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*Professor J.H.H. Weiler*  
*European Union Jean Monnet Chair*

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Jan Komárek

**European Constitutionalism and the European Arrest Warrant: Contrapunctual Principles in Disharmony**

NYU School of Law • New York, NY 10012

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## **European Constitutional Pluralism and the European Arrest Warrant: Contrapunctual Principles in Disharmony**

*Jan Komárek\**

*This paper examines two recent decisions of the Polish Constitutional Tribunal and the German Federal Constitutional Court, which both annulled national implementation of the EAW Framework Decision. After a brief discussion of these courts' reasoning and pointing out some of their questionable elements, the decisions are put into the context of contrapunctual law principles designed by M. P. Maduro to guide national courts when applying EU law. This serves a twofold aim: firstly to show that although both decisions' outcome was the same, each court took a fundamentally different approach in reaching its conclusion. Secondly the discussion aims at showing that contrapunctual law principles have their limits that correspond to the limits of legal interpretation and reasoning. M. Kumm's principle of best fit and his analysis of constitutional conflict help to find reasons supporting this contention. It is highlighted by the particular context of each decision: the fact that constitutional courts may be increasingly protecting the sovereignty of their constitutions (which is even more true in case of post-communistic Member States) and the special character of the Area of Freedom Security and Justice. It is 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 creating a genuine EU constitution - may be not written, but not having to mask itself behind the word "treaty".*

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\* EC Law Department, Ministry of Foreign Affairs of the Czech Republic. LL.M. Stockholm (2004), Diploma of Academy of European Law, EUI Florence (2004). I am grateful to participants of the WISH 2005 conference for their comments on an earlier draft of this article, particularly to Professor F. Snyder. Professor M.P. Maduro, Professor M. Kumm and Michal Bobek provided me with further stimulating comments. All opinions (and faults) are mine. Comments are welcome at [jankomarek@centrum.cz](mailto:jankomarek@centrum.cz).

## **I Introduction – national constitutional courts and their perspectives on the European constitutional order**

### *A Setting the scene: problems with the European Arrest Warrant*

On 27 April 2005 the Polish Constitutional Tribunal (“the Tribunal”) annulled national implementation of the European Arrest Warrant Framework Decision (“EAW Framework Decision”)<sup>1</sup> for its conflict with the constitutional prohibition of extraditing Polish nationals.<sup>2</sup> Shortly after this ruling, the German Federal Constitutional Court (“the FCC”) decided that the implementation of the same framework decision by the German legislator was unconstitutional too.<sup>3</sup> Although the FCC did not find any obligation arising directly from the framework decision to be incompatible with the German Basic Law (“the BL”), its reasoning challenged the philosophy behind the EU measures in the field of criminal law cooperation: the principle of mutual trust among Member States.<sup>4</sup> The latest among the national highest judicial authorities to strike a heavy blow to the EAW was the Supreme Court of Cyprus in 2005.<sup>5</sup> It annulled the implementing law on the same grounds as the Polish Constitutional Tribunal. In its judgment, the Cypriot Supreme Court quoted several passages of the Polish decision to support its arguments that an interpretation of the Cypriot Constitution consistent with EU law was not possible in that case.

Yet this may not be the last threat for the EAW since other cases concerning a conflict between national constitutions and obligations arising from the framework decision are now pending before the Spanish<sup>6</sup> and the Czech constitutional courts.<sup>7</sup> To complete the list of European courts currently dealing with constitutional questions relating to the EAW Framework Decision,<sup>8</sup> the ECJ is now having a case questioning validity of the framework decision itself. The Belgian *Cour d’Arbitrage* (court with constitutional jurisdiction) made a preliminary reference concerning a possible conflict of abolition of

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<sup>1</sup> 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.

<sup>2</sup> Judgment of 27.4. 2005, P 1/05; decisions of the Tribunal and in some cases their English summaries are available at <http://www.trybunal.gov.pl> (See n 22 regarding the summaries).

<sup>3</sup> Judgment of 18.7.2005, 2 BvR 2236/04, available at: <http://www.bverfg.de/entscheidungen/rs200507182bvr223604.html>. Press release in English is also available at <http://www.bverfg.de>.

<sup>4</sup> For a critical analysis of this principle see Peers, ‘Mutual Recognition and criminal law in the European Union: has the Council got it wrong?’ 41 *Common Market Law Review* 5 (2004).

<sup>5</sup> Judgment of 7.11. 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.

<sup>6</sup> Cases No. RA 3865-2004, RA 3865-2004, RA 4760-2004, RA 3988-2005 and RA 3988-2005.

<sup>7</sup> Case No. Pl. ÚS 66/04.

<sup>8</sup> At its meeting on 2 and 3 June 2005, the Justice and Home Affairs Council requested that decisions concerning the European arrest warrant handed down by Constitutional Courts and Supreme Courts of the Member States be collected and distributed. Such decisions may be found as Council documents – delegations’ communications to the Working Party on Cooperation in Criminal Matters (Experts on the European arrest warrant).

the dual criminality requirement in case of some criminal offences laid down in the framework decision with fundamental human rights and a question examining the very legal basis of the framework decision<sup>9</sup>

Why so much ado about a legal instrument in the expanding field of the EU criminal cooperation, or to put it widely, in the Area of Freedom, Security and Justice (“Area of FSJ”)? This article will search for answers in several contexts. It will consider the specific nature of the EU third pillar law in contrast to Community (first pillar) law.<sup>10</sup> It will take into account the time when the decisions were handed down: the 2004 enlargement made the EU even more diverse and heterogeneous, the fact that brought about concerns in some Member States.<sup>11</sup> In doing so, the article will contrast the decision of the Tribunal with that of the FCC to show that despite the fact that the Tribunal gave expressly precedence over the EU law to the Polish Constitution, it acted in a much more pro-European way than its German counterpart. Contrary to the Tribunal, the FCC was not forced to decide a conflict between the German Basic Law and a EU law provision; it nevertheless put in doubt the EU cooperation in criminal justice. The constitutional framework behind the article is founded on the idea of constitutional pluralism (or “constitutionalism beyond the state”).<sup>12</sup> This concept of constitutionalism, which is not bound to the State, offers solutions or at least argumentative tools for better understanding the tensions within the European constitutional order and for their possible solutions.

