要旨

「刑事協力における EU と CoE の国際機構間関係：立憲的多元主義への理論的含意」
(“Inter-Institutional Relationship between the EU and the CoE in Criminal Cooperation: Its Theoretical Implications for Constitutional Pluralism”)

欧州統合の深化に対する種々の抵抗を背景として、「立憲的多元主義(constitutional pluralism)」といわれる EU 法学上の一潮流は、EU と加盟国の関係を再検討し始めている。しかしながら、一見したところ、「立憲的多元主義」という名辞そのもののうちに矛盾があるようにも思われる。すなわち、「立憲的」と「多元的」が両立しうるのかという矛盾である。この矛盾は、EU 法と加盟国法の衝突が生じた際に先鋭化する。仮に EU 法秩序が真に「立憲的」であり、ある EU 法規と矛盾する加盟国法の妥当性を棄却するのであれば、当該秩序は「多元的」ではない。一方、仮に EU 法秩序が真に「多元的」であるのならば、EU 法の統一性は保たれない。この二律背反が、現実と理論の乖離を生じている。すなわち、理論的には、立憲的多元主義は EU 法と加盟国法の衝突を予期する。しかしながら現実の EU 法においては、加盟国裁判所が自国法の自律性も同一性（identity）も放棄していないにも関わらず、おおむね統一的に適用されている。

本稿は、この疑問を解決すべく、「国際機構間関係」、すなわち異なる国際機構同士の関係性に着目しながら、立憲的多元主義を修正することを目的とする。同目的を達成するため本稿は、警察刑事協力、とりわけ 2002 年に採択された欧州逮捕令状(European Arrest Warrant)枠組決定をめぐる加盟国裁判所の懸念を題材にしながら、EU と CoE の関係を検討する。いくつかの加盟国憲法裁判所は、欧州逮捕令状が被疑者の人権と自国の主権の双方を侵害する可能性について懸念を示した。こうして加盟国と EU との緊張関係は、次の 2 つの要因によって緩和された。第一に、CoE の元で長らく各国の行政府が密な協力の経験を蓄積し、相互の信頼を醸成していたために、他国の権利状況を理由とした身柄引き渡し拒否が生じる可能性が低かったという要因である。第二に、欧州司法裁判所(ECJ)と加盟国裁判所が、いずれも欧州人権条約と欧州人権裁判所判例に依拠しているという配置のために、ECJ と加盟国裁判所の間の《司法機関間対話》が可能になったという要因である。それにより、ともに自らの究極的権威(ultimate authority)を主張しながらも、どちらかが他方に一方的に優越する事態が避けられている。従って、国際機構間関係を顧慮すれば、「立憲的」でありながら「多元的」であると考える余地は十分にあるものだと言える。

Inter-Institutional Relationship between the EU and the CoE in Criminal Cooperation

Its Theoretical Implications for Constitutional Pluralism*

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Summary

In the background of resistance against the deepening of the European integration, constitutional pluralism takes the relationship between the European Union (EU) and Member States seriously. However, a question has been raised: can 'constitutional' be at the same time 'pluralist'? The contradiction comes to the fore when a conflict between EU and national law occurs. If the European legal order is truly 'constitutional', a contradicting national law would be invalidated, which means that the order is not 'pluralist'. If it is truly 'pluralist', then EU law might no longer be consistent. This dilemma leads to a puzzle. *In theory*, constitutional pluralism predicts conflicts between the EU and Member States. Because of the dilemma, the theory does not clearly explain how the conflicts are resolved. Nevertheless, EU law *in reality* has been consistently applied while national courts have not given up the autonomy or the identity of their legal order.

In order to modify constitutional pluralism to account for the puzzle, this paper suggests paying attention to "inter-institutional relationship", namely the relationship between different international organizations. This paper examines the relationship between the EU and the Council of Europe (CoE) will be examined. With regard to the field of criminal cooperation, both the European Court of Justice (ECJ) and Member State courts can rely on the European Convention of Human Rights (ECHR), as well as case-laws of the European Court of Human Rights (ECtHR). This constellation allows both the ECJ and Member States to assert their own ultimate authority and to avoid a dominance of either. In this sense, there is room to assert that 'constitutional' can be at the same time 'pluralist'.

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1. Introduction – Integration and Resistance

The European Union (EU) has evolved under the slogan of 'ever closer union' and now deals with a wide range of issues traditionally addressed by sovereign states. Meanwhile, however, the deepening has been accompanied by political and legal resistance by the Member States. For example, the German Constitutional Court (GCC, *Bundesverfassungsgericht*) has made clear that it reviews the constitutionality of EU acts if it thinks necessary[1]; in 2005, citizens in France and the Netherland rejected the ratification of the Treaty establishing the Constitution for Europe; there is a widespread Eurosceptical discourse, with the UK even considering withdrawing from the EU.

The existence of these contradicting dynamics is a touchstone for European integration theories attempting to explain the creation and/or the maintenance of 'supranationality'. The notion means that the EU is above, and superior to, Member States. But the notion can no longer offer exhaustive accounts for the reality of the EU. It is in this context that a theoretical trend named 'constitutional pluralism' began to take the coexistence of, and the relationship between, the authority of sovereign states and that of the EU seriously.[2]

Constitutional pluralism has emerged in reaction to some "constitutional resistance" by Member State courts which attempted to show that "they could set aside EU Law on constitutional grounds under certain circumstances"[3] by asserting their own rights to review EU law in light of their own constitutions. Under this situation the hierarchical, or 'supranational', understanding of the legal order has come to be questioned. Instead, constitutional pluralism offers explanations for the legal and political order within the EU in a non-hierarchical or 'pluralist' way.

