

In Maduro's view, the courts should firstly subscribe to the idea of pluralism: 'any legal order (national or European) must respect the identity of the other legal orders; its identity must not be affirmed in a manner that either challenges the identity of the other legal orders or the pluralist conception of the European legal order itself'.¹⁰⁹ To apply this principle would therefore mean that no court should assume supremacy of its legal order, be it the constitutional courts on one hand or the ECJ on the other. Pluralism means that no formal hierarchy exists among the applicable legal orders.¹¹⁰

Observance of this principle is not actually tested in the cases concerned, since although the PCT and the CCC met the situation of conflict between national constitution and a EU law provision, in their argumentation neither of them questioned identity and autonomy of EU law. The FCC was in an even easier situation since it reviewed the implementing act *within* the boundaries of discretion left for national legislators by the framework decision.¹¹¹ However, all courts are far from accepting that in some cases their Constitutions should defer to the unwritten Constitution of the EU.¹¹²

Secondly, the courts should seek consistency and vertical and horizontal coherence in the whole of the European legal order. This is a very ambitious claim. Maduro proposes that '[w]hen national courts apply EU law they must do so in a manner as to make those decisions fit the

¹⁰⁸ See Maduro, op. cit. n. 9, p. 532.

¹⁰⁹ Ibid at 526.

¹¹⁰ "Primacy in application" in *every* case of conflict is therefore not the way towards the *real* pluralism.

¹¹¹ See n. 78 supra.

¹¹² See part 1.2. supra.

decisions taken by the [ECJ] but *also by other national courts*'.¹¹³ It may be added that the ECJ too should take national courts' decisions seriously.¹¹⁴

Thirdly, the courts should reason in universal terms, thus taking into account the European context. '[A]ny judicial body (national or European) should be obliged to reason and justify its decisions in the context of a coherent and integrated European legal order'.¹¹⁵ According to Maduro, this means that courts should use reasons, which may be adopted by other courts within the EU. Consequently, under this principle the courts are not allowed to rely on specific provisions of their constitutions as justification because it could lead to 'evasion and free-riding'. The second and the third principle may be put together as they both require that courts should not reason only from the point of view of their own legal order, but that they should take into account the other national courts primarily the EU and also legal orders of other Member States, which would be an obligation of the ECJ too, apart from its role as an authoritative interpreter of EU law within its own context.

Here the explanatory force of the contrapunctual principles shows its best: although the final outcome of the PCT's and the FCC's decisions was the same (annulling national implementation), two *very* different approaches can be identified. The principle of coherence was probably not satisfied fully with regard to the PCT's treatment of the principle of consistent interpretation.¹¹⁶ On the other hand, the PCT expressly referred to other Member States, which had to amend their constitutions in consequence of their inconformity with EU law.¹¹⁷ Thus the PCT uses constitutional practice in Europe as a further justification for its reference to the constitutional legislator who is obliged to attain conformity of the Polish legal order with its EU commitments. Moreover, the PCT referred to the wider context of the EAW Framework Decision, urging the legislator to take its obligation seriously and to move towards a more advanced level of cooperation in criminal matters with the other Member States:

The system of surrendering persons among judicial bodies created in the [EAW Framework Decision] shall serve not only realization of Union's aims, which is creation of a common area of freedom, security and justice. The Tribunal stresses again that the institute of the EAW has a far-reaching importance for proper functioning of the Polish justice and

¹¹³ Maduro, op. cit. n. 9, p. 528, emphasis added. For even more ambitious claim, envisaging all constitutional actors, see Besson, "From European Integration to European Integrity: Should European Law Speak with Just One Voice?", 10 ELJ 257 (2004). There is no room to repeat the debate in general jurisprudence on a theory of "law as integrity", proposed by Dworkin in his *Law's Empire* (Cambridge, Mass, 1986) although it would be certainly beneficial; other, more important reservations are made in section 4.2. For a very accessible introduction (not only because it is available on Internet) see Dickson, "Interpretation and Coherence in Legal Reasoning", *Stanford Encyclopaedia of Philosophy* available at <<http://plato.stanford.edu/entries/legal-reas-interpret>>.

¹¹⁴ This is necessary consequence of non-hierarchical organisation of the EU judiciary. See Komárek, "Federal elements in the Community judicial system: Building coherence in the Community legal order", 42 CML Rev 9 (2005), particularly at 27-30.

