The European Arrest Warrant in the Italian Republic

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Italian veto in the EU Council reversed by Berlusconi – Italian Parliament: lack of trust in other European Union member states – Italian implementing Act: in between the Framework Decision and the Italian legal order – Case-law of the *Corte di Cassazione:* interpretations in conformity with the Framework Decision *and* with the Italian constitutional order – Some reflections on consistent interpretation, the relationship between the legislature and the judiciary, and two very recent decisions of the *Corte Costituzionale*

Introduction

The framework decision on the European Arrest Warrant (hereafter Framework Decision)[1] is the first elaboration of the mutual recognition principle, which became the leading principle of judicial co-operation in criminal matters in the European Union after the Tampere European Council. The decision replaced the classical extradition procedures in reciprocal relations between the member states.

The adoption of the Framework Decision at European level and its implementation in member states' legal orders raised many concerns as to its impact on fundamental rights and individual liberty, as well as other common legal principles of European states. The haste with which this dossier was handled, as well as the political pressure brought to bear on it, did not encourage reflection during the negotiations.

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

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Approved six years ago, the Framework Decision has been operational since 2004.[2] Its practical application in European states' courts suggests that the time has come to research its impact on national legal orders.[3] The aim of this study is to open a window on the panorama of the Italian legal order, and to investigate the impact of the Framework Decision at the Italian constitutional level.

I will first concentrate on the position taken by the Italian government during the negotiation. I will then focus on the domestic act implementing the Framework Decision to assess how the legislature tackled the sensitive issues left open by the Framework Decision. A last part will be devoted to the Italian Supreme Court's case-law dealing with European arrest warrants, in order to understand which parts of the implementing act proved to be problematic in practice and which solutions have been offered. Before concluding, I will reflect on the impact of the Framework Decision in the Italian constitutional order. In this part I will also briefly deal with two rulings of the *Corte Costituzionale*, Italy's constitutional court, on the Italian act implementing the Framework Decision, which were given just before this text went to press.

The Italian position at the European and domestic stage

The Italian veto on the Framework Decision: chronicle of a delay foretold

The analysis of the impact of the Framework Decision on Italian law should start with the events that prevented the immediate approval of the Framework Decision, negotiated as part of the European reaction to 9/11.[4] Indeed, the Justice and Home Affairs Council of 6-7 December 2001 had almost reached an agreement when the process was interrupted by the veto of the Italian Minister of Justice, who objected to the number of thirty-two 'crimes' in Article 2(2) of the Framework Decision.[5] After further political negotiations held in Rome on 11

[2] *See also* the Commission's reports on the implementation of the Framework Decision, COM(2005) 63 final, of 23.2.2005; COM(2006) 8 final, of 24.1.2006; COM(2007) 407 final, of 11.7.2007.

[3] *See* E. van Sliedregt, 'The European Arrest Warrant: Extradition in Transition', *European Constitutional Law Review* (2007), p. 249 et seq.

[4] On the European reaction to 9/11, *see* Conclusions and Action Plan of the extraordinary European Council of 21.9.2001, <www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/it/ec/conclbxl.i1.pdf>. For a comment on these measures, *see* B. Gilmore, 'The Twin Towers and the Third Pillar: Some Security Agenda Developments', EUI Working Paper LAW No. 2003/7, <www.iue.it/PUB/law03-7.pdf>.

[5] The Italian Minister for Justice, Mr. Castelli, preferred abolition of the double criminality check on a shorter list of crimes, such as the six serious crimes of the Treaty between Italy and Spain of 28 Nov. 2000. *See*, e.g., V. Grevi, 'Il "mandato d'arresto europeo" tra ambiguità politiche e attuazione legislative', 51 *Il Mulino* (2002), p. 122; M. Plachta and W. van Ballegooij, 'The Framework Decision

December 2001, between the Prime Minister of Belgium (holder of the European Union Presidency), Mr Verhofstadt, and his Italian counterpart, Mr Berlusconi, the Italian veto was removed, and the instrument was agreed upon a week after the veto during the Laeken European Council of 14-15 December 2001. Unlike the Minister for Justice, the Italian Prime Minister seemed not concerned about the list of crimes excluded from double criminality protection.[6] Relying on a legal opinion of two prominent Italian jurists, Justice Caianiello and Justice Vassalli,[7] both a former Minister for Justice and President emeritus of the Constitutional Court, the Prime Minister raised objections on the consistency of the Framework Decision with fundamental principles of the Italian legal order, while at the same time surprisingly accepting the Framework Decision. Thus, under pressure of the European governments the Italian veto was removed.

In the press release of 11 December 2001,[8] Mr. Berlusconi stated that the Italian government would start all domestic procedures to make the Framework Decision compatible with supreme principles of the Italian constitutional legal order on fundamental rights. Interestingly, Berlusconi also declared that the Italian judiciary would be adapted to European models in respect of constitutional principles.

It is hard to draw legal significance from this declaration. Indeed, it is not possible to imagine any *domestic* legal procedure that could make the European Framework Decision consistent with the Italian national order, because any intervention on it should take place at the *European* stage during the negotiations. Another interpretation could be that the European Framework Decision required consti-

on the European Arrest Warrant and Surrender Procedures Between Member States of the European Union', in R. Blekxtoon and W. van Ballegoo? (eds.), *Handbook on the European Arrest Warrant* (The Hague, T.M.C. Asser Press 2005), p. 13 et seq.

[6] This paved the way to some remarks on the contradictory positions taken by the Ministry of Justice and the Prime Minister. *See* V. Grevi, *supra* n. 5, p. 119 et seq.

[7] *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 concentrate 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 constitutional discipline of extradition. They also argued it violated 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, *supra* n. 5, p. 123 et seq.

[8] The statement is: 'Per dare esecuzione alla decisione quadro sul mandato di cattura europeo il governo italiano dovrà avviare le procedure di diritto interno per rendere la decisione quadro stessa compatibile con i principi supremi dell'ordinamento costituzionale in tema di diritti fondamentali, e per avvicinare il suo sistema giudiziario ed ordinamentale ai modelli europei, nel rispetto dei principi costituzionali'.

tutional revision. This meaning is even more problematic because of the reference to supreme principles of the constitutional legal order on fundamental rights: it is indeed common knowledge that those principles constitute 'implicit limits' to constitutional revision.[9] As to the second part of the declaration, the asserted need for approximation of the Italian judiciary to some vaguely defined 'European models' raises suspicions, bearing in mind the relation between Mr. Berlusconi and the judiciary. Indeed, there is no clarity on the parameters of this 'approximation' (to which European model, or models, should the Italian system be approximated?), nor does the declaration provide any reason why a reform of the judiciary would be justified or necessary in this case.[10] If the meaning of the declaration is, more plainly, that the Framework Decision needed to be implemented by the legislature in a manner that respects constitutional principles on fundamental rights, then the whole declaration could be considered pointless because this is obvious. Perhaps the declaration, which was attached to the text of the Framework Decision, is only an attempt to justify the incoherent Italian behaviour (first the veto and then the sudden reconsideration of its position) during the last stage of the negotiations on the Framework Decision.

