

INHERENT RISKS OF THE PLURALIST STRUCTURE: USE OF THE CONCEPT OF NATIONAL CONSTITUTIONAL IDENTITY BY THE POLISH AND CZECH CONSTITUTIONAL COURTS

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Summary: The jurisprudence of the ECJ and national constitutional courts related to the national constitutional identities of the Member States fits into the framework of constitutional pluralism as a modus vivendi of the European legal order. This paper focuses in particular on the recent judgments of the Polish and Czech constitutional courts. One might perceive a general tendency in the process of EU integration for EU policies to be increasingly dominated by national agendas. As a result, EU policies might be held hostage by the interests of the stronger Member States. These tendencies increase the tensions inherent in the pluralist structure of the relationships between legal orders in the European arena. Constitutional identity is yet another concept used in this debate about ultimate authority. Pluralism assumes that the courts will compete over ultimate authority and will try to use such a concept 'to their advantage'. With regard to article 4 (2) TEU, the ECJ seems to have more persuasive power than the Polish and the Czech constitutional courts. However, the jurisprudence is certainly not settled yet.

The interweaving of national, European and international law creates the need to examine constitutional identity expressed inside and outside the EU. Pure heterarchy based on a balance of powers and protection of national constitutions as well as constitutional courts comes with the inherent risk of leading to the logic of 'might is right'. On the other hand, even though one could identify cases where the judicial actors seem to miss an opportunity to improve the protection of individual rights or where they reveal a troubling eagerness to ensure their own authority, such risks are an idiosyncrasy of the system of constitutional pluralism. The theory of constitutional pluralism has the ambition of improving the quality of judgments and creating a framework for fruitful interaction of competing visions of Europe. Single judgments that may be open to criticism do not bring into question the viability of the whole framework, but it is nonetheless important to be aware of the systemic risks.

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I. Introduction

The issues of enlargement of the European Union (EU), the euro crisis, national and European identity as well as the debate on the relations between legal orders in the international arena all come together on the Kirchberg Plateau, at the seat of the European Court of Justice (ECJ). Mainly due to an increase in the caseload, a legislative proposal for a reform of the Statute of the ECJ has been introduced and is currently awaiting its first reading in the European Parliament.¹ This reform would involve changes in the procedure and the composition affecting all three 'instances' of the institution. In particular, the decision to increase the number of judges at the General Court, instead of creating another specialised tribunal, shows that certain considerations were crucial for the judges, namely the guarantee of the coherence of the jurisprudence and the constitutional role of the Court of Justice. However, these procedural changes that might be seen to lie on the surface run in parallel with the constantly evolving structural position and role of the ECJ in the process of European integration. Both procedural and jurisprudential 'modernisation' represents efforts to strengthen the institution. Even though the first one has been subject to heated debate on the need to guarantee the coherence of the jurisprudence, as well as the efficient functioning of the EU courts, the developments in the latter stream appear to be more controversial as their effects on the constitutional role of the ECJ are ambivalent.

The jurisprudential changes have to be identified through an analysis of the Court's jurisprudence. In this paper, I focus on the concept of constitutional identity, as this demonstrates the crucial tension in the European framework. The process of European integration oscillates between the 'supranational tendency', which in the legal context involves strengthening the position of the ECJ, and the 'intergovernmental tendency', which strengthens the position of national constitutional courts. The same kind of tension has resurfaced during the euro crisis, and the adopted solution in the form of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) signed on 2 March 2012 is rather intergovernmental.² In fact, the Member States chose a 'traditional' form of international negotiation that naturally strengthens the role of the richer, bigger or more powerful partners. At

¹ Court of Justice of the European Union, Legislative proposal 2011/0901(COD) of 28 March 2011, summary <<http://www.europarl.europa.eu/oeil/popups/summary.do?id=1148372&t=e&l=en>> accessed 7 June 2012.

² Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), signed on 2 March 2012 <http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf> accessed 7 June 2012.

the national level, a legal mechanism that is supposed to guarantee respect of the less privileged parties in a community has been the constitutional model. In the European pluralist structure, the question arises of who the guardian of the national constitutional identity of the Member States is: the ECJ or the national constitutional courts?

These procedural and jurisprudential developments have to be analysed against the background of theoretical debates on the relations between legal orders in the international arena. These include the national, European and international levels, which are nowadays tightly interwoven.³ Hence the need to examine European identity expressed to the inside and outside of the EU. This paper analyses the jurisprudence of the ECJ, as well as the national constitutional courts' use of the concept of national constitutional identity in light of constitutional pluralism within the EU. Possible consequences of the recent developments and tensions within the EU on account of its actions at the international level are also highlighted. The fundamentals for the construction of a European identity have been identified mainly in the external relations of the EU. While consolidation of the jurisdiction of the ECJ can contribute to strengthening its position on the internal plan of the EU, striving to ensure the Court's exclusive jurisdiction on all issues concerning European law might undermine its position on the international scene. Similarly, while developing national constitutional identity as a concept of European law might enlarge the scope of jurisprudence of the ECJ and ensure its flexibility, from an external perspective this could diminish the transparency and legal security of the EU as an international actor.

Before moving to substantive considerations, it is important to briefly clarify the use of certain terms and notions in this paper. According to article 19 TEU, the Court of Justice of the EU, commonly referred to as the European Court of Justice (ECJ), includes the Court of Justice, the General Court (GC) and specialised courts (currently only the Civil Service Tribunal (CST)). These can be referred to as EU courts. Following the general logic of EU legislation, I will also use the terms 'EU law' and 'European law' interchangeably. For national constitutional courts, in order to facilitate the distinction between the jurisdictions, I will use their names in the native languages. Obviously, within the constraints of this paper, I cannot conduct a complete analysis of the jurisprudence of the constitutional courts of the Member States. Moreover, such studies have already been already carried out.⁴ Therefore, I will often use the German

³ Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010) 8.

⁴ See Anne-Marie Slaughter, Alec Stone Sweet and Joseph Weiler (eds), *The European Court and National Courts* (Hart Publishing 1998); José Maria Beneyto, Ingolf Pernice, *Europe's Constitutional Challenges in the Light of the Recent Case Law of National Constitutional*

Federal Constitutional Court - the Bundesverfassungsgericht (BVerfG) - as a reference point as it has probably been the most outspoken on the question of the relationship between national and European law.⁵

The changing constitutional role of the ECJ has already been described from a historical perspective.⁶ In this paper, I focus on very recent developments and present how the concepts of European and national constitutional identities have been articulated by the ECJ and by the national constitutional courts. European and national constitutional identities in the context of the constitutional role of the ECJ and the national constitutional courts are ultimately two sides of the same coin.

I approach the topic in four steps. First, I briefly present the notion of national constitutional identity and its relation to a common European identity. Secondly, I present the debate on ultimate jurisprudential authority in the European framework. Jurisprudence has proven that the domain of human rights is the most fertile ground for potential conflicts between legal orders as human rights norms are often perceived as constituting the core values of a legal order.⁷ Therefore, the main actors or competitors in this debate are the national constitutional courts, the ECJ and the European Court of Human Rights (ECtHR). Even before the Lisbon Treaty there were many episodes in this jurisprudential debate. They drew the attention of academia and those engaged in politics and generally involved all partners in judicial dialogue. Thirdly, I explain how constitutional identity can be perceived as a concept helping to construct European constitutionalism. Finally, I focus on the articulation of the most recent normative addition to identity: article 4 (2) TEU in the jurisprudence of European courts. The notion of national constitutional identity has resurfaced in the jurisprudence of both the ECJ and the national constitutional courts. The Court in Luxembourg has used it to grant Member States free passage to keep their particular legislation, restricting certain rights or freedoms under EU law. Yet, by doing so, the ECJ has put itself in the position of gatekeeper of the national constitutional identity of the Member States, perceiving it as a concept of EU law. The ECJ has simply continued with its previous jurisprudence,

Courts (Nomos Publishers 2011); Matthias Wendel, 'Lisbon Before the Courts: Comparative Perspective' (2011) 7(1) *European Constitutional Law Review* 96.

⁵ See Anne Marie Slaughter, 'Judicial Globalization' (1999-2000) 40 *Virginia Journal of International Law* 1103, 1107; Frank Schorkopf, 'The European Union as an Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon' (2009) 10 *German Law Journal* 1219, 1232.

⁶ Julio Baquero Cruz, 'The Changing Constitutional Role of the European Court of Justice' (Summer 2006) 34(2) *International Journal of Legal Information* 222.

⁷ See JHH Weiler, 'Human Rights, Constitutionalism and Integration: Iconography and Fetishism' (2001) 3 *International Law FORUM du droit international* 227, 228-229.

adding one new concept to its palette. In order to show how this attitude can contradict the national perspective, I discuss two recent and controversial judgments of the Polish Constitutional Court - Trybunał Konstytucyjny (TK) and the Czech Constitutional Court - Ústavní soud (ÚS), which review the constitutionality of an EU regulation and the limits of the jurisprudence of the ECJ. This analysis of jurisprudence clearly reveals that there is a link between national identity and sovereignty.⁸

II. National and European identity as two sides of the same coin

The notion of European identity has been present in the normative framework of the EU for a long time. In 1973, the Heads of State or Government of the European Communities, meeting at the Copenhagen European Summit, signed a Declaration on European Identity, stating that the Member States:

(...) wish to ensure that the cherished values of their legal, political and moral order are respected, and to preserve the rich variety of their national cultures. Sharing as they do the same attitudes to life, based on a determination to build a society which measures up to the needs of the individual, they are determined to defend the principles of representative democracy, of the rule of law, of social justice — which is the ultimate goal of economic progress — and of respect for human rights. All of these are fundamental elements of the European Identity.⁹

Since then it has proven difficult to affirm more elements of the common European identity.¹⁰ Naturally, instead of making a clear positive choice it is easier to assert a standpoint by negatively positioning oneself vis-à-vis others. Hence, it has been easier to affirm the European identity to the outside than to the inside. The only express reference in the Treaties to European identity can be found in the context of external action.¹¹ The Treaties do, however, contain references to EU values as

⁸ Franz C Mayer, 'Rashomon in Karlsruhe - A Reflection on Democracy and Identity in the European Union: The German Constitutional Court's Lisbon Decision and the Changing Landscape of European Constitutionalism' (2011) 9 *International Journal of Constitutional Law* 757, 783.

