

Sovereignty – Out, Constitutional Identity – In: The ‘Core Areas’ of Controversy of EU Membership*

BY MIODRAG JOVANOVIĆ**

Abstract. The Lisbon Treaty has sparked a new round of debate about the nature of membership in the European Union. Constitutional courts of Germany and the Czech Republic played a prominent role in this debate. Parts of their rulings were framed in the traditional vocabulary of ‘sovereignty’. In this paper, I proceed by showing heuristic limitations of the concept of ‘sovereignty’ in addressing the intricate issue of the EU membership. I will, first, argue that none of the aspects of sovereignty – neither international, nor domestic – is significantly affected by the membership in the Union. Moreover, the sovereignty lenses necessarily put emphasis on the question of the final authority, which legal pluralists rightly reject as misleading in the EU context. This rejection is a result of a genuine “heterarchical” relation between the EU and Member States. As a consequence, the EU membership can be more adequately reconstructed through the constitutional identity lenses. This is what both constitutional courts to a certain extent did in their Lisbon rulings. The German court, in addition, tried to determine the “core areas” of competences beyond which the constitutional identity of Germany as a member state can be compromised within the EU. In the last part of the paper, I will challenge this course of action by demonstrating that it is problematic on a number of accounts. In this respect, the Czech Constitutional Court’s (hereinafter: CCC) approach of refraining from determining in advance and in abstracto what might be the ultimate defining elements of the Czech constitutional identity seems to be more commendable.

Keywords: Lisbon Treaty, sovereignty, heterarchical, core areas of competences

1. INTRODUCTION

Ever since the process of European integration started to accelerate, particularly after the introduction of the Maastricht Treaty, political and legal theorists began to search for an adequate methodological and conceptual tool-kit to capture the nature of an emerging and evolving EU polity. A common thread of virtually all attempts in theorizing the EU polity-building is that they “take place against the background of the existence of nation-states as the predominant form of the polity in recent European history.”¹ This, in turn, calls for shedding some new light on the traditional concepts, as well as inventing novel ones that might better represent the legal and political reality.² One of the most often employed traditional concepts is sovereignty. As soon as the European polity stepped onto the fast track of political integration, theorists have started to raise the question of how this process

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** Full Professor, Faculty of Law, University of Belgrade. E-mail: miodrag@ius.bg.ac.rs

¹ Friese et al. (2002) 344.

² As pointed out by von Bogdandy, one of the new strands of scholarship “aims to conceptualise the whole of the Union and Member States.” In doing so, they largely rely on notions such as ‘multi-level’ and ‘network’, coined by political science. German scholarship, “always particularly preoccupied with conceptual autonomy, proposes the term *Verbund*, probably best translated using the English nouns composite and compound.” von Bogdandy (2009) 38.

will affect the sovereignty of member states. Theorists were not the only ones in need of an appropriate conceptual framework for addressing practical problems such as the functioning of the EU. Involved institutional actors, particularly member states' constitutional courts, also relied heavily on the traditional theoretical apparatus developed for the paradigm case of nation-state. No wonder, thus, that sovereignty was at the center of both theoretical discussions and the inter-judicial dialogue in the early post-Maastricht era.³

The Lisbon Treaty has expectedly sparked a new round of debate, in which the constitutional courts of Germany and the Czech Republic took the most prominent role.⁴ Parts of their rulings were again framed in the traditional vocabulary of sovereignty. I will proceed by demonstrating the heuristic limitations of the concept of 'sovereignty' in addressing the intricate issue of the legal and political nature of EU membership. Sovereignty is today commonly perceived as having both *international* and *domestic* aspects. The *international* aspect primarily refers to the state's title to territory and its right to be exempted from foreign military intervention. The *domestic* aspect of sovereignty mainly stands for the state's monopoly on the legitimate use of physical force, as well as for its right to determine conditions for citizenship. None of these aspects is seriously affected by the membership in the EU, and, thus, the sovereignty lenses are not particularly apt for elucidating truly puzzling features of the state membership in a supranational polity. Moreover, the sovereignty lenses necessarily highlight the question of the final authority, which legal pluralists, I believe rightly, reject as misleading in the EU context. This rejection stems from a genuine "heterarchical" and horizontal relation between the EU and Member States. Hence, I will argue that the EU membership can be more adequately reconstructed through the lenses of constitutional identity. This is what the German, and to a lesser extent Czech, Constitutional Court did in its Lisbon ruling. The German Federal Constitutional Court (hereinafter GFCC), in addition, was inclined to determine the "core areas" of competences, which are "particularly sensitive for the ability of a constitutional state to democratically shape itself",⁵ and beyond which the constitutional identity of Germany as a member state can be compromised within the EU. I will challenge this course of action by demonstrating that it is problematic on a number of grounds. In this respect, the Czech Constitutional Court's (hereinafter CCC) approach of refraining from determining in advance and *in abstracto* what might be the ultimate defining elements of the constitutional identity of a "sovereign democratic state governed by the rule of law"⁶ seems to be more commendable.

2. EU MEMBERSHIP THROUGH THE LENSES OF SOVEREIGNTY

In the internal exchange of political arguments preceding the second CCC's decision regarding the Lisbon Treaty, President Václav Klaus warned that "[t]he substance of sovereignty is an unlimited execution of power. Its sharing negates sovereignty." The

³ See MacCormick (1995) 259–266.

⁴ These were not the only two constitutional courts to address the constitutionality of the Lisbon Treaty. For a comparative review of different court proceedings, see Wendel (2011) 96–137.

⁵ BVerfG, 2 BvE 2/08 vom 30.6.2009, par. 252 <http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.htm> accessed 12 August 2015.

⁶ Constitutional Court of the Czech Republic, 2009/11/03 - Pl. ÚS 29/09: Treaty of Lisbon II, par. 112. <http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=466&cHash=eedba7ca14d226b879ccaf91a6dcb276> accessed 12 August 2015.

Constitutional Court's contrary stance "that no sovereign in the true sense of the word will exist in the European Union ... represents a very dangerous social arrangement."⁷ Klaus's statement reflects the classical wisdom, according to which sovereign power is within its own territorial limits both internally and externally (internationally) absolute and uncontrolled. Despite this statement, as early as 1917, Laski in his treatise on sovereignty resentfully reacted, by saying that when faced with such legal definitions he "can only throw up (his) hands."⁸ Instead, Laski argued that "there is nothing absolute and unqualified about" sovereignty, and that, indeed, "it is a matter of degree."⁹

Almost a century later scholars would more readily concede to Laski's claim than to Klaus's. In fact, we are witnessing the proliferation of theoretical constructs, such as 'shared',¹⁰ 'pooled',¹¹ 'floating',¹² 'competitive'¹³ sovereignty, etc. The majority of these were specifically designed so as to elucidate the peculiar nature of the states' membership in the European Union. One of the most hotly debated issues, in that respect, concerns the question whether it is possible to predefine the ultimate frontiers of the process of shrinking the powers of a member state, beyond which it would be meaningless to speak of it being 'sovereign'. This question is of particular relevance taking into account that constitutional documents of the EU member states, including those of the Czech Republic and Germany, normally operate with terms such as 'sovereignty' and 'sovereign powers'.¹⁴ This was Klaus's main point.

