

**THE EUROPEAN ARREST WARRANT,
THIRD PILLAR LAW AND NATIONAL CONSTITUTIONAL
RESISTANCE / ACCEPTANCE**

**The EAW Saga as Narrated by the Constitutional
Judiciary in Poland, Germany, and the Czech Republic**

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Summary: In European societies of the early 21st century, the judicialisation of politics and society seems to be 'a partial aspect of societal evolution'.¹ Politics has become deeply judicialised and the judiciary has become profoundly involved in issues which used to be the sole domain of 'pure' politics.² Some talk of 'the secular papacy', ie the judiciary of the Modern West playing the role of the 12th century papacy of the Medieval Western World.³ Others criticise the rise of 'juristocracy' and the decline of popular politics.⁴ Thus, it is not surprising that the phenomenon of 'New Constitutionalism' started to influence the emerging constitutionalisation of the European Communities in the 1960s and 1970s. A specific regime of European 'constitutional tolerance'⁵ involves constitutional and methodological pluralism among the Union and its Members, including the plurality of views on what is, and whether there is any, Grundnorm of the legal system, or who is the final arbiter of European Constitutionalism. This sort of pluralism makes the domestic judicial acceptance of European doctrines a

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¹ Teubner, 'Juridification: Concepts, Aspects, Limits, Solutions' in G Teubner (ed) *Juridification of Social Spheres* 3 27 (W de Gruyter, Berlin and New York 1987).

² Miller, 'Lords of Democracy: The Judicialization of "Pure Politics" in the United States and Germany' (2004) 61 Wash. & Lee L Rev 587.

³ R Badinter and S. Breyer (eds), *Judges in Contemporary Democracy: An International Conversation* (NYU Press, New York 2004) 67, 79.

⁴ R Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard 2004). It is true that the expansion of 'New Constitutionalism' also meant that 'rights rhetoric' proliferated and court-like rhetoric is now used in political discourse generally. Cf A Stone Sweet, *Governing with Judges. Constitutional Politics in Europe* (OUP, Oxford 2000). This, however, seems to approve Hirschl's skeptical thesis about stealing politics from 'We the People'.

⁵ Cf recently, eg JHH Weiler, 'On the Power of the Word: Europe's Constitutional Iconography' (2005) 3 Intl J Const L 173, part 7.

necessary condition of the proper application of EU law. Thus, it is fair to say that the principle of primacy of European law cannot be understood from the ECJ's perspective only. Instead, the primacy of EU law is formed by both the ECJ and national high courts.⁶

The logic of European integration empowered national ordinary courts and disempowered national constitutional courts through the European-style decentralised judicial review of national law for its compliance with EU law.⁷ At the same time, the logic of 'New Constitutionalism' and the judicialisation of politics shifted the important last word of acceptance or veto over any European rule to national high courts, especially constitutional courts. Thereby, national constitutional courts appeared even stronger on the European scene. The lead was taken by the German Federal Constitutional Court (FCC) in its in/famous 'Maastricht' decision,⁸ which on a legalistic basis protects German sovereignty within the Union from the uncontrollable expansion of the Union's power at the expense of the nation states.

In fact, Western European national politics was able to internalise these powers which are supposedly vested in their constitutional courts. Far from being disappointed by the increasing powers of their constitutional courts, national politicians in turn might 'play the constitutional card'⁹ during European negotiations, claiming that the draft of the European legislation they oppose is likely to be found unconstitutional by their constitutional court.

European constitutional justices are generated via the political process and, unlike the United States Supreme Court justices, they do not have life tenure (with the exception of Austria, Belgium, and Malta).¹⁰ This seems to guarantee that justices will cooperate with their national political elites on defending their respective countries' interests and, at the same time, will not go far beyond the mainstream viewpoints on the proper relation between European and national legal systems. Perhaps this is the reason why constitutional justices could claim their

⁶ See generally A-M Slaughter, A Stone Sweet, JHH Weiler (eds), *The European Court and National Courts - Doctrine and Jurisprudence* (Hart, Oxford 1998). For a recent update of the CEE constitutional courts, cf A Albi, 'Supremacy of EC Law in the New Member States: Bringing Parliaments into the Equation of "Co-operative Constitutionalism"' (2007) 3 *EuConst* 25.

⁷ Ferreres Comella, 'The European Model of Constitutional Review of Legislation: Toward Decentralization?' (2004) 2 *Intl J Const L* 461.

⁸ BVerfGE 89, 155 (1993), English translation in 33 *ILM* 388 (1994).

⁹ Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11 *Eur LJ* 262, 281.

¹⁰ Another obvious exception where justices have life tenure is the group of supreme courts of countries where these courts also exercise constitutional review (Ireland, Scandinavian nations).

*power which, if truly exercised, would destroy the complex design of the European Union.*¹¹

The New EU Member States developed strong constitutional courts in the course of the 1990s. The purpose of this paper is to show what the position of these courts to EU law is, and the application of this law within the national legal system. After a brief introduction, the constitutional courts of the new EU Member States are introduced in the second and third section. The fourth and fifth sections provide the core of the paper: an analysis of constitutional discourse relating to the European Arrest Warrant in Germany, Poland and the Czech Republic. Whereas the German and Polish constitutional courts annulled the national implementation of the European Arrest Warrant (though for different reasons), and the Polish legislature, acting as a constituent power, finally settled the issue, the Czech Constitutional Court upheld the respective Czech law. Finally, the sixth section offers my moderate conclusion which cautions against excessive judicial activism vis-à-vis EU law and calls for the inclusion of political forces into European constitutional debate.

I An Overture

In the three-year saga of re-staffing the Czech Constitutional Court by the new President Klaus,¹² the peak of the new President's inability to offer reliable nominees to the Czech Senate came with the nomination of a state prosecutor in December 2004. The Senate reached almost unanimity in rejecting the nominee (11 in favour, 65 against), despite the fact that the President's own Party controlled almost half of the Senate. The nominee ridiculed herself with her letter to the President, a well-known Eurosceptic, in which she denounced the European Arrest Warrant (the constitutionality of which was pending before the Constitutional Court), while writing articles celebrating the EAW at the same time. When the facts of her letter to the President became known to the public, the nominee was unable to explain her apparent inconsistency.¹³

¹¹ The most influential German doctrine of both *kompetenz-kompetenz* and substantial limits imposed on European Integration (Maastricht ruling) as well as the minimal level of protection of human rights at European level (BVerfGE 73, 339, *Solange II* of 1986) was in respect of the role of nuclear weapons during the Cold War. All relevant parties know about the impact of powers they claim, while at the same time they know that their real strength lies not in their actual use, but merely in their potential to be used. This comparison is made by Weiler and Haltern, 'Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz' (n 6) 362.

¹² See Kühn and Kysela, 'Nomination of Constitutional Justices in Post-Communist Countries: Trial, Error, Conflict in the Czech Republic' (2006) 2 *EuConst* 183.

¹³ Moreover, the nominee's long membership in the former Communist Party of Czechoslovakia contributed to her failure. Cf the Senate of the Czech Republic, 16 December 2004, stenographic records, available at: <www.senat.cz> (in Czech).

Several months later, in spring 2005, President Klaus, who had always criticised referrals to the Constitutional Court by his predecessor Havel, sent a letter to the Chief Justice of the Constitutional Court, in which the President urged the Chief Justice to review the European Constitutional Treaty. Because the Czech Republic had not started the process of ratification, and thus the Court did not have formal jurisdiction over the issue, the President's request was politely rejected by the Chief Justice.¹⁴

These two examples show that the respective post-communist political actors had already realised the importance of the Constitutional Court in pursuing their political agenda. The three Central European Constitutional Courts of Poland, Slovakia, and the Czech Republic had already decided seminal issues on the relation of their legal and political system to the EU and EU law. The Polish Constitutional Tribunal (PCT) has already adjudicated several important cases, including the constitutionality of elections to the EU Parliament and the constitutionality of the Polish Accession Treaty, as well as the unconstitutionality of the EAW under the Polish Constitution. In Slovakia, two important cases are before the Slovak Constitutional Court (SCC): first, the Slovak Court has already decided that positive action in favour of an underprivileged race is not compatible with the Slovak Constitution;¹⁵ the second, pending case presents the issue whether parliamentary ratification of the European Constitutional Treaty suffices or whether a referendum is required by the constitution.¹⁶ In the Czech Republic, the issues of the constitutionality of sugar quotas, and especially that of the implementation of the European Arrest Warrant have been decided by the Czech Constitutional Court (CCC).

These examples show that the new EU Members' Constitutional Courts swiftly took on, or are about to take on, a role as final arbiter of the constitutionality of EU action within their respective jurisdictions. That is why it is worth discussing these courts' general attitudes to EU law and to fundamental issues of constitutionality and law. The issue of the EAW and the extradition of nationals first decided by the Polish

¹⁴ The President was apparently well aware of that and his letter might be interpreted as the political gesture of a man who had directed most of his political agenda to a critique of the EU. In more detail, see Kühn, 'Ratification without Debate and Debate without Ratification: the European Constitution in Slovakia and the Czech Republic' in A Albi and J Ziller (eds) *The European Constitution and National Constitutions: The Ratification and Beyond* (Kluwer, The Hague 2007).

¹⁵ See the decision PL. ÚS 8/04-202 of 18 October 2005, available in Slovak <www.concourt.sk>

¹⁶ For more details, see the translation in English <www.euroustava.sk/en> accessed 26 September 2006.

Constitutional Tribunal, which has been meanwhile adjudicated also in Germany and the Czech Republic, is the core of my analysis.¹⁷

II The Post-communist Constitutional Courts: Introducing the Actors

In Poland, a constitutional tribunal was created in 1985 during the final crisis of communism. The PCT did not become an important legal and political factor until 1989, during the last months of the Polish communist regime. Its competences were broadened in the course of the 1990s, and were modified with the enactment of the new Polish Constitution of 1997.¹⁸ The Czechoslovak Constitutional Court, originally established in 1920 and abolished by the communists, was recreated in 1992. Both republics which emerged from the vanished Czechoslovak Federation established their own constitutional courts in 1993.¹⁹

In Poland, candidates for the PCT are nominated by at least 50 deputies of the lower house (the *Sejm*) or by the presidium of the *Sejm*, and elected by a simple majority of votes in the *Sejm*.²⁰ Unlike Germany, where bargaining between the opposition and the coalition is necessary,²¹ the Polish law means that the coalition controlling a simple majority in the lower house can elect justices completely disregarding the opposition. The practice shows, however, that the PCT has always been a predominantly academic court, and the process has selected the top Polish academics. In August 2005, of the fifteen justices, eleven were law professors.²² Between 1985 and 2001, thirty-six Polish justices served at the PCT, a number which included twenty-four law professors (five of whom were also experienced practitioners), five ordinary judges, three prosecutors, and two practising attorneys.²³ In my view, the Polish system, despite the

¹⁷ One must also note the Cypriot judgment of the Supreme Court of Cyprus of 7 November 2005, Ap No 294/2005 (a short English summary is available as Council document No 14281/05 of 11 November 2005).