⁹ Declaration on European Identity (Copenhagen, 14 December 1973) EC Bulletin 1973 No 12, 2 <http://www.cvce.eu/obj/Declaration_on_European_Identity_Copenhagen_14_December_1973-en-02798dc9-9c69-4b7d-b2c9-f03a8db7da32.html> accessed 7 June 2012.

¹⁰ For example the 'failed' Treaty establishing a Constitution for Europe [2004] OJ C310/1 and the question of a reference to Christianity in the preamble of this Constitution. See Srdjan Cvijic and Lorenzo Zucca, 'Does the European Constitution Need Christian Values?' (2004) 24 *Oxford Journal of Legal Studies* 739.

¹¹ Eleventh recital to the preamble of TEU: 'RESOLVED to implement a common foreign and security policy including the progressive framing of a common defence policy, which

guiding principles for the exercise of both internal and external powers.¹² Even though the ECJ has never made an express reference to 'European identity', it has emphasised the importance of the EU's values and standards when dealing with legal provisions external to the EU legal order.¹³ At the same time, the ECJ has been referring both expressly as well as implicitly to the national identities of the Member States. The role of the ECJ as the ultimate umpire in the EU has constantly been challenged. The national constitutional courts perceive themselves as the sole gatekeepers of national constitutional identities that constitute the untouchable core of the national legal orders. As a consequence of this multi-level judicial dialogue, the concept of European constitutional identity is at least as complex from the internal perspective (inside the EU) as from the external one (outside the EU). This is reflected in the normative provisions of the Treaties. Since the Maastricht Treaty, the emphasis has shifted to the national constitutional identities of the Member States. Article 6 (3) TEU stipulated that 'the Union shall respect the national identities of its Member States'. As a consequence of the amendments introduced by the Lisbon Treaty, article 4 (2) TEU reads as follows: 'the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'.

According to the documents of the responsible Working Group of the European Convention, the purpose of this reform was 'to provide added transparency of what constitutes essential elements of national identity, which the EU must respect in the exercise of its competence'.¹⁴ However, the mere expansion of the concept of national identity in the Treaties has caused quite a stir. It has provoked reactions and speculations both in academic and public discourse.¹⁵ One might claim that the legislative amendment has at least significant declaratory power as it reflects the general tendency in the approach of the Member States to the process

might lead to a common defence in accordance with the provisions of Article 42, thereby reinforcing the *European identity* and its independence in order to promote peace, security and progress in Europe and in the world' (emphasis added).

¹² Articles 2, 3(5) and 21 TEU.

¹³ Joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the EU and Commission of the EC* [2008] ECR I-06351 (hereinafter *Kadi*), paras 282, 290, 304.

¹⁴ Final report of Working Group V of the European Convention, 4 November 2002, 10 <<http://register.consilium.europa.eu/pdf/en/02/cv00/cv00375-re01.en02.pdf>> accessed 7 June 2012.

¹⁵ See inter alia Sinisa Rodin, 'National Identity and Market Freedoms after The Treaty of Lisbon' (2011) <<http://ssrn.com/abstract=2005691>> accessed 7 June 2012; 'European Values and Identity' *EurActiv* (9 May 2006) <<http://www.euractiv.com/culture/european-values-identity-links dossier-188378?display=normal>> accessed 7 June 2012.

of European integration, which underlines its constraints. In the euro crisis, the Member States chose to abandon the 'community method' as a way to introduce the necessary measures, but instead decided to sign a separate international treaty that is now expected to be ratified by 25 Member States.¹⁶ In the history of the EU, we can find examples of treaties like Schengen or Prüm that were first signed as international treaties, later to be integrated into the framework of the EU.¹⁷ Nonetheless, this solution might be viewed as one disregarding the institutional structure of the EU, undermining the democratic legitimacy of the Union and even representing a triumph of national egoisms. On the other hand, the new wording of article 4 (2) TEU might just be another representation of a phenomenon that is already familiar to EU law. The ECJ has already been accepting national constitutional particularities as a justification for Treaty derogation.¹⁸ Then it would be yet another example of putting into normative provisions principles that have already been recognised and applied by the Court, just as was the case with the Charter of Fundamental Rights.

Further, it is interesting to observe how the current debate on the national identities of the Member States affects the still open question of construing a common constitutional identity of the EU. The argument that the EU is too diverse for a common constitutional identity has resurfaced at various stages of European integration. It has been pointed out that the EU lacks both a common *ethnos* as well as a *demos*.¹⁹ At first glance, the constitutional diversity within the EU might seem directly proportional to the number of Member States. However, this is not the crucial factor. Even though EU enlargements have resulted in larger numbers of partners to include in a consensus, constitutional diversity has in fact always been inherent in the structure of the EU. For instance, there were three opt-outs from the Charter of Fundamental Rights - two by the 'new Member States' Poland and the Czech Republic, but also by the UK. The same opt-outs can be viewed either as putting a spoke in the wheel of European integration in order to preserve national identity and

¹⁶ Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), signed 2 March 2012 <http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf> accessed 7 June 2012.

¹⁷ The Schengen Acquis [2000] OJ L239/1 was integrated with the Treaty of Amsterdam [1997] OJ C340/1; the Prüm Convention <<http://register.consilium.europa.eu/pdf/en/05/st10/st10900.en05.pdf>> accessed 7 June 2012 was partly transposed in 2007. See <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/803&format=HTML&aged=1&language=EN&guiLanguage=fr>> accessed 7 June 2012.

¹⁸ For example Case C-36/02 *Omega Spielhallen v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-09609.

¹⁹ Michel Rosenfeld, 'The European Treaty - Constitution and Constitutional Identity. A Comment on Professor von Bogdandy' (2004) Jean Monnet Working Paper 5/04, 11.

sovereignty, or as proof of the solidity of the European construction. The latter perspective would invoke the argument that those opt-outs are in fact void, as the provisions of the Charter are already enshrined in the general principles of EU law as they have been developed by the ECJ, which proves the stability of the European legal order.²⁰

European and national constitutional identities are ambivalent terms with unclear contours. From the perspective of political philosophy, common European identity or at least constitutional patriotism can be regarded as a basis for a democratic link between citizens and the government.²¹ However, 'the notion of "national identity" has over time acquired a legally more relevant flavour by its reformulation as "constitutional identity"'.²² This paper focuses on European and national constitutional identities as legal concepts. Constitutional identity is not an individual but rather a collective identity of the national constitution.²³ At the same time, national constitutional identity is diverse as it encompasses the essential particularities of each constitutional order.²⁴

The identity question in its internal and external dimensions is particularly intertwined in the context of the EU, as the EU domesticates relations between states. It touches upon one of the crucial characteristics of European integration, namely that the EU tries to bring a sense of common responsibility to international relations among its Member States and then also promotes this method in its external relations.²⁵ This will be achieved 'by each Member State's acceptance of the unique identity of the other Member States within a framework of law, based not on strict hierarchy, but on diversity and loyalty'.²⁶ Hence, for the purpose of analysing the tools in the pluralist structure of European and international law, the national and European constitutional identities can be treated as two sides of the same coin.

²⁰ Mayer (n 8) 784.

²¹ See *inter alia*: Patrizia Nanz, *Europolis: Constitutional Patriotism Beyond the Nation-State* (Manchester University Press 2006); Jan-Werner Müller, 'Verfassungspatriotismus: Eine systematische Verteidigung' (2010) 3 *Zeitschrift für Bürgerrechte und Gesellschaftspolitik* 111.

²² Leonard FM Besselink, 'National and Constitutional Identity Before and After Lisbon' (2010) 6(3) *Utrecht Law Review* 36, 37.

²³ Mayer (n 8) 783.

²⁴ Alexandre Viala, 'Le concept d'identité constitutionnelle: approche théorique' in Laurence Burgogues-Larsen (ed), *L'identité constitutionnelle saisie par les juges en Europe* (Editions Pedone 2011) 9.

²⁵ Geert De Baere, *Constitutional Principles of EU External Relations* (OUP 2008) 314.

²⁶ De Baere (n 25).

III. Disputed ultimate authority

The pluralist structure of relations between European and national law of the Member States involves constant competition for ultimate authority.²⁷ Apparently, a crucial means to ensure the uniform application of EU law is the Court of Justice as the instance to review the jurisprudence of the other EU courts and to answer the preliminary ruling questions from the national courts. In order to be able to fully fulfil this role, the Court of Justice would need to have ultimate authority to decide on the application and interpretation of EU provisions, even if they override national constitutional provisions. However, such consolidation of judicial power and responsibility does not seem to be a view shared by all judicial actors on the European stage. The question of potential conflicts becomes a particularly sensitive issue in the domain of human rights, as understanding of this is often viewed as a part of national constitutional identity.

