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CONSTITUTIONAL IDENTITY IN THE EUROPEAN LEGAL SPACE AND THE COMITY OF CIRCUMSPECT CONSTITUTIONAL COURTS**

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Stop for a second in a rushing crowd. There is the Other next to you. Meeting Him is the greatest experience of all. Talking to the Other, feeling him out while at the same time knowing that he sees and understands the world differently, is crucial to building the atmosphere for positive dialogue¹.

Some PEOPLE BELIEVE IN FATE, OTHERS DON'T. I DO and I don't. It may seem at times as if invisible fingers move us about like puppets on strings. But for sure, we are not born to be dragged along. We can grab the strings ourselves and adjust our course at every crossroad, or take off at any little trail into unknown².

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¹ R. Kapuściński, *Ten Inny*, (The Other), Warszawa, 2010 (my translation).

² T. Heyerdahl, *Kon-Tiki. Across the Pacific by Raft. Foreword to the 35th Anniversary Edition*, New York, London, Toronto, Sydney, 2009, (italics in the original).

1. European constitutionalism. Setting the scene

European constitutional landscape today is being dominated by the overlapping consensus of constitutional courts which forms the heart of supranational adjudication in Europe with different interests, power struggles and jostling for better positions. Post-national law sees law as a never-ending discourse and conflict as written into the DNA of the system. Dogmatic and exclusive “*either ... or*” logic becomes untenable as hierarchy is highly divisive from the external perspective of plural systems which look for ways to coexist and operate and not simply cancel each other out. Each system stakes its own claim to constitutional distinctiveness. The uniqueness of European legal space resides in different courts speaking for their respective legal systems and coming up with divergent interpretations of the systemic relationship between EU law and national laws. Seen from this perspective European constitutionalism main concern should be on proper understanding and categorization of EU as a supranational community designed to complement states not replace them, to provide new platform for citizens interests and to protect them beyond state borders, often against the excesses of their own states³. It recognizes that constitutional court aspiring to be “good” must be able to go beyond mere defense of its Constitution when it is attacked and accept the challenge of promoting domestic constitutional values as part of the European constitution-building. It aims at redrawing constitutional *status quo* and points towards new opportunities and methods of understanding the world of European constitutionalism. Such approach stems from accepting that the legitimacy of judicial power comes not only from within the systems but is also a consequence of systems interacting, learning and adapting.

Judges usually see their legal order above all the others and consider themselves at the centre of the legal universe. They are solely to protect their own legal systems from outside encroachments. EU law questions this state rather dramatically and demands to take account of perspectives different from one’s own. The Court of Justice (“CJ”) asserts in the name of autonomy and effectiveness of EU law its full and unconditional primacy over any national law, whereas constitutional courts anchor primacy of EU law in their constitutions and claim residual jurisdictions to strike down EU law as incompatible with constitutional norm. This approach means that we are faced with a constitutional impasse as neither court is willing to defer to the other. Reconciliation and reasonable deference should rather come in good time from the reassurance that EU law is no threat. Such reconciliation however hinges on necessary accommodations to be made by both sides of the process: the CJ and national courts. It is thus crucial to work out theories of justification and deliberations which would have judges strive

³ For an approach underlining the rupture of “*Van Gend case law*” with the traditional reading of constitutions and states see M. Everson, J. Eisner, *The Making of European Constitution. Judges and law Beyond Constitutive Power*, (Routledge, 2007), p. 41.

at mutual understanding by generalizing and universalizing their language⁴, renouncing single and universally operational theory. Sharing of a common legal discourse then becomes a challenge and takes the place of obsolete searching for “who has the ultimate authority”. It is much more difficult to try to communicate and search for a common understanding than simply retrench behind constitutional lines and lie in wait.

According to A. Stone Sweet Europe possesses an overarching constitutional structure, comprised of fundamental rights and the shared authority of judges to adjudicate individual claims. In this system, no single organ possesses the „final word” when it comes to a conflict between conflicting interpretations of Right; instead, the system develops through inter-court dialogue, both cooperative and competitive⁵ (capital R in the original)”. Constitutional pluralism teaches us that there is a necessary overlap of legal sources without *ex ante* hierarchy and it is the individual who has a choice which source to plead and judges who then have a choice of which right to enforce. Pluralism is more subjective and is defined as an attitude which recognizes plurality, in the objective sense understood as sources, jurisdictions and interpretations⁶. In this sense plurality is much more easier than pluralism. As a result of all this constitutional courts are urged to move away from the traditional notion of a constitutional court as a guardian of a constitution only *towards* a court that is more engaged in a constructive dialogue on the European stage and reads its mandate through the prism of European constitutionalism. Constitutional courts today become agents of the common project. It is very important that courts at the level of Member States and EU play the game, balance sovereign and community needs and voice their concerns within the procedural and institutional framework of EU law. It is all the more important nowadays when argument “from the Constitutional identity” is being employed as a legitimate counter-argument in the debate over the importance of uniformity and integrity of the EU law. The latter is ready to take the back seat, something that was hardly conceivable forty years ago. This bestows upon constitutional courts a sense of purpose, relevancy, recognition, and last but not least, responsibility. New function(s) call for new framework(s) and the judicial comity aims at providing them.

The primacy dispute should be seen as a never-ending process rather than a zero-sum game and move from „hierarchical primacy” to “discursive primacy”. It is time to embrace the fact that constitutional courts at the national and EU

⁴ M.P. Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, available at www.ejls.eu/2/25UK.pdf.

⁵ A. Stone Sweet, *A cosmopolitan legal order: Constitutional pluralism and rights adjudication in Europe* (2012)1 *Journal of Global Constitutionalism* 53.

⁶ Plurality is more objective and connotes overlapping jurisdictions, whereas the latter is more subjective and stands for an attitude which embraces plurality, wants to maintain it and not destroy it. See N. Walker, in M. Avbelj, J. Komárek, (eds.), *Four visions of Constitutional Pluralism*, *European Journal of Legal Studies*, (2008) Vol. 2, no 1, at p. 336.

