

EUROPEAN INTEGRATION OR DEMOCRACY DISINTEGRATION IN MEASURES CONCERNING POLICE AND JUDICIAL COOPERATION?

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ABSTRACT

In recent cases on the European Arrest Warrant, the Court of Justice of the European Union has made decisions which are incompatible with the requirements of national Constitutions on the protection of fundamental rights such as the right to freedom from imprisonment. National Constitutions are acts of national Parliaments which often require the completion of a very difficult procedure in order to be amended. Unfortunately, the Court of Justice has not taken these procedures into consideration when it has ruled that, in order to enhance mutual trust between national judicial authorities, the European Arrest Warrant can be issued even at the sacrifice of freedoms of individuals protected by national Constitutions. Similar judgements are incompatible with decisions made by Constitutional Courts such as the Italian Constitutional Court which states that the Union's supremacy and the application of the European Arrest Warrant cannot encroach upon the fundamental principles of Constitutions.

Elected bodies such as the European Parliament and national Parliaments should decide whether fundamental principles protected by national Constitutions should be set aside. The entry into force of the Lisbon Treaty could have made the difference as it increased the respective powers of national Parliaments and the European Parliament in the EU decision making procedure. Unfortunately, these changes have not led to more democracy in the criminal area. The result is that the Court of Justice case-law on the European Arrest Warrant is incompatible with the judgments of national Constitutional Courts. This article will show how incompatibility between the different courts and lack of democracy in the criminal area could lead to the failure of police and judicial cooperation between Member States. In order to avoid this failure, it is imperative that measures in the criminal area are adopted by the democratic institutions: the European

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Parliament and national Parliaments in cooperation with each other. Indeed, these institutions alone, not unelected bodies such as the Court of Justice, should evaluate whether national Constitutions should be set aside in order to fight against criminal organisations.

Keywords: constitutions; cross-border crime; democracy; EU; human rights

1. INTRODUCTION

The EU criminal area has been developed during the last decades by the Court of justice's case-law and not through a democratic process which should have been undertaken by the democratic institutions which are national parliaments and the European Parliament (EP). It is essential to give these institutions more power in the decision making procedure concerning the criminal area, because this area impacts on democratic principles protected by national Constitutions, especially the right of freedom from unfair detention.¹ In many Member States people have fought to conquer this right and this is the reason why they alone should decide whether the right of freedom could be sacrificed in order to enhance mutual judicial cooperation between the law enforcement authorities of EU Member States. Cohesion and solidarity could be established by developing a sense of belonging of EU citizens to the EU. In a Member State such as Italy, principles of the Constitution and in particular the fundamental right to freedom, could be modified by a very complex procedure which requires the Parliament's consent and a referendum where people should decide whether this fundamental principle of the Constitution should be amended.² Unfortunately, recent case-law of the Court of Justice on the European Arrest Warrant (EAW) shows that fundamental principles of the Constitutions could be set aside automatically where, according to the Court of justice's judgments, this is necessary in order to strengthen mutual judicial cooperation. These rulings are of concern for democracy because it is evident that national Constitutions are being set aside without the consent of democratic bodies. In addition, the EP, the only elected EU institution, is playing a very marginal role in shaping legislative measures on police and judicial cooperation and this fact is aggravating the democratic deficit in criminal matters.

This article will analyse the recent Court of Justice case-law, and will then compare these rulings with the Italian Constitutional Court's case law on Union supremacy in criminal matters. The article will subsequently explore whether there could be possible conflicts between the Court of Justice's rulings and national Constitutional Courts

¹ See for example Article 13 of the Italian Constitution which fully protects and guarantees "the inviolable right to personal liberty". On www.governo.it/Governo/Costituzione/1_titolo1.html, accessed on 19 July 2013.

² This procedure is fully described in section 5.

before concluding that if the process of European integration in criminal matters will not be conducted by the EP and national Parliaments, this process will come to an end.

2. THE NEED TO ENHANCE EU POLICE AND JUDICIAL COOPERATION

The European Commission has emphasised that the need to strengthen the fight against crime and thus, to enhance police and judicial cooperation, is one of the most important areas for EU citizens alongside economic and monetary policy, immigration policy and health policy.³ In addition, it has been recently reported that serious and organised crime has increased, and is a threat to the EU's safety and prosperity.⁴ It is, then, essential to develop European integration in the criminal area so as to construct the solid mutual trust between police and judicial authorities of EU Member States which is required in order to facilitate cooperation against criminal organisations.⁵ The Court of Justice has pointed out that mutual judicial recognition presupposes mutual trust between Member States' different criminal justice systems, which should recognise criminal law in force in other Member States even when the result would be different if national criminal law were to be applied.⁶ However, this is difficult to achieve as the process of integration in order to construct mutual trust on criminal matters, has been carried out through the Court of Justice's decisions rather than through meaningful involvement of the democratic and elected bodies which are the EP and national parliaments. The concepts of EC and then EU competence in criminal matters and EU supremacy have been established by the Court of Justice's decisions. Initially, the Court of Justice stated that, although the EC does not have competence in criminal matters and it cannot impose criminal sanctions for breaches of EC law, in the event of such a breach Member States must nonetheless impose appropriate civil and administrative penalties.⁷ Subsequently, the Court ruled that EC competence can encompass the criminal area for the protection of the environment.⁸ In *Pupino*,

³ See European Commission, "Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law" COM (2011) 573 final, p. 2. See also Eurobarometer 75, Spring 2011.

⁴ See Europol-SOCTA 2013 available at www.europol.europa.eu/sites/default/files/publications/europol_socta_2013_report.pdf, accessed on 16/04/2013.

⁵ See Report from the Commission on the implementation of Framework decision 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking. COM (2009) 669 final, highlighting the importance of judicial cooperation to the fight against drug trafficking committed in EU Member States.

⁶ See Case C-187/01 and C-385/01 *Gozutok and Brugge* ECR I-1345 paragraph 33. See also B. Nascimbeni "Lo spazio di libertà, sicurezza e giustizia a due anni dall'entrata in vigore del Trattato di Lisbona", *Diritto, Immigrazione e Cittadinanza* (2011) 4, pp. 23 and 24.

⁷ See *Amsterdam Bulb* Case 50/76 [1977] ECR 137. See *Commission v. Greece* Case 68/88 [1989] ECR 2965. See *Zwartveld and Others* Case C-2/88 Imm [1990] ECR I-3365. See *Drexel* Case C-299/86 [1988] ECR 1213. See *Nunes and de Matos* Case C-186/98 [1999] ECR I-4883.