The European human rights regime can serve as an illustration of pluralist judicial dialogue.²⁸ The main actors involved in guaranteeing protection of human rights in Europe are the national constitutional courts, the ECJ and the European Court of Human Rights (ECtHR). There is no hierarchically ordered system of human rights protection to clearly indicate the ultimate supremacy of the legal norms of the national constitutions, the general principles of EU law or the ECHR.²⁹ In principle, each of these three judicial actors asserts its ultimate authority.³⁰ The German Federal Constitutional Court can serve as an example for such an approach. In its *Görgülü* judgment, it asserted that the ECHR has the same rank as a regular federal statute.³¹ As long as the legislation leaves room for manoeuvre, the German courts are obliged to follow an interpretation that is in compliance with the ECHR.³² However, the limit of that principle is reached when, for instance due to a change in the factual situation, compliance with a judgment of the ECtHR would contradict the German statute or Constitution, namely the fundamental rights of third parties.³³

²⁷ Nico Krisch, 'The Open Architecture of European Human Rights Law' (2007) LSE Working Paper 11/2007, 3

²⁸ Krisch (n 27) 33

²⁹ Krisch (n 27).

³⁰ Krisch (n 27) 15.

³¹ *Görgülü* [2004] BverfG, 2 BvR 1481/04 (14 October 2004), para 31.

³² *Görgülü* (n 31), para 62.

³³ *Görgülü* (n 31).

This is a very similar tone to the one adopted by the German Constitutional Court with respect to EU law.³⁴ It started sceptical to the *Solange I*³⁵ judgment, but then practically reversed it in *Solange II* with the following statement:

As long as the European Communities, in particular European Court case law, generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safe-guard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Basic Law.³⁶

In the *Maastricht* decision, the Federal Constitutional Court underlined its relationship of cooperation with the ECJ and the fact that it would only become active again should the Court depart from the established standard of fundamental rights.³⁷

There are apparent parallels with the relationship established between the ECJ and the ECtHR by the *Bosphorus* judgment that was founded on the assumption of 'equivalent protection'.³⁸ However, this dialogue also had a rough start. In the *Matthews* judgments, the ECJ and the ECtHR reached different results.³⁹ In the judgment of the ECtHR, the violation of the Convention is based on primary EC law, over which the Court of Justice had in principle no jurisdiction and which was concluded by Member States by means of international treaties. Hence, the

³⁴ A series of judgments by the German Constitutional Court concerning the relationship with EU law: *Solange I* [1974] BVerfGE 37, 271 2 BvL 52/71; *Vielleicht-Beschluß* [1979] BVerfGE 52, 187, 2 BvL 6/77; *Mittlerweile-Beschluß* [1983] 2 BvR 1461/82; *Solange II* [1986] BVerfGE 73, 339 2 BvR 197/83; *Maastricht-Urteil* [1993] BVerfGE 89, 155; *Bananenmarktordnung-Urteil* [2000] BVerfGE 102, 147; *Lissabon-Urteil* [2009] BVerfG, 2 BvE 2/08 (30 June 2009) <http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html> accessed 1 July 2011

³⁵ *Solange I* (n 34).

³⁶ *Solange II* (n 34) headnotes point 2.

³⁷ *Maastricht-Urteil* (n 34), para 174.

³⁸ *Bosphorus Hava Yollari Turizm v Ireland* [GC] App no 45036/98 ECHR 2005-VI <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Bosphorus%20I%20Hava%20I%20Yollari%20I%20Turizm%20I%20v%20Ireland&sessionid=3666597&skin=hudoc-en>> accessed 1 July 2011.

³⁹ *Matthews v United Kingdom* App no 24833/94 ECHR 1999-I; *Case C-145/04 Kingdom of Spain v United Kingdom* [2006] ECR I-07917.

court could have traced the responsibility back to the Member State in question.⁴⁰ However, since then the logic has rather been one of 'division of labour' along the lines of the field of application of the respective legal orders.⁴¹ The Court in Strasbourg has thus declared numerous cases concerning EU measures inadmissible.⁴² Similarly, the ECJ was glad to avoid questions of fundamental rights by pointing to another place in cases that could be solved through other means of interpretation of EU legislation.⁴³ In the case *Centro Europa 7*, the ECJ decided that the Italian national legislation that made it impossible for Centro Europa 7 to broadcast due to the absence of broadcasting radio frequencies, although it has been granted the rights for terrestrial television and radio broadcasting, was precluded by European law.⁴⁴ The Court in Luxembourg based its decision on article 49 EC and the relevant secondary legislation, instead of resorting to fundamental rights arguments raised by the referring court, in particular a possible breach of article 10 ECHR requiring Member States to secure pluralism and competition in the broadcasting sector. A breach of article 10 ECHR was declared later in separate proceedings by the Court in Strasbourg, which also took into account the proceedings before the ECJ.⁴⁵

Apart from the jurisprudential dialogue, there are also regular meetings between the judges from Luxembourg and Strasbourg that contribute to convergence and harmony in the relationship between the two courts.⁴⁶ In view of the coming accession of the EU to the ECHR, the two courts are determined to engage in constructive dialogue to ensure 'quality and coherence of the case-law on the protection of fundamental

⁴⁰ *Matthews* (n 39), para 32.

⁴¹ Olivier De Schutter, 'L'influence de la Cour européenne des droits de l'homme sur la Cour de justice des Communautés européennes' (2005) CRIDHO Working Paper 2005/07, 3.

⁴² See, for example, *Segi and Gestoras Pro-Amnistia v Germany and others* App nos 6422/02 and 9916/02 ECHR 2002-V; *Senator Lines GmbH v the 15 Member States of the European Union* App no 56672/00 ECHR 2004-IV; *Connolly v the 15 Member States of the European Union* App no 73274/01 (ECtHR 9 December 2008).

⁴³ Daniel Sarmiento, 'The Silent Lamb and the Deaf Wolves' in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012) 295.

⁴⁴ Case C-380/05 *Centro Europa 7 Srl v Ministero delle Comunicazioni* [2008] ECR I-00349.

⁴⁵ *Centro Europa 7 Srl and Di Stefano v Italy* [GC] App no 38433/09 (ECHR, 7 June 2012).

⁴⁶ Example of the meetings: Dialogue between judges: 'Fifty Years of the European Court of Human Rights Viewed by its Fellow International Courts' Strasbourg 2009 <http://www.echr.coe.int/NR/rdonlyres/B35F6B38-C429-48D2-AB33-77A3C0CD9DA3/0/Dialogue_between_judges_2009.pdf> accessed 1 July 2011; Affirming the harmony of the relationship between CJEU and ECtHR: Krisch (n 27) 19; Olivier De Schutter, 'L'influence de la Cour européenne des droits de l'homme sur la Cour de justice des Communautés européennes' (2005) CRIDHO Working Paper 2005/07, 3.

rights in Europe'.⁴⁷ On the other hand, the accession will raise new questions concerning the delimitation of the competences of the ECJ and the ECtHR in the co-respondent mechanism and in inter-party cases.⁴⁸

The cooperation between the ECJ and the ECtHR illustrates how little importance can be attached to the formal setting of the legal orders. The Court in Strasbourg has developed its jurisprudence gradually in order to keep the costs low for the Member States.⁴⁹ In summary, it started with the 'lowest common denominator' and slowly raised the threshold for the standard of human rights protection by using an evolutionary approach to the convention as a 'living instrument'.⁵⁰ This might be regarded as necessary in view of the inherent need for the ECtHR to establish its authority through acceptance of its jurisprudence by the Member States of the Council of Europe.⁵¹ However, the ECJ has a stronger enforcement apparatus at its disposal and far less concerns about the implantation of the judgments. In spite of this different formal setting within the respective legal order, the courts have adopted an approach based on mutual accommodation and judicial dialogue. It is not a one-way street, but a mutual process of accommodation that can be influenced not only by the judicial counterparts, but also by political actors or polity changes.⁵²

Undoubtedly there are divergences in the perception of the interactions between the legal orders among the national constitutional courts, the Court of Justice in Luxembourg and the Court of Human Rights in Strasbourg. These divergences might be fundamental in nature, but they do not seem to be visible on the surface. The reality of the judicial dialogue between the courts in Europe proves to be rather harmonious.⁵³

Due to these divergent perceptions, the relations among the European courts are in fact not hierarchical. They are self-contained jurisdictions that are not bound by their own precedents and then *a fortiori* not by those of other judicial bodies.⁵⁴ Even the relationship between the na-

⁴⁷ Joint communication from Presidents Costa and Skouris 24 January 2011, 3 <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf> accessed 1 July 2011.

⁴⁸ Arts 3 and 4 of the Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms CDDH-UE (2011) 16 final <http://www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/CDDH-UE_documents/CDDH-UE_2011_16_final_en.pdf> accessed 7 June 2012.

⁴⁹ Krisch (n 27) 28.

⁵⁰ Krisch (n 27).

⁵¹ Krisch (n 27) 20.

⁵² Krisch (n 27) 27.

⁵³ Krisch (n 27)15.

⁵⁴ Daniel Terris, Cesare PR Romane and Leigh Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (BUP 2007) 120.

tional constitutional courts and the ECJ within the supranational pillar is a lot more complex and nuanced than clear primacy.⁵⁵ As a result, the political weight and public legitimacy of the actors involved can influence the direction of the legal development in a particular domain.⁵⁶ It is the lack of established hierarchy that provides the basis for openness and responsiveness in the judicial dialogue.

It is the pluralist vision that allows the current reality within the EU to be assessed. It provides the tools for explaining the apparent contradiction between, on the one hand, the principled assertion of ultimate jurisdiction by both the national constitutional courts and the ECJ, and, on the other hand, the overall smoothly running cooperation in practice, which leads to growing convergence between the European jurisdictions.