¹⁸ Cf M Brzezinski, *Struggle for Constitutionalism in Poland* (St. Martin's Press, New York 1998).

¹⁹ On the Czech Constitutional Court, see G Brunner, M Hofmann and P Holländer, *Verfassungsgerichtsbarkeit in der Tschechischen Republik: Analysen und Sammlung ausgewählter Entscheidungen des Tschechischen Verfassungsgerichts* (Nomos, Baden-Baden 2001). The best introduction to all four Central European constitutional courts is provided by R. Procházka, *Mission Accomplished. On Founding Constitutional Adjudication in Central Europe* (CEU Press, Budapest and New York 2002).

²⁰ Cf Art 5 of the Constitutional Tribunal Act <<http://www.tribunal.gov.pl>> (in English).

²¹ On staffing the FCC, see G Vanberg, *The Politics of Constitutional Review in Germany* (CUP, Cambridge 2005) chapter 3.

²² The data according to the Tribunal's Internet site: www.trybunal.gov.pl accessed 15 August 2005.

²³ Garlicki, 'The Experience of the Polish Constitutional Court' in W. Sadurski (ed.) *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Postcommunist Europe in a Comparative Perspective* (Kluwer, The Hague 2002) 269.

absence of any checks and balances, has generated the most respected post-communist constitutional court.

The Czech Constitution follows the American model of staffing the Constitutional Court. The Constitution gives the President the power of nomination and the Senate the power of confirmation of 15 constitutional justices.²⁴ The term is ten years, and, unlike most other European countries, is renewable.²⁵ The CCC appointed by President Havel tended to be composed of one third of legal academics, one third of practitioners, and one third of former ordinary judges. President Klaus, over a long process in the creation of the new court after the terms of most justices had expired in 2003, substantially changed the bench. Of fifteen constitutional justices, three are President Havel's remaining appointees who occupied vacancies between 2000 and 2002. Another three of Havel's former justices were reappointed to the bench by President Klaus. If the CCC is taken as a whole, three justices, including a new Chief Justice, are former top politicians, another three are law professors, four are former ordinary judges, two are attorneys and one is a former Czech representative at the European Commission of Human Rights.²⁶

The role and activity of Central European constitutional courts substantially differ. Some constitutional courts are much closer to real courts, adjudicating real-life cases, while other courts mostly deal with abstract issues only. For instance, the PCT exercises abstract constitutional review of acts of parliaments.²⁷ That is why one might find in Poland only very indirect interactions between the constitutional and ordinary judiciary. The basic mode of interaction is the judicial referral of the law's constitutionality, while a constitutional complaint proper does not exist. In contrast, following the German model,²⁸ the CCC exercises judicial

²⁴ See Czech Const. Art 84 § 2.

²⁵ On this critically, see Kühn and Kysela (n 12).

²⁶ The rest is difficult to specify. For more detail, see the article cited in n 25. Although the Central European model tends to generate law professors at the expense of other law professions, considering the low status of legal academia during Czechoslovak's 'really existing socialism', both Slovakia and the Czech Republic face more difficulties in staffing their courts with competent academics.

²⁷ Pol. Const. Art 79 § 1, Art 191 § 1 cl. 6.

²⁸ See Art 13 § 8a of the Federal Constitutional Court Act (BVerfGG) and Grundgesetz [GG] [Constitution] Art 93 § 1 cl 4a and 4b of the Basic Law). Similarly, Spain (the organic law on the Constitutional Tribunal, Art 43ff). In post-communist Europe, this model is much less popular. Besides the Czech Republic (and since 2002, Slovakia), it seems to exist only in Slovenia (Art 21 para 1 (6) of the Act on the Constitutional Court of the Republic of Slovenia, Uradni list [Official Gazette] No 15/1994, available in English at the website of the Slovenian Constitutional Court <www.us-rs.si/en/index.html> accessed 16 May 2003) and Croatia (Art 127 para 1 of the Constitution of Croatia, Art 62ff of the Constitutional Act on the Constitutional Court of the Republic of Croatia, Narodne novine [Official Gazette] no 49/02 of 3 May 2002 <www.usud.hr> accessed 16 May 2003).

review both of the constitutionality of laws and the constitutionality of individual decisions, including the judgments of ordinary law courts.²⁹

The tendency to use constitutional adjudication as a means of prolonging or even revising the political battle lost in parliament found its way very quickly into post-communist political systems.³⁰ Constitutional review in some post-communist systems is even more open to parliamentarians because there is no time limit to refer the law to the court by Members of Parliament.³¹ Taking all data into account, the number of parliamentary referrals is similar to the most litigious Western European constitutional courts.³²

The political standing of the constitutional courts seems to be high. The peculiar situation of post-communist democracies where parliaments enjoy very little social prestige creates the specific situation of too powerful constitutional courts. The media usually present judicial opinions in a very different way from, for instance, the results of parliamentary votes. Unlike the latter political processes, judicial deliberation is conducted in closed chambers.³³ The courts employ dogmatic German-style concep-

²⁹ Procházka noted that the Czech Constitutional Court, because of its constitutional complaints and the review of judicial decisions, is the most 'judicial' tribunal in Central Europe. Procházka (n 19) 166.

³⁰ For instance, in the Czech Republic, the number of parliamentary referrals between autumn 1993 and the end of 2004 was close to ten annually (91 referrals in total during the first 12 years). Of these laws challenged, every third law was either totally or partially annulled.

³¹ This is the case of both Poland and the Czech Republic. In contrast, German parliamentarians can challenge the law within 30 days following its adoption. See BVerfGG Art 76 and Art 93 (1). Some post-communist systems provide a very diverse body of institutions which might challenge the law before the court. The Polish constitution provides a catalogue of institutions eligible to challenge the law before the PCT which is the most extensive one in Europe. In practice, apart from parliamentarians, the Ombudsman and local self-governments, unions, and trade organisations are also very active in activating the PCT. See the website of the PCT.

³² I have in mind especially the French Constitutional Council. After the first important decade of the socialist government of the 1980s and its aftermath, the judicialisation of politics intensified during the late 1990s and early 2000s, with its peak of 25 referrals in 2003. See A Stone, *The Birth of Judicial Politics in France. The Constitutional Council in Comparative Perspective* (OUP, New York 1992) 140ff and the Council's website <www.conseil-constitutionnel.fr> accessed 17 July 2005 respectively.

³³ Cf Holmes and Sunstein, 'The Politics of Constitutional Revision in Eastern Europe' in S Levinson (ed), *Responding to Imperfection. The Theory and Practice of Constitutional Amendment* (Princeton University Press, Princeton NJ 1995) 300 (claiming that 'there is an unholy alliance here between the culture of communism and the culture of human-rights lawyers ... The latter, too, believe that there is no room for bargaining when important things are at stake ... The relatively high prestige of the constitutional courts in the region ... may derive at least in part from the strange resemblance between this unelected body of people who make decisions in secret (without public bargaining) and the old Politburo (which also claimed to speak with the "higher voice of the people").' Cf also W Sadurski, *Rights before Courts: a Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer, Norwell MA 2005) 293.

tual reasoning which keeps this form of decision-making from the attention of most political scientists. This further legitimises the court because it supports the all-embracing idea of the court as composed of unbiased judges who do not make the law, but rather interpret it.

The fact that these views dominate general discourse explains the high public support for constitutional courts. However, out-of-sight disregard for judicial rulings is not uncommon. In post-communist Europe, it is not exceptional for constitutional rulings to be disrespected by the public authorities and politicians. For instance, the legislature enacts a law, even though that law might be unconstitutional considering previous constitutional decisions. While this is almost unknown in Western countries, where some scholars even criticise 'the excess of deference by members of Parliament toward the court',³⁴ frequent disregard of constitutional rulings happens in the Czech Republic, Poland and other post-communist countries with a still immature political culture.³⁵

III Case Study: the EAW in Poland, Germany and the Czech Republic

A Introduction

In our analysis of how the constitutional courts of Central Europe fit within the complex scheme of EU law, an interesting comparison might be provided by several decisions relating to the implementation of the European Arrest Warrant Framework Decision (hereinafter 'Framework Decision').³⁶ In principle, I will concentrate on one specific aspect of this

³⁴ Christine Landfried, 'Germany' in C Neal Tate and Torbjörn Vallinder (eds), *The Global Expansion of Judicial Power* (New York University Press, New York and London 1995) 307, 314.

³⁵ Due to growing judicialisation at transnational level, national governments find themselves more pressed to obey rulings of their own constitutional courts. For instance, the Court of Human Rights found that in the case of Polish rent control several constitutional rulings made by the PCT were disobeyed by the Polish legislature. The European Court found rent control as practiced in Poland contrary to the right to property, adjudicated against the Polish state and criticised Poland for non-compliance with the decisions of the PCT. See *Hutten-Czapska v. Poland*, application No 35014/97, the judgment of the Grand Chamber of 19 June 2006, para 208: 'The Grand Chamber, in its assessment of the applicant's situation in the period under consideration, shares the opinion expressed by the Constitutional Court, to which the Chamber subscribed, that the provisions of the 2001 Act as applicable at the relevant time unduly restricted her property rights and placed a disproportionate burden on her, which cannot be justified in terms of the legitimate aim pursued by the authorities in implementing the relevant remedial housing legislation' (referring to the previous decision of the ECHR's Chamber in the same case on 22 February 2005).

³⁶ See the Council Framework Decision on the European Arrest Warrant (and surrender procedures between Member States) 2002/584/JHA, OJ L190/1 of 18 July 2002. Cf on this framework decision, inter alia, R Blekxtoon and W van Ballegooij (eds) *Handbook on the European Arrest Warrant* (Asser, The Hague 2004); Alegre and Leaf, 'Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study - the European Arrest Warrant', (2004) 10 Eur. LJ 200; Wouters and Naerts, 'Of Arrest Warrants, Terror-

complex law, which is the extradition of nationals,³⁷ and in some respects also on the elimination of the requirement of double criminality.³⁸

The prohibition of extradition of nationals is a rule which was developed during the rise of the modern nation state on the European Continent throughout the 18th and 19th centuries. In contrast, the prohibition of extradition of nationals has never been firmly established in the Anglo-Saxon world.³⁹ In fact, only in the 19th century did the growing mobility of Europeans present extradition as a practical issue. The prohibition to extradite nationals was originally understood to maintain the jurisdiction of the state over its subjects rather than to protect the rights of citizens.⁴⁰

Moreover, mutual distrust of the nation states in their exercise of justice played a substantive role in strengthening the rule. Writing more than two hundred years ago, the Marquis of Beccaria refused to decide the issue whether or not to extradite nationals until tyranny disappeared from Europe and all European states acknowledged 'the universal empire of reason':

Whether it be useful that nations should mutually deliver up their criminals? Although the certainty of there being no part of the earth where crimes are not punished, may be means of preventing them, I shall not pretend to determine this question, until laws more conformable to the necessities, and rights of humanity, and *until milder punishments, and the abolition of arbitrary power of opinion, shall afford security to virtue and innocence when oppressed; and until tyr-*

ist Offences and Extradition Deals: An Appraisal of the EU's Main Criminal Law Measures against Terrorism after "11 September" (2004) 41 CML Rev 909.