⁸ Case C-176/03 *Commission v. Council* [2005] ECR I-7879, para 47.

the Court of Justice asserted that, although framework decisions do not entail direct effect, national Courts must interpret national law in conformity with the EU objectives.⁹ Elected bodies have not played any role in developing supremacy in the criminal area, although police and judicial cooperation can impact on individual rights. This is why it is important that elected bodies fully participate in adopting legislation within the EU criminal area.¹⁰ The Lisbon Treaty has attempted to achieve this outcome. Article 67 TFEU is the legal basis of EU police and judicial cooperation as it states that the Union aims to construct an area of freedom, security and justice through mutual judicial recognition by respecting fundamental rights, as well as the different traditions and legal systems of EU Member States. Therefore, the EU is aware that this process must be moved forward through a democratic approach as the TFEU states that the Council and the EP can agree minimum rules on the definition of crimes and penalties by the co-decision procedure and the adoption of Directives.¹¹ Co-decision procedure, now known as “ordinary legislative procedure”, has been introduced in the former third pillar of the EU Treaty by Articles 83–89 TFEU Treaty.

In order to achieve the Union objectives, the Treaty has also reinforced the power of national Parliaments. Indeed, it states that national Parliaments must ensure EU proposals and legislation comply with the principles of subsidiarity and proportionality.¹² Subsidiarity means that the EU must legislate only when it is in a better position than Member States to achieve the Union’s objectives.¹³ Proportionality means that the Union should not go beyond what is necessary to achieve its objectives.¹⁴ These two principles aim to preserve national sovereignty. However, although these new provisions have been added by the Lisbon Treaty, it has been highlighted that national Parliaments still have weak powers and this limitation is threatening

⁹ See Case C-105/03 *Criminal proceedings against Maria Pupino*. [2005] 2 ECR I-5285, paras 36–45. For an overview of this case and its implications see K. Lenaerts and T. Corthaut, ‘Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU law’, *European Law Review* (2006) 31/3; S. Peers, ‘Salvation outside the Church: Judicial Protection in the Third Pillar after the *Pupino* and *Segi* judgement’, *Common Market Law Review* (2007) 44. See M. Dougan, ‘When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy’ (2007) *Common Market Law Review* 44, p. 932.

¹⁰ On the way police and judicial cooperation can impact on individual rights see A. Hinarejos, ‘Integration in criminal matters and the role of the Court of Justice’, *European Law Review* (2011) 36/3, pp. 420–430. See also Article 6 TEU and Article 83 TFEU which highlight the importance of respecting the ECHR and the Charter of Fundamental Rights.

¹¹ See Article 83(1) TFEU Treaty.

¹² See Article 69 TFEU. See also Protocol No 1 on the Role of National Parliaments in the European Union and Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality, C-326/201, 26 October 2012.

¹³ See Article 5(3) EU Treaty.

¹⁴ See Article 5(4) EU Treaty.

democracy in the EU.¹⁵ It must be added that the EP is still playing a marginal role in the decision making procedure involving the criminal area, even if the co-decision procedure has been introduced in the former third pillar. These two limitations of the Lisbon Treaty will be explained and analysed in the following section.

3. THE ROLE OF THE EUROPEAN PARLIAMENT AND NATIONAL PARLIAMENTS IN LEGISLATION CONCERNING POLICE AND JUDICIAL COOPERATION

This section will focus on the limited powers of the EP and then it will move on to analyse the marginal role that national Parliaments play in the decision making procedure concerning the criminal area.

There is a main concern regarding the way the co-decision procedure has been modified in practice. It has been noted that many legislative initiatives have been discussed and resolved at the first reading through trilogue meetings between representatives of the Council and representatives of the EP.¹⁶ It has been reported that trilogues are commonly used at the first reading and prior to the second reading in order to approve EU legislation, but in this way potential discussions between a broader range of members of the EP and the Council are prevented.¹⁷ The Vice-Presidents responsible for Conciliation have reported that between 2004 and 2009, 72 per cent of legislative acts had been concluded at first reading and 10.8 per cent at an early stage of the second reading and that they were the outcome of trilogues.¹⁸ These data have been confirmed by the Report for the period 2009–2011 (when the Lisbon Treaty was already in force) which shows that 78 per cent of legislative acts had been concluded at the first reading and 18 per cent at the second reading.¹⁹ In the area of police and judicial cooperation, although the Lisbon Treaty has replaced unanimity with the Qualified Majority Vote (QMV), when a Member State fears that a draft Directive could affect its criminal justice system, it may enforce the emergency brake procedure. This refers the question to the European Council, which can suspend the co-decision procedure for four months and then refer it to the Council which will

¹⁵ See A. Cygan, 'The parliamentarisation of EU decision-making? The impact of the Treaty of Lisbon on national parliaments', *European Law Review* (2011) 36/4, pp. 480–499. See D. Piquani, 'Arguments for a holistic approach in European constitutionalism: what role for national institutions in avoiding constitutional conflicts between national constitutions and EU law', *European Constitutional Law Review* (2012) 8/3, pp. 493–522.

¹⁶ See P. Craig, *The Lisbon Treaty* OUP 2010, p. 346.

¹⁷ *Ibid.* note 16, p. 39.

¹⁸ See Activity Report 1st May-13 July 2009 of the Delegations to the Conciliation Committee, CM\787539EN.doc.

¹⁹ See Activity Report 14 July 2009–31 December 2011 of the Delegations to the Conciliation Committee, DV\903361EN.doc.

terminate the suspension.²⁰ This provision reduces further the EP's powers in favour of the European Council which is an unelected body and thus, should not limit the powers of an elected body. Trilogues and suspension of the co-decision procedure through the emergency brake procedure in criminal matters without consulting the EP render this institution weak and do not facilitate the process of democratic integration. It has been suggested that trilogues should be abolished. Indeed, if these discussions are not acceptable at national level, why should they be accepted at EU level?²¹ Trilogues are organised in secrecy and documents produced during these debates are published when the procedure is completed.²² Therefore, civil society is prevented from knowing what is being discussed before it is adopted.²³ The Court of Justice promotes transparency in the legislative process as this principle contributes to strengthening European citizens' confidence in the EU institutions.²⁴ The EP is trying to improve its internal functioning to better negotiate secret trilogues so that civil society can be aware of the legislation adopted.²⁵ It is hoped that in the future trilogues will be completely abolished in the decision making procedure.