IV. National constitutional identity: a concept of European law or a chance to strengthen the subsidiarity principle?

In spite of some contradictions between the approaches of the German Constitutional Court and the Court of Justice in Luxembourg to the supremacy question in the domain of human rights, major conflicts have not arisen in the courts' practice since the *Solange II* judgment.⁵⁷ In terms of the pluralistic vision of relations between national and European legal orders, that is as good as it gets - the question is settled not as a matter of hierarchy between legal norms, but rather by means of judicial politics. However, such a solution has little promise with respect to stability. In particular, since the amendments introduced by the Lisbon Treaty, the concept of national constitutional identity gives new wind to the controversial debate on the challenged supremacy of EU law. This alone proves the importance of this concept in the European context.

In principle, 'the concept may even help to pursue the aim of a multilevel polity'.⁵⁸ Constitutional identity could be viewed as a concept of European law and hence another stage in the construction of European constitutionalism. A noteworthy attempt to grasp European constitutionalism is provided by the vision of 'multilevel constitutionalism' introduced by Ingolf Pernice. It focuses on 'the correlation of national and European law from the perspective of both states and citizens'.⁵⁹ It views

⁵⁵ For example *Solange I* (n 34); *Solange II* (n 34).

⁵⁶ Krisch (n 27) 33.

⁵⁷ *Solange II* (n 34).

⁵⁸ Mayer (n 8) 784.

⁵⁹ Ingolf Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action' (2009) 15 *Columbia Journal of European Law* 349, 372.

both the national and European levels of government operating as elements of one system whose purpose is to serve the same citizens. This vision involves an assumption that can be traced back to Rousseau's social contract, namely that the citizens are the constituent, the origin of public authority.⁶⁰

Two aspects of multilevel constitutionalism seem to be particularly attractive. The first is its postnational orientation. It strives to establish an original and basic relationship between the people and public authority at national, subnational and supranational levels.⁶¹ It is not exclusive to a specific territory or legal order, but encompasses power-sharing among interrelated levels of public authority.⁶² Further, it is not based on the existence of a state: it is open to other political units.⁶³ Second, even though Ingolf Pernice uses the notion of 'levels', this does not imply a hierarchy among the legal orders within a multilevel constitution.⁶⁴ Both national and European legal orders have the same legitimacy originating in a direct line from the citizens. Hence, there seems to be no place for a hierarchical relationship, but rather a coexistence of autonomous legal orders based on a functional division.⁶⁵ Even though the terminology might be misleading, there is in fact only 'functional primacy, based on mutual consideration, recognition, and cooperation between the courts'.⁶⁶ On the other hand, this theoretical openness of the vision of multilevel constitutionalism might also be viewed critically. One can go so far in embracing the close link between theory and the current pluralist reality within the EU as to accept this model as a well-functioning one. This then questions the constitutionalist appeal of providing *order* to the plurality of legal systems. If the citizens are the constituent, then how can it be legitimate for a conflict of competences between legal orders to be worked out by way of judicial dialogue? This question acts as a bridge to the second critical remark about constitutionalism at the EU level. It is questionable whether there is enough democracy at the EU level to legitimise the construction of an autonomous legal order originating in a direct line from the citizens without the intermediary of the national state usually used for the cases of international organisations.⁶⁷ An answer to this possible

⁶⁰ Pernice (n 59).

⁶¹ Pernice (n 59) 365.

⁶² Pernice (n 59).

⁶³ Pernice (n 59) 366.

⁶⁴ Pernice (n 59) 383.

⁶⁵ Pernice (n 59).

⁶⁶ Pernice (n 59) 384.

⁶⁷ For an overview of literature concerning the democratic deficit of the EU, see Andreas Føllesdal, 'Survey Article: The Legitimacy Deficits of the European Union' (2006) 14(4) *Journal of Political Philosophy* 441.

criticism about the democratic deficit of the EU can be easily imagined. The steps taken in the Treaty of Lisbon to improve the transparency and democratic legitimacy of the EU have to be noted.⁶⁸ EU citizenship has its positive expression and is aimed at developing an EU identity in parallel to the national one.⁶⁹ Second, there is the reorganisation of the Treaties, with the EU Treaty containing the common values, general objectives and principles, and the TFEU establishing the more detailed provisions on specific rights, competences and policies.⁷⁰ Further, there are reforms contributing to this development, such as the introduction of the public session of the Council when acting in a legislative capacity, the new powers of the European Parliament, especially the co-decision procedure as the 'ordinary legislative procedure' or the new responsibilities of national parliaments, especially the 'early warning system' foreseen in article 12 TEU, and the citizens' initiative.⁷¹ Still, these incremental changes have not provided a persuasive and credible answer to the question about the democratic legitimacy of the EU.⁷² There is also serious opposition to the idea of constructing a direct legitimacy connection between individuals and the EU under its current legal framework.⁷³ Hence, acceptance of its existence might be premature.

This conclusion, however, does not preclude the potential of national constitutional identity as a concept from becoming a tool within the framework of European law to be used in the preliminary ruling procedure both by national constitutional courts and the ECJ.⁷⁴ It could potentially become another mechanism in the structure of European constitutional pluralism. What such a pluralistic approach adds to the analysis is the inherent element of the 'struggle' between the judicial actors about the appropriation of this concept.

The responsible Working Group of the European convention foresaw that 'the Court could be the ultimate interpreter of the provision if the political institutions went beyond a reasonable margin of appreciation'.⁷⁵ This competence of the Court in Luxembourg appears problematic in

⁶⁸ For example arts 10, 11 and 12 TEU.

⁶⁹ Pernice (n 59) 385.

⁷⁰ Pernice (n 59) 388.

⁷¹ Pernice (n 59) 389-91; Nicolas Levrat, 'L'initiative citoyenne européenne: une réponse au déficit démocratique?' (2011) 47 *Cahiers droit européen* 53, 99.

⁷² Levrat (n 71) 100.

⁷³ For example *Lissabon-Urteil* (n 34), para 264. <http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html> accessed 9 June 2011.

⁷⁴ Mayer (n 8) 784.

⁷⁵ Final report of Working Group V of the European Convention (4 November 2002) 11 <<http://register.consilium.europa.eu/pdf/en/02/cv00/cv00375-re01.en02.pdf>> accessed 1 April 2012.

view of the limits of its jurisdiction. The scope of the Court's competences does not include interpretation of the national law of the Member States. On this basis, one could build the argument that the Court would exceed its competences by judging what falls within the definition of German or Polish national constitutional identity. This is traditionally the realm of national constitutional courts. Hence, national constitutional identity is yet another concept in the long history of judicial dialogue between the ECJ and national constitutional courts. It appears questionable whether the growing importance of this concept reflected in the Treaty amendments implies any substantial changes to the way the Court in Luxembourg deals with national particularities in the domain of human rights, the margin of appreciation of Member States and the reconciling of human rights conflicts. On the other hand, the concept might also be perceived as a stronger argument in the hands of either the ECJ that could enlarge the scope of its jurisdiction in the domain of human rights, or of national constitutional courts to justify national derogation from the freedoms of the internal market. Currently, one could find proof for both of the hypotheses, which indicates that there is no established approach towards the concept of national constitutional identity in the European framework.

IV.1. The jurisprudence of the ECJ

When discussing the jurisprudence of the Court of Justice relating to national constitutional identity, it is impossible to limit the scope of analysis to cases dealing expressly with the concept. An approach that appears more revealing is rather one encompassing the judgments where the Court in Luxembourg dealt with a national constitutional particularity vis-à-vis European norms. Hence, it is rather the history of 'silent mentioning' - constellations where the Court could potentially apply the concept of national constitutional identity. Such a potential also exists in the case *Republic of Hungary v Slovak Republic*, still pending at the ECJ.⁷⁶ Advocate General Yves Bot in his opinion considered that EU law is not intended to govern the incident in question, where the Slovak authorities refused the Hungarian President entry into its territory.⁷⁷ If the ECJ decides otherwise and applies EU law to the situation, national identity could be one of the factors weighed in the reasoning. In general, it remains questionable whether the fact of expressly relying on the concept of national constitutional identity implies any substantial change in the jurisprudence of the Court.

⁷⁶ Case C-364/10 *Republic of Hungary v Slovak Republic* (action brought on 8 July 2010).

⁷⁷ , *Republic of Hungary* (n 76), Opinion of AG Bot, para 61.

In *Omega* (2004), the Court used respect for human dignity enjoying a particular status as a factor falling within public policy that can justify derogation from the freedom to provide services.⁷⁸ In the *Michaniki* (2008) case, on the other hand, the judges did not accept a constitutional provision as being 'capable of reconciling the national provision at issue in the main proceedings with the principle of proportionality'.⁷⁹ Would the result be any different now that the Court has at its disposal a written and binding catalogue of fundamental rights and the concept of national identity mentioned in Treaty? The European legislators chose to include the notion of national identities in the Treaties and to place it right next to the mention of equality of the Member States. Doubts remain about the impact of this choice on the European legal system.

Nonetheless, the notion of national or constitutional identity has surfaced in European jurisprudence since the entry into force of the Lisbon Treaty. In *Sayn-Wittgenstein* (2011), the Court accepted that:

in the context of Austrian constitutional history, the Law on the abolition of the nobility, as an element of national identity, may be taken into consideration when a balance is struck between legitimate interests and the right of free movement of persons recognized under European Union law.⁸⁰

The result is the same as in *Omega* (2004), although the superficial way of carrying out the proportionality test might suggest a certain persuasive power of national identity.