M. P. Maduro’s *Principles of Contrapunctual Law* and the *Principle of Best Fit* proposed by M. Kumm move theories of constitutional pluralism to their application in practice, particularly by courts. However, this article will try to show that some of these principles are hardly acceptable by courts bound to their national contexts, particularly by constitutional courts. Constitutional courts will, by definition, protect national constitutions from external encroachments. This applies even more in the third pillar law, which touches upon the substance of the state power’s legitimacy: the care for citizens’ security and the public order. Furthermore, the self-understanding of these courts’ role may be different in the new Member States whose communist past is still fresh.

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<sup>9</sup> 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.

<sup>10</sup> See generally Walker, ‘In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey’, in: N. Walker (ed), *Europe’s Area of Freedom, Security and Justice* (Oxford University Press, 2004).

<sup>11</sup> The threat that is felt also by the ECJ: cf Opinion of Advocate General Geelhoed of 18.11. 2004 in Case C-304/02 *Commission v France* (not yet published), para 12.

<sup>12</sup> See particularly Maduro, ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’, in: N. Walker (ed), *Sovereignty in Transition* (Hart Publishing, 2003), Maduro, ‘Europe and the constitution: what if this is as good as it gets?’, in: J.H.H. Weiler and M. Wind (eds), *European Constitutionalism beyond the State* (Cambridge University Press, 2003) and Kumm, ‘The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty’, (2005) 11 *European Law Journal* 262. See also Weiler, ‘In defence of the status quo: Europe’s constitutional *Sonderweg*’, in: J.H.H. Weiler and M. Wind (eds), *European Constitutionalism beyond the State* (Cambridge University Press, 2003) and N. MacCormick, *Questioning Sovereignty* (Oxford University Press, 1999).

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

### *B Perspectives on the European integration of the FCC and the Tribunal*

There is probably no constitutional court in Europe, which is so vigilantly observed as the German Federal Constitutional Court. Much has been written about its most important judgments in *Solange I*<sup>13</sup> and *II*,<sup>14</sup> *Maastricht*<sup>15</sup> and *Banana Dispute*.<sup>16</sup> There is no need for repetition here.<sup>17</sup> Essentially, the FCC regards itself as the final arbiter of the EU competences 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.<sup>18</sup>

The Polish Constitutional Tribunal took a very similar approach in its *Accession Treaty Decision*,<sup>19</sup> even though it used much harsher wording. The scope of this article does not allow analysing the decision in detail,<sup>20</sup> what is however relevant here is that the Tribunal expressly stated that two constitutional provisions must be balanced: one establishing the

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<sup>13</sup> 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 University Press, 1994) at 440.

<sup>14</sup> Judgment of 22.10. 1986, 2 BvR 197/83, BVerfG 73, 339, in English Oppenheimer 1994, op cit n 13 at 461.

<sup>15</sup> Judgment of 12.10. 1993, 2 BvR 2134 and 2159/92, BVerfGE 89, 155, in English Oppenheimer 1994, op cit n 13 at 526.

<sup>16</sup> Judgment of 7.6. 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 University Press, 2004)

<sup>17</sup> 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*, <http://www.jeanmonnetprogram.org/papers/03/030901-03.html> (11.1. 2004) at 12-18, 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 (1999) at 362-374 and Aziz, 'Sovereignty lost, sovereignty regained? Some reflections on the Bundesverfassungsgericht's Bananas Judgment', 9 *Columbia Journal of European Law* 109 (2002).

<sup>18</sup> On very similar lines also the European Court for Human Rights reviews how the EU respects standards established by the European Convention – judgment of 30.6. 2005 (Grand Chamber), application No. 45036/98.

<sup>19</sup> Judgment of 11.5. 2005, K 18/04.

<sup>20</sup> For a short comment see Kowalik-Bańczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law', 6 *German Law Journal* 1355 (2005), available at <http://www.germanlawjournal.org>. An earlier version of this 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.

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 Tribunal as a 'requirement to respect and be sympathetically predisposed towards appropriately shaped regulations of international law binding upon the Republic of Poland'.<sup>21</sup> 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.<sup>22</sup>

In the last sentence the Tribunal stresses the importance of political process for resolving constitutional conflicts. It played an important role in the Tribunal's decision concerning the implementation of the EAW Framework Decision. Before turning to the decision itself, let us briefly discuss one of the constitutional tensions, which the framework decision brought for national constitutions - the issue of extraditing own nationals.

## **II 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.<sup>23</sup> It arose from the need to respond to the danger of terrorism and transborder

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<sup>21</sup> Point 2.1, cf para. 10 of the English summary.

<sup>22</sup> 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. The quotes in this article were taken from the original Polish text if it is not indicated that were taken directly from the English Summary. References to points of the original decision are complemented by references to respective paragraphs of the English Summary, where available. I am grateful to Radana Passerová for her generous help with the Polish text.

<sup>23</sup> See Alegre and Leaf, 'Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant', 10 *European Law Journal* 200 (2004), Douglas-Scott, 'The rule of law in the European Union - putting the security into the Area of freedom, security and justice', 29 *European Law Review* 219 (2004) and Wouters and Naerts, 'Of arrest warrants, terrorist offences and

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.<sup>24</sup>

However, the implementation of the framework decision caused constitutional problems in several Member States, mainly because their constitutions prohibited extraditing their own nationals<sup>25</sup> 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 tradition<sup>26</sup> as opposed to the continent.<sup>27</sup>

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'.<sup>28</sup> 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.<sup>29</sup> While the 1996 convention on extradition between the Member States<sup>30</sup> (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.

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extradition deals: an appraisal of the EU's main criminal law measures against terrorism after "11 September"', 41 *Common Market Law Review* 909 (2004).

<sup>24</sup> As Douglas-Scott points out (see n 85 at 224), the extradition procedure is political in nature, which was shown eg 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.

<sup>25</sup> 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.

<sup>26</sup> 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 25 at 86-87.

<sup>27</sup> This applies with some exceptions: eg Nordic countries do not prohibit extradition of own nationals among them (Plachta, *op cit* n 25 at 99-100).

<sup>28</sup> Plachta, *op cit* n 25 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 87 at 77.

<sup>29</sup> See Tampere European Council Presidency Conclusions, 15 and 16 October 1999, para. 33, EAW Framework Decision, 6<sup>th</sup> and 10<sup>th</sup> recital of the Preamble, Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* [2003] ECR I-1345, para. 38. See also Alegre and Leaf, *op cit* n 23 and Wouters and Naerts, *op cit* n 23 at 919-923.

<sup>30</sup> OJ 1996 C 313/12.

