CONSTITUTIONAL IMPLICATIONS OF THE EUROPEAN ARREST WARRANT AND THE DOMESTIC COURTS' REACTION TO IT

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ABSTRACT

This thesis studies the constitutional problems caused by the European Arrest Warrant from the perspective of the national Constitutional Courts or their equivalents and the domestic courts' reaction to them in order to define the constitutional implications of the European Arrest Warrant on the national constitutional orders. The difference between the European Arrest Warrant and the traditional system of extradition, the constitutional principles of the ban on extradition of citizens and the implications of the mutual recognition on the principle of double criminality and human rights protection are analyzed in theory or in the judgments of the Constitutional Courts in Poland, Germany, Cyprus, Greece and Czech Republic first, and then in comparison with the principles on which the European Arrest Warrant is based.

Based on this analyze, these main constitutional problems are recognized: abolition of the ban of extradition of nationals and the mutual recognition of judicial decisions in criminal matters that caused three main constitutional implications: First, the surrender was recognized as either a new legal instrument or a part of the extradition procedure. Second, the constitutionally guaranteed freedom from extradition of nationals was weakened; eventually it disappeared from the Constitution. Third, the mutual recognition that caused problems with regard the principle of legality, principle of ne bis in idem and the obligation of protection of human rights required the Member States to trust to each others legal orders instead of the examination and comparison of the two legal systems.

INTRODUCTION

On the 13th of June 2002, an important step towards the simplifying and speeding up of the procedure of surrender/extradition[1] of persons between the Member States of the European Union was made by adopting the Framework Decision on the European arrest warrant and the surrender procedures between Member States[2] (hereinafter only "Framework Decision"). The European arrest warrant (hereinafter only "EAW"), the judicial decision issued by a Member State requesting arrest or surrender of a certain person by another Member State, replaced the complicated and long-lasting system of extradition.

However, the positive impact of the EAW on the police and judicial cooperation in criminal matters was accompanied by constitutional problems regarding the supremacy of the European (not Community) law over the national Constitution[3] and the correctness of use of the Framework Decision to implement a change into the system of extradition[4], the abolition of ban on extradition of nationals and the problems of mutual recognition of judicial decision in criminal matters and the protection.[5]

Although the first mentioned problem is an important one it is not examined in this paper as the attention is paid to the abolition of ban on extradition of nationals and on problems regarding the mutual recognition. These issues are studied from the perspective of the national constitutional systems in order to understate the objections of the national

[1] Jurists do not agree whether surrender and extradition are different instruments. See the Chapter one of this thesis.
[2] Council Framework Decision on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) [2002] OJ L 190/1
[3] See e.g. Mattias Kumm, "The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty," *European Law Journal* 11:3 (May 2005): 262-307.
[4] Treaty on European Union (1992). Official Journal C 325 of 24 December 2002. Article 31 and Article 34
[5] Another analyze in e.g. Mutual recognition of criminal decisions in the European justice space, (London: The European Group for Prisoners Abroad, August 2002), <http://www.egpa.org/pdf/Mutual%20recognition.pdf> (7 March 2007).

Constitutional Courts against the Framework Decision and to point to the main constitutional implications of the EAW.

To achieve the aforementioned goal, these three research questions must be answered: "What are these constitutional the implication of the Framework Decision? How did the domestic courts and legislators react to the constitutional problems regarding the EAW? How did they and resolve them?". Therefore, first a legal research and a law analyses were done to identify the basic differences between the systems of extradition and the surrender based on the EAW, second the literature on the EAW, the principles incorporated in the system of surrender and the decisions of the Constitutional Courts or their equivalents on the EAW were studied to point out to the constitutional problems that arose with regard to the EAW.

Based on the described methodology, this paper identified two main constitutional problems of the EAW by which the Constitutional Courts mostly dealt: extradition of nationals and mutual trust; and three constitutional implications of the EAW: First, recognizing the surrender as a part of the traditional system of extradition or as a new legal instrument, second abolishing the strict ban on extradition of nationals, third employing the mutual recognition of a judicial decision of another Member State that requires the existence of mutual trust between the participants, in practice and that causes problems regarding the principle of double criminality, principle of ne bis in idem and human rights protection.

All these implication already have been analyzed by the Constitutional Courts or by the authors of the literature relevant to the EAW. First, the unconstitutionality of the acts implementing the Framework Decision to the national legal order was declared by the Constitutional Courts in Poland[6], Germany[7] and Cyprus[8] while in the Czech Republic[9] and

[6] Judgment of the Polish Constitutional Tribunal of 27 April 2005, P 1/05 <http://www.trybunal.gov.pl/eng/summaries/summaries_assets/documents/P_1_05_full_GB.pdf> (1 April 2007).

Greece[10] the new legislation did sustain all the attacks on its constitutionality. Furthermore, Ruiz-Jarabo Colomer, the Advocate General of the European Court of Justice (hereinafter only "ECJ") supported the EAW in his opinion to the case C – 303/05 Advocaten voor de Wereld VZW v. Leden van de Ministerraad[11] where the legal basis of the Framework Decision and the relationship between the Framework Decision and the fundamental rights were examined.

Second, the aforementioned judicial decisions were objects of analyzes in the articles or papers published either on the Internet or in journals like the Common Market Law Review, the European Law Review, the European Law Journal. Furthermore, the authors dealt with the issues of human rights protection and the constitutional implication of the mutual trust on the national constitutional orders.

However there is a gap in the detailed general study of the constitutional implication of the EAW from the perspective of the national legal orders taking into account the decisions from Poland, Germany, Cyprus, Czech Republic and Greece[12]. Therefore this thesis does not deal only with the Member States and the applicable legal principles separately but analyzes the constitutional problems and points to the concrete decisions and solutions in

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[7] Judgment of the German Federal Constitutional Court of 18 July 2005, 2 BvR 2236/04. <http://www.bundesverfassungsgericht.de/en/decisions/rs20050718_2bvr223604en.html> (1 April 2007).

[8] Judgment of the Supreme Court of Cyprus of 7 November 2005, Αρ. No. 294/2005, English Summary in the Council document No 14281/05. Brussels 11 November 2005.

[9] Nález Ústavního soudu Pl ÚS 66/04. (Judgment of the Czech Constitutional Court of 3 May 2006, Pl. ÚS 66/04.-original version in Czech language), own trans. <http://www.concourt.cz/scripts/detail.php?id=413&keyword=evropsky+zatykac> (22 November 2006). English Summary on <http://test.concourt.cz/angl_verze/doc/pl-66-04.html> (1 April 2007)

[10] Judgment of the Greece Supreme Court No 591/2005, English Summary in Council Document No. 11858/05. Brussels 9 September 2005

[11] C – 303/05 Advocaten voor de Wereld VZW v. Leden van de Ministerraad - Opinion of Advocate General Ruiz-Jarabo Colomer. Notice in OJ No. C 271/14 of 29-10-2005.

[12] In some parts of the thesis, examples of theoretical or practical approaches to the analyzed issues of another Member States are provided as well.

mentioned Member States that were chosen as the object of the study due to the fact that the judicial proceeding and its outcomes illustrate the problems in the best way.

In order to understand the topic well, this thesis begins with an analysis of differences and similarities between the extradition and surrender in the first chapter while the second chapter concentrates on the general problem of extradition of nationals that is or was prohibited by the constitutions of certain countries because of the special relationship between the state and the national on which the national should rely and that shall not be terminated due to the EAW. Consequently, the last chapter deals with the problem of mutual recognition of decisions from another Member State that includes the issue of double criminality, principle of ne bis in idem and the protection of human rights.

I. IS THE SURRENDER BASED ON THE EUROPEAN ARREST WARRANT A DIFFERENT INSTRUMENT THAN THE TRADITIONAL EXTRADITION?

Before looking for any constitutional implications of the EAW, the fundamental question whether the surrender on the EAW is the same legal instrument as the traditional extradition[13] should be asked because the answer to this question provides information necessary to understand the problem of the extradition of citizens. Legal orders of some Member States bar or barred extradition of nationals but do not speak about surrender. Thus it is important to determine whether the surrender is a form of traditional extradition or whether it is a new legal instrument in order to find out the scope of the constitutional provisions on extradition.