¹¹⁵ Maduro, op. cit. n. 9, pp. 529-530.

¹¹⁶ See the text accompanying n 55 and 59.

¹¹⁷ *EAW Judgment*, PCT, op. cit. n. 3, Part III, point 5.7, mentioning France amending its Constitution in order to make ratification of the Maastricht Treaty possible, the same case of Spain and finally Germany, abolishing its rule prohibiting women's service in armed forces after the ECJ's judgment in Case 285/98 *Tanja Kreil* [2000] ECR I-69.

primarily for strengthening its internal security; thus attainment of its functioning should be the highest priority of the Polish legislator.¹¹⁸

Conversely, the German FCC took no account of possible consequences of its decision on the European level and annulled the implementing law with immediate effect. The decision brought some confusion into the European legal order. The PCT managed to avoid similar effects without having to sacrifice the autonomy of the national constitution. The FCC's decision provoked a severe reaction from the part of the Spanish *Audiencia Nacional* in Madrid,¹¹⁹ whose EAW was dismissed in consequence of the FCC's decision. The Regulatory Chamber of this court (not deciding on a particular case but giving a decision on a question of principle) decided that because Germany excluded itself from the European system of cooperation in criminal matters the *Audiencia Nacional* would (in line with *the principle of reciprocity*) treat German requests for surrender as conventional requests for extradition. Even if this amounts to another breach of EU law, this time committed by the Spanish court, it is a necessary consequence of the absence of proper implementation of the EAW Framework Decision in one Member State.

However, the most serious refusal of the principle of universalisability follows from the FCC's examination whether the partial abolition of the ban on extraditing German citizens could not in itself breach the Basic Law, in particular its unassailable provisions. The FCC came back to its *Maastricht* judgment and examined the possibility to extradite German citizens to other EU Member States in the light of unassailable structural principles of the Basic Law. When reaching the conclusion that the limitation of the protection of German citizens against extradition did not encroach upon these principles, the FCC stressed the role of the national citizenship. The FCC considered that the EU prohibition of discrimination on grounds of nationality is not widely construed, but limited only to specific areas, particularly in the sphere of fundamental freedoms.¹²⁰ This should have helped the Member States to preserve their national identities, expressed in their fundamental political and constitutional structures, which EU law protects too.¹²¹

This statement may have far-reaching consequences. In essence, it means that a degree of differentiation (or even discrimination) based on nationality among EU citizens must be preserved in order not to deprive the national citizenship of all meaning. The idea of universalisability orders the exact opposite: no free-riding or evasion should be possible for a particular Member State or its citizens.

It should be pointed out, however, that the PCT did not fully satisfy the principle of universalisability either since this principle requires that the reasoning used by one court of law

¹¹⁸ *EAW Judgment*, PCT, op. cit. n. 3, Part III, point 5.9. So did the CCC (see n. 97 supra), which is not expressly analysed here, as it upheld national implementation.

¹¹⁹ Decision of 21.7. 2005. I am grateful to Daniel Sarmiento for providing me with detailed information regarding the reaction of the Spanish High Court.

¹²⁰ Para. 74. However, one may add to the FCC's statement that the construction of the EU citizenship depends largely on the ECJ, which does in no way take such a limited understanding. Dissenting opinion of Judge L ubbe-Wolff mentions the ECJ's recent ruling in Case C-209/03 Bidar [2005] ECR I-2119, to argue that the ECJ used this provision rather extensively. See Hilson, "What's in a right? The relationship between Community, fundamental and citizenship rights in EU law", 29 ELRev 636 (2004).

¹²¹ The FCC refers in this respect to Art. 6 (3) EU and to Art. I-5 (1) of the European Constitutional Treaty.

should be universalisable by all other EU courts. The PCT could therefore never use the constitutional prohibition concerning *exclusively* Polish citizens.¹²²

The problem goes to the core of the principles of contrapunctual law: what to do in cases of conflicts, which cannot be avoided by way of interpretation? Maduro's version of the principle of universalisability would force the court in such a situation to set aside provisions of the national constitution. However, this to a certain extent contradicts the idea of pluralism: EU law would in this case trump national constitution. Maduro provides no detailed analysis of such an open conflict (although he sees this limitation of national constitutions as a necessary commitment limiting European pluralism).¹²³ This is when Kumm's analysis of constitutional conflicts comes into play because it deals exactly with these kinds of situations.

