

## 15. LIKE AFTER A STRANGE FALL: CONSTITUTIONAL MICRO-FRACTURES AND THE EAW

### Some Lessons for the 'Emerging' European Constitutional Law suggested by the Italian Case

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#### Introduction

The purpose of this chapter is to sketch the dynamics and draw some lessons for European composite constitutional law<sup>1</sup> from an episode of the saga of the European arrest warrant (hereafter EAW).<sup>2</sup> The focus will be kept on the Italian legal order.

After the first round of constitutional challenges<sup>3</sup> to the EAW following the transposition and first implementation of the European Framework Decision into domestic legal orders,<sup>4</sup> the EAW received the seal of its legitimacy and validity from the European Court of Justice in the judgment *Advocaten voor de Wereld*.<sup>5</sup> That moment signified the end of domestic contestations against the EAW. It is now time to investigate the (long-term) implications of the EAW on the legal systems of European countries.

It is suggested here that that early litigation had a different relevance to the issues raised in the more recent case law discussed at the end of this chapter. During the first round of constitutional conflicts on the EAW, applicants and courts focused on the instrument itself and on the implications of its main rules on constitutional norms and principles. The extradition (or rather surrender) of nationals was the first test for the constitutionality of the EAW in several European countries.<sup>6</sup> The problems were framed and discussed in terms of relations between sources of law and, thus, issues of systemic interactions between legal orders were (created and) analysed.<sup>7</sup> It is suggested

1 See L.F.M. Besselink, *A Composite European Constitution*, Groningen: Europa Law Publishing 2007.

2 Established with Council Framework Decision of 13 June 2002, *OJ* [2002] L 190/1, 18.7.2002.

3 E. Guild (ed.), *Constitutional Challenges to the European Arrest Warrant*, Nijmegen: Wolf Legal Publishers 2006.

4 *Trybunał Konstytucyjny* (Polish Constitutional Court), ruling 27 April 2005 (P 1/05), available at: [http://www.trybunal.gov.pl/eng/summaries/summaries\\_assets/documents/P\\_1\\_05\\_GB.pdf](http://www.trybunal.gov.pl/eng/summaries/summaries_assets/documents/P_1_05_GB.pdf); *Bundesverfassungsgericht* (German Federal Constitutional Court), ruling 18 July 2005 (2236/04), available at [http://www.bundesverfassungsgericht.de/entscheidungen/rs20050718\\_2bvr223604en.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20050718_2bvr223604en.html); Cyprus Supreme Court, ruling 7 November 2005 (294/2005), available only in the Greek language at [www.cylaw.org](http://www.cylaw.org).

5 Judgment of the European Court of Justice of 3 May 2007, Case C-303/05, *Advocaten voor de Wereld*, ECR 2007, I-3633. See the case note of F. Geyer published in *European Constitutional Law Review*, 2008, p. 149 *et seq.*

6 As in the case of Poland, Germany and Cyprus.

7 See the analysis developed by 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*, 9 *German Law Journal* 2008, p. 1313 ff., namely p. 1346 ff. and

here that this can be considered as the constitutional macro-level of analysis for the EAW as a new type of European instrument based on the principle of mutual recognition.

This chapter will consider whether the position taken by the Italian Republic in the negotiations on the EAW could be considered 'much ado about nothing', in light of the objections raised by the government and the position taken afterwards. Furthermore, the analysis will focus on the 'constitutional macro-level': this means investigation of the impact of the EAW against the background of constitutional guarantees applicable to extradition. The analysis will then switch to the daily enforcement of the EAW, in order to discuss some of the (most recent) problems that have been found in its application. Although some early concerns about the constitutional impact of the EAW were raised against the background of the principles framing the legal context of extradition, the impact of the EAW within domestic systems is, however, still far from being completely explored and understood. Close investigation reveals the presence of constitutional micro-fractures. The aim of this contribution is not only to focus on the constitutional macro-level, but also to investigate at the micro-level, *i.e.*, to examine the perhaps (but not necessarily) less showy implications of the EAW in its actual functioning within domestic legal orders. It is suggested here that many open issues remain on the stage of the EAW. All in all, the 'EAW adventure' represents a 'strange fall' of the European system, whose consequences need time to adjust.

### The First Steps of the EAW (in Italy): Much Ado about Nothing?

From the beginning of the EAW tale, Italy was known as the country that halted the speedy agreement at the Justice and Home Affairs Council of 6-7 December 2001, raising objections on the list of the thirty-two crimes of Article 2 para. 2 of the Framework Decision.<sup>8</sup> Although the front of countries sceptical toward the EAW was initially broader, at that time it became clear that the Italian delegation was isolated and, after further pressures from the Presidency of the Council, the then Italian Prime Minister, Mr. Berlusconi, made an agreement possible at the well-known Laeken European Council of mid-December in the same year (2001).

Despite acceptance of the EAW, the Italian government was certainly not enthusiastic toward the instrument, as suggested by the even deeper objections raised against it by the Prime Minister, in the same government's declaration at the Laeken Council. All in all, they certainly let other countries understand that the road to the transposition of the Framework Decision into the domestic system would be long and that it was not a priority for Berlusconi's government, even though its agenda contained many proposals for justice reforms and criminal laws.<sup>9</sup> However, upon the initiative of the opposi-

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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*, 2 *European Journal of Legal Studies* 2008, p. 220-268.

8 For more details on the negotiation phase, see L. Marin, *The European Arrest Warrant in the Italian Republic*, 4 *European Constitutional Law Review* 2008, p. 252-256.

9 As is witnessed by this quick and non-exhaustive list of so called '*ad personam acts*' ('leggi *ad personam*') passed since 2001; see for instance Legislative Decree 61/2002 (scrutinised by the ECJ in its judgment of 3 May 2005, joined cases C-387/02, C-391/02, C-403/02, *Berlusconi et al.*); Act

tion, the Framework Decision was implemented in Italy with Act 22 April 2005, No. 69, passed sixteen months after the deadline.<sup>10</sup>

From the beginning, there has been in Italy 'much ado' about the EAW, with declarations of concern and doubts about its constitutionality. These positions have also been supported by some renowned scholars, whose legal opinion was requested by the government (probably) with the aim of strengthening its position on the European stage.<sup>11</sup>

The next section will examine the constitutionality of the EAW against the background of the Italian Constitution. It will, therefore, provide a presentation of constitutional guarantees that come into play in the operation of the EAW. The prohibition on the extradition of nationals for political offences and the principles of double criminality and strict legality will be examined, since they proved to be a major obstacle in the early operation of the EAW. Complementing the scrutiny done by other constitutional courts, the next section will also analyse whether there have been constitutional macro-fractures between the domestic legal order and the European one within the Italian Republic, as a consequence of the EAW system.

