CONSTITUTIONAL COURTS AS FRONTIER INSTITUTIONS IN THE EUROPEAN CONSTITUTIONAL SPACE: ON THE ROAD TOWARDS "VAN GEND EN LOOS 2"?

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ABSTRACT

The constitutional landscape of the European Union (EU) 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. European integration shows how constitutional courts are forced to learn and rediscover themselves. They cease to act as the guardians of absolute truths, but accept and embrace normative change. This paper argues for a novel model a constitutional court: one which speaks instead of remaining silent, which puts forward its understanding of Europe instead of stepping back, and which is ready to not only listen but also acknowledge arguments of others. Such court manages its own judicial policy by engaging in a dialogue in which it presents its arguments, accepts others' point of view and shows readiness to cede authority to better-placed courts. Most importantly such court appreciates that giving way and stepping back now does not rule out winning and taking centre stage in the future. This is so because every court has an equal right to win in the constitutional disagreement. This approach moves the court away from traditional "negative legislator" towards court taking on the mantle of law - maker that contributes to the development, and growth of European constitution along domestic constitutional document. In short a court becomes a political player. It acts both as an author of the European constitution, and a constructive interlocutor for the Court of Justice. Such

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authorship defines the mandate of constitutional courts as „frontier institutions". Only a court that is aware of its new frontier function stands a chance of surviving and keeping relevancy in the process of discursive European constitution – building which straddles national and supranational levels of governance.

[…] the core of incremental doctrine is respect for the status quo and movement from the status quo only in short, marginal steps carefully designed to allow for further modifications in the light of further developments […] Incrementalism is a theory of freedom *and* limitation

-M. Shapiro, *Stability and Change in Judicial Decision-Making: Incrementalism or stare decisis (*emphasis in the original)

I. SETTING THE SCENE: THE EUROPEAN CONSTITUTIONAL LANDSCAPE

The constitutional landscape of the European Union (EU) 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.[1] 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. European constitutionalism aims at redrawing the constitutional *status quo* and points towards new opportunities and methods of understanding the world of European constitutionalism. Seen from this perspective the main concern of European constitutionalism is focused on the proper understanding and categorisation of EU as a supranational community designed to complement states, and not replace them, to provide a new platform for citizens' interests and to protect them beyond state borders, often against the excesses of their own states[2]. It recognises that a

[1] See also N. Walker, *Beyond boundary disputes and basic grids. Mapping the global disorder of normative orders*, 6 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 373(2008).

[2] For an approach underlining, the rupture by EU law with the traditional reading of constitutions and states see in general M. Everson, J. Eisner, The Making of European Constitution. Judges and Law Beyond Constitutive Power 41 (Routledge, 2007); A. Vauchez, *The Transnational politics of judicialization. Van Genden Loos and the making of EU polity*, 16 EUROPEAN LAW JOURNAL 1(2010) and more recently His *L'Union par le droit. L'invention d'un programme institutionalle pour l'Europe*, Paris, 2013, in particular

constitutional court aspiring to be "good" must be able to go beyond the mere defence of its constitution when it is attacked and on to accept the challenge of promoting domestic constitutional values as part of the European constitution-building process.

In other words a constitutional court must become a "frontier institution" that reconciles domestic claims and rights with the supranational sources of law and authority. The frontier function of constitutional courts 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.

Having said that we are aware that constitutional judges tend to see their legal order above all the others and consider themselves at the centre of the legal universe. They understand their vocation as primary protecting the domestic legal system 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 (hereinafter referred to as "CJ" or "the Court") asserts, in the name of autonomy and effectiveness of EU law, the full and unconditional primacy of the said law over any national law, whereas a constitutional court anchors the primacy of EU law in its constitution and claim residual jurisdiction to strike down EU law as incompatible with constitutional norms. 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 for mutual understanding by generalising and universalising their language[3], renouncing a single and universally operational theory. The sharing of a common legal discourse becomes a challenge and takes the place of an obsolete searching for "*who, the Court or domestic constitutional courts, has the ultimate authority*".