4.2. *Contrapunctual principles and the constitutional evolution*¹²⁴

What Kumm expects from national constitutional judges is to give up the supremacy of the national constitutions if it is required by *the principle of best fit*, which guides the interpretation of the national and European constitutions in case of their conflict. *In principle*, Kumm thinks the court's shift from national to European supremacy is possible because national constitutional supremacy is not (or is no longer) 'a defining feature of national legal practice'.¹²⁵ If it were, the national judge trying to admit the supremacy of EU law would not be considered to participate in national legal practice. In Kumm's illustrative example,¹²⁶ he would be like a chess player moving a bishop horizontally instead of diagonally and claiming checkmate after this rules-breaking move. As the rules of moving chess pieces are at the heart of practice of playing chess, those who do not obey these rules are not considered playing chess. Similarly, if the national constitutional supremacy were at the heart of national legal practice, shifting to the EU Constitution supremacy would disqualify its perpetrator from national legal practice.¹²⁷ Kumm does not take this view and says that unlike chess players, courts may change the rules of the national legal practice and they therefore may finally acknowledge the supremacy of EU law, which 'would merely be another step along a path of legal integration that has guided the development of national legal practice for some time'.¹²⁸ Thus Kumm proposes that national constitutional courts give precedence to their specific constitutional provisions only if those provisions are clear and specific and if they reflect the national commitment to a constitutional essential.¹²⁹

Kumm relies on *the principle of best fit*, which assumes that both national and European constitutional orders are built on the same normative ideals. These ideals are, according to

¹²² Cf. for this the CCC, which expressly reminded ordinary courts that the protection provided applies to 'other persons, authorized to stay within the territory of the Czech Republic'. See the text accompanying n. 107.

¹²³ Maduro, op. cit. n. 9, p. 524.

¹²⁴ This is a completely new argument, which *complements (not replaces)* arguments made in "Contrapunctual Principles in Disharmony", pp. 22-25, which are not repeated here. Although it attempts to be a critique of Kumm's principle of best fit, it does not intend to undermine significance of his contribution for our understanding of constitutional conflicts. It however suggests that his principle blurs an important distinction.

¹²⁵ Kumm, op. cit. n. 10, pp. 269-274.

¹²⁶ Which originates in Hart', *The Concept of Law*, 2nd Ed (Oxford, 1994), pp. 56-57.

¹²⁷ Kumm, op. cit. n. 10, p. 271.

¹²⁸ *Ibid*, p. 285.

¹²⁹ *Ibid*, p. 298.

Kumm, the liberty, equality, democracy, and the rule of law, which are common to the EU Member States and the EU itself. According to Kumm:

The task of national courts is to construct an adequate relationship between the national and the European legal order on the basis of the best interpretation of the principles underlying them both. The right conflict rule or set of conflict rules for a national judge to adopt is the one that is best calculated to produce the best solutions to realise the ideals underlying legal practice in the European Union and its Member States.¹³⁰

Kumm's principle of best fit may be identified as a version of Dworkin's conception of law as integrity. According to it, 'propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice.'¹³¹ It has been already mentioned that such accounts of law have been for long contested in general jurisprudence.¹³² The following shall make no attempt to repeat the critiques raised; it however seems mostly pertinent to pick up some when we explore constitutional conflicts in the European Union.

One of the criticisms raised against law as integrity is that it obscures boundaries between *positive law* and other, *non-legal considerations*, which are relevant in adjudication and as such legitimately employed by courts. This distinction is important because *only* the former are supported by *legal authority*.¹³³ As J. Raz puts it: '[law as integrity] advocates acting on principles which may never have been considered or approved, either explicitly or implicitly, by any legal authority, and which are inferior to some alternatives in justice and fairness'.¹³⁴ Opponents to law as integrity do not claim that judges are not required to make non-legal choices. But these are '*non-legal considerations*' and judges have *discretion* to opt for a solution.¹³⁵

Contrary to this, Kumm tries to convince us, that the shift from the national constitutional supremacy is a legal choice and that judges does not have an option but to pay heed to European Constitutional Supremacy – except to some reservations, which would “fit” European legal practice as a whole, hence satisfying his “principle of best fit”.¹³⁶ To explore completely what Kumm proposes would require more complex jurisprudential argument than can be made here.

