European Constitutional Pluralism after the Enlargement

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On 27th April 2005 the Polish Constitutional Tribunal ("the Tribunal") has entered European constitutional discourse very loudly when it annulled a provision of the Polish Criminal Procedure Code implementing the European Arrest Warrant Framework Decision.[1] The judgment happened to be delivered at the time when the European University Institute in Florence organised conference "Après Enlargement", which aimed at evaluating the first year of the ten new Member States with their membership in the EU and conversely, the experience which the EU had with the newcomers. Some participants were very critical of the Tribunal for its admittedly counter-European approach, which even led M. Wyrzykowski, the reporting judge in the case who was present at the conference, to start his contribution by introducing himself as "an accused judge". This paper will attempt to do justice to the Tribunal and put its current decisions in context of the wider constitutional debate in today's Europe. It will do so on a basis of two decisions, since the EAW Decision was soon followed by another judgment, which despite the fact that it did not attract so much attention, deserves even closer look. It concerns Polish Accession Treaty and the Tribunal in fact reviewed there the current state of EU law from the point of view of the Polish Constitution.[2]

These two decisions deserve attention not only because the Tribunal was the first of the constitutional courts in the new Member States to directly touch EU law.[3] The decisions also reflect current constitutional debate in Europe, which emphasises pluralistic character of the European legal order and highlights the impossibility to find simple answers to the relationship

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[1] Judgment of 27.4. 2005, P 1/05, text of the decision as well as its English summary is available at http://www.trybunal.gov.pl (See n 11 regarding the summaries). The Tribunal was followed by the German Federal Constitutional Court: 2 BvR 2236/04 of 18.7.2005, available at: http://www.bverfg.de/entscheidungen/rs20050718 2bvr223604.html.

[2] For a short comment of the two decisions, which in my view however takes too one-(EU)-sided perspective, see Kowalik-Bańczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law', 6 *German Law Journal* 1355 (2005), available at http://www.germanlawjournal.org .

[3] The Hungarian Constitutional Court has already decided in a case, which concerned implementation of EC regulations. It however concerned a period before Hungary's accession. See for a very critical comment Sajo, 'Learning Co-operative Constitutionalism the Hard Way: the Hungarian Constitutional Court Shying Away from EU Supremacy', *Zeitschrift für Staats- und Europawissenschaften* 3/2004, 351.

between EU law and national constitutions.[4] On one hand the decisions show how far constitutional courts are willing to go in order to reconcile traditional concepts of state and state-based constitutionalism with the fact of their accession to the EU. On the other, however, they also show impassable limits, which their constitutions impose (in view of these courts) on the process of European integration.

The scope of this paper does not allow developing some general theory of European constitutionalism or constitutional conflicts which arise after the Enlargement.[5] However, it will adopt the pluralistic approach, aiming at analysing constitutional structures beyond the nation state as was proposed by N. MacCormick.[6] Recent works of Miguel P. Maduro and Mattias Kumm are taken as a special point of reference, since they move pluralistic constitutional theory towards its practical application (not only) by courts.[7] So, what is the practice of constitutional pluralism according the Polish Constitutional Tribunal?

I The Polish Constitutional Tribunal and its model of the European constitutionalism: the Accession Treaty Decision

The decision which formulates Tribunal's perspective on the European legal order in a comprehensive way concerned constitutionality of the Accession Treaty. Although it was delivered several days after the Tribunal had pronounced its "EAW Decision", it must be taken as a starting point.[8]

The review of the Accession Treaty arose out of applications of three groups of Deputies of the *Sejm* (the lower chamber of Polish Parliament), which put forward several claims alleging unconstitutionality of the Poland's Accession to the EU. The following will not take all of them; it will concentrate on those, which led the Tribunal's to formulate its approach to the European

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[4] I will differentiate throughout the paper between the EU law, meaning law created by the EU institutions, national law, meaning law created by the EU Member States and European law (or European legal order), which refers to the pluralistic system composed by both of them.

[5] I am however of the opinion that current theories of European constitutionalism should give particular attention to the changes caused by the Enlargement, when Member States with communistic past and very different legal and constitutional cultures joined the EU. See Kühn, 'Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement', 52 *American Journal of Comparative Law* 531 (2005) for a picture of the post-communistic judiciary and possible constraints to its effective participation in the European constitutional discourse and Rodin, 'Discourse and authority in European and post-communistic legal culture', 1 *Croatian Yearbook of European Law and Policy* 1 (2005), who offers even wider look at the post-communistic legal culture.

[6] N. MacCormick, *Questioning Sovereignty* (Oxford University Press, 1999).

[7] Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in: N. Walker (ed), *Sovereignty in Transition* (Hart Publishing, 2003), Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', (2005) 11 *European Law Journal* 262.

[8] Other cases concerning EU law, which the Tribunal itself considers as important, are mentioned in the summary of the Accession Treaty Decision. Apart from the EAW Decision they are: K 33/03 of 21.4. 2004 "Bio-components in Fuels Decision", K 15/04 of 31.5. 2004 "Participation of Foreigners in EP Elections Decision", K 24/04 of 12.1. 2005 "Competences Sejm/Senat Decision". English summaries of these decisions as well as their original full text versions are available at http://www.trybunal.gov.pl. Relevant is also P 10/04 of 26.1. 2005 "Bank Enforcement Title Decision" (only in Polish). I have obtained this information from prof. Wyrzykowski.

Constitutionalism and its relation to the ECJ.[9] It was mainly the question of primacy of EC law and the role of the ECJ in the EU institutional system and its relation to the Tribunal.

All three applications alleged unconformity of the principle of primacy of EC law with several provisions of the Constitution. They referred to the Constitution's Preamble, which emphasises Poland's 'possibility of a sovereign and democratic determination of its fate', which was recovered in 1989. They also invoked Article 8 (1) which states that '[t]he Constitution shall be the supreme law of the Republic of Poland' as well as Article 4 (1), vesting the supreme power in Poland in the Nation. Other claims, which will be dealt with here, concerned the constitutional role of the Tribunal as defined in Article 188 of the Polish Constitution. It would be undermined according to the applicants, since the Tribunal becomes a mere "transmitter" of the ECJ's jurisprudence within the territory of Poland. In the applicants' opinion the ECJ is building up the EC/EU legal order in accordance with its own vision, not the desires of the Member States. Petitioners expressly referred to the ECJ's judgments in *Internationale Handelsgesellschaft* and *Costa*[10] to show how the ECJ's constructs an autonomous legal order in favour of which Member States have permanently limited their sovereign rights, which is contrary to the Polish Constitution.

A Tribunal's competence to review EU law

At first, the Tribunal affirmed its competence to review the Accession Treaty together with the Act concerning the conditions of Poland's accession and the Final Act of the Athens IGC where the Accession Treaty was signed, which both form integral part of the Accession Treaty. While it states that it does not have the competence to review EU primary law as such,[11] it may adjudicate on international agreements' conformity to the Constitution, including international agreements, which delegate[12] to an international organization or international institution the competence of organs of State authority in relation to certain matters in accordance with Article 90 (1).[13] This assertion means that in Poland 'the authority of EU law can be accepted but only in so far as it is compatible with national constitutional identity'.[14] It is reflected by another Tribunal's claim: 'The process of European integration, connected with the delegation of competences in relation

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[9] See part I and II of the judgment. Applicants' arguments are also presented in the English Summary.
[10] Case 6/64 *Costa* [1964] ECR 585 and Case 11/70 *Internationale Handelgesellschaft* [1970] ECR 1125.
[11] Point 1.2 (All further references to the points of the judgment refer to its part III), cf para. 4 of the English Summary). The summary must be read with great caution since it also has a different structure of argumentation. The quotes in this paper were taken from the original Polish text, if it is not indicated that were taken directly from the English Summary. References to points of the original decision are complemented by references to respective paragraphs of the English Summary, where available. I am grateful to Radana Passerová for her generous help with translating the Polish text.
[12] Mik, 'State Sovereignty and European Integration: Public International Law, EU Law and Constitutional Law in the Polish Context', in: N. Walker (ed), *Sovereignty in Transition* (Hart Publishing, 2003) in n 97 at 398 criticizes this translation of the Polish term 'przekazac' as inadequate and gives his own one 'confer'. He also mentions translation used by another Polish scholar S. Biernat, 'transfer'. The judgment here is left for possible Polish readers, the official translation ('delegation') will be used throughout the text.
[13] Points 1.2-1.3. It also states that it may do so regardless the means of granting the consent for ratification. Some authors held that if consent were granted in the referendum, the jurisdiction of the Tribunal would be excluded. See Mik, op cit n 12, n 102 at 399.
[14] Maduro, op cit n 7 at 507.

to certain matters to Community (Union) organs, has its basis in the Constitution'.[15] The Tribunal confirms here, that from *its point of view*, EU law is applicable within the Polish territory not because of its autonomous authority stemming from an independent source of law, based on limitation of Poland's sovereign rights,[16] but because the Polish Constitution allows so. It goes further to state that

> [t]he supremacy of the Constitution finds its confirmation in the constitutionally regulated mechanism of control of constitutionality of the Accession Treaty and acts which form its integral parts. This mechanism is based on the same principles as those on a basis of which the [Tribunal] may adjudicate upon constitutionality of ratified international agreements. In such a situation other acts of primary law of the EC and EU being parts of the Accession Treaty, however indirectly, become subject to the control of constitutionality.[17]

So, what this control has revealed? And how far the Tribunal showed to be willing to exercise this control?