Poland nevertheless was not amongst them.<sup>31</sup> The Polish Constitution states in Article 55 (1) that ‘[t]he extradition of a Polish citizen shall be forbidden’.

### **III The EAW Framework Decision and the Polish Constitutional Tribunal: taking European commitments seriously?**

#### *A Surrender as a subset of extradition*

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

The Tribunal rejected the view that constitutional review would be excluded because the contested provisions were introduced into the Polish legal order to implement the EAW Framework Decision. The Tribunal stated that ‘[t]he duty to implement framework decisions is a constitutional requirement following from Article 9 of the Constitution, its realisation does not however mean automatic and in every case substantive conformity of acts of secondary law of the EU and acts implementing them with the provisions of the Constitution’.<sup>32</sup>

According to the Tribunal, given the independent character of the Constitution, the meaning, scope and content of its provisions could not be determined by ordinary law. First of all, the Tribunal therefore had to establish whether the concept of “extradition” encompassed also “surrender” although the relevant provisions of the Criminal Procedure Code had distinguished between the two with a precise aim to eliminate doubts as to the constitutionality of surrendering Polish citizens.<sup>33</sup> Tribunal stated clearly that such a difference could not be decisive for constitutional interpretation, nor could the use of the term “surrender” (instead of extradition) by the Framework Decision itself.<sup>34</sup>

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<sup>31</sup> 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.

<sup>32</sup> Point 2.4. Opinions to the contrary were expressed by a part of the Polish doctrine. See Weigend and Górski, op cit n 31 at 195 discussing such opinions (and rejecting them).

<sup>33</sup> Point 3.3.

<sup>34</sup> Points 3.2 and 3.3. Interesting in that regard is that the term “extradition” is still used by implementing laws in the UK, although the framework decision uses “surrendering”. Critical about the use of this term is eg Lord Hope of Craighead in *Office of the King’s Prosecutor v. Armas* [2005] UKHL 67 who at para. 22 ironically states: ‘the use of the word “extradition” to describe the system which is then laid down is only possible [...] if one subscribes to the *Through the Looking Glass* school of legislative drafting’. Similarly in Germany the implementing law uses the term “*Auslieferung*” (which corresponds to extradition) as a general term covering also the procedure based on the EAW. The term “*Übergabe*” (surrender) is used only to cover physical surrender of the person concerned from the German territory.

Here comes the first important part of the decision, which focuses on a potential impact of ‘the obligation to interpret domestic law in a manner sympathetic to EU law’<sup>35</sup> on the interpretation of the constitutional prohibition of extraditing Polish citizens. The Tribunal examined whether the duty of consistent interpretation exists also within the third pillar in case of framework decisions and came to the conclusion that it *probably* does. At the time when the Tribunal was deciding the case, the ECJ’s ruling in *Pupino* confirming the Tribunal’s opinion was yet to be delivered; only Advocate General J. Kokott’s opinion had been already published.<sup>36</sup>

However, the Tribunal did 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’.<sup>37</sup> Unfortunately, the Tribunal did not refer to specific ECJ’s judgments to show on what basis it constructed such a limitation to the principle of consistent interpretation. There are three main counter-arguments against such a simple conclusion.

First and foremost, it is questionable whether Community principles of consistent interpretation, developed in relation to the interpretation of national law provisions in order to remedy non-transposition (or incorrect transposition) would apply where the framework decision was correctly implemented and where it is a conflicting *national* rule that requires interpretation. From the EU-law perspective, the principle of primacy may have been more relevant than the principle of consistent interpretation. Consequently, the Tribunal should rather have considered the question whether the principle of primacy was applicable under the third pillar (i.e. whether a national rule implementing an EU obligation should have had precedence over another rule of national law where the latter was hierarchically<sup>38</sup> superior to the former).

Second, even if the Community principle of consistent interpretation had been applicable, such consistent interpretation, contrary to what the Tribunal stated, sometimes led to the “worsening of an individuals’ situation” given its application also between individuals and its role in giving full effect to EC law.<sup>39</sup> 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’,<sup>40</sup> however *Arcaro* concerned a situation where criminal liability would have been imposed on an individual.<sup>41</sup>

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<sup>35</sup> See n 21.

<sup>36</sup> Opinion of AG J. Kokott in Case C-105/03 *Pupino*, 11.11. 2004; judgment of 16.6. 2005, not yet reported. For a comment of the judgment see Fletcher, ‘Extending "indirect effect" to the third pillar: the significance of *Pupino*’, 30 *European Law Review* 862 (2006).

<sup>37</sup> Point 3.4, quote taken from the English summary, para. 8.

<sup>38</sup> Meaning within the hierarchy of rules of the *domestic* law.

<sup>39</sup> See S. Prechal, *Directives in EC Law*, 2<sup>nd</sup> Ed. (Oxford University Press, 2005) at 184 and at 214-215.

<sup>40</sup> Case C-168/95 *Arcaro* [1996] ECR I-4705, para. 42.

<sup>41</sup> For arguments supporting the view that consistent interpretation may allow imposing obligation on an individual even by public authorities (ie amounting to a reverse vertical effect) see Prechal op cit n 39 at 214-215.

This is related to the third 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 interpretation<sup>42</sup> did in no way concern procedural law,<sup>43</sup> to which surrendering pertains.<sup>44</sup> Thus when referring to the exclusion of consistent interpretation imposed by the ECJ, the Tribunal avoided the question too easily. 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 Tribunal 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'.<sup>45</sup> Thus the interpretation of the concept of extradition would have had to be made by reference to the Polish Constitution alone anyway.

The Tribunal rejected the view that the constitutional legislator may have had in mind the difference between "extradition" and "surrender" and prohibited extradition of Polish citizens in the strict sense only excluding at the same time surrender from the scope of this prohibition. According to the Tribunal, firstly both terms had been treated interchangeably in the Polish legal discourse and the Constitutional legislator drew no distinction between them. Secondly, at the time of adopting the Constitution (1997), the EAW Framework Decision, which uses the term "surrender" instead of "extradition", did not exist yet.<sup>46</sup> The Tribunal then went on to consider whether surrender was essentially the same legal institute as extradition. The Tribunal's reasoning was somewhat illogical, because it analysed the difference between the two concepts at a considerable part of the judgment only for (surely rightly) concluding that those differences existed in *ordinary* law only, which cannot determine the *constitutional* interpretation of the term „extradition“. The Tribunal found that surrender was simply a kind of extradition because they both aimed at the transfer of a prosecuted, or sentenced, person for the purpose of conducting criminal prosecution or imposing a penalty. For this reason, the Polish Tribunal declared the relevant provision of the Criminal Procedure Code unconstitutional.<sup>47</sup>

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<sup>42</sup> Case 80/86 *Kolpinghuis* [1987] ECR 3969 recently confirmed in Case C-60/02 *X* [2004] ECR I-651. See Prechal op cit n 39 at 203-208.