¹³⁰ Ibid, p. 286.

¹³¹ Dworkin, op. cit. n. 113, p. 225.

¹³² See n. 113 supra.

¹³³ This is a “positivistic” claim. Before discarding positivism as irrelevant in today's legal practice, see Gardner, “Legal Positivism: 5½ Myths” 45 Am.J.Juris. 199 (2001), particularly pp. 214-218, for it is a very good justification why not doing so. But an often-misled understanding of legal positivism is not something to blame people outside jurisprudence; even proponents of this tradition of thought do not agree what positivism is.

¹³⁴ Raz, “Speaking with One Voice: On Dworkinian Integrity and Coherence” in: Raz, *Ethic in the Public Domain* (Oxford, 1994), 303-309 (reprinted also in Burley (ed.) *Dworkin and His Critics: With Replies by Dworkin* (Oxford, 2004), 285-290) at 309.

¹³⁵ Again, there was (or may be still is) a debate in jurisprudence on the nature of this discretion. But contrary to what Dworkin assumed to be the positivists' (or at least H.L.A. Hart's position), judges “cannot do what they like” (see Raz, op. cit. n. 134, p. 307, n. 85). What opponents to law as integrity insist on is that there is no “one right answer” in these considerations. See Dworkin, op. cit. n. 58, 119-145 “Is There Really No Right Answer in Hard Cases” and its critique, Leiter, “Objectivity, Morality and Adjudication”, in: Leiter (ed) *Objectivity in Law and Morals* (Cambridge, 2001), 66-98.

¹³⁶ Kumm, op. cit. n. n. 10, p. 282-286.

But as a starting point for further discussions, which his proposal certainly deserves, some clarifications must be made.

According to at least some versions of legal positivism courts *may* change the ‘defining feature[s] of national legal practice’.¹³⁷ Hart would call Kumm’s “defining feature of national legal practice” “a rule of recognition”, which, as it only reflects *practice* of officials, particularly courts, may be changed.¹³⁸ The problem is somewhere else: by adopting “integrity” reading of the constitutional conflict in the EU, we leave something, what we should perhaps make ourselves and consciously, in hands of courts. That “something” is nothing else than making constitutional revolution.¹³⁹

On this reading, the “constitutional revolution” indeed just started by the ECJ’s judgment in *Costa*,¹⁴⁰ and the rule of recognition has been changing by the constant practice of national courts since then, as Kumm proposes. As a clarification, it would perhaps be more accurate to call this change a *constitutional evolution* instead of a revolution, as it does not occur at one moment of time, but is a continual process. A process, which may be now seriously disrupted by the accession of ten new Member States,¹⁴¹ which is proven particularly by “radical” reervations made by the PCT in its *Accession Treaty Decision*.¹⁴² They may have a very different view on a possible change of the rule of recognition.¹⁴³ N. Barber captures this process of a possible change of the rule of recognition in the following words:

The Court of Justice has never claimed that national legal systems are mere subsets of the European. Rather than moving towards a single system, it might be better to say that the two systems overlapped, with *the duties and loyalties of those within the German system [which Barber uses as an example of a national legal system] becoming increasingly ambiguous*. [... T]he ultimate resolution of the debate would depend on the loyalty of officials—in particular, but not exclusively, the loyalty of the judges.¹⁴⁴

But it does not mean that we should start to think that the change would be *legal* (determined by positive law as it exists) and *inevitable*. The change of the rule of recognition cannot be made by definition within law validated by the original rule of recognition. The change would be therefore “*illegal*”, so to speak, which however does not mean that it cannot be legitimate. Its legitimacy

¹³⁷ See n. 125 supra. See another jurisprudential critique of Kumm by T. Schilling, based on Kelsen’s version of legal positivism - Schilling, “The Jurisprudence of Constitutional Conflict: Some Supplementations to Mattias Kumm”, 12 ELJ 173 (2006). Schilling, with different arguments (not all of which I would embrace), comes to the same conclusions as I, I believe, although he argues that courts cannot change the fundamental rule of a legal system (instead of Hart’s Rule of Recognition Schilling uses Kelsen’s Basic Norm, which may lead, under his interpretation, to different considerations). For a very useful introduction to Kelsen see Kelsen (Paulson and Paulson transl) *Introduction to the Problems of Legal Theory* (Oxford, 1996), which is a translation of the first edition of Kelsen’s *The Pure Theory of Law*.