At the same time, the stress on domestic reforms in the Prime Minister's declaration could lead one to think that, although accepted at European level, the Framework Decision still had a long way to go in its implementation at domestic level. More specifically, the well-known judicial problems of the then-Prime Minister of Italy, his position towards judges and, more generally, the climate of political hostility against the judiciary, made it improbable that the Italian government would be very eager to implement it.[11] European judicial co-operation was not at all a priority on Berlusconi's political agenda;[12] he was keener on reforms of the judiciary with the aim of limiting the independence of the public prosecutor and of

[9] *See* V. Onida, *La Costituzione* (Bologna, Il Mulino 2004) p. 55 et seq.; S. Bartole, *Interpretazioni e trasformazioni della Costituzione repubblicana* (Bologna, Il Mulino 2004) p. 353-355.

[10] More generally, the reform of the judiciary has been a political target of the parliamentary majority during the XIVth legislature (2001-2006). This declaration stresses the accent on (constitutional) reforms of the judiciary: one might get the impression that the Italian government was willing to take some impetus from the EAW instrument to push this political goal. Cf. V. Grevi, *supra* n. 5, p. 119 et seq.

[11] Minister of Reforms and Devolution Bossi (Lega Nord) defined the European Union as 'gallows-land', the land of gallows (in Italian, 'Forcolandia'); Mr. Berlusconi, at the Laeken European Council of mid-Dec. 2001, expressed concerns about an international conspiracy ('internazionale giacobina') of magistrates. *See* V. Grevi, *supra* n. 5, p. 120 et seq.; 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>.

[12] It is common knowledge that his political friends considered the personal problems with justice of Berlusconi to be the result of a plot hatched by a lobby of left-wing judges.

dealing with specific (and personal) justice problems.[13] These observations seem to be confirmed by the fact that, despite the Prime Minister's declaration of December 2001, the Italian government took no initiative whatsoever, neither for constitutional or other legislative reforms in the field of the Framework Decision nor for the implementation of the Framework Decision.[14] Italian legislation implementing the Framework Decision was passed only on 22 April 2005, sixteen months after the European deadline.

The Framework Decision in the Italian Parliament[15]

Although the Italian government eventually accepted the Framework Decision on the arrest warrant, it did not take its responsibility on the domestic stage. In fact, it never presented any legislative initiative to the Parliament on the transposition of the Framework Decision, unlike other governments;[16] it was in fact the political opposition that submitted a draft bill to the Chamber of Deputies.[17]

The ensuing debate between majority and opposition is characterised by a dilemma between trust and distrust. The majority approved a wide range of amendments, changing the draft bill to such an extent that it became unacceptable to the initiators, who therefore withdrew their signature from the bill, in order to be able to submit another draft bill on the Framework Decision later on. While the debate focused on the threat to individual liberties and the lack of judicial guarantees in

[13] As is witnessed by list of '*ad personam* acts' ('leggi *ad personam*') passed since 2001; *see* for instance Legislative Decree 61/2002 (scrutinized 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 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).

[14] Unlike in France, where the Constitution was changed by adding a paragraph to Art. 88-2 ('Statutes shall determine the rules relating to the European arrest warrant pursuant to acts adopted under the Treaty on European Union'). *See* R. Errera, 'The Relationship of Extradition Law in International Treaties with the European Arrest Warrant and its Application in France', in E. Guild (ed.), *Constitutional challenges to the European Arrest Warrant* (Nijmegen, Wolf Legal Publishers 2006).

[15] This paragraph analyses parliamentary documents which can be found on the official website of the Chamber of Deputies and the Senate of the Republic (<www.camera.it> and <www.senato.it>). A useful collection of the relevant material can be found in L. Kalb (ed.), *Mandato di arresto europeo e procedure di consegna* (Milano, Giuffré 2005) p. 536 et seq.

[16] For the United Kingdom, *see* N. MacCormick, 'A Common Approach to Crime? Observations on the European Arrest Warrant and the Democratic Deficit', in *Festschrift für Heike Jung* (Baden-Baden, Nomos 2007) p. 536.

[17] During the drafting phase, the Chamber of Deputies' Justice Committee agreed on 13.11.2003 to adopt the Draft Bill presented to Parliament by Mr. Kessler and other MPs (AC 4246-private member's bill) as a basis for the discussion, according to the proposal of its Chairman, Mr. Pecorella. *See* the documents collected in L. Kalb, *supra* n. 15, p. 536 at p. 593-594.

the Framework Decision itself, the position of the parliamentary majority was the expression of a more general negative attitude: a lack of trust in the other European Union member states and their protection of fundamental rights. As the minority protested, even bilateral extradition treaties with non-European countries are not regarded with such distrust. The parliamentary majority defended traditional extradition procedures as if they were the highest achievement of legal civilisation. This stands in stark contrast to the law and the practice of extradition in many countries.

As concerns extradition in particular, it must be remembered that until 1988 the criminal procedural code offered less protection to extraditable persons than to those suspected or accused in Italian criminal procedures (*habeas corpus*). Furthermore, the Italian Cassation Court in its early case-law accepted this difference.[18]

The Italian Act implementing the Framework Decision

A Framework Decision represents the 'translation' into the Third Pillar of the EC directive. Just like a directive, it is a legal instrument that needs to be implemented at the national level in order to be applied domestically. However, while according to the case-law of the Court of Justice directives can have direct effect under circumstances, this is excluded for Framework Decisions by the Union Treaty (Article 34(2)(b)). Nevertheless, they can derive some 'indirect' effects from the duty of consistent interpretation.[19] For this reason, the Framework Decision and the twenty-seven implementing acts form a complex system of legislation. Even though the Framework Decision on European Arrest Warrant purported to be the first legislative application of the principle of mutual recognition and was not

[18] E. Marzaduri, *Libertà personale e garanzie giurisdizionali nel procedimento di estradizione passiva* (Milano, Giuffré 1993) p. 157-158, p. 101 et seq., p. 141. Indeed the doctrine of extradition in the 1930s fascist code, which remained in force until 1988 despite the entering into force of the new Constitution in 1948, conceived extradition as a form of interstate collaboration and co-operation, as demonstrated by the strengthening of the function and powers of the Minister of Justice within the procedure. The lack of means to question the legality of measures establishing custody and the absence of release from prison for exhaustion of maximal time limits, just to mention two aspects, made personal freedom nothing but a chimera for the individuals whose extradition was requested from the Italian Republic. The 1988 Code of Criminal Procedure eliminated the aforementioned provisions that were in breach of the Constitution. *See* E. Marzaduri, *supra* in this note, p. 123 et seq., p. 141 et seq., p. 149 et seq.

[19] *See* P.-Y. Monjal, 'Le droit dérivé de l'Union européenne en quête d'identité. A propos de la première décision–cadre du Conseil de l'Union européenne du 29 mai 2000', 36 *Revue trimestrielle de droit européen* (2001), p. 335-370; ECJ 16 June 2005, Case C-105/03, *M. Pupino*; on this decision and its implications, *see* E. Spaventa, 'Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Decision in *Pupino*', *European Constitutional Law Review* (2007), p. 5-24.

meant to be a harmonising measure, it *de facto* led (also) to the approximation of national legislation on surrender procedures between European states.[20] At the same time, the lack of an infringement procedure comparable to the one in the EC, leaving Third Pillar legislation without a powerful enforcement mechanism at the supranational level,[21] gives national legislatures ample room to deviate from it, as an analysis of the Italian act implementing the Framework Decision shows.