### **The Background of Constitutional Guarantees Applicable to Extradition: Mapping the Territory in the Search for Constitutional Macro-Fractures**

In the analysis of the issues related to the national impact of the EAW, the starting point will be the Italian constitutional context, more specifically the principles and rights related to extradition as defined by the Constitution and by the relevant constitutional case law. Aimed at introducing a simplified surrender of a suspect or convicted person, the EAW has its 'functional' predecessor in the institution of extradition.<sup>12</sup>

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248/2002 ('Legge Cirami', providing for the transfer of proceedings to a different court than the one by law if there is 'legitimate suspicion' about the impartiality of the first court); Act 140/2003 ('Lodo Schifani'), granting impunity to the five highest dignities of the State. This last act has been declared unconstitutional by the Constitutional Court (decision No. 24 of 2004), but recently adopted once again in a new Act 124/2008 of 26 July 2008, currently pending before the Constitutional Court. See <http://web.unife.it/convegni/amicuscuriae/> for more information.

10 For a comment on the (main points of the) domestic legislation, see L. Marin, 'The European Arrest Warrant in the Italian Republic', 4 *European Constitutional Law Review* 2008, p. 251–273.

11 See V. Caianiello and G. Vassalli, Parere sulla proposta di decisione-quadro sul mandato di arresto europeo, 42 *Cassazione penale* 2002, p. 462–467, which concentrates especially on Art. 2 of the Framework Decision. In a nutshell, the jurists argued that the Framework Decision was in breach of constitutional norms concerning the principle of 'sufficient certainty' (*tassatività*) of criminal norms and the principle of 'legal prerogative' (*riserva di legge*) in criminal matters as to the list of thirty-two crimes; violation of constitutional principles on personal freedom, contrast with the constitutional discipline of extradition. They also argued for a violation of Art. 31 letter e) and Art. 34(2) letter b) of the EU Treaty. For a different and equally authoritative position, tackling similar problems and refuting them, see A. Cassese, Mandato di arresto europeo e Costituzione, 24 *Quaderni costituzionali* 2004, p. 129 et seq.; V. Grevi, Il 'mandato d'arresto europeo' tra ambiguità politiche e attuazione legislativa, 51 *Il Mulino* 2002, p. 123 et seq.

12 Cf. Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 12.9.2006, in case C-303/05, *Advocaten voor de Eered 1'Z11*, and his reflections on the relationship between the EAW and extradition (§§ 38–47). See also the decision of 27.4.2005 (P 1/05) of the Polish Trybunał Konstytucyjny (Constitutional Court) at § 3. For a comment, see K. Kowalik-Bańczyk, Should

## The Constitution

### *Extradition of Nationals and Extradition for Political Offences*

In the Italian Constitution, in force since 1948,<sup>13</sup> there are only a few provisions referring to extradition. Though not dealt with comprehensively, a constitutional cornerstone is the general and absolute prohibition on extraditing nationals and foreigners for political offences.<sup>14</sup>

With regard to nationals, Section 26, § 2, of the Constitution states:<sup>15</sup>

'In any case, extradition is not permitted for political offences.'

Likewise, Section 10, § 4, states:

'Foreigners may not be extradited for political offences.'

Therefore, a first principle which can be drawn from the Constitution is an absolute ban on extraditing a citizen or a foreigner for political offences.

As to the second aspect, *i.e.*, citizenship as a subjective limit to extradition, the Italian Constitution, unlike other European constitutional texts, does not provide an absolute ban on extradition.

Section 26, § 1, states that: 'A citizen may be extradited only as expressly provided by international conventions',<sup>16</sup> thus referring to the possibility of extraditing its own nationals, on the basis of international conventions. This is the second basic constitutional rule.

Doctrine<sup>17</sup> stresses the two main rules established by the constituent power, underlining that extraditing Italian citizens has always been possible.<sup>18</sup> In 1953, the renowned

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We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law, 6 *German Law Journal* 2005, p. 1355-1366; L. Marin, Il mandato di arresto europeo al vaglio delle corti nazionali: divergenze e convergenze nell'interpretazione di uno strumento transnazionale europeo, in: N. Zanon (ed.), *Le Corti dell'integrazione europea e la Corte costituzionale italiana*, Naples: ESI 2006, p. 217-238.

13 For a recent overview of the Italian Constitution, see V. Onida, *La Costituzione*, Bologna: Il Mulino 2007.

14 The same prohibition applies to a stateless person ('apolide') dwelling on Italian territory, *ex Art.* 4, 1° co. Criminal Code, who is considered as a citizen for the purposes of criminal law. *Sub voce* 'Estradizione', I) Diritto costituzionale, in *Enciclopedia Giuridica Treccani*, Roma 1989, p. 1.

15 The English translation of the Constitution can be found on the website of the Constitutional Court, [www.cortecostituzionale.it](http://www.cortecostituzionale.it).

16 See M.R. Marchetti, *sub voce* 'Estradizione', in *Digesto delle Discipline Penali*, Torino: UTET 1990, p. 403-404.

17 See A. Cassese, Mandato d'arresto europeo e Costituzione, 24 *Quaderni costituzionali* 2004, p. 129-130; N. Mazzacava, Article 26, in AA. VV., *Rapporti civili. Article 24-26*, in G. Branca (a cura di), *Commentario della Costituzione*, Bologna-Roma: Zanichelli-Società Editrice del Foro Italiano 1981, p. 322 ff.

18 On this last aspect, the doctrine disputed whether or not the Italian citizen could be extradited only for those crimes expressly provided for in the treaties. In case law it has been held that the extradition of the citizen for crimes not indicated in the specific conventional source is also possi-

constitutionalist, Paolo Barile,<sup>19</sup> argued in his study on the position of individuals and legal remedies within the constitutional system, that the prohibitions on extradition for political offences,<sup>20</sup> for both nationals and foreigners, are ‘full subjective rights’ guaranteed by ordinary judicial protection.<sup>21</sup> The Constitution, therefore, allows extradition for non-political offences even for its own citizens, on the basis of international treaties which the Italian Republic is willing to agree with other States.<sup>22</sup>

More recently, with reference to the EAW, the doctrine did not encounter any problem in pulling it within the scope of Section 26 § 1 of the Constitution, via the European Union Treaty, whose Article 31, § 1, letter b) TEU<sup>23</sup> provided a specific legal basis for the simplification of extradition. The conclusion is that surrender of an Italian national to another European judicial authority under the EAW encounters no obstacle in the Constitution.