³⁷ For a superb analysis of this concept in general, see Plachta, '(Non-)Extradition Of Nationals: A Neverending Story?' (1999) 13 Emory Intl L Rev 77.

³⁸ Framework Decision (n 36) Art 2 (2).

³⁹ HC Biron and KE Chalmers, *The Law and Practice of Extradition* (Stevens & Son, London 1903) 13 ('... it may be observed that the most liberal governments of the world - those of this country [the United Kingdom] and the United States of America - are now sometimes willing to surrender their own subjects, even in some cases where they do not meet with reciprocal treatment. ... These facts may be fairly taken as an index of the general feeling in this country which is in favour of the surrender of all fugitive offenders of whose guilt of a crime punishable in this country a *prima facie* has been made out, a feeling which is due to the consciousness that such a policy is in accord with the interest of this country, and it is reasonable to suppose that this view of extradition is appealing to the other civilized nations of the world, and increasingly so as the general balance of convenience is recognised to be in favour of reducing obstacles to extradition'). This book is cited by the CCC in its *EAW* case (see para 75, noting that 'British lawyers have traditionally preferred this approach to that of the European continental countries'). Cf a declaration of 1968 by the Speaker of the British House of Commons: 'We don't feel outraged honour at the thought of delivering an Englishman into the hands of foreign judges. He is first of all a criminal and only after that an Englishman' (quoted by Plachta (n 37) 94).

⁴⁰ Plachta (n 37) 82.

*anny shall be confined to the plains of Asia, and Europe acknowledge the universal empire of reason by which the interests of sovereigns and subjects are best united.*⁴¹

The fact that it is not only the European Court of Justice⁴² which claims that the mutual distrust of European nations is a matter of the past, the prohibition of extradition of nationals offers an interesting test case on the positions of constitutional courts. Likewise, the elimination of the double criminality requirement would also test the degree of mutual trust between the EU Member States. After all, referring to the EAW, Advocate General Colomer noted that this law created 'a far-reaching debate concerning the risk of incompatibility between the constitutions of the Member States and European Union law.'⁴³

In the ongoing saga of the EAW, first the PCT declared the implementation of the EAW unconstitutional in Poland insofar as it allows the surrender of Polish nationals.⁴⁴ Poland implemented⁴⁵ the EAW despite Art 55 of the Polish Constitution which explicitly prohibits the extradition of Polish nationals ('Extradition of a Polish national is prohibited.'). Although expert opinion on this was divided,⁴⁶ the constitutional text itself was clear and allowed no exception to the prohibition of the extradition

⁴¹ C. Beccaria, *An Essay on Crimes and Punishment* (Philip H. Nicklin, Philadelphia 1819) 135-136 (emphasis added).

⁴² Joined cases C-187/01 and C-385/01, Criminal proceedings against Hüseyin Gözütok (C-187/01) and Klaus Brügge (C-385/01) [2003] ECR I-1345, paragraph 33: '... the Member States have mutual trust in their criminal justice systems and ... 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.'

⁴³ The opinion of Advocate General Colomer of 12 September 2006, case C-303/05, *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, para 8. However, neither the Court of Justice nor its Advocate General contributed much to this debate (cf the decision of the Court of 3 May 2007).

⁴⁴ The case P 1/05, quoted according to the Polish text published in *Orzecznictwie Trybunalu Konstytucyjnego. Zbiór urzędowy* [Collection of Decisions of the Constitutional Tribunal. Official Collection, hereinafter 'OTK ZU'] 2005 ser A, nr 4, item 42 (unless specifically referred to, the English summary available on the Tribunal's website). Cf case notes in Poland by Czaplirski, Hofmański, Plachta and Wieruszewski, all in *Państwo i Prawo* no 9/2005; English translation in Łazowski, 'Constitutional Tribunal on the Surrender of Polish Citizens Under the European Arrest Warrant. Decision of 27 April 2005' (2005) 1 *Eu-Const* 569; Wyrozumska, 'Some Comments on the Judgments of the Polish Constitutional Tribunal on the EU and on the Implementation of the European Arrest Warrant' (2004-2005) 27 *PYL* 7; or an analysis of both the German and Polish decision by Jan Komárek, 'European Constitutionalism and the European Arrest Warrant: Contrapunctual Principles in Disharmony' Jean Monnet Working Paper 10/05.

⁴⁵ See the amendment to the Criminal Procedure Code of 18 May 2004, Official Gazette (Dz. U.) 2004 no 69 item 626.

⁴⁶ Cf in English the report by Agnieszka Grzelak at the XXI FIDE Congress, Dublin, June 2004, part C, point 3 <<http://www.fide2004.org>> (claiming that the majority of Polish scholars did not consider it unconstitutional).

of nationals. The Tribunal acted based on a reference of the district court which was dealing with the case of surrender of a Polish national to the Netherlands. In an interesting exercise of inter-judicial dialogue, the district court openly doubted the soundness of the Euro-friendly construction of national constitutional law. It would be 'risky', in the opinion of the district court, if this sort of construction should limit basic rights.⁴⁷ One can easily see that the district court disputed the potential range of the earlier doctrines made by the PCT.⁴⁸

The German FCC declared the German act unconstitutional three months later, on 18 July 2005.⁴⁹ The case was based on the constitutional complaint of a German and Syrian citizen, Mamoun Darkazanli, who was about to be surrendered to the Spanish authorities. The Spanish authorities wanted Darkazanli for his alleged participation in the al-Qaeda terror network in Europe. Unlike both Poland and the Czech Republic, Germany had amended its constitution which expressly provided for an exception from the originally unexceptional prohibition of the extradition of nationals.⁵⁰

Finally, on 3 May 2006 the CCC rejected the proposal filed by the opposition parliamentarians to annul the Czech implementation of the EAW. The parliamentarians of the conservative Civic Democratic Party (ODS) argued that the possibility to surrender Czech citizens abroad under the EAW was in conflict with Art 14 para 4 of the Czech Charter of Fundamental Rights, according to which no citizen may be forced to leave his homeland. The prohibition laid down in this article was clear and unconditional in the petitioners' view. Moreover, facing poor definitions in the lists of offences for which the double criminality principle is not required, the petitioners based their arguments on the violation of the principle 'No crime without the law'.⁵¹

⁴⁷ See part 1.4 of the decision of 27 April 2005.

⁴⁸ See n 53 and the accompanying text.

⁴⁹ See the FCC, 2 BvR 2236/04 of 18 July 2005, paras (1-201) <http://www.bverfg.de/entscheidungen/rs20050718_2bvr223604.html> also published in [2005] 58 NJW [*Neue Juristische Wochenschrift*] 2289. See Böhm, 'Das Europäische Haftbefehlsgesetz und seine rechtsstaatlichen Mängel' (2005) 58 NJW 2588; Vogel, 'Europäischer Haftbefehl und deutsches Verfassungsrecht' (2005) 60 *Juristen Zeitung* 801; translation in English, for example, in Tomuschat, 'Inconsistencies - The German Federal Constitutional Court on the European Arrest Warrant' (2006) 2 *EuConst* 209; in German *Bundesverfassungsgericht* Decision of 18 July 2005, with annotation by Parga, (2006) 43 (2) *CML Rev* 583; Mölders, 'Case Note - The European Arrest Warrant in the German Federal Constitutional Court' 7 *German LJ* No 1 (1 January 2006) <www.germanlawjournal.com>

⁵⁰ See GG, Art 16 § 2.

⁵¹ See the judgment of 3 May 2006, published in Czech as No 434/2006 Sb [Official Gazette], the full English translation (used also in this paper) is available on the Court's website <www.concourt.cz>

B Polish, German and Czech Formalisms Compared

The unanimous decision of the PCT might be considered both formalist and EU-friendly. The PCT emphasised that its task was to review the constitutionality of all laws, including those which implement EU law into national law.⁵² At the same time, it highlighted (while referring to the ECJ case law) that the Euro-friendly construction of national law underscored by its earlier decisions had its limits and could not worsen the position of an individual.⁵³

The Euro-friendly position of the Polish justices could be seen throughout the judgment. The Tribunal repeated several times that the EAW was a measure of utmost importance⁵⁴ and deserved 'maximum priority by the Polish legislature'.⁵⁵ On the other hand, although it is possible to notice 'the general trend of the decline of the role which state citizenship has in determining the legal status of an individual', it is not up to the justices to change the constitution through creative 'dynamic interpretation', especially facing a strict and unconditional prohibition in Art 55 § 1 of the Polish Constitution.⁵⁶ The PCT reminded us that during the drafting of the Constitution, the opinion that 'the extradition of nationals is the most extreme limitation of state sovereignty'⁵⁷ effectively barred any exception to the constitutional ban on extradition. Thus, doctrinal arguments calling for the balancing of Art 55 against other constitutional provisions were ultimately refused.⁵⁸

Because one argument to uphold the law was an emphasis on the difference between extradition and surrender (only the former is prohibited by the Constitution, whereas criminal law talks about surrender), the PCT struggled with the concept of extradition and surrender. The Tribunal did not accept simple textual formalism and replaced it with its own systemic formalism when it summarised the basic differences between both concepts. Finally, the PCT reasoned that surrender was not qualitatively different from extradition, and if it differed, it was rather a more severe form of extradition.⁵⁹ That is why the PCT reasoned *a minori ad maius*.⁶⁰ Thus, on the one hand, the Euro-friendly court demarcated

⁵² See part 2.4 of the decision, quoted in n 44.

⁵³ Ibid 3.4.

⁵⁴ Ibid part 4.3.

⁵⁵ Ibid part 5.9.

⁵⁶ Ibid 4.3.

⁵⁷ Ibid 3.1.

⁵⁸ Ibid 4.1, 4.2.

⁵⁹ Ibid 3.2, 3.3, 3.5, 3.6.

⁶⁰ Ibid 3.6.

limits of judicial creativity, and, on the other hand, called (or even urged) the legislature to intervene and amend the Constitution.

When one compares both the German and Polish decisions, the perspective in which they fundamentally differ is in the final verdict and temporal consequences of the decision. First, the Polish CT (being bound by the ordinary court's referral) declared unconstitutional only the provision of the Criminal Procedure Code which allows the extradition of Polish nationals. Moreover, and even more importantly, the PCT took pains to justify that although the extradition of nationals is unconstitutional, it must be nevertheless applied until the Constitution is amended. The PCT gave Parliament 18 months for this amendment; if no amendment was made within this period, the decision would take effect and no extradition of nationals would be allowed. The PCT's argument was based on the constitutional provision which declares that Poland obeys international law⁶¹ and also on Polish obligations to the EU. The PCT devoted to the issue a substantial portion of its opinion⁶² which might be also explained by earlier frequent clashes between the ordinary judiciary and the constitutional judiciary.⁶³

In contrast, the FCC forgot all its judicial creativity and annulled the law on the implementation of the EAW⁶⁴ in its entirety, despite the fact that in most parts the constitutionality of the law was unquestioned⁶⁵ and there was a way to avoid this conclusion through an EU-friendly interpretation of domestic law⁶⁶ (in fact, exactly as the CCC finally did, as I show below). In reality, there were only limited problems with the German act: the principal problems for the German justices were, first, the fact that the German act did not implement Article 4 para 7 of the Framework Decision (the optional grounds for refusal to surrender persons suspected of offences committed on German soil), thus making the application of the EAW in Germany for German nationals disproportional under the German constitution; second, the fact that the German act, in the view of the Court, did not provide for sufficient judicial review;⁶⁷ and

⁶¹ Pol. Const. Art 9.