To what extent, however, can one rely on the concept of sovereignty in elucidating the nature of the EU membership? In addressing this issue, one has to be aware of Walker's cautionary reprimand that "an assessment of the contemporary resonance of the concept of sovereignty serves no purpose and permits no satisfactory conclusion in isolation from a broader set of concerns which define the explanatory or normative purpose of that assessment."¹⁵ The current debate over sovereignty, thus, is not so much "a debate over the capacity of a particular concept to capture some underlying trans-theoretical essence", as it is the one "over the heuristic value of this or that conception of sovereignty (or its demise) as a way of enhancing the claims of a particular theoretical understanding of the world."¹⁶

⁷ Klaus, V., 'Reply to the Constitutional Court Regarding the Lisbon Treaty' < <http://www.klaus.cz/clanky/1141> > accessed 12 August 2015.

⁸ Laski (1999) 12.

⁹ Laski (1999) 14.

¹⁰ For an early critical account of 'sharing' sovereignty at the EU level, see Wallace (1999) 503–521.

¹¹ For different historical trajectories of the concept in the US and EU, which in the latter led to the abandonment of the traditional reading and introduction of the 'pooled' sovereignty, see Keohane (2002) 743–765.

¹² See Kostakopoulou (2002) 135–156.

¹³ Maduro (2003) 521.

¹⁴ Having in mind historical circumstances of its adoption, it is not surprising that Germany's *Grundgesetz* does not explicitly refer to the term 'sovereignty'. However, the term *Hoheitsrecht*, which is widely used throughout the document, is usually translated in English as 'sovereign power'. This term is used also in Article 24, which regulates the transfer of powers to international organizations. Bundestag's English version of the Basic Law is available at < <https://www.btg-bestellservice.de/pdf/80201000.pdf> > accessed 12 August 2015.

¹⁵ Walker (2003) 3.

¹⁶ Walker (2003) 4.

The aforementioned usage of sovereignty has apparently been taken to be against the backdrop of the classical Westphalian understanding of the world.¹⁷ Yet, it is highly questionable to what extent one may nowadays rely on the explanatory potential of this approach. First, it is necessary to bear in mind that the instigation of the system of territorial states has led to the strict separation between international and domestic law, which in the case of domestic law enabled the theoretical division within the concept of sovereignty. Hence, “sovereignty’s claim to distinguish the inside from the outside is based on both power over territory and power over people.” Yet, “in due time sovereignty’s territorial frame became conceptually distinct from the exercise of jurisdiction over people within a body politic.” While the state’s jurisdiction within a clearly defined territory was regulated by *domestic law*, matters relating to the territorial frame of sovereignty were dealt with by *international law*.¹⁸ In both of its aspects, sovereignty is today considered neither absolute, nor unlimited.¹⁹ From the *international* point of view, it primarily refers to the title to territory²⁰ and the right to be exempted from foreign military intervention.²¹ Neither of them, however, is absolute. The former is counterbalanced by the absence of the general international legal prohibition of secession,²² while the latter by the emerging ‘responsibility to protect’ doctrine.²³ The *domestic* point of view, is that state sovereignty largely stands for the monopoly of the legitimate use of physical force, which is restricted by *jus cogens* international human rights norms.²⁴ Additionally the right to determine conditions of membership in the political community, which is, nonetheless, an international plane limited by the principle of “effective citizenship”, established by the International Court of Justice in the 1955 *Nottebohm Case*.²⁵

¹⁷ Walker, on the other hand, advances a pluralist theoretical account of the world.

¹⁸ Cornelisse (2010) 128.

¹⁹ Jackson emphasizes that at the intuitive level of ordinary language practice no sensible person would today subscribe to the “antiquated” concept of sovereignty, which would imply the power of state to violate virgins, chop off heads, arbitrarily confiscate property or torture its citizens. Jackson (2003) 790.

²⁰ Lauterpacht (1997) 139.

²¹ Article 2(4) of the UN Charter

²² This is how scholars often interpret the ICJ’s statement that “general international law contains no applicable prohibition of declarations of independence”, contained in its Kosovo Advisory Opinion. International Court of Justice, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion, No. 2010/25, 22 July 2010, par. 84.

²³ The balancing between the two is to be interpreted within the emerging regime of international rule of law. See Jovanović (2013) <<http://ssrn.com/abstract=2317153>> accessed 12 August 2015.

²⁴ For a nuanced account of the relationship between the two, see <<http://mysite.du.edu/~jdonnell/papers/hrsov%20v4a.htm>> accessed 12 August 2015. The process of globalization has led political philosophers to challenge the moral right of political communities to decide who can/cannot become a citizen. See Leydet (2014) <<http://plato.stanford.edu/archives/spr2014/entries/citizenship/>> accessed 12 August 2015.

²⁵ “While admitting that international law permits each State to formulate rules governing the grant of its *own* nationality, the Court maintained, however, that a State could not demand recognition of these rules by other States”, unless the rule of “effective citizenship” was satisfied. Goldschmidt (1959) 691. According to the Court, factors indicating compliance with this rule are the following ones: “the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.” *Nottebohm Case* (second phase) (*Liechtenstein v. Guatemala*), Judgment of April 6th, 1955, I.C. J. Reports 1955, 22.

Neither of these aspects of sovereignty of member states, however, is fundamentally challenged by the achieved level of European integration. Somewhat paradoxically, a few of those aspects might be even better preserved within the current institutional architecture of the EU. For instance, several EU member states met the challenge of politically handling secessionist claims.²⁶ The particular focus of global attention was put on the Scottish referendum on independence,²⁷ as well as on reiterated similar requests by Catalan secessionists.²⁸ The ambiguous stance of international law on the intricately connected issues of territorial integrity, right to self-determination and secession seems to additionally fuel the independence cause in these regions.²⁹ Yet, the important distracting factor might be exactly the stance of the EU officials. In the course of the debate over the possible independence of Catalonia, a spokesperson of the European Commission clearly stated: “An independent state, because of its independence, would become a third country *vis a vis* the EU and as of the day of the independence the EU treaties will no longer apply”.³⁰ Having in mind that Article 49 of the Consolidated Version of the Treaty on European Union requires the unanimous decision of the existing member states regarding the acceptance of new members, a European state that emerged through the process of unauthorized and unilateral secession from an EU member state may seriously, if not completely, compromise its chances of entering the Union.³¹ One is, thus, prone to conclude

²⁶ The 4-days unofficial voting for the independence of Veneto was not taken so seriously by global media. The organizers announced that out of a total of 3.7 million qualified voters in the region, 2.1 million voted for independence. See, ‘Veneto residents support leaving Italy in unofficial referendum’ <<http://www.telegraph.co.uk/news/worldnews/europe/italy/10715888/Veneto-residents-support-leaving-Italy-in-unofficial-referendum.html>> accessed 12 August 2015.