It is argued here that trying to communicate and search for a common understanding is much more difficult than simply retrenching behind constitutional lines and lying in wait. The latter defensive constitutionalism is marked by state - centred perspective and sovereignty. European law with its claim to primacy poses a challenge to states' constitutions and constitutional courts which thus far has been

Chapter III pp. 181 - 223. See also E. Benvenisti, G. W. Downs*, The Premises, Assumptions, and Implications of Van Genden Loos :Viewed from the Perspectives of Democracy and Legitimacy of International Institutions*, 25 EUROPEAN JOURNAL OF INTERNATIONAL LAW 85(2014).

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

enjoying the status of sole and absolute guardians of integrity and exclusivity of their constitutional orders. State constitutionalism finds its rival in European constitutionalism understood as a process and never-ending journey. European constitutionalism promotes plurality of voices and participation of many constitutional actors each with their own claims and pretensions. As a result constitutional disagreement undergoes fundamental internal evolution: from dominant argument from *hierarchy* ("my Constitution enjoys always preeminence") towards *discursiveness*. EU legal order is more nuanced as it introduces a certain degree of constitutional problematisation. The system moves away from a simple hierarchy and one centralised court with the universal power of last word on the question of legal validity. Constitutional disagreement is defined by constitutional competition and overlap which emphasise interconnectedness, interaction, accommodation, horizontality and hierarchy of legal systems. Both European and national law have a valid claim to an autonomous primacy. Result of the disagreement will be always negotiated which enhances identification with the common good, promotes participation and changes centuries-old legal thinking, universalises judicial reasoning and pushes the perspective of the constitutional court(s) well beyond constitution. European constitutional discourse is drawn along the lines of anticipation of the disagreement, its management and overlap of law and politics. Constitutional courts are forced to learn and rediscover themselves and cease to act as the guardians of absolute truths, but accept and embrace change. This calls for a novel model a constitutional court: the one which speaks instead of remaining silent, which puts forward its understanding of Europe instead of stepping back, and which is ready to not only listen but also acknowledge arguments of others. Such court manages its own judicial policy by engaging in a dialogue in which it presents its arguments, accepts others' point of view and shows readiness to cede authority to better-placed courts. Most importantly such court appreciates that giving way and stepping back *now* does not rule out winning and taking centre stage *in the future*. This is so because every court has an equal right to win in the constitutional disagreement. This approach moves the court away from traditional "negative legislator" towards court taking on the mantle of law - maker that contributes to the development and growth of European constitution along domestic constitutional document. Such court acts both as an author of the European constitution, and a constructive interlocutor for the Court of Justice. Such authorship defines today's the mandate of constitutional courts as "frontier institutions". Only a court that is aware of its new frontier function stands a chance of surviving and keeping relevancy in the process of discursive European constitution – building which straddles national and supranational levels of governance. Otherwise, it is doomed to being engulfed in an insoluble conflict of "who has the final word" or "which set of norms is supreme". In order to avoid isolation and to remain a player in the

European constitutional space "frontier courts" need discover new methods of communicating their message and making sure that they will be heard.

II. VIGILANT CONSTITUTIONALISM. WHAT IS IN A NAME?

Today good constitutional court should manage conflict and competition of excluding claims and pretensions. The emphasis on dialogue and communication is encapsulated here by the concept of "vigilant constitutionalism". Postulated model of constitutionalism is called "vigilant" as it urges the court to move away from the traditional notion of constitutional court as a guardian of a constitution only to 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 explains what it takes to be a good and vigilant "frontier court" within the complex judicial net marked by interactions and interdependencies. The vigilant constitutionalism's main challenge would be in the sphere of language, making it clear that separation as a legal technique is not just outdated, but alienating, and risks isolation[4]. This would require 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. Vigilant constitutionalism imposes on courts a responsibility for linking the nodes and connecting the dots within the legal net by deconstructing overlapping structures, building circles of coherence and, finally, managing consensus among participants of the emergent unique community of mutual impact and influence. This would allow each autonomous order to evolve in reaction to the other. Failure to follow this model risks marginalisation (of the states insisting on the primacy of their constitutions) and threatens, in some cases, their survival. As a result, changes would always be a by-product of outside reality and its demands. Such shift is all the more pressing given the fact that argument "from the Constitution" (*see* point 3 below) is being employed today as a legitimate counter-argument against the uniformity of EU law. As a result the latter, to an increasingly growing extent is ready to take the back seat, something that was hardly conceivable forty years ago. Such a shift is pragmatic as it recognises that legal world is no longer black or white (current "solving the conflict approach") but rather grey. If you cannot solve the conflict you try at least to manage it[5]. Respect and

[4] On a legitimising force of dialogue in EU law see A. T. Pérez, *Conflicts of rights in the European Union: A Theory of Supranational Adjudication*, (Oxford University Press, 2009).