The situation is different in the case of extradition for political offences, since the Constitution does not seem to allow any exception to this rule. The EAW in itself does not foresee explicitly the political offence as a ground for refusal, but only refers to it in clause 12 of the Preamble.<sup>24</sup> This clause states, though indirectly, that Member States’

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ble. As to the duty stated in the principle, *aut dedere aut judicare*, it should be recalled that, in less recent conventional sources, refusal to surrender automatically implies the duty to prosecute the person requested, whilst in the most recent ones this duty is not automatic, but dependent on a clear request from the requesting State. See M.R. Marchetti, *s.v.* ‘Estradizione’, *op.cit.*, p. 403–404.

19 In P. Barile, *Il soggetto privato nella costituzione italiana*, Padova: Cedam 1953, p. 62, 217, 226. The book is the first study on the legal position of the citizen within the State, a systematic analysis on the position of the individual in the new constitutional order.

20 It should be noted that political offences are defined by the legislature, constituting an example of ‘circularity’ in the relationship between the Constitution and the law.

21 ‘Tutela giudiziaria ordinaria’ (meaning tribunal’s judicial protection), as opposed to the administrative one. See P. Barile, *Il soggetto privato*, *op. cit.*, p. 226, arguing that ordinary judicial protection guarantees that a citizen’s extradition will occur only if so provided by international conventions, and not for political offences as defined by the criminal code.

22 In contrast to the situation of the foreigner, the extradition of the Italian national is further guaranteed by the principle of ‘legal prerogative’ (*riserva assoluta di legge a favore del diritto internazionale pattizio*). For the sake of completeness, see further P. Barile, *Diritti dell’uomo e libertà fondamentali*, Bologna: Il Mulino 1984, p. 339. Also in this book the author stressed that the absolute ban on extradition for political offences is common for both nationals and foreigners, and it cannot be derogated from by international conventions. Furthermore, for both categories the law requires the double criminality principle (Art. 13 Criminal Code and Art. 2 of the European Convention on Extradition of 13 December 1957). According to some scholars, this is a general legal norm (norma di diritto generale), quoting R. Quadri, *Estradizione (diritto internazionale)*, in *Enciclopedia del diritto*, Milano: Giuffrè 1967, p. 22.

23 Cf. A. Cassese, *Mandato d’arresto europeo e Costituzione*, *op. cit.*, p. 129–130.

24 The literal wording of the clause (negative sentences) indicates refusal of surrender in prosecutions for political opinions; see ‘This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union (7), in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person’s position may be prejudiced

judicial authorities can refuse surrender if there are reasons to think that a prosecution is for political opinions. This seems to be the case for the prosecution for a common offence (*reato comune*) for political reasons.

In order to see whether there is or is not a breach of the Constitution, we should, however, consider the Italian implementing legislation, since the provisions of the EU framework decisions do not have direct effect.<sup>25</sup> Article 18 of Act No. 69 of 2005 does provide refusal of surrender for the criminal offence: therefore there is no reason to say that the Framework Decision breaches the Constitution. There might be reason to think that implementing legislation breaches the (perhaps unclear and ambiguous) Framework Decision, but that is another point.<sup>26</sup> In any case, one could argue that there is no actual conflict between the Italian and European rules since the European Framework Decision also implicitly allows refusal of surrender in cases of prosecutions for political reasons.<sup>27</sup>

### *The Strict Legality Principle*

The status of other principles referring to extradition is uncertain. The double criminality principle is often considered a projection of the legality principle in the specific context of extradition, and is thus constructed as a constitutional guarantee. The doctrine, however, stresses the different *rationale* underlying the double criminality principle and that of the strict legality principle.<sup>28</sup>

Strict legality in criminal matters aims to define a fundamental limit to State power over individuals, stating that only legislative power can decide what is crime and criminal sanction. This protection operates with reference to executive and judicial powers, finding its roots in enlightened thinking.<sup>29</sup> The principle of legality is a constitutional cornerstone in European countries like Italy. Section 25, § 2 of the Constitution enshrines this principle.<sup>30</sup>

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for any of these reasons.' However, the doctrine explains that the EAW does not allow grounds for refusal for political offences.

25 As provided in Art. 34 para. 2 letter b) TEU.

26 See on this issue the reports of the Commission on the implementation of EAW, *ex* Art. 34 of the Framework Decision.

27 If this point could not be resolved via interpretation, the option would be to assess the systemic interaction between the two norms. If the prohibition on extradition for political crimes were deemed to be part of the core of constitutional system, at that point we would be facing a systemic conflict.

28 See L. Picotti, *Il mandato d'arresto europeo tra principio di legalità e doppia incriminazione*, in: M. Bargis & E. Selvaggi (eds.), *Mandato d'arresto europeo. Dall'estradizione alle procedure di consegna*, Torino: Giappichelli 2005, p. 46. For a somewhat different perspective, see S. Manacorda, *Il mandato di arresto europeo nella prospettiva sostanzial-penalistica: implicazioni teoriche e ricadute politico-criminali*, 47 *Rivista Italiana di Diritto e Procedura Penale* 2004, p. 789-843; Manacorda argues (p. 826) for an indirect link between double criminality and the right of the requested person not be extradited. See also P. Gualtieri, *Mandato d'arresto europeo: davvero superato (e superabile) il principio di doppia incriminazione?*, 10 *Diritto penale e processo* 2004, p. 115 ff.

29 First references are to Montesquieu, *De l'esprit des Lois*, and Cesare Beccaria, *Dei delitti e delle pene*. The principle is expressed as '*nullum crimen, nulla poena sine lege*'.

30 See Section 25 § 2 of the Constitution, stating that 'No one may be punished except on the basis of a law already in force before the offence was committed.' For a comment, see: M. D'Amico,

Double criminality is another story. The double criminality principle finds its *raison d'être* in State sovereignty, and is an expression of the reciprocity principle as a requirement for international judicial cooperation. This condition was introduced in international relations practice, as a guarantee of the sovereign will of the requested State against the requesting State. In this respect, the evolution has been very different from the legality principle. Nowadays, this principle is not absolute, having many derogations in international treaties,<sup>31</sup> and, partially, in the EAW as well.