⁶² See part 5 of the decision quoted in n 44.

⁶³ Anna Wyrozumska, 'Direct Application of the Polish Constitution and International Treaties to Private Conduct' (2001) 25 *PYIL* 5.

⁶⁴ Das Gesetz zur Umsetzung des Rahmenbeschlusses über den Europäischen Haftbefehl und die Übergabeverfahren zwischen den Mitgliedstaaten der Europäischen Union (Europäisches Haftbefehlsgesetz - EuHbG) vom 21. Juli 2004 (Bundesgesetzblatt I Seite 1748).

⁶⁵ Critically on this, the dissenting opinion of Justice Lübke-Wolff, internet version part 181, *NJW* (2005) 2301.

⁶⁶ Tomuschat (n 49) 222; Parga (n 49) 592.

⁶⁷ For the problems of this conclusion, see Tomuschat (n 49) 223-225.

finally, the retroactive effects of the EAW for crimes committed on German soil.

Thus, according to a dissenting Justice, 'by annulling the law which by and large might have been applied without any constitutional problem, the Senate [of the FCC] forces the Federal Republic of Germany to violate Union law' which could have been avoided without constitutional violation.⁶⁸ In this comparison, it seems that while international and European law represents for the Polish Constitution a compelling value which, for some time, allows even the violation of constitutional rights, the German constitution does not reflect German international obligations to any substantial degree.

The real explanation, however, lies rather in analysing what the constitutional courts wanted to show the ECJ and the Union's authorities. On the one hand, the PCT, a newcomer in the EU, making its first fundamental decision, disputing in effect the constitutionality of the European act, did its best not to look in a bad light in European discourse. On the other hand, the FCC, a well-known defender of national basic rights against European encroachments, wanted to send an important signal to Brussels and Luxembourg.⁶⁹ Unlike the PCT, the FCC did not question the constitutionality of the extradition (surrender) of nationals itself, but only some features of its national implementation. Thus, it was able to show the EU that the FCC was there, defending basic constitutional rights. The best way to do this was through the dramatic effect of annulling the whole law on the implementation of the EAWFD. The actual damage,⁷⁰ however, would be short-term because enacting a new law would not present a long-lasting problem for the legislature. Quite the contrary, the damage done by the Euro-friendly PCT might have been considerable: the search for a supermajority to amend the constitution was expected to be very difficult on the Polish fragmented political scene.⁷¹

⁶⁸ The decision quoted in n 49, internet version 182 NJW (2005) 2301.

⁶⁹ 'Having perused the judgment, the reader has definitely the impression that the Karlsruhe judges again wanted to make their views on the limits of European integration clear, but the case was not well suited for such a decision of principle.' Tomuschat (n 49) 226.

⁷⁰ Though not entirely negligible. See Komárek (n 44) 21 (explaining the actual situation after the effects of the German decision, which created a difficult Catch-22: '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').

⁷¹ Art 55 of the Polish Constitution, as amended in September 2006, reads as follows (found on the website of the Polish Constitutional Tribunal <www.trybunal.gov.pl>:

'1. The extradition of a Polish citizen shall be prohibited, except in cases specified in paras 2 and 3.

2. Extradition of a Polish citizen may be granted upon a request made by a foreign state or an international judicial body if such a possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international

When reading the PCT's opinion, the justices' pro-European stances are very visible. In fact, the conflict between EU law and the constitution seemingly presented an easy case, solvable by systemic formalism. The PCT did not try to make this case hard by questioning the very meaning of extradition: by applying the prohibition of extradition of nationals not as a straightforward rule but rather as the principle subject to balance conflicting rights and interests. Apparently willing to take its constitution seriously, the Tribunal did not want to overstep the boundaries of constitutional adjudication.⁷²

If the PCT exercised what it calls 'dynamic constitutional interpretation', it would be, in the Tribunal's opinion, an infringement of the division of powers between the constitution-maker and the interpreter of the constitution. It does not mean, however, that the Tribunal is some sort of formalist self-restrained court. The PCT emphasised that it would not engage in 'dynamic interpretation', considering the importance of the principle of non-extradition of nationals within the Polish constitutional system, as proved, after all, by the clear intention of the constitution drafters. The PCT thus sits easily within a superb analysis by Mattias Kumm on the primacy of EU law, which suggests that

[w]hen EU law conflicts with clear and specific national constitutional norms that reflect a national commitment to a constitutional essential, concerns related to democratic legitimacy override considerations relating to the uniform and effective enforcement of EU law.⁷³

organisation of which the Republic of Poland is a member, provided that the act covered by a request for extradition:

1. was committed outside the territory of the Republic of Poland, and
2. constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request.
3. Compliance with the conditions specified in para 2 subparas 1 and 2 shall not be required if an extradition request is made by an international judicial body established under an international treaty ratified by Poland, in connection with a crime of genocide, crime against humanity, war crime or a crime of aggression, covered by the jurisdiction of that body.
4. The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden, just as an extradition which would violate rights and freedoms of persons and citizens.
5. The courts shall adjudicate on the admissibility of extradition.

⁷² Cf Komárek (n 44) 12.

⁷³ Kumm (n 9) 298. Cf *ibid* 300 ('a thick European identity even if the Constitutional Treaty will be ratified—national courts continue to have good reasons to set aside EU Law when it violates clear and specific constitutional norms that reflect essential commitments of the national community').

The Polish Tribunal did not find itself competent to apply systemic or teleological arguments capable of overriding the prohibition of extradition of nationals. Thus, at the end of the day its reasoning was rather formalist. In contrast, the German Court used formalist reasoning pursuing its own policy agenda in order to strike down the entire German act.

Although the Czech EAW case bears plenty of purposive and historical arguments rather than adhering to the literal meaning of the constitutional text, we can find a very different type of formalism in some paragraphs of the Czech decision, too. This sort of formalism helped to uphold fully the EAW. For instance, formalist reasoning was applied by the Czech justices in order to avoid some tough questions relating to different standards of the protection of basic rights in criminal proceedings in different European countries.

Unlike some evident doubts of the German FCC about the degree of mutual trust between EU Member States,⁷⁴ the CCC refers to the ECJ's judgment (as proof that 'the Member States have mutual trust in their criminal justice systems') and to the fact that 'all EU Member States are also signatories of the European Convention.' Both these facts supposedly prove that 'a citizen cannot be significantly affected in his rights due to the fact that his criminal matter will be decided in another Member State of the Union.'⁷⁵

C Historical Memories in Germany and the Czech Republic and their Impact

The PCT, except for a few haphazard remarks, did not analyse the very purpose of extradition. In contrast, the FCC started with a careful analysis of the concept of extradition and its constitutional purpose.

The FCC shows a much more statist view than the PCT.⁷⁶ The FCC's opinion was that the prohibition of the extradition of nationals was not only the expression of the responsibility of the state for its own nationals, but that nationals should not be removed from the legal order to which they are accustomed. Nationals have a special relationship to their democratic community which also means in principle that they cannot be excluded from this community. The FCC emphasised the importance of that principle by referring to the (sad) German historical experience of

⁷⁴ The German decision (n 49) para 76ff, NJW (2005) 2291 (urging the German legislature to react if necessary). Cf para 79, noting that 'a basis for mutual confidence exists' (emphasis added).

⁷⁵ Para 86 of the Czech EAW case (n 51).

⁷⁶ The latter admitted 'the general trend of the decline of the role which state citizenship has in determining the legal status of an individual' (n 56 and the accompanying text).

persecution and exclusion of Jews.⁷⁷ Still, after the recent constitutional amendment, the principle is not without exceptions.⁷⁸ Interestingly, the FCC emphasised that this new constitutional exception is not 'unconstitutional constitutional law' (*verfassungswidriges Verfassungsrecht*)⁷⁹ within the meaning of its *Maastricht* jurisprudence.

The CCC also dealt in detail with the rationale of the prohibition of extradition of nationals, but its analysis of both the history and the purpose of the Czech provision were strikingly different from that of its German counterpart. First, like the FCC, the CCC explained the history of the basic right of Czech citizens 'not to be forced to leave their homeland'.⁸⁰ This prohibition reflects, in the Court's opinion, 'the experience with the crimes of the Communist regime', namely with the operation 'in which the Communist regime forced troublesome persons to leave the Republic.' Although the Court might have followed the German logic and emphasised the impact of this unhappy historical experience for the current situation and for the protection of Czech citizens,⁸¹ the Court argued to the contrary. It seems that the Czech provision was never concerned with extradition, the Court explained. Still, the question whether the original meaning should be expanded cannot be decided solely by reference to 'the intention of the constitutional framers.'⁸²

For this reason, the CCC tried to determine the objective of Art 14 para 4 against the backdrop of 'contemporary life and institutions at the start of the 21st century'. The Court emphasised that in view of the low mobility of Europe's inhabitants at the beginning of the 19th century, 'as well as the very limited degree of cooperation among the then European states, [extradition] did not even constitute much of a weighty issue.' Because the modern concept of extradition emerged as late as in the 19th century, many of its features still carry signs of that era.⁸³ The CCC concluded its purposive approach by contrasting the 19th century with

⁷⁷ The German EAW decision (n 49) internet version paras 65 - 67, NJW (2005) 2290.

⁷⁸ Referring to the 47th Amendment of the German Basic Law, Bundesgesetzblatt 2000, part I, 1633.

⁷⁹ The German EAW decision (n 49) internet version para 70, NJW (2005) 2290.

⁸⁰ Art 14 para 4 of the Charter of Fundamental Rights.

⁸¹ As dissenting Justice Balík eventually did.

⁸² The Czech EAW case (n 51) paras 66-67 (the intention of the constitutional framers is not a decisive argument 'where it is based on historical experience, particularly in the circumstance where historical memory fades and cannot be passed on to future generations, because they are bound up with the experience of their own times'). It must be noted that in Poland the history of drafting the Constitution was recorded through many reports, whereas the Czech Bill of Rights does not have any 'travaux préparatoires'. See Filip, 'Evropský zatýkačí rozkaz a rozhodování ústavních soudů' [The European Arrest Warrant and Constitutional Decision-Making] (2005) 6 (8) *Právní zpravodaj* 1, 4.

⁸³ The Czech EAW case (n 51) paras 68-69.