However, when constitutional pluralism acknowledges that national courts can annul an EU act, a question arises: who has the 'final say' on a matter within the EU? How can a conflict between different authorities be solved? As will be shown, several theorists have presented their answers to this kind of questions, none of which is decisive.

This paper aims to shed new lights on these questions by answering two questions. How is a conflict between the EU and Member States resolved? What factors play an important role in

[1] E.g. BVerfG, 2 BvR 197/83, *Solange II* [1986] BVerfGE 73, 339; BVerfG, 2 BvR 2134, 2159/92 *Maastricht* [1993] BVerfGE 89, 155.

[2] E.g. MacCormick, N., 'The Maastricht Urteil: Sovereignty Now', *European Law Journal*, 1(3), 1995, pp.259-266; Maduro, P. M., "Contrapunctual Law: Europe's Constitutional Pluralism in Action", in Walker, N. (ed.) *Sovereignty in Transition*, London: Hart Publishing, 2003, pp.501-537.

[3] Kumm, M., 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', *European Law Journal*, 11(3), 2005, pp.262-307, at 263.

the resolution? In so doing, this paper critically reviews constitutional pluralism and attempts to propose its modification, paying attention to "inter-institutional relationship".

The next section examines the existing literature of constitutional pluralism. Thereafter, an inherent dilemma is identified. An example of the European arrest warrant (EAW) follows to illustrate the problem. Then the concept of inter-institutional relationship is introduced so as to broaden the scope of constitutional pluralism. The paper considers the relationship between the EU and the Council of Europe (CoE) with regard to the criminal cooperation before concluding with some theoretical implications and suggestions for further research agendas.

2. Constitutional Pluralism and its Dilemma

2.1 Overview of the Theory

Though many authors have referred to constitutional pluralism, the exact meaning of the terms "constitutional" and "pluralism" are not clearly defined or commonly shared. On the one hand, to use the word 'constitution' or 'constitutionalization' is, in general, to assume the European legal order has been centralized through the establishment of "a new legal order […] for the benefit of which the states have limited their sovereign rights".[4] In the process of making the new legal order which the European Court of Justice (ECJ)[5] pursued through its case-laws, the doctrines such as direct effect, supremacy and mutual recognition have been developed.[6] To the extent that such developments went further and were institutionalized, sovereignty of Member States became eroded. Thus, at the end of that way of constitutionalization, if any, will be a monistic order where the ECJ holds the highest authority. On the other hand, pluralists deny such a conception of EU law and claim that Member States maintain the ultimate authority founded upon their own constitutions. In tandem, constitutional pluralism can be, though conventionally, defined as a way of understanding the EU legal order being centralized on the basis of the case-laws and the doctrines maintained by the ECJ while its Member States hold the ultimate authority and condition supremacy of EU law.

Just after the GCC's *Maastricht*[7] decision, Neil MacCormick, the 'founding father' of constitutional pluralism, suggested

> [t]he legal systems of Member States and their common legal system of EC law are

[4] Case C-26/62, *Van Gend en Loos v. Netherlands Inland Revenue Administration* [1963] ECR 1.

[5] Now it is the Court of Justice of the European Union (CJEU), but it has long been called the European Court of Justice (ECJ) and I call it thereby, because the later mentioned materials do so.

[6] Weiler, J., 'The Transformation of Europe', *The Yale Law Journal*, 100(8), 1991, pp.2403-2483.

[7] *Maastricht*, *supra* note 1.

> distinct but interacting systems of law, and hierarchical relationships of validity within criteria of validity proper to distinct systems do not add up to any sort of all-purpose superiority of one system over another.[8]

As such, MacCormick claimed that one should avoid the confusion of supremacy with "any kind of all-purpose subordination of Member State law to Community law".[9] According to the pluralist understanding, Member State courts are not subordinate to the ECJ but can resist the EU law. For example, they may review the treaty in light of their national constitutions. In that sense, perhaps, he may not be pleased to be categorized as a constitutional pluralist because his emphasis is laid more on being 'pluralist' than 'constitutional'. Indeed, although he clearly recognizes the possibility of a conflict between different legal orders, he does not put forward a solution but merely notes that "not all legal problems can be solved legally",[10] thus the conflict resolution is "a matter for circumspection and for political as much as legal judgment".[11]

However, MacCormick fails to indicate what a political solution would be because he does not clearly define the term 'political' (or 'politics'). For the time being, let us assume that 'politics' means an act by some actors other than judicial bodies. On this assumption, his claim would be that a conflict between legal orders would be resolved by actors other than legal organs. Then the conflict would become unlikely to solve because the resolution outside legal organs is less predictable and the result of the 'politics' depends on the place or the situation. If so, the consistency of EU law would be undermined. MacCormick is too optimistic about an avoidance of conflict by politics.

To this point, Miguel Poiares Maduro suggests another resolution. He also begins with the rejection of the hierarchical understanding of the European legal order. He sees the order as "contrapunctual law", where both EU law and national constitutional laws coexist in a harmonic manner while each of them asserts their ultimate authority.[12] In contrast to MacCormick who claims that a conflict between them is to be resolved politically, Maduro expects the resolution to be achieved by legal organs through interpretation. He is also optimistic about the avoidance of the decisive conflict because, as he understands, the creation of the order "was a cooperative process involving a larger group of actors that can be described as forming a European legal community".[13] Therefore, "[t]he relationship established between national courts and individuals on the one hand and the European Court of Justice on the other thus becomes one of dialogue

[8] MacCormick, *supra* note 2, p.265.
[9] *Ibid.*, p.264.
[10] *Ibid.*, p.265.
[11] *Ibid.*
[12] Maduro, *supra* note 2.
[13] *Ibid.*, pp.511-512.

rather than dictation".[14] He lists up the "harmonic principles" with which European courts should comply in case of a constitutional conflict and emphasizes the importance of mutual adjustment and recognition between courts.[15]

His reliance on the capacity of legal organs to avoid a conflict is understandable and preferable, because the avoidance through dialogue between courts would guarantee greater certainty and predictability than that by politics. However, Maduro did not show any more than principles, which seems to be in need of more empirical analysis. More importantly, as Jan Komárek correctly criticizes: "what to do in cases of conflicts, which cannot be avoided by way of interpretation?"[16] Thus, the problem of supremacy of EU law, which both MacCormick and Maduro simply denied without going further, remains central.