This principle does not have constitutional recognition in the Italian legal order;<sup>32</sup> it, nevertheless, has legislative rank, because it is stated in Section 13 of the Criminal Code,<sup>33</sup> and interpreted as the 'abstract bilaterality' (double criminality *in abstracto*) of criminal conduct.<sup>34</sup> This seems to confirm the nature of this principle, which is to affirm the sovereign will of a State to cooperate (or not); by contrast, the legality principle aims to protect the individual against public authorities, requiring a clear definition of *actus reus* and *mens rea* in the incriminating norm. For these reasons, it is argued here that the double criminality principle is not a constitutional limitation on the EAW.

#### *The Judicial Interpretation of Constitutional Protection against Extradition*

On some occasions, the Italian Constitutional Court<sup>35</sup> has intervened in legislation on extradition, in order to make it consistent with the new constitutional order, which has been in force since 1948.

The main issue has been the prohibition on extradition to countries having the death penalty. A first decision of 1979<sup>36</sup> can be compared to the *Soering* judgment of the European Court of Human Rights.<sup>37</sup> In its decision, the Constitutional Court declared the partial unconstitutionality of domestic rules implementing the Convention on extradition between Italy and France,<sup>38</sup> a treaty agreed before the Constitution came into force. The Court held that the contrast with the prohibition on the death penalty, enshrined in Section 27 § 4 of the Constitution, also applied to extradition because France had not abolished the death penalty at that time. Indeed, the scope of the constitutional guarantee, as far as the fundamental values of the legal order are involved, such as protection of life, also embraces the cooperation of the authorities of the

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G. Arconzo, Article 25, in: R. Bifulco, A. Celotto, M. Olivetti (a cura di), *Commentario alla Costituzione*, Torino: Hoepli 2006, volume I, p. 535 ff.

31 On multilateral treaties, see Art. 2, European Convention on Extradition of 13 December 1957; Art. 3, Dublin Convention of 27 September 1996, on Extradition among Member States of the European Union. As to bilateral treaties, see Convention between Italy and USA of 13 October 1983, and the recent one with Spain, 28 November 2000.

32 See L. Picotti, Il mandato d'arresto europeo tra principio di legalità, *op. cit.*, p. 58-59.

33 As 'previsione bilaterale del fatto'. See Section 13 of the Criminal Code, about extradition.

34 See M.R. Marchetti, s.v. 'Estradizione', *op. cit.*, p. 400 ff. for the thesis that the criminal code 'assimilated' the double criminality principle *in abstracto*, and not *in concreto*.

35 See E. Cheli, *Il giudice delle leggi. La Corte costituzionale nella dinamica dei poteri*, Bologna: Il Mulino 1999.

36 Judgment n. 54 of 1979.

37 See ECtHR, *Soering v. the United Kingdom*, 7 July 1989.

38 Signed in Paris 12.5.1870, and implemented in the Italian order with a 'regio decreto' (royal decree) of the same year (r.d. 30.6.1870, n. 5726). See: Estradizione, I) Diritto costituzionale, *op. cit.*, p. 2. The decision can be found at [www.giurcost.org](http://www.giurcost.org).

Italian State with those of the requesting State.<sup>39</sup> Thus, the Court determined another general limit to the extradition of foreigners, which was deemed applicable to Italian nationals as well.<sup>40</sup> Another decision of 1996 (n. 223) reasserted the importance of the value of life in the Italian constitutional system. The Court declared unconstitutional the domestic provision<sup>41</sup> allowing extradition to States prescribing the death penalty for prosecution of the alleged crime (in the specific case), even if the requesting State offered guarantees of non-execution of the death penalty. The evaluation of guarantees fell within the competence of the Ministry for Justice and judicial authority. The Constitutional Court declared that respect for life is an absolute value within the Italian constitutional system, which cannot be protected by a mechanism implying discretionary appraisals of the degree of effectiveness of guarantees presented by the requesting State.<sup>42</sup> Extradition to the U.S.A. was, therefore, not possible for crimes punished by the death penalty.

A recent decision of 2004<sup>43</sup> tackled a more technical aspect, declaring unconstitutional a domestic provision<sup>44</sup> on detention on remand pending trial in the case of 'active extradition', *i.e.*, extradition with Italy as the requesting State. The Court held the legislation unconstitutional, insofar as it did not provide that the preventive detention abroad as a consequence of a request for extradition must also be taken into account as to the effects of the *termini di fase* ('trial-stage-terms'), *ex* Article 303, co. 1, 2, 3, of the Code of Criminal Procedure, and not only for the maximum length (*termine massimo*) of detention on remand pending trial, as provided by law for domestic proceedings. Interestingly enough, a similar question on the EAW has been decided in the same way by the Court.<sup>45</sup> This type of the decision is called 'additive' since with it the Court adds the missing norm for the provision to be constitutional, without actually striking out any provision.<sup>46</sup>

Apart from these important decisions of the Constitutional Court, which show that extradition was placed in the broader context of fundamental constitutional values, the

39 See § 5, 'considerato in diritto' of the Court's decision.

40 The principle is also valid for non-political offences and for political offences for which extradition is exceptionally admitted, such as genocide. See: Estradizione. I) Diritto costituzionale, *op. cit.*, p. 4.

41 Namely, Art. 698, co. 2, Code of Criminal Procedure and Act 26 May 1984, n. 225, on ratification and execution of the extradition treaty between the Government of the Italian Republic and the Government of the United States of America, signed in Rome on 13 October 1983, as far as it gives effect to Art. IX of the extradition treaty. ('Ratifica ed esecuzione del trattato di estradizione tra il Governo della Repubblica italiana ed il Governo degli Stati Uniti d'America, firmato a Roma il 13 ottobre 1983').

42 The judgment held that there was a breach of Sections 2 and 27, § 4 of the Constitution.

43 Judgment 8-21 July 2004, n. 253.

44 Art. 722 of the Code of Criminal Procedure.

45 See Judgment No. 143 of 16 May 2008. The question has been presented by the 'G.U.P.' (*giudice per l'udienza preliminare*) of the *Tribunale di Bari* (Order 27.12.2006, published in the *Italian Official Journal*, No. 21, 30.5.2007).