'the current period ... connected with an extraordinarily high mobility of people, ever-increasing international cooperation and growing confidence among the democratic states of the EU ...'⁸⁴ In the CCC's logic, the EAW reflects the new rights of Czech citizens who have also become European citizens, which brings them also new responsibilities of the 21st century, nonexistent in the old Europe of closed borders.⁸⁵

The CCC did not limit its reasoning to this policy-line of arguments. It seems that the CCC was the only court which did not just analyse the rights of the accused person, but also the interests of victims.⁸⁶ According to the CCC, the extradition of nationals to the place where the criminal act was committed aims to improve the fair trial for *both* accused *and* victim:

... it is necessary to take into account *not only the protection of rights of persons suspected of committing a criminal act, but also the interests of the victims of criminal acts*. For the protection of the rights of victims and injured persons, it generally appears more practical and fair for the criminal proceeding to be held in the state in which the criminal act was committed ... Since the execution of the European Arrest Warrant, in the case a state is surrendering its own citizen, is conditioned on reciprocity ..., the rules contested by the petitioners protect the rights of persons who can be considered, according to the Czech Criminal Procedure Code, as injured persons. It can generally be said that, in view of the evidence that will be found in the state where the criminal act occurred, a criminal proceeding there will be quicker, more effective and, at the same time, more reliable and just both *for the defendant and for any victim of the criminal act*.⁸⁷

D The Role of Law Courts and the Legislature in the Protection of Basic Rights

The Polish Tribunal's strategy was to emphasise that the job of opening the gate to the EAW vis-à-vis Polish nationals rests exclusively within

⁸⁴ Ibid para 70.

⁸⁵ 'If Czech citizens enjoy certain advantages, connected with the status of EU citizenship, then naturally in this context a certain degree of responsibility must be accepted along with these advantages. The investigation and suppression of criminality which takes place in the European area, cannot be successfully accomplished within the framework of individual Member States, but requires extensive international cooperation. The results of this cooperation is the replacement of the previous procedures for the extradition of persons suspected of criminal acts by new and more effective mechanisms, *reflecting the life and institutions of the 21st Century*' *ibid* para 71 (emphases added).

⁸⁶ Considering the nature of the proceedings before the Czech Court (abstract review based on the petition of parliamentarians), the Czech Court was perhaps the best suited to make this argument.

⁸⁷ *Ibid* para 96.

the legislature. The PCT rejected any possibility of creative 'dynamic interpretation' which might make the full application of the EAW in Poland possible. In contrast, the CCC openly asserted a much more active role and, according to some domestic critics, rewrote the Constitution.⁸⁸

One might wonder why the Polish Tribunal emphasised so much that the implementation of the EAW was desirable. These arguments cannot be fully understood beyond their context. Throughout the subsequent process of amending the Polish Constitution, the patriotic and nationalist Polish political forces used these appeals by the Tribunal to relieve them of part of their own responsibility for the amendment to the Constitution which might be viewed by some of their electorate as unacceptable concessions to 'Brussels'. During parliamentary hearings, both the deputies and the senators frequently referred to the Tribunal's ruling. Thus, the Tribunal's justification contributed to the fact that the Constitution was amended by overwhelming majorities of both deputies and senators.⁸⁹ In this way, the limited judicialisation of the problem by the PCT (appeals to the legislature) was fully utilised by the subsequent political process in the Polish Parliament.

The delimitation of powers between the German judiciary and the German courts as envisaged by the FCC is complex and sometimes difficult to understand. First, the FCC criticised its legislature which did not use all the range offered by the Framework Decision for the protection of German nationals. The implementing law did not implement Art 4 (7) of the Framework Decision which gives the national authorities discretion whether or not to extradite a person who allegedly committed a crime on that state's own territory. In fact, in such a case, the accused national has special confidence in being prosecuted by its own state for the violation of its own law on German soil.⁹⁰

In contrast, the Czech Court was much more activist in its answer to the very same question. Although the Czech legislature did not implement Art 4 para 7 of the Framework Decision, this did not prevent the CCC from incorporating this provision by its own judgment. The CCC found this leeway in a general clause of Art 377 of the Criminal Procedure Code which says that the request of a foreign state's organ may not be granted if, inter alia, its granting would constitute a violation of the Czech Constitution. The CCC interpreted the said Art 377 'in the light of Art 4 (7) of the Framework Decision', with the result that

⁸⁸ Cf the dissenting opinion of Justice S Balik.

⁸⁹ See the hearings in the Sejm on 8 September 2006 and the Senate on 14 September 2006. The final vote in the Sejm was 344 deputies in favour, 48 against, with 29 abstentions <<http://www.sejm.gov.pl>>. The vote in the Senate was unanimous <<http://www.senat.gov.pl>>. For the text of the amended Constitution, Art 55, see n 71.

⁹⁰ The German EAW case (n 49) paras 82ff, NJW (2005) 2292-3.

a Czech citizen will not be surrendered to another EU Member State due to suspicion of having committed a criminal offense, if it was allegedly committed within the Czech Republic, except in cases where, in view of the special circumstances of the commission of the criminal act, priority must be given to holding the criminal prosecution in the requesting state, for example, on grounds of adequate fact-finding concerning the conduct in question, if in the greater part it occurred abroad, or because prosecution in the given EU Member State would, in that particular case, be more appropriate than that person's prosecution in the Czech Republic.⁹¹

Interestingly, the FCC urges the legislature to react unilaterally if the German confidence in the criminal justice of another Member State is shaken. In this, the FCC claims, the legislature is unrestrained by the fact whether or not proceedings against the respective state according to EU law were initiated. Here, one might see a sort of judicial self-restraint: the Court does not claim the competence to decide that another Member State violated significantly its human rights obligations. Instead, it entrusted the legislature to indicate when German confidence in another State's criminal justice is shaken.⁹²

The second reason why the German act was unconstitutional is based on the fact that it did not give persons the right to appeal a decision granting surrender. The FCC refused the earlier opinions that extradition should not be reviewed by courts because of its international and political aspects which are within the competence of executive power. Facing the new circumstances of the EAW, these old opinions had to be refused and the law had to enable judicial review of extradition decisions.⁹³

In the same way, but much more vigorously, the CCC emphasised the role of law courts in protecting nationals and others against (unlikely though it might be, in the view of the CCC) the abuse of the EAW. The

⁹¹ The Czech *EAW* case (n 51) para 113.

⁹² The German *EAW* case (n 49) para 79, NJW (2005) 2291: 'In this context, the legislature must verify when restricting fundamental rights that the observance of rule-of-law principles by the authority that claims punitive power over a German is guaranteed. Here, it will have to be taken into account that every Member State of the European Union is to observe the principles set out in Article 6.1 of the Treaty on European Union, and thus also the principle of proportionality and that therefore, a basis for mutual confidence exists. This, however, does not release the legislature from reacting, in cases in which such confidence in the general conditions of procedure in a Member State has been profoundly shaken, and from doing so irrespective of proceedings pursuant to 7 of the Treaty on European Union.' Cf the dissenting opinion of Justice Lübke-Wolff, para 175 NJW (2005) 2301 (in her opinion, this should be within the competence of either the executive or judicial power) and critically Tomuschat (n 49) 215 (explaining that the legislature has no place in individual cases but might interfere via a general enactment if necessary).

⁹³ The German *EAW* case (n 49) para 101ff, NJW (2005) 2294ff.

CCC was in a different position from the FCC because the Czech act did not exclude judicial review of the ultimate decision on surrender.⁹⁴ Founding the ultimate justification of its decision on this fact, the CCC held that although the implementation was not unconstitutional as such, an individual arrest warrant might still be unconstitutional in a real-life case on account of its conflict with the Constitution,⁹⁵ as, after all, foreseen by Art 377 of the Criminal Procedure Code.⁹⁶

Facing both the Czech and German decision, we see, as some scholars had correctly predicted,⁹⁷ that the EAW will not entirely depoliticise extradition proceedings among the EU Member States. Instead, due to the requirements of the constitutional courts, it would be rather another step forward in both the judicialisation of European politics and the politicisation of the judiciary. After all, even the 2006 amendment to the Polish Constitution highlights the role of law courts in protecting individual rights during EAW proceedings.⁹⁸

E Double Criminality in Germany, the Czech Republic and Poland

Lifting the double criminality rule seems to be one of the most controversial novelties introduced by the EAW Framework Decision.⁹⁹ Therefore, no wonder that both the German and Czech judgments were very reserved vis-à-vis this innovation. Moreover, as we shall see, the Polish legislature rejected this requirement as regards Polish nationals explicitly through a constitutional amendment. All three systems thus remain, to

⁹⁴ The construction of the Czech law is different from that of its German counterpart.

⁹⁵ Para 115 of the Czech EAW case (references omitted): 'Even though the contested provisions ... might be applied in an unconstitutional manner, *such a hypothetical and unlikely situation* does not provide grounds for their annulment. [The Court's case law says] that "theoretically every provision of a legal enactment can naturally be applied incorrectly, hence even in conflict with constitutional acts, which in and of itself does not constitute grounds for the annulment of a provision which can conceivably be incorrectly applied." [The purpose of this proceeding] *is not, however, to resolve every single hypothetical situation which has not as yet come to pass, even though it may occur at some point* [because] it would ... supplant the protection of fundamental rights which, in the nature of things, the ordinary ... courts must also provide.'

⁹⁶ Art 377 of the Criminal Procedure Code: the request of a foreign state's organ may not be granted if, inter alia, its granting would constitute a violation of the Constitution of the Czech Republic.

⁹⁷ Alegre, Leaf, 'Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study - the European Arrest Warrant' (2004) 10 Eur LJ 200, 216-217.

⁹⁸ Art 55 (5) as amended in September 2006 (for the new wording, see n 71).

⁹⁹ Framework Decision, Art 2 (2), covering a very broad list of vaguely called offences which are not subject to double criminality, including 'computer-related crimes' or 'racism and xenophobia'. For instance, Tomuschat calls this the 'list of horrors'. See Tomuschat (n 49) 218. Personally, I find the explanation of Advocate General Colomer far from satisfactory on this point. See the opinion of AG Colomer (n 43) paras 100-107. The Court in the same case touched the issue in its judgment even less satisfactorily.

say the least, unconvinced by this questionable novelty of European law; in fact, all of them delineated strong national limits.

The German FCC addressed the problem of lifting the double criminality rule extensively. The legislature ensures that '[c]harges of criminal acts with such a significant domestic connecting factor are, *in principle*, to be investigated in the domestic territory by German investigation authorities if those suspected of the criminal act are German citizens.'¹⁰⁰ Thus, it would be impossible for a German national to be surrendered for an offence committed while being in Germany if the act itself was innocent under German law.