¹³⁸ As every jurisprudential concept employed here, also the exact meaning of the rule of recognition is contested in jurisprudence. For an original exposition see Hart, op. cit. n. 126, pp. 94-95 and particularly 100-123.

¹³⁹ On this see MacCormick, *Questioning Sovereignty* (Oxford, 1999), pp. 110-113.

¹⁴⁰ Case 6/64 *Costa* [1964] ECR 1141.

¹⁴¹ For the relevance of the enlargement see “Contrapunctual Principles in Disharmony”, pp. 24-25.

¹⁴² Sadurski, op. cit. n. 8, pp. 39 et seq.. comes with a very interesting (and quite plausible) explanation for post-communist national constitutional courts would-be strong gestures towards the ECJ. They may actually empower themselves against political branches of government, as well as against the ECJ. They become actual final arbiters.

¹⁴³ The concept of the rule of recognition may prove to be more promising for the analysis of constitutional conflicts in Europe than the concept of sovereignty.

¹⁴⁴ Barber, “Legal Pluralism and the European Union”, 12 ELJ 306 (2006), p. 326 and 327. My emphasis.

depends on how much we believe that it is legitimate for courts to do this. While the principle of best fit does not leave much for processes outside courts (by saying it's all a *legal choice*)¹⁴⁵ contrapunctual principles may have response.

4.3. *Last principle: institutional choice as a way out?*

A useful, if not the key, tool in our analysis of the European constitutional conflict (which may be labelled constitutional evolution as well) is Maduro's last contrapunctual law principle, the principle of institutional choice. According to it 'each legal order and its respective institutions must be fully aware of the institutional choices involved in any request for action in a pluralist legal community' and that 'the importance of institutional choices in a context of legal pluralism only serves to reinforce the need to do adequate comparative institutional analysis to guide courts and other actors in making those choices'.¹⁴⁶

If the conclusion of the preceding section is correct, then the contrapunctual law principles have their limits corresponding to how far national courts may interpret national constitutions consistently with EU law. The question then shifts from who (what court) *the final arbiter* in the EU legal order is (either the ECJ or national constitutional courts) to what *the limits of law* and *the judicial process* are. On the other hand, Kumm's principle of best fit does not allow posing this question. It presupposes that as legal in nature, the choice pertains to courts.

If we do not subscribe to the principle of best fit, we will have to ask different questions: to what extent the conflict can be decided by the courts (and by their interpretation of law) and what should be left to the other constitutional actors, these actors being not only politicians, but also government officials, the legal/constitutional doctrine and the public at large. This is not to say that the courts should keep off constitutional conflicts and that the question of supremacy is only for politicians to resolve. Of course, the conflicts do and will arise and the courts cannot avoid them. However, the proper role of the courts should be to define the extent in which a conflict may be resolved in law and when it should be left for some extra-legal solution to be made by some other process.¹⁴⁷ In this respect Kumm's contribution is extremely useful for it provides a framework for analysing constitutional conflicts and the role, which law and legal process can play. The problem of his analysis however is that it does not allow to examine whether the conflict should be left for another process than the judicial decision making.

This may be beneficial for the EU constitutional order in yet another way: it will force the other actors, especially politicians, to take similar concerns more seriously and will show that these issues are not reserved for lawyers (or judges) only. The construction of the EU constitutional order should not be left entirely in the lawyers' hands. Courts' "passing the steer" to other constitutional processes will lead to democratisation of the European constitutional discourse,

¹⁴⁵ It may be argued that even the principle of best fit may accommodate criteria for institutional choice within it. However, Maduro's contrapunctual principles make this choice explicit, which is important for our complete understanding of the practice of constitutional conflicts.

¹⁴⁶ Maduro, op. cit. n. 9, p. 530. Maduro draws on Komesar, *Imperfect Alternatives. Choosing Institutions in Law, Economic, and Public Policy* (Chicago and London, 1994).