A conceptual analysis on supremacy is offered by Matej Avbelj.[17] He defines three models, according to which the terms "supremacy" and "primacy" have different meanings. The first is the hierarchical model, where "all EU law is regarded as a supreme body of law, which prevails over the entire body of national legal provisions […] and as a logical consequence render any contravening national law invalid".[18] Primacy and supremacy are identical here. The second is the conditionally hierarchical model in which the absolute nature of supremacy is cast into doubt. The model allows for, or even requires, some limits to supremacy of EU law under certain conditions.[19] The third is the heterarchical model assuming that supremacy is "an intra-systemic feature" while primacy is "a trans-systemic principle" which regulates the relationship between autonomous legal orders. Primacy is upheld only because Member States voluntarily comply with it. The principle is therefore "not about validity and can not lead to the national law's invalidation, the same, of course, applies vice versa".[20] He concludes that, though European courts are oscillating between the conditionally hierarchical model and the hierarchical model in practice, the latter is theoretically better because "[a]s a matter of logical consistency, can EU law be conditional, hierarchical and supreme at the same time? The answer appears to be no".[21]

However, while he advocates the pluralist understanding of the European legal order by preferring the heterarchical mode, he does not clearly answer why and how the model can prevent EU law from inconsistently applied by Member States. Some empirical description seems to be

[14] *Ibid.*, p.513.
[15] *Ibid.*, pp.524-531.
[16] Komárek, J., 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles"', *Common Market Law Review*, 44(1), 2007, pp.9-40, at 33. His argument will be reviewed in detail in Section 2.2.3.
[17] Avbelj, M., 'Supremacy or Primacy of EU Law—(Why) Does it Matter?', *European Law Journal*, 17(6), 2011, pp.744-763.
[18] *Ibid.*, p.746.
[19] *Ibid.*, pp.747-748.
[20] *Ibid*., pp.750-751. Maduro's "Contrapunctual law" is also included herein. *Ibid.*, p.753, note 69.
[21] *Ibid.*, p.761.

necessary in order to answer the question, but as he himself admits, his modelling is not necessarily based on the factual grounds.[22] Thus, in the next section, the conflict will be examined in a more empirical way.

2.2 European Arrest Warrant Saga

The framework decision on the European arrest warrant was adopted on 13th June 2002.[23] The EAW transformed the extradition system so drastically that various criticisms were raised, especially from the viewpoint of human rights and sovereignty.[24] The main concerns were twofold: the abolition of the requirement of double criminality and the immediate mutual recognition of a warrant. The double criminality requirement refers to a principle under the traditional international law, according to which when state A (an issuing state) issued an arrest warrant to require state B (an executing state) to extradite someone to A, the act in question had to constitute a crime in both states. Since this requirement was abolished, the erosion of state sovereignty and the infringement of the principle of legality, or *nullum crimen, nulla poena sine lege*, were concerned.[25] The latter concerned the immediate mutual recognition of an arrest warrant. The EAW requires an executing state to immediately recognize the arrest warrant only "with a minimum of formality".[26] In other words, the government of an executing state cannot decide whether it actually executes the warrant on a case-by-case basis, which raised the fear about the erosion of the sovereignty of the state. These features of the EAW were accompanied not only by political criticisms, but also by constitutional resistance by four constitutional courts that judged their domestic law implementing the framework decision unconstitutional.[27]

2.2.1 Constitutional Resistance by Member States

Polish Constitutional Court

The Polish Constitutional Court (PCC) ruled that the EAW implementing law does not conform to Article 55 (1) of the Polish Constitution prohibiting citizens' extradition, insisting that

[22] *Ibid.*, p.763.

[23] 2002/584/JHA, Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 2002.6.13, OJ L 149/34.

[24] E.g. Sanger, A., 'Force of Circumstance: The European Arrest Warrant and Human Rights', *Democracy and Security*, 6(1), 2010, pp.17-51.; Blekxtoon, R., "Commentary on an Article by Article Basis", in Blekxtoon, R. and van Ballegooij, W. (eds.) *Handbook on the European Arrest Warrant*, 2004, pp.217-269.

[25] Mitsilegas, V., 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU', *Common Market Law Review*, 43(5), 2006, pp.1277-1311.

[26] *Ibid*.

[27] In this paper, I will deal with three of them, because the Cypriot judgment mainly focused on a domestic procedural problem and the length of the paper is limited.

"[s]urrendering a citizen to another EU Member State on the basis of an EAW would entirely preclude enjoyment of this right [to be held criminally accountable before a Polish court] and, *ipso facto*, would amount to an infringement of the essence of this right".[28] Moreover, the PCC continued that "[i]t is beyond doubt that the surrender of a person prosecuted on the basis of an EAW […] must worsen the situation of the suspect".[29] Due to the distrust against the new extradition system, the PCC emphasized its right and duty "to review the conformity of normative acts with the [Polish] Constitution".[30] That claim sharply contradicts to the monistic conception of the European legal order in which EU law subordinates all national law.

