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‘A Spectre Is Haunting Europe’*: European Citizenship in the Area of Freedom, Security, and Justice

Some Reflections on the Principles of Non-Discrimination (on the Basis of Nationality), Mutual Recognition, and Mutual Trust Originating from the European Arrest Warrant

Luisa MARIN**

After a reconstruction of the traditional legal setting of extradition, the paper explores the European Arrest Warrant Framework Decision’s nationality and residence clauses in their normative context: mutual recognition and mutual trust. It then discusses how these clauses have been implemented at Member States’ level and the problems encountered therein with the surrender of a state national and with (some degree of) financial solidarity that the construction of the area of freedom, security, and justice (AFSJ) presupposes. Another section tackles the position taken by the European Court of Justice (CJEU) in its case law (Kozłowski and Wolzenburg) in order to analyse how it contributes to the emergence of an AFSJ in line with current developments of the European constitutional evolution, namely the (former first pillar) acquis on the European citizenship and the Member States’ common constitutional traditions on sanctioning theories, placing a paramount attention on the principle of social rehabilitation of convicted persons. Finally, the paper draws attention to European citizenship, which is at present nothing but a ‘spectre’ of the AFSJ but has great potential for a sound AFSJ construct, where state powers cannot discriminate against individuals according to their status personae.

1. INTRODUCTION: THE CHALLENGE OF BUILDING AN AREA OF TRUE FREEDOM, SECURITY, AND JUSTICE

The European Arrest Warrant (EAW) rests on the regulatory principle of mutual recognition of judgments and judicial decisions and on the socio-cultural premise of mutual trust;

* The quote is from the preamble of the Communist Manifesto. See K. Marx & F. Engels, *Das Manifest der Kommunistischen Partei* (London, 1848).

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among others, one of their normative implications has been the removal, or rather a re-contextualization, of the once traditional prohibition of surrender of a state's nationals. The EAW Framework Decision¹ (FD) considers nationality and residence clauses as an optional ground for the refusal of the execution of an EAW. Their implementation into domestic legislations is an actual stress test for mutual trust and reveals whether or not an EU Member State is ready to give some legal protection also to European citizens who are not its own nationals.

The constitutional relevance of these issues is beyond question and multi-faceted. It concerns the interactions between EU and Member States' regulatory powers in the areas of justice, the rule of law, and protection of rights.² It shows the interdependence, complementarities, and conflicts between domestic and European values.

These issues are all the more important and relevant under the Lisbon Treaty legal framework for several reasons: first, the area of freedom, security, and justice (AFSJ) is confirmed as one of the core objectives of the EU.³ Second, the Treaty of Lisbon confirms once again the principle of mutual recognition as the main regulatory principle governing judicial cooperation in criminal matters, complemented with approximation of law in some areas.⁴ Third, the Treaty of Lisbon, with the Charter of Fundamental rights having acquired legally binding force, reshapes the framework of reference of a significant number of legal and political questions.

The purpose of this article is to analyse one of the most prominent challenges currently facing the EU and its AFSJ, namely how to reconcile the *acquis* of non-discrimination rights with the enforcement of mutual recognition instruments. These create in some circumstances a conflicting set of obligations within the EU itself, which is especially problematic. The growing number of political initiatives in the sphere of the AFSJ is likely to increase the relevance of these questions; the Lisbon Treaty provides momentum for the construction of an AFSJ grounded on a sound constitutional dimension.

This article will proceed as follows: in the first section, the European legal framework is presented, with principles underpinning it. A second part will investigate the complex domestic panorama offered by provisions implementing European clauses and the problems encountered therein. A third section will present the solutions offered by the CJEU. A last section will provide a thorough analysis of the conceptual toolkit behind the legal provisions considered in this article and its significance for the construction of an area of true freedom, security, and justice and for the emergence of a sound constitutional dimension underpinning it.

¹ Council Framework Decision 2002/584/JHA [2002] OJ 190/1.

² These questions go to the heart of Member States' discretion when implementing EU instruments in criminal matters and can furthermore be strictly related to the provisions of constitutional law; last but not the least, this combination of European and domestic rules cuts across the European principle of non-discrimination based on nationality, the main implication of European citizenship, as well as a projection of equality principle in the context of European legal integration.

³ Cf. Art. 3, para. 2, of the TEU, as amended by the Lisbon Treaty, in force since 1 Dec. 2009. Another significant reform is that all policies falling within the area of freedom, security, and justice (AFSJ) are now disciplined by Title V of the Treaty on the Functioning of the EU (TFEU).

⁴ Cf. Art. 82 TFEU.

2. NATIONALITY (AND RESIDENCE) CLAUSES IN THE ERA OF MUTUAL RECOGNITION AND MUTUAL TRUST: THE LEGAL FRAMEWORK UNDER THE EAW

The abolition of the nationality clause as a traditional ground for refusal of a request for cooperation in extradition⁵ was one of the features of the EAW that was perceived as a revolutionary element, together with the partial removal of a dual criminality requirement for a significant group of crimes not having necessarily a trans-border dimension.⁶ This sign of a breach with the tradition was explained as a consequence of the endorsement of the principle of mutual recognition, the cornerstone of judicial cooperation in criminal matters since the Tampere Programme of 1999.

It is well known⁷ that in the extradition system, a state could refuse to extradite its own nationals; this provision even had constitutional rank in several European legal systems (e.g., Poland; Cyprus; and, to a more limited extent – that is, only for political offences – also Italy),⁸ with very different nuances in terms of whether or not exceptions to the rule could be accepted. Furthermore, it was more generally a common rule in civil law systems. From the perspective of international law, this clause can be found in several extradition treaties. Even the relatively recent Council of Europe's Convention on Extradition of 1957 confirmed the right not to extradite a state's own nationals while compensating it by requiring that the case be submitted to the competent authorities so proceedings might be taken if considered appropriate, in compliance with the principle '*aut dedere aut judicare*'.

The first attempts to overcome this rule were put in place within the European Union, first, with the Convention Implementing the Schengen Agreement of 1990 and, more recently, with the EAW. With this latter instrument, the ground for refusal based on the nationality of the requested person has been definitively abandoned. Such a clause has been found to be in profound contrast with the principle of mutual recognition,⁹ according to which the level of integration attained by EU Member States should allow a simplified process of recognition and enforcement of a Member State's judicial authority in another legal system. Scholarly analysis has underlined how 'recognition creates extraterritoriality'¹⁰ and that, in the case of mutual recognition in criminal matters, mutual recognition is a tool aimed particularly at providing a simplified or harmonized regulatory framework, with the

⁵ For a reconstruction of this rule, see M. Plachta, 'European Arrest Warrant: Revolution in Extradition?', *European Journal of Crime, Criminal Law and Criminal Justice* 11 (2003): 178–194; Z. Deen-Racsmany & R. Blekxtoon, 'The Decline of the Nationality Exception in European Extradition?', *European Journal of Crime, Criminal Law and Criminal Justice* 13 (2005): 317–363.

⁶ Article 2, para. 2, European Arrest Warrant (EAW) Framework Decision (FD). See Art. 2, para. 3, for the possibility of expanding this list.

⁷ M. Plachta, 'Non Extradition of Nationals: A Never-Ending story?', *Emory International Law Review* 13 (1999): 77.

⁸ On Poland see, *ex multis*, L. Marin, 'Il mandato di arresto europeo al vaglio delle corti nazionali: divergenze e convergenze nell'interpretazione di uno strumento transnazionale europeo', in *Le Corti dell'integrazione europea e la Corte costituzionale italiana*, ed. N. Zanon (Napoli: Edizioni Scientifiche Italiane, 2006), 217–238; on the Italian case, see L. Marin, 'The European Arrest Warrant in the Italian Republic', *European Constitutional Law Review* 4 (2008): 251.

⁹ See, *ex multis*, F. Kostoris Padoa Schioppa (ed.), *The Principle of Mutual Recognition in the European Integration Process* (Houndmills: Palgrave Macmillan, 2005); and more recently M. Möstl, 'Preconditions and Limits of Mutual Recognition', *Common Market Law Review* 47 (2010): 405–436.

¹⁰ K. Nicolaidis & G. Shaffer, 'Managed Mutual Recognition Regimes: Governance without Global Government', *Law and Contemporary Problems*, 68 (2005): 263, at 267.

purpose of ensuring extraterritorial enforcement of a state's judicial measures.¹¹ Second, the nationality clause was also found to contrast sharply with another core principle of the era of mutual recognition, that is, the principle of mutual trust or confidence. This trust translates a socio-political premise or value underlying every mutual recognition regime, which works smoothly if the legal environment also predicates loyal cooperation (clauses) among relevant actors.¹² It has been argued that the level of integration attained by EU Member States and the close sharing of social and legal values are such that they no longer allow a typical symptom of distrust¹³ – the possibility that a state will refuse to extradite its own nationals – by a state's legal system and institutions vis-à-vis another Member States' legal systems and institutions.