Fundamental rights as limits to mutual recognition

Article 1(1) of Act 22 April 2005, No. 69, the Italian act implementing the Framework Decision[22] provides that the implementation of the Framework Decision in the Italian legal order respects the supreme principles of the Italian constitutional order with regard to fundamental rights, including the rights on personal freedom and due process. The legislature thereby refers to the 'counter-limits doctrine' (*dottrina dei controlimiti*) of the Italian Constitutional Court. 'Counter-limits' are limits to the limitations of sovereignty accepted by a state, e.g., Italy. This doctrine aims at defining the relationship between, in this case, the Italian and European legal orders. Community acts that infringe fundamental rights or other fundamental values are not applicable in the domestic legal order and the Constitutional Court can sanction the violation of such constitutional limits.[23] It is for the first time that the counter-limits doctrine of the Constitutional Court receives a legislative hallmark.[24]

[20] *See* P. Bilancia, 'Lo spazio di libertà, sicurezza e giustizia tra realtà intergovernativa e prospettiva comunitaria', 14 *Rivista italiana di diritto pubblico comunitario* (2004), p. 359 et seq. This approach to integration in the criminal law sector seems to be an(other) example of the neo-functionalist method of dealing with procedures referred to extradition mixed with a sectoral perspective. On the relationship between harmonisation and mutual recognition, *see* the recent decision on the European Arrest Warrant of the European Court of Justice: C-303/05, *Advocaten voor de Wereld*, paras. 55-61. *See* the case note of F. Geyer, in this journal, 2008, p. 149 et seq.

[21] Furthermore, the arbitral settlement laid down by Art. 35(7) EU, did not prove to be effective in practice. *See* A. Weyembergh and S. de Biolley (eds.), *Comment évaluer le droit pénal européen?* (Brussels, Editions de l'Université de Bruxelles 2006).

[22] Act 22 April 2005, No. 69: 'Provisions to implement framework decision 2002/584/JHA (…) on EAW and surrender procedures between member states.' ['Disposizioni per conformare il diritto interno alla decisione quadro 2002/584/GAI del Consiglio, del 13 giugno 2002, relativa al mandato d'arresto europeo e alle procedure di consegna tra Stati membri'], published in the *Gazzetta Ufficiale* [2005] No. 98, 29.4.2005.

[23] This doctrinal position is also taken by the German constitutional courts. Both the Italian and the German constitutional courts reject the monistic approach followed by the European Court of Justice. *See* G. Itzcovich, 'Sovereignty, legal pluralism and fundamental rights: Italian jurisprudence and European integration (1964-1973)', 10 *European Public Law* (2004); G. Martinico, 'Complexity and Cultural Sources of Law in the EU Context: From the Multilevel Constitutionalism to the Constitutional Synallagma', 8 *German Law Journal* (2007), p. 205 et seq.

[24] Among the Constitutional Court's case-law, *see* especially judgments No. 170 of 1984 ('Granital'), and No. 232 of 1989 ('Fragd'). For a doctrinal reflection on this theory, *see* M. Cartabia, *Principi inviolabili e integrazione europea* (Milano, Giuffré 1995).

The emphasis in Article 1(1), the first of several provisions on constitutional guarantees, on the duty to protect constitutional fundamental rights contrasts with the attitude on the European level. The European Union Council agreed unanimously not to mention protection of fundamental rights in the actual text of the Framework Decision, on the assumption that a clause in the Preamble[25] was enough to express the European commitment to the individual's fundamental rights. The national governments apparently were not interested in developing this commitment beyond the 'embryonic stage'. This fundamental rights deficiency is commonly perceived as a weak point of the Framework Decision.[26] Scholars have criticised this aspect and have tried to suggest remedies.[27] Moreover, the Commission has initiated European legislation on common procedural minimum standards to smooth the functioning of the mutual recognition system,[28] and the Italian Parliament has emphasised the need to respect fundamental rights.

Article 2 of the Italian Act states that, in conformity Article 6 EU and recital 12 of the preamble of the Framework Decision, the execution of the European arrest warrants must respect fundamental rights and principles contained in both international treaties and the Constitution. It specifically mentions Article 5 (the right to liberty and security of person) and Article 6 (due process and fair trial rights) of the European Convention on Human Rights (hereafter, ECHR), and

[25] To be precise, clauses 12 and 13 of the Preamble of Framework Decision 2002/548/JHA. Although they are not legal provisions in themselves, statements in preambles of legal texts can confirm the interpretation of a legal provision. *See*, interestingly, *Corte di Cassazione*, *Sezioni Unite*, judgment 30.1.2007-5.2.2007, No. 4614, para. 7, 'in diritto'. Even if read *juncto* with Art. 1(3) of the Framework Decision, this public policy exception looks limited and minimalist. Art. 1(3) states as follows: 'This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.'

[26] The literature on this aspect is abundant. *See*, *ex multis*, J. Wouters and F. Naert, 'Of Arrest Warrants, Terrorist Offences and Extradition Deals: an Appraisal of the EU's Main Criminal Law Measures against Terrorism after "11 September"', 41 *Common Market Law Review* (2004), p. 909-935, especially p. 924-925; S. Alegre and M. Leaf, *European Arrest Warrant. A solution ahead of its time?* (London, Justice 2003), p. 14 et seq.

[27] Among the first authors to write on this aspect, *see* N. Vennemann, 'The European Arrest Warrant and its Human Rights Implications', 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2003), p. 103-121.

[28] This initiative faced serious troubles: the first version, presented by the Commission [COM(2004)328 final], was shelved by the Council of Ministers, reluctant to adopt a EU piece of legislation on this matter. For a comment, *see* R. Lööf, 'Shooting from the Hip: Proposed Minimum Rights in Criminal Proceedings throughout the EU', 12 *European Law Journal* (2006), p. 421-430. A second and less ambitious version presented by the German presidency in Feb. 2007, has now been definitively abandoned for the lack of political will to adopt it, as ascertained in the last summit held under the German Presidency. *See* the Presidency Conclusions of Brussels European Council of 21-22 June 2007, especially para. 27, available at <www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf>.

constitutional principles such as the protection of personal freedom, due process, the principle of personal culpability, and proportionate sanctioning. A strong core of both international and constitutional rules protecting individuals against public powers underpins the Italian legal framework for the operation of the European arrest warrants. In this context the position of the ECHR as a point of reference in the search for common European standards is remarkable.

Furthermore, Article 2(3) (redundantly) states that Italy shall refuse execution of European arrest warrants in case of a serious and persistent breach of fundamental rights enshrined in the ECHR (personal freedom and due process rights) by the issuing state, as ascertained by the European Council under Article 7 EU. The impact of this provision is uncertain, because it subordinates refusal of the execution of a warrant to a declaration of the Council under Article 7 EU, which is a notorious highly political procedure. Moreover, the European Framework Decision (at Recital 10) itself under such circumstances makes possible the more drastic measure of suspending the whole system of the European arrest warrants.

Article 18 tackles this seeming contradiction by presenting a detailed list of grounds for refusal of an arrest warrant. This demonstrates that the human rights discourse entails grounds for refusal to surrender individuals. These are more numerous than in the Framework Decision,[29] which may hamper the efficient co-operation schemes in criminal matters developed under the mutual recognition principle. Nevertheless, both the Third Pillar legislature and those of the member states, although in different degrees, in principle resolve the antithesis between fundamental rights of persons involved and duty to co-operate among investigative authorities in favour of fundamental rights by formulating exceptions to mutual recognition.