An example of a case where the Court went a very long way in allowing national identity as a justification for derogation from EU law is the *Runevič-Vardyn* (2011) judgment.⁸¹ The Court relies expressly on article 4(2) and affirms that national language is capable of serving as an objective consideration justifying a restriction on freedom of movement and residence of citizens of the Union. The Lithuanian government claimed that the 'Lithuanian language constitutes a constitutional asset which preserves the nation's identity (...) and ensures the expression of national sovereignty'.⁸²

⁷⁸ Case C-36/02 *Omega Spielhallen v Oberbürgermeisterin der Bundestadt Bonn* [2004] ECR I-09609.

⁷⁹ Case C-213/07 *Michaniki AE v Ethniko Symvoulío Radiotileorasis* [2008] ECR I-09999, para 65.

⁸⁰ Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* (22 December 2010), para 83.

⁸¹ Case C-391/09 *Runevič-Vardyn* (12 May 2011) not yet published.

⁸² *Runevič-Vardyn* (n 81), para 84.

The case concerned a Lithuanian national (first applicant), member of the Polish minority and married to a Polish national (second applicant). Lithuanian law foresees that in principle all entries on certificates of civil status must be made in Lithuanian. The rule has been confirmed by the Lithuanian Constitutional Court as ensuring the constitutional status of the language.⁸³ A possible exception to this rule is granted, though, for non-Lithuanian nationals.⁸⁴ In consequence, the Lithuanian wife found herself with two birth certificates and two marriage certificates indicating her first and family names respectively in Lithuanian and Polish versions (Malgožata Runevič-Vardyn and Małgorzata Runiewicz-Wardyn). The husband had his name transcribed on the Lithuanian marriage certificate using characters of the Roman alphabet but without diacritical modifications (Lukasz Pawel Wardyn from the Polish Łukasz Paweł Wardyn).

The judgment might be perceived as an example of the judicial restraint of the Court of Justice vis-à-vis national courts. First, the Court in Luxembourg emphasised that it is in principle up to the referring court to decide whether a preliminary ruling question is relevant for the case. In order to ensure the nature of the preliminary ruling procedure as 'concrete judicial review', the ECJ limits itself to ruling out obviously irrelevant questions.⁸⁵ Moreover, the Court practically left the preliminary ruling questions open, leaving it to the national court to decide whether the change in names in the particular case amounted to a 'serious inconvenience', as well as to strike a fair balance between, on the one hand, the interest of the applicants to respect for their private and family life and, on the other hand, the legitimate protection by the Member State concerned of its official national language and its traditions.⁸⁶ Obviously, the Court recognised the sensitive nature of the referred questions in the context of the strong Polish minority in Lithuania and the Polish-Lithuanian relationship in general.⁸⁷ On the one hand, this reserved judgment of the ECJ might be perceived as wise use of the framework of constitutional pluralism, allowing the Member States a margin of appreciation in order to ensure respect for their constitutional particularities.⁸⁸ On the other hand, in practice the preliminary ruling procedure has often been used as a tool by ordinary courts to induce a

⁸³ *Runevič-Vardyn* (n 81), para 27.

⁸⁴ *Runevič-Vardyn* (n 81), paras 10-14.

⁸⁵ *Runevič-Vardyn* (n 81), para 33.

⁸⁶ *Runevič-Vardyn* (n 81), paras 78 and 91.

⁸⁷ See eg 'Bad Blood: Polish-Lithuanian Ties Are Ancient But Increasingly Acrimonious' *The Economist* (London 10 March 2012) <<http://www.economist.com/node/21549987>> accessed 09 April 2012.

⁸⁸ Sarmiento (n 43) 290.

change in the national jurisprudence. With this 'silent judgment', the Court in Luxembourg leaves the referring court little choice but to follow the previous jurisprudence of the national constitutional court. Hence, the ECJ seems to adopt a hands-off approach to the problem directly affecting individual rights of EU citizens. It might also be perceived as inconsistent with the previous jurisprudential line developed in the *Garcia Avello* (2003) and *Grunkin and Paul* (2008) judgments, where the ECJ interpreted rather extensively the right linked to EU citizenship.⁸⁹ A flagship example of laconic jurisprudence endorsing the broad application of instruments of EU law, such as Union citizenship, is the *Ruiz Zambrano* (2011) case. The Court explained a highly controversial judgment in no more than 10 substantive paragraphs.⁹⁰

National identity as enshrined in article 4 (2) TEU is certainly a tool that can be used by various actors in different contexts. A recent judgment of the ECJ shows that, apart from by the Courts, it has also been identified as a useful concept by the parties to the proceedings. In the *O'Brien* case (2012), the Latvian Government, as an intervening party, argued that an application of European Union law to the judiciary would amount to a violation of article 4 (2) TEU.⁹¹ The ECJ did not accept this argument and applied the EU Directive to the case at hand.

The reality of the relationship between national and European constitutional law can be described as constitutional pluralism: it is 'heterarchical rather than hierarchical'.⁹² However, to the outside, the ECJ has been acting like a constitutional court, upholding the constitutional values of the EU, as in the *Kadi* judgment.⁹³ The ECJ is defending the integrity of the EU legal order and human rights as the 'very foundations of the Community',⁹⁴ by performing in fact a similar role to a constitutional court.⁹⁵ Contrary to the GC, the ECJ is consistent in its 'constitutional' view of European law.⁹⁶ It has considered the relationship between the UN Charter and the EC Treaty in the broader context of the relation be-

⁸⁹ Case C-148/02 *Carlos Garcia Avello v Belgian State* [2003] ECR I-11613; Case C-353/06 *Stefan Grunkin and Dorothee Regina Paul* [2008] ECR I-07639.

⁹⁰ Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* (8 March 2011), paras 36-45.

⁹¹ Case C-393/10 *O'Brien v Ministry of Justice* (1 March 2012), para 49.

⁹² Neil Walker, 'The Idea of Constitutional Pluralism' (2992) EUI Working Paper LAW No 2002/1, 27 <<http://cadmus.eui.eu/bitstream/handle/1814/179/law02-1.pdf?sequence=1>> accessed 7 July 2011.

⁹³ *Kadi* (n 13).

⁹⁴ *Kadi* (n 13), paras 282, 290, 304.

⁹⁵ Nikos Lavranos, 'Protecting European Law from International Law' (2010) 15 *European Foreign Affairs Review* 273.

⁹⁶ Lavranos (n 95).

tween the international and European legal order, treating the UN Charter as any other international treaty.⁹⁷ But it has also clearly established its lack of power to review the compatibility of the SC resolutions with *ius cogens*.⁹⁸ At the same time, it rejected the immunity from jurisdiction of the Community acts implementing them. It views itself competent to ensure their compatibility with fundamental rights as enshrined in the European legal order. As Advocate General Maduro suggested, the relationship between international and European law 'is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community'.⁹⁹ This is pluralism at the global level. Simultaneously, the Court asserts the general principles of EU law as part of the European identity. The fundamental importance of human rights in the EU legal order has also been upheld with relation to the ECHR or in the context of the EU's Neighbourhood Policy.¹⁰⁰

As early as 1973, the Heads of the Member States proposed 'progressively to undertake the definition of their identity in relation to other countries or groups of countries'.¹⁰¹ And this is how the Court is construing it right now.

IV.2. The jurisprudence of national constitutional courts

National constitutional courts naturally have an 'inside perspective' of the EU. As they perceive themselves as guardians of national constitutional identity, they are partners and essential elements of the construction of European constitutional pluralism. Judges in this framework should remain faithful to the narrative developed from that internal perspective, which can be national, domain-specific or European, but at the same time be informed of other legal orders existing in the 'outside world'.¹⁰² Hence the crucial aspect of pluralism as a theoretic-

⁹⁷ Juan Santos Vara, 'The Consequences of Kadi: Where the Divergence of Opinion between EU and International Lawyers Lies?' (2011) 17(2) *European Law Journal* 262.

⁹⁸ *Kadi* (n 13), para 287.

⁹⁹ *Kadi* (n 13) Opinion of AG Maduro, para 21.

¹⁰⁰ See *Joint Communication from Presidents Costa and Skouris* (24 January 2011) <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf> accessed 1 July 2011; Petr Kratochvil, 'Discursive Constructions of the EU's Identity in the Neighbourhood: An Equal Among Equals or the Power Centre?' (2009) 9 *European Political Economy Review* 5.

¹⁰¹ Declaration on European Identity, Copenhagen, 14 December 1973, 4 <http://www.cvce.eu/obj/Declaration_on_European_Identity_Copenhagen_14_December_1973-en-02798dc9-9c69-4b7d-b2c9-f03a8db7da32.html> accessed 9 April 2012.

¹⁰² Miguel Poiaras Maduro, 'The Three Claims of Constitutional Pluralism' (Draft) 10 <http://cosmopolis.wzb.eu/content/program/conkey_Maduro_Three-Claims-of-Pluralism.pdf> accessed 11 June 2011.

cal approach, as defined by Maduro, promotes internal action informed by the external perception and knowledge of the system.¹⁰³ However, in the most recent judgments, the Polish Constitutional Court - Trybunał Konstytucyjny (TK) - and the Czech Constitutional Court - Ústavní soud (ÚS) - use 'identity talk' rather to indicate a defensive approach to EU integration.¹⁰⁴

For instance, the German Federal Constitutional Court - Bundesverfassungsgericht (BVerfG) - in its judgment concerning the Lisbon Treaty (2009) might even seem to take advantage of the new wording of article 4 (2) TEU in order to support its arguments. It expresses its view on the limits of European integration by claiming that:

the Basic Law does not permit the special bodies of the legislative, executive and judicial power to dispose of the essential elements of the constitution, ie of the constitutional identity (Article 23.1 sentence 3, Article 79.3 GG). The constitutional identity is an inalienable element of the democratic self-determination of a people. To ensure the effectiveness of the right to vote and to preserve democratic self-determination, it is necessary for the Federal Constitutional Court to watch, within the boundaries of its competences, over the Community or Union authority's not violating the constitutional identity by its acts and not evidently transgressing the competences conferred on it.