²⁷ Scottish referendum could be said to represent the most commendable instance of the constitutionalization of secession. For a theoretical justification of this model, see, Jovanović (2007) and cf. Mancini, (2008) 553–584.

²⁸ On January 23, 2013, the Catalan Parliament voted in favor of the Declaration on the Sovereignty and right to decide of the people of Catalonia, which “initiates a process to bring to promote the right of the citizens of Catalonia to collectively decide their political future”. The English version is available at <http://en.wikipedia.org/wiki/Catalan_Sovereignty_Declaration#cite_note-1> accessed 12 August 2015. The Spanish Constitutional Court, however, on March 25, 2014 unanimously decided that the first point of the Declaration, according to which “the Catalan people have, by reason of democratic legitimacy, political and legal sovereignty”, is contrary to Articles 1.2 and 2 of the Spanish Constitution and Articles 1 and 2.4 of the Statute of Autonomy of Catalonia. The Court’s decision in Spanish is available at <http://www.tribunalconstitucional.es/es/salaPrensa/Documents/NP_2014_026/2013-01389STC.pdf> accessed 12 August 2015. The Government of Catalonia eventually rebranded the vote as a “participation process” and it was held on November 9, 2014, with the estimated 2,305,290 votes casted, out of which 80,8% were in favor of an independent state of Catalonia.

²⁹ For the much awaited argued advisory opinion of the International Court of Justice in the Kosovo case might have detrimental effects for some other self-determination conflicts, such as the one in Crimea, see Jovanović (2012) 292-317.

³⁰ At <<http://www.euractiv.com/video/brussels-says-independent-catalonia-would-need-leave-eu-9185>> accessed 12 August 2015.

³¹ If five EU member states, one of which is Spain, stayed adamant in refusing to recognize the unilaterally proclaimed independence of Kosovo, it is hard to see how they would be willing to accept the EU membership of a region that seceded without the consent of its host state. The situation was different in the United Kingdom, where in October 2012 the UK and Scottish governments signed the Agreement on a referendum on independence for Scotland. The text of the Agreement is available,

that a state's title to territory is in the present political circumstance more effectively protected in the capacity of the EU member state.

The EU cannot also be said to challenge the aforementioned internal aspects of member states' sovereignty. While the harmonisation of criminal law, exchanges of information between police authorities, and, most importantly, the European Arrest Warrant testify to the fact that this aspect of sovereignty of member states has certainly not been left completely untouched,³² "there is no sign of an emerging competition for the monopoly of force between the central EU institutions and the member states."³³ Similarly, despite having developed a common regime of regulating the crossing of Union borders, as well as regulating asylum and immigration issues,³⁴ the EU has no say in the member states' policies of determining conditions of nationality. The latest trend of granting 'golden visas' and 'selling national citizenship' – and indirectly EU citizenship – by some financially devastated member states, was met with reluctance by the EU bodies, but the Commission did not manage to completely dissuade national governments from taking this course of action.³⁵

3. EU MEMBERSHIP THROUGH THE LENSES OF CONSTITUTIONAL IDENTITY

The preceding analysis reveals that the lenses of sovereignty are not quite appropriate for addressing genuinely intriguing features of EU state membership. Yet, owing to the widespread constitutional terminology of 'sovereignty' and 'sovereign powers', constitutional tribunals' decisions on the Lisbon Treaty could not completely circumvent referring to this traditional phraseology. The same is true of the German and CCCs. Despite this, on a closer reading of their rulings, it transpires that both are more focused on an attempt to determine whether there exist certain core areas of competences, which pre-define the constitutional identity of the given political community.³⁶

at <<http://webarchive.nationalarchives.gov.uk/20130109092234/http://www.number10.gov.uk/wp-content/uploads/2012/10/Agreement-final-for-signing.pdf>> accessed 12 August 2015. Still, a putative independent Scottish state would need to go through the existing accession procedure. For legal aspects of the referendum on independence, see Tierney (2013) 359–390.

³² The European Arrest Warrant triggered a new round of inter-judicial contestation between national constitutional courts and the ECJ. Sarmiento (2008) 171–183.

³³ Jachtenfuchs (2006) 163.

³⁴ See the most recent 'A European Agenda on Migration', COM (2015) 240 final, Brussels, May 13, 2015. In the face of the high-volume of arrivals of immigrants, this document, *inter alia*, calls for a "temporary distribution scheme for persons in clear need of international protection to ensure a fair and balanced participation of all Member States to this common effort."

³⁵ The major fuss concerned Malta's contentious plan to grant citizenship to those investing at least 650.000 € in the economy of the state, without fulfilling some prior residence requirement. This plan was strongly opposed by the Commission, and eventually both parties agreed on "the introduction of an effective residence status in Malta prior to the possibility to acquire Maltese naturalisation". See 'Malta agrees to curtail plans to sell EU citizenship', January 30, 2014 <<http://uk.reuters.com/article/2014/01/30/uk-eu-malta-idUKBREA0S1WD20140130>> accessed 12 August 2015.

³⁶ There is another, equally important aspect of the GFCC's ruling, which addresses the issue of possible transgressions of powers conferred on the EU by its member states. However, for the discussion about the nature of the EU membership the primary question is the following one: are there any limitations to the principle of voluntary conferral of powers to the EU and, if so, do they follow from the respect for sovereignty or from protection of constitutional identity of a member state?