level function as a motor and critique of European constitutionalism. Hierarchic concepts are out of date and unable to capture the uniqueness and complexity of this new emerging comity of constitutional courts operating at different levels and guided by their distinct constitutional allegiances, and yet bound together in their desire to act jointly and with due regard to "the other". The EU not only teaches others, but also learns from others. That is why constitutional courts must present the EU their own vision of European constitutionalism before the CJ. Conflicts of jurisdictions and divergent judgments cannot be prevented by means of exclusive jurisdictions and hierarchical rules erected in advance and in a universal matter. Rather the question is one of the willingness to step back and recognize the other forum to be more appropriate for whatever reason for settling the dispute. It has though nothing to do with the hierarchy or last word but rather with the strength of the argument in favor of declining jurisdiction for the benefit of the other or recognizing the other. This restraint is a two-way sword and cuts both ways. Supranational judicial comity is based on a constructive dialogue as a means to judicial protection of human rights. As such it would elevate judicial comity to the legal duty of each and every court to deliver justice⁷. Constitutionalism will be then the result of reassurance that every actor plays according to the rules. There are and will be spheres of different and overlapping jurisdictions which interpret the same text and monitor each other's interpretation. As a result we must come to terms with the novel jurisprudence of mutual monitoring⁸. Factors related to time, adaptation, and accommodation all play their part. Judicial cooperation has contested action and discord inherent in the concept⁹. Constitutional courts needs complex deliberative theory for tackling challenges coming their way in the wake of EU law. The compromise is badly needed between reasonable deference towards the CJ and legitimizing and constructive defiance. It is clear that every time constitutional court makes concessions, it is preparing to gain some ground elsewhere. Constitutional discourse is like a chain – novel, full of turns, bumps and ruptures. What counts though is that there is an agreement to continue adding new chapters, plots and characters. After all it is nothing spectacular since entire project is about finding the right balance between diversity and uniformity, between stepping back and learning from others' visions and stepping forward and explaining one's visions to others. the most important point about comparative constitutionalism to which it seemingly aspires: comparative constitutionalism is not about mere citations to others. It is about readiness to change, to absorb and acknowledge that other courts had something

⁷ N. Lavranos, *Towards a solange -method between international courts and tribunals* in T. Broude, Y. Shany, (eds.), *The allocation of Authority in international law. Essays in honour of Prof. R. Lapidot*, 2008.

⁸ A.-M. Slaughter, *A typology of transjudicial communication*, 29 *University of Richmond* (1994 - 1995), p. 99. In the same vein see G. Davies, *Constitutional Disagreement in Europe and the search of pluralism*, Eric Stein Working Paper no 1/2010.

⁹ E.-U. Petersmann, *Do judges meet their constitutional obligation to settle disputes in conformity with ,principles of justice and international law'?* *European Journal of Legal Studies* Vol. 1, No. 2.

important to say. It involves constructive critique and comparative reasoning. Mutual influence of others does not equal automatic reception but also rejection.

2. The comity of constitutional courts

It is the contention of the present analysis that refocusing the constitutional debate is of utmost significance. The emphasis must be shifted towards the comity of courts transcending the now established and universally recognized “community of courts”¹⁰. Such comity acts as a decentralized sovereign within a new kind of polity – a cosmopolitan legal order characterized by legal pluralism. The comity of constitutional courts is premised on an important shift in emphasis. “*Judges asking judges*” as an EU paradigm for relations between the CJ and lower national courts is complemented in the context of constitutional courts by “*judges monitoring judges*”. The latter plays to the sensitivities and egos of the constitutional courts, ensuring their active role in the deliberative process. This shift is crucial for three reasons. *Firstly*, it brings vital rationalization of the discretionary powers of the courts and provides control of the constitutional disagreement by delineating the parameters within which the actors are free to roam. National courts are acting *not* on their own national authority and are not cast as agents defending an idiosyncratic national tradition *against* the EU. They are instead trying to give meaning to the principles of their national Constitutions in light of a common European constitutional practice. *Secondly*, it allows a margin for discretion and divergence by accepting that not all values are shared, and that the system might be better-off by playing up to the pride of the actors, and allowing them go their own ways. *Thirdly*, it vindicates the role of constitutional courts while reinventing their vocation in a plural and constitutionally-competitive world and making them catalyst for change and adaptation at the EU level. Without postulated *shift* from internal (inward perspective of the Constitution) towards external opening and absorbing European constitution, *change in language* (finding common ground and linking nodes of the network instead of separating and underlining divergences), new logic (not only ever-present “*either ... or*” but also “*both ... and*”) and readiness to problematize reality, constitutional courts risk marginalization and loss of influence on the way European law enters and penetrates their constitutional orders.

The comity recognizes that there is a notable shift away from the traditional notion of constitutional court as a guardian of a constitution only *towards* a court that is more engaged in a constructive dialogue on the European stage and reads its mandate through the prism of European constitutionalism. It shows what it takes to be a good and vigilant court within the complex judicial net marked by interactions and interdependencies. A starting premise is the willingness of all

¹⁰ A. D’Alterio, *From judicial comity to legal comity: A Judicial Solution to Global Disorder?* Jean Monnet Working Paper 13/10.

the actors to recalibrate their original positions in light of others' arguments. Constitutional absolutism has no reason to exist, for it is the deference, mutual respect and learning that define rules of the game. The CJ not only teaches constitutional courts, but it also learns from its constitutional counterparts, who put forward their own vision of the European constitutionalism. It is only under those circumstances that one has a chance to arrive at a true "constitutional synthesis". Comity points towards new opportunities and methods of seeing and understanding the world of European constitutionalism free of dogmatism. Rather than that the comity is pragmatic in that it both, allows and frames a confrontation and a dispute. It brings to the fore a fundamental challenge for judges accustomed to the traditional conception of the legal system as a pyramid with the result that lower laws always conform to the higher-ranking norm(s). It provides framework to reconcile the contradictory claims and pretensions of the CJ and national courts since it caters to the pride and relevance of each actor.

Building a European Constitution is a collective, dynamic and pluralistic enterprise. It calls for never-ending feedback and communication from national courts and their traditions. Its main rationale is to anticipate a dispute and fend it off immediately rather than to face uncertainty of the full-fledged disagreement and its consequences. That is why comity starts from a different assumption. EU law and national laws are distinct yet closely interwoven bodies of laws. Each system must learn from the other, change, engage in meaningful dialogue and accept otherness. Checks and balances between non-hierarchical legal orders build a whole based on mutual trust and control. Therefore the comity is built on judicial dialogue and understanding going beyond mere pro-European interpretation and citation of others' decisions. Dialogue acts as a legitimating power and when properly understood backs up courts' claims to their visions. Dialogue involving all the interested parties has the potential to arrive at better-reasoned interpretative results and rewards participants since each has *prima facie* equal right to succeed. Nothing is set in stone. On the contrary, the equilibrium never ceases to change, move and surprise both onlookers and actors. It is the power of better arguments (*imperio rationis*) not argument of power (*ratione imperii*) that counts and dictates the outcomes¹¹.