Even though the Lisbon judgment of the BVerfG includes a clear message about the problems and the limits of the process of European integration within its current framework, it is still formulated in a very cautious manner. One can observe a shift of expectations concerning democratic legitimation from the European to national level.¹⁰⁵ While beforehand the emphasis was rather on the necessity to ensure democratic governance within the EU, in 2009 the Court in Karlsruhe seemed to put its hopes and expectations for a representative link to society in the hands of the national parliaments.

The careful reasoning of the BVerfG opens up possibilities for various viewpoints. It can be criticised from the perspective of a euro-enthusiast or defended in view of the traditional understanding of democracy: perceived as a constructive contribution to the structure of European constitutional pluralism or a merely defensive attempt to retain the con-

¹⁰³ Miguel Poyares Maduro (Response to the question 'What is Constitutional Pluralism') in Matej Avbelj and Jan Komárek (eds), 'Four Vision of Constitutional Pluralism' (2008) EUI Working Paper Law 2008/21, 14.

¹⁰⁴ Mayer (n 8) 785.

¹⁰⁵ Davor Jancic, 'Caveats from Karlsruhe and Berlin: Whither Democracy after Lisbon?' (2010) 16 *Columbia Journal of European Law* 337ff.

stitutional court's position as the ultimate umpire in the power struggle with the ECJ.¹⁰⁶

IV.2.a. Trybunał Konstytucyjny on the constitutionality of an EU regulation

The judgments of the Court in Karlsruhe seem to serve as a reference point for the other jurisdictions in Europe. Recently, extensive references to the jurisprudence of the BVerfG concerning the supremacy of EU law have resurfaced in two recent controversial judgments of the constitutional courts in Poland and in the Czech Republic.

In its judgment rendered on 11 November 2011, the Polish Constitutional Tribunal - Trybunał Konstytucyjny (TK) - for the first time 'directly reviewed the conformity of the norms of EU secondary legislation to the (Polish) Constitution'.¹⁰⁷ This question arose in the course of a constitutional complaint to determine the conformity of article 41 of Council Regulation (EC) No 44/2011¹⁰⁸ to article 45 (1) of the Constitution, article 45 (1) in conjunction with article 78 and article 176 (1) of the Constitution, as well as to article 32 (1) in conjunction with article 45 (1) of the Constitution of the Republic of Poland.¹⁰⁹ The complainant challenged the provision of the Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters on the basis that it amounts to an infringement of her right to a fair and public hearing in first instance proceedings, the principle of equality in court proceedings and the principle of two stages of court proceedings as guaranteed by the Polish Constitution. The TK held that 'the legal construct of *ex parte* proceedings is justified by the special character, subject or function of given proceedings'.¹¹⁰ Hence, article 41 of the Regulation in question was viewed as consistent with the Polish Constitution.

There are several surprising aspects in the judgment, the first one being that even though the affirmation of a lack of infringement of procedural rights of the complainant in the particular case did not require a great effort of argumentation, the TK took the opportunity to pronounce itself extensively in nearly 50 pages on the issue of the control of secondary EU legislation in light of the national constitutional norms. Several

¹⁰⁶ For different narratives that can be read into the *Lisbon* judgment of the BVerfG, see Mayer (n 8) 776.

¹⁰⁷ Trybunał Konstytucyjny (16 November 2011) Ref No SK 45/09, para 8.1 <http://www.trybunal.gov.pl/eng/summaries/documents/SK_45_09_EN.pdf> accessed 7 June 2012.

¹⁰⁸ Council Regulation (EC) No 44/2011 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2000] OJ L12/1.

¹⁰⁹ Trybunał Konstytucyjny (n 107), para 5.1.

¹¹⁰ Trybunał Konstytucyjny (n 107), para 6.6.

points in this judgment can be regarded as *obiter dicta*, allowing the TK to underline its ultimate authority. The TK also takes the opportunity to rely on article 4 (2) TEU. It regards respect of national constitutional identities as an obligation of the EU, representing a counterpart of the obligation of loyal cooperation of the Member States.¹¹¹

From the perspective of the ECJ, it seems to be undisputed that the national courts do not hold ultimate competence to examine the EU legislation in view of its conformity with the Treaties or to adjudicate on the invalidity or interpretation of EU acts. These are namely the competences of the ECJ. However, in the view of the TK this does not exclude the possibility that the same acts can be examined in respect of their conformity with the national constitution by national constitutional courts.¹¹² This competence of the national constitutional jurisdiction applies only for secondary EU legislation and not for the provisions of the Treaties. Nonetheless, it obviously creates possibilities for normative and jurisprudential conflicts.¹¹³ If the TK in Warsaw should find a provision of an EU directive, regulation or decision contrary to the Polish constitutional provisions, it would suspend its application in the territory of the Republic of Poland.¹¹⁴ With reference to its previous judgment on the Treaty of Accession, the TK recalls that there are three possible reactions in such a situation, namely 'amending the Constitution; or causing modifications within Community provisions; or, ultimately, on Poland's withdrawal from the European Union'.¹¹⁵ Furthermore, a declaration of the unconstitutionality of an EU regulation could result in Poland's liability under article 258 TFEU.¹¹⁶ However, the TK sees itself bound to observe the principle of supremacy of the constitution in the Polish legal system, as this is the will of the constitutional legislator.¹¹⁷

Even though the bottom line of this judgment might be considered as a provocation from the perspective of European law, the tone of the TK's argumentation is mostly conciliatory. A ruling declaring the non-conformity of secondary EU law with the constitution is considered to be an *ultima ratio*, while an EU-conform interpretation of the national

¹¹¹ Trybunał Konstytucyjny (n 107), para 2.5.

¹¹² Trybunał Konstytucyjny (n 107), para 2.3.

¹¹³ Trybunał Konstytucyjny (n 107), para 2.4.

¹¹⁴ Trybunał Konstytucyjny (n 107), para.2.7.

¹¹⁵ Summary of the judgment of the Trybunał Konstytucyjny (11 May 2005) Ref No K 18/04, para 13 <http://www.trybunal.gov.pl/eng/summaries/documents/K_18_04_GB.pdf> accessed 7 June 2012.

¹¹⁶ Trybunał Konstytucyjny (n 107), para 5.

¹¹⁷ Argument (n 116), para 2.4.

constitution shall prevail in practice.¹¹⁸ From the perspective of Polish constitutional law, the argumentation advanced by the TK with respect to differentiation between article 188 and article 79(1) of the Polish Constitution and the inclusion of EU secondary legislation in the definition of 'other normative acts' in article 79(1) seems perfectly logical and legitimate.¹¹⁹ However, it must be emphasised that this line of argument is being developed in the bubble of the purely Polish constitutional order. Beforehand, in a judgment in the domain of fisheries, the TK ruled that it was not competent to review an EU regulation.¹²⁰ The TK followed a well-known approach that it can review merely the provisions of a transposing national act that are not dictated by the EU legal act. In the judgment of November 2011, the Court distinguished this jurisprudence on the basis that it was delivered in the course of proceedings of abstract norm control according to article 188 of the Polish Constitution and not on the basis of a constitutional complaint as in the present case. Hence, any more general statements on the inadmissibility of constitutional review of EU secondary legislation were expressed only *obiter dicta*.¹²¹ This line of reasoning actually undermines the significance of general considerations on the position of secondary EU legislation within the Polish legal order as these are also expressed *obiter dicta* in judgment SK 45/09. The Tribunal provides a concise lecture on the relation between Polish and European law as a dynamic system involving multiple law-making centres.¹²² It even goes so far as to present the principle of the supremacy of EU law that in the TK's view does not apply to the Polish Constitution which 'retains its superiority and primacy'.¹²³

The TK emphasises the parallels in the jurisprudence and the common values shared by the courts in Luxembourg and Warsaw in an attempt to mitigate the negative effects of its substantially defensive, if not disrespectful, approach towards the European legal order. The Tribunal emphasises its commitment to a relationship of cooperation with the ECJ.¹²⁴ It foresees the 'special character' of the judicial review of the

¹¹⁸ Argument (n 116), para 2.7.

¹¹⁹ Argument (n 116), para 1.2.

¹²⁰ Trybunał Konstytucyjny, 178/11/A/2009 (17 December 2009) Ref No U 6/08, para 3 <http://www.trybunal.gov.pl/OTK/teksty/otkpdf/2009/U_06p08.pdf> accessed 7 June 2012.

¹²¹ Trybunał Konstytucyjny (16 November 2011) Ref No SK 45/09, para 1.2. <http://www.trybunal.gov.pl/eng/summaries/documents/SK_45_09_EN.pdf> accessed 7 June 2012.

¹²² Trybunał Konstytucyjny (n 121), para 2. For more on the concept of 'multicentrism' in the Polish doctrine developed by Ewa Łętowska, see Ewa Łętowska, 'Multicentryczność współczesnego systemu prawnego i jej konsekwencje' (2005) 4 Państwo i Prawo 3.

¹²³ Trybunał Konstytucyjny (n 121), para 2.2.