The GFCC's ruling of June 30, 2009 in many respects firmly follows in the footsteps of the Maastricht decision,³⁷ in particular as an expression of the continuous fear of subjecting itself to the European Court of Justice.³⁸ The ruling on the Lisbon Treaty is "more than a *'Maastricht IP'*", insofar as "the Court's decision pursued a line of reasoning that combined democratic theory with a modern understanding of sovereignty."³⁹ According to Tomuschat, this Court's "self-established theory" of democracy, grounded in the reading of Article 38(1) of *Grundgesetz*, proceeds from the idea that "every German citizen is [sic the] holder of a democratic right to a legislature that is endowed with substantial powers to determine the destiny of the German people."⁴⁰ Since the democratic principle is, according to the so-called *Ewigkeitsklausel* of Article 79(3), neither amenable, nor violable, no constituent parliament can renounce this facet of the identity of the constitutional order. Consequently, no such authority can be transferred to some supranational legal entity.⁴¹

The Court did not stop at stating that the Basic Law guarantees sovereign statehood for Germany,⁴² but it "dared to take the step to the middle level of abstraction and substantiated the identity ensured by the constitution."⁴³ Even though the Court initially states that the aforementioned democratically rooted conception of sovereignty "does not mean that a pre-determined number or certain types of sovereign rights should remain in the hands of the state",⁴⁴ it, nonetheless, concludes that "European unification on the basis of a treaty union of sovereign states may, however, not be achieved in such a way that not sufficient space is left to the Member States for the political formation of the economic, cultural and social living conditions."⁴⁵

The areas which shape the citizens' living conditions constitute the outward limitations of the European integration, insofar as their political formation decisively depends on certain discursive features of democracy that, in the Court's opinion, cannot be met at the transnational level. Democracy does not exhaust in the "formal principles of organisation" and in "a cooperative involvement of interest groups." This political regime "first and foremost lives on, and in, a viable public opinion", which enables a genuine democratic deliberation about different political alternatives.⁴⁶ Consequently, despite "the great successes of European integration", it must not be overlooked "that the public perception of factual issues and of political leaders remains connected to a considerable extent to patterns of identification related to the nation-state, language, history and culture."⁴⁷

³⁷ Hence, the Court continues to compare the EU to international organizations; it reaffirms its position about member states as "masters of the Treaties"; the Court reiterates that the primary treaty law "constituting the powers of the Union" remains an "*abgeleitete Grundordnung*," i.e. a derivative legal order; the Court repeats its position on the "Kompetenz-Kompetenz" issue. Halberstam et al. (2009) 1241–1242.

³⁸ Grosser (2009) 1263.

³⁹ Schorkopf (2009) 1220.

⁴⁰ Tomuschat, (2009) 1259.

⁴¹ BVerfG, 2 BvE 2/08 vom 30.6.2009, par. 216.

⁴² BVerfG, 2 BvE 2/08 vom 30.6.2009, par. 216.

⁴³ Schorkopf (2009) 1220.

⁴⁴ BVerfG, 2 BvE 2/08 vom 30.6.2009, par. 248.

⁴⁵ BVerfG, 2 BvE 2/08 vom 30.6.2009, par. 249.

⁴⁶ BVerfG, 2 BvE 2/08 vom 30.6.2009, par. 250.

⁴⁷ BVerfG, 2 BvE 2/08 vom 30.6.2009, par. 251.

Finally, the Court lists the areas, which are “particularly sensitive for the ability of a constitutional state to democratically shape itself”, and, thus, decisions in those areas cannot be the subject of conferral. These are:

decisions on substantive and formal criminal law (1), on the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior (2), fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, *inter alia*, by social policy considerations (3), decisions on the shaping of living conditions in a social state (4) and decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities (5).⁴⁸

In order to protect the core areas of the constitutional identity of the German state, the transfer of *Kompetenz-Kompetenz* must be prohibited⁴⁹ and it must be possible for the GFCC to assert its responsibility for integration and for possible transgressions of the boundaries taken by the EU. Put differently, the Court has to preserve the competence of both “the identity review” and “*ultra vires* review” of the acts of the EU bodies.⁵⁰

The CCC delivered its second, 2009 ruling in a completely different political setting, in which one of the strong opponents of the Lisbon Treaty was President Klaus, who supported the group of Senators challenging the constitutionality of the Treaty. The petitioners’ point of departure was the claim that the Constitution, regrettably, “does not precisely define the essential requirements for a democratic state governed by the rule of law.” Therefore, they asked the Constitutional Court to set “substantive limits to the transfer of powers” in line with the previously discussed decision of the GFCC.⁵¹ The Court resisted taking this course of action, grounding its stance in “the position that it holds in the constitutional system of the Czech Republic”. In the Court’s view, it is up to the legislature to determine “substantive limits to the transfer of powers”, because this is a political question. The Court can review political decisions pertaining to these questions “only at the point when they have actually been made on the political level.”⁵²

The Court found an additional reason for rejecting the suggested route in the self-imposed “restraint and judicial minimalism, which is perceived as a means of limiting the judicial power in favor of political processes, and which outweighs the requirement of

⁴⁸ BVerfG, 2 BvE 2/08 vom 30.6.2009, par. 252.

⁴⁹ BVerfG, 2 BvE 2/08 vom 30.6.2009, par. 239.

⁵⁰ BVerfG, 2 BvE 2/08 vom 30.6.2009, par. 240. In a recent ruling, regarding Decisions of the Governing Council of the European Central Bank of 6 September 2012 on a number of technical features regarding the Eurosystem’s outright, monetary transactions in secondary sovereign bond markets (the so-called OMT program), the GFCC restated the relation between the two reviews. It emphasized that the “*ultra vires* review” “applies not only if independent expansions of powers affect areas which are part of the constitutional identity of the Member States or particularly depend on the process of democratic discourse in the Member States [...] though transgressions of powers weigh particularly heavy here...” BVerfG, 2 BvR 2728/13, January 14, 2014, par. 25 <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/01/rs20140114_2bvr272813en.html> accessed 12 August 2015.

⁵¹ Constitutional Court of the Czech Republic, 2009/11/03 - Pl. ÚS 29/09: Treaty of Lisbon II, par. 110.

⁵² Constitutional Court of the Czech Republic, 2009/11/03- Pl. ÚS 29/09: Treaty of Lisbon II, par. 111.

absolute legal certainty.”⁵³ Consequently, the Court refrained from formulating “in advance, in an abstract context, what is the precise content of Article 1(1) of the Constitution”, as requested by the petitioners, who were in favor of “a final list to define the elements of the ‘material core’ of the constitutional order, or more precisely, of a sovereign democratic state governed by the rule of law”.⁵⁴ Instead, the Court stated that “it is specific cases that can provide it a relevant framework in which it is possible, case by case, to interpret more precisely the meaning of the term ‘sovereign, unitary and democratic state governed by the rule of law, founded on respect for the rights and freedoms of the man and of citizens’.” The attempt to define the constitutional identity of the state “once and for all” would be a clear expression of “judicial activism”, which is on other occasions frequently criticized by other Czech institutional actors.⁵⁵

4. CONSTITUTIONAL IDENTITY, SOVEREIGNTY, STATEHOOD

In the moment of its theoretical conceptualization, in the 16th and 17th centuries, sovereignty was largely “conceived to be ‘all or nothing’, i.e., either unlimited or non-existent.” In the following centuries, “the discussion on the concept of sovereignty focused on how to tame this unleashed concept”.⁵⁶ The experiment of European integration largely contributed to this discussion, both theoretically and practically, and irrespective of the approach taken in the investigation of the legal and political nature of the EU the traditional concept of ‘sovereignty’ seemed to be an unavoidable heuristic tool. The analysis undertaken demonstrates that this is still the case. Nevertheless, the analysis also reveals the real limitations of this heuristic tool in addressing the nature of the EU membership. While it is true that sovereignty talk cannot be abandoned completely in connection to discussions regarding statehood, I will argue that the constitutional identity lenses seem far more promising in capturing genuinely intriguing features of the European integration.