As a result of this discursive premise the comity embraces the responsibility to not only engage in a dialogue but also frame it in universal terms. EU law touches constitutional law on so many aspects that it is no longer tenable for the constitutional courts to maintain their serene aloofness. The comity pits constitutional courts against the full force of constitutional debate which will be either joined or ignored. To join however mean to voice one's concerns critically and constructively so as to allow for true migration of constitutional ideas. The main challenge is then in the sphere of language, making it clear that separation as a legal

¹¹ M. Cogen-Eliya, I. Porrat, *Proportionality and the culture of justification*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1623397.

technique is not just outdated, but alienating and risks isolation¹². It requires that legal actors, in their scholarly writings (role of the doctrine) and in the case law (role of the courts), display flexibility and receptiveness to the changing nature of law. Being part of the comity imposes on constitutional courts a responsibility for linking the nodes and connecting the dots within the legal net by deconstructing overlapping structures and managing consensus among participants of the emergent unique comity of mutual impact and influence. This would allow each autonomous order to evolve in reaction to the other. As a result, changes would always be a by-product of outside reality and its demands.

As such comity recognizes systemic functions of the constitutional courts. These courts and the CJ act in a relational - although not always cooperative - way. The CJ must not simply continue "business as usual" of vetting every argument derived from national law (as was the case in the past where autonomy reigned) since it is the Treaty itself that mandates respect for outside sources of law in the form of constitutional traditions. The CJ must learn to act in unison as it must look towards constitutional courts to learn about traditions and invite them to join it in working out the meaning of European law in light of these traditions. The big question is then how to reconcile the possible overlap of competences, how to mediate between the expectations of national laws and the exigencies of the EU legal order and what role the respective courts (EU and national) should play in the process.

3. Relevance of the "argument from domestic constitution"

Constructive constitutional criticism might benefit EU law provided that it takes place in a structured and principled fashion and is argument-based. It is very important that courts at the level of Member States and EU play the game and balance sovereign and community needs. The challenge is for national courts to voice their concerns within the procedural and institutional framework of EU law. It is all the more important nowadays when argument "from the Constitution" is being employed as a legitimate counter-argument in the debate over the importance of uniformity and integrity of the EU law. The result is that the latter is ready to take the back seat, something that was hardly conceivable forty years ago¹³. Such approach is pragmatic as it recognizes that legal world is no longer black or white (current "solving the conflict logic") but rather grey (with the emphasis on conflict management)¹⁴. Constitutional argument enjoys its own claim

¹² On a legitimizing force of dialogue in EU law see A. T. Pérez, *Conflicts of rights in the European Union. A Theory of Supranational Adjudication*, (Oxford, 2009).

¹³ L.F.M. Besselink, *Respecting Constitutional Identity in the European Union. Case C -208/09, 22 December 2010, IlonkaSayn - Wittgenstein v Landeshauptmann Von Wien*, (2012) 49 *Common Market Law Review* p. 671.

¹⁴ See J. R. Bengoetxea, N. MacCormick, L. M. Soriano, *Integration and integrity in the Legal Reasoning of the European Court of Justice*, in G. de Burca, J. H. H. Weiler, (eds.), *The European Court of Justice. Collected*

to validity and is taken into account as an integral part of the systemic constitutional conversation. It is not simply waived off as parochial and old-fashioned but must be considered seriously by the Court of Justice as part-and-parcel of this emerging constitutional equilibrium in Europe. The risk in waiting for the EU impact on Member States constitutional structures is too uncertain and in the end might be too high. Constructive participation in the dialogue is always better than passively waiting for results which are beyond anyone's else individual control. Constitutional Courts thus become agents of the common project without renouncing completely their internal constitutional allegiances. It is important here to emphasize the aspect of reconstructing these allegiances in a European context.

Every constitutional court of a Member States has a crucial message to convey for European constitutionalism. Respect and communication become paradigmatic of this comity of courts and conflict is seen as a sign that system is working. A constitutional court which cuts itself off from constitutional dialogue with the CJ does a disservice to its own constitutional order and also to the European constitutional system, which needs to be continually fed by the national constitutions. The more national experiences are missing, the more the CJ runs the risk of imposing a specific cultural tradition on the whole of European society as if it were part of the common constitutional background. Constitutional court which sits on the fence is condemned either to accept a cultural homologation established by the strongest voices or to fight a sterile battle of defense, entrenched behind the counter-limits and national sovereignty. All this make it easier to understand why today the preliminary reference procedure (see below) is on the verge of constitutionalization and provides legal avenue for presenting rich and diverse points of view before the CJ and channeling constitutional concerns¹⁵. The answer by the CJ must strike a reasonable balance between the requirements of both legal orders. For the Court it is of utmost importance to understand that a preliminary ruling is not the end of sovereignty and but rather and more correctly beginning of something new: constructing discursive constitution of the European legal order which straddles national constitutional law and EU law. In this process constitutional courts become agents of the common project. The dispute about constitutional essentials recognizes that each court has an equal right to win only if it comes to the negotiating table with better and credible arguments in favour of national specificity and diversity. The importance of this discourse goes beyond concrete dispute: rather it is about building trust with every participant of the constitutional exchange so that next time today's losers will come out on top.

Discursive approach to constitutionalism puts constitutional courts in the systemic spotlight as it calls on those courts to detect and monitor "structural defi-

Courses of the Academy of European Law, Oxford 2001.

¹⁵ See J.H.H. Weiler, *Judicial ego*, ICON (2011) Vol. 9, No 1-4, p.1-2.

ciencies" of EU law and manage such deficiencies discursively and bring them to the attention of the CJ. This role bestows on these courts an additional sense of purpose, relevancy, recognition, and last but not least, responsibility. Structural deficiency talk presupposes a clash between EU and national law, and this shows why dialogue must be constructive and is nothing short of nice conversation. However this is the only way to make sure that national courts do not lapse into a nationalistic reading of structural deficiencies. Allowing such a lapse would be tantamount to the abuse of the dialogue and would put defensive mask on the dialogue. In this sense, playing within the community, not outside, requires as a condition *sine qua non* conceptual tolerance which precedes constitutional pluralism. European constitutionalism operates within the coordinate judicial web in which constitutional courts and the CJ (also ECHR) agree to defer to one another's decisions as long as these decisions respect mutually agreed upon essentials. It alludes to the analysis of Sabel and Gerstenberg who claim that an overlapping consensus on fundamental commitments of principle which each order requires the other to respect does not rest on one single doctrine and understanding of what is good, moral etc. Quite to the contrary all actors agree and acknowledge their differences and their influence on the interpretation of shared commitments, and accord such possibility others. As long as others respect jointly agreed essentials overlapping consensus is being articulated and adjusted. In this way comity extends beyond national territory by way of jurisprudence of mutual respect, peer review and supervision without the pretense to bring into existence new overarching entity. Actors build on this overlapping consensus while at the same time checking that others respect essential principles and commitments. Each court reserves the right to assert its residual jurisdiction if it is convinced that there is a violation of shared principles. Sabel and Gerstenberg state the following "*decision making is horizontal rather than vertical, in the sense that adjudication by one court of the boundaries of shared fundamental principles is contingent on the acceptance of overall outcomes by the others. The commitment to principles shared by all and the possibility that other orders, if convinced that fundamental rights on their understanding are imperiled, will assert their jurisdiction, induce each court to consider its decisions in light of reasons acceptable to all the others*"¹⁶.