On these premises, the EAW system abolished the ground for refusal based on the nationality of the requested person. Understandably, the domestic implementation of the EAW was accompanied by constitutional challenges,¹⁴ and some of those questions were framed and dealt with in terms of systemic relations between sources of law. Further issues concerning systemic interactions among legal orders emerged, which were eventually resolved by constitutional courts, albeit with different outcomes.¹⁵ The investigation in this article is not directed along those lines, which could be defined as the macro-level of European constitutional law; here, I am interested rather in what I have framed elsewhere as the 'micro-level of European constitutionalism'. With this, I mean the analysis of the implications of the domestic implementation and daily enforcement of the EAW on the multi-centred and dynamic constitutional dimension of European integration.¹⁶

However, did the EAW really represent the sunset of the nationality clause, or are there living 'remnants'¹⁷ of it? The nationality of the requested person indeed still plays a role as a possible ground for optional refusal of an EAW issued for the execution of a

¹¹ See also A. Di Martino, 'Principio di territorialità e protezione dei diritti fondamentali nello Spazio di Libertà, Sicurezza e Giustizia. Osservazioni alla luce della giurisprudenza costituzionale di alcuni stati membri sul mandato d'arresto europeo', in *Legalità costituzionale e mandato d'arresto europeo*, ed. R. Calvano (Napoli: Jovene, 2007), 69–138, at 102.

¹² G. Majone, 'Mutual Recognition in Federal Type Systems', EUI Working Paper, SPS n. 93/1, 1993, San Domenico di Fiesole.

¹³ Plachta, 1999, 77.

¹⁴ For example, Poland, Germany, Cyprus, Czech Republic. Cf. J. Komárek, 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles"', *Common Market Law Review* 44 (2007): 9–40.

¹⁵ See O. Pollicino, 'European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems', *German Law Journal* 9 (2008): 1313 et seq., especially 1346 et seq. and previously in O. Pollicino, 'Incontri e scontri tra ordinamenti e interazioni tra giudici nella nuova stagione del costituzionalismo europeo: la saga del mandato d'arresto europeo come modello di analisi', *European Journal of Legal Studies* 2 (2008): 220–268.

¹⁶ More precisely, by this, I mean to investigate how the EAW and more broadly European cooperation developing within the AFSJ impacts on traditional constitutional concepts, like defense rights, criminal proceedings guarantees. Because of the continuous influence typical of multilevel governance systems, the way the European level impacts on and transforms these concepts that developed within the conceptual 'borders' of the state. Simultaneously, the domestic level transforms the European level through reactions during implementation, as well as through the practice of enforcement. See L.F.M. Besselink, *A Composite European Constitution. Een Samengestelde Europese Constitutie* (Groningen: Europa Law Publishing, 2007); S. Dellavalle, 'Constitutionalism Beyond the Constitution: The Treaty of Lisbon in the Light of Post-National Public Law', Jean Monnet Working Paper No. 03/2009 <<http://centers.law.nyu.edu/jeanmonnet/papers/09/090301.html>>; L. Marin, 'Like After a Strange Fall: Constitutional Micro-Fractures and the EAW', in *Still Not Resolved? Constitutional Issues of the European Arrest Warrant*, ed. E. Guild & L. Marin (Nijmegen, 2009), 229 et seq.

¹⁷ Deen-Racsmany & Blekxtoon, 335.

sentence. Such a refusal is also extended to other categories of individuals, such as residents or people staying in the territory of the executing state who may thus enjoy the same protection as that offered to the national of the executing state.¹⁸ Another guarantee applies to EAWs issued for prosecution purposes; the FD allows the requested Member State to subject the surrender of its own nationals for purposes of conducting a prosecution to the condition that he or she is returned to the executing Member State in order to serve the sentence or detention order. The same guarantee is extended to residents of the executing Member State.¹⁹

To sum up this presentation on the metamorphosis of nationality clauses in the era of mutual recognition and mutual trust, it is argued that there are in the EAW ‘living remnants’ of the nationality clause, a legal principle that reflects a historically and philosophically grounded idea of relations between a state polity and its members and among states, basically an expression of a Westphalian world order. Interestingly enough, the European legislation expands the scope of these guarantees to other subjects, that is, residents and also people staying in the territory of the issuing state. The purpose of such clauses is to disconnect the action of state powers from the relation state–nationals and to afford legal relevance to other situations, such as (long-term) residence and the existence of a (stable) stay in a ‘host’ country, a natural consequence of more than fifty years integration based on freedoms of movement and, lately, also on European citizenship with its heritage of non-discrimination rights. This seems coherent also with the EU’s ambition to build an AFSJ and, more broadly, with the post-Westphalian world order European integration as a part thereof.

3. THE IMPLEMENTATION OF NATIONALITY AND RESIDENCE CLAUSES AS OPTIONAL REFUSAL GROUNDS: (DIS)TRUST BETWEEN MEMBER STATES?

Now the question is to look at how the Member States did implement these provisions, with reference to two aspects: how did they treat their nationals in the functioning of the EAW and how did they treat other Member States’ nationals. This examination of the

¹⁸ Article 4:

‘Grounds for optional non-execution of the European arrest warrant
The executing judicial authority may refuse to execute the European arrest warrant . . .
6. if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law’.

¹⁹ Article 5:

‘Guarantees to be given by the issuing Member State in particular cases:
The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions . . .
3. where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State’.

It is not clear why this guarantee does not apply also to persons ‘staying in’ or whether this omission is the consequence of an explicit choice.

domestic implementation of the European provisions is the stress test for mutual recognition and mutual trust for two main reasons. Firstly, surrendering nationals (or not) is actually a sign of trust (or a symptom of distrust) toward other states' justice systems.²⁰ Secondly, enforcing another Member State's judgment and accepting to 'pay the bill' for the administration of justice (mainly costs for the administration of justice in courts and costs for detention in prisons)²¹ also for the European citizens who have trouble with justice reveal, first, if and how much the EU and its Member States are building the AFSJ along the lines of modern punishment theories – in particular the principle of social rehabilitation of criminals – and, second, if they are willing to bear some side effects of the freedom of movement, that is, paying for the social costs represented by people who had trouble with justice.²² It is thus crucial to look at the tensions emerging in the implementation of the EAW and also at the solutions offered by the European Court of Justice (CJEU). Investigating these questions will help us understand whether the EU is meeting the challenge of building an area of *true* freedom, security, and justice, based on the rule of law and the protection of rights, another step in the evolution of the European legal order into a more sophisticated constitutional construct.

While looking at the implementation of nationality and residence clauses into domestic legal orders, some indications already emerge from the Commission Report on the EAW of 2005.²³ It appears that some seven Member States have transposed into their legal systems the ground of refusal of Article 4(6) FD as mandatory, whereas for the other eleven, it is still optional, like in the European FD. More specifically, several Member States (among them Greece, Cyprus, Sweden, Belgium, France, and Poland) differentiate between nationals and non-nationals in the implementation of such clause.

An in-depth analysis of Member States' legislations would be necessary in order to get a complete overview on domestic implementation of nationality and residence clauses. However, this is not possible here. Therefore, the following analysis focuses on three countries in order to detect and present common trends: Italy, Germany, and the Netherlands. The last two have been scrutinized by the CJEU, exactly on the implementation of the provisions discussed here, whereas the constitutionality (of related provisions) of the Italian law has been recently examined by the domestic Constitutional Court. The German legislation is actually the second implementation exercise after the *Bundesverfassungsgericht*

²⁰ The analysis of the reasons for trust or distrust – perhaps due to the high degree of diversity – does not fall within the scope of this article.

²¹ These could be called as the costs of equality in the context of the AFSJ, namely judicial cooperation in criminal matters. See, *mutatis mutandis*, the comments of C. Barnard, Review Article on Case C-209/03, *Bidar*, *Common Market Law Review* 42 (2005): 1465–1489, at 1483.

²² Another legal issue arising here concerns the legality principle and its respect in the framework of mutual recognition instruments, operating without previous harmonization of substantive criminal law.

²³ According to European Commission Staff Working Document [SEC(2005), 267, 23 Feb. 2005, 10–11, connected to COM (2005)63]. It is worth adding that the report did not take account of the Italian EAW implementing act because it is still undergoing approval, and more generally, relied on the information transmitted by Member States, which might have compromised the quality and completeness of the report.

Therefore, the information might be incomplete and might have been changed in the meanwhile. However, the value of these data is that they allow discussing some trends, which were detectable already in 2005.

(*BVerfG*) declared the first one unconstitutional. However, this will be given no attention since this analysis will not focus on the macro-level but rather on micro-level of constitutional analysis.²⁴

The Italian legislation,²⁵ presented as first, offers a clear example of a domestic implementing law bearing an outright discrimination toward non-nationals; indeed, the mentioned refusal ground became a compulsory one while being restricted to Italian nationals. The surrender of citizens of other Member States could not be refused, and they could not serve their sentence in Italy. As I have already presented (and criticized) elsewhere,²⁶ this interpretation has been confirmed and defended by the Supreme Court, which did not take the opportunity to refer the question of the CJEU, interpreting the variety of solutions taken by Member States and the silence of the CJEU on this point in the *Kozłowski* judgment as the evidence of the ample discretion enjoyed by Member States while implementing the EAW FD.²⁷ More recently, the Constitutional Court found that this provision was in breach of the Italian Constitution's European clauses.²⁸ This decision is to be welcomed because it is an important voice in the 'informal dialogue' among higher jurisdictions on the values underpinning the construction of the AFSJ.²⁹

Summing up, one could say that the Italian legislator showed distrust towards other Member States' justice systems and lack of financial solidarity, putting a clear discrimination into the implementing law, which has been declared unconstitutional.