B Multiple character of the Polish legal system

The Tribunal starts the substantive part of its reasoning by describing its vision of the Polish legal system. According to the Tribunal, from Article 9 also follows the multiple character of law binding within the territory of Poland, whereby besides norms created by the Polish legislator also acts of international law apply, which moreover have precedence in application in case of their conflict with ordinary statutes.[18] This multiple character of law binding in Poland is of general nature and was created several years before Poland's accession to the EU, thus it was not formed only in connection and for needs of the accession. However, the Tribunal distinguishes Community law from other international law. According to the Tribunal, Community law is not 'completely external law'. Its primary law was accepted by all Member States including Poland; secondary law is created in cooperation with representatives of other Member States in the Council of the EU together with representatives of European citizens (including Polish) in the European Parliament.[19] As we will see bellow, the Tribunal is somehow ambiguous about the nature of Community law. While here the Tribunal points to its special character, when it reasons on the accession's impact on the sovereignty of the Republic of Poland, it does not see EU law as anything else than ordinary international law.[20]

The particular character of EU law may be seen according to the Tribunal also in that requirements on ratification of agreements which delegate certain competences are particularly

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[15] Point 7, cf para. 2 of the Summary.
[16] The Tribunal moreover emphasises that what have been delegated were 'certain competences of organs of State authority in relation to certain matters'. It nowhere states that Poland has transferred or limited its sovereignty. See Mik, op cit n 12 at 397-399, who shows how important this distinction in the Polish discourse has been.
[17] Point 7, second paragraph.
[18] Article 91 (2) PC states: 'An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes'.
[19] Point 2.2.
[20] See bellow at 6-7.

strengthened - legislative organs act as representatives of the Nation-sovereign or the sovereign even acts alone through the procedure of the nationwide referendum.[21]

The Tribunal underlines uniqueness of the Accession Treaty in that while in case of ordinary international treaties the elements of their future functioning are known at the moment of their signature, the system of the EU has a dynamic character, since it allows changing the content of law and principles of the functioning of the EU after the moment of accession. However, Member States keep control over the development mainly because changes in the delimitation of competences by using Article 308 ES require unanimity of votes of all Member States. The Tribunal holds that no change is adopted against the will of a Member State.[22]

C The limits of EU law imposed by the Polish Constitution

According to the Tribunal, the Constitution itself imposes limits on the delegation of competences envisaged in Article 90 (1) of the Constitution. This delegation must be limited and must not encounter all competences of the State authority organ. It also presupposes exact delimitation of the competences thus delegated. The Tribunal stresses that the Constitution does not authorise delegation of the competence to issue legal acts or take decisions contrary to the Constitution.[23]

From this presumption it develops two lines of constitutional resistance to EU law, first concerning jurisdictional boundaries between the Polish Constitution and EU law, second regarding fundamental rights. As will be shown, it draws inspiration from other constitutional courts and does not differ much from their constructions allowing these courts to maintain some control over the development of EU law and its impact on national constitutions.[24]

a) Guarding the jurisdictional boundaries

Firstly the Polish Constitution forbids delegation of competences to such an extent that it would signify the inability of the Republic of Poland to continue functioning as a sovereign and democratic State.[25] Therefore, the independent existence of the Polish state is an insurmountable threshold beyond which the European integration cannot reach. What is important, the Tribunal expressly refers here to the "Maastricht Decision" of the German Federal Constitutional Court (the FCC) and the analogous decision of the Danish Supreme Court.[26] The Tribunal was inspired

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[21] Point 3.2 and 3.3. cf para. 5 of the English summary. See also points 4.3 and 4.4 where the Tribunal rebuts applicants' contentions that the delegation was insufficiently legitimized by the Nation-sovereign, and point 4.6, where the Tribunal states that the delegation occurred while requirements on representation when deciding on the delegation and acceptance of this decision have been respected.

[22] Point 5.1.

[23] Point 4.1, cf para. 7 of the English summary.

[24] See Kumm, op cit n 7 at 264-265.

[25] Point 4.5

[26] 2 BvR 2134 and 2159/92, BverfGE 89, 155, English translation available in: A. Oppenheimer, The Relationship between European Community Law and National Law: the Cases. Volume I (Cambridge University Press, 1994) at 526; *Carlsen* v. *Rasmussen*, I 361/1997, English translation available in: A. Oppenheimer, The Relationship between European Community Law and National Law: the Cases. Volume II (Cambridge University Press, 2004) at 174.

by these courts also when assessing its role as an ultimate guardian of the scope of delegated competences:

> The Communities and the European Union function, in accordance with the Treaties establishing these organisations, on the basis of, and within the limits of, the powers conferred upon them by the Member States. Consequently, the Communities and their institutions may only operate within the scope envisaged by the provisions of the Treaties. *The Member States maintain the right to assess whether or not, in issuing particular legal provisions, the Community (Union) legislative organs acted within the delegated competences and in accordance with the principles of subsidiarity and proportionality.* Should the adoption of provisions infringe these frameworks, the principle of the precedence of Community law fails to apply with respect to such provisions.[27]

In other words, the Tribunal claims its ultimate authority over the jurisdictional boundaries between the EU and the Polish Constitution. He even implicitly excludes that the ECJ could have ultimate control by stating that

> Member States can consensually accept – expressly or implicitly – interpretation which goes beyond the strict frameworks determined by the provisions of the Treaties. In such situations it is up to the Member States and their institutions to adopt their own position. Every international organization remains a secondary subject, whose establishment, functions and institutional arrangements depend on the will of Member States and sovereign nations in these States, expressed in a certain way. *The ECJ has not been delegated the competence to interpret national law*.[28]

The last sentence is probably meant to the effect that determination of the scope of the delegated competences can be made only by interpreting national constitutions, where the ECJ's jurisdiction is excluded. This should be read together with Tribunal's examination of accession's impact on sovereignty of Poland, an issue raised by the applicants. They claimed that it was not 'an international organisation or international institution' to whom Poland delegated certain competences, but a *supranational* organisation, which is not envisaged by Article 90 (1) of the Constitution. The Tribunal rejected the view that the EC or the EU could be anything else than an international organisation:

> The Accession Treaty was concluded between the existing Member States of the Communities and the European Union and applicant States, including Poland. [...] The Member States remain sovereign entities – parties to the founding treaties of the Communities and the European Union. They also, independently and in accordance with their constitutions, ratify concluded treaties and have the right to denounce them under the procedure and on the conditions laid down in the Vienna Convention on the Law of Treaties 1969.[29]

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[27] Point 10.2, last paragraph, quote taken from para. 15 of the English summary, emphasis added.
[28] Point 10.3, first paragraph.
[29] Point 8.5, cf para. 6 of the English summary. Furthermore it adds a little bit formalistic argument that the expression "supranational" is not mentioned anywhere in the Accession Treaty.