Depending on the point of view, generally, two approaches to answer this question can be identified: First, analyzing the EAW as a whole, surrender is a different legal procedure; second, concentrating only on the result of the procedures, surrender is a form of extradition. However, it must be noted that the opinions of scholars, lawyers and judges often differ within one country. Moreover, in some Member States it is really difficult to answer the presented question. For example in Finnish language, there is only one word for handing over a person to another state. Finnish government stated that the extradition and the surrender are the same procedure and the Framework Decision was implemented as the "EU Extradition Act". But on the other side, it was admitted in Finland that the EAW is built on a completely different basis than the traditional extradition. Another example may be in Lithuania where the law distinguishes between surrender and extradition, but does not

[13] For information about extradition see e.g. Christina Ashton and Valerie Finch, *Constitutional law in Scotland,* (Edinburgh: W GREEN/Sweet & Maxwell, 2000), 326-328. For extradition in EU prior the adoption of the Framework Decision see e.g. Mar Jimeno-Bulnes, "European Judicial Cooperation in Criminal matters," *European Law Journal* 9:5 (December 2003): 622.

provide any definitions of these instruments. Therefore the issue cannot be resolved definitely in this Member State. However the domestic legal doctrine mainly separates the procedures.[14]

Legal regulation of extradition and surrender in Slovenia is another interesting case. Extradition and surrender are clearly distinguished; however, the term surrender originally meant handing over a person for the prosecution before an international judicial body. After adoption of the Framework Decision, its meaning was extended to the handing over of a person on the EAW to another Member State of the EU.[15]

1. SURRENDER AND EXTRADITION AS TWO DIFFERENT PROCEDURES

Both a number of the Member States[16] and the Advocate General of the ECJ, Ruiz-Jarabo Colomer[17] reached the conclusion that the surrender procedure on the EAW is a completely different legal instrument than the extradition based on the International Treaties due to the following differences: ***First***, the traditional extradition is based on the international treaties concluded between at least two Member States, while in the case of surrender only an EAW, a judicial decision issued by the relevant court of another Member State is required. Thus in the surrender on the EAW, instead of a cooperation of two sovereigns, only the

[14] Darius Mickevicius, "The European Arrest Warrant and its Implementation in the Member States of the European Union. International research Questionnaire(**Lithuania**)," <http://www.law.uj.edu.pl/~kpk/eaw/raports/Questionnaire_Lithuania.pdf> (11 March 2007), Katia Šugman, "The European Arrest Warrant and its Implementation in the Member States of the European Union. International research Questionnaire (**Slovenia**)," <http://www.law.uj.edu.pl/~kpk/eaw/raports/Questionnaire_Slovenia.pdf> (11 March 2007), Raimo Lahti Sami Kiriakos, "The European Arrest Warrant and its Implementation in the Member States of the European Union. International research Questionnaire (**Finland**)," <http://www.law.uj.edu.pl/~kpk/eaw/raports/Questionnaire_Finland.pdf> (11 March 2007), question 1(i).

[15] Only the extradition to other states was prohibited in the Constitution of Slovenia. (Šugman, Questionnaire, point 1 letter I).

[16] e.g. **Belgium, Greece, Hungary, Slovenia, Spain, Sweeden, Czech Republic, the Netherlands**. See: The European Arrest Warrant Database. Krakow: Jagellonian University, 2006,<http://www.law.uj.edu.pl/~kpk/eaw/> (11 March 2007), Point 1 letter 1. Judgment of the Czech Constitutional Court (original version), points 46-51.

[17] Opinion of Advocate General Ruiz-Jarabo Colomer, points 38-47.

judicial authorities of these states cooperate in handing over of an individual. The process of surrender does not involve executive power but the judiciary and it is based on a "high level of confidentiality" between the Member States that reflects mutual trust, the cornerstone on the cooperation in the Third Pillar. Reciprocity, one of the most significant features of the classical extradition is omitted as the surrender is a judicial decision and it is not necessary in order to find out the truth and to promote justice[18].

Second, double criminality is a mandatory condition for executing the request for extradition but in the case of the EAW it is not required explicitly. In surrenders for offences enumerated in the Article 2.2 of the Framework Decision, the double criminality verification was abolished, while in the rest of the offences it was made optional for the Member States.[19] Furthermore, execution of the EAW cannot be refused on the grounds that the allegedly committed offence is one of the political characters, as it usually was in the case of the system of extradition. However, other important bars of execution of the handing out a person such as prosecution for sex, race, religion etc.[20] of the affected person remained in the Framework Decision.

Third, many International Treaties on extradition usually barred extradition of citizens of the parties in order to protect them against any violations of their human rights in the requesting state. However, under the Framework Decision, the ban on the extradition of own citizens is not a ground for refusal to execute an EAW, as all the Member States trust in each others legal systems that are bound to respect the human rights as the Members of the EU and the Council of Europe. Furthermore, the free movement of persons within the EU had to be accompanied by some means protecting security and public order. Therefore, in order to enhance the cooperation between the Member states in this area, the system of surrender

[18] Ibid., point 45
[19] The EAW is based on free movement of judicial decisions between the Member States that mutually trust to each others legal system. Ibid, points 42-45.
[20] See the Framework Decision, point 12 of the Preamble.

based on the free movement of judicial decisions has to apply to all persons, including nationals.

Fourth, the system of surrender is less formal, less time consuming and more effective procedure than extradition. The traditional system of extradition was based on review of each individual case, but the EAW introduced a general system of surrender of persons, on which the courts of the Member States can rely without the necessity to judge each case.

It cannot be questioned that both the surrender and the extradition result in handing over a person to another state. However examining only the result of the procedure without any other factor is too simplistic. The surrender may be perceived as a procedure that replaced the traditional extradition in relation to the Member States. Thus the traditional extradition remains in force in relation to the states outside the EU.

2. SURRENDER AS A FORM OF EXTRADITION

Member States refusing to accept the surrender on the EAW as a separate legal instrument supported their position by the fact that the result of the surrender is the same as the result of the extradition. Therefore the surrender is considered to be only a more effective form of extradition and the terms "extradition" and "surrender" are used as equal ones.

These states[21] can be divided into two groups: ***First***, the Member States that do not have any barriers of extradition of own nationals in their legal orders (e.g. Denmark, France, and Malta); ***second***, the Member States that bar or barred extradition of nationals on a provision of the Constitution (e.g. Austria, Cyprus, Poland, Germany). The difference or equality between the extradition and the surrender is very important for the latter as the extradition and not the surrender (emphasize added) is banned by the Constitution; and

[21] See The European Arrest Warrant Database, point 1(i).

therefore if the surrender is a new legal instrument different from the extradition, this ban is not applicable to the EAW and the Member States can surrender own citizens without violating the Constitution. However, if the surrender is the same as extradition or a form of extradition, then the ban forbids any handing over the nationals to other states unless specific conditions are stipulated in the Constitution[22].

An example of an analysis of this kind can be found in the Judgment of the Polish Constitutional Tribunal concerning the EAW of 27 April 2005, No. P1/05. The Constitutional Tribunal reached the decision that even though there are differences between the surrender and extradition regarding the double criminality, organization and competency, procedure and the political influence on the decision, the core of the surrender is the same as the core of the extradition – handing over a convicted or indicted person to another state in order to enable criminal proceeding or serving the sentence. The purpose is identical and the surrender on the basis of EAW is much more painful because the double susceptibility is not required in order to execute an EAW and furthermore the time limits for the execution are very short.[23]

In order to answer the question whether the surrender and the traditional extradition are the same legal procedures the Constitutional Tribunal looked into the history for clarification of the presented issue. It found that: first, before adopting the Constitution in 1997, the term "extradition" was not used in any legal act except of two documents[24], second by adoption of the Article 55 §1 of the Polish Constitution, the legislator forbade extradition of citizens. A proposal for excluding the ban in cases when an international treaty states the duty to extradite was not accepted; third, although there is no reference to surrender in the

[22] See the German Basic Law, Article 16 (2).
[23] Judgment of the Polish Constitutional Tribunal, Part III point 3.6.
[24] Ibid, point 3.1

Constitution it does not mean that the Article 55 §1 of the Polish Constitution cannot apply to the new legal institutions created in the future having the same essence as the extradition[25].

But the Tribunal contradicted itself in reasoning in the case of the definitions of the surrender and extradition. On one side, when the Legislative Council tried to prove the distinction between the surrender and the EAW by pointing to the fact that the surrender and extradition are clearly distinguished in the Code of Penal Procedure and therefore they are two separate legal instruments, the Tribunal said that the ordinary laws cannot determine the meaning of the constitutional regulation.[26] On the other side, the Constitutional Tribunal did the same as its interpretation of the terms surrender and extradition was based on the definitions in the Code of Penal Procedure.[27]

Furthermore, the author of the Framework Decision and the Polish legislator clearly distinguished between the terms "extradition" and "surrender". They did not use them as equivalents but as the terms describing different legal instruments. Because the surrender was perceived as a new legal procedure replacing the traditional system of extradition and the Constitution barred only extradition of nationals, the surrender should be constitutionally acceptable and excluded from the constitutional ban. The Constitution does not apply to the new and different procedure of surrender but to the traditional system of extradition of nationals.[28]

3. CONCLUSION

There is no consensus between the Members States about the relationship of surrender to extradition. The answer to the question whether they are the same or different legal

[25] Ibid, point 3.6
[26] Ibid, point 3.3
[27] Kazimierz, Bem: *The EAW and the Polish Constitutional Court Decision of 27. April 2005* ed. Elspeth Guild, *Constitutional Challenges to the European Arrest Warrant*, Nijmegen Guild:WLP, 2006, p. 133
[28] See Judgment of the Polish Constitutional Tribunal, part I point 1.3 and part III point 1.1.

instruments depends on the prevailing point of view in the affected country – whether the identical result of the procedures is more important than the different bases of them. There will always be two opposing groups, one claiming that surrender is a form of extradition or the same as extradition and, therefore, the constitutional provisions about extradition apply to surrender as well; and the other perceiving the surrender as a separate legal instrument applying in relation to the Member States of the EU and thus outside the sphere of the constitutional regulation of the extradition.

II. EXTRADITION OF CITIZENS

1. BAN ON EXTRADITION OF CITIZENS

Abolition of the ban of extradition of citizens was a significant constitutional implication of the EAW that caused an extensive debate in the legislative, executive and judiciary branches throughout the Member States of the EU.