<sup>43</sup> 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.

<sup>44</sup> 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.

<sup>45</sup> See note 22 and the text accompanying it.

<sup>46</sup> Point 3.1.

<sup>47</sup> Point 4.4.

The Tribunal 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 Tribunal, 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 was submitted to the Tribunal 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.<sup>48</sup> 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 Tribunal could follow the interpretation suggested.<sup>49</sup> The Tribunal 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 Tribunal, amount to violating the essence of his right not to be extradited.<sup>50</sup>

This Tribunal's conclusion may be supported by another consideration not mentioned by the Tribunal itself: the ban on extraditing Polish nationals is formulated rather as a straightforward *rule* than a *principle*.<sup>51</sup> 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.<sup>52</sup> 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.

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<sup>48</sup> Point 4.1.

<sup>49</sup> *Pupino*, op cit n 36, para. 47.

<sup>50</sup> Point 4.2.

<sup>51</sup> On this distinction see R. Alexy, (J. Rivers transl) *A Theory of Constitutional Rights* (Oxford University Press, 2002). See also review essay of this book, M. Kumm, 'Constitutional rights as principles: On the structure and domain of constitutional justice', 2 *International Journal of Constitutional Law* 574 (2004) at 576-578. I am grateful to Professor Kumm for bringing to my attention this distinction between constitutional right structured as principles and rules.

<sup>52</sup> See Kumm, op cit n 51 at 579.

Finally, the Tribunal rejected any relevance of the EU citizenship for the outcome of the decision.<sup>53</sup> It admitted that the content of the Polish citizenship has changed with Poland's accession to the EU. The Tribunal 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 Tribunal 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 interpretation" cannot change the constitutional role of the citizenship.

*B 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 Tribunal 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 Tribunal 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'.<sup>54</sup> 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.<sup>55</sup>

The Tribunal 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.<sup>56</sup> The Tribunal stressed that such temporal limitation of the effects of the decision 'activates a duty of immediate

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<sup>53</sup> Point 4.3.

<sup>54</sup> See n 21 and the text accompanying it.

<sup>55</sup> See point 5.

<sup>56</sup> Prospective temporal limitation of decisions' effects is available to many constitutional courts in Europe. Whether the ECJ has the same possibility is now being considered in Case C-475/03 *Banca Popolare di Cremona*. See opinion of Advocate General Jacobs of 17.3. 2005, para. 81-88.

initiation of legislative activities by the competent authorities<sup>57</sup> and that it also means that courts continue to be under a duty to temporarily apply the annulled provision.<sup>58</sup>

The Tribunal 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,

‘particularly Poland’s obligation to respect international law, but also public order and security, for whose attainment surrender of prosecuted persons to other States [...] contributes, and also having regard to the fact that Poland and other Member States of the European Union are bound by the same structural principles attaining proper administration of justice and due process before an independent court, even in case if it is connected with Polish citizens’ deprivation of guarantees following from the prohibition of extradition in the extent necessary for realization of the institute of surrender on a basis of the EAW. The care for fulfilment of a value, which is Poland’s credibility in the international relations as a state which respects [the] fundamental rule *pacta sunt servanda* speaks furthermore for this’.<sup>59</sup>

Here the Tribunal put its decision into the European context, seeing the importance of functional cooperation among the Member States. It is submitted that although the Tribunal probably could escape the constitutional conflict by interpreting the prohibition of extradition in a more EU-opened way,<sup>60</sup> 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. As we will see, the FCC was not so careful about the consequences of its judgment for the European legal order.

#### **IV 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<sup>61</sup>. He was suspected of being a key person in the European offshoot of Al-Kaida. Allegedly, he had financially supported Al-Kaida’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

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<sup>57</sup> Point 5.3, second paragraph.

<sup>58</sup> Point 5.5.

<sup>59</sup> Point 5.2, first paragraph.

<sup>60</sup> See particularly arguments discussed in the text accompanying n 48.

<sup>61</sup> 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.ihf.com/bin/print\\_ipub.php?file=/articles/2005/07/19/news/germany.php](http://www.ihf.com/bin/print_ipub.php?file=/articles/2005/07/19/news/germany.php) (29.12. 2005).

against him and asked for his surrendering from Germany. There he was also prosecuted for other criminal acts committed between 1993 and 2001. He could not be prosecuted for his participation in a terrorist organisation in Germany, as there were no indications in 2002 that Mr Darkanzali was a member of a terrorist organisation. Such acts were not punishable in Germany before 30 August 2002. Also for these reasons, the competent judicial body in Germany agreed with his extradition,<sup>62</sup> which was subsequently confirmed by *Hanseatische Oberlandesgericht* (Higher Regional Court) in Hamburg. The complainant challenged this decision before the FCC on several grounds, particularly that the implementing law as well as the framework decision lack democratic legitimacy, since the German Parliament cannot decide that German citizens will be penalized for acts non punishable in Germany. According to the complainant the extradition decision did not respect the requirement of dual criminality, which actually amounts to the application of foreign substantive law within the domestic legal order. In his view, the extradition decision was issued with retroactive effect because the relevant acts were not punishable in Germany at the time of being reportedly committed in Spain. Finally, the complainant argued that the mechanism of the EAW breached his right to judicial review because the extradition decision could not be challenged before courts.<sup>63</sup>

The FCC considered the complaint to be well founded and declared the implementing legislation void. It also reversed the original extradition decision of the Hamburg 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.<sup>64</sup> The next part of the article will examine it in details.

#### *A 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 2000<sup>65</sup> and now reads: ‘[n]o 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*’.<sup>66</sup> 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

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<sup>62</sup> Since the German implementing law uses the term “extradition” also for surrenders based on the EAW, which is followed by the FCC too, it is used here as well (see n 34 supra).

<sup>63</sup> For details of complainant’s arguments see paras. 19-29.

<sup>64</sup> The second ground for the FCC’s decision relied on an absence of judicial review of extradition decisions. Since this is not directly relevant for the topic of this article, it is not discussed in detail here. See paras. 101-115.

<sup>65</sup> 47<sup>th</sup> amendment, Bundesgesetzblatt 2000, part I, p. 1633.