Sovereignty is ultimately about supreme power. In the EU context, this issue is commonly translated into a legal problem of a final authority. There are two conflicting narratives – the EU view is determined by the Court of Justice of the European Union’s (hereinafter ECJ⁵⁷) proclamation of the supremacy of EU law over the law of Member States,⁵⁸ whereas the Member States’ view is determined by the stance, paradigmatically fostered by the GFCC, that all the EU powers are delegated to it by Member States. Not only do these narratives appear fatally irreconcilable,⁵⁹ but both are also premised on some

⁵³ Constitutional Court of the Czech Republic, 2009/11/03- Pl. ÚS 29/09: Treaty of Lisbon II, par. 113.

⁵⁴ Constitutional Court of the Czech Republic, 2009/11/03- Pl. ÚS 29/09: Treaty of Lisbon II, 112.

⁵⁵ Constitutional Court of the Czech Republic, 2009/11/03- Pl. ÚS 29/09: Treaty of Lisbon II, 113.

⁵⁶ Jakab (2006) 376.

⁵⁷ I will use the acronym according to the old name of the court – European Court of Justice – because it is used in most references which I quote.

⁵⁸ As early as in, Case 106/77, *Simmenthal* (1978) ECR 629, para 17.

⁵⁹ “How can the European view, apparently presupposing both the original sovereignty and the supremacy of the Union, be reconciled with the merely derived nature of the sovereign rights of the Union? How can the national view, insisting on national law as the starting point of all legal power of the Union, allow for the supremacy of Union law at all?” Martin Borowski, ‘Legal Pluralism in the European Union’, in Menéndez et al. (2011) 187–188.

sort of Kelsenian monistic doctrine, which epistemologically postulates the unity of national and international (in this case, the EU) law.⁶⁰ This means that there can be only one legal (and concomitantly political) system with one or more of its subsystems, which stand in a hierarchical relation. Whereas the ECJ's supremacy doctrine favors the view that there is a EU legal system with 28 subsystems, the GFCC's doctrine of conferral leads to the contrary conclusion. In either approach, it would not be possible to speak of "different and mutually independent systems of norms if the norms of both systems are considered to be valid for the same space and at the same time."⁶¹

Legal pluralism⁶² abandons the sovereignty lenses. For pluralists, neither of the aforementioned views can adequately capture the reality of the relationship between the EU and Member States. Simply put, the question of a final authority is misleading in the EU context,⁶³ insofar as the relation between the EU and Member States is "interactive rather than hierarchical",⁶⁴ it is "heterarchical", that is, "horizontal rather than vertical".⁶⁵ Consequently, "their relationship is fundamentally open and depends, in large part, on political factors."⁶⁶ Since "no final 'authority of authorities'" exists, "the point at which the various sovereign law-givers are unable to achieve normative convergence on the basis of their different validity claims is also the point at which we run out of legal solutions."⁶⁷

This interactive, horizontal relation between the EU and Member States can presumably be more adequately reconstructed through the lenses of identity. Just as one may do it in terms of the identity of interacting legal systems,⁶⁸ so one may reconstruct it in terms of the identity of mutually connected political systems. This approach is, furthermore, vindicated by Article 4(2) of the Lisbon Treaty, which states that the Union shall respect the Member States' "national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government." This novel focus on state structures means that "there is a shift in emphasis from national identity as such to constitutional identity."⁶⁹ The most intriguing question is who shall decide on the content of the Member States' constitutional identity and, more importantly, who shall determine what constitutes infringement under Article 4(2). For Besselink, the answer to this question illustrates how institutional actors have moved from the zero-sum game model to the

⁶⁰ Referring to the relationship between national and international law, Kelsen says: "A jurist who accepts both as sets of valid norms must try to comprehend them as parts of one harmonious system." Kelsen (1952) 424.

⁶¹ Kelsen (1952) 404.

⁶² To be sure, one cannot speak of a unified school of thought, but a common thread running through different conceptions is the claim of the simultaneous existence of multiplicity of legal orders within a particular socio-political unit. For an overview, see Tamanaha (2008) 375–411.

⁶³ Cf. Kumm (1999) 351–386.

⁶⁴ McCormick (2011) 118.

⁶⁵ Walker (2002) 337.

⁶⁶ Krisch (2012) 298.

⁶⁷ Walker (2005) 592.

⁶⁸ Dickson takes this approach in discussing various possible ways of understanding the character of the relation between legal systems in the EU. She provides evidence for the thesis that the EU and Member States' legal systems are distinct, yet interacting systems. Dickson, (2008) 9–50.

⁶⁹ Besselink (2010) 44. Rodin shares this view. In commenting the latest formulation of the national identity protection clause, which was initially introduced in the Maastricht Treaty, he concludes: "It would seem that an added value of the new wording [...] is the explicit reference to national constitutional identity, whatever this may be." Rodin (2011) 13.

situation of an “intricate mutuality which exemplifies the composite nature of the European constitutional order”.⁷⁰ Hence, one may “understand this provision as urging a relationship of cooperation between national (constitutional) courts and the ECJ, the first to determine the constitutional identity, the latter to determine the meaning of the relevant European law in dispute.”⁷¹

Arguably, this sort of dialogue has already been established in a line of cases in which national courts invoked the claim of the protection of particular constitutional values under the rubric of “national identity”. According to Rodin, it is possible to trace different evolutionary phases of the pre-Lisbon case law. All things considered, “national identity claims had limited success in the pre-Lisbon era.”⁷² A number of authors argue that things have changed with the Lisbon Treaty’s emphasis on the respect for “constitutional identity” of Member States. Hence, Besselink notices that “the provision of Article 4(2) EU forms an important qualification of the rule on the primacy of EU law”, but only in cases of those provisions that are fundamental, in the sense that they contribute to the constitutional identity of the Member State.⁷³ Similarly, Bogdandy and Schill argue that the revised identity clause may be understood as permitting domestic constitutional courts to invoke, under certain conditions, constitutional limits to the primacy of EU law.⁷⁴