In the traditional system of extradition the ban on extradition of citizens was one of the cornerstones of the procedure aimed at the protection of the citizens. The other purpose of the ban lay in the state sovereignty. *"The relationship between the state and the individual is historically based on mutual benefit. Any individual lawfully within the realm owed a duty of allegiance to the Crown, in return for which the Crown owed a duty to protection to the individual. This came to be regarded as a social contract under which citizens canceled power to a government to rule. The government holds its powers as a trustee of the individual's rights and freedoms."*[29] However, the ban on extradition of nationals has been more important principle in the European continental legal system than in the common law legal system as the latter limited the extraterritorial jurisdiction of the state over its citizens to the most dangerous crimes.[30]

The Czech Constitutional Court pointed to some historical facts in its reasoning as well. Firstly, it stated that due to the very low level of cross-border movement until the 19th century the extradition did not cause any problems. The law on extradition mainly developed later in the 19th century. The main feature of the law of that time was the ban on extradition of own citizens as a reflection of the state's right to exercise its sovereignty over the citizens. In the first half of the 20th century, the ban on extradition of citizens changed its character

[29] Christina Ashton and Valerie Finch, *Constitutional law in Scotland.* (Edinburgh: W GREEN/Sweet & Maxwell, 2000), 322.
[30] Malcolm N Shaw, *International Law.* 5th ed. (Cambridge University Press, 2003), 588.

and was recognized as the right of the citizens to be protected by the state and was incorporated to the Constitutions of some states. However, now days the movement of people within the European Union is more frequent and therefore the extradition of nationals had to undergo further development. As the borders between the Member States disappeared it was necessary to improve the international cooperation in maintaining the security in all these states. And one of the means how to achieve this goal was the improvement of the handing over suspected individuals in order to successfully investigate, prosecute and punish criminals. In conclusion, as the Czech Constitutional Court said, the European citizenship does not contain only rights but responsibilities as well.[31]

Contrary to the decision of the Czech Constitutional Court, the Polish Constitutional Tribunal and the German Federal Constitutional Court refused do rely on the concept of the European citizenship in their reasoning. Although the Polish Constitutional Tribunal admitted that the concept of the citizenship has changed from the time of adoption of the prohibition of extradition of Polish citizens, the Polish citizenship cannot be replaced by the European citizenship and therefore the interpretation of the Article 55 §1 of the Polish Constitution containing the ban on extradition of citizens, cannot be changed[32]. Argumentation of the German Federal Constitutional Court was the same: Extradition of nationals is not possible due to the European citizenship as the latter did not replace the national citizenship but is only additional to it.[33]

Position of the Czech Constitutional Court regarding the Union citizenship is welcomed from the practical point of view as it is obvious that the rights of an EU citizen should carry adequate responsibility as well in order to protect the rights of the other citizens.

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[31] Judgment of the Czech Constitutional Court, part III, points 68-70.
"The concept of citizenship is fundamental to the question of rights of residence and free movement of the individual." Hilaire Barnett, *Constitutional & Administrative Law,* 3rd ed. (London: Cavedish Publishing Limited, 2000), 833.
[32] Judgment of the Polish Constitutional Tribunal, point 4.3.
[33] Judgment of the Federal Constitutional Court, point 75.

However, the decisions of the other two courts cannot be attacked due to the fact that until now the EU citizenship only supplements the national one that remained guiding.[34] Therefore it seems to be too early to introduce a European citizenship replacing the national one.

2. CASE LAW

In order to find out the constitutional implication of the abolition of the ban on extradition of citizens, it is important to distinguish the Member States where the ban is not a constitutional principle[35] from the Member States where the ban is a constitutional principle.

While in the first category of the Member States, no constitutional amendments or serious constitutional issues requiring any change of the Constitution arise, in the second category, amendments to the constitutions or a very careful implementation of the Framework Decision was unavoidable.

2.1. Member States where the ban on extradition of nationals is not a constitutional principle

In this group of Member States, there were generally no constitutional implications of the extradition of nationals as there were no principles of the Constitution that could be violated. However, the return of the national surrendered to another Member State for the prosecution of a crime may[36] or must[37] be required in order to serve the imposed sentence in his or her homeland.

[34] Treaty establishing the European Community OJ C 325, 24 December 2002, Article 17.
[35] e.g. common law countries, Czech Republic, Greece, Denmark, Sweden, Belgium, Luxembourg, and the Netherlands
[36] e.g. Denmark, Sweeden
[37] In the Netherlands extradition of nationals without the grant of return to serve the imposed sentence or an extradition of a national only for serving a sentence in another Member State is not possible. See H. van der Wilt, *The European Arrest Warrant and its Implementation in the Member States of the European Union. Iternational research Questionnaire (The Netherlands).*

Despite of the absence of any constitutional principle of the ban on extradition of citizens in the Czech Republic and Greece, the extradition of nationals was challenged as unconstitutional.

2.1.1. Czech Republic

In the Czech Republic, a group of Members of the House of Representatives filled a complaint to the national Constitutional Court arguing that the provisions implementing the Framework Decision are unconstitutional. Their argumentation was based mainly on the infringement of the constitutional right of each citizen not to be forced to leave his/her homeland (Article 14 Section 4 of the Charter of Fundamental Rights and Basic Freedoms). Complainants interpreted the ban of force to leave the ones homeland extensively as containing the ban on extradition of citizens.[38]

But the opinions presented by the House of Representatives, Senate and the Minister of Justice, stated opposite. Both the House of Representatives and the Senate reached the conclusion that the ban on forcible leave of the homeland was only a reaction to practice of the communist regime when citizens were forced to leave the country against their will. Extradition under the EAW cannot be compared to this practice as the citizen in the former case is not forced to leave the country for ever but only for the time necessary for the criminal prosecution or serving the imposed sentence.[39]

In the next part of its opinion[40] the House of Representatives used the comparative and grammatical methods of interpretation of law. The meaning of words "to extradite to another state" and "to force to leave the homeland" was examined and compared in Czech

<http://www.law.uj.edu.pl/~kpk/eaw/raports/Questionnaire_The_Netherlands.pdf> (11 March 2007), Question 5(m).

[38] Summary in of the Judgment of the Czech Constitutional Court, points 1-11.

[39] Judgment of the Czech Constitutional Court, points 16 and 17.

[40] Ibid, point 18

and Slovak legal order as the Slovak language and legal order is based on the principles closest to the Czech one. In order to avoid violation of the Constitution, the Slovak Parliament adopted an amendment to the Constitution[41] excluding the ban on extradition of a Slovak citizen. However, in the final wording of the amended provision remained the ban of the state to bar a Slovak citizen from entry to the territory of Slovakia, the ban on expulsion of a citizen and the ban to force him or her to leave the country. Thus the Slovak legislator drew a clear line between the extradition and the force to leave the homeland. Based on these facts, the House of Representatives was persuaded that the extradition cannot be equaled to the force to leave the homeland and therefore the EAW cannot violate the Article 14 Section 4 of the Charter of Fundamental Rights and Basic Freedoms. Furthermore, the Minister of Justice stressed the fact that neither any Constitution of the Czechoslovakia nor the Constitution of the Czech Republic has ever abolished extradition of own national and therefore there is no tradition of forbidding extradition of nationals[42]. However, the complainants refused a historical interpretation as improper and unacceptable because in their mind, the history shall not be decisive in explaining the meaning of the Article 14 Section 4 of the Charter of Fundamental Rights and Basic Freedoms.[43]

The Czech Constitutional Court held that a citizen of Czech Republic is never forced to leave its homeland in the meaning of the Article 14 Section 4 of the Charter of Fundamental Rights and Basic Freedoms in the case of surrender under the EAW. If the affected person requires it, the requesting Member State is always obliged to return this person to serve the imposed sentence in Czech Republic. Surrender for a limited time to other

[41] Act No. 90/2001. Curent version of the Article 23 Section 4 of the Slovak Constitution: "A citizen must not be forced to emigrate or to be expelled from his or her homeland." <http://www.concourt.sk/A/a_index.htm> (10 March 2007).
[42] Judgment of the Czech Constitutional Court, point 27.
[43] Ibid., point 7.

Member State cannot be considered as forcing to leave the homeland in the meaning of the Article 14 Section 4 of the Charter of Fundamental Rights and Basic Freedoms.[44]

However, the court first did not find the comparison with the Slovak Republic decisive as the wording of the Article 14 Section 4 of the Charter of Fundamental Rights and Basic Freedoms that grants to the citizens the right not to be forced to leave their homeland is not as broad as the wording of the Slovak Constitution and therefore the court had to find out the objective meaning of this article; and second it hold that the historical method of interpretation excluding the ban on extradition is important but however itself is not a sufficient one as the law cannot depend on the intentions of the legislator on the time when it was adopted. Persons on that it is directed may lack any knowledge of the local historical reasons.[45]

Regarding the necessity of amendments to the constitution, the Czech Constitutional Court refused to accept the ban on extradition of citizens as a general constitutional principle that can be changed only by an amendment to the Constitution and not by adoption of new laws as it happened in the case of the EAW. In its reasoning the court pointed to a number of states where the ban has never become a constitutional principle (Greece, Denmark, the Netherlands, Belgium, Luxembourg, Sweden or Great Britain) and on the other side, on countries where it was directly expressed in the constitution (e.g. Poland, Germany, Slovenia).[46]

In conclusion the Czech Constitutional Court stated that the Czech Republic does not have incorporated any general ban on extradition of nationals in its constitutional laws and therefore there is no need to change the Constitution. Furthermore, as it was mentioned in the

[44] Ibid, point 72.
[45] Ibid, points 65-67.
[46] Ibid., points 73-78.

first Chapter, the Czech legal order clearly distinguishes the surrender from the traditional system of extradition.

Compared to the German and Cypriot decision on the EAW, this one can be classified as a very euro friendly, especially with regard to the European citizenship. The court did not emphasized that the European citizenship does not replace the national one, but rather pointed to the fact that it includes not only rights but duties as well.