In order to overcome the democratic deficit just described, the EU has also introduced instruments of direct democracy. Indeed, Regulation 211/2011 on the citizens' initiative has been adopted in order to render the process of European integration more democratic.²⁶ This Regulation aims to involve civil society by encouraging citizens' initiatives. However, the citizens' initiative is filtered by the European Commission, the Council and the EP. If from one side, this is desirable as representative democracy should not be replaced by direct democracy, from the other side, these different filters render the citizens' initiative weak.²⁷ Furthermore, whereas the EP filter could be acceptable since the Parliament is an elected body, filtering by the other bodies is unacceptable since these are either unelected (the Commission) or only indirectly representative of EU citizens (the Council).²⁸ In the area of EU police and judicial cooperation, finally, some initiatives such as the establishment of a

²⁰ See Articles 82(3) and 83(3) TFEU. See also S. Peers, 'Guide to EU decision-making and justice and home affairs after the Treaty of Lisbon'. December 2010 available at www.statewatch.org/analyses/no-115-lisbon-treaty-decision-making.pdf, accessed on 18 January 2013.

²¹ See T. Bunyan, 'European Parliament: Abolish 1st [and 2nd] reading secret deals-bring back democracy "warts and all"'. Available at www.statewatch.org/analyses/no-84-ep-first-reading-deals.pdf accessed on 18 January 2013.

²² *Ibid.* note 18.

²³ *Ibid.* note 18.

²⁴ See Joined Cases C-39/05 P and C-52/05 P ECR 2008 I-4723, especially paras 59 *at* 60 of the judgment.

²⁵ *Ibid.* note 18.

²⁶ See Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, OJ 201, L 65/1.

²⁷ See M. Dougan, 'What are we to make of the citizens' initiative?', *Common Market Law Review* 2011, 48, pp. 1807–1848.

²⁸ See section 5.

European Public Prosecutor and important initiatives on police cooperation can be adopted by the Council using the special legislative procedure after having consulted the EP.²⁹ Consequently, in these cases the EP is not entitled to co-legislate with the Council on delicate matters which are going to change drastically the criminal procedure of EU Member States.

Other institutions that should contribute to making the EU and the criminal area more democratic are national Parliaments. The Lisbon Treaty has introduced Protocols 1 and 2 which have added new provisions on the role of national Parliaments.³⁰ Protocol 1 establishes that draft legislative acts originating from the Commission or the EP shall be sent to national Parliaments which shall monitor whether they comply with the principle of subsidiarity.³¹ The method by which European institutions and national Parliaments shall review the application of this principle and the principle of proportionality is indicated by Protocol 2 and is known as the “Early Warning Mechanism”.³² Principles of subsidiarity and proportionality are defined by Article 5 TEU. Paragraph 3 of this Article states that in areas of non-exclusive competence, the Union shall act only when the action cannot be adequately achieved by Member States as the Union is in a better position to act. Paragraph 4 states that, on the basis of the principle of proportionality, the Union shall not exceed what is necessary to achieve the Treaties’ aims. The settled case-law at EU level has given restrictive interpretations of the application of these two principles. The Court of First Instance (CFI) has asserted that where the EC and Member States have shared competence, the principle of subsidiarity can only be applied if the Community proves that Member States powers’ are limited.³³ In another case, the CFI stated that the principle of proportionality is a general principle of Community law and ruled that the European Commission was in breach of this principle.³⁴ The European Commission has also been very strict in assessing the application of subsidiarity and proportionality and, on many occasions, has highlighted that it was not clear in different directives and recommendations whether European institutions were in a better position to achieve the Union objectives and that they had acted within the limits of proportionality.³⁵ Nevertheless, it has been argued that, although the two Protocols have given national Parliaments the power to monitor whether the principles

²⁹ See Articles 83, 86, 87 and 89 TFEU.

³⁰ See Protocol No 1 on the Role of National Parliaments in the European Union and Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality, C-326/201, 26 October 2012.

³¹ See Articles 1–3 Protocol No 1.

³² For a detailed analysis of the “Early Warning mechanism”, see A. Cygan, “The parliamentarisation of EU decision-making? The impact of the Treaty of Lisbon on national parliaments”, *European law Review* (2011) 36/4, p. 482 at 488.

³³ See Case T-374/04 *Germany v. Commission* ECR 2007 II-4431, para 79.

³⁴ See Case T-170/06 *Alrosa v. Commission* ECR 2007 II-2601, paras 92 and 175–205.

³⁵ See Report from the Commission on Subsidiarity and Proportionality, COM (2008) 586 final, pp. 4 and 5.

of subsidiarity and proportionality have been respected by European institutions, there has in fact been a *deparliamentarisation* because the monitoring system does not influence policy formulation as it can only be exercised at the end of the decision-making process.³⁶ Certainly, the “Early Warning Mechanism” could enhance the participation of national parliaments in EU affairs, but this does not guarantee they will use the mechanism proactively.³⁷

How could these issues impact on the criminal area? The German Federal Constitutional Court’s (FCC) Lisbon Treaty judgment stated that it is essential that Member States retain political control over police and judicial cooperation since different cultures prevent the creation of a uniform Union approach to the criminal area.³⁸ Consequently, national Parliaments’ powers should be transferred to the Union only when the cross-border dimension of a problem requires harmonised approaches.³⁹ National Parliaments are accountable for monitoring whether the EU adopts unnecessary legislation.⁴⁰ This is especially important in the criminal area because cross border cooperation could impact on national legislation such as national Constitutions as it could be necessary to review criminal procedure regulated on the basis of national Constitutions, in order to enhance the effectiveness of cross-border cooperation. Therefore, national Parliaments and the EP should decide whether an EU measure on police and judicial cooperation should set aside the requirements of national Constitutions. These measures could affect fundamental rights protected by national Constitutions. This is why national Parliaments and the EP should actively participate in the adoption of these measures; otherwise there is a risk of creating strict measures on criminal matters, weakening the protection of fundamental principles of the national Constitutions which are the basic principles that democratic nations aim to protect.

There is another issue to be taken into consideration. In civil law countries such as Italy, criminal law and criminal procedure can only be modified by law and not by Courts or other institutions not directly elected by citizens. Indeed, the Italian Constitution fully recognises the principle of legality in criminal law and criminal procedure (*nullum crimen, nulla poena sine praevia lege poenali*).⁴¹ In common law countries such as the United Kingdom, parliamentary sovereignty is one of the most important elements of the Constitution.⁴² This means that courts are very careful not

³⁶ See Cygan, *supra* note 15, p. 486.

³⁷ See Cygan, *supra* note 15, p. 487.