[5] 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 Courses of the Academy of European Law*, (Oxford University Press, 2001).

communication become paradigmatic of this community of courts and conflict is seen as a sign that system is working. A critique expressed every now and then by constitutional courts does not bring into question the overall acceptance of EU law by constitutional judges and their approval of EU law as a legitimate force. Constructive criticism might benefit EU law provided that it takes place in a structured and principled fashion is argument-based and final judicial determinations are rendered on the strength of arguments and not simply their source and hierarchy. 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. To do so would be a major concession from the perspective of constitutional pride and this option should be utilised to its fullest. Constitutional disagreement is at the end of the line and should be a last resort.

The discursive constitutionalism is argument-driven and exposes arguments resorted to by a court X to a critical reading by other courts. It is popular to present the relationship between the legal orders of the European Union and Member States in terms of legal pluralism which means that these orders interact, adapt to each other, accommodate each other in a non-hierarchical fashion, and in the end try to agree on a reasonable result acceptable to all. Constitutional courts are not only asked to open up and cooperate but are also required to engage in a meaningful judicial bargaining. Judicial bargaining adds important dimension to vigilant constitutionalism. It is much more than just a dialogue. The latter can ultimately lead to a failure since it is good will of the courts that such conversations depend on[6]. Judicial bargaining emphasises courts' regulatory functions vis-à-vis their most immediate neighborhood - EU law (from the perspective of constitutional courts) and constitutional systems (from the perspective of the Court of Justice). Each court is asked to surrender the hierarchical view of its relationship between legal systems and enter into a strategic game of power and argumentation. When faced with a conflict judges should be debarred from resorting to the comfortable world of hierarchy but instead are thrust into the European judicial arena in order to convince its counterparts to their vision of protection of fundamental rights and constitutional identity or its critique of so-called "competence creep".

Vigilant constitutionalism aims at breaking this impasse and points towards new opportunities and methods of seeing and understanding the world of European constitutionalism. Its ambition is not simply

[6] For more somber take on the pluralism see however D. Keleman, *On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone*, 23 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 136(2016). On pluralism see also analysis *infra*.

to contribute a few case-notes on selected judgments but rather to approach the European jurisprudence of the Constitutional Court from a more systemic and general perspective, point out its inconsistencies and faults and propose ways out of the simplistic constitutional world as currently interpreted. It does not mean giving up constitutional allegiances but rather reconstructing them in a European context. Every constitutional court of a Member States has a crucial message to convey for European constitutionalism provided that it will show readiness to join, listen, speak up, all this at the same time. At the heart of the novel concept of constitutionalism lies trust. 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*[7]" (emphasis in the original). Today a Constitutional court aspiring to be "good" must be able to go beyond mere defence of its Constitution when it is attacked and accept the challenge of promoting domestic constitutional values as part of the European constitution-building. 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[8]. 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 defence, 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. The more all national experiences are taken into

[7] JAN BROEKMAN, A PHILOSOPHY OF EUROPEAN UNION LAW: POSITIONS IN LEGAL SPACE AND THE CONSTRUCTION OF A JURIDICAL WORLD 266 (Leuven, 1999).