It is indeed essential that fundamental rights and other refusal grounds operate as corrective mechanisms to the quasi-automatic functioning of mutual recognition as in the Framework Decision. This is so because mutual recognition cannot be absolute, but only dependent on the respect of certain pre-conditions, especially when it operates in a context of different national justice systems in an area with such a high impact on personal freedom.[30]

[29] I.e., statement on respect for human rights in the Preamble, and lack of a ground for refusal based on the risk of breach of fundamental rights in the legal text; grounds for refusal enumerated at Art. 3 and 4 of the Framework Decision.

[30] *See* on the concept of 'conditionality' of the mutual recognition principle L. Marin, *Il principio di mutuo riconoscimento nello spazio penale europeo* (Napoli, Editoriale Scientifica 2006) p. 65-74. The principle of mutual recognition goes beyond the single measure to be recognised, but implies to some extent a 'systemic' recognition of foreign legal systems, including criminal law, procedural rules, and also enforcement institutions, such as the judicial power and its role within the constitutional system. I therefore argue that in an area of law with a high impact on personal freedom, mutual recognition can only be based on a shared legal culture and judicial practice. In any case,

One may wonder why the legislature, especially the European one, chose not to match the first mutual recognition instrument more strongly to a European logic of active protection of fundamental rights in order to better reinforce its programme of strengthening transnational co-operation among judges. Anyway, it is clear that the lack of fundamental rights guarantees in the text of the Framework Decision only inspired member states to take many different directions, thus encouraging divergence in this very sensitive field.[31]

Refusal grounds

As said before, Article 18 holds more grounds for refusal of the execution of an arrest warrant than the European Framework Decision itself. The Italian legislator extended the grounds for mandatory refusal which are contained in Article 3 of the Framework Decision. Furthermore, optional grounds of refusal listed in Article 4 of the Framework Decision became mandatory. Though the latter can be found in implementation acts of other member states as well, taken together with the mandatory refusal grounds added by the Italian legislator, the situation is nevertheless problematic from the perspective of compliance with the Framework Decision. In all, Italian law formulates twenty mandatory grounds for refusal.

Most of the refusal grounds are inspired by the rationale of protecting human rights. Execution of an European arrest warrant must be refused when it is issued to accuse or punish someone for reason of sex, race, religion, ethnical origin, nationality; when a maximum limit for pre-trial detention is absent in the issuing state; when it is issued for a political offence; when the conviction took place in an unfair process in which the minimum rights of the accused as enshrined in Article 6 of the ECHR were violated; when there is a risk that the requested person will be sentenced to death or tortured.[32] However, other refusal grounds are motivated by the wish to control the jurisdiction of the issuing state from a perspective of substantive criminal law. This concerns situations in which a right was violated with the consent of the individual concerned, or the charged fact constitutes the exercise of a right, the execution of a duty, or has been determined by fortuitous event or *force majeure*; and the situation in which the requested person has immunity according to Italian law.[33] These latter refusal grounds refer to the idea of

corrective mechanisms, such as the possibility of refusal of the Framework Decision on human rights grounds, work as antibodies that help keep the system healthy. *See also* M. Poiares Maduro, 'So Close and Yet So Far: the Paradoxes of Mutual Recognition', 14 *Journal of European Public Policy* (2007), p. 814-825, especially p. 823.

[31] Cf. on this aspect, E. van Sliedregt, *supra* n. 3, p. 249; S. Alegre and M. Leaf, *supra* n. 26, p. 15 et seq.

[32] *See* the letters a), e), f), g), h) of Art. 18.

[33] Such as letters b), c), q), and u) of Art. 18.

double criminality *in concreto*, which was not applied even under the conventional extradition schemes, and can be deemed to be an expression of anything but trust in European counterparts.[34] Though many provisions are meant to tackle issues not appropriately dealt with by the Framework Decision, it is not certain whether values by which Italian law seems to be inspired are consistent with those underpinning European integration in criminal matters.

The mandatory refusal of surrender for political crimes (Article 18 under f), although excluded by the Framework Decision, corresponds to a prohibition in the Italian Constitution which is applicable to Italian citizens as well as to foreigners.[35] The ban to surrender to all those countries which do not have a maximum temporal limit for detention on remand pending trial (Article 18 under e) reflects a constitutional principle. Section 13(5) of the Constitution aims at limiting and controlling the employment of detention on remand pending trial. However, the ban set in Article 18, letter e) is certainly not proportionate, because it does not reckon with those legal systems based on *continuous review* mechanisms in order to achieve the same goals as Section 13.

Double criminality[36]

As to the well-known list of thirty-two crimes for which Article 2(2) of the Framework Decision abolishes the double criminality requirement, the Italian Parliament adopted a contrary solution. In Article 7(1) it holds on to the double criminality check in principle. In Article 8, entitled 'mandatory surrender', the legislature states that the Italian courts will execute an arrest warrant without double criminality check for a list of facts, with the proviso that punishment requirements are met as requested in the European Framework Decision. However, it

[34] *See also* M. Del Tufo, 'Il rifiuto della consegna motivato da esigenze di diritto sostanziale', in G. Pansini and A. Scalfati (dir.), *Il mandato d'arresto europeo* (Napoli, Jovene 2005) p. 146 et seq.; A. Damato, 'Il mandato d'arresto europeo e la sua attuazione nell'ordinamento italiano (II)', 10 *Il Diritto dell'Unione Europea* (2005), p. 203-251.

[35] *See*, for this purpose, Sections 10 and 26 of the Constitution. For a comment, *see* A. Cassese, 'Articolo 10', in AA. VV., *Principi fondamentali. Art. 1-12*, in G. Branca (ed.), *Commentario della Costituzione* (Bologna, Zanichelli 1975) p. 544 et seq.; N. Mazzacuva, 'Articolo 26', in AA. VV., *Rapporti civili. Art. 24-26*, in G. Branca (ed.), *Commentario della Costituzione* (Bologna, Zanichelli 1981). Furthermore, the doctrine interpreted the possibility of refusal implicitly provided in the Framework Decision as expression of the non-discrimination clause. At the same time, the doctrine stressed the evolution of the European political context, i.e., with reference to 'de-politicisation clauses' contained in many treaties. Through these clauses, contracting parties reciprocally engage not to consider a given set of crimes of a political nature for the purpose of extradition. *See* S. Buzzelli, 'Il mandato d'arresto europeo e le garanzie costituzionali sul piano processuale', in M. Bargis and E. Selvaggi (eds.), *Mandato d'arresto europeo. Dall'estradizione alle procedure di consegna* (Torino, Giappichelli 2005) p. 97.