³⁸ See Judgement of Bundesverfassungsgericht, BVerfG, 2 be 2/08 at [351] in Cygan, *supra* note 15, p. 489.

³⁹ See Judgement of Bundesverfassungsgericht, BVerfG, 2 be 2/08 at [251] in Cygan, *supra* note 15, p. 489.

⁴⁰ *Ibid.*

⁴¹ See section 5.

⁴² See M. Tabarelli, “The influence of the EU and the ECHR on “Parliamentary Sovereignty Regimes”: Assessing the impact of the European Integration on the British and Swedish Judiciaries”, *European Law Journal* 2013, 19/3, p. 344.

to intrude upon legislative functions.⁴³ This is not the situation in the EU. The reason for this is because, at the moment, the Court of Justice – an unelected institution – is filling the gaps caused by the absence of legislative action and, as Hinarejos argues, this fact could cause conflicts with national Constitutional Courts which could contribute to damaging the Court of Justice’s credibility.⁴⁴ Indeed, decisions in the criminal area involve individual rights and one agrees with those who point out that the role of the Court of Justice should only substitute legislative actions when an extensive interpretation of secondary legislation creates advantages rather than disadvantages to individual rights.⁴⁵ Assigning a different role to the Court of Justice would be an attack on democracy as it would jeopardise Member States’ national identities and cultures.⁴⁶ Therefore, it is desirable that integration in criminal matters is achieved either by representative democracy or by direct democracy consisting of involving civil society without creating so many filters and obstacles as can be noted in Regulation 211/2011.

The next section will explain how recent judgments of the Court of Justice on the EAW could impact upon fundamental principles of national Constitutions and, thus, could create obstacles to integration in the criminal area.

4. RECENT COURT OF JUSTICE CASE LAW ON THE EUROPEAN ARREST WARRANT

As can be deduced from Article 1(1) and (2) of Framework Decision 2002/584 and the Court of Justice’s case-law, the EAW is based on the principle of mutual recognition.⁴⁷ Mutual recognition permits a quicker surrender of the requested person than the traditional extradition procedure which has been replaced by the Framework Decision on the EAW. However, the introduction of this measure was not agreed through a democratic legislative procedure. This is because the EAW was adopted by a framework decision which, according to the previous EU Treaty, did not entail direct effect.⁴⁸ Certainly, the Court of Justice has stated that even if framework decisions do not

⁴³ *Ibid.* See also *Malone v Commissioner for the Metropolitan Police* (no. 2) [1979] 2 All ER 620; *Kaye v Robertson* [1991] FSR 62.

⁴⁴ See A. Hinarejos, ‘Integration in criminal matters and the role of the Court of Justice’, *European Law Review* 2011, 36/3, p. 427.

⁴⁵ *Ibid.*, note 44.

⁴⁶ See section 5.

⁴⁷ See of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. OJ L 190/1, 18 July 2002. See Case C-396/11 *Radu* [2013] ECR I-0000, para 33. See also Case C-42/11 *Lopes De Silva Jorge*, judgment of 5 September 2012, para 28. See Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, para 28. Case C-66/08 *Kozłowski* [2008] ECR I-6041, paras 31 and 43; Case C-123/08 *Wolzenburg* [2009] ECR I-9621, para 56; and Case C-261/09 *Mantello* [2010] ECR I-11477, para 35.

⁴⁸ See Article 34(1)(b) of the EU Treaty C 321 E/1, 29 December 2006.

entail direct effect, national courts and national authorities must interpret national law in conformity with framework decisions.⁴⁹ However, the Court has also pointed out that the conforming interpretation may not lead national courts to interpret national law *contra legem*.⁵⁰

Regarding the EP's role in the criminal area, it must be emphasised that, according to the previous EU Treaty, the Parliament did not even have a co-legislative role in the adoption of this Framework Decision. As the EP had only the right to be consulted by the Council, the latter was the only institution with legislative powers in the criminal area.⁵¹ This area was intergovernmental rather than supranational. Framework Decision 2002/584 was partially amended in 2009 by Framework Decision 2009/299, using the same intergovernmental approach.⁵² This Framework Decision allows the surrender of a person tried *in absentia* even if the requesting authority does not guarantee that the trial will be reviewed.

After the entry into force of this amendment, the Court of Justice has delivered different judgments which could jeopardise national Constitutions and national identities of Member States, whilst there is no democratic involvement of actors that can be affected by these decisions. These actors are the EU citizens who should be represented by national Parliaments and the EP. This desirable situation is not yet in place and the results are these judgments from the Court of Justice.

This section intends to show how the ECJ's rulings in the criminal area could be too invasive of national Constitutions due to their incompatibility with the requirements of national Constitutions regarding the amendment of the provisions therein.

Certainly, the Court of Justice has always aimed to guarantee the rights of persons tried *in absentia*. In the *IB* case, for example, the Court of Justice stated that when a person has been trialled *in absentia*, he or she has the right to apply for a retrial of the case.⁵³ Subsequently, the Court of Justice prioritised the reinforcement of EU police and judicial cooperation rather than individuals' rights.

This is demonstrated by the following cases. In *Radu*,⁵⁴ the Romanian court of appeal referred to the Court of Justice for a preliminary ruling principally asking whether the judicial authority of the State executing the EAW can refuse to surrender the requested person when there is a breach of Articles 48 and 52 of the Charter of

⁴⁹ See *Pupino*, *supra* note 9, paras 33–34.

⁵⁰ See *Pupino*, *supra* note 9, para 47 and Case C-282/10 *Dominguez* [2012] ECR I-0000, para 25.

⁵¹ See Articles 34 and 39 EU Treaty.

⁵² See Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81/24, 27 March 2009.

⁵³ See Case C-306/09 *IB* [2010] ECR I-10341, para 54. See also Case C-123/08 *Wolzenburg* [2009] ECR I-9621, para 62.

⁵⁴ See Case C-396/11 *Radu*, ECR I-0000.