The second example is about Germany, where we observe some analogies with previously examined legislation.

First, it must be recalled that the Federal Legislator passed a second EAW Act³⁰ after the judgment of the *BVerfG* in which the Court stressed the special link between Germany and its citizens (in its interpretation of Article 16, 2 of the *Grundgesetz*), showing off a kind of paternalistic vision where the only possible protection for German citizens is within Germany. This is not only a patent symptom of distrust toward other Member States but also an exclusionary dimension of national citizenship, bonding a given group of individuals to a political and legal community but at the same time excluding others from the entitlement of legal goods, which are connected mainly with citizenship but are as well projections of the rule of law, protection for fundamental rights, and the equality principle.

²⁴ On this concept, see the previous paragraph.

²⁵ For an overall analysis of the implementation process, implementing legislation, and early case law, see L. Marin, 'The European Arrest Warrant in the Italian Republic', *European Constitutional Law Review* 4 (2008): 251–273.

²⁶ See Art. 18, para. 1, letter (r) of the Italian EAW Act, Act 22 Apr. 2005, No. 69; see also Marin, 2009, 240 et seq.

²⁷ *Corte di Cassazione, Sezione feriale*, 2–15 Sep. 2008, No. 35286, *Zvenca*, but previously see *Cassazione, Sez. VI*, 25 giugno 2008 – 26 giugno 2008, n. 25879, *Vizitiu*, R.v. 239946; *Cassazione, sez. VI*, 16 Apr. 2008, no. 16213, *Badilas*; *Cassazione, sezione feriale*, 4 Sep. 2007, no. 34210, *Dobos*. The position has been confirmed recently in *Cassazione, Sez. VI*, 12–16 Dec. 2008, No. 46299, where the Court stressed that the provision in question is not to be considered as a right.

²⁸ More precisely, Arts 11 and 117(1) of the Constitution.

²⁹ It has been argued that the Court could have chosen other parameters of constitutionality, like the principle of social rehabilitation of sentenced persons. See F. Fontanelli, 'Commento alla sentenza della Corte Costituzionale n. 227 del 2010 in materia di mandato di arresto europeo', *Giornale di Diritto Amministrativo*, forthcoming, 2011.

³⁰ See F. Geyer, 'A Second Chance for the EAW in Germany. The "System of Surrender" after the Constitutional Court's Judgment of July 2005', in *Still Not Resolved? Constitutional Issues of the European Arrest Warrant*, ed. E. Guild & L. Marin (Nijmegen: Wolf Legal Publishers, 2009), 202.

As such, these values show the deep identity of the legal order, identity that should be the same toward citizens and non-citizens.

In a nutshell, the outcome of the judgment was a request to the legislator to increase for German nationals the level of protection *from* surrender. But what about the added value of European integration and the protection of the principles of the *Rechtsstaat* also for other individuals falling under the German jurisdiction?

The second EAW Act (also indicated as *Internationales Rechtshilfegesetz (IGR)*), passed in 2006, was drafted under the guideline of changing as little as possible³¹; however, in spite that the *BVerfG* decision of 2005 did not object to the rules of the first EAW Act of (26 July) 2004 providing for the equal treatment accorded to some categories of non-German nationals resident in Germany, the legislator of EAW Act of 2006 changed also these provisions.

For the purposes of the current analysis, we must remark a new section 2 of Article 83b *IRG* (implementing Article 5(3) FD),³² which is about foreign nationals with habitual residence in Germany. In a case where the surrender of a German national must be *mandatorily* refused, for the foreign resident, it is an *optional* ground for refusal.

In a similar fashion, also in the case of surrender for the execution of a sentence or detention order (Article 4(6) FD), another double path is established. For the German citizens, the consent to surrender is the decisive factor, whereas for foreign residents, the consent to surrender is not a decisive factor; on the contrary, it must be established that the foreign resident's interest to serve the sentence in Germany preponderates.³³

The German implementing law considered non-nationals, allowing discretion to the judiciary in the implementation of FD refusal grounds. If there is a limited extent of financial solidarity toward other Member States' nationals, the level of protection reserved for German nationals is a rather subtle symptom of distrust toward other Member States' justice systems.

The Dutch legislation is the last case analysed here. The Dutch Surrender Law or *Overleveringswet (OLW)*³⁴ prohibits the surrender of Dutch nationals if the EAW is issued for the execution of a custodial sentence imposed by final judicial decision (Article 6(2) *OLW*). Furthermore, a Dutch prosecutor must declare to the issuing judicial authority that the Netherlands is 'prepared to take over execution' on the basis of the Convention on Transfer of Sentenced Persons or another convention (Article 6(3) *OLW*).³⁵

In the case of EAW issued for the execution of a sentence, domestic legislation provides for the mandatory and automatic refusal of execution of EAW against nationals, as well as a guarantee (such as 'being prepared to take over') to counterbalance the refusal of

³¹ *Ibid.*, 200.

³² Refusal ground of EAW issued for prosecution purposes.

³³ Geyer, 202.

³⁴ Law on the surrender of persons of 29 Apr. 2004 (in Dutch: *Overleveringswet [OLW]*), *Staatsblad* 2004, No. 195.

³⁵ Procedure laid down in Art. 11 of the Convention on the Transfer of Sentenced Persons of 11 Mar. 1983. See V. Glerum & K. Rozemond, 'Surrender of Nationals', in *The European Arrest Warrant in Practice*, ed. N. Keijzer & E. van Sliedregt (The Hague: TMC Asser Press, 2009), 81.

mutual recognition, which has been deemed to be not fully adequate,³⁶ whereas in the case of EAW for the exercise of a criminal prosecution – Article 5(3) FD – against a Dutch national, the Netherlands would also check for double jeopardy. This can be interpreted as a sign of domestic resistance to the choices made by the EU under the mutual recognition framework.

Another paragraph of the *OLW*, Article 6(5), concerns persons other than Dutch nationals, whether nationals of a Member State or third-country nationals. It states that the rules applying to Dutch nationals also apply to foreign nationals in possession of a residence permit of indefinite duration³⁷ in so far as they may be prosecuted in the Netherlands for the offences on which the EAW is based and in so far as they can be expected not to forfeit their right of residence in the Netherlands as a result of any sentence or measure that may be imposed on them after surrender.

Other provisions regulate the status of foreigners and domestic administrative procedures in order to acquire the entitlement of permanent residence, according to Article 16 of Directive 2004/38/EC, after five years of continuous stay in the Netherlands.

The hermeneutic result of these provisions implies that the refusal is mandatory and automatic for Dutch nationals. Second, there is no strong guarantee concerning the execution of the sentence, whereas the provisions on EAW addressed to non-Dutch nationals should be interpreted as providing for a compulsory but conditional refusal of surrender.

I submit that this analysis on the legislation of three countries, chosen because of recent judgments of the CJEU and of a domestic constitutional court, is representative or symptomatic of a bigger phenomenon. Although not based on a comprehensive analysis of twenty-seven Member States' legislation, this thesis is definitively confirmed also by Commission Reports on the implementation of the EAW (2005–2007), as it appears that states apply different rules in setting conditions for the surrender of nationals. Some, for example, still apply a double criminality clause,³⁸ and others apply the rule of checking the requested person's consent. The EU Council's Country Reports depict a similar picture illustrating divergences in the implementation of Articles 4(6) and 5(3) FD.

These difficulties encountered by the EAW in its transposition at national level witness a deeper political problem with the principle of mutual recognition and its normative implications. At first, not all Member States have accepted easily the amount of discretion given to judges when they have to decide on cooperation cases. Second, with reference to a state's nationals, we have several examples of domestic legislators who decided to keep for themselves the discretion, deciding not to surrender their own nationals and thus removing the discretion from the judge, limiting mutual recognition and dissolving any hope of mutual trust into a foreign system of justice. Third, the other side of the coin is that (EU)

³⁶ Indeed, the Public Prosecutor's declaration of 'being prepared to take over' has been deemed not strong enough from a legal point of view. See Deen-Racsmany & Blekxtoon, 317–363.

³⁷ The residence permit of indeterminate duration is a domestic measure relating to staying in the Netherlands; it is *de facto* enforced mainly with third-country nationals.

³⁸ It is the case of the Czech Republic, Poland, and the Netherlands; see also Glerum & Rozemond, 80.

'foreigners' are not given the same 'protection from surrender' accorded to nationals. While considering the treatments reserved to a state's non-nationals, it emerges that there is a high degree of resistance to bearing the costs of justice for such a category of individuals. Financial solidarity in the context of judicial cooperation in criminal matters is still far from reality.