¹⁴⁷ In fact, both constitutional conflicts referred to by Kumm were finally resolved by the political process, in case of Ireland's prohibition of abortion at the Community level by adopting a special protocol exempting Ireland from certain Community rules (because of the "abortion issue"), in Germany by changing the Basic Law after the ECJ's ruling in Case C-285/98 *Kreil* [2000] ECR I-69. See Kumm, op. cit. n. 10, p. 270.

which will encompass much more relevant actors. Actually, the proposed control of respecting the principle of subsidiarity, exercised by national parliaments, may be a step in this direction.¹⁴⁸

What is interesting, this seems to be embraced by a constitutional court, which at its face adopts to the greatest extent Kumm's principle of best fit – the Czech Constitutional Court. On one hand, it rewrites quite radically the Czech legal order's fundamental rule by saying that in principle it accepts primacy of EU law, even over the Constitution, save for its most fundamental provisions.¹⁴⁹ On the other hand, there is a troubling part in its EAW Judgment, contradictory to this, which resembles the Polish Constitutional Court's approach:

The constitutional principle that national law shall be interpreted in conformity with the Czech Republic's obligations resulting from its membership in the European Union is limited by the possible significance of the constitutional text. [...] If the national methodology for the interpretation of constitutional law does not enable a relevant norm to be interpreted in harmony with European Law, it is solely within the Constitution lawgiver's prerogative to amend the Constitution.¹⁵⁰

This passage suggests that the CCC does not feel competent to rewrite the Constitution. But at the same time, it contradicts the more general formulation of the relationship between the Czech Constitution and EU law. Only pragmatically it may be explained by the fact that the CCC's position is not yet settled amongst the judges.¹⁵¹ In a principled way it may illustrate that even courts are not comfortable with Kumm's principle of best fit and the institutional role it assigns to them.¹⁵²

What should also be kept in mind is that the institutional choice is being made as early as the court interprets law and determines its limits. If the court finds it impossible to reconcile an apparent conflict by way of interpretation, it simultaneously defers its decision to the political process, and thus makes the choice. There is an inherent danger in this possibility given to courts: they can escape their institutional role of arbiters in disputes arising in law. Thus when making institutional choices, courts must reason in a persuasive manner to justify their choice. The FCC's exclusion of possibility of consistent interpretation (for which in a similar situation opted the CCC) may be an example of such misuse of institutional choice, whereas the PCT, facing much harder conflict, was much more faithful to contrapunctual law principles.

5. Conclusion

This article examined recent decisions of three EU Member States' constitutional courts, which faced constitutional conflicts raised by implementation of the EAW Framework Decision. After a

¹⁴⁸ National parliaments have not given up with the failure of the European Constitutional Treaty (ECT) and the Conference of Community and European Affairs Committees of Parliaments of the European Union now exercises a pilot project of subsidiarity and proportionality check even without the ECT. See <http://www.cosac.eu/en/info/earlywarning/>.

¹⁴⁹ See the text accompanying n. 22 supra.

¹⁵⁰ *EAW Judgment*, CCC, op. cit. n. 4, para. 82.

¹⁵¹ See the text accompanying n. 26 supra.

¹⁵² Although this does not apply generally, quite to the contrary: see Breyer, "Introduction: The 'International' Constitutional Judge, in: Herschovitz (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (Oxford, 2006), 1-4. On the other hand, one of the most prominent Dworkin's critics is Judge of the U.S. Federal Court of Appeal R. Posner. (See e.g. Posner, "The Problematics of Moral and Legal Theory", 111 *HLRev* 1637 (1998)).

brief discussion of these courts' reasoning and pointing out some of their questionable elements, the decisions were put into the context of contrapunctual law principles designed by M. Maduro to guide national courts when applying EU law. This served a twofold aim: firstly to show that some of the decisions' outcome was the same (annulling implementing acts), each court took a fundamentally different approach in reaching its conclusion. Secondly the discussion aimed at showing that contrapunctual law principles have their limits that correspond to the limits of constitutional role of courts. M. Kumm's principle of best fit was problematised to show that it may hide some important questions, involving institutional choice amongst possible processes to deal with the conflict.

It has been proposed however that since this limitation of contrapunctual law principles can lead to involvement of broad set of actors – politicians, constitutional doctrine and also the general public, it could be beneficial for building a genuine EU constitution - may be not written, but not having to mask itself behind the word “treaty”.