The PCC, however, decided that the loss of the binding force of the challenged provision should be delayed for 18 months because "[t]his institution of the EAW has crucial significance for the functioning of the administration of justice and, primarily […] for improving security".[31] By doing so, the PCC avoided to delay the vitalization of the EAW system.

German Constitutional Court

The German Constitutional Court (GCC) ruled that the EAW implementing law infringed Article 16 of the Basic Law that conditions any extradition on "Gerechtsstaatliche Gründsätze" (rule of law principle), according to which the extradition is constitutional only when the rule of law in an issuing state is guaranteed.[32] The article enshrines the right not to be extradited for the reason that there is "die besondere Verbindung" (the special association) between German citizens and German legal system.[33] Although the GCC considered that a basis on which German trust other EU Member States did exist since they abided by the principles enshrined in Article 6(1) of the Treaty on the European Union,[34] a case-by-case examination of an extradition by GCC is still required.[35] However, the EAW implementing law in Germany did not leave "anfechtbarkeit", which is officially translated as "voidability", of the decision,[36] namely the possibility of case-by-case examination and refusal of extradition. For this reason, the GCC declared the implementing law as void.

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[28] P 1/05, *Application of the European Arrest Warrant to Polish Citizens* [2005], para.4.
[29] *Ibid.*, para.8.
[30] *Ibid.*, para.9.
[31] *Ibid.*, para.17.
[32] BVerfG, 2 BvR 2236/04, *European Arrest Warrant Act* [2005] BverfGE 113, 273. The paragraph numbers put by the paragraphs in the official English translation are, seemingly as a result of mistakes, different from those in the original version. Thus this paper basically relies on the English version and looks at the German version if necessary.
[33] *Ibid.*, para.68.
[34] It reads that "[t]he Union is founded on the principle of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States".
[35] *European Arrest Warrant Act*, *supra* note 32, para.120.
[36] *Ibid.*, para.103.

Czech Constitutional Court

The Czech Constitutional Court (CCC) only showed a hypothetical situation where the extradition by EAW might be unconstitutional, without nullifying the implementing law. However, the judgment shared the character of constitutional resistance with other courts in the sense that it explicitly refused to accept "absolute primacy" of EU law over Czech law, insisting that

> the delegation of a part of the powers of national organs upon organs of the EU may persist only so long as these powers are exercised by organs of the EU in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the substantive law-based state.[37]

Although the CCC regarded the threat on its sovereignty by the ECJ as a "highly unlikely eventuality"[38] and showed its cooperative attitude towards the EU, the CCC insisted that it was the court that had the ultimate authority, by denying what it called absolute primacy. The obedience to the ECJ is, therefore, not more than a product of chance, which is open to a conflict if the preservation of Czech sovereignty is threatened.

2.2.2 The ECJ judgment on the EAW

In 2005, the ECJ answered the preliminary reference by the Belgian Court of Arbitration (Arbitragehof) concerning the legality of the EAW framework decision.[39] An NPO called Advocaten voor de Wereld claimed that the EAW implementing law infringed on the principle of equality and non-discrimination as well as the principle of legality, thus requested its annulment. Though the ECJ supported the validity of the EAW implementing law, it engaged in a more concrete argument on human rights and the rule of law.

The ECJ followed the previous judgments to clarify the legal basis of judicial review and reemphasized the importance of fundamental rights protection. In so doing, the ECJ mentioned the European Convention of Human Rights (ECHR) and the Charter of Fundamental Rights of the EU,[40] and argued that the EAW did not infringe the rights enshrined in them. Concerning the principle of legality, the ECJ clarified that the offences and penalties continued to be defined by the issuing states, all of which are the contracting parties of the above-mentioned instruments.

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[37] Pl. ÚS 66/04, *European Arrest Warrant* [2006], para.53.
[38] *Ibid.*
[39] Case C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad* [2007] ECR I-3633.
[40] *Ibid*., paras.45-46. These paragraphs will be examined later in Subsection 3.2.2 (b).

The ECJ thus concluded that the principle was not infringed either.[41]

Although the ECJ admitted the broad discretion of Member States in defining the crimes and penalties which the EAW was applied, the court did not directly address the problem of conflict with Member States' constitutions at all. With that regard, one lawyer found the judgment "disappointing".[42]

2.2.3 Existing Analysis on the EAW saga by Constitutional Pluralists

Some constitutional pluralists have attempted to put the EAW saga in a theoretical context. Among them, Jan Komárek tries to analyze a set of judgments by the constitutional courts in order to examine Maduro's "contrapunctual principles" and Kumm's "the principle of best fit".[43]

Komárek first examines whether the judgments accorded with contrapunctual principles which require both EU and national courts to reason in universal terms, taking the European context into account.[44] The principle of universalizability, according to Maduro, requires a decision to be "grounded in a doctrine that could be applied by any other national court in similar situations".[45] However, Komárek argues that the principle has a certain limit, saying that

> [i]n essence, [the preservation of national identity] means that a degree of differentiation (or even discrimination) based on nationality among EU citizens must be preserved in order not to deprive national citizenship of all meaning. The idea of universalizability orders the exact opposite.[46]

Having said this, he arrived at the core of his criticism that "Maduro's version of the principle of universalizability would force the court in such a situation to set aside provisions of the national constitution. However, this contradicts the idea of pluralism to a certain extent".[47] On this basis, he turns to Kumm's "the principle of best fit" requiring national courts to give up supremacy of their constitutions by assuming "that both national and European constitutional orders are built on the same normative ideals".[48] However, this path is also problematic because, according to Komárek, if we expect national courts to abide by the principle, "we leave something in the