In this respect the decision is very much criticisable for such open hostility towards the Court of Justice and its ability to resolve competence conflicts between the EU and its Member States. However, the real consequences of these statements may be seen only after actual cases concerning jurisdictional conflicts arise before the Tribunal. The same concerns existed after the German FCC had claimed the jurisdictional competence in its Maastricht judgment. Later cases (at least so far) showed that these concerns have not been so acute.[30]

Indeed a case, which may give rise to such a conflict, is now pending before the Court of Justice. It was brought by the Polish Government against measures intended to change the system of certain direct payments within the Common Agriculture Policy. Possibility of adoption such measures was anticipated by the Act of Accession and they were actually adopted by the Council before the date of the accession (thus without effective participation of the new Member States in the decision making). One of the arguments put forward by the Polish Government is that such a change actually amounted to a change of the conditions of Poland's accession and was therefore beyond the Council's competences. The Court of Justice is in a very chancy position, since it must also decide, whether Poland may actually bring such an action before it, since the measures were published in the Official Journal too long before the date of accession and the period for bringing the action had in the meanwhile expired.[31] It is not excluded that the same issue may arise before the Tribunal and it will depend on the ECJ's reasoning how satisfactory the Tribunal will find the ECJ's review.

b) Protecting fundamental rights

The second limitation imposed by the Constitution on EU law concerns fundamental rights. According to the Tribunal

> [t]he norms of the Constitution within the field of individual rights and freedoms indicate a minimum and unsurpassable threshold which may not be lowered or questioned as a result of the introduction of Community provisions. The Constitution performs the role of a guarantor of protection of rights and freedoms enshrined therein in relation to all subjects of its application.[32]

This is not such a hard statement, as it could seem at first sight. Further in the judgment the Tribunal holds that both the Polish Constitution and Community law are based on the same values, which express the essence of a democratic state based on the Rule of Law and fundamental rights. Also rights protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms form general principles of Community law due to

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[30] The conflict following the Maastricht judgment concerned banana import regime, the FCC refused to review relevant Community regulations. 2 BvL 1/97, BVerfGE 102, 147. English translation available in: A. Oppenheimer, The Relationship between European Community Law and National Law: the Cases. Volume II (Cambridge University Press, 2004) at 270. See Aziz, 'Sovereignty Lost, Sovereignty Regained? Some Reflections on the Bundesverfassungsgericht's Bananas Judgment', 9 *Columbia Journal of European Law* 109 (2002).

[31] See Case C-273/04 *Poland v. Council*, OJ 2004 C 239/6. Similar cases are also pending before the Court of First Instance: Case T-257/04 *Poland v. Commission*, OJ 2004 C 251/20 and Case T-258/04 *Poland v. Commission*, OJ 2004 C 251/21.

[32] Point 6.4, cf para. 14 of the English summary.

Article 6 (2) EU.[33] Of outmost importance is the Tribunal's statement that 'this circumstance makes fundamentally easier mutually responsive interpretation of national and Community law',[34] complemented by the Tribunal's remark that the duty of '"cooperation with all countries for the good of a Human Family", observance of the obligation of "solidarity with others" and universal values, such as truth and justice', enshrined in the Constitution's Preamble, also applies to external relations (thus to relations to the EU and its law).[35]

From this it may be inferred that the Tribunal does not intend to review every individual act of Community or EU law. It rather reserves the right to control an overall standard of protection of fundamental rights in the EU and would exercise its control only in case when this standard is not satisfactory. It is therefore in no way different from the German FCC with its *Solange II*[36] line of jurisprudence and other constitutional courts in Europe.

The above showed that the position of the Polish Constitutional Tribunal is not different from old Member States' constitutional courts. Somehow innovative is however the Tribunal's treatment of the issue of supremacy and its reasoning open to the pluralistic construction of the European legal order analysed in the following section. The question of supremacy is also connected with the problem of constitutional conflicts. They may arise in cases described above. Kumm distinguishes yet another type of constitutional conflicts: when EU law provision collides with a special constitutional commitment.[37] However, I would rather treat these conflicts as sub-types of the former two. The specific constitutional commitment may lead to either competence conflict (as is the case of Greek recognition of university diplomas issued by public institutions only, thus in conflict with EC directives[38]) or the conflict over the protection of fundamental rights (as was the Irish abortion case). Thus the question on how to resolve constitutional conflicts in such "even harder cases" is related to the cases of "ordinary collisions" and therefore will not be treated separately.

D Managing constitutional conflicts

a) The question of supremacy – applying Kumm's principle of best fit

It is the question of supremacy of the Polish Constitution which is central to the question what the Tribunal would do in case of conflict between the Constitution and EU law provision. The Tribunal holds that 'Art. 8 para. 1 of the Constitution grants unequivocally to the provisions of the Constitution the status of "the supreme law of the Republic of Poland"'. However, in the following sentence it continues

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[33] Point 8.3 and also 6.1 and 6.2 where the Tribunal examines independently respect for fundamental values enshrined in the Preamble to the Constitution.
[34] Point 8.3, last sentence.
[35] Point 8.2.
[36] 2 BvR 197/83 BVerfGE 73, 339, English translation available in: A. Oppenheimer, The Relationship between European Community Law and National Law: the Cases. Volume I (Cambridge University Press, 1994) at 461.
[37] Kumm, op cit n 7 at 264-265 and 296-298. It would be eg Irish ban on abortion, German prohibition on women's service in the armed forces or Greek recognition of university diplomas issued by public institutions only.
[38] See Maganaris, 'The principle of supremacy of Community law in Greece – from direct challenge to non-application', 24 *European Law Review* 426 (1999).

> '[t]his is accompanied by the requirement to respect and be sympathetically predisposed towards appropriately shaped regulations of international law binding upon the Republic of Poland. By a conscious decision the constitutional law-maker introduced Art. 9 among the fundamental principles of the Constitution of the Republic of Poland, in a direct connection to the provision of Art. 8 para. 1, which the applicants invoked as a basis for constitutional review. In accordance to it "The Republic of Poland shall respect international law binding upon it"'.[39]

The contraposition of these two provisions lies behind the whole Tribunal's approach to the relationship of the Polish Constitution to the Constitution of the EU. In a way it allows *to a certain extent* following Kumm's principle of best fit, whereby

> [t]he task of national courts is to construct an adequate relationship between the national and the European legal order on the basis of the best interpretation of the principles underlying them both. The right conflict rule or set of conflict rules for a national judge to adopt is the one that is best calculated to produce the best solutions to realise the ideals underlying legal practice in the European Union and its Member States.[40]

These ideals are according to Kumm liberty, equality, democracy, and the rule of law, which are common to the EU Member States and the EU itself. This assertion is expressly confirmed by the Tribunal when it examines axiological orientation of the Polish Constitution and EU law in relation to fundamental rights and when it finds that they are principally the same.[41] It is exactly this understanding of European constitutionalism based on principles, which allows managing constitutional conflicts without the need to establish predetermined hierarchy between them. Adopting Alexy's theory of principles[42] and understanding fundamental rights as principles[43] permits their balancing in order to find the best solution, satisfying all principles to the highest degree possible. The Tribunal's vision of the European constitutionalism corresponds to this:

> The concept and model of European law created a new situation, wherein, within each Member State, autonomous legal orders co-exist and are simultaneously operative. Their interaction may not be completely described by the traditional concepts of monism and dualism regarding the relationship between domestic law and international law. The existence of the relative autonomy of both, national and Community, legal orders in no way signifies an absence of interaction between them. Furthermore, it does not exclude the possibility of a collision between regulations of Community law and the Constitution.[44]

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[39] Point 2.1, cf para. 10 of the English summary.
[40] Kumm, op cit n 7 at 286.
[41] See the text accompanying n 35.
[42] Alexy, 'On the Structure of Legal Principles', 13 *Ratio Juris* 194 (2000).
[43] R. Alexy, (J. Rivers transl) *A Theory of Constitutional Rights* (Oxford University Press, 2002). See also M. Kumm, 'Constitutional rights as principles: On the structure and domain of constitutional justice', 2 *International Journal of Constitutional Law* 574 (2004).
[44] Point 6.3, quote taken from para. 12 of the English summary.