Fundamental Rights and Articles 5(3) and (4), and Article 6(2) and (3) of the ECHR.⁵⁵ Mr Radu argued that the EAW was issued without him having been heard by the requested German judicial authorities. Articles 5 and 6 ECHR protect the right to liberty and security and the right to a fair trial. Article 48 of the Charter of Fundamental Rights guarantees the right of defence and the respect of the presumption of innocence. Article 52 states that the rights protected by the Charter are the same rights as those protected by the ECHR and that limitations are only admissible where necessary in order to protect general interests or the rights and freedoms of others. It also states that the Charter must be interpreted in harmony with the traditions of Member States' national Constitutions. The Romanian court of appeal emphasised that the mentioned Articles of the ECHR and of the Charter are provisions of primary EU law because they have been incorporated in the EU Treaties through Article 6. However, the Court of Justice stated that the aim of the EAW is to replace the existing extradition rules to facilitate judicial cooperation in order to create an area of freedom, security and justice based on the high degree of trust between Member States. Therefore, an EAW may be issued when the person concerned has not been heard for the purpose of conducting a criminal prosecution. In other words, issuing the EAW without previously hearing the person concerned is not in breach of Articles 47 and 48 of the Charter. The Court of Justice added that a different interpretation of the EAW Framework Decision would prevent the achievement of an area of freedom, security and justice. This decision has clearly stated that the protection of human rights and fundamental freedoms comes second compared to the achievement of an area of freedom, security and justice which must be constructed by reinforcing mutual trust between Member States' judicial authorities. This ruling is clearly incompatible with national Constitutions. This is because, according to national Constitutions such as the Italian Constitution, freedom from imprisonment is inviolable and limitations to freedom can only be allowed by a reasoned act of a judicial authority with the methods and in the exceptional circumstances expressly indicated by law.⁵⁶ The question is: if the Italian Constitution requires that the judicial authority be legitimated by a law which has been approved by the Parliament, why should the same not apply to the Court of justice? Where does the Court of justice find the legitimacy to make a judgment such as that in *Radu*? Stating that the achievement of mutual trust is more important than the requirements of national Constitutions does not have any legislative foundation because the concept of mutual trust has not even been defined at EU level. What is mutual trust in the criminal area and who should understand and encourage the achievement of this concept? It is thought that EU citizens should understand and develop this concept. EU citizens should be fully involved in the process of integration in the criminal area because this area can impact on their right

⁵⁵ Compare Articles 48 and 52 of the Charter of Fundamental Rights of the European Union (2010/C 83/02), OJ C/83/389, 30/3/2010 with Article 4(3) and (4) and Article 6(2) and (3) of the Convention for the Protection of Human Rights and Fundamental Freedoms CETS No. 005.

⁵⁶ See Article 13 of the Italian Constitution.

to freedom. Therefore, it is proposed to give more space to EU citizens by applying Regulation 211/2011. In other terms, members of the European Parliament, in cooperation with national Parliaments, should create awareness amongst EU citizens of the importance of fighting against cross-border crime and on the impact that measures in the criminal area can have on their everyday life. Members of parliaments should organise committees, petitions, debates and discussions on what mutual trust is and how to establish it within EU Member States. This is because it is thought that the basis to create mutual trust is knowledge of other, different cultures and traditions. Once this knowledge has been developed, EU citizens could establish trust with each other.

In *Melloni*,⁵⁷ following the application of the EAW framework decision to a person who had been convicted *in absentia*, the Spanish Constitutional Court referred to the Court of Justice for a preliminary ruling. In this case, the Court of Justice principally stated that when an EAW has been issued and the person concerned has been tried *in absentia*, the review of the trial in the requesting State is unnecessary where the applicant had been made aware of the trial in the requesting State and had given a mandate to lawyers to defend himself or herself. This is because Article 4a(1)(b) of the Framework Decision as amended in 2009, stated that an EAW must be executed by the requested State when the applicant was 'aware of the scheduled trial, had given a mandate to a legal counselor, ... to defend him or her at the trial, and was indeed defended by that counselor at the trial...'.⁵⁸ The Court of Justice, then, stated that even if the Charter of Fundamental Rights and the ECHR, in particular Articles 47(2), 48 and Article 52(3) of the Charter, and Article 6(1) ECHR, whilst Article 48 corresponds to Article 6(3) ECHR,⁵⁹ require stronger protection of fundamental rights and human rights, reinforcing mutual judicial cooperation is more important in the fight against crime across the EU.

In the following paragraphs, particular attention is given to the question posed by the Spanish Constitutional Court since the points made by the Court of justice could create conflicts between national Constitutional courts and the Court of Justice.

The Spanish Constitutional Court, which should have the task of ensuring that national law and EU law respect the principles protected by the Constitution, asked whether it could apply the provisions of the Spanish Constitution since those provisions were the most favourable to the accused person, in accordance with Article 53 of the Charter which states that the Charter will not restrict or adversely affect fundamental rights and human rights protected by national Constitutions. The

⁵⁷ See Case C-399/11 Criminal Proceedings against Stefano Melloni, judgement of 26 February 2013, not yet reported.

⁵⁸ See Article 4a(1)(b) of Council Framework Decision 2009/299/JHA, *ibid.*, note 52.

⁵⁹ See Explanatory Remarks on the Charter of Fundamental Rights. OJ 2007 C 303, p. 17 and compare Articles 47(2) and Article 48 of the Charter of Fundamental Rights, *ibid.*, note 4 with Article 6(1) and (3) of the Convention for the protection of Human Rights and Fundamental Freedoms CETS No. 005.

Spanish Constitutional Court proposed three different interpretations of Article 53. The first interpretation considered this Article equivalent to Article 53 ECHR which states that the ECHR does not intend to derogate from any human rights or fundamental freedoms protected by the State Parties. From this comparison, according to the Spanish Constitutional Court, it can be deduced that Member States can establish higher standards of fundamental rights protection in their Constitutions. Consequently, Member States should be allowed to prevent the execution of an EAW when judgments have been issued *in absentia*. The second interpretation of Article 53 would consider it in conjunction with Article 51 of the Charter and thus, the level of protection of fundamental rights should be that provided by the Charter where EU law applies, while outside the scope of EU law, Member States should be allowed to grant a higher protection of fundamental rights if their national Constitutions so require. The third interpretation of Article 53 consisted of applying the first or the second interpretation on the basis of the specific problem involving the protection of fundamental rights and the context within which the level of protection is made.⁶⁰ The Court of Justice rejected all three suggested interpretations and stated that interpreting Article 53 as giving Member States the opportunity to apply their Constitutions when their standard of protection of fundamental rights is higher than the standard of the Charter and other provisions of EU law; would jeopardise the primacy of EU law. Consequently,

... national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.⁶¹

The Court of Justice added that the priority of the two framework Decisions on the EAW was to overcome difficulties caused by lack of mutual recognition of decisions rendered *in absentia* and that allowing Member States to avail themselves of Article 53 of the Charter would compromise the principles of mutual trust, mutual recognition and the efficacy of Framework Decision 2009/299. It can be noted that the national Constitutional Court and the Court of Justice gave opposing interpretations to the provisions of the Charter. This judgment is very controversial because on one side there is a national Constitutional Court which is legitimated by its Constitution to ensure that the fundamental principles enshrined therein are fully protected. On the other side, there is the Court of Justice which has gained legitimacy in the criminal area not through a democratic process but through its own rulings in this area. In other words, the Court of Justice has created its own legitimacy whilst the legitimacy of the national Constitutional Courts has been established by the Constitutions which

⁶⁰ See Case C-36/02 *Omega* [2004] ECR I-9609, paras 37–38 and Case C-105/03 *Pupino*, *supra* note 9, para 60.