This judicial monitoring of the overlapping consensus takes place within the more general structure provided by the comity which sets up argumentative, institutional and procedural framework for voicing constitutional concerns and managing overlap inherent in the European coordinate constitutional order. Such rationalization of discretionary powers granted to each and every court within the comity is crucial if the system is to function properly. "Constitutional override" resulting from the disregard for the essentials must be seen as the last resort, as an exception rather than a rule since comity's primary concern is about

¹⁶ Ch. Sabel, O. Gerstenberg, *Constitutionalising an overlapping consensus: the ECJ and the emergence of a coordinate constitutional order*, (2010) 16 European Law Journal.

reconstructing circles of coherence, building understanding and finding common ground among reasonable and acceptable divergences. The EU's and comity's legal vocation in the years to come is not only „*united in diversity*” but equally „*united from diversity*”.

4. Comity and art of “*constitutional bargaining*”

It is no coincidence that the analysis opens with the excerpt from Ryszard Kapuściński novel “*The Other*” as comity offers an opportunity for constitutional rediscovery and understanding single court vocation through the lenses of other and equal courts. The Courts not only have a voice, but also ears. The role of any constitutional court is also a function of constitutional constraint, self - critique and self- correction. The constitutional reconciliation however hinges on necessary accommodations to be made by both sides of the process: the Court of Justice and national courts¹⁷. For the sake of argument we might assume that two propositions are possible concerning the solution of competing jurisdictions. On the one hand the interpretation is superior as a result of the Court's place in the hierarchy since the Court higher in the hierarchy enjoys superiority. On the other hand the argumentative school of thought is more ambitious since it rejects the hierarchy and adopts the quality and the strength of reasoning as a counter- argument for hierarchy. In the latter case it is not „who says” but „how it is said”. The force of arguments prevails over strict hierarchies. Landscape is characterized by the diversity of legal sources, various sites of new governance as a by-product of europeization, privatization and biurocratization, the plurality of sites of legal expression and prima facie equality of authority claims, relationship between legal orders is already more horizontal than vertical, heterarchical than hierarchical¹⁸.

The interpretive result should never close the door on the interpretation by the other but rather should leave enough room and options to invite the other and turn the monologue into a dialogue. Judicial review is always a matter of interaction between deference and defiance and the challenge is to combine the two without falling into the trap of extremism of either attitude. As a result constitutional judges put on a mantle of political theorists which recalibrates the discourse on their legitimacy and vocation. Such a denomination helps avoid denouncing judgments as mere political statements rather than legal ones. It liberates the doctrine from analyzing what the courts are really saying since we

¹⁷ G. Davies, *Constitutional disagreement, op. cit.*.. For the negative and unfortunate example of adding fuel to the fire by constitutional courts see comment on the Czech Constitutional Court judgment following the Court of Justice ruling in *Landtovà* – A. Dyevre, *The Czech Ultra Vires Revolution: Isolated Accident or Omen of Judicial Armageddon?*, (available at <http://www.verfassungsblog.de/the-czech-ultra-vires-revolution-isolated-accident-or-omen-of-judicial-armageddon/>).

¹⁸ D. Halberstam, *Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational, and Global Governance*, University of Michigan Law School Public Law and Legal Theory Working Paper no 229/2011.

assume in advance that what they are saying does belong in the courtroom anyway. It is no longer true that only politicians bargain while judges merely argue. Constitutional judges are powerful political institutions, building alliances, speaking for their legal systems and impacting on the political process¹⁹. They do bargain to an ever-increasing extent even though they pretend that they are only deciding cases²⁰. Power struggle was traditionally limited to domestic stage. since the Court's message takes on a European dimension, has relevance and is read beyond national borders. In reading the judgment and the preceding case-law there is no doubt that Polish Court feels endangered by EU law and feels the necessity to fight for its survival. The problem is that the Court misperceives the tools needed to achieve this goal. Posturing and reassuring itself in a monologue leads nowhere and the Court risks marginalization. This is where vigilant constitutionalism should be applied and proposes a new framework for rationalizing systemic interaction between legal orders. A starting premise of vigilant constitutionalism is the willingness of all the actors to recalibrate their original positions in light of others' arguments. The Court of Justice not only teaches constitutional courts, but it also learns from its constitutional counterparts, who put forward their own vision of the European constitutionalism. It is only under those circumstances that one has a chance to arrive at a true "constitutional synthesis". All this takes on a special importance when one considers the change of internal dynamics in a constitutional litigation²¹. It also explains why we are not only talking about "comity" but add qualification "circumspect". Courts act as political actors wielding persuasion rather than compulsion, engaged in a common enterprise and redrawing lines between the courts and political institutions²². The constitutional debate is shifting dramatically from *who* has the final say to *what* the limits of law are. European constitutionalism worthy of the name calls for much more than simplistic and antagonistic arguments from hierarchy. It requires modesty, self-limitation, awareness of the other and, last but not least, readiness to defer to

¹⁹ Most recently see D. Robertson, *The judge as a political theorist. Contemporary constitutional review*, Princeton, Oxford, 2010 with further references.

²⁰ M. Shapiro, "Judges as Liars" (1994) 17 Harvard Law Review 155.

²¹ Constraints of space preclude any detailed analysis. Suffice to say that the Court of Justice came a long way from being mere "court of integration" to "court of rights". See among others M. Cartabia, "Taking Dialogue Seriously". *The renewed need for a judicial dialogue at the time of Constitutional activism in the European Union*, Jean Monnet Working Paper 12/2007. On the legitimizing consequences of turn by the Court of Justice from mere "competence court" to "rights court", see excellent analysis by M. Shapiro, *The European Court of Justice. Of Institutions and Democracy*, (1998) 32 Israel Law Review 3. Furthermore introduction by the Lisbon Treaty of the national identity clause added a new constitutional layer to the case law of the Court. S. Schill, *Overcoming absolute primacy: Respect for National Identity under the Lisbon Treaty*, (2011) 48 Common Market Law Review 147. See in this vein L.F.M. Besselink, *National and Constitutional Identity before and after Lisbon*, 6 Utrecht Law Review no 3 (2010), L.F.M. Besselink, *Respecting Constitutional Identity in the European Union. An Essay in ECJ (Second Chamber), Case C-208/09, 22 December 2010, Ilonka Saym - Wittgenstein v Landeshauptmann Von Wien*, 49 Common Market Law Review (2012), p. 671.