In the next section, the position taken by the CJEU will be examined.

4. THE EUROPEAN INTERPRETATION OF RESIDENTS, BETWEEN NON-DISCRIMINATION AND MUTUAL RECOGNITION

As recalled above, Member States' legislations on this issue present common aspects in spite of some diversities – 'united in diversity', one could ironically paraphrase. The position of the CJEU is therefore important for four reasons: first, because of the impact it could have on other Member States' legislation;³⁹ second, the case law of the CJEU is interesting also in the perspective of the dialogue between the CJEU and domestic interlocutors, such as higher and constitutional courts;⁴⁰ third, the legal values at stake here pertain to the harmonious construction of a European AFSJ,⁴¹ where cooperation among state actors and eventually the exercise of states' coercive authority itself are founded on and limited by guarantees and rights for individuals whether they are a Member State's nationals or non-nationals. In addition, the position held by the CJEU is worthwhile observation in order to track the emergence of a European constitutional culture based on a negotiated and shared set of values.⁴²

This section discusses the judgments delivered in the *Dominic Wolzenburg* (hereinafter '*Wolzenburg*') case and in the previous *Kozłowski* case, which tackled similar questions, focusing on the notions of residents and of persons staying in a host country.⁴³ Considering

³⁹ According to European Commission Staff Working Document [SEC(2005) 267, of 23 Feb. 2005, 10–11, connected to COM (2005)63], seven Member States have transposed into their legal system the ground of refusal of Art. 4(6) as mandatory, whereas for eleven, it is still an optional ground for refusal. However, several Member States (among them Greece, Cyprus, Sweden, Belgium, France, and Poland) differentiate the treatment of nationals from non-nationals. It is worth adding that the report did not take account of the Italian EAW implementing act because it is still undergoing approval and, more generally, relied on the information transmitted by Member States, which might have compromised the quality and completeness of the report. Cf. also E. Guild & L. Marin, 'Still Not Resolved? Constitutional Challenges to the European Arrest Warrant: A Look at Challenges Ahead after the Lessons Learned from the Past', in *Still Not Resolved? Constitutional Issues of the European Arrest Warrant*, ed. E. Guild & L. Marin (Nijmegen: Wolf Legal Publishers, 2009), 1–10, at 9.

⁴⁰ G. Martinico & F. Fontanelli, 'The Hidden Dialogue: When Judicial Competitors Collaborate', *Global Jurist* (2008), <http://works.bepress.com/giuseppe_martinico/1/>; F. Fontanelli, G. Martinico & P. Carrozza (eds), *Shaping Rule of Law Through Dialogue; International and Supranational Experiences* (Groningen, the Netherlands: Europa Law Publishing, 2009).

⁴¹ K. Lenaerts, 'The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice', *International Comparative Law Quarterly* 59 (2010): 255–301.

⁴² L. Marin, 'The European Arrest Warrant and Domestic Legal Orders. Tensions between Mutual Recognition and Fundamental Rights: the Italian Case', *Maastricht Journal of European and Comparative Law* (2008): 473–492, at 484. See also M. Poiars Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in *Sovereignty in Transition*, ed. N. Walker (Oxford: Hart Publishing, 2003), 530; S. Dellavalle, 'Constitutionalism Beyond the Constitution: The Treaty of Lisbon in the Light of Post-national Public Law', Jean Monnet Working Paper No. 03/09, <www.JeanMonnetProgram.org>.

⁴³ Case C-123/08, *Dominic Wolzenburg* (hereinafter '*Wolzenburg*'), Judgment of the Court (Grand Chamber) of 6 Oct. 2009, nyr; Case C-66/08, *Proceedings concerning Szymon Kozłowski* (hereinafter '*Kozłowski*'), Judgment of the Court

that other Member States are facing similar issues, the relevance of these judgments for EU law is beyond question.

If the first case, that is, *Kozłowski*, should be placed against the background of the *BVerfG* judgment of July 2005 declaring the domestic law on the EAW unconstitutional and the subsequent need not to create a constitutional conflict with the second German law implementing the EAW,⁴⁴ the *Wolzenburg* case arises by contrast from a more neutral domestic context, as the Dutch legal actors are traditionally not in the front line of contestation against European integration.⁴⁵

In spite of this, it is here suggested that in both cases, the CJEU took an approach of self-restraint, avoiding going beyond the strictly necessary response and, most importantly, avoiding tackling the sensitive question of whether or not the automatic refusal based on nationality for a Member State's nationals is in breach of the principle of non-discrimination.⁴⁶ The CJEU is especially cautious while adjudicating over (fundamental principles and) the EAW; the EAW indeed creates tensions between European and domestic legislatures and systems⁴⁷ on issues like (1) the protection of fundamental rights in the relations between individuals and state authorities and also (2) on mutual trust across Member States' justice systems. This relation of trust inevitably comes under stress when Member States establish judicial cooperation mechanisms through mutual recognition instruments; these instruments indeed not only presuppose trust but also test whether or not there is trust among relevant actors across systems.⁴⁸

A first point that has been addressed by the CJEU is the scope of former Article 12 EC, now Article 18 TFEU, namely whether a national of a Member State who is lawfully a resident in another EU state is entitled to rely on the principle of non-discrimination on the basis of nationality against the legislation of the state of residence implementing the EAW.⁴⁹ On this point, the Court's answer is in the affirmative, as it has been previously stated in the *Pupino* case about the principle of loyal cooperation.⁵⁰ The underlying issue, in the

(Grand Chamber) of 17 Jul. 2008. For a comment of the latter, see the case note of M. Fichera, 'Case C-66/08, Proceedings concerning Szymon Kozłowski', *Common Market Law Review* 46 (2009): 241–254.

⁴⁴ Geyer, 195–208.

⁴⁵ Cf M. Claes & B. de Witte, 'Report on the Netherlands', in *The European Court and National Courts – Doctrine and Jurisprudence. Legal Change in its Social Context*, ed. A.-M. Slaughter, A. Stone Sweet & J.H.H. Weiler (Oxford: Hart Publishing, 1998), 171–194.

⁴⁶ I argue this thesis, bearing the following in mind: in *Kozłowski*, the CJEU answered one of the two questions referred to it and avoided answering the question of the compatibility of domestic law with the principle of non-discrimination based on nationality; in *Wolzenburg*, the CJEU limited its analysis to the *OLW* as far as it concerned non-nationals and did not consider whether the discipline covering the situation of Dutch nationals was in line with EU law, as the CJEU did in *Kozłowski*. This position was not shared by Advocate General Bot, who in both Opinions also tackled the treatment of nationals. I argue that this is symptomatic of a problematic issue. It might be that there is disagreement among CJEU judges on this point, as it refers to a complicated and sensitive constitutional question.

⁴⁷ O. Pollicino, 'European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems', *German Law Journal* 9 (2008): 1313 et seq., namely 1346 et seq.; J. Komárek, 'European Constitutionalism and the Arrest Warrant: In Search of the Limits of "Contrapunctual Principles"', *Common Market Law Review* 44 (2007): 9–40.

⁴⁸ On mutual trust, see the interesting comments of J. Ziller, *Il nuovo Trattato europeo* (Bologna: Il Mulino, 2008), 113–114, which ascribes the omission of reference to mutual trust in the Treaty of Lisbon as a consequence of a Freudian lapsus!

⁴⁹ Case C-123/08, *Dominic Wolzenburg*, Judgment of the Court (Grand Chamber) of 6 Oct. 2009, nyr.

⁵⁰ Case C-105/03, *Criminal Proceedings against Maria Pupino* [2005], ECR I-5285.

pre-Lisbon scenario, was the separation between pillars and the fact that old Article 12 EC and the legal basis of the EAW FD (Article 29 TEU, pre-Lisbon) were rooted in two different pillars. The rationale of the Court's answer seems to lie in the protection of Community law and the Community *acquis*, more than in the existence of a common legal framework of reference, which has been theorized within the doctrine as the principle of unity across the pillars.⁵¹ The Court reasoned that a framework decision cannot infringe the freedom of movement granted to every EU citizen. Therefore, there is a need to subject a framework decision to a review of legality in the light of Community law. Following on from this, a national of a Member State who is lawfully a resident in another Member State is entitled to rely on the principle of non-discrimination on the grounds of nationality, also against legislation implementing the EAW and laying down the conditions for refusal of the execution of the EAW.