[36] Not to be confused with the double jeopardy principle, also known in Europe as *ne bis in idem* principle.

then enumerates a list of national criminal provisions corresponding to those listed in the Framework Decision. It is clear that Italian Act in this way clashes with the European Framework Decision, as it *de facto* denies the abolition of the double criminality check, whereas according to the letter and the spirit of the framework legislation only the criminal qualification of the *issuing state* should be taken into account.[37] This is recently confirmed by the European Court of Justice in its judgment on the European Arrest Warrant Framework Decision.[38]

Articles 7 and 8 of the implementing Act therefore restore the double criminality check. The impression is that the legislature was uncomfortable and not ready for the partial abolition of double criminality, as demonstrated by the positions taken by the Minister of Justice during the negotiations and in Parliament. The Italian position seems at least partly the result of a misunderstanding of the concept of mutual recognition, inspired by some early scholars who sought satisfaction of the *lex certa* requirement in the Framework Decision itself.[39] Both minister and the Parliament regarded the Framework Decision as a federal law defining and punishing federal crimes. Under mutual recognition mechanisms, the *lex certa* principle has to be satisfied in the national legislation of the issuing member state.[40] Furthermore, according to the doctrine, the application of a European arrest warrant is problematic in the following situations: (1) the facts for which surrender is sought lack criminalisation in the executing state and (2) the commission of the facts took place in the executing state.[41] In my opinion, the best solution for these cases would be to limit the extraterritorial effectiveness of the substantial criminal law of the issuing state. The lack of co-ordination of member states' criminal jurisdictions appears here in its dangerous potential: in these cases European arrest warrants indeed work as a 'resonator' for the most severe criminal rules, espe-

[37] L. Salazar, 'La lunga marcia del mandato d'arresto europeo', in M. Bargis and E. Selvaggi (eds.), *supra* n. 35, p. 21.

[38] *See* ECJ 3 May 2007, Case C-303/05, *Advocaten voor de Wereld*, paras. 55-61, in particular paras. 57-58.

[39] In the Italian legal order, the doctrine has formulated those principles as '*tassatività*' and '*determinatezza*' of the criminal norm, which are corollaries of the legality principle. For a similar doctrine, *see* the judgment ECtHR, 15 Nov. 1996, Case No. 45/1995/551/637, *Cantoni* v. *France*, on the principles of accessibility and the foreseeability of the criminal rule.

[40] *See*, especially on this point, paras. 48-54, in particular 52-53, of the ECJ's decision, *Advocaten voor de Wereld* (*supra* n. 38) For some references to the national debate on this issue, *see* E. Rosi, 'L'elenco dei reati nella decisione sul mandato d'arresto europeo: l'UE "lancia il cuore oltre l'ostacolo"', 10 *Diritto penale e processo* (2004), p. 377 et seq. For a different position, *see* S. Riondato, 'Dal mandato d'arresto europeo al libro verde sulle garanzie alla Costituzione europea: spunti sulle nuove vie di affermazione del diritto penale sostanziale europeo', 17 *Rivista trimestrale di diritto penale dell'economia* (2004), p. 1128-1135.

[41] The reference is to Stefano Manacorda, 'L'exception à la double incrimination dans le mandat d'arrêt européen et le principe de légalité', 42 *Cahiers de droit européen* (2007), p. 149 at p. 167 et seq.

cially problematic when the conduct is not considered criminal by the executing state. However, the Framework Decision ignores the problem.

The right to a judicial remedy against surrender

Article 22 of the implementing Act provides for a judicial remedy before the Court of Cassation against the decision of the court of appeal on the surrender. On the basis of this provision, the only way to question the legality of an arrest warrant, the person requested can raise objections on grounds related either to its merit or to the law. The Court of Cassation has to decide within rigid time limits.[42]

The Italian regulation fills a gap in the Framework Decision. The only procedural protection demanded by the Framework Decision is a right to be informed (Article 11) and to be heard by a judicial body in case the requested person opposes surrender (Article 14). In terms of (even) minimum defence rights to be incorporated into every national legal order, the Framework Decision is thus very minimalistic.

The Italian implementing Act by providing for a '*ricorso per Cassazione*', in particular complies with Section 111(7) of the Constitution, which gives everybody the right to bring an action before the Court of Cassation against measures *de libertate*.[43] However, the Italian implementing Act goes further than this, as the appeal against a surrender decision can be based not only on grounds of law, but also factual grounds.

In practice: The interpretation of the *Corte di Cassazione*

At present there are several decisions of the *Corte di Cassazione* on Act No. 69/2005 implementing the Framework Decision. The following part will focus on this case-law.

The first decision of the *Corte di Cassazione* to uphold a surrender sounded like a symbolic approval of the European arrest warrant instrument by the Italian judiciary. The case had a high media impact as a suspect in the London bombings of 21 July 2005 was involved.[44] The Court ruled that the Italian provisions on

[42] *See* Art. 22, co. 3, 4, 6 of Act No. 69 of 2005.

[43] The provision states that 'Appeals to the Court of Cassation for breaches of law are always allowed against judgments and against measures on personal freedom pronounced by ordinary and special courts. This rule can only be waived in cases of sentences by military tribunals in time of war.'

[44] *Corte di Cassazione*, '*Sezione feriale*', judgment 13.9.2005-14.9.2005, No. 33642, Hussain. For a comment, *see* F. Peroni (ed.), 'Osservatorio della Corte di cassazione- Processo penale', 11 *Diritto Penale e Processo* (2005), p. 1528-1529; A. Scalfati, 'Il Commento', 12 *Diritto Penale e Processo* (2006), p. 83 et seq.

European arrest warrants have to be interpreted in compliance with the Framework Decision. Interpretation in conformity with the Framework Decision is indeed one of the two trends which characterise the case-law of the *Cassazione* until now. The other trend concerns interpretation of the implementation act in conformity with the Italian constitutional system in order to give procedural guarantees with regard to the arrest and surrender of the person requested. We will begin with the latter.

Interpreting the implementing Act in conformity with the Italian constitutional order

In its Spinazzola judgment of 2006[45] the *Corte di Cassazione* held that the period in which an arrest on the basis of a European arrest warrant should be validated (*convalida dell'arresto*) and precautionary measures (detention; *misure cautelari*) should be issued, is the same as that in the code of criminal procedure for purely national cases, i.e., 48 hours from the reception of the arrest report (*verbale di arresto*). The European Framework Decision does not change the applicability of the constitutionally based legal rules involved.[46] The aim of the arrest warrant's validation is to have the deprivation of liberty scrutinised by a court. In a second decision of that same year,[47] the Court held that the period of 48 hours in which the arrest should be validated, starts at the reception of the arrest report of the police, not at the moment the arrested person is heard by the court.[48]

These decisions have the clear goal of signalling to the Italian judicial bodies that the Framework Decision has not modified the legal terms on deprivation of freedom, which belong to the constitutional tradition of *habeas corpus*. The simplified and speedy system of extradition within European Union member states does not allow national courts to neglect legal procedural guarantees rooted in the Constitution. The Italian Constitution does not retreat before European law, because the coexistence of the different sets of legal provisions involved is possible here:

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

[46] The reference is to Section 13 of the Constitution, stating: 'Personal liberty is inviolable. No form of detention, inspection or personal search is admitted, nor any other restrictions on personal freedom except by warrant which states the reasons from a judicial authority and only in cases and manner provided for by law. In exceptional cases of necessity and urgency strictly defined by law, the police authorities may adopt temporary measures which must be communicated within forty-eight hours to the judicial authorities and, if they are not ratified by them in the next forty-eight hours, are thereby revoked and become null and void. All acts of physical or moral violence against individuals subjected in any way to limitations of freedom are punished. (5) The law establishes the maximum period of preventive detention.'