46 L. Marin, The European Arrest Warrant and Domestic Legal Orders. Tensions between Mutual Recognition and Fundamental Rights: the Italian Case, 15 *Maastricht Journal of European and Comparative Law* 2008, p. 473-492.

ordinary case law never broadened the scope of legal protection of the person subject to extradition, stressing the special nature of this institution.<sup>47</sup>

*Is this All?*

This overview of the constitutional background to extradition provides an outline of the constitutional principles within which extradition operated. With the EAW as its natural successor in relations between European States, it follows that the new instrument, based on the mutual recognition principle, cannot (at least) frustrate this constitutional basis. This said, one must observe that the dimension of legal protection against the EAW is far from being exhausted. It is argued here that this is not all the domestic constitutional system has to offer concerning the protection of fundamental rights for the individual addressed by an EAW. Can one say that this is everything the emerging European constitutional order can offer? It is argued here that the answer must be in the negative for several reasons, typical of the EAW as the first and main paradigm of the principle of mutual recognition in criminal matters.

First, one should note that the EAW creates several situations that have specific relevance in the domestic systems, according to the domestic categories of the same legal system. Thus, the deprivation of liberty is one of the legal situations determined by the execution of an EAW, to mention just one. This implies that that situation falls within the legal framework of the domestic protection against deprivation of liberty by the action of public authorities. Secondly, the argument above must be strengthened by another set of reasons, these also peculiar to the EAW. Indeed, the EAW has been conceived and created without a necessary part: the one on legal guarantees.<sup>48</sup> Without this part in the European Framework Decision, one must simply be aware that that part must be borrowed from domestic legal orders and also from the emerging European constitutional order; otherwise the EAW would be 'unconstitutional' against the background of domestic constitutional orders and the emerging European constitutional law and heritage (comprising also the general principles of Community law as the traditional vehicle through which the European Court of Justice protected fundamental rights).<sup>49</sup> Furthermore, there is a third argument inherent in the constitutional dimension of freedoms. The content of a 'freedom right' (*diritto di libertà*) is strictly connected with the situations in which the same liberties can be limited.<sup>50</sup> I argue that this also

47 Cf. E. Marzaduri, *Libertà personale e garanzie giurisdizionali nel procedimento di estradizione passiva*, Milano, Giuffrè 1993, p. 157-158, p. 101 ff., p. 141.

48 Cf. E. Paciotti, *L'espace de liberté, de sécurité et de justice: au-delà de Tampere et de La Haye*, in: G. Amato, H. Bribosia, B. De Witte (eds.), *Genèse et destinée de la Constitution européenne*, Bruxelles: Bruylant 2007, p. 1129 ff. See especially p. 1131, where the author states that with the EAW the Member States aimed at 'mettre en commun les moyens de répression sans vouloir partager les garanties juridictionnelles'.

49 L. Marin, *The European Arrest Warrant and Domestic Legal Orders. Tensions between Mutual Recognition and Fundamental Rights: the Italian Case*, 15 *Maastricht Journal of European and Comparative Law* 2008, p. 473-492.

50 See G. Amato, *Articolo 13*, in: G. Amato, A. Pace, F. Finocchiaro, *Rapporti civili*, in G. Branca (a cura di), *Commentario alla Costituzione*, Bologna-Roma: Zanichelli-II Foro Italiano 1977, p. 1, states that 'carte e costituzioni regolano le libertà stesse in relazione ai poteri che possono o non possono turbarle'. Amato observes that liberties-situations (*libertà-situazione*) are similar to the

happens in the case of the EAW. The 'EAW situations' must be split into several legal situations that can be attracted under the framework of the relevant domestic frameworks. To provide an example, this is clearly the case with deprivation of liberty as a consequence of an EAW. The typical content of the personal freedom is the '*libertà dagli arresti*' or 'writ of habeas corpus' and this freedom is guaranteed by some constitutional provisions.

What has been described above is, after all, one of the most significant features of the EAW system. Looking at the traditional protection against extradition is important, but we cannot stop there since the EAW aims to go beyond extradition. It thus creates several new legal situations that deserve protection. After this constitutional analysis, based, firstly, on the constitutional framework and, secondly, on this 'fleeting' dimension of the EAW, one can observe that (apparently and so far) the EAW has caused no constitutional macro-fractures in the domestic system; both because the domestic constitutional system does not seem to be breached by it and also because the EAW intrinsically refers to the latter (domestic constitutional system), especially in its protective dimension, for all the legal situations it creates. The monitoring of the legal practice will show whether the daily application of the EAW will create constitutional clashes.

#### Constitutional Micro-fractures: the EAW in its Judicial Implementation

After this analysis of the interactions between the EAW and the domestic normative constitutional framework (within which the EAW came into operation), attention will be shifted to the practice of the implementation of the EAW, looking at the case law and at the problems that have been found and solved there.

For this purpose, some trends observed in the early case law of the *Cassazione* and in some recent judgments of the *Corte Costituzionale* will be presented.<sup>51</sup> The most recent cases of the *Cassazione* will be discussed in order to detect the new issues that have arisen under the cooperation taking place through the EAW.

Firstly, it must be mentioned that, so far, no systemic conflicts have arisen in the Italian legal order, despite early announcements and fears from the Berlusconi Government about violations of fundamental rights and values of the Italian constitutional order. After the first moments of political hostility toward the Framework Decision and the resistance displayed by the legislator during the transposition phase,<sup>52</sup> the system

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'fattispecie a schema aperto' elaborated by A. Barbera, in A. Barbera, *I principi costituzionali della libertà personale* (Milano, Giuffrè 1967), p. 196. Amato argues that the function of this theory is to grant a better evolution of the constitutional guarantee, 'nel caso di alterazioni dei poteri contrapposti od in quello di sopravvenienza di nuove situazioni di conflitto'. See G. Amato, *op. cit.*, p. 3.

51 For a more detailed analysis, I refer to my previous studies on the topic: L. Marin, *The European Arrest Warrant and Domestic Legal Orders. Tensions between Mutual Recognition and Fundamental Rights: the Italian Case*, 15 *Maastricht Journal of European and Comparative Law* 2008, p. 473-492; L. Marin, *The European Arrest Warrant in the Italian Republic*, 4 *European Constitutional Law Review* 2008, p. 251-273.