[41] *Ibid.*, paras.53-54.
[42] Sarmiento, D., "European Union: The European Arrest Warrant and the quest for constitutional coherence", *International Journal of Constitutional Law*, 2008, pp.171-183, at 177-178.
[43] Komárek, *supra* note 16.
[44] *Ibid.*, p.31.
[45] Maduro, *supra* note 2, p.530.
[46] Komárek, *supra* note 16, p.33.
[47] *Ibid.*
[48] *Ibid.*, p.34.

hands of courts, something we should perhaps be doing ourselves and consciously. That 'something' is nothing else than making constitutional revolution".[49] Therefore, the question needed to be answered became:

> to what extent can the conflict be decided by the courts (and by their interpretation of law) and what should be left to the other constitutional actors, these actors being not only politicians, but also government officials, the legal/constitutional doctrine and the public at large.[50]

Then he concludes that Maduro's final principle, namely "the principle of institutional choice", according to which "each legal order and its respective institutions must be fully aware of the institutional choices involved in any request for action in a pluralist legal community",[51] is "amongst possible processes to deal with the conflict".[52]

Komárek's argument is significant because it correctly shows the limit of constitutional pluralism itself by asking, again, "what to do in cases of conflicts, which cannot be avoided by way of interpretation?"[53] However, his argument can be criticized in the same way as MacCormick because he did not identify "other constitutional actors" nor show what a resolution by that kind of actors would be.[54] Even if his argument and conclusion are effective, there is room to testify his proposal, closely looking at the institutions at stake.

2.3 Dilemma and Puzzle: 'Constitutional' 'Pluralism' at the same time?

The EAW saga illustrates both virtue and vice of constitutional pluralism. On the one hand, it has a certain explanatory power to recognize the pluralist character of the European legal order, which has been largely overlooked. Taking that character into account, the broader legal and political dynamics within the EU can fall into the scope of analysis. Without the theory, the judgments on the EAW, backed by a political fear of the deepening of European integration, might have been treated merely as an exceptional selfishness of the national courts.

On the other hand, a serious concern has been raised, questioning: can 'constitutional' be at the same time 'pluralist'?[55] The contradiction comes to the fore when we consider a situation in which EU law and national law are in conflict. If the European legal order is truly 'constitutional',

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[49] *Ibid.*, p.36.
[50] *Ibid.*, p.38.
[51] *Ibid.*, p.37 (originally, Maduro, *supra* note 2, pp.530-531).
[52] *Ibid.*, p.40
[53] *Ibid.*, p.33.
[54] See Section 2.1.
[55] Avbelj, M., "Can European Integration be Constitutional and Pluralist – Both at the Same Time?", in Avbelj, M. and Komárek, J. (eds.) *Constitutional Pluralism in the European Union and Beyond*, Oxford/Portland: Hart Publishing, 2012, pp.381-409.

a contradicting national law would be invalidated, and then the order is not 'pluralist'. If it is truly 'pluralist', then EU law might no longer be consistent. Moreover, even if a national court holding the ultimate authority would voluntarily consider the uniform application of EU law seriously, the decisions of national courts would converge with the stance of the ECJ, and the legal order would, *de facto*, be no longer 'pluralist'.

This dilemma leads to a puzzle. *In theory*, constitutional pluralism predicts conflicts between the EU and Member States. Because of its dilemma, the theory does not clearly explain how the conflicts are resolved. Nevertheless, EU law *in reality* has been consistently applied with few exceptions,[56] while national courts have not given up the autonomy or the identity of their laws, as is the case with the EAW. In order to account for this puzzling situation, there is a need to modify constitutional pluralism.

3. Inter-Institutional Relationship in Criminal Cooperation

3.1 Focus on Inter-Institutional Relationship

On the ground argued so far, the paper suggests paying attention to "inter-institutional relationship" when analyzing the conflict between the EU and the Member States.

The dilemma in constitutional pluralism and its explanatory shortcomings come from its two limits of the analytical scope. First, it tends to assume a dichotomy between the EU and the Member States and to ignore a third party. This dichotomy, say, 'the EU or the Member States' approach, makes the problem of the final authority needlessly difficult. Even though Maduro and Komárek suggest a possibility of making an institutional choice, they do not analyze it in detail. Thus, what can be "institutional alternatives"[57] needs to be explored.

Second, because constitutional pluralism largely ignores time dynamics, a possibility of resolution over time is overlooked and thus the problem becomes also needlessly insolvable. Even if the views of the ECJ and national court(s) seem irreconcilable in one case, there is a possibility that either court shows its intention of compromising with, or reassuring, the other in another case.

On these considerations, a hypothesis is suggested: focusing on inter-institutional relationship between the EU and other international organizations or institutions allows constitutional pluralism to overcome its shortcomings, at least with regard to certain issue-areas.

[56] The exceptions include a disobedience of the Czech Constitutional Court to a preliminary ruling by the ECJ, but the case seems exceptional. See, Zbiral, R., 'Czech Constitutional Court, judgment of 31 January 2012, Pl. ÚS 5/12. – A legal revolution or negligible episode? Court of Justice decision proclaimed *ultra vires*', *Common Market Law Review*, 49(4), 2012, pp.1475-1492.

[57] Maduro, *supra* note 2, p.530; Komárek, *supra* note 16, p.37.

Inter-institutional relationship means relationship between different international organizations or institutions, which produces a certain outcome such as practices and norms. Existing literatures in constitutional pluralism do not take into account other international organizations within or beyond Europe, such as the United Nations, the OSCE, the NATO, and the Council of Europe among which this paper will focus on.