<sup>66</sup> Article 16 (2), emphasis added. English translations of the Basic Law are taken from A. Tschentscher, *The Basic Law (Grundgesetz): The Constitution of the Federal Republic of Germany (May 23rd, 1949)* (Jurisprudentia, 2002,2003), available at <http://www.ecln.net>.

considered that in case of implementation of the EAW Framework Decision,<sup>67</sup> the German legislator did not use the discretion allowed by the framework decision in conformity with the Basic Law.

The FCC started with an analysis of the purpose of the constitutional prohibition of extraditing German citizens. The FCC held that

‘citizens cannot be removed against their will from the legal order known to them [...] Every citizen should be protected – if he remains within the national territory – from uncertainty that he would be condemned in a legal system alien to him, under extraneous conditions, which are little transparent to him’.<sup>68</sup>

The philosophy behind the FCC’s judgment is based on the presumption that Article 16 BL protects the special link that German citizens have to their domestic legal order, which was established by them. According to the FCC, ‘[s]tate citizenship is a legal prerequisite for the citizen status, which on one hand justifies the same obligations and on the other hand, particularly, the same rights whose safeguarding legitimise state power in democracy’.<sup>69</sup> Similarly to the Polish Constitutional Tribunal, the FCC makes reference to the rights stemming from the citizenship as a legitimising factor of the State power.<sup>70</sup> We will come back to this in due course.<sup>71</sup> The special relationship of German citizens to their state and its legal order has, in the view of the FCC, a considerably high status in the German constitutional legal order because of Germany’s modern history, when some citizens, particularly of Jewish origin or religion, were after 1933 denied their citizen status and protection. According to the FCC, this constitutional guarantee also finds a justification in the European understanding of the citizenship and its international law protection.<sup>72</sup>

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.<sup>73</sup> 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

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<sup>67</sup> 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](http://www.eurowarrant.net/documents/cms_eaw_14_1_EJN576.pdf).

<sup>68</sup> Para. 65. All translations of the judgment are unofficial.

<sup>69</sup> Para. 66.

<sup>70</sup> See above text accompanying n 53.

<sup>71</sup> See below text accompanying n 127.

<sup>72</sup> Para. 67. Cf however dissenting opinion of Judge Lübke-Wolff, paras. 156 and 157, who (correctly) rejected that prohibition of extraditing own nationals may be justified on that basis. See also the text accompanying notes 26 and 27.

<sup>73</sup> See paras. 99 and 100. For other limitations on execution of the EAW in Germany see paras. 92 and 95.

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.<sup>74</sup> In such circumstances, a “significant domestic connecting factor” is established<sup>75</sup> 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.<sup>76</sup>

If this were the only justification for declaring the implementing act null and void, much less could be objected to the decision.<sup>77</sup> Where Member States have discretion in carrying out their obligations under EU law, nothing should *in principle* prevent constitutional review of the exercise of this discretion.<sup>78</sup> 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.

### *B 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.<sup>79</sup>

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’,<sup>80</sup> the FCC takes a very different perspective.

The FCC understands the condition that the extradition of German nationals must be made in accordance with the rule of law as ‘an expectation in relation to the requesting Member State and the international court of justice in a sense of structural conformity as

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<sup>74</sup> Article 4 (7) of the EAW Framework Decision.

<sup>75</sup> See paras. 84 and 85.

<sup>76</sup> Para. 98.

<sup>77</sup> Judge Lübke-Wolff is of a similar opinion – see paras. 181-183 of her dissenting opinion.

<sup>78</sup> See n 32 and the text accompanying it.

<sup>79</sup> 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 its basis.

<sup>80</sup> Para. 33. See also n 29.

formulated by Article 23 (1) BL.<sup>[81]</sup> The legislator, which makes extradition of German citizens possible, must to this extent examine whether these requirements are fulfilled'. In the following paragraph, the FCC admits that - because every Member State must respect the principles listed in Article 6 (1) EU - the *foundation* 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.<sup>82</sup> The legislator must construe the extradition procedure as a 'discretionary process of application of law'. The existence of Article 6 (1) EU and Article 7 EU 'does not justify the assumption that state law structures of the EU Member States are materially synchronised and that proportional national review of individual cases is nugatory. [...] The effect of the strict principle of mutual recognition and the wide mutual trust connected thereto cannot limit the constitutional guarantee of fundamental rights'.<sup>83</sup>

As a result, in case of German nationals the whole of the EAW approach must be replaced by a procedure under which all circumstances of the case and also the system of criminal justice of the requesting Member State will be examined.<sup>84</sup> 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 openly stated that it is for 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. How can both decisions be appreciated in the light of constitutional pluralism, particularly the principles of contrapunctual law proposed by M. P. Maduro? Does the Area of FSJ, particularly its third-pillar part, pose different questions than the first pillar law, traditionally studied in much greater detail? This will be the focus of the last part of the article.

## **V Contrapunctual law principles and the Area of Freedom, Security and Justice**

### *A The decisions in the light of Principles of Contrapunctual Law*

Maduro proposes several principles to be followed by courts (both national and the ECJ) when applying EU law. In this part, I will examine how faithful the Tribunal and the FCC

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<sup>81</sup> Which speaks about 'a protection of fundamental rights essentially equivalent to that of this Constitution'.

<sup>82</sup> Paras. 88, 97 and particularly 118.

<sup>83</sup> Para. 118.

<sup>84</sup> The German Federal Government immediately prepared new legislative proposal to implement the EAW Framework Decision in line with the FCC's requirements. Thus there should be a case analysis in connection with the extradition of German nationals whereby each case is carefully examined to determine whether or not extradition is commensurate. See press release of the Federal Government of 24. 11. 2005 available at <http://www.bundesregierung.de/en/Latest-News/Information-from-the-Government-10157.925174/artikel/Implementation-of-the-European.htm> (29.11. 2005).

were to those principles. Since the principles are designed ‘to guide ordinary state of affairs’<sup>85</sup> rather than situations of constitutional collisions, Kumm’s investigation of such situations must be also taken as another indispensable framework for the present analysis.