2.1.2. Greece

In Greece, the ban of extradition of citizens is not incorporated in the Constitution but is expressed only in the Article 438 (a) of the Code of Penal Procedure and the international treaties on extradition. Some legal scholars[47] argued that the Greece citizens should not be extradited under the Article 5 Section 2 and Section 4 of the Greek Constitution[48]. However these arguments were refused by the Supreme Court in the Decision No. 591/2005 concerning the extradition of a Greek citizen to Spain for prosecution of the crime of seduction of a child. The court held that the extradition of a Greek national does not violate

[47] Dionysios Spinellis, The European Arrest Warrant and its Implementation in the Member States of the European Union. International research Questionnaire (Greece), <http://www.law.uj.edu.pl/~kpk/eaw/raports/Questionnaire_Greece.pdf> (11 March 2007), question 1(a).

[48] Article 5 Section 2 of the Greece Constitution: *"All persons within the Greek State enjoy full protection of their life, honor, and freedom, irrespective of nationality, race, creed, or political allegiance. Exceptions shall be permitted in such cases as are provided for by international law. Aliens persecuted for acts carried out in defence of their freedom shall not be extradited."* Article 5 Section 4 of the Greece Constitution: *"Individual administrative measures restricting free movement or freedom of residence in the country and the right of every Greek to leave or enter Greece shall be prohibited. Such measures may be taken in cases of extraordinary emergency and only for the prevention of illegal acts, following the decision of a penal court as the law provides. In cases of utmost urgency, the ruling of the court may be issued after the administrative act has been taken, but not later than three days; if not the said administrative act shall be lifted ipso jure."* <http://www:confinder.richmond.edu/country.php> (10 March 2007).

any provision of the Constitution and if it meets the requirements of the provisions of the Code of Penal Procedure, there is no reason to ban an extradition.[49]

2.2. Member States where the extradition of nationals is or was a constitutional principle

Member States where the ban on extradition is or was a constitutional principle can be divided into two categories: In the first category, there are Member States that incorporated the ban on extradition of citizens into their constitutions as a rigid ban, e.g. Cyprus, Poland. The second category is formed by the Member states where the extradition of the citizens is generally forbidden but under some circumstances clearly stated in the constitution it is made possible, e.g. Germany.

2.2.1. Poland

In Poland the Constitutional Tribunal had to resolve the issue whether the Article 607t §1 of the Code of Penal Procedure allowing the surrender of a Polish citizen on the basis of the EAW is in conformity with the Article 55 §1 of the Polish Constitution[50] prohibiting the extradition of the Polish citizens.

The Tribunal stated that ***first*** there is no difference between the surrender on the EAW and the traditional procedure of extradition; ***second*** the constitutional ban on extradition of nationals based on the interpretation of the ban anchored in the Article 55 §1 of the Polish Constitution is an absolute one; ***third*** as this ban is an absolute one it can neither be limited by the Article 31 §3 of the Polish Constitution providing: *"Any limitation upon the exercise of constitutional freedoms and rights may by imposed only by statute, and only when*

[49] Summary of the Decision of the Greek Supreme Court 591/05 in the Document of the Council of the European Union No. 11858/05, Annex A, Part D.

[50] Article 55 §1 of the Polish Constitution: *"The extradition of a Polish citizen shall be prohibited."* <http://www:confinder.richmond.edu/country.php> (10 March 2007).

necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights."

However, in the present case, the conditions of the Article 31 §3 of the Polish Constitution were fulfilled. The constitutional right of citizens not to be extradited to another state was limited by a statute implementing the Framework Decision (Article 607t §1 of the Code of Penal Procedure). Then as the Legislative Council and the Prosecutor General noted, the limitation on this constitutional right was necessary in a democratic state as the offences specified in the Framework Decision clearly endangered the security, public order, natural environment, health, public morals and the freedoms and rights of others.[51] And finally, the Article 31 §3 last sentence of the Polish Constitution prohibits any violation of the essence of freedoms and rights.

Based on the Point 4.2 of the Judgment of the Polish Constitutional Tribunal: "(…) the ban on extraditing Polish nationals is formulated rather as a straightforward *rule* than a *principle*.[51] As such it cannot be balanced in the same way as other constitutional rights, which are formulated structurally as principles (…)."[52] It is possible to balance the essence of the rule as it has a structure much more similar to a right than to a rule. Therefore it is important to determine what the essence of the rule is.

In the view of the critics of the judgment of the Tribunal, the essence of the freedom from extradition in the Polish Constitution rests in *"(…) the right of a Polish citizen to be protected by the Republic of Poland and to be granted just and open trial before an*

[51] Judgment of the Polish Constitutional Tribunal, part III, point 4.1.
[52] Jan Komárek, *European Constitutionalism and the European Arrest warrant: Contrapunctual Principles in Disharmony.* Jean Monet Working Paper 10/05. (New York: NYU School of Law, 2005), 12.

independent and impartial court in the democratic state governed by the law." [53] Based on this definition, the following conclusion may be reached: If the issuing Member State respects procedural rights in its legal system, the extradition of a Polish citizen to another Member State would not violate the essence of the right not to be extradited.

However, the Polish Constitutional Tribunal defined the essence of the ban in a much more restrictive way. It found the substance of the right of Article 55 §1 of the Polish Constitution in the right of a Polish citizen to be tried before a Polish court. Therefore there can be no exception from the ban on the EAW as a Polish citizen extradited to another Member State would be tried by a court of that state and thus the essence of the constitutional right of the Polish citizen would be violated.[54]

2.2.2. Cyprus

The Supreme Court of Cyprus held that the extradition of nationals to the member States on the EAW is unconstitutional due to the fact that all legal bases on which a citizen may be arrested are enumerated in the Constitution[55]. The EAW is not one of them thus the

[53] Judgment of the Polish Constitutional Tribunal, Opinion of the Prosecutor General and the Legislative Council, part III, point 4.1.

[54] Ibid., point 4.2. For additional comments on the Judgment of the Polish Constitutional Tribunal, see Adam Łazowski, "Constitutional Tribunal on the Surrender of Polish Citizens Under theEuropean Arrest Warrant," *European Constitutional Law Review* 1:3 (October 2005): 569-581.

[55] Articles 11 Section 1 and 2 of the Cypriot Constitution of 1959: *"1. Every person has the right to liberty and security of person. 2. No person shall be deprived of his liberty save in the following cases when and as provided by law: (a) the detention of a person after conviction by a competent court; (b) the arrest or detention of a person for noncompliance with the lawful order of a court; (c) the arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by a lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the detention of persons for the prevention of spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the arrest or detention of a person to prevent him effecting an unauthorised entry into the territory of the Republic or of an alien against whom action is*

extradition of a citizen based on the EAW is clearly unconstitutional. The Supreme Court did not dealt with the question of the difference or sameness of the surrender and extradition as it was not necessary to determine this issue in order to decide the case.[56]

2.2.3. Germany

In Germany, the ban on extradition of nationals is expressed in the Article 16 (2) sentence 1 of the Basic Law: *"No German may be extradited to a foreign country."* This general ban was softened by a constitutional amendment that inserted a second sentence to the Article 16 (2) saying: *"A different regulation to cover extradition to a Member State of the European Union or to an international court of law may be laid down by law, provided that constitutional principles are observed."*

The Federal Constitutional Court did not question the constitutionality of this amendment. Under the Article 79(3) of the Basic Law, amendments to the Basic law are inadmissible if they infringe principles stated in Articles 1 (human dignity) and Article 20 (basic institutional principles, defense of the constitutional order=principles of state structure) of the Basic Law. Legislator respected the rule of law in allowing German citizens' extradition; therefore these principles were not violated.[57] The Federal Constitutional Court understood that Germany as the member of the international community and the European

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being taken with a view to deportation or extradition." Retrieved from http://confinder.richmond.edu/country.php

[56] Judgment of the Supreme Court of Cyprus of 7 November 2005, Αρ. No. 294/2005, English Summary in the Council document No 14281/05. Brussels 11 November 2005. For other information on the surrender and extradition in Cyprus see Elias Hazou, "UK extradition case forces Cyprus to amend Constitution," *Cyprus Mail*, 8 November 2005. <http://www.cyprus-mail.com/news/> (2 March 2007). "Deputies seek compromise on controversial extradition law," *Cyprus Mail*, 25 March 2006, <http://www.cyprus-mail.com/news/> (2 March 2007). Jacqueline Theodoulou, "Constitutional change planned for accordance with EU law," *Cyprus Mail*, 17 February 2006, <http://www.cyprus-mail.com/news/> (2 March 2007) "Should extradition change be retroactive?" Cyprus Mail, 3 March 2006, <http://www.cyprus-mail.com/news/> (2 March 2007).

[57] Judgment of the German Federal Constitutional Court, point 71.

Union has the duty to respect the development in the area of extradition that concerns the revocation of the ban of extradition of national.[58]

The court emphasized that the ban is not supposed to exclude German citizens from criminal liability for acts committed in other countries but serves the purpose to protect the special relationship between the state and the citizen and liberty rights of this citizen who shall have the right to rely on the protection of the state and cannot be removed from the domestic legal system.[59]

As it can be seen the ban on extradition of own nationals is not as strong as it was in the Cypriot and Polish Constitution thus the Federal Constitutional Court had much more possibilities to confirm the constitutionality of the implementation of the Framework Decision. However, it did not happen. The court ruled that the legislator did not use the entire possible means to protect the German citizens when implementing the Framework Decision. The proportional balance between the restriction on fundamental rights[60] and the freedom from extradition was not respected.