Few works of Global Administrative Law (GAL) have already adopted a similar notion to mean a possibility of horizontal review between international organizations.[58] However, the GAL does not clarify the exact meaning or the function of "horizontal review". Moreover, it is unnatural to assume that the mode of relationship between international organizations is limited to review. Thus, it seems to be difficult to rely on the GAL literature directly.

The idea of inter-institutional relationship strongly resonates with the "inter-institutional view" of EU law proposed by Keith Culver and Michael Giudice.[59] They find an understanding of EU law as "a clash between Member State legal systems and an EU legal system […] ultimately misleading".[60] Instead, their approach "tracks law and legal orders in the interactions between institutions of law",[61] calling it the inter-institutional view of EU law. They begin with criticism against Josepf Raz, arguing that his understanding of legal system as having comprehensiveness, supremacy and openness cannot account for "the relation between EU law and the law of Member States […] best characterized […] not as integration of legal systems at all, but instead as a kind of systems clash".[62] Alternatively, they suggest an inter-institutional account, according to which

> the existence and nature of supra-state law is to be found in the interactions, or what we will call relations, of mutual reference, between EU institutions and Member State institutions which share and exchange norms and normative powers to create, apply, and enforce norms.[63]

They support their own view for the reason that "a static time-slice view of a momentary hierarchy of legal institutions has very little probative value, and is inapt given the dynamic nature

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[58] Deshman, A., 'Horizontal Review between International Organizations: Why, How, and Who Cares about Corporate Regulatory Capture', *European Journal of International Law*, 22, 2011, pp.1089-1113. See also: Raffaelli, R., 'Horizontal Review between International Organizations: A Reply to Abigail C. Deshman', *European Journal of International Law*, 24(4), pp.1195-1200; Deshman, A., 'Horizontal Review between International Organizations: A Rejoinder to Rosa Raffaelli', *European Journal of International Law*, 24(4), pp.1201-1203.

[59] Culver, K. and Giudice, M., "Not a System but an Order: An Inter-Institutional View of European Union Law", in Dickson, J. and Eleftheriadis, P. (eds.) *Philosophical Foundation of European Union Law*, Oxford: Oxford University Press, 2012, pp.54-76.

[60] *Ibid.* p.55.

[61] *Ibid.*

[62] *Ibid.* p.63.

[63] *Ibid.* p.68.

of the phenomena".[64] This criticism and the second shortcoming of constitutional pluralism suggested above largely overlap each other, and thus this paper basically agrees to their idea of the inter-institutional view. As to the first shortcoming, however, they seem to be inward-looking as well because, although they suggest the inter-institutional view in general terms, they look only at the relations between EU law and national law, ignoring relationship between other international organizations or institutions.[65] Therefore, focusing on such a relationship contributes to the inter-institutional account by Culver and Giudice in a more concrete way.

Upon these considerations, the focus on inter-institutional relationship will lead to the extension and modification of constitutional pluralism by elaborating "institutional alternatives". If we can assume that both of the EU and the Member States commonly rely on norms which are not inherent to either part, then we might say that the coherency between them is upheld without a dominance of one side. In other words, even if a national court has a cooperative attitude and decides to give a judgment consistent with the ECJ's view, that would not mean *de facto* abolition of pluralism as long as the reasoning is based on a commonly referred norm made through the inter-institutional relationship. At the same time, we can also address the second problem of time dynamics by considering the accumulation of the outcomes which is produced through the relationship.

In the following part, the development of the criminal cooperation in the EU within which the EAW saga occurred will be examined through the lens of inter-institutional relationship.

3.2 Overview of the EU Criminal Cooperation and the EAW Saga Again

3.2.1 Practical Cooperation under the CoE

Before the criminal cooperation under the EU began under the Maastricht Treaty in 1992, the Member States had already cooperated in the frameworks outside the European Communities, such as the Trevi Group, the Schengen Agreement, and the CoE, all of which facilitated the EU criminal cooperation as "laboratories".[66]

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[64] *Ibid.* p.75.

[65] The difference between 'organization' and 'institution' and their exact definitions are of importance, but they are beyond the scope of this paper. Suffice it to say that 'institution' here is a broader notion than 'organization' because 'institution' includes a set of rules or norms, and subsidiary organs of 'organization'. For example, the former refers to 'the EU' or 'the CoE' while the latter includes 'the ECJ', 'the ECtHR', 'the Treaty on the European Union' and 'the ECHR'. This difference is akin to the distinction between "legal institution" and "institution of law", which Culver and Giudice did distinguish. See also: Zucca, L., "Monism and Fundamental Rights" in Dickson and Eleftheriadis, *supra* note 59, pp.331-353.

[66] Monar, J., 'The Dynamics of Justice and Home Affairs: Laboratories, Driving Factors and Costs', *Journal of Common Market Studies*, 39(4), 2001, pp.747-764. See also: Peers, S. *EU Justice and Home Affairs Law*, Edinburgh: Pearson Education, 2000; Mitsilegas, V., Monar, J.

Among these extramural frameworks of cooperation, of the greatest importance is the CoE, to which all the EU Member States belong. It is an intergovernmental organization which aims to promote human rights, democracy and the rule of law in Europe. For that purpose, the European Convention of Human Rights (ECHR) and other various treaties have been ratified, and enforced by the European Court of Human Rights (ECtHR). The CoE has been an important forum in which the criminal matters are discussed, not only because that policy-area is strongly connected with human rights issues, but also because the EC Member States tend to be reluctant to transfer their sovereignty by dealing it in a non-intergovernmental way under the EC. The treaties ratified under the CoE provided the EU with "points of departure", some of which were incorporated in *acquis communautaire* of the EU.[67] Indeed, the EAW also followed the European Convention on Extradition ratified in 1957.