However, what Kumm expects from national constitutional judges is to give up supremacy of their constitutions if it is required by the principle of best fit. *In principle*, he thinks the court's shift from national to European supremacy be possible because national constitutional supremacy is not (or no more is) 'a defining feature of national legal practice'.[45] If it was, a national judge trying to admit supremacy of EU law would not be considered to participate in national legal practice. In Kumm's illustrative example, he would be as a chess player moving a bishop horizontally instead of diagonally and claiming checkmate after this rules-breaking move. As the rules of moving chess pieces are at the heart of practice of playing chess, those who do not obey these rules are not considered playing chess. Similarly, if the national constitutional supremacy was at the heart of national legal practice, shifting to the supremacy of the EU Constitution would disqualify its perpetrator from national legal practice. Kumm does not take this view and states that contrary to chess players courts may change the rules of the national legal practice and that they therefore may finally acknowledge the supremacy of EU law, which 'would merely be another step along a path of legal integration that has guided the development of national legal practice for some time'.[46]

There are strong reasons why not expect that national judges may shift to the European constitutional supremacy. First it is because this shift would actually be a constitutional revolution.[47] The power of judicial action does not reach so far and the issue should be left to a political process or if possible should be left unresolved. Kumm's assertion that 'it is not the political actors that are most concerned with the issue of constitutional conflict'[48] is refutable. He claims that no state has tried to override an EU law provision by enacting a special constitutional act. However, this fact does not mean that such an EU law provision cannot be constitutionally challenged *on a national level* (before constitutional courts) by political parties in opposition to the government. This has actually happened in both cases we are dealing with here. Constitutional override has probably never been enacted because governments are generally not motivated to do so as they participated in the decision-making on the EU level. The opposition does not have by definition enough political power to push constitutional overrides through either. The absence of attempts to constitutionally override EU law is not the evidence of politicians' lack of awareness of (or their interest in) the issue of constitutional conflict.[49] In other words, the issue of constitutional supremacy is not a purely juridical one and a constitutional court shifting from national to the European constitutional supremacy would probably provoke strong political reaction.

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[45] Kumm, op cit n 7 at 269-274.
[46] Ibid at 285.
[47] See MacCormick, op cit n 6 at 110-113.
[48] Kumm, op cit n 7 at 280.
[49] Kumm himself gives another example: the German government 'playing the constitutional card' in negotiation on the EC level (Kumm, op cit n 7 at 281). Thus no matter that the politicians would probably not be aware of the potentials offered by their constitutions if the courts did not formulate their doctrines, the fact is that now they know and use them. The "banana saga" would probably be an example of a case where the government would have interest in the constitutional override. My point here is not to say that it is open to governments to do so but to assert that politicians are aware about constitutional conflicts and may count with them in their calculations. To invoke the constitutional override would be the hardest possible step, which every government would try to avoid.

This is even truer in case of post-communistic Member States, which have 'complex sovereignty provisions'.[50] It is hard to imagine that the Polish Constitutional Tribunal could make such a shift when the Polish Constitution *expressly* states that '[t]he Constitution shall be the supreme law of the Republic of Poland'.[51] This sovereignty provisions have been enacted in a reaction to these countries' bitter past, when they were mere satellites of the Soviet Union. Brezniev's doctrine of "limited sovereignty" may illustrate how degraded these countries and their constitutions had been before the communism failed. The doctrine was formulated in 1968 in order to justify invasion and occupation of Czechoslovakia by armed forces of the Warsaw Pact and stipulated that if communism had been in danger in some of the countries belonging to the Warsaw Pact, the Soviet Army and in some cases its allies (one could rather say its serfs) would have had right to intervene there regardless of this country's government's will. In fact, Soviet Army was present within the territory of these states, sometimes even without any legal basis.[52] The experience of the Baltic States, whose independent existence was denied for almost fifty years, is even much worse.[53] Thus it cannot come as a big surprise that constitutions of these countries are so much concerned with the issue of sovereignty.[54]

Furthermore, sovereignty is much more present in the political discourse of these States, which is also explained by the role of nation-based sovereignty in providing 'the basis for societal mobilization without which the processes of state-building and state transformation would not have occurred, or would have been less successful'.[55] That these concerns persist and that the concept of sovereignty has not been re-thought after the accession was shown during the debate on the European Constitutional Treaty. The Czech President Václav Klaus referred to the old, state-based concept of sovereignty when he summarized his "Ten theses against the European Constitution":

> If anybody wants an even shorter synopsis, the meaning of the term 'sovereignty' – as used in Article 1 of the Czech Republic's Constitution – is the key to everything. Under this article 'the Czech Republic is a sovereign, unitary and democratic, law-abiding State...'.[56] The word 'sovereign' is of paramount importance in this respect. The Czech law dictionary defines sovereignty as 'the independence of a state's power from any other power within the state and externally...'. I am more than convinced

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[50] See Albi, 'Postmodern Versus Retrospective Sovereignty: Two Different Discourses in the EU and the Candidate Countries?' in: N. Walker (ed), *Sovereignty in Transition* (Hart Publishing, 2003) at 402-409.

[51] Article 8(1) of the Polish Constitution. See further at 9-13.

[52] Mik, op cit n 12 at 394.

[53] See on the debate on sovereignty in these countries Albi, 'The Central and Eastern European Constitutional Amendment Process in Light of the Post-Maastricht Conceptual Discourse: Estonia and the Baltic States', 7 *European Public Law* 433 (2001).

[54] Albi, '"Europe" articles in the constitutions of Central and Eastern European Countries', 42 *Common Market Law Review* 399 (2005) at 402-404. Aziz, op cit n 30 shows that the same concerns over sovereignty caused by country's history exist in old Member States too.

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

[56] The translation available at the website of the Czech Constitutional Court (http://www.concourt.cz) reads: 'The Czech Republic is a sovereign, unitary, and democratic *state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens*' (the emphasised part is the part translated differently or omitted by President).

> that the Treaty establishing Constitution for Europe does not 'fit' into this explanation of the term sovereignty.[57]

Klaus's reference to the "Czech law dictionary" shows that the concept of sovereignty is understood to be untouched by the process of European integration by the Czech legal doctrine. In Kumm's terms, it seems to be 'a defining feature of national practice of law'. Even less promising for a possible future change is the fact that as such a concept of sovereignty is taught at law faculties and new lawyers produced by these faculties take it as a paradigm of their understanding of constitutional law and theory of state.[58]

This is confirmed by the Tribunal. It expressly denied the possibility that the constitutional rule of precedence in application of international law over ordinary statutes[59] should be widened in a sense that international agreements on delegation of certain competence would have precedence over the Constitution.[60] According to the Tribunal, constitutional conflicts '[w]ould occur in the event that an irreconcilable inconsistency appeared between a constitutional norm and a Community norm, such as could not be eliminated by means of applying an interpretation which respects the mutual autonomy of European law and national law'.[61] The interpretation 'in a manner sympathetic to European law',[62] which allows respecting autonomy of both legal orders to the highest degree possible, has its limits in the Constitution:

> In no event may it lead to results contradicting the explicit wording of constitutional norms or being irreconcilable with the minimum guarantee functions realised by the Constitution. In particular, the norms of the Constitution within the field of individual rights and freedoms indicate a minimum and unsurpassable threshold which may not be lowered or questioned as a result of the introduction of Community provisions.[63]

Then the Tribunal forcefully denies that it could give rise to a constitutional revolution by admitting primacy of Community law:

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

[58] The argument which cannot be developed here relates to the role of legal education in the process of European integration. See however Tucker, 'Reproducing Incompetence: the Constitution of Czech Higher Education' *East European Constitutional Review* 94 (2000), who draws a very dark picture of the Czech legal education and its (im)possible reform.

[59] Article 90 (2).

[60] Point 4.2

[61] Point 6.3, quote taken from para. 13 of the English summary.

[62] The formulation of the obligation 'to interpret domestic law in a manner sympathetic to EU law' has somewhat developed in the Tribunal's jurisprudence. The Tribunal has firstly dealt with it in K 33/03 of 21.4. 2004 "Bio-components in Fuels Decision" (see para. 2 of the English summary which however omits a lot of Tribunal's elaboration of the principle of Euro-conform interpretation, discussing relevant case law of the ECJ (Case 14/83 *Von Colson and Kamann* [1984] ECR 1896 and Case C-106/89 *Marleasing* [1990] ECR I-4135 – see part III, point 9 of the original decision in Polish). It moreover seems to follow that the Tribunal constructs this obligation as an obligation for courts to take into account European law *ex officio* as a criterion of domestic law interpretation – see P 10/04 of 26.1. 2005 "Bank Enforcement Title Decision", part III, point 7. Formulation 'to interpret domestic law in a manner sympathetic to EU law' is used in "the EAW Decision".