Only Article 5.3 of the Framework Decision providing that the Member State may make the surrender of its nationals conditional to the return of the person in order to serve the punishment in Germany was aimed at the protection of Germans. Except this there is no other special protection of the German citizens. Even in cases, where a significant domestic factor exists, a German has to be extradited although the offence belongs under the German jurisdiction.[61]

German legislator did not implement the optional grounds for refusal of the execution of the EAW established in the Article 4 Section 7 Letters a) and b) of the Framework Decision, namely in cases when the offences:

[58] Ibid., points 72 -74.
[59] Ibid., points 65-69.
[60] See the Chapter III. (recourse to the court) of this thesis.
[61] Judgment of the German Federal Constitutional Court, points 91-93.

"(a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or

(b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory."

In its reasoning the court emphasized that the connecting factor should be carefully examined in each case and if necessary balancing should be provided in order to reach a decision on the surrender.[62] Furthermore, while a German national shall have the knowledge of the criminal law of Germany, he or she does not have the duty to know the criminal law of another state.

German decision on the EAW was criticized for its holding that in each case, the executing authority should examined whether the rights of the affected person will be respected in the issuing Member State.[63] Thus the Federal Constitutional Court expressed its mistrust to the legal orders of the other Member States again[64] and undermined the principle of mutual trust on which the cooperation in criminal within the Third Pillar is based. As Prof. Fr. Johannes Massing stated in his opinion presented to the court by the government, first the extradition was based on mutual recognition of EAW and extradition of national of other Member States. Second, the objective of the Framework Decision was to create legal standards applicable in all Member States and all citizens of the EU. Furthermore the respect

[62] See Chapter III. part 1.1.2. b) (Nexus between the act and the territory of the prosecuting state) of this thesis.
[63] Judgment of the Federal Constitutional Court, points 83-89.
[64] See Judgment of the German Federal Constitutional Court (Solange I) of 29 May 1974, 2 BvL 52/71. English summary. <http://www.ucl.ac.uk/laws/global_law/german-cases/cases_bverg.shtml?29may1974> (1 April 2007)
Judgment of the German Federal Constitutional Court (Solance 2) of 22 october 1986. <http://www.ucl.ac.uk/laws/global_law/german-cases/cases_bverg.shtml?22oct1986> (1April 2007).

for human rights and the rule of law is a condition of the EU membership. Thus he concluded that invoking public order means invoking public order in all Member States (Article 6 of the Treaty on European Union).[65]

3. CONSTITUTIONAL IMPLICATIONS OF THE ABOLITION OF THE BAN ON EXTRADITION OF CITIZENS

In the Member States where the ban on extradition of citizens is or was a constitutional principle, the legislator has or had two ways how to resolve the constitutional conflict: He could amend the constitution and remove the ban on extradition of citizens or chose a way of interpreting the surrender on the EAW as a new legal instrument different from the extradition and implement the Framework Decision as a part of the ordinary law.[66] Both methods are defensible but the second one is uncertain because it is very likely that the legislation implementing the Framework Decision will be challenged as unconstitutional and it is possible that the court will not share the argumentation of the legislator.

The Polish legislator followed the second method of implementation of the Framework Decision and as it was said the Constitutional Tribunal refused to accept it. An amendment of the Constitution had to be adopted in order to make the surrender of nationals constitutional. But even though the Polish Constitutional Tribunal declared the extradition of nationals unconstitutional it did not declare the unconstitutional provisions null and void as the German Federal Constitutional Court but postponed the nullity of the provision in order to let 18 month for the legislator to amend the Constitution. The ban on extradition of nationals

[65] Judgment of the Federal Constitutional Court, Points 37-39. For a detailed analyze of the Judgment of the Federal Constitutional Court see Christian Tomuschat, "Inconsistencies – The German Federal Constitutional Court on theEuropean Arrest Warrant," *European Constitutional Law Review* 2:2 (June 2006): 209-226.

[66] See previous Chapter on the differences and similarities between extraditions and surrender procedure.

was removed by the amendment adopted on the 8th September 2006 and thus these days, the Polish courts can extradite even nationals without breaching the Constitution.

The case of Poland is similar to the one of Cyprus although the constitutional principle of non extradition of nationals was based on a different wording of the provision of the Cypriot Constitution. The Constitution of Cyprus enumerated bases on which a person may be extradited to a third country. But the EAW did not fall under anyone. To find the extradition on the EAW constitutional in this situation, it would be difficult. However, under the opinion of the Cypriot Attorney General it would be possible. As the Polish legislator, he unsuccessfully argued that the surrender on the EAW is a different procedure than the traditional extradition. The Supreme Court of Cyprus did not accept this argument. The legal order had required an Amendment that was adopted in March 2006 and enabled the extradition of Cypriots to third countries.

In case of constitution containing a rigid ban on extradition of nationals it would be much more difficult to defend the constitutionality of the law implementing the Framework Decision than it was in Germany. However, the German Federal Constitutional Court declared the Act implementing the Framework Decision void because the legislator did not used the all possible means to protect the interest of the German citizens. The criticism was directed on the legislator not the Basic Law or the framework Decision therefore the situation required adoption of a new Act implementing the EAW respecting the sentence 2 of the Article 16 (2) of the Basic Law. The Constitutional Court warned the legislator that the rights of the German citizens and generally the human rights incorporated in the Basic law must be taken seriously.

In Czech Republic, the Constitutional Court explained that the meaning of the right not to be forced to leave the homeland does not contain any ban on surrender of nationals and contrary to the German Federal Constitutional Court expressed its trust to the legal systems of

the other Member States of the EU. Likewise, the Greek Supreme Court had no objection against the surrender of nationals even though it was incorporated in the Code of Penal Procedure.

As it can be seen the constitutional implication of the EAW in relation to the ban on extradition are different. However a main common feature can be identified. In general, the surrender of nationals to the Member States of the EU was simplified and the strict bans on extradition of citizens disappeared from the Constitution or were softened.

III. MUTUAL RECOGNITION

Mutual recognition of judicial decisions from another Member States is the principle established by the Tampere Council in 1999 as the cornerstone of the judicial cooperation in the criminal matters in the EU. It was incorporated to a Framework Decision for the first time thus the EAW is the first instrument of the EU applying the principle of mutual recognition in practice.

Under the Framework Decision the authorities of the requested state are required to execute the EAW, a judicial decision of the requesting state with the minimum formality. They are not empowered to examine the legal order of the other state to determine whether the execution of the EAW is possible but they have to trust in its legal system even though the legal systems of these two countries may vary and the result of the proceeding in the same case could be different in each state.

Whole system is based on the mutual trust between the Member States. *"Mutual trust is at the heart of the European Union. Although the Union lacks a general mechanism to enforce its rules and decisions, Member States usually comply with them. This remarkable fact can in part be explained by self interest: although individual rules and decisions may be found harmful and are ducked from time to time, all member states know they win by sticking to the rules of the game. The member state that grudgingly applies a rule or a decision trusts all the others to do the same most of the time. If this were not so, the system would break down, in spite of the European Court of Justice denying the rule of reciprocity legal status in the Union."*[67]

[67] JHR/WTE, "Mutual trust," Editorial, *European Constitutional Law Review* 2:1 (February 2006): 1-3.

However the mutual trust is not a principle fully respected in all Member States.[68] The mutual recognition based on the mutual trust attacks the principles on which the legal order of the requested state is based. As a judicial decision of the authorities of one Member State has effects on the territory of another one, the territorial jurisdiction of the requesting state is broadened. The requested state has to comply with a decision of another Member State based neither on the European standards nor its domestic standards but on the national standards of the requesting state.[69] The requested Member State cannot verify the double criminality of the offence in each case and by an automatic execution of the EAW it may violate the duty to protect the human rights of its citizens or residents. Therefore the principle of mutual recognition applied in the Framework Decision causes constitutional implication regarding: first, the constitutional principles of the verification of double criminality and the principle ne bis in idem and second the human rights protection.[70]

The criminal law has not been harmonized in the EU due to its different features in each Member State and the special relationship with the particular state, its history, tradition, culture.[71] Moreover, the problem with the harmonization is in the Member States' unwillingness to give up the part of their sovereignty in the field of criminal law.[72] Therefore

[68] See e. g. the Judgment of the German Federal Constitutional Court. For the problems concerning the mutual recognition in Italy, see Franco Inpalá, "The European Arrest Warrant in the Italian legal system. Between mutual recognition and mutual fear within the European area of freedom, security and justice," [electronic version] *Utrecht Law Review*, 1:2 (December 2005): 56-78. <http://www.utrechtlawreview.org/publish/articles/000009/article.pdf> (3 February 2007)

[69] See Valsamis Mitsilegas,"The constitutional implications of mutual recognition in criminal matters," *Common Market Law Review* 43 (2006): 1281.

[70] Mutual recognition in criminal matters leads to the issue of supremacy of the EU law and the competence of EU in this field as well. But this topic does not fall within the scope of this thesis.

[71] See e.g. Elspeth Guild, "Crime in the EU's Constitutional Future in Area of Freedom, Security, and Justice," *European Law Journal* 10:2 (March 2004): 220-223.