The Lisbon judgment of the GFCC seems to go a step further. It is not primarily about the supremacy claim, as it is about the relation between the two separate, yet interacted political entities. In Grimm’s words, the core of the judgment lies in a Court’s attempt to maintain the picture of “the current structure of the EU as a political entity created and supported by the member states, without being a state itself, and to prevent its open or creeping transformation into a state.”⁷⁵ Put differently, the Court’s characterization of the EU as a “*Staatenverbund*”, that is, “a close long-term association of states, which remain sovereign”,⁷⁶ becomes the principal reason for the subsequent conclusion about the outward limitations of European integration, which are defined through the “core areas” of constitutional identity. For this reason, I believe that Grimm’s ultimate qualification of the Lisbon judgment as “defending sovereign statehood against transforming the Union into a state” is not quite correct. To be sure, concepts of sovereignty, statehood and constitutional identity are intricately connected, but they are, nonetheless, conceptually distinguishable. This distinction is acknowledged in international legal theory. With respect to the problem of state succession, Craven draws the following line of demarcation:

⁷⁰ Besselink (2010) 44.

⁷¹ Besselink (2010) 45.

⁷² “On the one hand, Member States were successful in what can be called implied margin of discretion cases, where the ECJ refused to rule on national value choices on jurisdictional grounds. However, on the substantive count, justification on the grounds of national identity was argued a number of times in order to justify restriction of market freedoms but with limited success. When it comes to substantive conflicts, the ECJ treated national identity as a general justification and balanced it against market freedoms or other values of EU law.” Rodin, ‘National Identity and Market Freedoms after the Treaty of Lisbon’, 28.

⁷³ Besselink (2010) 48.

⁷⁴ Bogdandy et al. (2011) 1417–1453.

⁷⁵ In that respect, “the Lisbon judgment exceeds previous case-law without deviating from it. In fact, it relies on it.” Grimm (2009) 364. For the main points of previous precedents, see 353 ff.

⁷⁶ BVerfG, 2 BvE 2/08 vom 30.6.2009, par. 229.

“[W]hereas the concepts of statehood and personality proceed on the understanding that states have certain attributes or qualities in common and that they are thereby attributed with, or inherently enjoy, certain competencies under international law, the concept of identity, by contrast, is predicated upon a notion of difference. ‘Identity’ assumes that individual states, whilst being members of a particular class of social or legal entities, also possess certain distinguishing features that differentiate one from another. Identity, therefore, presumes personality but is concerned with what is personal or exceptional in the nature of the subject. This can never be provided by reference to the traditional requirements of statehood.”⁷⁷

Therefore, just as a state in international law can preserve its identity even after experiencing changes in territory and population,⁷⁸ so it can also alter its constitutional identity without modifying either of these elements of statehood.⁷⁹ Differentiation along these lines can be made even in the case of a complex supranational polity, such as the EU. According to the Lisbon Treaty, the Union as such enjoys legal personality,⁸⁰ but this by no means implies that the EU is state under international law. Simply put, “the existence and exercise of legal personality is not a badge of statehood”.⁸¹ How about the constitutional identity of the EU? The EU is commonly said to possess a basic “constitutional architecture”,⁸² albeit in the form of a “small ‘c’” constitutional solution.⁸³ Already the Maastricht Treaty stipulated that one of the goals of the Union is “to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy” (Article B).⁸⁴ Drafters were aware of the fact that, in order to be recognized as a distinctive political entity and a global actor in its own right, the EU would need to act with one voice in international relations. On a number of occasions, however, this goal proved to be unattainable.⁸⁵ This failure can be attributed to the EU’s lack of “a sufficient

⁷⁷ Craven (1998) 160.

⁷⁸ According to Craven, in the law of succession, the “emphasis should not be so much upon the existence of ‘external’ rules of succession that allow for the ‘transference’ of rights and duties from one subject to another, but rather upon determining the extent to which legal continuity should follow from elements of material (social, cultural or political) identity.”

⁷⁹ Thus, Rosenfeld argues that “from a functional and material standpoint the United States had many different constitutions and constitutional identities in the past two centuries.” He speaks of the post-Civil War, the New Deal, the civil rights, and a national security constitution of the United States. Rosenfeld (2010) 31–32.

⁸⁰ To be sure, the implicit legal personality of the EU existed even before the Lisbon. See de Schoutheete et al. (2007) 1-9.

⁸¹ Memorandum by Prof. Steve Peers to the House of Lords, UK Parliament <<http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcom/62/62weg17.htm>> accessed 12 August 2015.

⁸² It “determines the balance between the EU and the member-states and between the institutions at the European level, and the policies of the EU have significant implications on the economy and society in Europe.” Hix (2014) 394.

⁸³ Walker (2006) 14.

⁸⁴ On the EU legal personality in foreign policy matters before the Lisbon, see, Leal-Arcas (2006) 165-212.

⁸⁵ Take the example of the relatively recent UN vote on Palestine’s membership. Fourteen EU countries voted in favor, twelve abstained and the Czech Republic voted against. See ‘EU divided in UN vote on Palestine’s status’, November 30, 2012 <<http://www.euractiv.com/global-europe/palestine-recognition-highlights-news-516369>> accessed 12 August 2015.

common ethos or identity.”⁸⁶ That is, no stable and coherent “we” of the European pre-constitutional socio-political order existed, and neither of treaties, including the aborted constitutional treaty, was capable of forging more robust EU constitutional identity.⁸⁷

5. IS THE ‘CORE AREAS’ REASONING DEFENSIBLE?

For all the above stated reasons, the Lisbon ruling should be read not primarily as an expression of the GFCC’s concern that Germany can dissolve its internationally recognized statehood into some putative EU state,⁸⁸ but rather as an attempt to draw the lines beyond which Germany’s identity as the state under the given constitutional order can be compromised within a supranational political entity. The remaining question is whether the Court is justified in providing a closed list of competences, which allegedly constitute an “inviolable core” of this identity that would be destroyed were these competences to be transferred to the EU level. Rodin contrasts GFCC’s approach to the one of the French *Conseil Constitutionnel*,⁸⁹ and considers it “sober”, because “[i]t is based on the principle of co-operation and a clearly defined constitutional identity core.”⁹⁰ He believes that, in conjunction with the obligation of loyal and sincere cooperation between the EU and Member States, which stems from Article 4(3) of TEU,⁹¹ the GFCC’s approach is justified, insofar as “Member States are at liberty to define the core of national constitutional identity, while the ECJ retains the power to interpret the broader normative framework within which national identity operates in the EU.”⁹²

Contra Rodin, I find the GFCC’s approach problematic for a number of reasons. First, despite proceeding from the thesis that the “safeguarding of sovereignty” does not necessarily imply that “a pre-determined number or certain types of sovereign rights should remain in the hands of the state”,⁹³ the Court eventually concludes that further transfer of competences should be restricted “in central political areas of the space of personal development and the shaping of living conditions by social policy”.⁹⁴ In doing so, the Court

⁸⁶ Rosenfeld (2010) 172.