⁶¹ See Case C-399/11, *supra* note 57, para 60.

are Acts of Parliament, a democratic elected body. The Court of Justice, under the Amsterdam Treaty, could only rule in the criminal area by giving a preliminary ruling, if Member States authorised it to do so by form of a declaration.⁶² The Lisbon Treaty, conversely, does not require this declaration as the Court of Justice can rule on any aspects of EU police and judicial cooperation. However, similar rulings could contribute to a loss of credibility for the Court of Justice as, instead of cooperating with legitimate Constitutional Courts, the Court of Justice might create conflicts with these courts and these conflicts might lead in turn to the Court of Justice losing the legitimacy it has so far gained not through a democratic process in the area, but through its own jurisprudence. In addition, there is the real risk that freedoms protected by national Constitutions will lose their relevance and fundamental importance. One is of the idea that EU citizens may be reluctant to accept that their Constitutions be set aside by the Court of Justice, an institution which has not acquired the same democratic legitimacy as national Constitutional Courts. In order to avoid this disintegration, it is desirable that the Court of justice cooperate with national Constitutional Courts by primarily respecting the national Constitutions that these courts have the legal obligation to protect against abuses of national laws, but also against abuses of EU law and European institutions such as the Court of Justice.

Certainly, Member States can use the emergency brake in Article 82(3) TFEU if they find an EU measure too invasive of their national sovereignty.⁶³ However, one is of the opinion that such a mechanism does not fully protect national democracy and Constitutions, since the institution Member States can refer to is the European Council – a non-elected institution composed by Heads of Member States who can be keener to preserve particular interests of specific political parties rather than the general interests of EU citizens. One is also of the opinion that similar judgments threaten national identities because they threaten basic principles of national Constitutions such as the principle of legality which any restrictions of fundamental freedoms must respect. In *Melloni*, the Court of Justice distorted provisions of the Charter and the ECHR for the sake of enhancing mutual trust. If Article 53 of the Charter states that higher levels of human rights protection established by national Constitutions must be respected, the Court of Justice should not have stated that Article 53 must not allow Member States to apply their Constitutions when this could compromise mutual trust and mutual recognition. Paragraph 12 of the Preamble to Framework Decision 2002/584/JHA, then, states that this Framework Decision does not prevent Member States from applying their constitutional rules related to due process and other specified issues. From this provision it can be presumed that, although it has not been included more specifically in the main text of the legislation, international human rights commitments and national Constitutions take precedence

⁶² See Article 35 of the EU Treaty as amended by the Amsterdam Treaty 1999.

⁶³ See E. Herlin-Karnel, 'From mutual trust to the full effectiveness of EU law: 10 years of the European arrest warrant', *European Law Review* 2013, 38 /1, p. 88.

over the application of the EAW Framework Decision.⁶⁴ The Court of Justice, an unelected body, should not have ruled in the way described above because it could change drastically national constitutional requirements.

5. THE REQUIREMENTS OF THE ITALIAN CONSTITUTION AND ITS COMPATIBILITY WITH THE EUROPEAN ARREST WARRANT

This section analyses the Italian Constitution to demonstrate that possible conflicts between the Court of Justice and national Constitutional Courts may put an end to integration in the criminal area.

The Italian Constitution is rigid, thus, its provisions can only be changed after a very complex procedure established in Article 138.⁶⁵ It is rigid because of the history of the Italian Republic. Indeed, the Italian Constitution replaced the *Statuto Albertino*, a flexible Constitution which entered into force in 1848. This flexible Constitution was significantly modified during fascism when undemocratic principles within the *Statuto Albertino*, leading Italy to join Germany in the World War II (WWII), were inserted.⁶⁶ After WWII, Italy intended to protect democratic values against a possible return to fascism. This is why a rigid Constitution was adopted, characterised by a very difficult reform mechanism.⁶⁷ This mechanism, enshrined in Article 138 of the Italian Constitution, requires that laws amending the Constitution and other constitutional laws must be adopted by each House after two successive debates separated by intervals of not less than three months, and shall be approved by an absolute majority of the members of each House in the second vote.

The laws are submitted to a popular referendum when, within three months of their publication, this is requested by one-fifth of the members of a House or five hundred thousand electors or five regional councils.

The law submitted to referendum shall not be promulgated if not approved by a majority of valid votes.

A referendum shall not be held if the bill is passed at the second vote in each of the Houses by a majority of two thirds of its members.⁶⁸

It must be pointed out that the Court of Justice, in the cases analysed above, did not request a similar procedure to modify national Constitutions as this can be done automatically if it is necessary, in order to enhance mutual trust between police and

⁶⁴ See S. Peers, *EU Justice and Home Affairs Law 2011*, OUP, p. 709.

⁶⁵ See Article 138 of the Costituzione della Repubblica Italiana, 1 January 1948.

⁶⁶ See R. Lucifredi, *La nuova Costituzione italiana raffrontata con lo Statuto albertino e vista nel primo triennio di sua applicazione*, Società editrice libraria, 1952, p. 9 *et seq.*

⁶⁷ *Ibid.*

⁶⁸ My unofficial translation of Article 138 of the Italian Constitution.

judicial authorities of EU Member States and to make the fight against cross border crime, more effective.