Moreover, the CoE has helped national administrations deepen their understanding of their counterparts. Some specialists in criminal matters pointed out that

> [t]he often protracted negotiations on the conventions, which were affected by all the substantial differences between the national legal systems […] provided national administrations with an increasing experience in cooperation with other European countries, led to a better understanding of the particular systemic differences and difficulties in partner countries, and created gradually a more favourable climate for cooperation on internal security issues.[68]

In course of achieving human rights protection by the CoE, national administrations grew mutual understanding of, and trust in, their counterparts. Indeed, the importance of mutual trust with regard to criminal cooperation including EAW was emphasized by the Commission,[69] the ECJ,[70] and importantly, the GCC[71] and the CCC.[72] Without this background cultivated by the CoE, conflicts between the Member States and the EU would be more likely to occur. This is because, if an executing state does not trust the human rights protection of the issuing state, it would be more likely that a petition to preclude the surrender is submitted. The more such petitions are brought before national courts, the more likely it would be that some of them judge

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and Rees, W., *The European Union and Internal Security: Guardian of the People?*, New York: Palgrave Macmillan, 2003; Mitsilegas, V. *EU Criminal Law*, Portland: Hart Publishing, 2009.

67 Mitsilegas, Monar and Rees, *supra* note 66, p.20.

68 *Ibid.*, p.21.

69 European Commission, Mutual Recognition of Final Decisions in Criminal Matters, COM (2000) 495 final, 2000.7.26

70 Joined Cases C-187/01 & C-385/01, *Criminal proceeding against Hüsseyin Gözütok and Klaus Brügge* [2003] ECR I-5689.

71 *European Arrest Warrant Act*, *supra* note 32.

72 *European Arrest Warrant*, *supra* note 37.

the procedure unconstitutional. In reality, however, no courts mentioned above reasoned on the basis of the human rights situation in the issuing state.

In sum, the practical cooperation between national authorities under the auspice of the CoE cultivated the mutual understanding and trust, and thus decreased the likelihood of a constitutional resistance by national courts. However, this argument needs further justifications by examining the judicial aspect of the inter-institutional relationship.

3.2.2 Judicial Relationship with the ECtHR

(a) Changes in the character of the ECtHR

The ECtHR, legally engaging in human rights protection since 1959, has been changing its character, especially after the enlargement eastwards of the CoE. Martinico and Pollicino emphasize that the ECtHR has shifted from "an exclusively subsidiary role as secondary guarantor of human rights to a more central and crucial position as a constitutional adjudicator".[73] Consequently, the court has gone "beyond the original aim of ensuring (only) individual justice"[74] by amplifying both direct and indirect effects of its case-laws. Although the exact meanings of these terms are different from those in EU law, this trend can be understood as an acceleration of judicial activism and centralization of the ECtHR.[75]

In such a context, it is natural that the ECtHR should commit to human rights protection by the EU. The attitude towards the EU was articulated in *Bosphorus* where the court "has recognised that absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer [to the EU] would be incompatible with the purpose and object of the Convention".[76] Having said this, the ECtHR requires the EU and its Member States to provide with the "equivalent protection", stating that

> state action taken in compliance with such legal obligations [flowing from the EU] is justified *as long as the relevant organisation is considered to protect fundamental rights*, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention[…]. However, any such presumption can be rebutted if, in the

[73] Martinico, G. and Pollicino, O., *The Interaction between Europe's Legal Systems: Judicial Dialogue and the Creation of Supranational law*, Cheltenham: Edward Elgar, 2012, p.166.
[74] *Ibid.*, p.167.
[75] *Ibid.*, esp. Ch.5 and Ch.7.
[76] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland* (App. no 45036/98), Judgment 30 June 2005, para.154.

> circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by *the Convention's role as a "constitutional instrument of European public order" in the field of human rights*.[77]

As such, the ECtHR refrained from intervening in matters dealt with by the EU as long as the equivalent protection is upheld.[78] In other words, the court is ready to hand down a judgment if it regards an EU act or its national implementation as breaching the human rights law under its jurisdiction. If that were to be the case, the reference point would be the ECHR. In that sense, the ECHR is the "constitutional instrument" common to the EU and its Member States.

(b) Reference to the ECHR and the ECtHR case-law

At the same time, the ECJ and national courts have repeatedly referred to the ECHR norms and the ECtHR case-laws. Among the constitutional courts which judged on the EAW, the GCC and the CCC explicitly referred to the ECHR or ECtHR case-laws. The GCC stated that

> the existence of an all-European standard of human rights protection established by the European Convention for the Protection of Human Rights and Fundamental Freedoms do not […] justify the assumption that the rule-of-law structures are synchronised between the Member States of the European Union.[79]

While the GCC seems somewhat skeptical about the effectiveness of human rights protection in other countries, the PCC argues more optimistically that

> [i]t is always necessary to remember the fact that all EU Member States are also signatories of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Accordingly a citizen cannot be significantly affected in his rights due to the fact that his criminal matter will be decided in another Member State of the Union, as each EU Member State is bound by a standard of human rights protection.[80]

What matters is not that the attitudes of the courts differed but that they commonly showed a certain condition under which they regard the EU act as justifiable. It is likely that these courts would be satisfied with the human rights protection as long as they can believe that the rights enshrined in the ECHR are guaranteed (even) under the EAW system. This explains why the ECJ explicitly refers to the ECHR and ECtHR case-laws in *Advocaten*. The court confirms that

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[77] *Ibid.*, paras.155-156, emphasis added.
[78] The resemblance of the *Bosphorus* doctrine to the doctrine articulated in *Solange* by the GCC has been pointed out. E.g. Martinico and Pollicino, *supra* note 73, Ch.1.
[79] *European Arrest Warrant Act*, *supra* note 32 (the GCC), para.120.
[80] *European Arrest Warrant*, *supra* note 37 (the CCC), para.86.