[63] Point 6.4, quote taken from para. 14 of the English summary

> Such a collision may *in no event* be resolved by assuming the supremacy of a Community norm over a constitutional norm. Furthermore, it may not lead to the situation whereby a constitutional norm loses its binding force and is substituted by a Community norm, nor may it lead to an application of the constitutional norm restricted to areas beyond the scope of Community law regulation. *In such an event the Nation as the sovereign, or a State authority organ authorised by the Constitution to represent the Nation, would need to decide on: amending the Constitution; or causing modifications within Community provisions; or, ultimately, on Poland's withdrawal from the European Union*. [64]

b) Institutional choice

At first it seems that the Tribunal simply seeks to avoid responsibility for making such a fatal decision, which would lead either to a revolt against the fundamental principles of Community law as prescribed by the ECJ, or to a constitutional revolution by denying supremacy of its own Constitution and shifts this responsibility to the hands of politicians or even the people. I agree with Kumm that constitutional courts should face the conflict and try to address it.[65] However, in cases of open conflict it seems implausible that a constitutional court could say "A" if the Constitution says "non A" only because EU law dictates so. Kumm proposes that national constitutional courts should give precedence to their national constitutions only if the conflicting constitutional norm is clear and specific and if it reflects a national commitment to a constitutional essential.[66] On this basis Kumm would give primacy to the Irish constitutional prohibition on abortion, since it reflects such a commitment,[67] however would not acknowledge that the provision of the German constitution generally prohibiting service of women in armed forces should prevail over the Community prohibition on discrimination of women.[68] While the difference between the two cases is obvious, the issue of abortion being 'a high profile and deep commitment of the mainly catholic Irish citizenry' contrary to the German provision, which 'has not played any significant role whatsoever in German public and political life', it still does not give necessary grounds for courts to switch from national constitutional supremacy to the factual supremacy of EU law.

The question of ultimate authority within the European legal order then turns out from the question on which *court* has the final authority to the question of *what are the limits of law*. In other words, we should ask how far can the conflict be decided by courts and what should be left

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[64] Point 6.4, quote taken from para. 13 of the English summary, emphasis added.

[65] See Kumm, op cit n 7 at 286. See also his brilliant analysis of whether the question on final authority in the European constitutionalism is answerable by courts (and whether it ought to be answered by courts) at 269-281.

[66] Ibid at 298.

[67] *Attorney General v. X* [1992] 2 CMLR 277. The case concerned a 14-years-old girl having been raped and subsequently becoming pregnant. She had been prohibited to leave Ireland in order to undergo abortion in the UK and subsequently claimed ia the breach of Community freedom to provide (in this case obtain) services. The Irish Supreme Court decided the case without the need to consider the constitutional conflict between the ban on abortion and Community freedoms, since it balanced the right to life of an unborn against the right to life of its mother, who manifested her intention to end her life if the child was born. It therefore resolved the conflict while remaining within the national constitution.

[68] This was at stake in Case 285/98 *Tanja Kreil* [2000] ECR I-69, where the ECJ decided that this prohibition constitutes discrimination forbidden by Community law.

for other constitutional actors, these actors being not only political process, but also legal/constitutional doctrine and general public. This is not to say that the courts should give their hands off the constitutional conflicts and that the question of supremacy is only for politicians to resolve. Of course, the conflicts do and will arise and courts cannot avoid them. However, their proper role should be to define how far the conflict may be resolved within the boundaries of law and when it should be left for extra-legal solution.[69] In this respect is Kumm's contribution extremely useful for it gives a framework for analysing the constitutional conflict and the role which law and judicial process may play. However, the conclusion from such an analysis defended here is different, perhaps because here the consequences of the Enlargement are included among the relevant factors influencing the outcome.

c) The decision and 'the Principles of Contrapunctual law'

Miguel P. Maduro's 'principles of contrapunctual law' may provide further basis for assessing the decision of the Tribunal and its actual contribution to European constitutionalism. These principles differ from Kumm's principle of best fit in that they are intended to govern situations of every-day application of Community law rather than (extraordinary) cases of constitutional conflicts.[70] For this reason they are of limited use in case of this decision, since review of the Accession Treaty is certainly not a case of every-day application of EU law. However, it may useful to contrast how far these principles were satisfied in this "special case" and whether in other cases of application of EU law the Tribunal was closer to them than here.

Maduro proposes these principles to be followed by courts (both national and the ECJ) when applying EU law. First the courts shall subscribe to the idea of pluralism: 'any legal order (national or European) must respect the identity of the other legal orders; its identity must not be affirmed in a manner that either challenges the identity of the other legal orders or the pluralist conception of the European legal order itself'.[71]

Second, courts should seek to ascertain consistency and vertical and horizontal coherence in the whole European legal order, which is a very ambitious claim, since Maduro proposes that '[w]hen national courts apply EU law they must do so in a manner as to make those decisions fit the decisions taken by the [ECJ] but *also by other national courts*'.[72] It may be added to this claim that from the other side also the ECJ should take national courts' decisions seriously.

Thirdly, courts should reason in universal terms, thus taking into account the whole European context. '[A]ny judicial body (national or European) should be obliged to reason and justify its decisions in the context of a coherent and integrated European legal order'.[73] These two principles may be summarized as they require that courts do not reason only from the point of view of their

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[69] In fact, both constitutional conflicts mentioned above were finally resolved by the political process, in case of Ireland at the Community level by adopting a special protocol exempting Ireland from certain Community rules, in Germany by changing the Basic Law. See Kumm, op cit n 7 at 270.
[70] Maduro, op cit n 7 at 532.
[71] Ibid at 526.
[72] Ibid at 528, emphasis added. For even more ambitious claim, envisaging all constitutional actors, see Besson, 'From European Integration to European Integrity: Should European Law Speak with Just One Voice?', 10 *European Law Journal* 257 (2004).
[73] Maduro, op cit n 7 at 529-530.

own legal order, but that they take into account the other – national courts primarily the EU and also legal orders of other Member States, which would be an obligation of the ECJ too apart from its role as an authoritative interpreter of EU law within its own context. They could therefore be summarized as a principle of integrity of European law.[74] In this respect the principles of contrapunctual law and Kumm's principle of best fit are very close to each other. The point of both constructions is to make judges to think and actually reason beyond the limits of their legal orders and to take into account elements (principles) common to both of them. Kumm's principle of best fit is distinctive in that it gives more normative account of what the courts ought to do and how they should reason. Maduro's principles of contrapunctual law on the other hand give more colourful picture of what is at stake when courts make their decisions.

Finally, what is very relevant to the approach defended here, Maduro claims that 'each legal order and its respective institutions must be fully aware of the institutional choices involved in any request for action in a pluralist legal community' and that 'the importance of institutional choices in a context of legal pluralism only serves to reinforce the need to do adequate comparative institutional analysis to guide courts and other actors in making those choices'.[75]

How does the Tribunal's reasoning fits into this scheme proposed by Maduro? The pluralistic vision of the European legal order adopted by the Tribunal was described above.[76] The Tribunal further develops it when examining its role in the cooperative relationship with the ECJ.[77] The Tribunal states:

> The Court of Justice of the European Communities (ECJ) is the primary, but not the sole, depositary of powers as regards application of the Treaties within the legal system of the Communities and Union. The interpretation of Community law performed by the ECJ should fall within the scope of functions and competences delegated to the Communities by its Member States. It should also remain in correlation with the principle of subsidiarity. Furthermore, this interpretation should be based upon the assumption of *mutual loyalty* between the Community-Union institutions and the Member States. This assumption generates *a duty for the ECJ to be sympathetically disposed towards the national legal systems and a duty for the Member States to show the highest standard of respect for Community norms*.[78]

When saying this, the Tribunal refers to doctrinal works dealing with the role of courts in a pluralistic legal order.[79]

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[74] See Besson, op cit n 72.
[75] Maduro, op cit n 7 at 530.
[76] See the text accompanying n 44.
[77] This reasoning is developed in response to applicants' arguments as to unconstitutionality of the preliminary ruling procedure.
[78] Point 10.2, second paragraph, quote taken from para. 16 of the English summary, emphasis added.
[79] Barcz, 'Zasada pierwszeństwa prawa wspólnotowego w świetle postanowień Konstytucji z 1997 r.', *Kwartalnik Prawa Publicznego*, 2/2004; Mayer, 'The European Constitution and the Courts - Adjudicating European constitutional law in a multilevel system', *The Jean Monnet Program Working Paper* 9/03, http://www.jeanmonnetprogram.org/papers/03/030901-03.html (11.1. 2004).