[8] 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/

consideration, the easier it is for the Court to accomplish the task of adjudicating based on the common European values. 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 the member states? If one or more experiences are missing, the Court's work is more difficult and potentially misleading. For these 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 constitutionalisation. 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" which recognises individuals as equals to powerful states. Preliminary rulings give a unique and formalised 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 scrutinised[9]. 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 should therefore become agents of the common project without completely renouncing their internal constitutional allegiances. They are called on to detect and monitor "structural deficiencies" of EU law and manage these discursively. This role bestows upon these courts a sense of purpose, relevancy, recognition, and last but not least, responsibility. Dialogue is constructive. Sometimes the discussion about essentials and commitments will be extremely difficult. 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

[9] Art. 267 of the Treaty on the Functioning of the EU gives each court of the member state a power (in certain „constellations" it imposes a duty) to refer questions to the Court of Justice on the interpretation and/or validity of the EU norms. This procedure has been long hailed as one the success stories of the EU law. See D. Edward, *The National Courts - The Powerhouse of Community Law*, 5 Cambridge Yearbook of European Legal Studies 1(2002). On various procedural „constellations" in using art. 267 and the switch from a discretion to refer to a duty, consult K. Lenaerts, I. Maselis, K. Gutmann, *EU Procedural Level*, (Oxford University Press, 2015). See also analysis *infra*.

constitutional pluralism. The constitutional dispute recognises 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. 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.

Vigilant constitutionalism changes the traditional role of constitutional courts. They must speak, rather than remain silent, argue and break new grounds, rather than merely protect their home turf. The courts must also understand that they have a crucial role to play in supervising the integration, together and in collaboration with the Court of Justice. When their voice is heard, the Court will act accordingly and shape its jurisprudence so as to take into account the concerns voiced at the domestic level. In the end these concerns might be upheld (nod to diversity) or discarded (nod to uniformity) but never will they be ignored. There is no zero-sum game; every actor, be it a constitutional actor or the Court of Justice, is positioned to win in this never-ending constitutional disagreement. Every court should rest assured that its voice was heard and given due consideration, even though the end – result did not go the way a 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. Importantly vigilant constitutionalism does not advocate giving up the constitutional allegiances but rather reconstructing them in the light of Europe. Not only lesson is to be learnt from European constitutionalism, but also every constitutional court of a Member States has a crucial message to convey for European constitutionalism. Vigilant constitutionalism is based on the premise that both legal orders (European and national) are constitutional in nature. The concept of vigilant constitutionalism puts forward the working hypothesis that constitutional courts of the member states of the EU 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. The conceptual challenge is then to problematise and contextualise the European case law and review functions of the Constitutional Court. The true role of the Court in exercising these review functions is that of monitoring European integration and the Court of Justice 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 the 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 bargaining among 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. A constitutional court, wielding such warning mechanisms and engaging 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 a court understands that defensive constitutionalism and a state-centred only approach are all matters of the past. With all this vigilant constitutionalism 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). This existential challenge is even more evident with constitutional courts whose main rationale was always to protect the constitution. The model of vigilant constitutionalism provides a framework to reconcile the contradictory claims and pretensions of the Court of Justice and national courts since it caters to the pride and relevance of each actor. It does not mean though that hierarchical models and reasoning are matters of the past. 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. EU is a new legal order but at the same time it is not self–sufficient. Rather, it is dependent on the national traditions from which it grew and on the basis of which it strives to build. It is not in opposition to national systems but at the intersection of legal systems. Without the contribution from national traditions it would be cut off from its very source of inspiration and guidance. Therefore the national enrichment of the EU must not stop. It is crucial though that national legal systems and traditions must speak up and let their message be known. It is incumbent on the respective constitutional courts to reconcile the role of being the mouthpiece of national constitutionalism while at the same time functioning as the catalyst for change and adaptation at the EU level.

Vigilant constitutionalism is the direct consequence of the uniqueness of EU law where different courts speaking for their respective legal systems come up with divergent interpretations of the systemic