²² Also *Les juges constituants*, (2010) European Constitutional Law Review 2010, no 6, p. 171–174.

one another's decisions. Legal systems are linked and the jurisprudence of their courts is the most important tool to make this work. Actors speaking for each order acknowledge not only their differences and understandings but also mutual influence on their decisions. The European legal space is polyarchic because it lacks a final decider. Such a legal order must resolve disputes by exchanges among coordinate bodies, each with a contingent claim to competence and the parties are bound in these exchanges to re-examine their interpretations of shared principles and in the end in the light of arguments presented by the others²³. Legal orders are so interdependent that one cannot be read and fully understood without regard to the other. Novel and challenging questions include to what extent the conflict can be decided and interpreted by the courts and what the proper role of other actors in this constitutional enterprise is rather than sterile disputes of "the last word court".

Constitutional absolutism has no reason to exist, for it is the deference, mutual respect and learning that define rules of the game. The Court of Justice not only teaches constitutional courts, but it also learns from its constitutional counterparts, who put forward their own vision of the European constitutionalism. These courts must learn Court must balance constitutional arguments against European integration on a case-by-case basis, avoiding general and abstract principles which might tie its hands in the future and deprive it of breathing room in its interactions with the Court of Justice. It is only under those circumstances that one has a chance to arrive at a true "constitutional synthesis". All this takes on a special importance when one considers the change of internal dynamics in a constitutional litigation. First, the Court of Justice gains confidence of a fully-fledged "court of rights", and not merely that of the "court of integration". Expanding and nuancing its fundamental rights jurisprudence the Court enters the stage of rights' litigation with confidence and its own claim to respect. Secondly, and more importantly, to support our contention, EU law itself undergoes subtle changes in its internal structure. With the introduction of art. 4(2) TEU that obliges the Union to respect national identity inherent in the political and constitutional structure of Member States, and recent case law of the Court (cases like *Michaniki* and more significantly *Sayn-Wittgenstein*), free movement rights might be restricted on the basis of a national measure which is the expression of national identity²⁴. The traditional, first generation, constitutional dispute between competing rights and interests turns into the second generation conflict that goes beyond fundamental rights. Constitutional rules and principles (other than fundamental rights), pertaining to the political and constitutional identity of Member States, become a valid counter – argument for the full operation of Community

²³ Ch. Sabel, O. Gerstenberg, *Constitutionalising an overlapping consensus*, *op. cit.*, at p. 513-514.

²⁴ For thorough analysis of art. 4(2) of the Treaty and the jurisprudence of the Court of Justice see A. von Bogdandy, S. Schill, *Overcoming absolute primacy: Respect for National Identity under the Lisbon Treaty*, (2011) 48 *Common Market Law Review* 147.

law. It was a republican nature of the state which was a relevant restriction on EU rights in *Sayn- Wittgenstein*, the situation hardly conceivable in the early years of the Court's jurisprudence on the independent nature of law "stemming from the Treaty, that cannot be overridden by rules of national law, however framed"²⁵. It is submitted that this is exactly what is taking place now. We are witnessing a fascinating process of shifting from an absolute autonomy of a European legal order (external sources of human rights were translated/interpolated into EU legal order by the intermediary of general principles of Community law and thus the Community law pretended to keep its independence from national laws) to heteronomy, where EU is obliged to respect sources that reside outside its hallow catalogue of fundamental rights. There is no place for reading of constitutional traditions into EU, as it would have been the case in accordance with the classic "*Costa -Simmenthal* case law". Instead EU is under an obligation to respect sources that are external to its own legal system. In that sense, art. 4(2) TEU is nothing short of being revolutionary, for it consists of the classic tenets of a traditional European supranationalism. leading to a truly constitutional supranationalism. Third, for the very first time in the history of integration, there exists a situation of a jurisdictional overlap where one set of norms is integrated into another by the way of a direct referral from one legal order to another. Art. 4 (2) TEU belongs to such category, as it postulates that constitutional norms of a Member State, that form a part of its identity, are to be respected and protected by the institutions of the EU. The Court of Justice cannot simply continue business as usual of vetting every argument, derived from the national law (as it was the case in the past where autonomy reigned), since it is the Treaty itself that mandates a respect for outside sources of law in the form of constitutional traditions. And that is not an individual task, but a collective one. The Court must look towards constitutional courts to learn about their traditions, and invite them to join it in working out the meaning of the European law in light of those traditions. Thus, a big question arises as to how to reconcile the possible overlap of competences, how to mediate between the expectations of national laws and exigencies of EU legal order, and what role the respective courts (EU and national) should play in the process. There is no doubt that the Court must lead the way, and execute, at least, a rudimentary check of what the constitutional courts present to it by the way of constitutional traditions. That is an extremely delicate task as the Court partly treads on the national turf, even though it appears to be ascertaining the meaning of EU law. As a result, vetting a piece of national constitutional legislation must be carried out with a great caution and a sense of appropriateness, all being

²⁵ See in this vein L.F.M. Besselink, *National and Constitutional Identity before and after Lisbon*, 6 Utrecht Law Review no 3 (2010), L.F.M. Besselink, *Respecting Constitutional Identity in the European Union. An Essay in ECJ (Second Chamber), Case C -208/09, 22 December 2010, Ilonka Sayn - Wittgenstein v Landeshauptmann Von Wien*, 49 Common Market Law Review (2012) , p. 671.

hallmarks of the vigilant constitutionalism with each court knowing its limits and recognizing “*the other*”.