52 See also F. Impalà, *The European Arrest Warrant in the Italian legal system. Between mutual recognition and mutual fear within the European Area of Freedom, Security and Justice*, 1 *Utrecht Law Review* 2005, p. 56-78, [www.utrechtlawreview.org/publish/articles/000009/article.pdf](http://www.utrechtlawreview.org/publish/articles/000009/article.pdf).

became operational. From the beginning, the judiciary proved to be cooperative towards its European counterparts.<sup>53</sup>

Some early trends have been detected in the case law of the Court of Cassation: to one extent it interpreted the domestic provisions along the lines of domestic constitutional guarantees, for example, as suggested by the cases on rules against the deprivation of liberty.<sup>54</sup> From another perspective, the *Cassazione* reduced the distance between the European Framework Decision and Italian Act No. 69 with consistent interpretation, for example, stating in some early cases the situations in which cooperation would be refused;<sup>55</sup> in contrast, it was decided in other cases that the non-respect of some formalities would not frustrate cooperation.<sup>56</sup> In several judgments, the Court stressed that the purpose of the instrument was to strengthen and simplify cooperation between judicial authorities.<sup>57</sup> The *Cassazione* went further towards interpreting the Italian legislation consistently with the European Framework Decision. It clarified the scope and the extent of judicial review of the Italian judge as executing authority within the framework of the EAW.<sup>58</sup>

The same approach has been followed to resolve another issue that could have represented a major problem with the Italian EAW: a domestic provision<sup>59</sup> provided the Italian judge with a ground for refusal of surrender (in the case of an EAW for the purpose of prosecution) if the legislation of the issuing judge did not foresee a maximum limit for pre-trial detention. That problem was solved by the United Chambers (*Sezioni Unite*) of the *Cassazione*,<sup>60</sup> deciding the interpretation of that additional refusal ground as meaning that Italian judges must verify whether the legislation of the issuing Member State provides for a maximum term of preventive detention until the end of the first stage of the criminal proceedings; however, in the absence thereof, the Italian judge must verify whether a time limit is implied in other procedural control mechanisms, establishing in a compulsory manner and at regular intervals judicial scrutiny of the legality and necessity for detention (continuous review mechanism). Furthermore, the court should have the authority to release the suspect.

53 For an analysis on Germany, Poland and Cyprus, see S. Siegel, *Courts and Compliance in the European Union: the European Arrest Warrant in National Constitutional Courts*, Jean Monnet Working Paper 05/08, www.jeanmonnetprogram.org.

54 *Corte di Cassazione*, Section VI, judgment 26.1.2006-30.1.2006, No. 3640, Spinazzola: on Arts. 11 and 39 of Act No. 69 of 2005.

55 *Corte di Cassazione*, Section VI, judgment 11-16.12.2008, No. 46298.

56 *Corte di Cassazione*, Section VI, judgment 21.11.2006-12.12.2006, No. 40614, Arturi, para. 4, 'in diritto'. This interpretation has been confirmed in *Corte di Cassazione*, 'Sezioni Unite', judgment 30.1.2007-5.2.2007, No. 4614, Ramoci Vllazim.

57 See for an example *Corte di Cassazione*, Section VI, judgment of 17-19.4.2007, No. 15970, Piras e Stori.

58 *Corte di Cassazione*, Section VI, judgment 23.9.2005-26.9.2005, No. 34355, Ilie; *Corte di Cassazione*, Section VI, judgment 13.10.2005-14.10.2005, No. 36630, Pangrac; *Corte di Cassazione*, Section VI, judgment 8.5.2006-15.5.2006, No. 16542, Cusini.

59 Art. 18(e) of the Act No. 69 – establishing refusal of surrender 'if the legislation of the issuing member State does not provide for maximum limits of preventive detention'.

60 See *Corte di Cassazione*, 'Sezioni Unite', judgment 30.1.2007-5.2.2007, No. 4614, Ramoci Vllazim.

That important judgment allowed the Constitutional Court to sidestep the first question of the constitutionality of that provision.<sup>61</sup> Indeed any other interpretation would have meant facing a conflict between a rule expression of a constitutional norm and another rule expression of the principle of mutual recognition.<sup>62</sup> Another question of constitutionality was instead accepted, since it referred to the calculation of preventive detention for the purpose of maximum terms. The question was identical to another one decided in 2004 on extradition (cf. *supra*, paragraph on judicial interpretation of constitutional protection against extradition). However, despite the declaration of unconstitutionality, there were no dramatic implications from that judgment, since the Court pointed in the same judgment to the correct interpretation of the implementing legislation.<sup>63</sup> Therefore, the final outcome did not lead to a legislative vacuum; the implementing legislation is still in place and in force.<sup>64</sup>

### *The 'Unbearable Lightness' of the EAW*

In the most recent case law, the *Cassazione* tackled a legal question related to that recently decided by the European Court of Justice in the case of *Kozłowski*.<sup>65</sup> The issue refers to the implementation of some optional refusal grounds in the EAW Framework Decision, in this case Article 4 paragraph 6. This provision states that where an EAW has been issued for the purpose of the execution of custodial detention, the judicial authority can refuse surrender if the Member State concerned undertakes to execute that decision.<sup>66</sup> What has been apparently left open by the Framework Decision is the scope of persons concerned by this optional refusal ground, *i.e.*, the extension by the executing State to non-nationals of some of the guarantees *lato sensu* provided by the EAW. Therefore, the issue concerns namely 'residents' and 'people staying in' the territory of the executing State but having the citizenship of another Member State. This point is related to more fundamental problems, such as the meaning of European clauses lacking a harmonised definition of some notions, such as 'residents' and 'people staying in', the discretion of Member States in the implementation of the Framework Decision, the link between individual and State in the operation of the EAW. At another level, this is relevant since it has implications for the States' power of punishment

61 Order (*ordinanza*) of the Venice Court of Appeal, 24-25.10.2006, published in the *Official Journal of the Italian Republic*, No. 10 of 7.3.2007 (Constitutional Court series), at [www.gazzettaufficiale.it](http://www.gazzettaufficiale.it).

62 Constitutional Court, Order No. 109 of 18 April 2008, available at [www.giurcost.org](http://www.giurcost.org).

63 This type of decision is known in the domestic constitutional system as '*sentenza additiva*' (roughly translated as 'additive judgments').

64 For more developments on these judgments, see L. Marin, *The European Arrest Warrant and Domestic Legal Orders. Tensions between Mutual Recognition and Fundamental Rights: the Italian Case*, 15 *Maastricht Journal of European and Comparative Law* 2008.

65 Case C-66/08, *Proceedings concerning Szymon Kozłowski*, Judgment of the Court (Grand Chamber) of 17 July 2008, nyr. For a comment, see the case note of M. Fichera, 46 *Common Market Law Review* 2009, p. 241-254.

66 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; (...).'

and also for the detention system of the executing Member State. Again, another aspect of this question has implications that concern the very nature of the relationship between the judiciary and the legislator.