relationship between EU law and national laws. The Court of Justice asserts in the name of autonomy and full 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. Conflict as seen from a hierarchical perspective is thus insoluble. That is why vigilant constitutionalism starts from a different premise. EU law and national laws are distinct yet closely interwoven bodies of 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 simplistic arguments from the hierarchy but rather must engage in meaningful dialogue, accepting otherness and being ready to step back. Checks and balances between non-hierarchical legal orders build a whole based on mutual trust and control. Vigilant constitutionalism promotes judicial dialogue and understanding going beyond mere pro-European interpretation. Dialogue is the cornerstone of European constitutionalism. It acts as a legitimating power and when properly understood backs up courts' claims to their visions. Nothing is set in stone. On the contrary, the equilibrium never ceases to change, move and surprise both onlookers and actors. Dialogue involving all the interested parties with their claims and arguments has the potential to arrive at better-reasoned interpretative results and rewards participants since each has *prima facie* equal right to succeed. It is the power of better arguments (*imperio rationis*) not argument of power and hierarchy (*ratione imperii*) that counts and dictates the outcomes. This is the demand of the "culture of justification"[10]. Constitutional authority is dispersed and goes beyond national borders[11]. As a result of the discursive premise vigilant constitutionalism 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. What is at stake is the art of judicial balancing at a systemic level. The European constitutional landscape is being dominated by the overlapping consensus of constitutional courts in Europe which forms the heart of supranational adjudication in Europe with different interests, power struggles and jockeying 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 is untenable. Hierarchy is good from an internal perspective but legal systems have long outgrown it. Hierarchy is highly divisive from the external perspective of plural

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

[11] See also J. Bengoetxea, *Nation - States v Nation - Regions in the Post-sovereign European Polity*, in A.J. Menéndez, J.E. Fossum, (eds.), *Law and Democracy in Neil MacCormick's Legal and Political Theory. The Post-sovereign - Constellation*, (Dordrecht, Heidelberg, London, New York, 2011).

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. There is no subordination but rather a hardly-fought balance between individual claims (states) versus communities' and permanent adaptation. Reconciliation and reasonable deference (not capitulation as portrayed by some) should 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 Court of Justice and national courts. It is crucial to work out theories of justification and deliberations which would have judges strive at mutual understanding by generalising and universalising their language, 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. Vigilant constitutionalism would take its cue from the cosmopolitan way of thinking and make language and admissible arguments as its focal point[12]. Constitutional language must absorb change and meet the challenge of time. From this perspective beating the drum of sovereignty in a repetitive and steady fashion discredits the Court since it affirms that it is not able to redesign and rediscover itself. It also shows lack of intellectual discipline and a certain self–satisfaction with arguments of power and not the power of arguments. Vigilant constitutionalism is thus a process drawing on the ideal of constitutional tolerance - voluntary acceptance of a binding discipline that was not pronounced in the names of European peoples and yet is by them accepted as binding.

My plea for vigilant constitutionalism is being reinforced by the novel functions played today by the domestic constitutions in EU law.

III. JUDICIAL BARGAINING AND COMITY. ON THE POWER OF THE "ARGUMENT FROM A CONSTITUTION"

The vigilant approach to European constitutionalism calls for recognising systemic frontier functions of the constitutional courts which build, support, criticise and mould the system in which neither level can exist without the other. Constitutional courts and the Court of Justice act in a relational - although not

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

always cooperative - way. The Court of Justice 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. This is not however an individual task but rather a collective one. The Court 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. There is no doubt that the Court must lead the way and execute at least rudimentary checks on what the constitutional courts present to it by way of constitutional traditions. This is an extremely delicate task since the Court treads partly on national turf even though on its face it ascertains EU law. As a result vetting the piece of national constitutional legislation must be carried out with great caution and a sense of appropriateness which are hallmarks of the vigilant constitutionalism in which each court must know its limits and recognise "the other". However all the above can exist and function if there are channels of communication which make problems visible and arguments readily accessible.

I have been arguing thus far that the good constitutional court must understand that being faithful to its own Constitution is no longer a decisive factor in the overall assessment of this institution. Such a court moves from being defensive and cautious towards an engaging and constructive offense. It must come to terms with the fact that European integration makes it a political actor, putting a premium not only on words but on actual actions which confirms M. Shapiro's argument that "i*n the realm of judicial behaviour, what judges say, what rules they announce and/or threaten to announce is often a more significant aspect of their behaviour than how they vote*"[13]. Such a court calculates, anticipates, plans ahead, makes choices, speaks to various audiences all at the same time (both euro-enthusiasts and euro- skeptics) and manoeuvres deftly between pro-European result *v.* Euro-skeptic reasoning and *vice versa.* What is crucial though is that it must absorb legal change around it and accommodate its case law accordingly. It must speak up and make its understanding of European law known to all the parties concerned. To an ever increasing degree a courtroom becomes a forum for difficult dialogue with the outside world, dialogue in which every participant is ready to defer to the other. Today it is high time that we start speaking about the EU law as the Constitutional law of the

[13] M. Shapiro, *Can Judges Deliberate?,* Third Annual Walter W. Murphy Lecture in American Constitutionalism, Princeton University, 29 April 2003, p. 3 (paper on file with the Author).