The problems with the elimination of the double criminality requirement were overcome by ostensible formalism in the Czech decision:

The enumeration of criminal offenses which do not require dual criminality is not given due to the fact that it would otherwise be presumed that some of these categories of conduct do not qualify as criminal offenses in one or more of the Member States; rather the exact opposite, that *it is conduct which, in view of the values shared by the EU Member States, is criminal in all of them*. The reason for enumerating them in this fashion is to speed up the execution of European Arrest Warrants, as the proceeding for ascertaining the criminality of such acts under Czech law has been dropped. In addition, in adopting this Framework Decision each EU Member State expressed its agreement that all criminal conduct coming within the categories defined in this way will also be criminally prosecuted.¹⁰¹

At first glance, the Czech Court's premises relating to the degree of harmonization of substantive criminal law are plainly wrong¹⁰² and contrary even to the opinion of the Court of Justice.¹⁰³ The second reading of that provision might, however, be that this claim is not descriptive but rather normative. This reading is confirmed by the Czech Court's concession 'that, under quite exceptional circumstances,' the application of the EAW might be in conflict with the Czech Constitution, especially if the distance offence 'would qualify as a criminal act under the law of the re-

¹⁰⁰ The German EAW case (n 49) para 85 (emphasis added).

¹⁰¹ The Czech EAW case (n 51) para 103.

¹⁰² Cf for a very different logic the German case (n 49) para 77 (emphasising that 'the cooperation that is put into practice in the "Third Pillar" of the European Union in the shape of limited mutual recognition, which *does not provide for a general harmonisation* of the Member States' systems of criminal law, *is a way of preserving national identity and statehood* in a single European judicial area.' Emphases added).

¹⁰³ Cf the *Advocaten* case (n 43) para 52: 'The Framework Decision does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract.' According to para 59 *ibid*.

questing state, but would not qualify as such under Czech criminal law, and perhaps would even enjoy constitutional protection in the Czech Republic (e.g. within the framework of the constitutional protection of free expression).’ Then the arrest warrant would not be executed.¹⁰⁴

This conclusion, however, raises more questions than it settles. What would happen, for instance, if, in the case where dual criminality is not verified, the arrested person argues that the crime does not have its Czech equivalent? The CCC does not say explicitly. I suppose that such a case would force the Czech authorities to check double criminality and might establish grounds for the refusal to surrender due to conflict with the constitution. Whether this would be the case only vis-à-vis distance offences (i.e. acts committed within the Czech territory), as the Court seems to indicate, or also some offences committed abroad, remains to be seen.

In sum, the problem of double criminality was at least partly solved in Germany by the legislature (as instructed by the GFCC). In contrast, the CCC attempted to solve this problem, but its decision stopped far short of any clear statement. In Poland, the issue has been resolved by the Constitution. Although the PCT did not address the issue, the Polish legislature, by amending Art 55 of the Constitution, reaffirmed the double criminality requirement for extraditing Polish nationals. Therefore, the Polish legislature openly showed the constitutional limits for the implementation of the EAW in Poland. Still, what constitutes an offence ‘committed outside the territory’ of Poland remains, at least in tough cases, questionable.¹⁰⁵

F Looking at Each Other: Comparative Arguments in the EAW Decisions

Although Maduro’s claim of vertical coherence among European high courts¹⁰⁶ might seem to be far from the real style of judicial decision-making in Europe, it is now well known that justices of Europe’s constitutional courts carefully observe the corresponding decisions of their

¹⁰⁴ The Czech EAW case (n 51) para 114.

¹⁰⁵ See Art 55 (quoted in n 71).

¹⁰⁶ Maduro, ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’ in N. Walker (ed), *Sovereignty in Transition* (Hart, Oxford 2003) 528 (according to Maduro when national courts apply EU law ‘they must do so in a manner as to make those decisions fit the decisions taken’ not only by the ECJ but also by other national courts). Something like the Maduro’s claim exists in the practice of the application of law in the United States, where interstate comparisons and the use of persuasive precedents are courts’ daily routine. Cf Reimann, ‘Stepping Out of the European Shadow: Why Comparative Law in the United States Must Develop Its Own Agenda’ (1998) 46 Am. J. Comp. L. 637, 644.

colleagues.¹⁰⁷ Some courts perceive themselves as models to be followed, while others carefully listen and import foreign doctrines. The German FCC is the outstanding example of the former group, whereas post-communist constitutional courts generally belong to the latter category. In this case, however, the Czech Court even dared to question indirectly some statements made by the FCC in its *EAW* case (though without doing this openly).

The Polish Tribunal has dealt with the European case law in detail, but has not referred to *Pupino* for the obvious reason that the PCT had decided its case earlier. But even the *Pupino* case and the Euro-friendly construction would be of little help, as the Euro-friendly construction of national law is still merely a 'construction' and does not require rewriting the domestic law altogether.¹⁰⁸

When reading the FCC's decision, one can see the decision of the court which is well aware of its powerful position as the most respected constitutional court in Europe. Its reasoning is by and large self-referential (which is usually the case with the FCC): the FCC limits its attention to its own case law and domestic doctrine; a reader will not gain from the opinion any information that the ECJ had decided recently the *Pupino* case,¹⁰⁹ which arguably should have influenced the FCC's reasoning.¹¹⁰ One should have no doubts that one of the addressees of its opinion is the ECJ itself.¹¹¹

In striking contrast with the FCC, the CCC engaged in an extensive comparative exercise. In fact, it had been invited to do exactly this by the petitioners who alleged 'the existence of a general, widely-shared constitutional principle prohibiting a state from extraditing its own citizens', which means that 'the implementation of the EAW ... cannot be effected otherwise than subsequent to a constitutional amendment.'¹¹²

The CCC referred to numerous states which had amended their constitutions, but it also highlighted that many states did implement the

¹⁰⁷ The Advocate General in *Advocaten* (n 43) referred to all decisions of the constitutional courts but the practical significance of this reference for his reasoning seems to be close to nil.

¹⁰⁸ According to Łazowski (n 44) 581.

¹⁰⁹ Case C-105/03 *Maria Pupino* [2005] ECR I-5285 para 43.

¹¹⁰ Cf the German *EAW* case (n 49) para 80, on the one hand, and the dissenting opinion of Justice Gerhard, on the other hand.

¹¹¹ Cf the dissenting opinion of Justice L ubbe-Wolff, para 159 (it should not be within the competence of the GFCC to send 'dark signals' to the ECJ in respect to the latter's opinions which do not relate to the case at hand). Kom arek opines that the addressees of those dark signals are also other Member States, primarily new ones, whose judiciaries enjoy questionable reputation. See Kom arek (n 44) 27.

¹¹² The Czech *EAW* case (n 51) para 73.

EAW without any constitutional amendment. Thus, there was no European consensus on such a constitutional principle which effectively means that the existence of such a constitutional principle is purely a matter of national constitutional law.¹¹³ The CCC took pains to distinguish the judgment of its Polish counterpart, something completely unique even at the generally widely open gate of comparative law argumentation, to which the CCC seems to be inclined.¹¹⁴ The CCC repeatedly referred to the ECJ and its *Pupino* case, including the opinion of the Advocate-General.¹¹⁵ The CCC went even so far as to state that the primacy principle might yet apply within the third pillar law if the ECJ says so (taking into account that the ECJ's case law is still 'evolving'¹¹⁶).

Conspicuously, the CCC seems to ignore entirely the respective German judgment. It would, however, be a mistake to think that the German decision was unknown. First, dissenting justices do refer to the German judgment and some of them take it as the only correct answer for the Czech Court, too.¹¹⁷ Second, the German decision seems to be present even in the Czech majority opinion, but rather by way of negation. When reading the separate paragraph which stresses that the Czech constitutional order will protect (through the envisioned judicial review of the constitutionality of individual arrest warrants) both Czech citizens' confidence in Czech law *and* the confidence and legal certainty of 'other persons, authorized to stay within the territory of the Czech Republic',¹¹⁸

¹¹³ Ibid paras 74-78. It is clear that almost all Continental nations do prohibit the extradition of their nationals (see generally Plachta (n 37)), although it is true that not all of them have incorporated this prohibition in their constitutions (see examples mentioned by the CCC).

¹¹⁴ The Czech *EAW* case (n 51) para 77: '[CCC] refers to the fact that, in contrast to the wording of Art 14 par. 4 of the Czech Charter, the formulation of Art. 55 par. 1 of the Polish Constitution excludes any form whatsoever of extradition of Polish citizens inclusive also of a surrender pursuant to the EAW. In comparison with the Czech constitutional order, the Polish Constitution leaves no room at all for it to be interpreted in harmony with the state's obligations towards the EU.'

¹¹⁵ See *ibid* paras 58, 59 and 81.

¹¹⁶ See *ibid* para 59: 'In the *M. Pupino* case, neither did the ECJ even touch upon the delicate issues of whether the principle of supremacy that it has expounded in relation to Community law applies in the same way to Union law, whether framework agreements are simply intergovernmental in nature, or whether some other interpretation is possible. It can, in consequence, be stated that ECJ doctrine concerning the exact nature of Union law acts such as framework agreements is still evolving.' Justice E. Wagnerová in her dissent, on the contrary, criticised the majority of the Court for not distinguishing between the first pillar law and the third pillar law.

¹¹⁷ Justice Wagnerová, joined in her dissent by another justice, in effect based her opinion on the German decision. What she proposed to the Czech Court was to repeat the decision of the Germans in the Czech scenario, ie to annul the Czech implementation without disputing the constitutionality of the concept of the EAW itself. See the dissenting opinion by Wagnerová.

¹¹⁸ The Czech *EAW* case (n 51) para 113.

one cannot but compare this to the dissenting opinion of Justice Lübbecke-Wolff.¹¹⁹

IV The Delimitation of the National Constitution and European Law Compared

In communist Europe, the very paradigm of the hierarchy of legal sources disappeared; a unified legal order comprising enumerated sources of law prevailed only on paper and was displaced in genuine significance by an enormous number of decrees of very different character, some of them even not promulgated in the official gazettes. The central role of the act of parliament was typically abandoned. The most important matters were dealt with in by-laws, ministerial decrees and government regulations.¹²⁰

That is why the very notion of legal pluralism presents a serious challenge to Central European lawyers. While attempts at pluralist conceptions of European Constitutionalism were increasing in Western Europe, post-communist Europe returned to the Kelsenian concept of the legal system as a pyramid. While for some Western Europeans this is an old-fashioned concept, for Central and Eastern Europeans this concept holds the charm of something precious lost and recently rediscovered. If Kumm claims that '[j]udicially articulated constitutional conflicts did not generally resonate strongly in the political sphere'¹²¹ this is definitely not valid for the post-communist political spheres.¹²²

That is also one of the reasons the Polish Constitution of 1997 contains a detailed chapter on the sources of law¹²³ and one of the reasons post-communist lawyers in the new Member States adhere so adamantly to the classical Kelsenian paradigm of the legal system. Learning 'co-operative constitutionalism' would challenge all these concepts deeply embedded within domestic legal traditions.¹²⁴ Let us see to what extent these theories were challenged by the *EAW* cases in Poland and the Czech Republic.

¹¹⁹ Especially part 1a) of her dissenting opinion.

¹²⁰ See Wronkowska, 'The Sources of Law in the Constitution of the Republic of Poland of 2 April 1997' (1998) *Polish Contemp. L Quarterly Rev* Nos 1-4.