In some decisions,<sup>67</sup> the *Cassazione* has interpreted the domestic provision transposing one of the optional refusal grounds of the Framework Decision. The Italian law has transposed the European provision in Article 18 letter r). First of all, one must observe in general that the Italian Parliament added refusal grounds to the ones provided by the Framework Decision. Secondly, from the wording of the law, it appears that the refusal grounds are not optional but compulsory. Thirdly, the European provision in question has been limited by the Italian legislator (with transposition) only to Italian nationals.

In the most recent case of this consistent stream of cases,<sup>68</sup> a Romanian national with a stable job in Italy, and being the only source of income for his family (a wife and a child younger than three years living in Italy), was requested for surrender by the Romanian authorities to purge a detention penalty of one year and six months. The offence was driving under the influence of alcohol, a crime punishable by detention under Romanian law.

Among the several grounds raised by the applicant, it is worth focusing on the limitation to Italian nationals on the refusal of surrender. The *Cassazione* stated that Member States were not bound to grant to foreigners who were 'residents' or 'staying in' Italy the same guarantees recognised for their own nationals. Article 4 of the Framework Decision enumerated optional refusal grounds, whose transposition had been left to domestic legislators. The *Cassazione* defended the choice of the Italian Parliament and denied that it could be questioned under reasonableness. At the same time, it remarked on the silence of the European Court of Justice on this point; it stated that the judgment in *Kozłowski* did not have an impact on this case. In its judgment, the European Court of Justice did not answer the question of the compatibility of national legislations with European citizenship and with the principle of non-discrimination (on the basis of nationality, under Article 12 EC Treaty); it only interpreted the concepts of 'residence' and 'stay in' and, on the basis of the legal facts, found that it was not necessary to answer any further questions. One could have the impression that the European Court of Justice avoided examining those more sensitive and problematic questions in order to avoid situations of conflict with the *BundesVerfassungsgericht*, especially since the preliminary questions were raised on the German law enacted after the EAW judgment of that court.

Furthermore, the legal reasoning of the *Cassazione* in European matters was worth some consideration. Indeed the *Cassazione* supported its thesis with an argument based on a comparative analysis of other States' legislation. The higher court indicated that it had considered the implementing legislations of other Member States and observed that across other European States the panorama was varied, since Member States took dif-

67 *Corte di Cassazione, Sezione feriale*, 2 September 2008-15 September 2008, No. 35286, *Zvenca*; but previously see *Cassazione*, Sez. VI, 25 giugno 2008 – 26 giugno 2008, n. 25879, *Vizitiu*, Rv. 239946; *Cassazione*, sez. VI, 16.4.2008, no. 16213, *Badilas*; *Cassazione*, sezione feriale, 4.9.2007, no. 34210, *Dobos*. The position has been confirmed recently in *Cassazione*, Sez. VI, 12-16 December 2008, No. 46299, where the Court stressed that the provision in question is not to be considered as a right.

68 *Corte di Cassazione, Sezione feriale*, 2 September 2008-15 September 2008, No. 35286, *Zvenca*.

ferent and divergent approaches in this respect. Some Member States limited this guarantee only to their nationals, whereas other Member States, like Germany, as witnessed by the preliminary reference brought under the *Kozłowski* case, also extended the application of the guarantee in question to non-nationals. From this observation, the *Cassazione* argued that the approach of full discretion was the correct one because in the opposite case the conclusion would be that no Member State had implemented the Framework Decision correctly. As this final conclusion was paradoxical in the view of the *Cassazione*, it must be that Member States had implemented Article 4 paragraph 6 correctly.

The argument *a contrario* is clearly weak and, in my opinion, reveals the clear lack of parameters for the assessment of the situation in question. It seems that the *Cassazione* considered the Italian domestic context, made a quick analysis also on the basis of other legal orders and having no constraint from the European Court of Justice after *Kozłowski*, then reached the less problematic conclusions. The perspective taken by the *Cassazione* is certainly valuable, since it considers the domestic law within the broader European system of laws. However, this reasoning is extremely weak and brings another problem to the attention of the doctrine, the need for clear parameters<sup>69</sup> and instruments to assess the current situations that concern the domestic implementation of a Framework Decision.

This set of judgments brings to the attention of the doctrine a new series of problems arising in the shadow of the EAW: the EAW, and its implementation into domestic legal orders, does not guarantee the same treatment by the executing State to its nationals and to non-nationals. This is, however, not completely surprising, bearing in mind the sphere of discretion Member States enjoy according to Article 34 EU while implementing the EAW Framework Decision. It is also true that the issue is related to the question of purging a sentence in the State where an individual has more social ties, in order to ensure that the process of social rehabilitation can be more successful. Another issue related to the first, is that the so-called 'host State' could lack interest in having someone purge a sentence for a fact committed and judged in another Member State. Furthermore, there are financial implications related to the purging of a custodial sentence. The first set of problems is related to the function of penalty in the rehabilitation process of the individual. The last is an expression of the repressive power of the State and its financial implications.

In the presence of these different factors and criteria, it is to be wondered whether the individual should have something to say regarding his/her social rehabilitation, on whether his/her social ties are stronger in the 'country of origin' or in the 'host country'. The author is persuaded that it is impossible to ignore this perspective, unless under the principle of mutual recognition (of criminal judgments) it is politically decided and socially accepted to consider human beings as irrelevant details. It is not the case that the links between the judicial entities in question have been formulated as 'home State' and 'host State', terminology clearly borrowed from the internal market. If the individual concerned by the criminal decision to be recognised is still a human being, there should be some consideration also for his/her social ties, within the broader con-

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69 For a similar conclusion, with reference to the *Kozłowski* case, see the case note of M. Fichera, in 46 *Common Market Law Review* (2009), pp. 241-254.

sideration of the social rehabilitation path. Of course, other public interests and perspectives must be taken into account, but at the same time the realisation of the Area of Freedom, Security and Justice must be construed with the concept of the individual as a main focus. The convicted person is an individual and the Area of Freedom, Security and Justice must also respect him/her.