One of the merits of the Lisbon Treaty is to bring the policies of the former third pillar within the TFEU and therefore to provide a single legal framework. This will mean that the general principles of EU law and the Charter of Fundamental Rights of the EU will apply also to the AFSJ.⁵²

A second question dealt with by the CJEU relates to domestic (in the case, Dutch) legislation requiring the possession of a residence permit of indefinite duration as a requisite for the operation of the refusal ground within Article 4(6) of the FD. This requirement of the Dutch legislation implementing the EAW has also been examined in the *Wolzenburg* case.⁵³ Although for different reasons, both Advocate General Bot and the Court agree on this point, qualifying the residence permit of indefinite duration as a 'supplementary administrative requirement'.⁵⁴

However, for the Advocate General, the right of residence derives from the (old) Article 18 EC or from the exercise of a fundamental freedom provided by the treaty,⁵⁵

⁵¹ Cf. Opinion of Advocate General Póitres Maduro in the Case C-160/03, *Eurojust* [2005], ECR I-2077. For a doctrinal reference, see A. von Bogdandy, 'The Legal Case for Unity: The European Union as a Single Organization with a Single Legal System', *Common Market Law Review* 36 (1999): 887–910. The reasoning of the CJEU (paras 44–45) recalls case law involving litigation across pillars, namely between first and second pillars and the first and third pillars. On the first point, cf. the recent *ECOWAS* case, Case C-91/05, *Commission v. Council* (hereinafter '*ECOWAS*' or 'Small Arms and Light Weapons') [2008], ECR I-03651. For a comment, see C. Hillion & R.A. Wessel, 'Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?', *Common Market Law Review* 46 (2009): 551–586. On the second stream of conflicts mentioned, see Case C-176/03, *Commission v. Council* (protection of the environment through criminal law) [2005], ECR I-7879; Case C-440/05, *Commission v. Council* (ship source pollution) [2007], ECR I-9097.

⁵² See the Opinion of Advocate General Bot in Case C-137/09, *M. Josemans v. Burgemeester van Maastricht*, for an interesting example: the framework in place with the Treaty of Lisbon could provide new outcomes in the balancing of freedom of movements and the objectives belonging to the AFSJ. The case is about drugs tourism and limitations to fundamental freedom on grounds of public order, arisen from a Dutch administrative case.

⁵³ Cf. Judgment in *Wolzenburg*, *supra*, paras 48 et seq.

⁵⁴ Cf. Advocate General's Opinion in *Wolzenburg*, *supra*, paras 71–79 et seq., and CJEU's Judgment, paras 48 et seq.; see also CJEU's Judgment in Case C-85/96, *Martínez Sala* [1998], ECR I-2691, para. 53.

⁵⁵ Cf. Advocate General's Opinion in *Wolzenburg*, *supra*, paras 74 et seq. Furthermore, the Advocate General examines the two conditions provided under Dutch law, even though they were not requested by the Amsterdam Court, arguing that the first condition provided by Dutch law (it must be possible to prosecute the requested person in the Netherlands) is not compatible with the FD, whereas the second (not losing the right of residence as a consequence of the sentence) is. The merit of this detailed analysis is that it sets out an overall framework within which European criminal law regulation is interpreted coherently with the whole body of European law, for example, by referring to the strict

whereas the CJEU embeds its reasoning in both the primary and the secondary EU Law, namely referring at the Citizenship Directive and at the right of permanent residence provided therein,⁵⁶ which entitles the mentioned right to Union citizens who have legally resided in the host Member State for a continuous period of five years.⁵⁷ On this premise, it considers that a domestic administrative requirement cannot be a precondition for the application of an optional ground of refusal for Article 4(6) of the FD.

A third question tackled by the CJEU is the interpretation of the notion of residents within the scope of the application of the FD's ground of refusal. This point has been discussed in both cases: in the German case, the domestic legislation did not specify the category of residents, whereas in the second case, the application of such a clause was restricted to people residing in the Netherlands for more than five years, a requirement to get the permanent residence permit. In a regulatory perspective, the question is crucial because it touches upon the extent of the principle of mutual recognition and its limits through the prism of possible exceptions to mutual recognition and how they can or should be interpreted. In the perspective of the relation between EU and its Member States, this issue touches upon the discretion that Member States enjoy while implementing a framework decision in their legal orders and the extent of control of the CJEU on domestic laws implementing European legislative acts in the field of criminal justice (cooperation).

The picture emerging from the case law is that the concept of 'resident' must be interpreted uniformly since it refers to an autonomous concept of EU law⁵⁸ and that the executing judge has to conduct an overall assessment,⁵⁹ in which a 'single factor' 'cannot, in principle, have a conclusive effect of itself'.⁶⁰ In contrast, an overall assessment should be made of various objective factors characterizing the person's situation, such as length, nature, conditions of his or her stay, as well as family and economic ties.⁶¹

However, in the *Wolzenburg* case, the CJEU faced a framework decision where the (Dutch) legislature made a choice on how to define the category of residents, a choice that the CJEU scrutinized in consideration of Member States' margin of discretion, whereas in the previous *Kozłowski* case, the CJEU was confronted with the German EAW act, where the German parliament did not choose to specify further which residents must be considered within the scope of Article 4(6). Therefore, the CJEU gave guidelines.

In *Wolzenburg*, the Court⁶² stated that the term of five years for the duration of the residence for the purposes of the application of Article 4(6) EAW FD is not in contrast with Article 12 EC, as this provision is 'based on the exercise by the Member State concerned of the discretion conferred on it by Article 4(6)' FD.

conditions under which someone can be deprived of his/her right of residence. These are the rules to which the situation at issue should be compared.

⁵⁶ Directive 2004/38/EC, Arts 16(1) and 19.

⁵⁷ Directive 2004/38/EC, Arts 16(1) and 19, as well as Case C-85/96, *Martínez Sala* [1998], ECR I-2691, quoted at paras 49–50.

⁵⁸ Cf. Judgment in *Kozłowski*, *supra*, para. 43.

⁵⁹ *Ibid.*, para. 49.

⁶⁰ *Ibid.*, para. 76.

⁶¹ *Ibid.*, para. 51.

⁶² *Ibid.*, paras 75–78.

It is interesting to note here that the Advocate General came to a different result, considering as a main reference the criteria set down by the CJEU in the *Kozłowski* judgment,⁶³ which stated that the residence and the stay must provide connections with the executing Member State and that an overall assessment should be made of various objective factors, characterizing a person's situation.⁶⁴ As one of the exceptions of the principle of mutual recognition, the clause of Article 4(6) FD refers to a concept – residence – which is not uniformly defined at EU level. According to the AG, the concept must therefore be interpreted in light of the context and of the objectives of the FD,⁶⁵ and this should require that the concepts that determine its application must be assessed by the executing judicial authority in each individual case.⁶⁶

As the purpose of the EAW and namely of the Article 4(6) is on where to enforce a sentence, it must be considered that reintegration into society is the main goal of modern sanctioning theories, the prism through which one looks at the whole issue.⁶⁷

Another relevant issue – the fourth in our analysis – dealt with by the CJEU concerns whether the domestic implementing laws establishing a difference in treatment between nationals and non-nationals violate the principle of non-discrimination based on nationality. This point has been tackled by the *Wolzenburg* case, as the CJEU avoided answering this question in the *Kozłowski* case, having regard to the factual circumstances of the criminal proceedings of Mr Kozłowski.

The CJEU focuses in particular on non-nationals lawfully residing in the Netherlands for a continuous period of five years because this requirement is brought under domestic law. The CJEU does not tackle whether the treatment reserved to Dutch nationals is compatible with EU law. There is, however, another subtle difference, which is never really central and explicit in the CJEU's reasoning, in contrast to the Opinion of the Advocate General,⁶⁸ which saw the Dutch legislation as providing for a 'mandatory' refusal for nationals and 'optional' refusal for non-nationals. Interestingly, the CJEU does not categorize the treatment reserved to non-nationals as an optional ground for refusal but rather as a conditional refusal.⁶⁹ It is uncontested, however, that the refusal of surrender for Dutch nationals is merely based on the nationality and is mandatory, that is, the court has no discretion in the matter.⁷⁰

Perhaps some supplementary explanation of the Dutch law may be useful in understanding this point. The Dutch legislation at Article 6(5) states that mandatory refusal shall also apply to non-nationals, if two conditions are met:⁷¹ lawful residence for five years and the person in question would not lose the right of residence as an effect of criminal proceedings. Thus, in both cases (nationals and non-nationals), the judge *must* refuse to

⁶³ *Ibid.* For a comment, see the case note of Fichera, 241–254.

⁶⁴ Opinion, paras 51–54.

⁶⁵ Opinion, para. 62.

⁶⁶ *Ibid.*, paras 60–67.

⁶⁷ *Ibid.*, paras 68–70.

⁶⁸ Opinion, paras 118–157.

⁶⁹ Cf. Court's Judgment, paras 54 and 64.

⁷⁰ *Ibid.*, para. 70.

⁷¹ *Ibid.*, paras 19–25.

execute the surrender of the person requested. The difference is that, in the case of nationals, the refusal is automatic, but for non-nationals, the refusal must be *subject to the two conditions* mentioned above. It is therefore difficult to argue for manifest discrimination although there is a clear difference in treatment that will eventually lead the Dutch judge to block the surrender of Dutch nationals and to surrender non-nationals more easily. I would argue that this is close to covert discrimination.⁷²

On this point, the CJEU takes the position that there is a ‘different treatment’⁷³ and therefore performs a proportionality test, reaching the conclusion that it is objectively justified⁷⁴ and proportionate and legitimate⁷⁵ in the sense that it does not go beyond what is necessary to attain the objective of ensuring that requested persons who are nationals of another Member States achieve a degree of actual integration in the Member State of execution.⁷⁶

It is interesting to observe that, also on this point, the Advocate General argued differently in his Opinion, proposing a divergent thesis.