⁸⁷ Cf. Bogdandy (2005) 295–315.

⁸⁸ The Court’s defense, in that respect, is directed towards the Bundestag: “It is true that the Basic Law grants the legislature powers to engage in a far-reaching transfer of sovereign powers to the European Union. However, the powers are granted under the condition that the sovereign statehood of a constitutional state is maintained...” BVerfG, 2 BvE 2/08 vom 30.6.2009, par. 226. It would be absurd, however, to imply that the Court’s defense of German sovereign statehood is directed towards German people. In fact, Grimm himself notices that “[p]ermission to transform the EU into a federal state can only be given by the people through a new constitution.” Grimm (2009) 359.

⁸⁹ In its 2006 ruling, the Council stated that “transposition of a directive may not run counter to a rule or principle inherent to the constitutional identity of France, except when the constituting power consents thereto.” (*la transposition d’une directive ne saurait aller à l’encontre d’une règle ou d’un principe inhérent à l’identité constitutionnelle de la France, sauf à ce que le constituant y ait consenti*). CC Décision no 2006-540 DC (27 July 2006), par. 19.

⁹⁰ Rodin (2011) 40.

⁹¹ This paragraph states as follows: “Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.”

⁹² Rodin (2011) 41.

⁹³ BVerfG, 2 BvE 2/08 vom 30.6.2009, par. 248.

⁹⁴ BVerfG, 2 BvE 2/08 vom 30.6.2009, par. 251.

appears to resurrect the outdated international law doctrine of “*domain réservée*”, according to which certain issues fall outside of the material scope of the jurisdiction of international law. As the Permanent Court of International Justice stated previously in the 1923 Nationality Decrees Advisory Opinion, “[t]he question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations”⁹⁵ Whereas certain aspects of the enlisted “core areas” might indeed be of crucial importance for the shaping of the constitutional identity of state, the Court’s formulation of non-transferable competences *in abstracto* and in rather broad terms seems to draw a thick red line beyond which the development of European integration is no longer possible. This is, eventually, in stark contrast with the Court’s adopted doctrines of “openness” of the German legal system towards international law (*Völkerrechtsfreundlichkeit*)⁹⁶ and European law and integration (*Europarechtsfreundlichkeit*).⁹⁷

This leads me to the second, interrelated problematic aspect of the “core areas” approach. Rodin correctly argues that “too extensive” reading of the constitutional identity “has the potential to block or even reverse the course of European integration”.⁹⁸ Yet, he does not perceive the Lisbon ruling as one such interpretation of the constitutional identity. In my opinion, this ruling has the potential of stalemating the “the open-ended nature of the constituent process”⁹⁹ of the EU polity-building, which is fundamentally political in nature, as rightly pointed out by the CCC. This process is by no means a one-way street, as the failure of the European Constitutional Treaty clearly demonstrated. It is characterized by specific dynamics of inter-institutional relations, particularly between member states’ constitutional tribunals and the ECJ. This inter-judicial dialogue has managed so far to provide some *modus vivendi*, which ultimately enabled all the involved actors not to enter into a conflict that would constitute the point of no return.¹⁰⁰ The Lisbon ruling, in contrast, created an initial impression that the GFCC took a “preemptive strike” against the ECJ and a creeping European federalization.¹⁰¹ Despite this, it turned out that the GFCC was ready to quickly retreat to a position of “sincere cooperation” with the ECJ.¹⁰² Despite explicitly proclaiming its right to *ultra vires* review of the EU legal acts, in the first such post-Lisbon

⁹⁵ PCIJ, Nationality Decrees in Tunis and Morocco, Advisory Opinion, 1923, Series B, n. 4, 23-24. Cançado Trindade argues that the expansion of international law in the second half of the 20th century is evidenced, among other things, “by the concomitant erosion of the objection of the domestic jurisdiction or the reserved domain of States.” In the framework of multilateralism, states gradually realized that this objection “was self-defeating, and should be avoided, for the sake of the growth of International Law itself.” Cançado Trindade, (2010) 172–173.

⁹⁶ BVerfG, 2 BvE 2/08 vom 30.6.2009, par. 219.

⁹⁷ BVerfG, 2 BvE 2/08 vom 30.6.2009, par. 221.

⁹⁸ Rodin (2011) 41.

⁹⁹ Bellamy et al. (1997) 115.

¹⁰⁰ Hence, Komárek argues that “to describe the place of national constitutional courts in the EU solely in terms of conflict would be far from reality. They do impose important limitations on the application of EU law in their legal orders, but they also help to make it more effective.” Komárek (2013) 422.

¹⁰¹ See, Arato (2010) <<http://www.ejiltalk.org/a-preemptive-strike-against-european-federalism-the-decision-of-the-bundesverfassungsgericht-concerning-the-treaty-of-lisbon/>> accessed 12 August 2015.

¹⁰² This move has confirmed Weiler’s somewhat harsh statement that “the German Constitutional Court has a well-earned reputation of the Dog that Barks but does not Bite.” Weiler (2009) 505.

ruling case (Honeywell),¹⁰³ the GFCC decided to take a rather cautious stance and significantly narrow down its *ultra vires* doctrine.¹⁰⁴ Nonetheless, a new potential ground for inter-judicial battle concerns the question of whether the OMT program of the Governing Council of the European Central Bank is compatible with the EU primary law. In its January 2014 ruling, GFCC for the first time in its history submitted a preliminary reference to the ECJ. It did so, by “already suggesting the answer”,¹⁰⁵ namely, that the OMT program in the present form is in breach of the EU law.¹⁰⁶ In its June 2015 decision, the ECJ, however, decided that no contravention of the EU primary law exists.¹⁰⁷ It is yet to be seen how this will affect the GFCC’s understanding of the “cooperative relationship” between the two courts.¹⁰⁸

Third, the upshot of the Lisbon reasoning is that the transfer of powers in the enlisted ‘core areas’ could lead to the creation of some rival EU constitutional identity, which might in the end completely substitute national constitutional identities of member states. However, the emergence of “constitutional identity” decisively depends upon the existence of a “constitutional subject”, in this case – the EU *demus*. In Rosenfeld’s words, constitutional subject must be at once plural and singular. It must be plural in the sense of either individual differences (e.g. different conceptions of good life) or communal differences (e.g. ethnic, linguistic, religious differences), or both. At the same time, it must be singular, “a ‘people’ giving itself a (particular) constitution that lifts it out of its past without severing all ties to it and that binds it together to confront its future.”¹⁰⁹ Since the GFCC argues that there is no such thing as “a sovereign European people”,¹¹⁰ the “core areas” reasoning is defective on the Court’s own account.