[72] See Judgment of the Czech Constitutional Court, point 25: A group senator emphasized that the harmonization of the criminal law is not sufficient yet.

it was an easier way to agree on the mutual trust and mutual recognition although in fact it requires certain degree of harmonization as well.[73]

1. CONSTITUTIONAL PRINCIPLES OF VERIFICATION OF DOUBLE CRIMINALITY AND NE BIS IN IDEM

Under the international law, *"jurisdiction concerns the power of the state to affect people, property and circumstances and reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs. Jurisdiction is a vital and indeed central feature of state sovereignty, for it is an exercise of authority which may alter or create or terminate legal relationship and obligations."*[74] But applying the principle of the mutual recognition[75], the territorial jurisdiction of the issuing state is extended to the territory of another Member State as it has legal effect there. The requested Member State has the duty to execute the EAW except the situation when the grounds for refusal are applicable. Decisions in criminal matters adopted by judicial authorities of another Member States are recognized and enforced with minimum formality and under an almost automatic procedure established by the EAW in the requested state and thus they gain an extraterritorial jurisdiction and influence the constitutional order of the executing state as they may import principles unfamiliar to the domestic legal system.

[73] See Mitsilegas, The constitutional implications of mutual recognition, 1280.
[74] Shaw, *International Law,* 572.
[75] For additional information see Communication from the Commission to the Council and the European – Parliament, *Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States* (COM(2005)195 final), Brussels 19.5.2005.

1.1 Double criminality issue

As the Advocate general Ruiz-Jarabo Colomer wrote, the EAW is not based on the double criminality principle. Verification of the double criminality was abolished in the case of 32 offences of a serious character enumerated in the Article 2.2 of the Framework Decision while execution of an EAW for other offences does not necessary require the double criminality check. It is sufficient if the act is a criminal offence in the requesting state. Whether a Member State will resist on the double criminality of offences other than those of the Article 2.2 of the Framework Decision depends on the implementation of the Framework Decision to the legal order of each Member State.[76] But it is important to note that the double criminality check is in fact contrary to the mutual recognition as it requires the review of the laws of the requesting state instead of application of the mutual trust to its legal system.

However, the abolition of double criminality lead to strong debates where the participants mostly concentrated on three problems: First, the **democratic deficit**, second the **principle of legality** and third the **ban on retroactivity**.

1.1.1 Democratic deficit

Critics of the Framework Decision point to its democratic deficit and support their allegation by three arguments: ***First***, the Framework Decision was adopted by the Council as the reaction to the attacks of the September 11th 2000 in a very quick and secretes procedure.[77] There was not enough time for discussion about the draft of the Framework Decision even though the necessity to pass the Framework Decision was not so urgent. ***Second***, the citizens of the Member State did not participate in adoption of the criminal law through their legitimate representatives. Instead of that, the rules were passed by the

[76] Opinion of Advocate General Ruiz-Jarabo Colomer, points 85-86.
[77] See Sionaidh Douglas-Scott, "The rule of law in the European Union – putting the security into the area of freedom, security and justice," *European Law Review* 29:2 (April 2004): 228.

government. Thus the legislative power was taken from to parliaments to the executives and the adopted law lacked the necessary connection with the people to whom it will apply. *"Criminal law and the limits that it sets must be openly negotiated and agreed via a democratic process, and citizens must be aware of exactly what the rules are. However, mutual recognition challenges this framework. Contrary to harmonization, which would involve – even with the current prominent democratic deficit in the third pillar – a set of concrete EU-wide standards which would be negotiated and agreed by the EU institutions, mutual recognition does not involve a commonly negotiated standards."* [78]

On the other side, it has to be admitted that the Framework Decision is a legal instrument adopted by the Council under the Article 32 §2b of the Treaty of Amsterdam and European Parliament is only consulted in the procedure according to the Article 31.9 of the TEU. Framework Decisions are binding for the Member State as to the result but the methods of achieving it are left to the Member State. The national legislator has the control over the adoption of the law implementing the Framework Decision.[79] Implementation cannot be enforced before any court therefore the national legislator cannot be punished for refusing the implementation. However, the political pressure may be employed by the other actors on the field.

[78] Mitsilegas, The constitutional implications of mutual recognition, 1287.
[79] For the implementation of the framework Decision, see Report from the Commission based on Article 34 of the Council framework decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, (COM(2005)63 final), Brussels 23.2.2005. Report from the Commission based on Article 34 of the Council framework decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (revised version), (COM (2006) 8 final), Brussels 23.1.2006. Statements made by certain Member States on the adoption of the Framework Decision,Official Journal L 190 , 18/07/2002 P. 0019 – 0020.

1.1.2 Principle of legality

Principle of legality incorporated in the legal orders of the Member States requires first, the legislator to clearly determine the behavior that is forbidden in order to ensure the certainty of the legal order. This means that persons within the jurisdiction of a state must be aware of the acts that are criminalized in advance and thus to be able to adopt their behavior to these rules. Second a nexus between the forbidden act and the territory of the state that is prosecuting this offence must be established to legitimize its action.[80]

a) Definition of the criminalized behavior

The principle of legality (nullum crimen sine lege, nulla poena sine lege) requires clear definitions of the acts that are forbidden and the penalties imposed for the commission of these offences otherwise the content of the law would be uncertain and the individuals would not be able to adjust their behavior to it. However, the Article 2.2 of the Framework Decision does not contain the definitions of the offences but only the legal qualification of the criminalized acts. On the other side, it must be admitted that the principle of legality applies in the substantive law and the legal instrument of surrender is a part of the procedural law. The requested Member State only facilitates the prosecution under the legal order of the requesting state but does not apply foreign law on its own territory. Therefore the substantive criminal law of the requesting Member State that always defines the crimes is decisive. If an individual is surrendered to another Member State he or she is prosecuted and/or punished according to the law of that foreign state that does not lack clarity. And finally, it is often

[80] See e.g. Antonio Casses, *International Criminal Law,* (Oxford; New York: Offord University Press, 2003), 138-158. Roelof Haveman, Olga Kavran and Julia Nicholls, eds. *Supranational Criminal Law: A system sui generic,* (Antwerpen: Intersentia, 2003), 39-78.

stated that all the offences of the Article 2.2 of the Framework Decision are punishable in the all Member States.[81]

Although these arguments are persuasive, *"(…) constitutionally it is not acceptable to execute an enforcement decision related to an act that is not an offence under the law of the executing State. The executing State should not be asked to employ its criminal enforcement mechanism to help prosecute/punish behaviour which is not criminal offence in its national legal order."*82

Based on the aforementioned, three problems arise: Under the Article 4.6 of the Framework Decision, if the requested state takes the obligation to execute a punishment or a protective measure imposed on its national, resident or any other person staying on its territory in accordance with the national laws, it may refuse an EAW issued for the purpose of its execution; and under the Article 5.3 of the Framework Decision, return of a national or a resident to the requested state for the purpose of executing the imposed punishment or protective measure may be required as a condition of his or her surrender. But in all these cases, the punishments or protective measures shall not be executed as the act for which they were imposed is not criminalized in the requested state because it would be contrary to the constitutional order. Issues of euthanasia, abortions and usage of drugs, can be shown as examples of acts which can fall to the category of the offences where the double criminality is not required but they are not punishable in all Member States. By execution of the EAW in this situation, the requested Member State would apply an unknown or a different constitutional rule than those recognized in its legal system.

If neither the grounds for mandatory non-execution established in the Article 3 of the Framework Decision[83] nor the optional grounds stipulated in the Article 4 of the Framework

[81] Opinion of Advocate General Ruiz-Jarabo Colomer, points 95 and 103.
[82] Mitsilegas, The constitutional implications of mutual recognition, 1286-1287.
[83] In short, it is amnesty, res iudicata, age of the affected person.

Decision are fulfilled (or implemented to the domestic legislation), the requested state cannot refuse the EAW for the offences enumerated in the Article 2.2 of the Framework Decision on the base of lack of double criminality.

b) Nexus between the act and the territory of the prosecuting state

Although the aforementioned arguments are strong, some problems may appear in determining the nexus between the act and territory of the prosecuting state. This nexus can be based on the principles of nationality, protection, universality and territoriality. In this case, the most important is the principle of territoriality based on which a state can exercise its jurisdiction not only on its territory but in the territory of another states if the act was committed on the territory of another states but the results arose on its territory.[84]

Applying the principle of territoriality, **three general situations may be distinguished**: ***First***, if both the act and the result are connected to the territory of the requested state a strong domestic connecting factor is established. Surrender would be barred and the requested state would prosecute the crime itself. The German Federal Constitutional Court justified the refusal by the argument that otherwise the fundamental rights of the citizen who should be surrendered would be violated as he or she neither participated in the adoption of the criminal laws of the requesting state that are applied on his or her behavior nor he or she had the duty to know these norms.[85] ***Second***, if both the act and the result are allocated in a foreign state, the surrender shall be executed as the person will be prosecuted and/or punished for the violation of the laws of the requesting state that he or she had to respect when staying on its territory. ***Third***, the situation when the act was committed on the territory of the requested state but the result arose on the territory of another state causes the most

[84] See Shaw, *International Law,* 579-620. Judgment of the Czech Constitutional Court, point 109.
[85] Judgment of the German Federal Constitutional Court, point 86.

problems. The German Federal Constitutional Court stated that the gravity of the offence and possibilities of prosecution should be balanced with the fundamental rights of the affected persons in order to determine whether the surrender is possible.[86]

On the other side, the Czech Constitutional Court refused the surrender in this case as in the point 110 of Decision of the Czech Constitutional Court on the EAW declared a general rule based on which the surrender is possible on if the prosecuted act was committed outside its territory. An exemption is possible only regarding to the act partially committed on the territory of the Czech Republic if the prosecution is more efficient in another state.