The reasoning of the Advocate General moves along three lines: in the first place, it assesses whether there is an option or obligation to transpose Article 4(6) FD and, if so, which margin of discretion Member States enjoy; second, it examines whether the principle of non-discrimination applies to conclude determining whether or not the Dutch *OLW* is discriminatory.

As to the first sub-question, the Advocate General concludes that even in the view that the transposition of the rule in question is not obligatory, it is not possible for Member States to discriminate on the basis of nationality.⁷⁷ This conclusion is based on a sound teleological argumentation of the rule of Article 4(6) FD, that is, centred around its objective: the facilitation of reintegration of the sentenced person into society, as previously recognized by the CJEU in the *Kozłowski* case.⁷⁸ This conclusion is strengthened by the framework within which the provision is called upon to operate, the freedom of movement of persons, which is one of the main, fundamental freedoms, first as a tool for the common market project and lately also a right within the framework of EU citizenship. This systematic reading is confirmed by the opening of borders, as well as other EU instruments, such as Framework Decision 2008/909/JHA, on facilitating the execution of custodial sentences in the state in which execution can better guarantee the chances of reintegration.⁷⁹

A second point concerns whether the principle of non-discrimination applies. The Advocate General argues in the affirmative – it does apply, even if ‘the duties and the rights which reciprocally link a Member State to each of its own nationals’,⁸⁰ the

⁷² For an analysis of the Italian case, see Marin, 2009, 229–245.

⁷³ Court’s Judgment, para. 64.

⁷⁴ *Ibid.*, paras 64–68.

⁷⁵ *Ibid.*, para. 69.

⁷⁶ *Ibid.*, paras 69–73.

⁷⁷ *Ibid.*, paras 102 and 108.

⁷⁸ *Ibid.*, para. 103.

⁷⁹ *Ibid.*, para. 107.

⁸⁰ *Ibid.*, para. 109.

content of nationality law, are still a fully reserved competence of Member States. The *Cowan*⁸¹ and *García Avello*⁸² cases are adduced as examples of a previously consolidated interpretation. Furthermore, this interpretation was also required by (former) Article 47 EU, pursuant to which nothing in the EU should affect the construction of the EC Treaty (in the pre-Lisbon era marked by the pillars), of which the principle of non-discrimination based on the nationality was clearly a part.

The third point considers whether Dutch legislation may possibly constitute discrimination. This clearly goes right to the heart of the problem, viz., the automatic refusal to surrender nationals coupled with another treatment for non-nationals. If the overall picture of the implementation of this provision across Member States is complex and wide ranging, there are nevertheless convergent choices as to the treatment of nationals since several Member States have chosen not to surrender.⁸³ The reasoning of the Advocate General tackles *in extenso*⁸⁴ the absolute impossibility of surrendering nationals, which should be amended into a reading consistent with the FD, requiring a case-by-case assessment by the executing judicial authority and bearing in mind that the objective of the rule in question is the reintegration of the individual into society, which cannot be based merely on the parameter of nationality.⁸⁵ Besides this, the general structure and overall objective of the EAW is to radically change the extradition system into a system based on mutual recognition and trust, and this system cannot but also apply to Member States' nationals.⁸⁶

In his conclusions, the Advocate General argues therefore that the period of residence must be one of the factors to be assessed in order to decide where he or she can best reintegrate and therefore cannot be subject to the fulfilment of a supplementary administrative requirement, such as the possession of a residence permit of indefinite duration (1–2). Third, Advocate General Bot concludes also that Dutch legislation, in the sense of a mandatory refusal for nationals and an optional refusal only for those for non-nationals in possession of a residence permit, is precluded by Article 12 EC, read *juncto* with Article 4(6) FD.

What these cases seem to show is that, currently, there is uncertainty on the relation between mutual recognition and protection of rights, on one side, and between mutual trust and nationality, on the other one. We will further analyse these issues in the next section.

5. THE CONSTITUTIONAL SIGNIFICANCE OF EUROPEAN CITIZENSHIP WITHIN THE AREA OF FREEDOM, SECURITY, AND JUSTICE

In this final section, we focus first on the position of the individual within the AFSJ through the prism of the interaction between mutual recognition and other interests deserving legal

⁸¹ Case 186/87, *Cowan v. Trésor public* [1989], ECR-195.

⁸² Case C-148/02, *García Avello* [2003], ECR I-11613.

⁸³ See *supra*, previous paragraph.

⁸⁴ *Ibid.*, paras 121–153.

⁸⁵ *Ibid.*, para. 123.

⁸⁶ *Ibid.*, paras 126–132.

protection, such as reintegration into society, translated into the FD as a ground for refusal (of nationality and residence clauses); second, the legal and political ambiguities underpinning the legal paradigm of the individual within the AFSJ will be discussed, finally pointing at the hidden *leitmotiv* of this analysis, European citizenship, which in the early post-Lisbon era is nothing but a ‘spectre’ haunting Europe,⁸⁷ although it bears the potential of (and should) becoming the basic legal paradigm of the individual within the AFSJ. This article is an attempt to draw a ‘manifesto’ on this subject.

The comparative analysis conducted on the implementation of residence clauses in Italy, Germany, and the Netherlands revealed some resistance in the domestic acceptance of such a clause. In spite of diversities, there are common trends: distrust, little or no financial solidarity toward other Member States’ nationals, and resistance to accept the discretion that mutual recognition confers upon the judiciary (not accepted toward a state’s nationals). Some domestic laws are patently discriminatory. It was the Italian case before the Constitutional Court’s judgment referred above; others are better constructed, like the German and the Dutch ones. The latter, for example, is giving protection also to non-nationals who have demonstrated a stable connection – on which connection is relevant has been decided by the legislator – with the Kingdom of the Netherlands.⁸⁸

Being confronted with this panorama, the CJEU is working hard in order to bring some coherence to this divergent framework, at the same time respecting Member States’ margins of discretion in implementing EU law, the natural projection of their sovereignty in criminal matters.

In spite of this effort, one finds it difficult to be persuaded by the reasoning chosen by the CJEU in its recent case law, presented above. In other words, the current state of affairs of the case law of the CJEU presents reasons for criticism. These concern, first, the legal position of the individual within the AFSJ, namely with reference to the relationship between the protection of rights and the principle of mutual recognition. In this framework of reference, even if domestic legislation, like the Dutch law, do not bear an outright discrimination, they nevertheless establish a double path, which is not in line with the objectives of the EAW FD, and build on the endorsement of mutual recognition and mutual trust as regulatory paradigms of the new era of judicial cooperation. Second, the current case law does not respect Member States’ common constitutional traditions, which endorse the social rehabilitation of sentenced persons as the main function of criminal sanctioning. Last but not least, this analysis will show that the current case law fails to be coherent also with the *acquis* on the principle of non-discrimination based on nationality and of freedom of movement; therefore, it represents an attack at the heart of European citizenship, which nevertheless is ready for a new life in the constitutional era opened by the Lisbon Treaty and complemented by the Stockholm program.

⁸⁷ Marx & Engels.

⁸⁸ In the Dutch *OLW*, Art. 6(1) implements Art. 5(3) FD and paras 6(2) and 6(3) concern Art. 4(6) FD: Art. 6(5) provides the same treatment for non-Dutch nationals. Therefore, there is no reason to consider different treatment or discrimination regarding this category. Art. 6(5) *OLW* states that Art. 6(1)–6(4) ‘is eveneens van toepassing’, which means ‘applies also’ to foreign nationals with a residence permit.

The first thesis of this analysis is on mutual recognition and how to interpret it in harmony with the European composite constitutional framework.

In its reasoning,⁸⁹ the Court recalls that mutual recognition is the cornerstone of the new system, replacing extradition among Member States. According to this principle, 'Member States are in principle obliged to *act upon* an EAW',⁹⁰ which, according to the further reasoning of the CJEU, seems to imply that surrender is the rule and refusal is the exception.⁹¹ I argue that the CJEU espouses a vision of mutual recognition in its quasi-automatic dimension⁹²; in other words, the principle should imply an automatic mechanism of recognition and therefore automatic execution of measures of other Member States.⁹³ The CJEU goes further, stating that the grounds of non-execution are only those listed in the FD as mandatory or optional.⁹⁴ The consequence of this is that the possibilities to stop the principle from functioning are only those listed at the European level, which apparently leads to no acceptance of (further) domestic mandatory requirements. This introduces into the system a strong element of centralization for exceptions to mutual recognition in the criminal justice sphere, which is precisely an area – criminal law cooperation – where there should be room for the recognition of fundamental domestic values since they might affect the relationship between individuals and state powers. This constitutes a fundamental difference from the principle of mutual recognition as embraced in the internal market. The European 'rule of reason' for mutual recognition in criminal matters is therefore not dynamic but rather static and 'fully codified' at European level. Furthermore, I argue that this reveals some confusion between objectives and instruments; the principle of mutual recognition is *an* instrument and not *the* objective itself, which is the harmonious construction of an AFSJ.