*a) 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’.<sup>86</sup> To apply this principle would therefore mean that no court should assume supremacy of its legal order, be it the Tribunal or the FCC on one hand or the ECJ on the other. Pluralism means that no formal hierarchy exists among the applicable legal orders.<sup>87</sup> Observance of this principle is not actually tested in the cases concerned, since although the Tribunal met the situation of conflict between national constitution and a EU law provision, in its argumentation the Tribunal did not question 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. However, both courts are far from accepting that in some cases their Constitutions should defer to the unwritten Constitution of the EU.<sup>88</sup>

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 decisions taken by the [ECJ] but *also by other national courts*’.<sup>89</sup> It may be added that the ECJ too should take national courts’ decisions seriously.<sup>90</sup>

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’.<sup>91</sup> 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

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<sup>85</sup> Cf. Maduro, op cit n 12 at 532.

<sup>86</sup> Ibid at 526.

<sup>87</sup> “Primacy in application” in *every* case of conflict is therefore not the way towards the *real* pluralism. There must always be some scope for balancing and allowing different outcome.

<sup>88</sup> See part I B.

<sup>89</sup> Maduro, op cit n 12 at 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 *European Law Journal* 257 (2004).

<sup>90</sup> 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 *Common Market Law Review* 9 (2005), particularly at 27-30.

<sup>91</sup> Maduro, op cit n 12 at 529-530.

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.

If one looks at the Tribunal's and FCC's decisions in the light of the two principles, two different approaches can be identified although the final outcome will be the same. The principle of coherence was probably not satisfied fully with regard to the Tribunal's treatment of the principle of consistent interpretation.<sup>92</sup> On the other hand, the Tribunal expressly referred to other Member States, which had to amend their constitutions in consequence of their inconformity with EU law.<sup>93</sup> Thus the Tribunal 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 Tribunal 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 primarily for strengthening its internal security; thus attainment of its functioning should be the highest priority of the Polish legislator.<sup>94</sup>

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. On the contrary, the Polish Constitutional Tribunal 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,<sup>95</sup> 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.

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<sup>92</sup> See the text accompanying n 50 and 53.

<sup>93</sup> 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.

<sup>94</sup> Point 5.9.

<sup>95</sup> 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.

Another, probably much more serious consequence for the European legal order arises generally: in fact, the FCC created a legal vacuum in extradition (or surrendering) persons among EU Member States since the other Member States actually cannot in case of German requests use the traditional extradition procedures based on previous international conventions. According to Article 31 of the EAW, the framework decision replaced these conventions: only the EAWs should be used among the Member States.<sup>96</sup> It is a “Catch-XXII-like situation”: Germany cannot request surrender on the EAW basis because the FCC has erased it from the German legal system. On the other hand however, the other Member States cannot extradite requested persons but on the EAW basis. From a strictly legal point of view, the other Member States should refuse German requests based on previous international conventions because according to the above-cited provision of the EAW Framework Decision, the conventions simply do not apply anymore.

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.<sup>97</sup> 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.<sup>98</sup>

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

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<sup>96</sup> The same problem exists in the Czech Republic, which did not respect the absolute time limit given for restricting the application of the EAW to crimes committed after a specified date. While the limit was set to 7 August 2002, the Czech Republic will not issue or execute the EAW for crimes committed before 1 November 2004. It means that it is not possible to request extradition from Member States, which implemented the EAW Framework Decision timely and correctly. This is what happened to requests for extradition sent to Ireland: Ireland refused to execute them because they were not submitted as EAWs. In consequence some of the prosecuted use Ireland as a refuge from criminal prosecution in the Czech Republic. On the other hand, as the Spanish example shows, in some Member States nothing apparently prevents to use previous instruments for extradition. See Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2005) 63 final at 3 and also Annex to this Report at 32 for other transitional problems arising from incorrect implementation of the EAW Framework Decision.

<sup>97</sup> 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*, 15.3. 2005, not yet reported, to argue that the ECJ used this provision rather extensively. See Wernicke, “*In the name of the Union citizens!*” Art. I-1 of the Constitution and the European Court of Justice”, in: I. Pernice and J. Zem anek (eds) *A Constitution for Europe: The IGC, the Ratification Process and Beyond* (Nomos 2005).

<sup>98</sup> The FCC refers in this respect to Art. 6 (3) EU and to Art. I-5 (1) of the European Constitutional Treaty.

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 Polish Constitutional Tribunal did not fully satisfy the principle of universalisability either since this principle requires that the reasoning used by one court of law should be universalisable by all other EU courts. The Tribunal could therefore never use the constitutional prohibition concerning exclusively Polish citizens.

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. This is when Kumm's analysis of constitutional conflicts comes into play because it deals exactly with these kinds of situations.

#### *b) Limits of Contrapunctual Law*

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'.<sup>99</sup> 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, 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. 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'.<sup>100</sup> 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.<sup>101</sup>

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<sup>99</sup> Ibid at 269-274.

<sup>100</sup> Ibid at 285.

<sup>101</sup> Ibid at 298.

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

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.<sup>102</sup>

While this may work as far as it is possible to satisfy the principle of best fit by way of (however dynamic) interpretation, there are good reasons to expect that national judges will not be willing to shift to the European constitutional supremacy openly and declare national constitutions inapplicable. First, it is because the shift would actually be a constitutional revolution.<sup>103</sup> The power of judicial action does not reach so far and the issue should be left to political process or, if possible, should be left unresolved. Kumm's assertion that 'it is not the political actors that are most concerned with the issue of constitutional conflict'<sup>104</sup> is refutable. He claims that no state has tried to override an EU law provision by enacting a special constitutional act. However, this does not mean that such an EU law provision cannot be constitutionally challenged *on the national level* (before constitutional courts) by political parties in opposition to the government. This in fact has happened in the *Accession Treaty Case* before the Tribunal or in a case concerning the implementation of the EAW Framework Decision in the Czech Republic.<sup>105</sup> Constitutional override has probably never been enacted because governments are generally not motivated to do so as they participated in the decision-making on the EU level. The opposition does not have, by definition, enough political power to push constitutional changes through either. The absence of attempts to constitutionally override EU law is not evidence of politicians' lack of awareness of (or their interest in) the issue of constitutional conflict.<sup>106</sup> In other words, the issue of constitutional supremacy is not a purely legal one and a constitutional court shifting from national to European constitutional supremacy would, in all likelihood, provoke a strong political reaction.

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<sup>102</sup> Ibid at 286.

<sup>103</sup> See MacCormick, op cit n 12 at 110-113.

<sup>104</sup> Kumm, op cit n 12 at 280.

<sup>105</sup> See n 7.