This is quite problematic and incompatible with the requirements of national Constitutions. It may be anticipated that in the long term, similar judgments of the Court of Justice might increase EU citizens' reluctance towards the EU whose supremacy could be interpreted as too invasive of national sovereignty. In the past, the Italian Constitutional Court already considered EC supremacy too invasive of national sovereignty. This is demonstrated by the fact that it was not until 1973 that the principle of EC supremacy had been fully recognised.⁶⁹ The Italian Constitutional Court ruled that, although limitations of national sovereignty are permitted under Article 11 of the Constitution which states that Italy allows limitations on national sovereignty which are necessary to ensure peace and justice between nations, this does not mean that EU institutions can act in breach of fundamental principles of the constitutional order and of the inalienable rights of the person.⁷⁰ The Constitutional Court added that the Italian Constitution contains supreme principles that may be subverted or changed in their essential content neither by constitutional acts nor by acts of constitutional revision because they belong to the essence of supreme values which underpin the Italian Constitution.⁷¹ These strict rules on the protection of Italian constitutional principles, are due to the characteristics of the Italian Constitution and criminal justice system which are strictly based on the principle of legality.⁷² This principle requires that individual liberty can only be limited by law, and that measures restricting individual liberties shall be reasoned and always subject to the possibility of appeal to the *Court of Cassation* (Italian Court of last resort).⁷³ In addition, the Constitution reads that no case may be removed from the court seized with it as established by law, and that no one can be punished except by virtue of a law that is in force before the offence was committed.⁷⁴ The latter provision confirms that the principle of legality applies not only to criminal law but also to criminal procedure. The inclusion of criminal procedure within the principle of legality has also been established by Article 1 of the Italian criminal code because it states that no one can be punished with penalties which are not established by law.⁷⁵ Article 7(1) ECHR also

⁶⁹ See Case 183/73 *Frontini* Corte Costituzionale, in *Gazzetta Ufficiale* no. 2, 2 January 1974. This ruling has been confirmed later in Case 170/84 *Granital* Corte Costituzionale in *Gazzetta Ufficiale* no 169, 20 June 1984 and Case 117/94 in *Gazzetta Ufficiale* 13 April 1994.

⁷⁰ See Case 183/73 *Frontini*, Case 170/84 *Granital*, Case 117/94 and Case 73/01 *Gazzetta Ufficiale*, 28 March 2001. See Case 454/06 *Corte Costituzionale*. See E. Cannizzaro, "Direct" and "Indirect" rights: fundamental rights between the European Union, the ECHR and the Italian Constitution', *Il Diritto dell'Unione Europea* 2012, 1, p. 33 at 35.

⁷¹ My unofficial translation of a part of the Case 1146/ 1988, *Corte Costituzionale*.

⁷² See M. Fichera, *The implementation of the EAW in the EU: Law, Policy and Practice*, Intersentia 2011, p. 138.

⁷³ *Ibid.*, note 113. See also Articles 13, 104 and 111 of the Italian Constitution.

⁷⁴ *Ibid.*, note 113. See also Article 25 of the Italian Constitution.

⁷⁵ See Article 1 *Codice di Procedura Penale* D.P.R. 22 September 1988, n. 447.

establishes that criminal offences and penalties can only be imposed by law. The European Court of Human Rights (ECtHR) initially left open the issue of whether the principle of legality applies to prosecution limitation periods.⁷⁶ It has subsequently established that Article 7 shall be read ‘that only the law can define a crime and prescribe a penalty’.⁷⁷ It went further by stating not only that the principle of legality is an essential principle of criminal procedure, but also that the principle of the most favourable law (a corollary of the principle of legality), must be applied to criminal procedure, retrospectively.⁷⁸ Conversely, the Court of Justice has definitively established that the principle of legality does not apply to criminal procedure, although it has ruled that national courts are not requested to give interpretations of national law *contra legem*.⁷⁹ This ruling might mean that if there are conflicting interpretations between the different courts on the principle of legality, national courts should not give an interpretation which would be against their Constitutions. The exclusion made by the Court of Justice could, indeed, create conflicts with national Constitutions. This could be the case of the Italian Constitution which establishes that the principles of legality and most favourable provisions are constitutional principles which apply to criminal law and criminal procedure.⁸⁰ It would be desirable that the ECtHR clarify what role the Court of Justice should have in this regard, and how to avoid conflicts between the Court of Justice and national courts when they interpret criminal law and procedure according due respect to the principle of legality. This clarification should be given in light of the judgments of the Italian Constitutional Court and in light of the recent judgment of the German Constitutional Court which confirmed the objections of the Italian Constitutional Court by affirming that there are absolute limits to the process of European integration, which are the principle of conferral and the Constitutional identity of Member States.⁸¹

With regard to the EAW, the Italian Constitutional Court has stated that Framework Decision 2002/584 is part of the Italian legal system by virtue of Article 11 of the Constitution.⁸² The Constitutional Court has further confirmed the primacy of Union law over national provisions, including constitutional provisions.⁸³ However, the limits of the respect of the constitutional order and inalienable rights of persons

⁷⁶ See Case *Coeme and others v. Belgium* Reports 2000-VII. See also Peers, *supra* note 64, p. 681.

⁷⁷ See Case *Camilleri v. Malta*, Application No. 42931/10, 22 January 2013, para 34. See also Case *Scoppola v. Italy*, Application No. 10249/03.

⁷⁸ See *Scoppola v. Italy*, para 92–121.

⁷⁹ See C-105/03 *Pupino*, *supra* note 9, para 47. See also Peers, *supra* note 64, p. 687.

⁸⁰ See Case 236/11, in *Gazzetta Ufficiale* 27 July 2011.

⁸¹ See Judgement of Bundesverfassungsgericht, BVerfG, 2 be 2/08, [226] at [228]. Commented in S. Gambino ‘Identità costituzionali nazionali e primaute’ eurounitaria’, *Quaderni costituzionali* 13/3, 2012, p. 536.

⁸² See Case C 227/10 *M.K.P* in *Gazzetta Ufficiale* 30 June 2010.

⁸³ *Ibid.*

have also been confirmed as priorities which go beyond Union supremacy.⁸⁴ In other words, the Constitutional Court reaffirmed the priority of the principle of legality in criminal matters, including criminal procedure, over Union supremacy because the principle of legality is a fundamental principle of the constitutional order.⁸⁵ Indeed, it is inserted within the Constitution under Article 25. In *Melloni*, the Court of Justice's ruling contrasted with the requirements of the Italian Constitutional Court as, by stating that national authorities and national courts can apply a higher level of protection of human rights when this does not compromise Union primacy and its effectiveness,⁸⁶ it implicitly established that when cross-border crimes have been committed, enhancing mutual trust in the criminal area is more important than preserving fundamental rights as protected by national Constitutions. The Italian Constitutional Court, instead, has always affirmed that the primacy of EU law must be set aside if it goes against the inalienable rights of persons and the constitutional order. There is no EU law which states that preserving mutual trust and mutual cooperation in criminal matters has priority over the greater respect of human rights as established by national Constitutions. Indeed, there is not even a definition of mutual trust in the criminal area⁸⁷ and

... the inability to reject mutual recognition on human rights grounds, on the assumption that the problem will be fixed months later in the issuing State or years later in the European Court of Human Rights, would mean that human rights protection in this field would be theoretical and illusory, not real and effective.⁸⁸

Article 53 the Charter states that the Charter shall not restrict human rights as protected by other sources of law such as national Constitutions. Article 53 should provide the necessary balance to identify the strongest protection for individuals.⁸⁹ On the basis of this Article, therefore, fundamental rights should be protected to the highest standard and by preferring the constitutional guarantees indicated by Member States.⁹⁰ Constitutional Courts should ensure that higher protection is put in place.⁹¹ This is particularly important in the criminal area where the respect of human rights is a sensitive issue.⁹² Certainly, one agrees with scholars who affirm that always giving absolute priority to Constitutions instead of the Treaties and general principles of the

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*, note 80.