At the same time, the Tribunal in no way makes isolationistic assertions, claiming the supremacy of the Polish Constitution *without regard to the European context*. It expressly refers to the European justification of the ECJ's version of supremacy of Community law:

> The principle of primacy of Community law in relation to national law is powerfully expressed by the Court of Justice of the European Communities. Such a state of things is well-founded on the aims of the European integration and the needs to establish a common legal space. The principle undoubtedly reflects an endeavour to ascertain uniform application and execution of European law.[80]

The Tribunal moreover protected the autonomy of the ECJ's vision of primacy, when it refused to review ECJ's primacy jurisprudence in light of the Polish Constitution.[81] Applicants referred to the Protocol on the application of the principles of subsidiarity and proportionality, where the role of the ECJ's jurisprudence for defining the scope of these principles is highlighted and to the ECJ's decisions in *Costa* and *Internationale Handelgesellschaft*[82] to show that the ECJ's jurisprudence conflicts with the Polish Constitution. The Tribunal did not give many grounds for its refusal to review, apart from stating that the Protocol is limited to these two principles and that the Tribunal 'fully acknowledges the importance of the ECJ and its jurisprudence'. However, it is understandable: there are not many grounds *in the Polish Constitution alone* for acknowledging autonomy of Community law and pluralistic character of the European constitutionalism. Thus this silence rather shows Tribunal's pragmatism and willingness to preserve pluralism in the EU legal order.

However, all these pluralistic statements, to a certain extent aiming to show respect for integrity of European law, are always from the other side undermined by reminders that for Poland and its Constitutional Tribunal the supreme law of land remains the Constitution. It is in line with what has been stated above: two competing principles are to be balanced: Poland's duty to respect international law obligations prescribed by Article 9 on one hand, and supremacy of the Polish Constitution dictated by Article 8 (1) on the other, with the latter prevailing in case of 'an irreconcilable inconsistency between a constitutional norm and a Community norm':

> [n]ot only [the principle of primacy of Community law] - on an exclusive basis – sufficiently determines decisions adopted through sovereign Member States in cases of hypothetical collision between the Community legal order and the constitutional regulation. In the Polish legal system such a decision should be always adopted with regard to the content of Article 8 para. 1 of the Constitution. Conform to Article 8 para. 1 of the Constitution it remains the supreme law of Poland.[83]

Tribunal's statements as regards its competence over jurisdictional conflicts between the EU and its Member States, with its implicit mistrust in the ECJ's playing decisive role, is even more serious negation of pluralism within the European legal order.[84] However, again: its real meaning

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[80] Point 7, last paragraph.
[81] Points 9.1-9.3, cf para. 19 of the English summary.
[82] See n 10 and the text accompanying it.
[83] Point 7, last paragraph.
[84] See above at 6.

will come to light only after the Tribunal will approach its first competence case. Similar considerations apply in case of institutional analysis. The Tribunal states that in cases of irreconcilable conflict it is for the political process to decide, it does not however give any criteria which would guide the Tribunal in such a case. To judge the Tribunal's observation of principles of contrapunctual law we must look at other decisions of the Tribunal so far delivered. The most important amongst them is the decision concerning Polish implementation of the EAW Framework Decision.

III The EAW Decision – taking European commitments seriously?

A The EAW Framework Decision and extradition of own nationals

The EAW Framework Decision has been regarded as the first and most striking example of the extensive judicial cooperation in criminal matters adopted within the third EU pillar.[85] It arose from the need to respond to the danger of terrorism and transborder criminality, something that has been felt to be more acute after 11 September 2001. Its main purpose is to simplify and expedite procedures for extradition of persons convicted or accused of crimes between the EU Member States. It took the procedure from hands of politicians and made it purely judicial matter whereby only courts of Member States cooperate without the need to turn to the executive, which traditionally participated in the process of extradition.[86]

However, implementation of the Framework decision caused constitutional problems in several Member States, mainly because their constitutions prohibited extraditing their own nationals,[87] something which is required by the EAW Framework Decision. It is questionable how deeply is this restriction indeed embedded in constitutional traditions of European states; it has never developed in the Anglo-Saxon legal tradition[88] as opposed to the continent.[89]

As one author observed, '[t]he justification of the rule of non-extradition of nationals largely derives from a jealously guarded conception of national sovereignty, and it presupposes the existence of sharp contrasts in the administration of criminal justice between states, resulting in

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[85] See Alegre and Leaf, 'Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant', 10 *European Law Journal* 200 (2004), Douglas-Scott, 'The rule of law in the European Union - putting the security into the Area of freedom, security and justice', 29 *European Law Review* 219 (2004) and Wouters and Naerts, 'Of arrest warrants, terrorist offences and extradition deals: an appraisal of the EU's main criminal law measures against terrorism after "11 September"', 41 *Common Market Law Review* 909 (2004).

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

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

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

[89] This applies with some exceptions: eg Nordic countries do not prohibit extradition of own nationals among them (Plachta, op cit n 87 at 99-100).

potentially unfair treatment'.[90] Conversely, the Area of Freedom, Security and Justice established within the third EU pillar is based on the assumption of mutual trust of Member States in their systems of criminal justice.[91] While the 1996 convention on extradition between the EU Member States[92] (a measure which preceded the EAW Framework Decision) had allowed refusal to extradite nationals by way of reservations, the EAW Framework Decision did not make this possible any more.[93] Some Member States had changed their constitutions to be able to fully implement the framework decision, Poland nevertheless was not amongst them.[94] The Polish Constitution states in Article 55 (1) that '[t]he extradition of a Polish citizen shall be forbidden'.

B Surrender as a subset of Extradition

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

The Tribunal rejected the view that the constitutional review would be excluded since the contested provisions were introduced into the Polish legal order for the purpose of implementation of the EAW Framework Decision. The Tribunal stated that '[t]he duty to implement framework decisions is a constitutional requirement following from Article 9 of the Constitution, its realisation does not however mean automatic and in every case substantive

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[90] Plachta, op cit n 87 at 88. The issue of prohibition on extradition of own nationals has also been controversial on international plane and the debate was even more fuelled by establishment of the International Criminal Court. See *Deen-Racsmány*, 'A New Passport to Impunity? Non-Extradition of Naturalized Citizens versus Criminal Justice', 2 *Journal of International Criminal Justice* 761 (2004). It is also questioned whether the prohibition is a rule of international law: Plachta, op cit n 87 at 77.

[91] See Tampere European Council Presidency Conclusions, 15 and 16 October 1999, para. 33, EAW Framework Decision, 6th and 10th recital of the Preamble, Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* [2003] ECR I-1345, para. 38. See also Alegre and Leaf, op cit n 85 and Wouters and Naerts, op cit n 85 at 919-923.

[92] OJ 1996 C 313/12.

[93] Surrender may be only refused if the Member State that executes the arrest warrant undertakes to execute the sentence or detention order in accordance with its domestic law (Article 4 (6)) or may be made subject to the condition that the national, after being heard, is returned to the Member State which had executed the arrest warrant in order to serve there the custodial sentence or detention order passed against him in the State which issued the arrest warrant (Article 5 (3)).

[94] It was expected that it would put the implementation of the EAW Framework Decision in doubts as regards its constitutionality. See Weigend and Górski, 'Die Implementierung des Europäischen Haftbefehls in das polnische Strafrecht', 117 *Zeitschrift für die gesamte Strafrechtswissenschaft* 193 (2005) at 196-197. These authors (at 197-199) see another problem with the EAW Framework Decision, removal of the principle of dual criminality in relation to 32 types of offence determined by the Framework Decision in very vague terms, which may conflict with the principle of legality of criminal prosecution enshrined in Article 42 PC. This issue was not nevertheless submitted to the Tribunal to decide. See also Alegre and Leaf, op cit n 85 at 208-209. It was also touched by the German FCC in its judgment of 18.7. 2005 concerning German implementation of the EAW Framework Decision, 2 BvR 2236/04, available at http://www.bverfg.de/entscheidungen/rs20050718 2bvr223604.html and is now object of a preliminary reference submitted by the Belgian Cour d'Arbitrage (Case C-303/05 *Advocaten voor de Wereld*, OJ ___, see also information by a Belgian delegation to the Co-operation in Criminal Matters Working Party, document No 11518/05 of 4.8. 2005, for more information regarding the case).

conformity of acts of secondary law of the EU and acts implementing them with the provisions of the Constitution'.[95]

Given the independent character of the Constitution, the meaning, scope and content of its provisions cannot be determined by ordinary law. The Tribunal therefore firstly had to establish whether the concept of "extradition" does encounter also "surrender" notwithstanding that relevant provisions of the Criminal Procedure Code have distinguished between the two with a precise aim to eliminate doubts as to constitutionality of surrendering Polish citizens.[96] Such a difference cannot be decisive for constitutional interpretation, nor can the use of the term "surrender" (instead of extradition) by the Framework Decision itself.[97]