[47] *Corte di Cassazione*, Section VI, judgment 21.11.2006-12.12.2006, No. 40614, Arturi, on Article 13 of Act No. 69 of 2005.

[48] *Corte di Cassazione*, Section VI, judgment 21.11.2006-12.12.2006, No. 40614, Arturi, para. 2.

the applicability of the Italian procedural guarantees does not threaten the coherence of the execution of European arrest warrants in the European constitutional order.

Interpreting the implementing Act in conformity with the Framework Decision and international rules on extradition

Again, we can observe that the *Corte di Cassazione* is moving at two different levels. On a first level, the Court interprets the Italian implementing Act in conformity with the European Framework Decision, which is its immediate source.[49] They concern, *inter alia*, procedural provisions that could have severely hindered the practical functioning of the system of European arrest warrants if they had not been interpreted in the light of the Framework Decision. On a second level it treats the 'Italian-European' arrest warrant like conventional extradition[50] as regulated by the familiar European Convention of 1957.[51] Most of the activities of the *Corte di Cassazione* concern the first level.

A duty of co-operation among judicial authorities – In several decisions, the Court tried to find a balance between the Italian court's option to refuse the execution of an arrest warrant for lack of necessary information in the surrender request and the option to ask the issuing court to additionally provide this information.[52] This seems to encourage Italian courts to establish direct contacts with their colleagues in order to limit hindrance of this mechanism of co-operation, and implies, in my analysis, a duty of Italian judges to co-operate with other European colleagues. This duty finds a basis on the European level in the principle of mutual trust, binding courts,[53] to which the *Corte di Cassazione* has referred several times. This principle of mutual trust draws on the principle of loyal co-operation in Article 10 of Community Treaty, which, *mutatis mutandis*, also applies to the Third Pillar.[54]

The Court further had the opportunity to penalise the misuse of the Framework Decision surrender procedure. It quashed a surrender decision in a case in

[49] Through systematic interpretation 'secundum legem'.

[50] Through systematic interpretation 'secundum jus'.

[51] *Corte di Cassazione*, 'Sezione feriale', judgment 13.9.2005-14.9.2005, No. 33642, Hussain.

[52] *Corte di Cassazione*, Section VI, judgment 21.11.2006-12.12.2006, No. 40614, Arturi, para. 4, 'in diritto'. This intepretation has been confirmed in *Corte di Cassazione*, 'Sezioni Unite', judgment 30.1.2007-5.2.2007, No. 4614, Ramoci Vllaznim.

[53] *See* H. Labayle, 'Les perspectives du contrôle juridictionnel de la confiance mutuelle dans l'Union européenne', in G. de Kerchove and A. Weyembergh (eds.), *La confiance mutuelle dans l'espace pénal européen – Mutual Trust in the European Criminal Area* (Bruxelles, Editions de l'Université de Bruxelles 2005) p. 123-147, especially p. 147, p. 137.

[54] *See* ECJ 16 June 2005, case C-105/03, *M. Pupino*.

which the requested persons were not suspected or accused of the crime in question, but surrender was merely requested because the investigating authorities deemed it useful to interrogate them in a preliminary investigation (concerning other suspects).[55] Indeed, these activities fall outside the scope of the Framework Decision. Meanwhile, the persons requested had already been surrendered to Belgium, because the *Corte di Cassazione* did not give its decision until after the surrender had already taken place. This case brings to the surface the open issue of the consequences of unlawful surrender, which seems to be one of the shortcomings of the system.

The scope of the judicial review – A significant group of decisions dealt with the requirements in the implementing act that 'serious circumstantial evidence of culpability' (*gravi indizi di colpevolezza*) against the requested person is a condition for approval of the surrender request (Article 17(4)) and that European arrest warrants have to be supported by reasons (Article 18(1) under letter t).

The *Corte di Cassazione* held[56] that the condition of the existence of 'serious circumstantial evidence of culpability' does not mean that the Italian court should verify whether such evidence exists according to national law.[57] It merely implies that the Italian court has to verify whether according to the issuing authority there is circumstantial evidence indicative of a criminal fact. This less rigorous check is in compliance with Recital 8 of the Preamble of the Framework Decision, which refers to 'sufficient controls' in the execution of an arrest warrant.

The Court used the underlying concept of trust of the executing judge to reach a similar conclusion regarding the condition that European arrest warrants be supported by reasons. According to the higher court, this condition is satisfied if the issuing authority provides some factual evidence against the requested person.[58]

These judgments refer to the principle of non-enquiry in traditional extradition law, which is (also) based on a principle of mutual trust and good faith between States that conclude extradition treaties, and which prohibits the thorough scrutiny of an extradition request and the underlying facts. In this sense, this case-

[55] *Corte di Cassazione*, Section VI, judgment of 17-19.4.2007, No. 15970, Piras e Stori.

[56] *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.

[57] I.e., as 'esposizione logico-argomentativa del significato e delle implicazioni del materiale probatorio'.

[58] This interpretation has been confirmed on many occasions: *see*, *inter alia*, *Corte di Cassazione*, Section VI, judgment 27.4.2007-9.5.2007, No.17810, Imbra.

law is not groundbreaking; it rather endorses to European arrest warrants a general principle of inter-state co-operation in criminal matters.

Maximum terms of detention on remand – Another group of decisions dealt with the condition in the implementing Act that surrender shall be refused if the legislation of the issuing state does not set a maximum term for detention on remand pending trial (Article 18(1), under letter e). This provision, which does not have a direct legal basis in the Framework Decision and which is not found in traditional extradition law, is inspired by Section 13(5) of the Italian Constitution, which states: 'The law establishes the maximum period of preventive detention'. Its goal is to limit detention on remand pending trial, balancing the principle of individual freedom and the presumption of innocence against the requirements of justice and protection of society. Many European countries perform the same balancing act with different instruments. As mentioned above, some of them, including the United Kingdom and Belgium, have adopted systems of *continuous review* of the legitimacy of detention on remand pending trial.

Article 18(1) under letter e) gave rise to different interpretations in the case-law of the supreme court, especially of Section VI of the *Corte di Cassazione*. In some judgments the literal interpretation was used and in others a teleological and systematic one was preferred.[59] This explains why the question was referred to the United Chambers (*Sezioni Unite*) of the Court, whose specific task is to resolve conflicting interpretations.

The *Sezioni Unite*[60] chose plainly to interpret Italian law consistently with the European Framework Decision. The *ratio* of the provision in the Italian implementing act, a direct expression of a constitutional provision, is to limit and control preventive detention. The *Sezioni Unite* indicated that there is a duty for the courts to look for and to consider 'functional equivalences',[61] i.e., different instru-

[59] *See Corte di Cassazione*, Section VI, judgment 8.5.2006-15.5.2006, No. 16542, Cusini: this decision suggests a restrictive and literal interpretation of the provision. In a different pronouncement (*ordinanza* 2.10.2006-23.11.2006, Ramoci Vllaznim) the same Section (VI) opted for an 'extensive' reading of the same provision. In a previous judgment, No. 24705, of 12.7.2006-1.9.2006, Charaf, the Court rejected the claim of maximum time limits for detention on remand pending trial, deciding on a European arrest warrant issued by a French judge.