As the German legislator, the Czech one did not implement the optional ground for non-execution of the EAW to the national legislation. But the Czech Constitutional Court found this process constitutional because in a situation of this kind the protection of the reliance of any person on the Czech territory on the Czech legal order incorporated in the Article 39 of the Charter of Fundamental Rights and Basic Freedoms and the §377 of the Code of Penal Procedure would automatically apply. On the Czech territory only the Czech law is applicable. However the court admitted that the decision on surrender may be problematic regarding the long distance offences.[87]

1.1.3 Ban on retroactivity

In order to apply the ban on retroactivity in the criminal law, it is important to distinguish between the substantive criminal law and the procedural criminal law. ***First***, in the substantive criminal law retroactivity unfavorable for the executed person is not acceptable. Only acts defined as criminal by the law on the time when they were committed can be punished. Although the new law criminalized an act if it had been committed prior this law came into force the offender shall not be prosecuted. Otherwise an individual could not

[86] Ibid., point 88.
[87] Judgment of the Czech Constitutional Court, point 111.

rely on the laws and adjust his or her behavior to them as it would not be certain on the time of the commission of an act whether it is criminalized or not. ***Second***, in the criminal procedural law, the ban on retroactivity does not apply. All the procedural steps are lead by the laws in force on the time of their execution.

Extradition or surrender are not a part of the substantive criminal law but the procedural one therefore the constitutional challenges against the execution of the EAW for acts committed prior to the implementation of the Framework Decision are not acceptable. Offenders are not prosecuted and punished under the substantial law of the requested Member State. They are surrendered to another state where they have to take the responsibility for the acts committed on the territory of this state and criminalized on that time.[88]

Therefore the arguments of the opponents of the application of the EAW for the offences committed prior the implementation of the Framework Decision that the persons who relied on the protection of the state will be unconstitutionally surrendered are not acceptable unless an exception confirmed by the Federal Constitutional Court of Germany. Extradition of a German national relying on the protection of the state would be unconstitutional if the allegedly committed offence would not be punished in Germany and would not establish any connecting factor to the requesting state.[89]

Although the ban on retroactivity applies only in the substantive law, the Article 32 of the Framework Decision offers a possibility to file a declaration to the Council stating that the EAW will not be executed for acts committed before a certain date prior to day when the Framework Decision had gone into effect. The procedure will be governed by the traditional system of extradition.

[88] See Judgment of the German Federal Constitutional Court, Opinion of the Hamburg Hanseatic Higher Regional Court, point 10.
[89] Judgment of the German Federal Constitutional Court, point 99.

Based on the attitude to the application of the EAW, the Member States can be divided into two categories: ***First***, Member States that accept EAW-s for acts allegedly committed prior the implementation of the Framework Decision to the national law.[90] ***Second***, the Member States that do not apply the EAW for acts allegedly committed before this date.[91]

However, the law of the requested state is governing therefore the execution of the EAW depends on the fact whether the requested Member State applies the EAW for acts committed prior the implementation of the Framework Decision. Reciprocity is not required in this case however Finland made the execution of the EAW-s conditional to the time limits applied in another Member States. If the other Member States do not impose any time limits on the commission of the offences Finland executes the EAW-s from these states without any limitation as well.[92]

[90] e. g. Poland, Cyprus, Denmark, Greece, the Netherlands, Lithuania, Germany, Spain, Finland, Sweden. See The European Arrest Warrant Database, question 4(g). Spanish Constitutional Court declared the surrender for acts allegedly committed before the implementation of the Framework Decision as constitutional in its Decision No. 83/2006 dated on the 13 May 2006

[91] e. g. Hungary, Malta, Austria

[92] See Kiriakos , International research Questionnaire (Finland), Question 4(g). For another example of applying the reciprocity, see A summary can be found in e.g. House of Lords. European Union Committee. *European Arrest Warrant – Recent Developments.* Report with evidence. 30th Report of Sessions 2005-06. [Electronic version] HL Paper 156. London: The Stationery Office Limited, 2006. <http://www.publications.parliament.uk/pa/ld200506/ldselect/ldeucom/156/156.pdf> (10 January 2007), para 30.

1.2 Ne bis in idem[93]

The principle of ne bis in idem prevents any further prosecution of an individual for the same act and thus safeguards the legal certainty of the legal position of this individual. However, it does not bar any parallel prosecution in other Member States. It is based on the "first come first take" principle meaning that only if the case is a res iudicata, no prosecution regarding the same case can be lead. [94] The rationale behind this principle is following: *"A person who is exercising free movement rights in a borderless area may not be penalized doubly by being subject to multiple prosecutions for the same acts as a result of him/her crossing borders. EU Member States must respect the outcome of proceeding in other Member States in this context in the conditions set out by the Schengen Convention. … This form of mutual recognition … does not require the active enforcement of an order in the executing Member State by coercive means, but rather action stopping prosecution."*[95]

The ne bis in idem principle is based on a special kind of mutual trust that causes some problems as well. There are two main questions[96] regarding the definition of the principle of ne bis in idem: The ***first*** one concerns the definition of "idem". Does it mean a

[93] Principle ne bis in idem, incorporated in the Schengen acquis and later implemented by the Treaty of Amsterdam was expressed in the Articles 3 and 4 of the Framework Decision. The Article 54 of Convention Implementing the Schengen Agreement 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders of19 June 1990. < http://www.unhcr.bg/euro_docs/en/_schengen_en.pdf> (1April2006).
defined it following: "*A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another contracting Party for the same acts provided that if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party*." However, under the Article 58 of the Convention a wider definition of any national legal order is acceptable.
See Geert Corstens and Jean Pradel, *European Criminal Law*, (The Hague: Kluwer Law International, 2002), 88-92.

[94] Green Paper on Conflicts of Jurisdiction and Principle of ne bis in idem in Criminal Proceeding, (COM (2005)696 final). Brussels 23.12.2005, 3.

[95] Mitsilegas, *"The constitutional implications of mutual recognition,"* 1300.

[96] For other problems see the Green Paper on Conflicts of Jurisdiction and Principle of ne bis in idem in Criminal Proceeding, 8-9.

same act or a same legal qualification of this act? Legal orders of the Member States do not define the same offences on the same way due to a different legal tradition and history although a certain level of harmonization of the criminal law was already achieved. ***Second***, what kind of decision does the principle of ne bis in idem require? Is it only a guilty/innocent judgment of a court or could be the other means of settlements accepted?

Both of these questions were answered by the ECJ. In the Esbroek case the ECJ emphasized the reliance on material facts rather than their legal qualification.[97] And in the joined Gözütok and Brüge case the court held that the Member States do have to accept any results of a prosecution based on the criminal law of other Member State that placed obligations on the accused person, including out of court settlements because *"there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognizes the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied"*.[98]

However, the fact that the different approaches of the national legal orders to the definition of res iudicata were not accepted by the ECJ may cause problems because in a Member State an out of court settlement could not be sufficient to bar the prosecution as the legal order requires a final decision strictly determining whether the prosecuted person is innocent or guilty.

[97] C-436/04 Van Esbroek Judgment. OJ C 131, 03.06.2006, p. 18.
[98] Joined cases C – 187/01 Gözütok and C – 385/2001 Brügge ECR [2003] I-01345, point 33.

2. HUMAN RIGHTS PROTECTION

Originally, the EU was perceived as a guarantor of the democracy and the protection of human rights.[99] Although at the beginning there was no binding list of human rights but the case law of the ECJ that was later incorporated into the Article 6 of the Treaty of EU stating that EU is *"founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States"*. The Article 7 of the same Treaty established the duty of the Member States to comply with these obligations as their membership would be terminated if they seriously breached the principles of rule of law. Lastly, in 2000 the Charter of Fundamental Rights of EU that is not biding but at least declares the respect for the human rights protection in the EU was adopted.[100] Then the draft of the Framework Decision of certain procedural rights in criminal proceeding was drafted by the Commission.

The **Framework Decision** itself guarantees the protection of human rights in the Preamble and in the Article 1.3. ***First***, the Framework Decision respects the fundamental rights and principles incorporated to the Article 6 of the TEU[101] and nothing in the Framework Decision can be interpreted contrary to this article of the TEU[102]. ***Second***, in the Articles 12 and 13 of the Preamble of the Framework Decision, grounds for refusal of execution of the EAW in cases of violation of human rights are established.

Furthermore, all the Member States are signatories of the **European Convention on Human Rights** (hereinafter only "ECHR") that established a general principle regarding extradition of persons in the decision of the case Soering v. UK: No person shall be

[99] See Wojciech Sadurski, *Constitutional Courts in Central Europe – Democracy – European Union,* Legal Studies Research Paper No. 06/54. Sydney: Sydney Law School, 2006, <http://ssrn.com/abstract=947031>.
[100] But see Robin Lööf, "Shooting from the Hip: Proposed Minimum Rights in Criminal Proceeding throughout the EU," *European Law Journal* 12:3 (May 2006): 421-430 as well.
[101] Framework Decision, Preamble, point 12.
[102] Ibid., Article 1.3.

extradited to any state where the Article 3 of the ECHR prohibiting torture, inhuman or degrading treatment or punishment could be violated.[103]

However, some of the Member States, scholars and lawyers still have not considered the level of protection of human rights and fundamental freedom satisfactory in the whole territory of the EU. **Germany** is the player expressing the strongest mistrust into the legal systems of other Member States. In the Solange I, the Court decided that it will review the Community law because the EC did not created a mechanism of protection of fundamental rights and legitimize its law-making power sufficiently to fulfill the criteria of the Basic Law. After twelve years, the same matter reached the Court again. But in this case it hold that EC established a mechanism of protection of human rights that met the requirements of the Basic Law and therefore the Court will not review the Community law as long as this standard will be maintained. Then, in 2005 the Court refused to trust to the system of fundamental rights' protection of other Member States in its decision on the EAW. In each case of surrender, the German executing authority has to review whether the level of protection of the human rights and fundamental freedoms of the affected person meets the requirements of the German legal order.[104] Contrary to the position of Germany, the Czech Constitutional Court did not find any violation of the obligation to protect human rights by surrendering a person to another Member State as everywhere the common EU standards of protection of human rights apply.[105]

The basic problem of the protection of human rights and fundamental freedoms in relation to the EAW lies in the **difference between the law and practice**. While the human

103 Soering v. United Kingdom. (1989) 11 EHRR 439. See Susie Alegre and Marisa Leaf, "Mutual Recognition in European Judicial Cooperation: a Step Too Far Too Soon? Case Study - the European Arrest Warrant," European Law Journal 10:2 (March 2004):Alegre and Leaf, Mutual Recognition in European Judicial Cooperation, 205.
104 Judgment of the German Federal Constitutional Court, point 89.
105 Judgment of the Czech Constitutional Court, point 87.

rights are protected on the EU level, national level and furthermore by the ECHR, in reality the Member States often breach their obligation as the case law of the ECHR demonstrates.