Here comes the first important part of the decision, considering potential impact of 'the obligation to interpret domestic law in a manner sympathetic to EU law' on the interpretation of the constitutional prohibition of extraditing Polish citizens. The Tribunal examined whether the duty of consistent interpretation exists also within the third pillar in case of framework decisions and came to the conclusion that it *probably* does. Given the detailed elaboration of the principle of consistent interpretation in its "Bio-components in Fuels Decision", where it referred to the ECJ's judgments in *Van Colson and Kamann* and *Marleasing*,[98] it is somewhat surprising that it did not mention at all Opinion of Advocate General J. Kokott in *Pupino*, which had been delivered long before the Tribunal was deciding this case and which had proposed to answer this question in the affirmative, which was later (after the Tribunal's decision) confirmed by the ECJ.[99]

However, the Tribunal did not consider this obligation relevant in the present context, since it found that the obligation was limited by the ECJ itself: 'it may not worsen an individual's situation, especially as regards the sphere of criminal liability'.[100] Unfortunately, the Tribunal did not refer to specific ECJ's judgments in its decision to show on which basis it constructed such a limitation to the principle of consistent interpretation. There are three main counter-arguments against such a simple conclusion. First and foremost, it is questionable whether Community principles of consistent interpretation, developed in relation of interpretation of national law provisions in order to remedy non-transposition (or incorrect transposition) would apply here, where the framework decision was correctly implemented and what is to be interpreted is a conflicting national rule. From the EU law perspective, more than the principle of consistent interpretation the principle of primacy would have been relevant and the question whether it applied also in context of the third pillar would have been at stake instead (whether the national rule implementing an EU obligation should have had precedence over another rule of national law being hierarchically superior to it). Second, even if the Community principle of consistent interpretation had been applicable, contrary to what the Tribunal stated, consistent interpretation sometimes led to 'worsening individuals' situation' given its application also between individuals

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[95] Point 2.4. Opinions to the contrary were expressed by a part of the Polish doctrine. See Weigend and Górski, op cit n 94 at 195 discussing such opinions (and rejecting them).
[96] Point 3.3.
[97] Points 3.2 and 3.3.
[98] See n 62.
[99] Opinion of AG J. Kokott in Case 105/03 *Pupino*, 11.11. 2004; judgment of 16.6. 2005, not yet reported.
[100] Point 3.4, quote taken form the English summary, para. 8.

and its role in giving full effect to EC law.[101] It is true that the ECJ stated in *Arcaro* that consistent interpretation 'reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed',[102] however this case concerned a situation where criminal liability would have been imposed on an individual.[103] This is related to the last counter-argument: surrendering a person does not affect his criminal liability. He is liable in criminal law of the State issuing the EAW regardless the fact whether he would be finally surrendered or not. Cases which prohibited imposition of criminal liability by way of consistent interpretation[104] did in no way concern procedural law,[105] to which surrendering pertains.[106] Thus when referring to the exclusion of consistent interpretation imposed by the ECJ, the Tribunal avoided the question too easily. However, it would have most probably reached the same conclusion given the limits imposed on consistent interpretation by the Polish Constitution itself. As we know, the Tribunal limited the effects of consistent interpretation to the effect that it may in no event lead to a contradiction with the explicit wording of the Constitution, when the constitutional standard of fundamental rights protection forms a particular 'unsurpassable threshold'.[107] Thus interpretation of the concept of extradition would have had to be made by reference to the Polish Constitution alone anyway.

The Tribunal rejected the view that the constitutional legislator could have in mind this difference and prohibited extradition of Polish citizens in a strict sense only while at the same time excluded surrender from the scope of this prohibition. According to the Tribunal, firstly both terms had been treated indifferently in the Polish legal discourse and the Constitutional legislator did not distinguish between them, secondly at the time when the Constitution was adopted (in 1997), the EAW Framework Decision, which used the term "surrender" instead of "extradition", had not existed yet.[108] The Tribunal then went on to consider whether the surrender was essentially the same institute as extradition. Its reasoning was somewhat illogical, since it dealt with the differences between the two at a substantial part of the whole judgment[109] only for finally stating

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[101] See S. Prechal, *Directives in EC Law*, 2nd Ed. (Oxford University Press, 2005) at 184 and at 214-215.
[102] Case C-168/95 *Arcaro* [1996] ECR I-4705, para. 42.
[103] For arguments supporting the view that consistent interpretation may allow imposing obligation on an individual even by public authorities (ie amounting to a reverse vertical effect) see Prechal op cit n 101 at 214-215.
[104] Case 80/86 *Kolpinghuis* [1987] ECR 3969 recently confirmed in Case C-60/02 X [2004] ECR I-651. See Prechal op cit n 101 at 203-208.
[105] AG J. Kokott in *Pupino* also distinguished between substantive criminal law, determining criminal liability, where the consistent interpretation cannot be used, and criminal procedure, where it can. See para. 42 of her Opinion.
[106] That consistent interpretation is excluded only if it imposed criminal liability (as opposed to rules of criminal procedure) is expressly confirmed by the ECJ in *Pupino*: see paras. 45-46. It may be also added that because the consistent interpretation here concerns conflicting rules *within national law* as opposed to situations when it seeks to remedy missing or incorrect implementation of a Community norm into national law, the limits of the consistent interpretation may be more relaxed.
[107] See note 32 and the text accompanying it. What is not dealt with in details here is the substance of the right stemming from the prohibition of extradition. The Tribunal found that it is the right to be prosecuted before Polish courts, not just the right to have a fair trial before courts in a democratic state based on the Rule of Law. If the latter had been true, the substance of the prohibition of extradition would have been respected and there would have not been any constitutional conflict.
[108] Point 3.1.
[109] Point 3.5 – they according to the Tribunal are: limitation of a dual criminality requirement, difference in organisation and competences (extradition being primarily concern for the executive, surrender being a judicial procedure with exclusion of political factors, radical simplification and expediting of the extradition procedure and removal of two barriers to extradition: citizenship of the surrendered person and political nature of the criminal act.

that the differences exists on a level of ordinary law, which cannot determine constitutional interpretation of the term "extradition". Then the Tribunal found that surrender was only a kind of extradition, since they both aimed at the transfer of a prosecuted, or sentenced, person for the purpose of conducting a criminal prosecution or executing a penalty. For this reason it declared relevant provision of the Criminal Procedure Code unconstitutional.[110]

C Temporal limitation of the decision's effect as a case of balancing competing principles

Up to this point the decision may be very much criticized because the Tribunal probably had interpretative ways to avoid the constitutional conflict and for some reasons did not follow them. However, the efforts it then made in order to avoid *actual* conflict and incoherency in the European legal order arising from its annulment decision and the way in which it reasoned to reach this result may serve as an excellent example what constitutional courts should do in cases of true irreconcilable conflicts between their constitutions and EU law.[111]

The Tribunal found that the mere annulling of the conflicting provision is neither equivalent to nor sufficient for achieving conformity of law to the Constitution, since such state of things may be realized only by intervention of the legislature. It referred to Article 9 of the Constitution, which states that '[Poland] shall respect international law binding upon it'.[112] Mere annulment of the provision implementing Poland's obligations stemming from the EAW Framework Decision would have inevitably led to a breach of this constitutional principle. Therefore a change of Article 55 (1) of the Constitution and subsequent reintroduction of the annulled provision into the Polish legal order were considered necessary for attaining full conformity with the Constitution.[113]

The Tribunal found the way out: prospective temporal limitation of effects of the decision so as the constitutional legislator may adopt necessary amendments to the Constitution and subsequently reintroduce the annulled provision into the Polish legal system, while the provision temporarily remains in force.[114] The Tribunal stressed that this temporal limitation of the effects of the decision 'activates a duty of immediate initiation of respective legislative activities by competent authorities'[115] and that it also means that courts continue to be under a duty to temporarily apply the annulled provision.[116]

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

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[110] Point 4.4.
[111] See discussion regarding (im)possibility of national judges to switch from supremacy of their constitutions to the supremacy of EU law.
[112] See n 39 and the text accompanying it.
[113] See point 5.
[114] Prospective temporal limitation of decisions' effects is available to many constitutional courts in Europe. Whether the ECJ has the same possibility is now being considered in Case C-475/03 *Banca Popolare di Cremona*. See opinion of Advocate General Jacobs of 17.3. 2005, para. 81-88.
[115] Point 5.3, second paragraph.
[116] Point 5.5.