> [t]he Union is founded on the principle of the rule of law and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms […] and as they result from the constitutional provisions common to the Member States, as general principles of Community law.[81]

As such, the court incorporated the ECHR, as well as the Charter of Fundamental Rights,[82] to accentuate its positive attitude towards human rights protection.

Additionally, the ECJ emphasized the right to an effective remedy enshrined in the ECHR, answering the preliminary reference by the French Constitutional Council (Conseil Constitutionelle) The French court asked whether the EAW framework decision must be interpreted as precluding Member States from providing for an appeal suspending execution in a certain situation.[83] The ECJ pointed out that the right to an effective remedy was of special importance,[84] and referred to three ECtHR case-laws.[85] The ECJ finally answered that Member States were not precluded from providing for an appeal suspending execution of the decision of the judicial authority,[86] despite that this interpretation seems to contradict to the *prima facie* meaning of the framework decision.

We can understand these judgments given by Member States courts and the ECJ as a process of reassurance: the national constitutional courts showed concerns on human rights protection under the EAW system; thus the ECJ attempted to assure the constitutional courts. In this dialogue, both the ECJ and the national courts commonly relied on the extramural norms, namely the ECHR and the ECtHR case-laws. The reference to the outside norms which are commonly shared by the ECJ and the national courts enabled the former to reassure the latter.

4. By way of Conclusion

We have observed that the practical cooperation under the CoE seems to have reduced the likelihood of a conflict between the EU and Member States, which was predicted by constitutional pluralism, on the ground of the mutual understanding and trust. Even in the case of a conflict exemplified by the EAW saga, the reference to the ECHR and the ECtHR case-laws made it possible that the ECJ reassured the national courts. It should be noted here that the Member States did not give up the final authority in this process, since the PCC, GCC and CCC reviewed the EAW in particular, and human rights protection in general, in light of their national

[81] *Advocaten voor de Wereld*, *supra* note 39, para.45.
[82] *Ibid.*, para.46. This was done even though the Charter was not entered into force at that time.
[83] Case C-168/13, *Jeremy F. v. Premier Ministre*, EUR unreported, para.27. It was the first use of the preliminary reference procedure for the Constitutional Council.
[84] *Ibid.* para.42.
[85] *Ibid.*
[86] *Ibid.* para.55.

constitutions.

Then the question to be answered is whether this plurality can be called constitutional without returning to the denial of the former. The answer seems to be positive, because, through the inter-institutional relationship, the ECHR and the ECtHR case-laws became part of the constitutional law to which the EU and its Member States commonly refer. As long as the term 'constitutional' is understood as a certain kind of centralization,[87] the ECHR deserves the constitutional status because it was declared as the "constitutional instrument of European public order" in *Bosphorus* by the ECtHR, and was incorporated into "general principles of Community law" by the ECJ on the basis of Article 6(1) of the Treaty of the EU,[88] as observed in *Advocaten*.

Because of this incorporation, the European courts must abide by, and can rely on, the norms and case-laws, even though they lie neither in EU law nor in Member States law. This constellation enables both the ECJ and Member State courts to keep on asserting their own ultimate authority without allowing a dominance of either. In this sense, there is room to assert that 'constitutional' order can be at the same time 'pluralist'. There lies the answer to the question put forward at the beginning of the paper: conflicts between the EU and its Member States can be resolved with the help of inter-institutional relationship.

Further research needs to be done to answer some remaining questions. Among them, the most critical one is whether, or to what extent the theoretical framework suggested in this paper can be applied to other cases. The account relying on inter-institutional relationship clearly cannot be applied to issue-areas where there is no other relevant international organizations. Therefore, it must be admitted that not every conflict resolution between EU law and national laws can be explained by inter-institutional relationship. For instance, the constitutional resistance concerning the problem of EU's *ultra vires*[89] needs to be otherwise explained. Put differently, however, the basic framework of the inter-institutional account can be extended to other cases if the following conditions are fulfilled: the EU and Member States are in conflict with regard to a certain issue; there exists a relevant international organization whose task covers the issue in question.

Furthermore, it remains unanswered whether the concept of inter-institutional relationship can be applied beyond Europe, or what if the relationship is not 'cooperative', as is the case of this paper, but competitive or adversarial. Or, what if the constitutionalization of the ECHR or the ECtHR case-laws would lead to another constitutional resistance?[90]

All of these remaining questions are important and worth answering elsewhere. Yet focusing

[87] See Section 2.1.
[88] *Supra*, note 34.
[89] Some judgments by the GCC indeed problematize *ultra vires*. E.g. *Maastricht*, *supra* note 1.
[90] Indeed, the ECtHR has been harshly criticized for *ultra vires* by its Member States. See, Martinico and Pollicino, *supra* note 73, ch.5.

on inter-institutional relationship may further develop constitutional pluralism and integration theories in general. European integration studies can and should be more pluralist, taking into consideration actors other than the EU, such as international organizations, NGOs or even individuals. They have been largely ignored or underestimated by many of the existing integration studies identifying the European 'integration' with the European 'Union'. However, the European legal and political order is a product of complex interactions between multiple actors. The focus on inter-institutional relationship is one of steps towards understanding this multiplicity.

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