¹²¹ Kumm (n 9) 280.

¹²² Cf the discussions in the Czech Senate on 14 April 2004 over some EU-related laws which were allegedly against the Czech Bill of Rights, available in Czech at: www.senat.cz accessed 18 October 2006, where Czech politicians discussed the issue of constitutional supremacy in the legalistic language.

¹²³ Cf Wronkowska (n 120).

¹²⁴ See on this Sajó, 'Learning Co-operative Constitutionalism the Hard Way: the Hungarian Constitutional Court Shying Away from EU Supremacy' (2004) 2 *Zeitschrift für Staats- und Europawissenschaften (ZSE)* 351, 361.

A The Polish Scenario: National Constitutional Supremacy

The decisions of the Polish Tribunal show its willingness to support the application of EU law and to cooperate with the ECJ, as well as its readiness to become the ultimate guardian of the limits of EU law within the Polish constitutional system. Here, the EAW case must be read against the backdrop of other EU-related decisions.

We have seen that in the *EAW* case, while listening to the arguments made by the ordinary court which referred the issue to the PCT, the Tribunal showed that the Euro-friendly construction of national law had its limits: the plain text of the Constitution. In another important decision dealing with the Polish Accession Treaty, decided a few weeks after the *EAW* case on 11 May 2005, the PCT finally explained its general position with respect to the EU legal system.¹²⁵

Technically, in May 2005 the Tribunal decided on the constitutionality of the Accession Treaty signed on 16 April 2003, but the review inevitably covered both the EU Treaty and the EC Treaty. The PCT acted based on the referral made by deputies (members of the *Sejm*). The question was whether the limits of the transfer of powers to an international organisation or institution provided by the Polish Constitution were exceeded.¹²⁶

The PCT, in its heavy German-style reasoning, again emphasised that the Constitution was the 'supreme law of the Republic of Poland', as stated after all in Art 8 (1) of the Constitution.¹²⁷ Even though the Constitution provides for the transfer of State competences, this transfer is prohibited if it undermines the existence and functioning of State organs. In short, the Constitution does not allow any transfer which would deprive Poland of its sovereignty, consequently making an international organisation sovereign.¹²⁸ This has not happened with the current transfer of powers, however.

¹²⁵ The decision K 18/04 of 11 May 2005, published in Polish in OTK ZU (2005) ser A, nr 5, item 49 (hereinafter *Polish Accession Treaty Case*). A short English summary is available on the Tribunal's website. In English, see Kowalik-Bańczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law' 6 German LJ. No 10 (1 October 2005) <www.germanlawjournal.org> or in more detail by Wyrozumska (n 44).

¹²⁶ The Polish Constitution provides that '[t]he Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters.' Pol. Const. Art 90 (1).

¹²⁷ Part III.2.1 of the *Polish Accession Treaty Case* (n 125).

¹²⁸ The Tribunal reasoned through Pol. Const. Art 4 ('Supreme power in the Republic of Poland shall be vested in the Nation') and Art 5 ('The Republic of Poland shall safeguard its independence').

'The dynamic nature of European integration does not signify an extension of the scope of the prerogatives of the EU's organs to areas which are not encompassed by the transfer of competences,' reasoned the Tribunal. That is why an international organisation is not able to determine its own competences 'disregarding the appropriate procedures governing the transfer of competences by Member States on the basis of legal norms in force within these States.' The Tribunal, following the reasoning of the famous *Maastricht* case by the GFCC, also claims for itself the *kompetenz-kompetenz*, the power to control whether the Community organs (including the ECJ itself) act within their competence.¹²⁹

The PCT, in its minor deviation from the GFCC jurisprudence,¹³⁰ openly admitted that it might refer the issue of European law to the ECJ. The Member State has to respect 'Community norms to the highest extent possible.' That is why a preliminary question referred by the PCT to the ECJ concerning the validity or interpretation of Community law would not infringe 'the superiority of the Constitution and the specific legal status of the Constitutional Tribunal'. It is so because the PCT would refer the issue to the ECJ during an 'examination of a case in which it would be obliged, *on the basis of the Constitution*, to apply Community law.'¹³¹

The core normative claim on the relationship between EU law and national constitutional law made by the PCT seems to be embodied in the following paragraph:

Following Poland's accession to the EU, there are two autonomous legal systems (i.e. those of Poland and the European Union) which are simultaneously in force. This does neither preclude, on the one hand, their mutual interaction nor, on the other hand, the possibility of a conflict between European law and the Constitution. In the event of any such conflict occurring, it is for a sovereign deci-

¹²⁹ Part III.4 of the *Polish Accession Treaty* Case (in 4.5 referring to the German *Maastricht* judgment and the Danish *Carlsen* judgment).

¹³⁰ I emphasise minor because the German doctrine itself is in flux on this issue. As is well known, in the 1970s the GFCC originally accepted its status as a court according to the EC Treaty, Art 234 (ex 177). See BVerfGE 37, 271 (281-282), *Solange I*: '...the Federal Constitutional Court does not decide on validity or invalidity of community law (*die Gültigkeit oder Ungültigkeit einer Vorschrift des Gemeinschaftsrechts*). At most, it can conclude that some provision cannot be applied by state authorities or courts if they are in conflict with the constitutional rule dealing with basic rights. The Federal Constitutional Court can decide incidental questions (*Inzidentfragen*) of the community law (similar to the ECJ), unless there are circumstances provided by Art 177 *which binds also the Federal Constitutional Court ...*' (emphasis added). However, the GFCC has never referred a preliminary question to the ECJ. Instead, it sometimes finds what European law is by calling as experts employees of the Commission. Franz Mayer, *The European Constitution and the Courts. Adjudicating European Constitutional Law in a Multilevel System*. Jean Monnet Working Paper 9/03.

¹³¹ See the *Polish Accession Treaty* Case, English summary (n 125) (emphasis added). In the Polish text, Part III.10 and 11.

sion of the Republic of Poland whether to introduce an appropriate constitutional amendment, or to initiate amending the Community legal regulations, or, ultimately, to withdraw from the European Union.¹³²

One might sum up that the Tribunal's decision in the Polish Accession Treaty was based ostensibly on 'National Constitutional Supremacy'¹³³ (NCS), and that its logic closely follows its German counterparts. This is not surprising considering the GFCC's reputation in the post-communist region. The German position seems to be very pragmatic, however, and the GFCC plays the card of its own judicial politics vis-à-vis the ECJ.¹³⁴ The PCT, in contrast, went far beyond the German jurisprudence. It claimed the power to review both Community secondary law and the Polish laws implementing EU law for its conflicts with the Polish Constitution.¹³⁵ However, taking the Polish Constitution as a minimum level of the protection of basic rights seems to be problematic and can hardly be enforced in practice.¹³⁶

On the other hand, the Polish Tribunal softened its hard version of NCS in the *EAW* case through its readiness to listen to EU needs by postponing the effects of its decision by eighteen months,¹³⁷ as well as by urging the legislature to amend the Constitution and by emphasising the

¹³² *Idem*.

¹³³ Kumm (n 9) 266ff (distinguishing three normative approaches to the relation between European law and national law: European Constitutional Supremacy, National Constitutional Supremacy, and finally the 'sui generists' who consider these questions unhelpful for daily practice. Subsequently, Kumm elaborates his approach which would fuel theory in the camp of the 'sui generists' and would explain more fully the question of the interrelation between a plethora of legal systems: Constitutionalism Beyond the State).

¹³⁴ Cf the text accompanying n 9.

¹³⁵ Part III.18.5 of the *Polish Accession Treaty* Case (n 125).

¹³⁶ The issue was discussed in the 1970s, and the ECJ's claim of European Constitutional Supremacy reflects the practical impossibility of verifying all individual national constitutional standards (see Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125 para 3, strongly emphasising the uniformity and efficacy of community law). That is why the German FCC does not bind the level of the minimum protection of basic rights to the German national legal standard on a case-by-case basis. Instead, the German Court claimed: 'As long as the European Communities, in particular European case law, generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as *substantially similar to the protection of fundamental rights required unconditionally by the Basic Law*, and in so far as they generally safeguard the essential content of fundamental rights, the FCC will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of fundamental rights contained in the Basic Law.' See BVerfGE 73, 339 (1986), *Solange II* (legal sentence No 2, emphasis added).

¹³⁷ According to Komárek (n 44) 13-14 and Wyrozumska (n 44) 20.

desirability of the EAW within the Polish legal order. Last but not least, we should not overlook that the Polish Tribunal has repeatedly emphasised the value of the Euro-friendly construction of national law.¹³⁸

Unless adhering to the opposite version of 'European Constitutional Supremacy', one can hardly blame the Polish Tribunal for its decision in the *EAW* case, especially taking into account the importance of the prohibition of the extradition of nationals within the Polish constitutional system (as also proved, after all, by the subsequent constitutional amendment). However, some conclusions made by the same court in the *Polish Accession Treaty* case seem to tilt the balance much more to the side of extreme National Constitutional Supremacy.

B The Czech EAW Case: Towards Soft European Constitutional Supremacy?

Prior to 1 May 2004, the CCC acted similarly to its Polish counterpart and supported the application of Czech law consistently with the requirements of EU law. The CCC emphasised the existence of general principles of law, common to all EU Member States. The content of these principles is derived from common European values; the general principles imbue with content the abstract concept of the state governed by the rule of law, which includes human rights. The Constitutional Court had to apply these principles prior to the Accession - thus it followed European legal culture and its constitutional traditions. 'Primary Community law is not foreign law for the Constitutional Court, but to a wide degree it penetrates into the Court's decision making - particularly in the form of general principles of European law.'¹³⁹

It was not until 8 March 2006 that the Constitutional Court explained what the relation between the national Constitution and EU law should be. The case was the *Sugar Quota II* case, where the question was whether the EU sugar quotas were against the Czech Constitution.¹⁴⁰ In its reasoning in the *Sugar Quota II* case, the CCC re-emphasised the importance of the maxim of the interpretation of domestic law in a way consistent with EU law. In the Court's view, the maxim acquired a new quality after the Accession:

¹³⁸ See the decision of 31 May 2004, K 15/04, the English summary at <www.trybunal.gov.pl/Eng> published in Polish in OTK ZU 2004 ser A, nr 5, item 47, 655-668. In more detail, see Kühn, 'The Application of European Law in the New Member States: Several (Early) Pre-dictions' 6 German LJ No 3 (1 March 2005) <www.germanlawjournal.com>.

¹³⁹ *Milk Quota Case*, published as No 410/2001 Official Gazette (English translation available at: www.concourt.cz). For more detail on this, see Kühn, 'The Application of European Law in Central European Candidate Countries' (2003) 28 EL Rev 551.

¹⁴⁰ *Sugar Quota Case II* of 8 March 2006, published as No 154/2006 Official Gazette, available in English at: www.concourt.cz (I use this translation).