[60] *Corte di Cassazione*, 'Sezioni Unite', judgment 30.1.2007-5.2.2007, No. 4614, Ramoci Vllaznim; *see* G. Negri, 'Salvo il mandato d'arresto Ue', *Il Sole-24 Ore*, 31 Jan. 2007, who stresses how the *Corte di Cassazione* extensively interprets the Italian implementing act, achieving a more 'European' interpretation of the transnational instrument.

[61] In my opinion, the principle formulated by the *Corte di Cassazione* is the principle of 'equivalence' among different legal orders. It is natural to find a parallelism here with the economic integration of Europe. The scholars that dealt with the functioning of the internal market argued that the mutual recognition principle implies and is strictly related to the equivalence principle. *See* A. Bernel, *Le principe d'équivalence ou de 'reconnaissance mutuelle' en droit communautaire* (Zürich, Schulthess

ments protecting the same value. In doing so, according to the Court, they have to pay attention to both the legal rules and the actual practice of the legal system in which the requesting authority operates. This makes clear that mutual recognition in judicial co-operation goes beyond the acceptance of a single judgment or decision: mutual recognition embraces the entire justice system.[62]

Whatever the legitimacy of the Italian legislature's choice, the impact of a literal interpretation of the legal provision of Article 18(1) under letter e) would have meant a drawback for the functioning of Framework Decision, hindering the collaboration of Italy with a significant group of European partners. Moreover, Italy would have run a specific risk of becoming a 'haven' or refuge-state for criminals wanting to escape from the prosecuting justice of other European countries.

Some reflections on the Framework Decision's impact at the national constitutional level

The 'European mandate' of Italian Court(s)

As we have seen, after a sixteen-month delay the Italian Parliament passed the law designed to meet its obligations under the European Union treaty, filling several gaps in the European Framework Decision with norms borrowed from domestic criminal procedural law instead of from traditional international extradition law. This looks like another symptom of the reluctance with which the Italian legislature accepted the Framework Decision, strengthening guarantees for individuals but at the same time 'muddling' the smooth surrender procedure. This also explains the significant amount of case-law of the *Corte di Cassazione* on the interaction between the national and European legal sources and its impact on constitutional guarantees.[63]

The analysis of this case-law demonstrates that the *Corte* on the one hand uses national constitutional guarantees to protect personal freedom. On the other hand, the *Corte di Cassazione* interprets national rules in conformity with the European rules and their basic principles, such as mutual trust and mutual recognition.[64] In

Polygraphischer Verl. 1996); more recently, Luisa Torchia, *Il governo delle differenze* (Bologna, Il Mulino 2006), argued that mutual recognition is one of the 'techniques' giving shape to the equivalence principle: at p. 68, note 31.

[62] As argued by Poiares Maduro, mutual recognition in the context of justice and home affairs is 'systemic'. *See* M. Poiares Maduro, *supra* n. 30, p. 823.

[63] This study does not aim to give a complete survey of case-law on the European Arrest Warrant.

[64] The *Corte di Cassazione* often refers in its judgments to the principle of mutual trust, a conceptual pivot for mutual recognition instruments such as the EAW.

doing so, the Court clearly (also) acts according to its 'European mandate',[65] and not only as a supreme court of the national legal order. In fulfilling this task, the Court generously employs the teleological-systematic interpretation method, thus giving an extensive interpretation to national rules, especially when a literal interpretation would lead to a result inconsistent with the European Framework Decision. Paraphrasing, we could say that the Court practices the adage *in dubio pro jure europeo*.[66] The Court demonstrates its will to avoid national 'particularism' hindering the achievement of a common supranational result.[67]

Convergence of legal orders is certainly one of the virtues of consistent interpretation. This is satisfactory when one focuses on interactions between different legal orders. Nevertheless, consistent interpretation is problematic in view of the relationship between the national judiciary and the national parliament. The *Corte di Cassazione* seems to be aware of this, although not all its judgments seem to point in the same direction. This can be demonstrated by several judgments in which the interpretation of Article 18(1) under letter e) of the implementing Act, which as we have seen holds the requirement of a maximum period of detention on remand pending trial, was at stake.

On the one hand, the *Sezioni Unite,* by opting for an interpretation consistent with the Framework Decisions were deliberately avoiding the re-activation of a political discourse on this issue. The final result is not very different from the case-law[68] of the British House of Lords on the Extradition Act of 2003, which

[65] In the words of Monica Claes, *The National Courts' Mandate in the European Constitution* (Oxford, Hart Publishing 2006).

[66] In my opinion, the Court goes beyond the duty of consistent interpretation as stated in *Pupino* by the ECJ. In contrast, the Court seems to apply here a kind of consistent interpretation similar to the domestic concept of *interpretazione conforme a Costituzione* (interpretation consistent with the Constitution). This is a peculiar interpretation adopted by the *Corte Costituzionale* to avoid a declaration of unconstitutionality of a piece of legislation, but thus manipulating the literal wording of the legislation. *See* R. Romboli, 'La natura della Corte costituzionale alla luce della sua giurisprudenza più recente', paper available at <www.associazionedeicostituzionalisti.it/dottrina/giustizia_costituzionale/romboli.html>.

[67] According to the author this case-law is a demonstration of the principle of the universalizability of deliberative choices. *See* M. Poiares Maduro, 'Contrapunctual law: Europe's Constitutional Pluralism in Action', in N. Walker (ed.), *Sovereignty in Transition* (Oxford, Hart Publishing 2003) p. 524-525. *See also* 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* (Napoli, Edizioni Scientifiche Italiane 2006) p. 217-238.

[68] Judgment of 28.2.2007 of the House of Lords, *Dabas*, available at <www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070228/dabas-1.htm> but also House of Lords, decision of 17.11.2005, *Armas*, available at <www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd051117/armas-1.htm>.

argues for an interpretation of national law consistent with the European Framework Decision.[69]

On the other hand, when Section VI of the *Corte di Cassazione* opted for the literal interpretation in its decision No. 16542/2006, it was fully conscious of the risks involved for European judicial co-operation.[70] Furthermore, it recognised that neither the European Framework Decision nor traditional extradition provisions provide ground for the refusal of extradition based on the absence of a maximum period of detention on remand pending trial in the requesting state. And it admitted that the case-law of the Strasbourg Court seems to indicate that the Strasbourg Court prefers continuous reviews of preventive detention as more responsive to reasons of protection of personal freedom and the necessities of justice. In my view, the clear aim of the *Corte di Cassazione* was to let the problem surface, in order to bring it to the attention of the Constitutional Court and possibly the Parliament as well. Later that same year, the Venice Court of Appeal took the opportunity to refer the question to the Constitutional Court.[71]

Generally speaking, this approach should be applauded, for several reasons. First of all, the question relates to (the broader issue of) interaction between the Italian and European legal orders, with systemic implications for constitutional law. Second, in line with the current trend of 'judicialisation' of law, the Constitutional Court is the proper institution to decide which antinomies deserve a judicial solution and which deserve a political answer from the Parliament.[72] In this way, the Court controls the delimitation of legislative and judicial powers. Third, the Italian Constitutional Court is one of the actors that can contribute to the constitutional dialogue at the heart of the European integration process. This is crucial for the consolidation of a legal order based on the rule of law and human rights, which are especially at stake in Third Pillar matters.[73]

[69] *See* N. Padfield, 'The Implementation of the European Arrest Warrant in England and Wales', in this journal, 2007, p. 253 et seq.