European Union which is in competition with national law, that European constitutionalism is not an enemy of national constitutionalism but rather its constructive and critical interlocutor. This process works both ways and the European Courts have an important educational role to play in the system too[14]. This fragile system will work only to the extent that all the voices are given channels for expression and are heard.

European constitutional debate must move beyond *kompetenz-kompetenz* and sovereignty[15]. Any conclusive statements on the contours of the comity must be preceded by one crucial caveat. The comity brings together two perspectives which sometimes make the whole rather blurry and on the verge of collapse. One perspective flows from the image and the perception the Court has of itself looking from within. The other is dictated by the translation of this internal image from the outside, in other words how the Court is perceived by others. It is indeed true that the meeting of these two can result in the inspirational potential[16], provided however that the internal perception is ready to be tested critically from the outside and change accordingly. It no longer has a claim to superiority but on the contrary is ready to accept the challenge of change and the importance of engagement. The challenge is to embrace positive and inclusive language centred on what is common rather than expounding at all costs the differences. It is this kind of constructive message and readiness to engage that we should expect of the Court. A war of courts is the last thing that today's Europe needs[17]. What is instead needed is not only predictable and formally correct analysis but 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. Constitutional imagination is never decided by a single decision but rather is built over time. 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 balance constitutional arguments against European integration on a case-by-case basis, avoiding general and abstract principles which might

[14] See A. Albi, *From the banana saga to a sugar saga and Beyond: Could the post-communist constitutional courts teach the EU a lesson In the rule of law?* (2010) 47 COMMON MARKET LAW REVIEW 791.
[15] *The Editors*, 5 EUROPEAN CONSTITUTIONAL LAW REVIEW 345(2009).
[16] A. Voβkuhle, *Multilevel cooperation of European constitutional courts: Der EuropaischeVerfassungsgerichtsverbund,* 6 EUROPEAN CONSTITUTIONAL LAW REVIEW 175-196(2010).
[17] Bearing in mind the latest developments, we could be on the verge of discovering how things might turn badly when constitutional courts take the rhetoric one step further and start applying it. See R. Zbiral, *Czech Constitutional Court judgment of 31st January 2012: A Legal revolution or negligible episode? Court of Justice decision proclaimed ultra vires*, 49 COMMON MARKET LAW REVIEW 1(2012).

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 as a result of introduction of Article 4(2) of the Treaty on the European Union[18]. With the introduction of Article 4(2), TEU 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*[19] and more significantly *Sayn- Wittgenstein*[20]*,* see analysis *infra*), free movement rights might be restricted on the basis of a national measure which is the expression of national identity[21]. 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 law. For example in *Sayn- Wittgenstein* it was a republican nature of the state which was a relevant restriction on EU rights, 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"[22]. It is submitted that 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

[18] Art. 4 (2) of the Treaty on the EU reads: The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State".

[19] Case C - 213/07, Michaniki AE v. EthnikoSymvoulioRadiotileorasis and YpourgosEpikrateias, (available at http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d594a1bc585ad6433caa708e1b456a97c9.e34KaxiLc3eQc40LaxqMbN4PaNqOe0?text=&docid=76072&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=361781

[20] C - 208/09, IlonkaSayn-Wittgenstein v. Landeshauptmann von Wien, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=83459&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=361935

[21] 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*, 48 Common Market Law Review 147(2011) and B. Guastafferro, *Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause*, Jean Monnet Working Paper 1/12.

[22] In this vein L.F.M. Besselink, *National and Constitutional Identity before and after Lisbon*, 6(3) Utrecht Law Review 56(2010), On possible ramifications of the "*Sayn – Wittgenstein jurisprudence*" consult also D. Ritleng, *Le droit au respect de l'identitéconstitutionellenationale* in J.-Ch. Barbato, J.-D. Mouton, (eds.), *Vers la reconnaissance de droits fondamentaux aux etatsmembers de l'Union europénne. Réflexions à partir des notions d'identité et de solidarité* 21-47 (Bruxelles, 2010).