The case law of the CJ is still in its infancy, and it would be interesting to see how it evolves and builds on the basis of *Sayn-Wittgenstein* precedent. One might tentatively argue that the Court is in the process of carving out room for its minimal correcting intervention, should the doubts arise as to a true categorization of the constitutional rule/principle as the expression of the constitutional identity. There are two strands of case law that seem to take shape. And so, on one hand, in *Michaniki*, the Court found an incompatibility between the Greek national law and EU law, despite the fact that the national law was of the constitutional status. In *Sayn-Wittgenstein*, while, on the other hand, the Court accepted, at a face value, the argument that the invoked constitutional principle was a valid and a proportionate counter – argument to EU law norms, and, as a result, had a good claim to prevail over the latter. Thus it seems that it is the power of an argument and of a particular significance of the constitutional norm for the overall scheme of constitutional system that will be of a primordial importance, and not the mere constitutional rank of the norm. Not all constitutional norms enjoy an argumentative force within the meaning of *Sayn-Wittgenstein* and do not make up the identity of the constitution but only those that are argued properly, established in the case law of constitutional courts and put before the Court²⁶. As a result, one gets an vigilant constitutionalism and a strategic dialogue in their purest form, both centered around a discursive model of law and a dispute regarding the law’s meaning. A new equilibrium between constitutional courts of Europe is marked by an overlap, interconnectedness, inclusion and tolerance as opposed to a once dominant and unproblematic logic of hierarchy, autonomy and separateness. And so, it remains to be seen how the Court of Justice will construe the proportionality test in future cases, for those will ultimately determine the scope of the constitutional discretion left to the national constitutional courts

5. Constitutional identity, dialogue and imagination

The result is never set in advance but always open to negotiation and each court must always be ready to step back²⁷. All this calls for a novel kind of reformative interpretation of a legal system in response to changing social conceptions of justice. Such interpretation should be about constitutional imagination understood as a “bundle of impression and images, which can be found, not merely in

²⁶ See in detail L.F.M. Besselink, *National and Constitutional Identity before and after Lisbon*, 6 Utrecht Law Review no 3 (2010), L.F.M. Besselink, *Respecting Constitutional Identity in the European Union. An Essay in ECJ (Second Chamber), Case C -208/09, 22 December 2010, Ilonka Sayn - Wittgenstein v Landeshaupmann Von Wien*, 49 Common Market Law Review (2012), p. 671.

²⁷ G. Martinico, *A Matter of Coherence In a Multilevel Legal System: Are the “Lions” Still “Under the throne”*, Jean Monnet Working Paper 16/08.

statutes and cases, but in a myriad texts and treatises"²⁸. Constitutional imagination in the comity is not about good adjudication *here and now* but calls on the constitutional courts to show the art of anticipation, reconciliation of divergent interests and true constitutional synthesis *in the days to come*. Only such constitutional reconstruction can respond to the exigencies of today's world. It is in this sense that EU and domestic law, interconnected now more than ever, must set themselves on the road towards a new version of "*Van Gend en Loos 2*", this time bringing together vigilant constitutional courts. At the very least this constitutional journey should continue with one crucial caveat in mind: tolerance for "*the other*" and "*otherness*" coupled with a constant catering for the other's constitutional relevance. At its very core, European constitutionalism accepts that not all values are shared and such disagreement forms its part and parcel. The conflict seen from a hierarchical perspective is unsolvable. Comity recognizes thus that EU law is different from national laws. It recalibrates the constitutional conflict and frames it in discursive terms. Each system must learn from the other, change, and compete. It cannot hide between a simplistic argument, dictated by hierarchy, but, rather, it must engage in a meaningful dialogue that accepts otherness and is ready to retreat. Constitutional pluralism becomes, on one hand, a framework for a reconciliation of the contradictory claims and pretensions of the Court of Justice, and national courts, on the other, as it caters to the pride and relevance of each actor. That does not mean that hierarchical models and reasoning are matters of the past. The evolving European Constitution is a collective, dynamic and a pluralistic enterprise. It calls for a never – ending feedback and a communication from national courts and traditions. EU is a new legal order, and yet, at the same time, it is not self – sufficient. Instead it depends on national traditions from which it has grown, and on whose basis it strives to build. It is not in opposition to national systems, but rather at an intersection of those systems that EU has a chance to prosper with. Without a contribution from national traditions, it is cut off from its very source of inspiration and guidance. The national enrichment of EU must not stop. It is imperative that national legal systems and traditions speak up and spread their message. It is incumbent on the respective constitutional courts to be a mouth – piece for those national systems and a catalyst for change and an adaptation at the EU level.

Discursive constitutionalism has two faces - external and internal. They form two sides of the same coin but should nonetheless be distinguished for the sake of clarity. The former includes the dialogue and constitutional disagreement at the EU level. Of equal importance is the latter aspect. The capacity of national courts to affect the uniform enforcement of EU law is limited. A national court may disagree with the way the CJ has interpreted an abstract right or principle, but it can not impose its own interpretation in the name of national constitutional

²⁸ Term borrowed from I. Ward, *A Charmed Spectacle: England and its Constitutional Imagination*, Liverpool Law Review Volume nr 2-3/2000, p. 235.

law. The decision of the court should be merely declaratory. Its effect would be to signal to the political branches that a constitutional value is negatively affected. The burden is then on those branches (if they agree with the national court) to amend the Constitution to support that interpretation, against the ECJ. Only after that successful amendment would the national interpretation override that of the ECJ. There would thus be an internal dialogue in the Member State, triggered by the domestic court's decision, about the extent to which there is truly an aspect of national identity at stake that requires the introduction of a constitutional exception to the application of EU law (as interpreted by the CJ). The effective and uniform enforcement of EU law is at stake in these situations, but we should not exaggerate this concern. Apart from the fact that these situations are exceptional, we should bear in mind that the uniform and effective application of EU law is not the only principle to be taken into account. Trade-offs between the ideal of effectively establishing a supranational rule of law and principles of democratic governance may be necessary. Any potential loss along the dimension of effective and uniform enforcement of EU law is likely to be insignificant when seen in the context of European constitutional practice as a whole. The EU Treaties contain a whole range of opt-out clauses that allow national actors under narrowly circumscribed substantive and/or procedural conditions to deviate from EU law. As a matter of EU law the uniform application of the same standard is not paramount and is easily overridden in many core areas of the Common Market. Every court should rest assured that its voice was heard and given due consideration, even though the end – result did not go the way the Constitutional Court desired it would. The importance of this discourse lies elsewhere: building trust with every participant of the Constitutional exchange so that next time today's losers will come out on top and that no result is ever prejudged.