Although the Constitutional Court's referential framework has remained, even since 1 May 2004, the norms of the Czech Republic's constitutional order, the Constitutional Court cannot entirely overlook the impact of Community law on the formation, application, and interpretation of national law, all the more so in a field of law where the creation, operation, and aim of its provisions is immediately bound up with Community law. In other words, *in this field the Constitutional Court interprets constitutional law taking into account the principles arising from Community law.* (emphasis added)

This maxim was even more stressed in the *EAW* case, when the CCC held:

From Article 1 par. 2 of the Constitution, in conjunction with the principle of cooperation enshrined in Art. 10 of the EC Treaty, follows a constitutional principle according to which national legal enactments, including the Constitution, should whenever possible be interpreted in conformity with the process of European integration and the cooperation between European and Member State organs ...¹⁴¹

According to the *EAW* case, this maxim is limited by the possible meaning of the constitutional text, which means that 'if the national methodology for the interpretation of constitutional law does not enable a relevant norm to be interpreted in harmony with European Law, it is solely within the Constituent Assembly's prerogative to amend the Constitution.' The second limit is implied by those essential attributes of a democratic law-based state which cannot be changed even by the Constituent Assembly.¹⁴²

Constitutional review of European laws is in principle excluded in the Czech Republic. *Sugar Quota II* approved the current standard within the Community for the protection of fundamental rights which is neither 'of a lower quality than the protection accorded in the Czech Republic,' nor does the standard 'markedly diverge from the standard up till now provided in the domestic setting by the Constitutional Court.' The CCC emphasised that the delegation of part of the powers of national organs to the EU is conditional and 'may persist only so long as these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic,' and should not threaten the basic principles of the Czech constitutional order which are

¹⁴¹ *EAW* Case (n 51) para 81 (the CCC referred to the decision of the Polish CT K 15/04 of 31 May 2004 (n 138) and *Pupino*).

¹⁴² *Ibid* para 82. Similar caveats are made by the Polish *EAW* case (n 44) and *the Accession Treaty* case (n 125).

not subject to revision (eternal law). If these conditions are threatened, the Constitutional Court would be 'called upon to protect constitutionalism'¹⁴³ and to exercise constitutional review. The CCC thus rephrased the famous *Solange II* decision.

The crucial question of both the *Sugar Quota II* and the *EAW* cases was whether the Constitutional Court should review domestic laws which implement EU obligations. In *Sugar Quota II*, the CCC held that if 'the Community delegates powers back to the Members States for the purpose of implementing certain Community law acts, or if it leaves certain issues unregulated', respective rules take the form of national law, and as such they must be in conformity with both EU law *and* the Czech Constitution. The domestic law (whether or not EU law gives the national legislature any discretion) is thus subject to full constitutional review, even though the maxim of European-conform interpretation applies.¹⁴⁴

The *EAW* case does not seem to fit easily into this line of thought. While *Sugar Quota II* relies on full (though Euro-friendly) constitutional review of domestic acts implementing EU law, a few weeks later the *EAW* case stated:

[I]n areas where Community law applies exclusively, it is supreme, so that it cannot be contested by means of national law referential criteria, not even on the constitutional level. *According to this doctrine the Constitutional Court would have no competence to decide on the constitutionality of a European Law norm, not even in the case that they are contained in legal enactments of the Czech Republic. Its competence to adjudicate the constitutionality of Czech norms is, thus, restricted in the same respect. ... [W]here the delegation of authority leaves the member states no room for discretion ... the doctrine of primacy of Community law in principle does not permit the Constitutional Court to review such Czech norm in terms of its conformity with the constitutional order of the Czech Republic, naturally with the exception [of the alleged conflict with the very essence of the substantive law-based state].*¹⁴⁵

Interestingly, this opinion was criticised as an unjustified 'shift' by the Justice-Rapporteur of *Sugar Quota II*, who dissented in the *EAW* case.¹⁴⁶ This doctrinal difference, however, does not make a substantial

¹⁴³ *Sugar Quota II* (n 140) part VI.B.

¹⁴⁴ *Sugar Quotas II* (n 140) VI.A.

¹⁴⁵ *EAW Case* (n 51) paras 52 and 54.

¹⁴⁶ See the dissenting opinion of Justice Wagnerová in the *EAW* case: 'Today's majority opinion shifts this doctrine [announced in *Sugar Quota II*], formulated by the Constitutional Court not even two months previously ... In actuality, in the cited judgment the Constitu-

difference in practice, because the CCC, despite its alleged self-restraint vis-à-vis the national laws implementing EU laws, did engage in a *complete* review of the law. The only way to reconcile the difference between what the Court really did with what the Court had said it was about to do is to accept that all the arguments made by the petitioners were based on the 'eternal' constitutional core.¹⁴⁷ Interpreted in this way, the soft European Constitutional Supremacy claimed by the CCC has lost much of its weight and in fact is close to Kumm's concept of 'Constitutionalism Beyond the State' or Maduro's Constitutional Pluralism.

V Conclusions

It is unlikely that the constitutional courts of the new EU Member States will refuse to accept the leading role exercised by the ECJ in the field of European law. The constitutional courts, following the lead of their German archetype, view their primary position in respect of EU law, rather than as being ultimate guardians of national sovereignty and constitutional traditions.

The influence of the methodology and style of the German FCC on the post-communist constitutional courts is overwhelming.¹⁴⁸ Consequently, the post-communist constitutional courts follow the general approach of the GFCC which prefers the identification of general principles and values to the precise statement of concrete rules capable of settling every future dispute.¹⁴⁹ Balance and symmetry of values is emphasised, and the reading of the Constitution is often a matter of compromise. On the other hand, the German style adopts the theory-like conceptualisation of the vague abstract constitutional principles. This more academic reasoning might easily be badly replicated; it also presents the danger of being unresponsive to societal needs.¹⁵⁰ This might be even more problematic

tional Court declared that in the case that powers are re-delegated from EC (EU) organs to organs of the Czech Republic (this still concerns the First Pillar of the EU), the Constitutional Court will review legal norms resulting from that re-delegation from the perspective of the Czech constitutional order, in which case, however, it will interpret it with a view toward the ECJ case law on those principles which are identical with the principles contained in the Czech constitutional order'.

¹⁴⁷ See *EAW* case (n 51) para 53, the last sentence: 'In this matter, however, the petitioners asserted that, by adopting the European Arrest Warrant, *just such a conflict with the essential attributes of a democratic law-based state has come about*' (emphasis added).

¹⁴⁸ Cf a former President of the HCC speaking about the 'nearly overwhelming' influence of the GFCC's jurisprudence on his own Court's case law. L Solyom and G Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (University of Michigan Press, Ann Arbor 2000) 5.

¹⁴⁹ DM Beatty, 'The Forms and Limits of Constitutional Interpretation' (2001) 49 *Am J Comp L* 79.

¹⁵⁰ Cf Sajó, 'Constitutional Adjudication in Light of Discourse Theory' (1996) 17 *Cardozo L Rev* 1193 1219 ('The typical constitutional tribunal decision is less interested in social

when the court lacks the power to deal with real-life cases and deals only with the abstract review of laws. The Polish Accession Treaty, with some of its claims going far beyond the German *Solange II* and *Maastricht* decisions, illustrates this.

In comparing the constitutional courts, one should see them in their political context. While there are countries where political parties are almost united vis-à-vis European questions (France or Germany as a typical example), many Central European countries are not. On the one hand, the detailed provision of Article 88 of the French Constitution regularly replies to the judgments of the French Constitutional Council in European matters. On the other hand, amending the Polish, Czech or Hungarian Constitution in the face of polarised political scenes and the presence of strong Euro-sceptic parties effectively suggests roundabout pressure on the constitutional courts to interpret their constitutions in a Euro-friendly manner and avoid the need for constitutional amendments. After all, as early as in 2004 the Czech Parliament rejected the government's attempt to amend the Czech Charter of Fundamental Rights and thus to confirm explicitly the possibility of extraditing nationals.¹⁵¹

Facing these facts, we might explain the outspoken and strong appeal of the Polish Constitutional Tribunal to its legislature to amend the Constitution. Perhaps in this way we might also read the crucial argument of the PCT in its later judgment on the Polish Accession Treaty that, after finding inconsistency between the domestic constitution and EU law, 'it is for a sovereign decision of the Republic of Poland whether to introduce an appropriate constitutional amendment, or to initiate amending the Community legal regulations, or, ultimately, to withdraw from the European Union.'¹⁵² In the example of the amendment to the Polish Constitution, we have seen how helpful a strong EU-friendly justification of the judicial decision can be for the subsequent political process in a volatile parliamentary democracy.

Although being the most pro-EU decision in the EAW saga so far, the CCC did not entirely give up domestic constitutional requirements. Rather, as we have seen, it engaged all ordinary judges in monitoring whether the minimum constitutional safeguards in the practice of the EAW were respected, and, in fact, whether some extreme cases of surrender under the EAW would really be so *hypothetical and unlikely* as the CCC predicted. Although, at first glance, some of the statements made by the CCC might seem naïve (for instance, the general consistency of criminal

consequences or even social values than it is in the correspondence of the decision to the principles that are partly stated in the constitution but, more often, are developed by the tribunal in reference to the constitution that they reshaped').

¹⁵¹ See the Czech EAW case (n 51) para 5.

¹⁵² See n 132 and the accompanying text.

substantive law), another reading of the Czech judgment might be that if these tenets are not materialised in practice, the CCC has nonetheless left the gate open to intervene and to protect the minimal requirements of Czech constitutional law.

On the other hand, the Czech decision shows the dangers when the Court pushes EU law hard against a passive legislature. One might wonder whether it would be ultimately helpful for democracy if problematic EU rules were justified by activist constitutional courts and by the technical language of law. Moreover, what is clear from the foregoing analysis is that in the enforcement of the EAW the CCC created a situation which was much less secure than in Germany or Poland. In the latter two countries, unlike the Czech Republic, the requirements for the enforcement of the EAW are now clearly stated in the German law and the Polish Constitution.

Despite its strong rulings questioning some essential features of European law (most notably the *Solange I* and *Maastricht* decisions), the German FCC has never caused any substantial damage to the application of European law in Germany. A sceptic might perhaps expect that the complex doctrines of the GFCC would be badly imitated by the post-communist constitutional courts, and that the German-made abstract principles would cause difficulties in the application of European law in the new Member States. To what extent the post-communist constitutional courts will be able to follow the FCC's pragmatism in dealing with EU law remains to be seen.

Still, the first EAW cases from Poland and the Czech Republic show that the prospects are not necessarily bad. We have seen in the Czech and Polish examples that justices carefully monitor the positions of their foreign colleagues on comparable issues. Although their own conclusions might often seem to be pure and simplified imitations of foreign models (the *Polish Accession Treaty* case as a primary example), sometimes too complicated and incomprehensible (the *Czech Sugar Quota II* case¹⁵³), we can see that post-communist constitutional courts at least sometimes attempt to bring new solutions and try hard to engage in European constitutional dialogue and in building a Network of European Constitutional Pluralism.

¹⁵³ I invite readers to judge for themselves: the full text of the decision is available in English at: <www.concourt.cz>