¹²⁴ Trybunał Konstytucyjny (n 121), paras 2.4 and 2.6.

acts of EU law.¹²⁵ Apparently, the TK will review their constitutionality, but cautiously with regard to the principle of loyal cooperation.¹²⁶ Its review is supposed to be subsidiary in relation to the jurisprudence of the ECJ.¹²⁷ This might suggest that in the case of non-conformity, the Constitutional Tribunal would first refer a preliminary question to Luxembourg. Such conclusions remain, however, ambiguous as they are not applied in the case at hand. A general explanation of the stance of the Tribunal follows unexpectedly in the last part of the judgment, after the TK had rendered its judgment in the case presented to it.¹²⁸ This clear statement of intent at the end lies clearly beyond the *ratio decidendi* of the case and appears even to be in contradiction to the approach applied to the present set of facts. For the future, the Trybunał Konstytucyjny intends to apply the test of equivalent protection developed in the *Solange* judgments of the BVerfG and the *Bosphorus* judgment of the ECtHR. In order to 'trigger' the jurisprudence of the TK, a future complainant would thus have to 'make probable that the challenged act of EU secondary legislation causes considerable decline in the standard of protection of the rights and freedoms' in the EU.¹²⁹

Another aspect of this judgment that catches the eye is that the TK relies to a large extent on legal doctrine and on the foreign jurisprudence of the ECJ, the ECtHR and in particular, the BVerfG. This clearly reveals that the Tribunal delivers its judgment informed of the possible approaches adopted by other European jurisdictions. The constantly growing number of references among national constitutional courts can also be seen as a reflection of constitutional pluralism. In judgment SK 45/09, the extensive description of how the procedural rights at stake in the present case are protected under European law seems ambiguous as the Tribunal is apparently reviewing the compatibility of the Regulation exclusively with the Polish Constitution.¹³⁰ On several occasions, the TK relies on the jurisprudence of the Court from Karlsruhe. On the one hand, the BVerfG had the chance to deal with the position of secondary EU law in the German legal order long before Poland even joined the EU. Hence, it might be regarded as only natural that the TK relies on the experience of its German counterpart. On the other hand, the Polish Tribunal definitely appears to strengthen its argument by referring to the BVerfG, which shows the important position the Court in Karlsruhe holds in the

¹²⁵ Trybunał Konstytucyjny (n 121), para 1.5

¹²⁶ Trybunał Konstytucyjny (n 121), para 2.5.

¹²⁷ Trybunał Konstytucyjny (n 121), para 2.6.

¹²⁸ Trybunał Konstytucyjny (n 121), para 8.

¹²⁹ Trybunał Konstytucyjny (n 121), para 8.5.

¹³⁰ See Trybunał Konstytucyjny (n 121), para 6.4.

field of judicial politics in the EU. Some of the parallels drawn by the TK to German jurisprudence might be criticised, in particular the reliance on the *Honeywell* judgment.¹³¹ In *Honeywell*, the BVerfG reserved competence to review secondary EU legislation, although only if the legislation is manifestly *ultra vires*.¹³² The Polish Constitutional Tribunal goes further in its judgment, reviewing the conformity of the EU regulation with the human rights enshrined in the Polish Constitution. The Tribunal also makes reference to the jurisprudence of the BVerfG concerning the supremacy of EU law (including the *Solange* judgments) as well as to the *Bosphorus* judgments of the ECtHR. The only logical conclusion is, however, that it does not apply them to the case at hand, as otherwise the TK would regard the standard of human rights protection within the EU as significantly lower than under the Polish Constitution, which appears implausible.

IV.2.b. Ústavní soud on the *ultra vires* jurisprudence of the ECJ

The Constitutional Court of the Czech Republic - Ústavní soud (ÚS) - in the judgment announced on 31 January 2012 ruled that it would not apply a judgment of the ECJ in an analogous case because the Court in Luxembourg had exceeded the scope of powers transferred to the EU and hence had acted *ultra vires*.¹³³

The case concerned a Czech citizen, former employee of the Czechoslovak National Railways based in Bratislava, who claimed to be entitled to an old age pension that arose only taking into account the period of insurance acquired in the Slovak pension insurance system. The claim was dismissed first by the Regional Court in Hradec Králové and then by the Supreme Administrative Court, before the claimant lodged a constitutional complaint at the Constitutional Court.¹³⁴ The legal question before the Court in Brno involved legal acts of European, international and Czech law. The first two courts dealing with the case applied Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to member of their families moving within the Community. The Regulation in Annex III point A/9 ensures the remaining applicability of

¹³¹ Trybunał Konstytucyjny (n 121), para 2.6.

¹³² BVerfG, *Honeywell*, 2 BvR 2661/06, 6.7.2010, Absatz-Nr (1 - 116) <http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106en.html> accessed 7 June 2012.

¹³³ Ústavní soud, Pl ÚS 5/12 of 31 January 2012 (Slovak Pensions XVII - application of the Agreement between the CR and the SR on Social Security, obligations in international and EU law) 13 <<http://www.usoud.cz/view/GetFile?id=6416>> accessed 7 June 2012.

¹³⁴ Decision of the Regional Court in Hradec Králové, of 29 January 2009 Ref No 52 Cad 35/2008-40; Judgment of the Supreme Administrative Court of 31 August 2011, File No 6 Ads 52/2009.

the Agreement between the Czech Republic and the Slovak Republic on Social Security.¹³⁵ With respect to that Agreement, the ÚS developed a rule which

provides for the payment of a supplement to old age benefit where the amount of such benefit, awarded under (...) the Agreement, is lower than that which would have been received if the retirement pension had been calculated in accordance with the legal rules of the Czech Republic.¹³⁶

In principle, with the aim of avoiding 'constitutionally impermissible discrimination' resulting from 'a particular circumstance that originates in the dissolution of the then-existing Czechoslovak federation', the ÚS granted more beneficial treatment than the one foreseen in the international Agreement by counting the periods of employment in Slovakia in the same manner as those effectuated in the Czech Republic.¹³⁷ This beneficial rule going beyond the Agreement applied, however, only to Czech citizens residing in the territory of the Czech Republic. The ÚS justified that fact by reference to the scope of application of article 30 (1) of the Czech Charter of Fundamental Rights and Freedoms that guarantees the right to adequate material security in old age to Czech citizens.¹³⁸

Already in the *Landtova* case referred for a preliminary ruling by the Supreme Administrative Court, the ECJ ruled that the Regulation does not preclude the Czech Constitutional Court from increasing the amount of Czech old age benefit, yet the requirements of nationality and residence that the ÚS attaches to its rule amount to direct and indirect discrimination.¹³⁹ In order to justify its decision of sticking to the established jurisprudential rule, the ÚS engaged in a more general debate on the relationship between Czech and European legal orders. While recalling its previous judgments, the Constitutional Court reiterated the principles of a Euro-conform interpretation of national law and of the double binding subordination of transferred European law.¹⁴⁰ The latter principle is consistent with the approach of the Polish Constitutional Tribunal as it implies a judicial review of secondary EU law for its conformity both with European and national law. The ÚS also underlined its role as 'supreme interpreter of the constitutional regulations (...), which have the highest

¹³⁵ Published as no 228/1993 Coll.

¹³⁶ Ústavní soud (n 133) 7.

¹³⁷ Ústavní soud (n 133) 12.

¹³⁸ Charter of Fundamental Rights and Freedoms (as a part of the constitutional order of the Czech Republic) No 2/1993 Coll <http://www.concourt.cz/view/czech_charter> accessed 7 June 2012.

¹³⁹ Case C-399/09 *Marie Landtová v Česká správa sociálního zabezpečení* (22 June 2011).

¹⁴⁰ Ústavní soud (n 133) 9.

legal force on Czech territory'.¹⁴¹ An interpretation *contra legem* of national provisions in order to ensure conformity with EU law would infringe the prerogative of the Constituent Assembly to amend the Constitution.¹⁴² The Court in Brno reserves the right to intervene and review the actions of EU organs in three situations: the non-functioning of EU bodies, protection of the material core of the Czech Constitution, and *ultra vires* control.¹⁴³ In the case at hand, the ÚS came to the conclusion that the ECJ had exceeded the powers that the Czech Republic had transferred to the EU. By applying the EU Regulation to the entitlements of citizens arising from social security until 31 December 1992, the ECJ had acted *ultra vires*.¹⁴⁴ The ÚS did not omit to voice a critique of the Court in Luxembourg for not familiarising itself 'with arguments that respected the case law of the Constitutional Court and the constitutional identity of the Czech Republic'.¹⁴⁵

Another parallel between the judgment of the ÚS and the TK is extensive references to the jurisprudence of the BVerfG. Unfortunately, the *Solange* jurisprudence keeps being misunderstood as a gate-opener, granting national constitutional courts the possibility to 'intervene in a matter that was addressed as part of the exercise of powers transferred to the European Union'.¹⁴⁶ Such an interpretation disregards the first step foreseen by the Court in Karlsruhe, namely the 'equivalent protection test' that was the necessary precondition to trigger the jurisprudence of the national constitutional court. The ÚS chose not to distinguish its previous jurisprudence given that it does not apply to pensions granted after accession to the EU, because now also the Regulation needs to be taken into account.¹⁴⁷ Concerns about preserving the balance enshrined in the Agreement with respect to the repartition of the payment of pensions between the successor states did not play a crucial role in the judgment of the ÚS as it mostly involved an internal perspective.¹⁴⁸

The *ultra vires* declaration is in the end a mere side effect of an internal conflict between the Supreme Administrative Court and the Constitutional Court in Brno.¹⁴⁹ It is however important to observe that the

¹⁴¹ Ústavní soud (n 133) 10.

¹⁴² Ústavní soud (n 133) 11.