At the heart of the novel concept of constitutionalism lies trust sense of appropriateness. It is worth recalling *in extenso* one of very few philosophical interpretations of the rivalry between the constitutional courts on the one hand and the Court of Justice on the other. M. Broekman precipitously writes that “the main issue is the question whether the ECJ or the highest courts of the Member States have final determination. The political issue is whether the Union depends on Nation State legal systems or is a legal entity in its own right. Concerns about the quality of performance of the ECJ if that Court were the decisive instance for the Member States are at the background. The issue is then on the *trust of performance* of the ECJ rather than in *questions of legality*²⁹” (emphasis in the original). European Constitutionalism is about a nuanced constitutional power play. Each court's imperative should be to take part in this process actively instead of shielding behind the Constitution. European constitutionalism calls for proper understanding of the EU as a supranational community designed to complement states not

²⁹ *A Philosophy of European Union Law. Positions in Legal Space and the Construction of a Juridical World*, Leuven, 1999, p. 266.

replace them, to provide new platform for citizens interests and to protect them beyond state borders, often against the excess of their own states³⁰. Today a Constitutional court aspiring to be “good” must be able to go beyond mere defense of its Constitution when it is attacked and accept the challenge of promoting domestic constitutional values as part of the European constitution-building³¹. A Constitutional court which cuts itself off from constitutional dialogue with the CJ does a disservice to its own constitutional order and also to the European constitutional system, which needs to be continually fed by the national constitutions³². The preliminary ruling could serve the purpose of presenting rich and diverse points of view before the Court of Justice. One of its functions could be precisely to bring experience to the European court, linking its judgments to concrete cases pending before the national tribunals. The more these judges are able to convey the constitutional tradition of their own legal order to the central institutions for the common good of the whole society, the greater the chances are of respecting the cultural and constitutional pluralism in Europe. Otherwise, the constitutional courts are condemned to accept a cultural homologation established by the strongest voices, or to fight a sterile battle of defense, entrenched behind the counter-limits and national sovereignty. All national constitutional experiences are necessary to shape common values shared throughout Europe. It is only through careful examination of all the historical experiences of the European countries that a common heritage can emerge. These considerations are important because the Polish Constitutional Court falls short of understanding that the more all national experiences are taken into consideration, the easier it is for the Court to accomplish the task of adjudicating based on the common European values; whereas the more national experiences are missing in this process, the more the Court runs the risk of imposing a specific cultural tradition on the whole of European society as if it were part of the common constitutional background. How could the Court of Justice determine issues of common human rights without taking into account the traditions of all member states? If one or more experiences are missing, the Court’s work is more difficult and potentially misleading. For these

³⁰ For approach underlining the rupture of “*Van Gend case law*” with the traditional reading of constitutions and states see M. Everson, J. Eisner, *The Making of European Constitution. Judges and law Beyond Constitutive Power*, (Routledge, 2007), p. 41 inast. And A. Vauchez, *The Transnational politics of judicialization. Van Gend en Loos and the making of EU polity*, (2010) *European Law Journal* Vol. 16, no 1, p. 1.

³¹ M. Cartabia, “*Taking Dialogue Seriously*”. *The renewed need for a judicial dialogue at the time of Constitutional activism in the European Union*, Jean Monnet Working Paper 12/2007, at p. 36. She writes „The mission (to look after the interest of the national constitutions) does not only imply the defense of constitutional values when they are attacked [...] but also to promote them as necessary part of the construction of Europe”. On the legitimizing consequences of turn by the Court of Justice from mere “competence court” to “rights court”, see excellent analysis by M. Shapiro, *The European Court of Justice. Of Institutions and Democracy*, (1998) 32 *Israel Law Review* 3.

³² See also J. Komarek, *Playing With Matches: The Czech Constitutional Court’s Ultra Vires Revolution* (available at <http://www.verfassungsblog.de/playing-with-matches-the-czech-constitutional-courts-ultra-vires-revolution/>).

reasons the Court of Justice cannot allow the constitutional conversation to die down. That is exactly why today the preliminary reference procedure is on the verge of constitutionalization. It was always agreed that this procedure played pivotal role in transforming Community law from a mere international compact among sovereign states into a “constitutional charter of the Community based on the rule of law”³³, which recognizes individuals as equals to powerful states. Preliminary rulings give a unique and formalized procedural opportunity for voicing and channeling constitutional concerns. Constitutional courts voicing their concerns give the Court of Justice the opportunity to learn about the problem, to respond and mould its reply with a truly European dimension. Constitutional traditions expressed via art. 267 of the TFEU send a clear signal to the Court that the matter needs to be carefully scrutinized. The answer by the Court calls for the constitutional court to follow the preliminary ruling and (depending on the facts of the case) strike a reasonable balance between the requirements of both legal orders. Therefore it is of utmost importance to understand that a preliminary ruling is not the end of sovereignty but rather and more correctly beginning of something new: constructing discursive constitution of the European legal order which straddles national constitutional law and EU law. Constitutional Courts are called on to detect and monitor “structural deficiencies” of EU law and manage these discursively. Dialogue is constructive. Sometimes the discussion about essentials and commitments will be extremely difficult³⁴. This is the only way to make sure that national courts do not lapse into nationalistic reading of structural deficiencies. That would be tantamount to the abuse of the dialogue and would put a defensive mask on dialogue. In this sense vigilant constitutionalism requires as a condition *sine qua non* conceptual tolerance which precedes constitutional pluralism. The constitutional dispute recognizes that each court has an equal right to win only if it comes to the negotiating table with better and credible arguments in favour of national specificity and diversity.

6. Constitutional Identity. Dialogue and Imagination

Today constitutional court aspiring to be “good” should not only criticize and supervise but admit that there are better - placed fora for protecting certain interests. It has nothing to do with the judicial ego (way of thinking typical for defensive constitutionalism) and everything to do with the common sense and reason of judges. Here lies a great conceptual challenge for European Constitutional Courts: to build their mandate and prestige on the basis of dialogue and craft good arguments aimed at new audiences beyond traditional domestic audiences

³³ As famously stated by the Court of Justice in 294/83, *Les Verts v European Parliament*. [1986] ECR 1339. For the in-depth analysis see L. Pech, *The Rule of Law as a Constitutional Principle of the European Union*, Jean Monnet Working Paper 4/2009.

³⁴ It is often neglected that „dialogue not only entails a pleasant conversation, but also a passionate discussion, which is actually driven by conflict”; A.T. Pérez, *Conflicts of rights, op. cit.*, p. 129.

and instead of a safe hierarchy. A hierarchy is good from an internal perspective but legal systems have long outgrown it. Therefore any hierarchy is highly divisive from the external perspective and pluralistic systems which look for ways to coexist and cooperate and not simply cancel each other out. Each system stakes its own claim to constitutional distinctiveness. Restraint becomes a virtue just as much as activism. The latter played fundamental role in putting the Union Court on its fundamental rights' case law track, the former might acknowledge that the Union Court is ready to take center stage. This process works both ways though and goes for the Court of Justice to defer at times to the constitutional courts and acknowledge their claims and concerns. Pushing the limits of European integration against the Constitution is like building castles on the sand. Only working hand-in-hand will work. Therefore the Court of Justice must see constitutional courts as partners and interlocutors. Raising doubts from the perspective of the Constitution does not have to be passé. Constitutional courts could teach the Court of Justice useful lessons in the protection of rights, interpretation of proportionality or shaping the desirable contours of judicial review. It all boils down to framing good arguments and putting them forward. The conflict itself would not be such a bad thing. Rather it is the lack of a common language and a point of reference that will doom this endeavor of courts talking past each other, engaged in a monologue rather than a dialogue.