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"[23]. Instead, the 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 supra-nationalism. 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) 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 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[24]. 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. 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

[23] In case 106/77, Amministrazionedelle Finanzedello Stato v. Simmenthal SpA, the Court famously held that EU law enjoys primacy over conflicting national provisions as "Every national court must, in a case within its jurisdiction, apply community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the community rule" (para 21) and then accordingly […] any provision of a national legal system and any legislative , administrative or judicial practice which might impair the effectiveness of community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent community rules from having full force and effect are incompatible with those requirements which are the very essence of community law."

[24] See L. F. M. Besselink, *Respecting Constitutional Identity in the European Union. An Essay in ECJ (Second Chamber), Case C -208/09, 22 December 2010*, *IlonkaSayn - Wittgenstein v. Landeshauptmann Von Wien*, 49 COMMON MARKET LAW REVIEW 671 (2012).

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 hallmarks of the comity of equal courts where each court knows its limits and recognises "*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[25]. 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 categorisation of the constitutional rule/principle as the expression of the constitutional identity. There are two strands of case law that seem to take shape at least now. 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 Court[26]. Constitutional identities should be about constitutional essentials not constitutional peculiarities. EU factors national expressions as important value but refuses these expressions status of constitutional trump cards. Constitutional disagreement is not ruled out altogether but made less likely and its internal dynamics are changed[27]. Shared constitutional space is inclusive and is inhabited by various actors with competing (and often clashing) pretensions. EU law is not qualified by the constitutional identity but rather the process becomes more diversified and proceduralized.

Constitutions must assert their voice and join the debate and constitutional scholarship must enter and navigate the uncharted waters of translation from one vocabulary into the other with Art. 4(2) of the Treaty serving as an important signpost. As a result, one gets a vigilant constitutionalism and a strategic dialogue in their purest form, both centred around a discursive model of law and a dispute regarding the

[25] For possible "routes" and directions see interesting reflections by M. Safjan, *Between Mangold and Omega: Fundamental Rights versus Constitutional Identity*, 3 IL'DIRITTODELL'UNIONEEUROPEA 437(2012).
[26] See in detail L.F.M. Besselink, *National and Constitutional Identity before and after Lisbon*, 6 UTRECHT LAW REVIEW 3(2010) and His *Respecting Constitutional Identity in the European Union. An Essay in ECJ (Second Chamber), Case C -208/09, 22 December 2010*, *IlonkaSayn - Wittgenstein v Landeshauptmann Von Wien*, 49 COMMON MARKET LAW REVIEW 671(2012).
[27] G. Davies, *Constitutional Disagreement In Europe and the Search for Pluralism*, Eric Stein Working Paper no 1/2010.

law's meaning. This case law show how that 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. 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[28]. What is the next step(s) then on this constitutional road? There is not one easy answer to this question. In the past the argument from the constitution was seen as a danger to the very foundations of EU law. This fear of heteronomy was at the centre of *Simmenthal-InternationaleHandellsgesellschaft* case law. Today's European constitutional disagreement is no longer about recognition of national constitutional elements but first and foremost also about giving constitutional mandate to them. The result is never set in advance but always opens to negotiation and each court must always be ready to step back[29]. EU recognises relevance of constitutional law of member states. National constitutional claims are elevated to valid constitutional claims in the realm of EU law. National law does not simply operate next to EU law but within it. Comity of circumspect courts calls on constitutional courts to open up and absorb novel kind of reformative interpretation of a legal system in response to changing social conceptions of justice and a new set of judicial virtues.