[70] *Corte di Cassazione*, Section VI, judgment 8.5.2006-15.5.2006, No. 16542, Cusini.

[71] 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.gazzetta ufficiale.it>.

[72] As is well-known, the constitutional courts in Germany, Poland and Cyprus, declared the national acts implementing the Framework Decision unconstitutional, thereby obliging the national parliaments to take their responsibilities, though in different ways and for various reasons. *See* S. Ninatti, 'Cittadinanza e fiducia reciproca fra Stati membri nella sentenza della corte costituzionale tedesca sul mandato d'arresto europeo', in N. Zanon (ed.), *supra* n. 67, p. 239 et seq. and L. Marin, *supra* n. 67, p. 217-238.

[73] I wish to recall here that the Constitutional Court does not deem itself a national judge within the scope of Article 234 EC Treaty, as stated in its order No. 536 of 1995, in <www.giurcost.org>. On this issue, *see* M. Cartabia, '"Taking Dialogue Seriously". The Renewed Need for a Judicial Dialogue at the Time of a Constitutional Activism in the European Union', Jean Monnet Working

As mentioned before, just before this article went to press, the Constitutional Court ruled on two questions concerning the Framework Decision. The first decision, order No. 109 of 18 April 2008, regards the question referred to it by the Venice Court of Appeal on Article 18(1) under e), discussed above. The Constitutional Court declared the question inadmissible because the Venice Court of Appeal had not demonstrated that other interpretations than the literal interpretation were not viable. The Constitutional Court pointed to the decision of the *Sezioni Unite* and embraced the interpretation given by that Court. In my view, the decision is in line with earlier case-law of the *Corte Costituzionale*. Indeed, the Italian Constitutional Court only declares a provision unconstitutional if no interpretation consistent with the Constitution (*interpretazione conforme a Costituzione* or *adeguatrice*) is viable, not simply because *one* of the possible interpretations breaches the Constitution. Moreover, the Court always requires that the referring courts demonstrate that an interpretation of the provision consistent with the Constitution is not possible.[74]

The second judgment, No. 143 of 16 May 2008, tackles a more technical aspect.[75] The Court declared Article 33 of the implementing Act to be (partially) unconstitutional, because it does not provide that pre-trial custody suffered abroad as effect of a European arrest warrant is to be taken into account for the purposes of determining the maximum term of detention in the analogous phase of the proceeding in Italy. In fact, the Italian code of criminal procedure not only provides for a maximum term of pre-trial detention for a criminal proceeding as a whole, but also for each 'internal' stage of the proceeding ('*termini di fase*', trial stage periods). It was almost impossible for the Constitutional Court to opt for a different solution. In 2004 the Court had already ruled on a similar question in the context of traditional extradition law (judgment No. 253). In that decision, Article 722 of the Code of Criminal Procedure, concerning detention on remand pending trial in cases in which Italy is the requesting state, was declared unconstitutional. Similarly to Article 33 of the act implementing the Framework Decision, Article 722 did not provide that the preventive detention abroad as a consequence of the request for extradition also had to be taken into account in determining the

Paper 12/07 within the series ELINIS – European Legal Integration: The New Italian Scholarship, available at <jeanmonnetprogram.org/papers/07/071201.pdf>. More recently, the Court partially overruled this position, but only for the proceedings *in via principale*. *See* judgment No. 102/2008 and order No. 103/2008.

[74] *See supra* n. 66. Cf. at this purpose the 'Report on the Constitutional case-law of 2006', p. 22-24. Furthermore, this issue was problematic because the provision of the Italian implementing act is the expression of a constitutional fundamental right. Here we are in the sensitive area of the *controlimiti*. *See* text between n. 22 and n. 24 *supra*.

[75] The second 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).

maximum trial stage terms for detention on remand pending trial (*ex* Article 303, co. 1, 2, 3, of the Code of Criminal Procedure), and not only for the maximum term (*termine massimo*). It is clear that both judgments equate detention suffered abroad and detention suffered in Italy.[76]

At first sight, in these two cases the Constitutional Court is following the same path as the *Corte di Cassazione*.

Concluding observations

Despite political statements that it violated Italy's Constitution, Italy agreed to the Framework Decision. No constitutional revision was made, nor did the government take the initiative to implement the Framework Decision; rather, the opposition did. The implementing Act diverges from the Framework Decision in many respects, and as such looks like a *matrimonio all'italiana*[77] to an unwillingly accepted European instrument.

The case-law on the Framework Decision demonstrates that the *Corte di Cassazione* corrected the work of the Parliament, by both interpreting the implementing act in conformity with the Framework Decision and to some extent with the Italian Constitution. The recent decisions of the *Corte di Costituzionale* paint the same picture.

Looking at the constitutional dynamics triggered by the Framework Decision in the legal order of the Italian Republic, it is striking how the Italian Parliament is losing ground on a topic so sensitive for the individual's position in relation to state power. The Parliament has tried to exert influence via the implementing act, but this was arguably too late. Once a framework decision is adopted at the European level, the principle of loyal co-operation demands the Parliament faithfully implements it (unless of course fundamental principles of the Italian constitutional order are at stake). Instead of adapting a diverging implementing act, the Parliament should have intervened in the *fase ascendente*, influencing the Italian government during the negotiations on the Framework Decision. Perhaps this is valid also beyond the Italian borders. Therefore, it is to be welcomed that the Italian Parliament recently adopted a scrutiny reserve.[78]

[76] The decision is an 'additive' judgment, according to the theory developed about constitutional adjudication in Italy. This means that in this kind of ruling, the Court, rather than striking down the statute, supplies a missing norm that is necessary to make the statute constitutional, on the basis of the indication of the referring judge (in this case: *Tribunale di Bari*).

[77] The reference is to the famous movie of 1964 directed by Vittorio De Sica starring Sophia Loren and Marcello Mastroianni.

[78] Act No. 11 of 2005, the so-called 'Legge Buttiglione', provides for a general parliamentary scrutiny reserve'; and Art. 3 of Act No. 69 of 2005 implementing the Framework Decision provides for a specific scrutiny reserve regarding the extension of the list of crimes for which the double

More generally, the shift of powers triggered by mutual recognition within national legal orders from legislative to the judicial authorities should be balanced by the possibility for political actors to control the process again. As Poiares Maduro remarked, 'Mutual recognition will also be more successful where existing alternative institutions are available to co-manage mutual recognition and guarantee that the political process can always regain control over the policy issues that it, frequently and implicitly, delegates to courts.'[79]

criminality requirement is abolished. *See* P. Gambale, 'La partecipazione dei Parlamenti nazionali alla fase "ascendente" del diritto comunitario: modelli stranieri e novità dell'ordinamento italiano', p. 9, *Amministrazione in cammino*, available at <www.amministrazioneincammino.luiss.it/site/it-IT/>.

[79] M. Poiares Maduro, *supra* n. 30, p. 824-825. On the key role of actors like Parliament and enforcement agencies in the implementation of the Framework Decision, *see* S. Lavanex, 'Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy', 14 *Journal of European Public Policy* (2007), p. 773.