> 'particularly Poland's obligation to respect international law, but also public order and security, for whose attainment surrendering of prosecuted persons to other States [...] contributes, and also regard to the fact that Poland and other Member States of the European Union are bound by the same structural principles attaining proper administration of justice and due process before an independent court, even in case if it is connected with Polish citizens' deprivation of guarantees following from the prohibition of extradition[117] in the extent necessary for realization of the institute of surrender on a basis of the EAW. The care for fulfillment of a value, which is Poland's credibility in the international relations as a state which respects [the] fundamental rule pacta sunt servanda speaks furthermore for this'.[118]

Here comes the point when we may again assess how faithful to the principles of contrapunctual law the Tribunal was.[119] The first principle (to respect pluralism in the European legal order) was not questioned here, since the Tribunal did not review the Framework Decision but national law implementing it.[120] The second principle of coherence was probably not satisfied fully with regard to the Tribunal's treatment of the principle of consistent interpretation.[121] On the other hand, the Tribunal expressly referred to other Member States which had to amend their constitutions in consequence of their inconformity with EU law.[122] Thus the Tribunal uses their constitutional practice as a further justification for its reference to the constitutional legislator who is obliged to attain conformity of the Polish legal order with its EU commitments.

What must be appreciated most is the Tribunal's care for the European context of its decision-making, thus its fulfilment of the principle of universalizability, particularly in contrast to the German FCC annulling national implementation several weeks after the Tribunal. The Tribunal referred to a possibility of using so called 'disciplinary clause', contained in Article 39 of the Act on Accession, against Poland. However, it stressed that

> [i]t is necessary to state expressly, that the duty of timely implementation of obligations stemming from this decision has a wider than juridical or – in consequence of use of sanctions against Poland – economical justification.
>
> The growth of criminality, particularly organized and transborder, compels looking for procedural means adequate to its extent, intensity and specificity, which would allow necessarily prompt reaction from the part of judicial bodies. The effectiveness of fighting this criminality to a great extent depends on transferring of cooperation between the EU Member States on a more advanced level than a traditional institute

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[117] See n 107.
[118] Point 5.2, first paragraph.
[119] See above at 14-17.
[120] Moreover it excluded possibility of such a review in the "Accession Treaty Decision" – see part 18.9 of the decision.
[121] See above at 19-20.
[122] Point 5.7, mentioning France amending its Constitution in order to make possible ratification of the Maastricht Treaty, the same case of Spain and finally Germany, abolishing its rule prohibiting women's service in armed forces after the ECJ's judgment in Case 285/98 *Tanja Kreil* [2000] ECR I-69 (see n 68 and the text accompanying it).

> of extradition.[123] It is possible owing to high mutual trust in the level of legal orders, created on a basis of structural principles ascertaining protection of fundamental human rights and freedoms. Common standards of this protection justify withdrawal from some formal guarantees, which classical measures of international cooperation contain.
>
> The system of surrendering persons among judicial bodies created in the [EAW Framework Decision] shall serve not only realization of Union's aims, which is creation of a common area of freedom, security and justice. The Tribunal stresses again that the institute of the EAW has a far reaching importance for proper functioning of the Polish justice and primarily for strengthening its internal security; thus attainment of its functioning should be the highest priority of the Polish legislator.[124]

Conversely the German FCC did not take possible consequences of its decision on the European level into account at all and annulled an act implementing the EAW Framework Decision altogether with immediate.[125] The decision caused serious disturbances within the European legal order of a kind the Polish Constitutional Tribunal effectively avoided while at the same time still protected its Constitution.

Firstly the FCC's decision provoked a severe reaction from the part of the Spanish High Court (Audiencia Nacional) in Madrid,[126] whose EAW was dismissed in consequence of the FCC decision. Regulatory chamber of this court (thus not deciding on a particular case but giving a decision on a question of principle) decided that because Germany excluded itself from the European system of cooperation in criminal matters, the High Court would (in line with *the principle of reciprocity*) treat German requests for surrender as conventional extraditions.[127] Even if this amounts to another breach of EU law, this time committed by the Spanish court, in fact it is a necessary consequence of the absence of proper implementation of the EAW Framework Decision in one Member State.

Another, probably much more serious consequence for the European legal order arises generally: in fact the FCC created legal vacuum in extradition (or surrendering) persons among EU Member States, since other Member States actually cannot in case of German requests use traditional extradition procedures based on previous international conventions. According to Article 31 of the EAW Framework Decision they were replaced thereby.[128] It is a "Catch-XXII-like situation":

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[123] One cannot refrain from observing here that the Tribunal implicitly admits that extradition and surrender are different institutes (extradition being "a traditional measure" while surrender according the EAW Framewoirk Decision "something more advanced") and therefore undermines its conclusion that they are essentially the same.
[124] Point 5.9.
[125] There is no space to analyse the decision, which is an expression of the FCC's distrust into the systems of criminal justice in other Member States. However, some points will be raised in order to illustrate the difference between the FCC's and the Polish Constitutional Tribunal's approach.
[126] I am grateful to Daniel Sarmiento for providing me with detailed information regarding the described reaction of the Spanish High Court.
[127] Decision of 21.7. 2005.
[128] The same problem exists in case of the Czech Republic, which did not respect the absolute time limit given for restricting the application of the EAW to crimes committed after a specified date. While the limit was set to 7 August

Germany cannot request surrender on a basis of the EAW, since it has been erased from the German legal system by the FCC. From the other side however, other Member States cannot surrender requested person otherwise but on a basis of the EAW.

From this short and elective comparison we can easily see that the Tribunal took its European mandate much more seriously than the FCC did. However, last Maduro's principle remains to analyse: institutional choice contained in Tribunal's passing the wheel to the legislator or more widely, political process.

D "Unbearable lightness of having the choice": did the Tribunal fulfil its institutional role properly?

It has been observed above that the Tribunal's reference to the Nation-sovereign or its representatives in case of an irreconcilable constitutional conflict may be justified since courts are not in some cases sufficiently legitimised or institutionally powerful to shift from national constitutional supremacy to supremacy of EU law. At the same time it has also been emphasised that the proper question therefore is not which court shall decide (the ECJ or a national constitutional court), but how far law is capable to reconcile the conflict. However, it is not only to question what the boundaries of law are but also what are the most efficient and legitimized institutions to make such decisions instead (or besides) courts. The question of a proper institutional analysis arises; nevertheless it is interconnected with the former: the limits of law may determine the institution called to act in the case of the conflict. What we must keep in mind, the institutional choice is being made already when the court interprets the law and determines its limits. If the court finds impossible to reconcile apparent conflict by way of interpretation, it simultaneously defers its decision to political process, thus makes the choice.

There is inherent danger in this possibility given to courts: they can escape their institutional role of arbiters in disputes arising in law and fail in their mission to create coherent and consistent legal order. Indeed, it is very easy to say: "it is not for me to decide". In this respect the Tribunal's justification for its choice is too short. It is based on a kind of judicial restraint, since the Tribunal argues that limiting effects of its decision prospectively would mean that it does not directly affect the sphere of politics and international law, where the state is represented by the President.[129] However, if taken seriously, it would be always a case for this "judicial restraint", if the reason for deference to the political process would be that politics or international law is affected by Tribunal's decision-making.

2002, the Czech Republic will not issue or execute the EAW for crimes committed before 1 November 2004. It means that it is not possible to request extradition from Member States, which implemented the EAW Framework Decision timely and correctly. See Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2005) 63 final at 3 and also Annex to this Report at 32 for other transitional problems arising from incorrect implementation of the EAW Framework Decision.

[129] Point 5.3, second paragraph.

IV Conclusion

It would be too easy to say that the Tribunal did not understand EU law when it denied primacy or even supremacy of EU law over the Polish Constitution. European legal order is not hierarchically organized around the Treaties, and if we admit pluralism, we must be also prepared that irresolvable conflicts sometimes occur. The Tribunal's gestures towards EU law, which show that for this court the supreme law of land remains the Polish Constitution, only show that new Member States may pose new challenges to traditional EU law scholarship which has understood non-acceptance of the doctrine of supremacy by national constitutional courts as something pathological, which should be cured by instant influence of the European integration.[130] How threatening or conversely how beneficial these gestures will be for the whole European constitutionalism and our understanding of European law will be seen only after some period of time, when we see actual impact of the Tribunal's vision of pluralism in every-day practice of Polish courts and politicians.

[130] See Maduro, op cit n 7 at 503.