Respect for the human rights must be real and not only in theory. Member States are those ones who are obliged to protect the human rights under the international human rights law and therefore they cannot simply rely on the trust to another Member States that they will respect their duties under the same law.[106] Although this practice is contrary to the mutual trust in the view of the German federal Constitutional Court, this does not restrict the guaranteed level of protection of human rights in the Basic Law.[107]

Likewise, in the UK the executing authority has to examine whether the human rights of the surrendered person will not be violated in the requesting state.[108] This approach is contained in decision of the English High Court in the Ramda case where the judges stated that the ECHR is not a court of appeal of the Member States in cases of violation of the human rights and therefore the membership in the ECHR and the possibility to file a complaint to this court does not mean an exception of the state's duty to protect human rights.[109]

Another problem of the regarding the human rights protection and the mutual recognition is in the admissibility of the judicial review of the decisions on the execution of the EAW. Under the available information, these decisions can be appealed in the most Member States.[110] For example in Czech Republic an affected person has the right to file both a request for a judicial review of the decision of execution of the EAW and a

[106] Alegre and Leaf, Mutual Recognition in European Judicial Cooperation, 216.
[107] Judgment of the German Federal Constitutional Court, point 119.
[108] Douglas-Scott, The rule of law in the European Union, 226-227.
[109] R v Home Secretary, ex p Elliot [2001] EWHC Admin 559 In Susie Alegre and Marisa Leaf, *Mutual Recognition in European Judicial Cooperation: a Ste Too Far Too Soon? Case Study - the European Arrest Warrant."* European Law Journal, 10:2 (March 2004).
[110] e.g. Denmark, Lithuania, Cyprus, Hungary, Greece, Finland, Sweden, Austria, Belgium, Poland, Czech Republic, Malta, Slovenia, Luxemburg, UK. See The European Arrest Warrant Database., question 5(k).

constitutional complaint.[111] However, there are Member States where this decision is final[112] or was final. In Germany, under the first German EAW Act, the grant of the surrender was not appealable. Only after the decision of the Federal Constitutional Court, the second EAW Act implemented a possibility of review of the final decision.

The German government argued before the Federal Constitutional Court that first the decision on the surrender is removed from the control of the judiciary as it is a sovereign act and second, the standards of the Basic Law are not applicable to the Framework Decision, only a reference for a preliminary ruling to the ECJ is applicable.[113] However, the court ruled that the first EAW Act violated the Article 19.4 of the Basic Law granting the right to recourse to the court to any person. In the reasoning, the court pointed to two important facts: First, as the executing authority is weighing the interest of the affected person and does not simply issue a policy decision the judicial review must be granted; and second, the decision on the surrender is classified as an administrative act that is subject to the judicial review because the executing authority has the obligation to reason its decision and to notify the affected person.[114] Therefore the protection of fundamental rights requires the possibility of judicial review of the decision on the EAW and the right contained in the Article 19.4 of the Basic law was upheld regarding the EAW.

[111] §411 Section 5 of the Criminal Procedure Code and §415 Section 3 of the Criminal Procedure Code. See the Czech Constitutional Court, point 90.
[112] See Wilt, International research questionnaire (the Netherlands), point 5(k)
[113] Judgment of the German Federal Constitutional, point 40 and 52.
[114] Ibid, point 114 and 115.

CONCLUSION

The Framework Decision adopted as the reaction to the terrorist attacks of September 11th 2000 did not only improve the cooperation between the Member States in fight against terrorism but established an important tool for much efficient prosecution of crime in the EU. The EAW was a necessary reaction to the abolition of boarders between the Member States that enabled the free movement of the nationals of EU Member States, including criminals and individuals fleeing from justice.

However positive was the impact of the EAW on retaining the security and promoting justice in the EU, this legal instrument carried a lot of constitutional problems. First, the supremacy of the European (not Community) law over the national Constitution and the correctness of use of the Framework Decision to implement a change into the system of extradition caused constitutional problems in Belgium where the case was referred for the preliminary ruling to the ECJ. Until now, only the opinion of the Advocate General favoring the supremacy and the constitutionality of the Framework Decision was presented. Second, the problem of abolition of the ban on extradition of nationals was an object of proceedings at the Constitutional Courts of the Member States as it influenced the special relationship between the state and the individual. Third issue, mutual recognition of judicial decision in criminal matters, is problematic itself as it requires the states to trust legal orders of another Member States without any verification of the real situation there.

This thesis studied the last two problems from the perspective of national constitutional orders. Attention was paid mostly to the Poland, Germany, Cyprus, Czech Republic and Greece as the constitutionality of the domestic legislation implementing the Framework Decision was an object of proceeding at these courts and the decisions offered a worth material for study and explanation. The analyzes of the principles on which the EAW

and the national constitutional orders are based help to understand the objections of the Constitutional Courts to the Framework Decision and the constitutional implications of the EAW on the national constitutional orders.

Base on the aforementioned methodology, three main constitutional implications of the EAW were find: First, recognition of the surrender on the EAW as a new legal procedure or as a form of extradition; second, the abolition of strict bans of extradition of nationals; and third increase of the mutual trust between the Member States, however the achievement of this goal is very problematic.

1.- 2. In order to decide on the constitutionality of the abolition of ban on extradition, first, the problem whether the surrender on the EAW is the same legal procedure as the extradition was necessary to resolve. If one accepts that the surrender on the EAW is a different legal instrument than extradition there should not be any constitutional problems regarding the surrender of citizens in the Member State where their extradition is barred, because the constitutional ban does not cover surrender. However, if a Member State with the freedom from extradition incorporated in the Constitution concentrates only on the result of the surrender that is the same as in the system of traditional extradition – handing over an individual, and therefore does not distinguish between surrender and extradition it has to adjust the relevant provisions of its Constitution to be able to surrender its nationals under the EAW.

3. The EAW is the first instrument of the mutual recognition requiring the Member States to surrender individuals to another Member States with the mutual trust in their legal systems. But the Member States do not fully trust in each others legal orders due to the fact that there are differences between them based on the different development of the law and subsequently different legal principles. Although the criminal law has been partially harmonized on the EU level it is not satisfactory yet. Therefore, some acts as abortion,

euthanasia, drugs, exercise of the freedom of speech, may lack double criminality in the Member States. But on the other side, these acts could fall within the Article 2.2 of the Framework Decision that abolished the double criminality verification. Thus the surrender in these cases would violate the principle of legality requiring clear definitions of the criminalized act on the time of its committing and a nexus between the act and the territory of the prosecuting state. Violation of the principle of ban on retroactivity is not very probable however it may occur if a national relies on the constitutional protection of the freedom from extradition, the act is not punishable under the domestic legal order and there is no nexus between the act and the territory of the requesting state.[115] Another problem of the mutual recognition lies in the lack of democracy in the process of adoption of the Framework Decision. Even if the Framework Decision was adopted in accordance with the Treaty of Amsterdam, a debate about the EAW was missing even though the implications on the national orders were important ones. Different national standards caused problems with regard to the application of the principle of ne bis in idem, namely the requirement of the national legal order on the decision ending the prosecution. If in a Member State, proceeding is considered to be ended only by the final decision of the court on the innocence or guilt of an individual, constitutionally it is unacceptable to refuse the prosecution based on an out of court settlement from another Member State. Moreover, despite the membership in the EU and signature of the ECHR and other international treaties protecting the human rights, the Member States questioned the level of protection of the human rights in another Member States, especially when they had to surrender their own nationals as the international obligation binds them to protect the human rights actively and not only mutually trust to the system of protection in another Member State.

[115] Judgment of the German Federal Constitutional, point 99.

Thus even though the EAW improved the cooperation in criminal matters within the EAW, it carried a number of constitutional problems requiring a substantial change of the constitutional principles of the Member States if they do not meet the standards set up by the Framework Decision. As judge Blakxtoon noted the EAW "is in fact much like Emmenthal cheese that, however delicious it may be, is characterized by consisting mainly of (loop)holes".[116]

[116] R. Blekxtoon, "Introduction,", in R. Blekxtoon, W. F. W. van Ballegooij, (eds.), Handbook on the Euroepan Arrest Warrant, (The Hague, 2005): 5 Quoted in Artur Gruszczak, *European Arrest Warrant – success story or constitutional troublemaker?* In *European Arrest Warrant Achievements and Dilemmas. Papers presented to the seminar held at the European Center Natollin on 27 January 2006,* Working paper 3 (7)/06, edited by Artur Gruszczak. Warsaw: European Centre Natolin, 2006, (citation omitted).

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