The Court of Justice pushes this line of reasoning further, stating that a national legislature that 'chooses to limit the situations in which its executing judicial authority may refuse to surrender a requested person merely reinforces the system of surrender . . . to the advantage of an AFSJ'.⁹⁵

In other words, the CJEU argues that limiting the grounds for refusal means facilitating surrender and therefore giving full operation to the principle of mutual recognition.⁹⁶ This reasoning is carried to its consequences in the balancing of the different interests underlying the grounds for refusal and the logic of mutual recognition,⁹⁷ which is of 'limiting . . . the situations in which it is possible to refuse to surrender a person'.⁹⁸ Consistently, this reasoning shows that the main purpose of the EAW is to permit the maximum

⁸⁹ *Wolzenburg*, paras 56 et seq.

⁹⁰ *Ibid.*, para. 57, emphasis added.

⁹¹ See in particular para. 56 of the judgment.

⁹² Marin, 2008, 473–492, at 482.

⁹³ On the difficulties that confront this interpretation, see V. Mitsilegas, 'The Third Wave of Third Pillar Law. Which Direction for EU Criminal Justice?', *European Law Review* 34 (2009): 523–560, at 547.

⁹⁴ *Wolzenburg*, para. 57.

⁹⁵ *Wolzenburg*, para. 58.

⁹⁶ *Ibid.*, paras 58–59.

⁹⁷ *Ibid.*, paras 60–62.

⁹⁸ Paragraph 62 of the judgment.

extent of mutual recognition, allowing as much as possible the execution of foreign authorities' measures. This should be to the advantage of the AFSJ, says the CJEU. However, one may question whether the meaning of the AFSJ of being a space within which judicial decisions can circulate freely; mutual recognition cannot imply a 'liberalization' or 'deregulation' of domestic justice systems. In spite of the potentiality that mutual recognition has as a regulatory principle, one might possibly exercise some caution before transferring the same logic of the market to the realm of (criminal) justice administration,⁹⁹ as we are clearly dealing not only with a (public) service, the administration of justice, but also, in Max Weber's terms, with the authorized violence of the state toward the individual.¹⁰⁰

The second point of this analysis concerns reintegration into society as a constitutional European value. Reasoning further on Articles 4(6) and 5(3) FD, the CJEU states that the reintegration into society 'while important, cannot prevent the Member States, when implementing that Framework Decision, from limiting, in a manner consistent with the essential rule . . . [of mutual recognition] the situations in which it is possible to refuse to surrender a person who falls within the scope of Article 4(6)'.¹⁰¹ This reasoning cannot be accepted, as it considers individuals as marginal or accidental elements of the legal framework. Furthermore, it conflicts with the Member States' constitutional heritage and principles.

Is it worth mentioning that the interpretation chosen by the Court contrasts with the Advocate General's Opinion in the same case. Furthermore, the recent Opinion of Advocate General Cruz Villalón in a preliminary reference from the Belgian *Cour Constitutionnelle*,¹⁰² besides supporting the thesis argued here, offers a valuable contribution to a more balanced and sound foundation for the AFSJ, recalling that if mutual recognition strengthens the AFSJ, the protection of fundamental rights must be considered as a *prius*, a precondition that makes the existence of such an area legitimate.¹⁰³ Coherently with this radically different premise, the execution of a sentence in a country with which the convicted person has personal connections is a guarantee provided by Article 8 of the European Convention of Human Rights and strengthens as well the chances of social reintegration – the 'ultimate goal' of criminal law according to modern theories of punishment, as enshrined in some European constitutions.¹⁰⁴

The CJEU's reasoning in *Wolzenburg* can even seem embarrassing if one considers that it deals with domestic rules implying some 'resurrection' of the nationality clause, which is not a *naïf* vintage operation but rather a direct 'shot' to the heart of the principle of mutual

⁹⁹ S. Lavenex, 'Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy', *Journal of European Public Policy* 14 (2007): 773.

¹⁰⁰ E. Guild, 'Crime and the EU's Constitutional Future in an Area of Freedom, Security, and Justice', *European Law Journal* (2004): 218–234.

¹⁰¹ Paragraph 62 of the judgment.

¹⁰² Opinion of Advocate General P. Cruz Villalón, Case C-306/09, *I.B. v. Conseil des Ministres*, delivered on 6 Jul. 2010. The Court has followed the Opinion of the Advocate General, though the reasoning underpinning the judgment is really concise.

¹⁰³ *Ibid.*, para. 43. See also Marin, 2008, 473–492, at 481.

¹⁰⁴ See Art. 27 of the Italian Constitution.

recognition, part of the domestic political response to the potentially uncontrolled power of mutual recognition, as it has been implemented in the EAW.

The result is that social rehabilitation is not given an adequate weight in the reasoning, in contrast with national legal justice systems. Unfortunately, the recent legislation on the transfer of sentenced persons¹⁰⁵ is not providing a better example, as it looks pretty much centred around the exercise of public powers. Limited relevance is given to the consent of the sentenced person on his or her social rehabilitation, whereas the focus of the measure rests on speedy enforcement, limited grounds for refusal, and abolition of dual criminality for the usual list of thirty-two offences.¹⁰⁶ This is certainly not an exercise of good legislation, and it challenges the meaning of freedom, security, and justice in the AFSJ.

A third question that needs to be discussed is whether the principle of non-discrimination based on nationality is infringed by legislation like the Dutch requiring a period of five years' residence for non-nationals, whereas nationals are automatically not surrendered merely on the basis of their nationality.¹⁰⁷ This problem impacts on the citizenship *acquis* and on non-discrimination and equal treatment right derived from that context.

The principle of non-discrimination on the basis of nationality is the translation of the equality principle into the context of European integration, a process aimed at achieving an 'ever closer union' among states. It therefore requires that 'comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified'.¹⁰⁸

While stating that a difference in treatment must be objectively justified,¹⁰⁹ the Court implicitly recognizes that the situation of a Dutch national and a non-Dutch national constitutes comparable situations: that of two hypothetical persons facing public powers. This is the starting point one has to consider in order to build an area on and with freedom, security, and justice. The rest of the reasoning seems to legitimate the automatic refusal for Dutch nationals and the conditional one for non-nationals on the grounds of the abuse of right,¹¹⁰ which, curiously, is assessed and discussed only with respect to non-nationals. The reasoning has not been developed consistently on the two terms of comparison; it looks as if one of the terms of comparison has been lost. If Mr Wolzenburg were a Dutchman living in Aachen (Germany), working and living there with family and under the threat of an EAW, and had decided to travel to the Dutch border city of Venlo, his surrender would have been refused, according to Dutch law. It is not clear why the criterion of nationality does not generate in a case like this a connection that is actually an abuse of right, perpetrated by a Dutch national. Situations like these should not be

¹⁰⁵ FD 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (FD on the transfer of sentenced persons) [2008], OJ L327/27.

¹⁰⁶ Mitsilegas, 523–560, at 542.

¹⁰⁷ Court's judgment, para. 64.

¹⁰⁸ *Ibid.*, para. 63.

¹⁰⁹ *Ibid.*, para. 64.

¹¹⁰ *Ibid.*, para. 65, when the CJEU accepts the Dutch Government's thesis of 'inventiveness of arguments put forward by those persons in order to prove... a connection to Netherlands society'.

possible within the AFSJ. In this perspective, the Dutch law bears a subtle discrimination, which cannot be compensated by its compliance with the five-year period requested by the Directive 2004/38/EC, Article 16.

While it is true that this criterion is provided under the Citizenship Directive as right of permanent residence, I deem that this does not suffice in itself to legitimate the use of this criterion in this context. A look on the CJEU's case law on European citizenship will illustrate this point. In the whole case law on citizenship, the CJEU has linked Union citizenship and equal treatment rights to lawful residence.¹¹¹ How to reconcile, for example, the directly effective right of residence granted by the CJEU in the former Article 18 EC, now Article 21 TFEU, with provisions like that of the Dutch EAW, requiring five-year residence? In *Baumbast*,¹¹² the Court held that the right of residence is subject to limitations contained in secondary legislation. This could indeed apply also to our EAW cases. However, because such limitations and conditions limit a right conferred directly by the Treaty, they must be applied consistently with the general principles of Community law, in particular with the principle of proportionality. Following *Trojani*,¹¹³ a clarification of *Baumbast*, if a Union citizen is lawfully a resident, the *Grzelczyk*¹¹⁴ ruling applies. Therefore, the citizen will be entitled to equal treatment in respect of all benefits, even though recourse to welfare provisions might justify termination of residence (although never automatically).¹¹⁵ *Mutatis mutandis*, the result of the application of these rules to the EAW would imply a higher refusal rate of surrender warrants and therefore less mutual recognition. Other principles developed by the CJEU require that, if the Member State would decide to terminate residence, because a Union citizen has asked to rely on his or her equal treatment right, becoming a burden for the host state, it would have to take into account the personal circumstances of the claimant. While limiting a right of residence, a Member State has to comply with the principle of proportionality and protection of human rights as general principles of EU law, for example, the respect for family life (*Baumbast*). Assessing current Article 21 TFEU in one of her analyses, Eleanor Spaventa concluded that the constitutional meaning is 'to reshape, at least partially, the relationship between Union citizens, in terms of relaxing the link of belonging necessary to be able to claim solidarity from the host-community'.¹¹⁶

If one considers the relevance of equal treatment rights in the context of the AFSJ, as interpreted by the CJEU, as well as financial solidarity among Member States, the impression one has is that we are still at the very beginning of the story.