⁸⁶ See section 4.

⁸⁷ See E. Herlin-Karnel, above note 63, p. 87.

⁸⁸ *Ibid.* note 44.

⁸⁹ See S. Gambino, note 81, p. 545.

⁹⁰ *Ibid.*, p. 553.

⁹¹ *Ibid.*, p. 553.

⁹² See G. Strozzi, 'Il sistema integrato di tutela dei diritti fondamentali dopo Lisbona: attualità e prospettive', *Il Diritto dell'Unione Europea*, 2011, 4, p. 845.

EU is an entrenchment.⁹³ This is because European integration in the criminal area should be encouraged in order to defeat cross-border criminal organisations, and this result can be achieved by removing obstacles to the promotion of mutual trust.⁹⁴ Nevertheless, mutual trust should not be achieved by overriding national identities as protected by Article 4(2) of the EU Treaty. This risk could exist when the Court of Justice delivers a judgment in conflict with fundamental constitutional principles. National constitutions are the result of national identities and should contribute to shaping EU law by enhancing the quality of EU decision-making.⁹⁵ In this context, Article 4(2) of the EU Treaty adds the ‘explicit recognition of national constitutional input’⁹⁶ to the process of EU decision-making. This means that national Constitutions should contribute to enhancing mutual trust in the criminal area and should not be ignored, otherwise the process of integration in this area will be undemocratic. This is why it is proposed that in order to reinforce integration in the criminal area and, concurrently, to preserve national identities, it is fundamental to involve the EP and national Parliaments in the appropriate application of the EAW. These institutions are representative of EU citizens and they alone should be authorised to state whether fundamental principles of national Constitutions should be set aside to the benefit of EU police and judicial cooperation. Currently, the most powerful institution in this area is the Council of Ministers. The Council of Ministers should not enact legislation in the criminal area because it is representative of Member States’ governments and thus does not have direct democratic legitimacy.⁹⁷ This is why it is thought that the bodies that should promote mutual trust in the criminal area are the EP and national parliaments. Potentially, the Council of Ministers could have the power to enhance mutual trust but only if their members are elected by the EP in cooperation with national parliaments, as takes place in Member States. This would create authentic democracy in the EU criminal area. Unfortunately, this approach has not been adopted and most of the measures in this area have been taken through the Court of Justice’s case-law. What scholars predicted when the EAW Framework Decision came

⁹³ See G. Strozzi, p. 849.

⁹⁴ See on this point M. Fichera *supra* note 72, pp. 139 at 141.

⁹⁵ See G. van der Schyff, ‘The constitutional relationship between the European Union and its Member States: the role of national identity in Article 4 (2) TEU’, *European Law Review*, 2012, 37/5, p. 583. See also R. Caponi, ‘La tutela dell’identità nazionale degli Stati membri dell’U.E. nella cooperazione tra le corti: addio ai <controlimiti>?’, *Il Diritto dell’Unione Europea* 2011, 4, p. 924.

⁹⁶ *Ibid.*

⁹⁷ See L. Pellegrini, ‘Riserva di legge e competenza penale europea’, *Osservatorio sulle Fonti*, 2/2011, p. 7 at 8. On Osservatoriosullefonti.it, accessed on 16 April 2013. See also R. Bin and G. Pitruzzella, *Diritto costituzionale*, Torino, 2009, p. 172 *et seq.*; L. Elia, voce *Governo*, in *Enc. dir.*, Milano, 1970, p. 634 *et seq.*; S. Bartole, voce *Governo italiano*, in *Dig. disc. pubbl.*, Torino, p. 634 *et seq.*, G. Silvestri, voce *Poteri dello Stato (divisione dei)*, in *Enc. dir.*, Milano, 1985, p. 670 *et seq.*

into force – that it would lead to breaches of the fundamental principles of equality and other human rights – is now a reality.⁹⁸

This undemocratic approach could be the end of the Union because EU citizens could be reluctant to accept modifications of their national Constitutions without following the appropriate procedure as national Constitutions are part of their history, culture and national identities. If the role of the Constitutional Court is marginalised, EU citizens could be put in the position of having to choose between their Constitutional Court and the Court of Justice. Conversely, national courts and the Court of Justice should contribute to the achievement of European integration under the direction of the EP and national Parliaments. In this way, a sense of belonging to the EU could be developed by EU citizens who, thus, would not consider the EU undemocratic and far removed from their needs.

6. CONCLUSIONS

This article examined what should be done in order to facilitate European integration in the criminal area. It would be undesirable for the Court of Justice to further develop integration in the criminal area because it is an unelected body whose rulings might compromise the role of national Constitutions and of Constitutional Courts. Conversely, these courts should cooperate with each other to ensure the full implementation of EU criminal measures. The institutions that should facilitate this cooperation are national Parliaments and the European Parliament because they have democratic legitimacy. Unfortunately, these institutions are very weak in the criminal area and this is why the Court of Justice is creating laws in this area even when there might be incompatibility with the rules of national Constitutional courts and national Constitutions.

The criminal area has implications on human rights; this is why only democratically elected bodies should shape criminal policy within the EU. In this way EU police and judicial cooperation will be reinforced with the support of EU citizens. Conversely, if the Court of Justice shapes criminal measures, EU citizens might interpret its position as encroaching too far on national sovereignty, and refuse the idea of EU criminal law and procedure to fight and defeat criminal organisations in the EU.

⁹⁸ See G. Vassalli, 'Il mandato d'arresto europeo viola il principio di uguaglianza', *Diritto e Giustizia* 2002, 28, p. 8. See S. Peers, 'Mutual Recognition and Criminal Law in the European Union: Has the Council got it wrong?', *Common Market Law Review* 2004, 41 5. See also M. Maduro, 'So close and yet so far: The paradoxes of mutual recognition', *Journal of European Public Policy* 2007, 14, p. 814.