Within this framework, some phenomena taking place 'under the shadow' of the EAW are, thus, worth monitoring. 'Under the shadow' refers not only to the EAW as a European Framework Decision, but also to the system of legislation composed by the Framework Decision and by domestic legislation implementing the European Framework Decision. The EAW is probably not the direct source of this problem. The EAW is a framework decision and by treaty framework decisions must be implemented into domestic legal orders and Member States enjoy significant freedom in the transposition of European legislation. It is once again demonstrated here how problematic the lack of a protective scheme under the EAW can be: it indeed fully refers to domestic systems as far as the protective dimension of the operation of the EAW is concerned, without any 'European constraint'.<sup>70</sup> The EAW appears in this respect in all its lightness. It does fail to provide a framework of protection for the individual in all the situations created by its operation, which involve the limitation of personal liberty. This was deemed as not necessary as it has been argued that Member States' legal systems provided sufficient protection for individuals.

Political freedom of the Council of Ministers, Member States' sovereign discretion while implementing the EAW, the final picture is quickly sketched: the different protection granted to some individuals, mainly non-nationals of the executing State, who enjoy fewer guarantees than nationals, represents another 'unbearable lightness' of the EAW system. There are significant differences across Member States' legal systems on these subject matters. This author believes that these cases of differentiation in the legal protection between nationals of the executing State, and the other category of non-nationals implies that, under the shadow of the EAW, there are inequalities mainly to the disadvantage of a group of individuals, the non-nationals. The EAW appears here in all its 'unbearable lightness'.

Are there boundaries to the freedom of choice of domestic legislators inherent in the European framework or in the European constitutional system? If a positive framework for the protection of individuals was not under consideration because of the legal and political difficulties in achieving this target, it is argued here that Member States are at least bound by 'negative obligations' while enforcing the EAW. We should wonder whether these duties arise from the system of the EAW or from the system of norms and principles created by the treaties and which can be their relationship to current domestic legislation implementing the EAW. And in this respect, it is argued here that the European 'emerging' constitutional order should display some consequences, by at least limiting Member States' sovereignty. Besides that, we should also not forget that domestic constitutional orders could provide some answers to the problems raised here.

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70 E. Paciotti, *L'espace de liberté, de sécurité et de justice: au-delà de Tampere et de La Haye*, in: G. Amato, H. Brihosa, B. De Witte (eds.), *Genèse et destinée de la Constitution européenne*, Bruxelles: Bruylant 2007, p. 1129.

via the principle of equality and its implications. Summing up, the questions the European Court of Justice did not answer in *Kozłowski* are still topical and require attention.

**‘A Spectre is Haunting Europe’: the Spectre of European Citizenship (and Non-Discrimination on the Basis of Nationality)**

As was the case in 1848,<sup>71</sup> so far there is no ‘European citizenship spectre’ which is actually haunting Europe. The purpose of the current paragraph is, rather, to turn attention to the concept of European citizenship; if drawing up a manifesto on its value for the construction of the Area of Freedom, Security and Justice is certainly too ambitious a project, a more affordable enterprise is certainly elaborating some reflections on it.

One striking element emerging from this case law, and more generally from the legal system created by the EAW and by domestic legislations, is the difference of treatment created between nationals of the executing State and other individuals: in particular it is argued here that special attention should be devoted to the legal status of (long-term) residents, as the other cases could be different.

From the system of the EAW, it appears that the Member States have a high discretion in deciding, for example, how to implement the guarantee of Article 4 para. 6. At the level of relations between the European Union and Member States, it is a matter of the latter’s sovereignty, since judicial cooperation in criminal matters covers a highly sensitive area, close to the heart of a State’s sovereignty. At the same time, and with regard to the interaction between individuals and public authorities, it is also a sensitive issue for the individual, since it encroaches on his/her personal liberty. Furthermore, there is the level of internal market integration, where European citizens have been empowered by a new system of rights, enjoying freedom of movement: however in the EAW perspective the same European citizens free to move across countries, are simply non-nationals of the executing State, thus they do not have a strong link with the executing (or hosting) State. Within this framework, European citizenship looks like a ‘ghost’ since it seems, so far, not to play any role. Furthermore, and more precisely, the prohibition on discrimination on the basis of nationality seems also not to play any role here. European citizenship and the prohibition on discrimination on the basis of nationality (which implies some consideration for the link between migrant citizens and the host State) do not seem to enjoy any consideration in this field, since no attention is given to ensuring that the citizen who enjoys freedom of movement does not suffer the worst treatment under the EAW.

This is the picture of the current situation. Without any consideration of this point by the European Court of Justice, discrimination or at least different treatment is taking place against migrant citizens. It is also important to understand that the current *status quo* requires attention from the legislators, in the first place: in no way is it advocated here that the European Court of Justice or other courts should start creative case law on the point. However, this issue remains and still deserves consideration, especially from

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71 The reference is to the Manifesto of the Communist Party, written by Marx and Engels and published in London in 1848, whose incipit was ‘A spectre is haunting Europe — the spectre of communism. (...)’

domestic and European legislators. It is argued here that the State must protect its citizens, and also to some extent all the individuals dwelling within its territory.<sup>72</sup> Decades of economic integration (and more) have empowered citizens to leave their State of origin and to have some rights recognised by the country of migration. Now it is somehow surprising to realise that in the operation of the EAW, States protect or differentiate individuals under their jurisdiction on the basis of their 'belonging' to a 'State community', as to the scope of some personal guarantees. This attitude is somehow outmoded, bearing in mind the increased mobility at least across European States, not to mention at the global level. Secondly, it is worth observing that a paternalistic attitude by the State towards 'its' citizens has the effect of diminishing the protection of those same citizens: all the European States that protect only their citizens in their legislations simply undermine the same legal protection of the group of those citizens who have left the 'protective wings' of the State of origin to move to another European State.<sup>73</sup> This paternalistic attitude is out of fashion and does not take into consideration that the European States must nowadays fulfil the challenge of ensuring peaceful and harmonious relations across a 'State community' which is very different from the one of the Nineteenth Century, recognising rights and legal protection for their nationals, as well as for European citizens and third country nationals.

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72 For similar considerations, see F. Geyer, The European Arrest Warrant in Germany – Constitutional Mistrust towards the Concept of Mutual Trust, in E. Guild (ed.), *Constitutional challenges to the European Arrest Warrant*, Nijmegen: Wolf Legal Publishers 2006, p. 101–124, namely p. 106–107.

73 For example, if we consider the function of punishment in the perspective of the Area of Freedom, Security and Justice, we must be aware that this cannot simply be left to State sovereignty: current criminal doctrines indeed stress that the function of punishment is mainly rehabilitation and reinsertion of the individual in the society. This function requires that the sentence is served in a context where the individual has social ties. This can be either the country of nationality or the country of residence, depending on the specific circumstances for the particular case. I owe this further reflection to Prof. John Vervaele.