<sup>106</sup> Kumm gives another example: the German government 'playing the constitutional card' in negotiations on the EC level (Kumm, op cit n 12 at 281). Thus no matter that the politicians would probably not be aware of the potentials offered by their constitutions if the courts did not formulate their doctrines, the fact is that *now* they know and use them. The "Banana Dispute saga" would probably be an example of a case where the government would have interest in the constitutional override. The point here is not to say that it is open to governments to do so but to assert that politicians are aware about constitutional conflicts and may count with them in their calculations. To invoke the constitutional override would be the hardest possible step, which every government would try to avoid.

This is even more so in case of post-communist Member States, which have ‘complex sovereignty provisions’.<sup>107</sup> It is hard to imagine that the Polish Constitutional Tribunal could make such a shift when the Polish Constitution *expressly* states that ‘[t]he Constitution shall be the supreme law of the Republic of Poland’.<sup>108</sup> The sovereignty provisions were enacted as a reaction to these countries’ bitter past of mere satellites of the Soviet Union. Brezhnev’s doctrine of “limited sovereignty” shows how degraded these countries and their constitutions were before the collapse of communism. The doctrine was formulated in 1968 in order to justify the invasion and occupation of Czechoslovakia by the Warsaw Pact. It stipulated that if communism were in danger in a country belonging to the Warsaw Pact, the Red Army and in some cases its allies (one is tempted to use the word vassals) would have the right to intervene regardless of that country government’s will. In fact, the Red Army was present in these states, sometimes without any legal basis.<sup>109</sup> The experience of the Baltic States that were denied independence for almost half a century is even worse.<sup>110</sup> Thus it cannot come as a big surprise that the issue of sovereignty is so important in the constitutions of the post-communist countries.<sup>111</sup>

Furthermore, sovereignty is much more present in the political discourse of these states. It can be explained by the role of nation-based sovereignty in providing ‘the basis for societal mobilization without which the processes of state-building and state transformation would have not occurred, or would have been less successful’.<sup>112</sup> That these concerns persist and that the concept of sovereignty has not been re-thought after the accession was clear during the debate on the European Constitutional Treaty. The Czech President Václav Klaus referred to the old, state-based concept of sovereignty when he summarized his “Ten theses against the European Constitution”:

If anybody wants an even shorter synopsis, the meaning of the term ‘sovereignty’ – as used in Article 1 of the Czech Republic’s Constitution – is the key to everything. Under this article ‘the Czech Republic is a sovereign, unitary and democratic, law-abiding State...’. The word ‘sovereign’ is of paramount importance in this respect. The Czech law dictionary defines sovereignty as ‘the independence of a state’s power from any other power

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<sup>107</sup> See Albi, ‘Postmodern Versus Retrospective Sovereignty: Two Different Discourses in the EU and the Candidate Countries?’ in: N. Walker (ed), *Sovereignty in Transition* (Hart Publishing, 2003) at 402-409.

<sup>108</sup> Article 8(1) of the Polish Constitution.

<sup>109</sup> Mik, ‘State Sovereignty and European Integration: Public International Law, EU Law and Constitutional Law in the Polish Context’, in: N. Walker (ed), *Sovereignty in Transition* (Hart Publishing, 2003) at 394.

<sup>110</sup> See on the debate on sovereignty in these countries Albi, ‘The Central and Eastern European Constitutional Amendment Process in Light of the Post-Maastricht Conceptual Discourse: Estonia and the Baltic States’, 7 *European Public Law* 433 (2001).

<sup>111</sup> Albi, “‘Europe’ articles in the constitutions of Central and Eastern European Countries”, 42 *Common Market Law Review* 399 (2005) at 402-404. Aziz, op cit n 17 shows that the same concerns over sovereignty caused by country’s history exist in old Member States too.

<sup>112</sup> Sadurski, ‘Constitutionalization of the EU and the Sovereignty Concerns of the New Accession States: The Role of the Charter of Rights’, EUI Working Paper Law 11/03, [www.iue.it/PUB/Law03-10.pdf](http://www.iue.it/PUB/Law03-10.pdf) (30.9.2003) at 13, see generally his analysis of the ‘sovereignty conundrum’ these states found themselves in at 11-20.

within the state and externally...'. I am more than convinced that the Treaty establishing Constitution for Europe does not 'fit' into this explanation of the term sovereignty.<sup>113</sup>

Klaus's reference to the "Czech law dictionary" shows that a prevailing part of the Czech legal doctrine (and practice too) understands the concept of sovereignty to be untouched by the process of European integration. In Kumm's terms, it seems to be 'a defining feature of national practice of law'. Even less promising for a possible future change is the fact that the nation-based concept of sovereignty is taught at law faculties whose graduates take it as a paradigm of their understanding of constitutional law and the theory of state.<sup>114</sup>

To conclude, contrapunctual law principles will reach their limits where they would lead to results contrary to the explicit wording of a Constitution. This is more probable in case of new Member States' constitutional courts, which will view "national sovereignty" differently from the courts in the Member States untouched by 40 years of communism. However, apart from these rather empiric reasons (and descriptive explanation) for such an outcome, there are reasons why to not expect the shift of supremacy made by courts also on a normative basis (providing therefore prescriptive reasons).

*c) Last principle: institutional choice as a way out?*

The prospects outlined above are not as dim as they may seem at first sight. This is related to 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'.<sup>115</sup>

If the conclusion of the preceding section is correct and contrapunctual law principles have their limits corresponding to how far national courts may interpret national constitutions consistently with EU law, the question will shift 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* are. In other words, 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 discourse actors, these actors being not only politicians, but also the legal/constitutional doctrine and the public at large. This is

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<sup>113</sup> 'Foreword by Václav Klaus to the CEP publication "Shall we say our Yes or No to the European Constitution"', available in English at <http://www.klaus.cz/klaus2/asp/clanek.asp?id=A1esXWD27Wvb> (10.8. 2005).

<sup>114</sup> The definition of sovereignty, referred to by Klaus, may be found in Hendrych et al, *Právníký slovník, [Law Dictionary]*, 2<sup>nd</sup> Ed. (C.H. Beck, 2003). Pavlíček et al, *Ústavní právo a státověda [Constitutional Law and the Theory of State]*, (Linde, 1998), a standard textbook on constitutional law and theory of state used at Czech law faculties, uses similar definition (which is then due to the system of legal education memorized by students) at p. 67.

<sup>115</sup> Maduro, op cit n 12 at 530.

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.<sup>116</sup> 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 conclusions of that analysis will, however, change once the EU enlargement has been taken into consideration as a relevant factor.

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, which will encompass much more relevant actors.