¹⁴³ Ústavní soud (n 133) 11.

¹⁴⁴ Ústavní soud (n 133) 13.

¹⁴⁵ Ústavní soud (n 133).

¹⁴⁶ Ústavní soud (n 133) 3. See also 11.

¹⁴⁷ This line of argument was suggested by the Czech Social Security Administration as a secondary party. Ústavní soud (n 133) 5.

¹⁴⁸ Ústavní soud (n 133) 5-6.

¹⁴⁹ See Jan Komárek, 'Playing With Matches: The Czech Constitutional Court's Ultra Vires Revolution' (Verfassungsblog 22 February 2012) <<http://verfassungsblog.de/playing-matches-czech-constitutional-courts-ultra-vires-revolution/>> accessed 7 June 2012.

ECJ has not shied away from involvement in relations among national instances. It should be enough to recall the *Cartesio* (2008) case, where the ECJ has as a result defended the full autonomy of a national court's decision to make a reference for a preliminary ruling to Luxembourg.¹⁵⁰ This decision cannot be amended or set aside by an appellate court.¹⁵¹ The underlying rationale is the protection of a preliminary discourse with the ECJ from appellate intrusions of superior domestic courts.¹⁵² In such situations the implied consequence of the Court's judgments is an 'invitation to national judicial rebellion'.¹⁵³ On the one hand, such a construction illustrates how the preliminary ruling procedure becomes an important tool of constitutional pluralism and contributes to the improvement of the quality of judgments. The national courts and the ECJ engage in a constructive discourse as each has to take into account that its judgment will be ultimately applied by another instance.¹⁵⁴ On the other hand, a natural consequence is that instead of remaining a neutral third party, the ECJ will be involved in power struggles between national institutions. The judgment of the Ústavní soud on Slovak pensions can serve as an illustration of the risk of abuse of the structure of constitutional pluralism for judicial politics and of skirmishes among the national judicial instances.

V. Conclusions

The jurisprudence of the ECJ and the national constitutional courts referring to the national constitutional identities of the Member States fits into the framework of constitutional pluralism as a *modus vivendi* of the European legal order. One might perceive a more general tendency in the process of EU integration for EU policies to be increasingly dominated by national agendas.¹⁵⁵ As a result, EU policies might be held hostage by the interests of the stronger Member States. These tendencies enhance the tensions inherent in the pluralist structure of the relationships between legal orders in the European arena. Constitutional identity is yet another concept used in this debate on ultimate authority. Pluralism assumes that the courts will compete over ultimate authority and will try to use such a concept 'to their advantage'. With regard to article 4 (2)

¹⁵⁰ Case C-210/06 *Cartesio Oktató és Szolgáltató* bt [2008] ECR I-09641, paras 88-98.

¹⁵¹ *Cartesio Oktató és Szolgáltató* (n 150).

¹⁵² Sarmiento (n 43) 300.

¹⁵³ Sarmiento (n 43) 301.

¹⁵⁴ Sarmiento (n 43) 302.

¹⁵⁵ For the case of EU Enlargement Policy, see Christophe Hillion, 'The Creeping Nationalisation of the EU Enlargement Policy' (2010) 6 SIEPS 7 < <http://www.wider-europe.org/sites/default/files/attachments/events/SIEPS%20report.pdf> > accessed 7 June 2012.

TEU, the ECJ seems to have more persuasive power than the TK or the US. However, the jurisprudence is certainly not settled yet.

The difficulties in defining national or European constitutional identity stem to a large extent from the fact that it is merely a translation of a societal or cultural, if not metaphysical, concept into a legal context.¹⁵⁶ Identity supposedly represents an essence that distinguishes one constitutional order from another: its 'genetic patrimony'.¹⁵⁷

Asserting a European constitutional identity is a difficult task, in particular in view of the enlargements and the growing competences of the EU. The Court has been very careful with the concept of European identity; it has never used it expressly in its jurisprudence. However, when the Court affirms the status of human rights as the 'very foundations of the Community legal order', this sounds a lot like 'identity talk'.¹⁵⁸ Like other EU institutions, the ECJ has emphasised the common values of the EU to the outside rather than to the inside, namely in relation to the international legal order rather than to the legal orders of the Member States. Such an approach might be perceived as furthering the process of constitutionalisation inside the EU and strengthening the position of the ECJ as the EU's constitutional court, but at the same time representing a pluralist stance outside the EU on the question of relations between legal orders in the international arena.

Respect of diversity both in internal as well as external matters is not a new value for the EU. Therefore, even though the normative references to 'European identity' or 'national identities of the Member States' might be important declarations at a political level, they are not revolutionary from the legal point of view. The concept of constitutional identity can become yet another tool in the European pluralist framework, used either to challenge or to uphold the authority of the ECJ. An interesting question in the legal architecture of the EU is whether national constitutional identity becomes a concept of European law, enlarging the scope of competence of the ECJ, or whether it represents a useful tool enabling national derogation from EU law. However, little consistent practice of the courts is available yet. A historical interpretation suggests that the legislative amendment of article 4 (2) TEU introduced by the Lisbon Treaty was not intended as a derogation clause. It was suppose to grant

¹⁵⁶ Alexandre Viala, 'Le concept d'identité constitutionnelle: approche theorique' in Laurence Burgorgue-Larsen (ed), *L'identité constitutionnelle saisie par les juges en Europe* (Editions Pedone 2011) 8.

¹⁵⁷ Viala (n 156) 21.

¹⁵⁸ Vasilios Skouris, 'EuGH oder BVerfG - wer hat das letzte Wort?' speech at the Deutscher Anwaltstag 2011 <<http://www.davblog.de/?p=844>> accessed 7 June 2012.

competence neither to the EU nor to the Member States.¹⁵⁹ On the one hand, the Court of Justice seems to have a tendency to gradually but constantly expand the field of application of EU law.¹⁶⁰ In light of this tendency, the usage of the principle of respect for the national identities of the Member States can also be seen as an attempt to ‘unionise’ this concept and guarantee the exclusive jurisdiction of the Court in Luxembourg on the modalities of its application. Then the concept of ‘national identities’ would become just another instrument of EU law that would, however, not substantially change its melody.

In view of the inherent role of constitutional courts as guardians of the constitution, it is an extremely difficult task for them to strike a balance with the obligations arising under European law. One could expect that this inherent tension should become less visible and more settled with the advancement of the process of EU integration. However, the constitutionalisation of the EU legal order serves as a catalyst in this debate. Moreover, in the last decade, there seems to have been a general tendency in EU integration to adopt a defensive position, barricading the national constitutions, instead of defining the common values and principles.¹⁶¹ The *Lisbon* judgment of the Constitutional Court in Karlsruhe, especially when read in the context of the whole jurisprudence of the BVerfG concerning the relationship with EU law, can be understood more as a symptom than a problem, a symptom for unresolved issues of European integration.¹⁶² The BVerfG formulates hypothetical caveats for the *ultima ratio* case of normative incompatibility.¹⁶³

The ordinary judge can find himself facing a clash of authorities when a judgment from Luxembourg does not correspond to the judgment of his national constitutional court.¹⁶⁴ Nonetheless, unclear judgments of national constitutional courts disclosing a hostile attitude and a prevalent concern to protect their own jurisprudential turf do not offer a way to resolve this dilemma. The Polish and Czech constitutional jurisdictions in their recent judgment failed to make a constructive contribution to find a settlement of the relationship between national and European

¹⁵⁹ Final report of Working Group V of the European Convention (4 November 2002) 11 <<http://register.consilium.europa.eu/pdf/en/02/cv00/cv00375-re01.en02.pdf>> accessed 7 June 2012.

¹⁶⁰ Henri De Waele, ‘The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment’ (2010) 6(1) *Hanse Law Review* 3, 11.

¹⁶¹ Franz C. Mayer, ‘L’identité constitutionnelle dans la jurisprudence allemande’ in Laurence Burgogues-Larsen (ed), *L’identité constitutionnelle saisie par les juges en Europe* (Editions Pedone 2011) 84.

¹⁶² Mayer (n 8) 785.

¹⁶³ Jancic (n 105) 337.

¹⁶⁴ Sarmiento (n 43) 302.

law. Those two judgments might be considered as examples of 'bad' constitutional pluralism, highlighting the risks that such a non-hierarchical construction bears.

Pure heterarchy, based on a balance of powers ignoring the institutional and normative framework of the EU in order to protect national constitutions and constitutional courts, comes with the inherent risk of leading us back to 'a pre-war state of development in the international relations among the States of Europe'.¹⁶⁵ On the other hand, even though one could identify cases where the judicial actors seem to miss an opportunity to improve the protection of individual rights (as the ECJ did in *Runevič-Vardyn* (2011)) or where they show too much eagerness to ensure their own authority (as the Czech Constitutional Court did in January 2012), this is how the system of constitutional pluralism functions. European constitutional pluralism has the ambition of creating 'a new kind of political polyphony intended to take the competing visions of Europe seriously'.¹⁶⁶ Single criticisable judgments do not bring into question the viability of the whole framework, but it is important to be aware of the systemic risks.

¹⁶⁵ Julio Baquero Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement' (2007) EUI Working Paper RSCAS 2007/13, 23 <http://cadmus.eui.eu/bitstream/handle/1814/6760/RSCAS_2007_13.pdf?sequence=1> accessed 7 June 2012.

¹⁶⁶ Kalypso Nicolaïdis, 'Germany as Europe: How the Constitutional Court Unwittingly Embraced EU democracy (A Comment on Franz Mayer)' (2011) 9(3-4) *International Journal of Constitutional Law* 786, 792.