Finally, one may also argue that, in its inclination to determine in advance and in abstract terms the “core areas” of non-transferrable powers, the GFCC exceeded its judicial

¹⁰³ BVerfG, 2 BvR 2661/06, July 6, 2010 See Mahlmann (2010) 1407–1420.

¹⁰⁴ Cf. Rodin (2011) 37.

¹⁰⁵ Mayer (2014) 114.

¹⁰⁶ Before the ECJ decided on the subject matter, Mayer had commented on the GFCC’s ruling, by making an analogy with a famous chicken run scene from James Dean’s *Rebels Without a Cause* movie. In the movie scene, the one who slows down or jumps out of the car heading towards the abyss loses the game. He says that the GFCC decision to submit the question to the ECJ “appears at first to be a decision to get out of the car in time. But looking closer, it turns out that this reference to the ECJ is, in fact, the right thing done in the wrong way at the wrong time.” Mayer (2014) 111–112. In another commentary, the OMT decision is taken as a signal that the GFCC finally moved from barking to biting. Petersen, N., ‘Karlsruhe Not Only Barks, But Finally Bites – Some Remarks on the OMT Decision of the German Constitutional Court’ (2014) 2/15 German Law Journal 321–329.

¹⁰⁷ The Court of Justice of the European Union, Case C-62/14, June 16, 2015

¹⁰⁸ In the OMT decision, the GFCC states that “[i]n their cooperative relationship, it is for the Court of Justice to interpret the act. On the other hand, it is for the Federal Constitutional Court to determine the inviolable core content of the constitutional identity, and to review whether the act (in the interpretation determined by the Court of Justice) interferes with this core.” 2 BvR 2728/13, January 14, 2014, par. 27.

¹⁰⁹ Rosenfeld (2010) 22–23.

¹¹⁰ According to the Court, “the European Parliament is not a representative body of a sovereign European people. This is reflected in the fact that it is designed as a representation of peoples in the respective national contingents of Members, not as a representation of Union citizens in unity without differentiation, according to the principle of electoral equality.” BVerfG, 2 BvE 2/08 vom 30.6.2009, par. 280. Cf. par. 286.

competence and entered the domain of political discretion. This was exactly the reason why the CCC refused to follow in the footsteps of the GFCC. It stated that it was not in the position “to create such a catalogue of non-transferrable powers”, insofar as the outward limits of the European integration “should be left primarily to the legislature to specify, because this is a priori a political question, which provides the legislature wide discretion”. A constitutional tribunal is not the body that should assume “responsibility for these political decisions”.¹¹¹ In the CCC’s words, taking the stance of deliberate self-restraint “is perceived as a means of limiting the judicial power in favour of political processes”.¹¹² Despite the fact that in its doctrine the GFCC did proclaim the adherence to the principle of “judicial self-restraint”,¹¹³ the Lisbon ruling, as well as the subsequent Honeywell and OMT decisions largely vindicate the charge that, with respect to the question of European integration, the Court has been often usurping the powers reserved for other branches of government.¹¹⁴

6. CONCLUSION: THE PORCUPINE DILEMMA OF THE EUROPEAN INTEGRATION

In a famous illustration of the problem of the limitations of human interaction, Schopenhauer places us in the scenery of a cold, winter day, which inclined a number of porcupines to group together for warmth. However, once they began to stab each other with their quills, they felt the need to separate. The freezing weather drove them yet again together, when just the same thing happened. Eventually, after many turns of grouping together and dissolving, they realized that they would be best off by staying at a little distance from one another. In Schopenhauer’s words, “[t]he mean distance which they finally discover, and which enables them to endure being together, is politeness and good manners.”¹¹⁵

The long-lasting process of the European integration, which is driven by the ideal of “an ever closer union among the peoples of Europe” (Article 1 TEU), seems to be constantly faced with the porcupine dilemma of limitations of interaction within the framework of the EU membership. In commenting on a similar opening phrase of the then EU Draft Constitutional Treaty, Weiler noticed that this wording implied that “[n]o matter how close the Union, it is to remain a union among distinct peoples, distinct political identities, and distinct political communities.”¹¹⁶ Yet, this is precisely an idiosyncratic and the most potent element of the European integration. Instead of trying to eliminate differences and become an indivisible one, the EU is taking the harder way, because “it is more difficult to attain an ever closer union if the components of that union preserve their distinct identities, retain

¹¹¹ Pl. ÚS 29/09: Treaty of Lisbon II, par. 111.

¹¹² Pl. ÚS 29/09: Treaty of Lisbon II, par. 112.

¹¹³ Cf. Streinz (2014) 101.

¹¹⁴ In its dissenting opinion to the OMT decision, Justice Lübbe-Wolff argues that the Court exceeded its judicial competence. Regardless of the fact that the German constitutional doctrine has been commonly interpreted as not having a political question doctrine, Justice Lübbe-Wolff points out that there are other techniques “to avoid overstraining judicial power”, such as the reference to “admissibility criteria” or “reduced intensity of review”. 2 BvR 2728/13, January 14, 2014, Dissenting Opinion of Justice Lübbe-Wolff, par. 4.

¹¹⁵ Schopenhauer (1974) 651–652.

¹¹⁶ Weiler (2005) 187.

their otherness vis-à-vis each other, and do not become one flesh, politically speaking.”¹¹⁷ Herein resides the principle of “constitutional tolerance”, which is the basis of “constitutional discipline” in the daily functioning of the EU legal and political heterarchical order.¹¹⁸

The latest round of political instability, triggered by the global economic crisis, is seriously jeopardizing the culture of “constitutional tolerance”. It furthermore testifies to the fact that European peoples and their institutions are constantly in search for the magical “mean distance”, which would enable them to draw all the benefits from being united and, yet, to remain unhurt from being excessively close to each other.

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¹¹⁷ Weiler (2005) 188.

¹¹⁸ Constitutional actors in Member States do not follow this discipline not because “they are subordinate to a higher sovereignty”, but rather because they exercise a “continually renewed, autonomous, and voluntary act of subordination”. Consequently, it is “constitutional tolerance”, rather than a Schmittian exceptionalism, that represents the “defining spiritual *Grundnorm*” of the EU constitutional architecture. Weiler feared that the discourse of formal constitution might easily “rob Europe of this ethos of tolerance” Weiler (2005) 188, 190. For an analytical reconstruction of Weiler’s understanding of the EU *heterarchy* as implied in the “rich” and “central” concept of constitutional tolerance, see Jaklic (2013) 74 ff.

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