EU law broadens the stage on which constitutional courts play and add new audience – transnational community with its own institutions and expectations. This is an important source of self – limitation. EU law and national laws are distinct yet closely interwoven bodies of laws. Each system must learn from the other, change, engage in meaningful dialogue and accept otherness. EU law touches constitutional law on so many aspects that it is no longer tenable for the constitutional courts to maintain their serene aloofness. Constitutional court aspiring to be “good” must be able to go beyond mere defense of its Constitution when it is attacked and accept the challenge of promoting domestic constitutional values as part of the European constitution-building. Such approach stems from accepting that the legitimacy of judicial power comes today not only from within the systems but is also a consequence of systems interacting, learning and adapting.

The constitutional court engaged in a dialogue aimed at diffusing conflicts-to-be rather than solving them, can be said to be a good constitutional court in the world marked by interdependence, learning and respect for “otherness”. Such court understands that defensive constitutionalism and a state-centered only approach are all matters of the past. Good constitutional court must understand that being faithful to its own Constitution is no longer a decisive factor in the overall assessment of its mandate and performance. European constitutionalism is not an enemy of national constitutionalism but rather its constructive and critical interlocutor and *vice versa* and the disagreement takes place within an unprecedented judicial comity. It is a true sign of constitutional tolerance to be ready

for both difficult dialogue and stepping back when necessary. that of monitoring European integration and the CJ by way of reasonable and foreseeable constitutional constraints placed on the integration project. The parameters of the game must be set down clearly and all actors must know in advance how far they can take their respective jurisprudence and systemic claims without breaking down the fragile equilibrium of European constitutional space in *statu nascendi*. By the constitutional threats and promises that make up constitutional politics you discipline the European project and take it further since you elaborate and read your Constitution as a credible barrier to integration, and as a result have the legitimate expectation that the lines thus drawn will be noticed and respected by the other actors. This process constitutes a sort of two-way traffic since the lines and barriers accepted by others are always the result of a dialogue of equals, never the result of high-handed defensive constitutionalism in which the constitutional court speaks to the world, but never listens to what kind of message the world has for the constitutional court.

European constitutionalism in XXI century sees constitutional courts as true ambassadors of their respective legal orders. Such recalibration is as much a challenge of minds' changing as it is for laws' adapting. It is here that constitutional identity as a Treaty concept poses a formidable challenge for constitutional and supranational courts of the EU. To tackle this challenge head-on these courts desperately need legal interpretation that imbues European dialogue with constitutional imagination. Constitutional imagination is not about solving cases "*here and now*" but about anticipating the next step, building strategies for the future and accommodating itself within the broader community *in the days to come*. Constitutional imagination is never decided by a single decision but rather is built over time. Only such constitutional reconstruction can respond to the exigencies of today's world and make sure that translation of constitutional identity from national register into EU vocabulary will be an enriching process for both. Taking its cue from the opening citation of Kapuściński, the emerging comity of courts must work on the assumption that courts learn from each other's decisions, and not only see others as sources of inspiration. The perspective of the "Other" should help us contribute to the ongoing constitutional debate, learn from it and, last but not least, change one's ways and methods of thinking. Only then will we have a chance of really, and not only mythically, embracing "*The Other*", adjust as the this constitutional journey goes on and as Heyerdahl urged us, to grasp the strings ourselves rather than wait idly for someone else grasp them for us !

Tomasz Tadeusz Koncewicz

TOŻSAMOŚĆ KONSTYTUCYJNA W EUROPEJSKIEJ PRZESTRZENI PRAWNEJ I WSPÓLNOTA CZUJNYCH SĄDÓW KONSTYTUCYJNYCH

Każdy sąd konstytucyjny korzysta ze szczególnego umocowania do przemawiania w imieniu swojego systemu prawnego. To jednak nie tylko przywilej, ale także odpowiedzialność, zwłaszcza dzisiaj w dzisiejszych czasach znaczonego pluralizmem, wielością roszczeń do pierwszeństwa i naciskiem na dialog w miejsce hierarchii. Sytuacja sądów konstytucyjnych nie jest łatwa. Z jednej strony sądy te walczą z niebezpieczeństwem marginalizacji, czasami nawet o przetrwanie, domagają się uwagi i przypominają o swoim istnieniu. Postępujący proces integracji europejskiej podważa bowiem dominujący dotąd paradygmat, że to konstytucja zajmuje najwyższe miejsce w hierarchii źródeł prawa i jest źródłem wszelkiej władzy publicznej, a w to miejsce proponuje nowy punkt odniesienia dla lojalności – traktat, z własną hierarchią, wartościami, celami i instytucjami, które roszczą sobie prawo do pierwszeństwa. Bezwarunkowe uznanie przez sądy konstytucyjne tego stanowiska oznaczałoby w rzeczywistości podważenie sensu swego dalszego istnienia. W konsekwencji sądy te nie mają innego wyjścia jak eksponować swą rolę i konstytucję jako przeciwwagę dla prawa europejskiego i Trybunału Sprawiedliwości. Z drugiej jednak strony sądy konstytucyjne stają przed wyzwaniem nowego myślenia o prawie, które na pierwszym miejscu stawia „dobry argument” i komunikację, a nie jak dotąd, dominujące i wygodne odwołanie do „argumentu z hierarchii”. Sąd konstytucyjny, który mówi defensywnie, chroniąc konstytucję, podkreślając jej nadrzędność i swoją szczególną rolę wobec tego dokumentu, jest dobrym sądem konstytucyjnym w sensie tradycyjnym, ale dzisiaj od sądu wymagamy znacznie więcej w ramach szczególnej „*judicial comity*” sądów orzekających w obrębie nowego europejskiego porządku prawnego. Dobry sąd konstytucyjny w ramach tej nowej wspólnoty sądów musi być przede wszystkim graczem nastawionym na interakcję, zmianę i absorbującym je. Występuje jako sąd, który sam siebie potrafi poprawić, uznać potrzebę nowego otwarcia, czy powstrzymać się w duchu wstrzemięźliwości. Jest sądem pragmatycznym, który dostrzega, że państwo nie jest już demokratyczną autarkią. W tym celu prowadzi dialog konstytucyjny, który nie jest tylko „przyjemną konwersacją”, ale przede wszystkim trudnym sporem o sposób rozumienia prawa podmiotowego i granic kompetencji, sporem, w którym każdy z systemów ma równe prawo do zwycięstwa, jeżeli tylko w sposób wiarygodny przedstawi argumenty przemawiające za uznaniem krajowego poziomu ochrony konstytucyjnej za lepszy i wątpliwości, dlaczego europejski poziom ochrony wymaga korekty.