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 and fail in their mission to create a coherent and consistent legal order. Indeed, it is very easy to say: "it is not for me to decide". In this respect, the Tribunal's justification for its choice is too succinct. It is based on a kind of judicial restraint since the Tribunal argues that limiting the effects of its decision prospectively would mean that the Tribunal does not directly affect the sphere of politics and international law where the state is represented by the President (and not by the Tribunal).<sup>117</sup> However, if taken seriously, there would always be a case for this "judicial restraint": Every constitutional court could argue that its decision will affect politics and international law. In sum, when making institutional choices, courts must reason in a persuasive manner to justify their choice.

### *B Contrapunctual law principles and the Area of Freedom, Security and Justice*

The last problem, which the contrapunctual law principles face in the Area of FSJ is due to the very nature of the cooperation in criminal justice matters. This relates to several considerations.

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<sup>116</sup> 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, in Germany by changing the Basic Law after the ECJ's *Tanja Kreil* ruling. See Kumm, op cit n 12 at 270.

<sup>117</sup> Point 5.3, second paragraph.

Firstly, most fundamental rights are at stake in the field of criminal justice. While perhaps the majority of the previous cases of constitutional conflict concerned economic rights,<sup>118</sup> which follows from the nature of the first pillar law, criminal justice cooperation involves rights such as human dignity, liberty, protection from torture and the like.<sup>119</sup> Constitutional courts may be inclined to stress their role as guarantors of individuals' rights at the expense of creating a coherent legal order. This may lead to different results of balancing the requirements of the national constitution with the need for consistency in the supranational legal order although, as the Polish Constitutional Tribunal stressed, significant mutual trust is possible because the Member States built their legal orders on structural principles that guarantee the protection of fundamental human rights and freedoms.<sup>120</sup>

Conversely, the FCC seems to imply that the only standards it is willing to uphold are those of its Constitution. However, the FCC's concerns about the standards provided by the Basic Law are *different* from those expressed in the cases concerning first pillar constitutional conflicts:<sup>121</sup> while in Community law it is *European standards* created by the ECJ which may be in conflict with the standards provided by the German Basic Law, in the case of third pillar criminal cooperation based on mutual recognition, *the standards of other Member States* are at play. Some of the new Member States still have problems with their judiciary<sup>122</sup> and it is understandable that the FCC is not willing to give up all control over what happens in these countries with persons surrendered by German courts. This may also explain why the FCC used "Maastricht-like" language at some parts of its decision. The 'dark-signals' sent by the FCC<sup>123</sup> could be directed not only towards the ECJ, but equally to other (particularly new) Member States.

Secondly, criminal justice touches the core of the state powers and sovereignty (as understood traditionally). Criminal law protects the most fundamental values of every society: it imposes sanctions for breaching those values and the sanctions are, in fact, a form of state violence against the perpetrator. Of course, it is questionable whether the fundamental values may differ across the Member States so as to justify the FCC's parochialism, however this may explain the present tensions. In the same vein, the power to sanction the breaches committed on the state territory is traditionally understood as a feature of the state sovereignty. The EAW Framework decision reflects this and the FCC only highlighted the possibility of Member States not to execute the EAW in case of an

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<sup>118</sup> That was the case of eg *Solange I and II* and *Banana Dispute*.

<sup>119</sup> Eg in the UK case *R v Home Secretary ex parte Elliot* [2001] EWHC Admin 559 referred to by Alegre and Leaf, op cit 23 at 210-212 the person requested from France contended that the basis for his conviction was a confession obtained by means of torture or inhuman or degrading treatment from his co-defendant. See other cases reported *ibid*.

<sup>120</sup> Point 5.9.

<sup>121</sup> Cited in n 13 to 16.

<sup>122</sup> See eg two reports prepared by Open Society Institute within the framework of EU Accession Monitoring Program: *Judicial Independence* (Central European University Press, 2001) and *Judicial Capacity* (Central University Press, 2002). Both reports are available at <http://www.eumap.org/topics/judicial/reports> (27.1. 2006).

<sup>123</sup> Judge Lübke-Wolff called them as such – see para. 159 of her dissenting opinion.

offence having been committed on their territory.<sup>124</sup> Furthermore, both courts argued against the possibility that anything could change with the existence of the EU citizenship, while at the same claimed that rights guaranteed to the citizens legitimise the state power.<sup>125</sup>

This is related to another feature of the Area of FSJ: as a public good,<sup>126</sup> security is a social goal whose attainment legitimises the public power. Both decisions mention the protection of own citizens as a necessary precondition for exercising public power.<sup>127</sup> Tensions within the third pillar law may be explained also by the fact that national constitutional courts are well aware of this fact and do not want the EU to get too much of it. This competition for “who should care for citizens” is just another case of the same tension regarding the protection of consumers, public health or the environment within the first pillar law.

Lastly, although *Pupino* brought elements of the first pillar law also to the third pillar (requiring a consistent interpretation of national law and bringing to EU law the principle of loyal cooperation known from Article 10 TEC ),<sup>128</sup> structural differences between the two EU law pillars continue to exist. Especially, the FCC refers to the absence of direct effect of framework decisions<sup>129</sup> or their adoption outside the supranational decision-making structure whereby ‘European Parliament, an independent legitimising source of European law, is in the process of law-making only heard (see Article 39 (1) TEU), which corresponds in the third pillar to the principle of democracy, since political power within the framework of implementation, in an extreme case by its refusal, rests with legislature of the Member States’.<sup>130</sup>

## VI Conclusion

This article examined two recent decisions of the Polish Constitutional Tribunal and the German Federal Constitutional Court which both annulled national implementation of the EAW Framework Decision. After a 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. P. Maduro to guide national courts when applying EU law. This served a twofold aim: firstly to show that although both decisions’ outcome was the same, 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 legal interpretation and reasoning. M. Kumm’s principle of best fit and his analysis of constitutional conflict help to find reasons supporting this contention. It is highlighted by the particular context of each decision: the fact that constitutional courts may be increasingly protecting the sovereignty

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<sup>124</sup> See n 74 and 75 and the text accompanying them.

<sup>125</sup> See n 53 and 69.

<sup>126</sup> Walker, op cit n 10 at 12.

<sup>127</sup> For Tribunal see point 4.3, FCC see para. 67. See above text accompanying n 53 and 70.

<sup>128</sup> *Pupino*, op cit n 36.

<sup>129</sup> Para. 80.

<sup>130</sup> Para. 81.

of their constitutions and the special character of the Area of FSJ. 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”.