To summarize this analysis, it is regrettable that the CJEU did not scrutinize carefully the compliance of the double regime established in the Dutch OLW with the European

¹¹¹ See E. Spaventa, *Free Movement of Persons in the European Union. Barriers to Movement in Their Constitutional Context* (Alphen aan den Rijn: Kluwer, 2007), 113–123.

¹¹² C-413/99, *Baumbast and R. v. Secretary of State for the Home Department*, [2002] ECR I-7091.

¹¹³ C-456/02, *Trojani*, [2004] ECR I-7573.

¹¹⁴ C-184/99, *Grzelczyk*, [2001] ECR I-6193.

¹¹⁵ See *ibid.*, 113–123. The author goes through the CJEU's case law on citizenship: with some judgments, the CJEU developed the right of being protected from discrimination on the basis of nationality within the scope of the Treaty (Martínez Sala, Bickel & Franz), whereas with *Grzelczyk*, *D'Hoop*, and *Baumbast*, the CJEU 'circled the square', conferring direct effect to Art. 18 EC.

¹¹⁶ Spaventa, *supra* at 122.

and domestic fundamental principles and values (non-discrimination on the basis of nationality and reintegration into society) and with the EAW FD (based on mutual recognition).¹¹⁷ Considering that there might be other Member States' legislations with similar problems, the contribution of the CJEU to the solution of a legal issue and to the emergence of a political problem undermining the functioning of a mutual recognition instrument is all the more important¹¹⁸ in the newly established European setting.¹¹⁹ A weak reasoning by the CJEU is dangerous as it might legitimate free-riding positions of domestic courts, creating divergence and inequalities in the enforcement of the AFSJ. Last but not the least, it undermines the authority of the CJEU.¹²⁰

6. CONCLUSIONS

Putting this analysis in a broader constitutional perspective, one could wonder about the meaning of European citizenship read in relation to the principle of non-discrimination based on nationality within the AFSJ.¹²¹ European citizenship is not yet the basic paradigm for the condition of the individual confronted with a Member State's public power within the EU's AFSJ. This reader's gut impression is that the CJEU of the *Wolzenburg* judgment 'killed the spirit' of the *Grzelczyk* judgment by not stating that:

(31) *Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.*

(32) *A citizen of the EU, lawfully resident in the territory of a host Member State, can rely on Article 6 of the Treaty in all situations which fall within the scope ratione materiae of Community law.*

(33) *Those situations include those involving the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside freely in another Member State, as conferred by Article 8a of the Treaty (see Case C-274/96 Bickel and Franz [1998] ECR I-7637, paragraphs 15 and 16).*

Why should such situations not include those involving the pursuit of judicial cooperation among state authorities proceeding against Member States' nationals who have exercised their right to move and reside freely in another Member State? I am convinced that the answer should be that such situations should indeed be included. If this would not be the case, we should conclude that EU law developed within the AFSJ is only meant to empower enforcement authorities at the disadvantage of individuals. This perspective is

¹¹⁷ For a different position, see M. Möstl, 'Preconditions and Limits of Mutual Recognition', *Common Market Law Review* 47 (2010): 405–436, where he argues that situations of different treatment such as the current one cannot be dealt with by the CJEU *rebus sic stantibus* but rather require legislative intervention via harmonization.

¹¹⁸ See M. Poiarés Maduro, 'So Close and Yet So Far: The Paradoxes of Mutual Recognition', *Journal of European Public Policy* 14 (2007): 814 et seq., at 823.

¹¹⁹ Cf. especially Arts 67 and 82 (but also 81) of the TFEU.

¹²⁰ Reflection elaborated by Bruno de Witte, at the Final Lecture held at the Ius Commune Congress 2010, Leuven, 25–26 Nov. 2010.

¹²¹ See R. White, 'Free Movement, Equal Treatment, and Citizenship of the Union', *International and Comparative Law Quarterly* 54 (2005): 885–905; 'Editorial Comments: Two-speed European Citizenship? Can the Lisbon Treaty Help Close the Gap?', *Common Market Law Review* 45 (2008): 1–11; E. Spaventa, 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and Its Constitutional Effects', *Common Market Law Review* 45 (2008): 13–45.

conflicting with (one of) the main narrative(s) behind the legal dimension of European integration, theorized since the *Van Gend en Loos* judgment, that is, of being ‘a new legal order of international law . . . the subjects of which comprise not only Member States but also their nationals’.¹²² The principle of mutual recognition is an instrument especially seductive and dangerous in this context, as it has been used in different areas of cooperation to achieve very different purposes¹²³; therefore, one has to ‘handle (it) with care’! This is true also for the CJEU, which devotes attention on it, as witnessed by the fact that decisions in this domain are often taken by the Grand Chamber.

Unfortunately, this is what is happening so far. However, administration of justice is more than this, as well as the potential of the principle of mutual recognition. If the EU claims to define itself as an AFSJ, then it should go beyond the mere dimension of enforcement of Member States’ decision coupled with exceptions and privileged tracks applying for a Member State’s nationals. Ambiguities around the socio-cultural value of mutual trust need to be tackled and solved. If Member States decide to block enforcement of decisions for their nationals, then mutual trust is nothing but a meaningless slogan. If this is really the case, then the only option would be to have less of mutual recognition for everyone, also for non-nationals.

The Treaty of Lisbon with its reforms should be welcomed, namely the legally binding status of the Charter of Fundamental Rights and the reform of the decision-making rules in this area, which should be able to produce higher quality legislation,¹²⁴ thanks to the stronger representation of a broader set of interests. After roughly two decades of separation across pillars, Lisbon draws everything ‘under one roof’, and this will not be without consequences. It is to be hoped that, in the future, the CJEU will be able to attune its case law on the (former) ‘third pillar’ legislation to the principles and values that have inspired its activity so far, stating that the basic legal paradigm for the individual within the AFSJ is European citizenship, which implies a minimum set of rights. In this way, the Court could act as ‘a guarantor of individual rights vis à vis national regulators’, to use Eleanor Spaventa’s formulation,¹²⁵ subjecting an increasing number of domestic rules to a proportionality assessment, especially because such rules are meant to implement European

¹²² Case 26/62, *Van Gend en Loos* [1963], ECR 1.

¹²³ In the internal market, the principle of mutual recognition had the goal of decreasing the regulatory burden that companies had to comply with in order to operate there. With judicial cooperation in criminal matters, as well as migration and asylum law cooperation, the principle of mutual recognition is serving the purpose of simplifying cooperation without harmonization.

¹²⁴ See Opinion of Advocate General P. Cruz Villalón, Case C-306/09, *I.B. v. Conseil des Ministres*, delivered on 6 Jul. 2010, para. 46, which states:

‘De même, les arguments qui viennent d’être exposés démontrent avec force que l’omission expresse dans la décision-cadre de la possibilité de subordonner à conditions l’exécution d’un mandat aux fins d’exécution d’une peine dans des circonstances comme celles de l’espèce *ne reflète pas une décision législative expresse, fruit d’une volonté politique claire et précise. J’estime qu’il s’agit plutôt, au contraire, d’un silence résultant d’une technique de réglementation défailante, dont la solution peut et doit être recherchée dans l’interprétation, sans qu’il soit nécessaire de créer un nouveau motif de non-exécution*’.

See also Marin, 2008, 473–492, at 481, 484, 490.

¹²⁵ E. Spaventa, ‘From Gebhard to Carpenter: Towards a (non-)Economic European Constitution’, *Common Market Law Review* 41 (2004): 743–773, at 766.

law. By doing so, it will also indicate clear parameters to domestic courts. This should also strengthen the coherence of the AFSJ.

In a post-national Europe, engaged in the construction of an AFSJ, the European citizen who is not a national of the executing state should not be *homo sacer*¹²⁶ in Agamben's words in the sense that he or she can be discriminated against in comparison to the state's own nationals. If this were to be accepted, then the AFSJ runs the risk of developing as a space of deregulated enforcement of Member States' repressive instruments where the basic paradigm for the protection of the individual would be his or her nationality, a dangerous variant of the mediaeval *status personae*. European citizenship should grant enforceable rights to individuals, without discrimination.

¹²⁶ G. Agamben, *Homo Sacer* (Torino: Einaudi, 2005).

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