IV. "VAN GENDEN LOOS 2" AS A PROMISE AND A … CHALLENGE OF CONSTITUTIONAL IMAGINATION

You need to take your position as a court with a grain of salt, and even when acting boldly, do it as a player, not as the holder of the truths of last resort[30]

With Art. 4(2) TEU constitutional argument enjoys its own claim to validity and is taken into account as an integral part of the systemic constitutional bargaining, that has become, whether we like it or not, part of

[28] What is crucial is the search for an accommodation in a shared constitutional space, exchange, tolerance and acceptance of the other. It seems that while expression of the constitutional identity and the question of substance (what properties can be ascribed to national identity in order for state expression to be recognised as such identity) should be a matter for Member states (here Member states understood not only as constitutional courts but also legislative organs), the final legal categorisation of the constitutional identity *within*, and its consequences *for*, the legal order of the EU, should be left to the Court of Justice as the ultimate interpreter of EU law. For more on the division of work in the reconstructing of the constitutional identity G. van der Schyff, *The Constitutional relationship between the European union and its Member States: the role of national identity in article 4(2) TEU*, 37 European Law Review 563(2013).

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

[30] W. T. Eijsbouts, *Wirsind das Volk. Notes About the Notion of 'the People' as occasioned by the Lissabon - Urteil,* 6 EUROPEAN CONSTITUTIONAL LAW REVIEW 220(2010).

the daily reality of European constitutional courts. It is not simply waived off as parochial and old-fashioned but must be considered seriously by the CJ 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 else's individual control. Constitutional courts thus become agents of the common project without renouncing completely their internal constitutional allegiances since these allegiances are reconstructed in a European context. Every constitutional court of a Member States has a crucial message to convey for European constitutionalism. As already shown above respect and communication are hallmarks of the judicial comity of courts and conflict is seen as a sign that system is working. 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. A 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 defence, 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 constitutionalisation and provides legal avenue for presenting rich and diverse points of view before the CJ and channeling constitutional concerns[31]. The answer by the CJ must strike a reasonable balance between the requirements of both legal orders. For a constitutional court 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. In this process constitutional courts become agents of the common project. The dispute about constitutional essentials recognises 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. A discursive approach to constitutionalism puts constitutional courts in the systemic spotlight as it calls on those courts to detect and monitor "structural deficiencies" 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. The narrative focused on structural deficiency presupposes a clash between EU and national law, and this shows why dialogue must be constructive and

[31] See J. H. H. Weiler, *Judicial ego*, 9 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, 1-2(2011).

should be 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.

In *Van Genden Loos* the Court has famously asserted that "the Community (predecessor of the EU - T.T.K..) "*constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. independently of the legislation of member states, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage . these rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community […].*"[32]

As espoused here "vigilant constitutionalism" draws on the language of vigilance used by the Court in *Van Gend*[33]. It is built on the premise of a new legal order of circumspect (vigilant) constitutional courts. Courts act as political actors wielding persuasion rather than compulsion, engaged in a common enterprise and redrawing lines between the courts and political institutions[34]. 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 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. As rightly put by Ch. Sabel and O. Gerstenberg, 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

[32]Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, [1963] ECR 1.

[33] In *Van Gend den Loos* the Court spoke of the "*vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by articles 169 and 170 to the diligence of the commission and of the member states."*

[34] Also *Les jugesconstituants*, 6 EUROPEAN CONSTITUTIONAL LAW REVIEW, 171-174(2010).

of arguments presented by the others[35]. 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". The result is never set in advance but always open to negotiation and each Court must always be ready to step back[36]. All this calls for a novel kind of reformative interpretation of a legal system in response to changing social conceptions of justice. European constitutionalism in the 21st century sees constitutional courts as true ambassadors of their respective legal orders and as the institutions involved, to a greater extent than was ever the case, in *mega – politics*, understood as core political controversies that define (and often divide) whole polities[37]. Such recalibration is as much a challenge of minds changing as it is of 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. New key words should be *adaptation* instead of subjugation, *learning* rather than imposing and *incorporation* and not one - way traffic. It all becomes imperative with the advent of kind of constitutional litigation centered not so much around fundamental rights but rather constitutional features of domestic legal systems[38].

The argument made out the analysis aimed at showing that the "vigilant constitutionalism" might add important procedural and discursive element to the ongoing debate of the *sui generis* plural character of the EU legal system[39]. Evolution of EU law has been the product of a dialogue between the Court and national courts (both ordinary and constitutional). "Vigilant constitutionalism" with its emphasis on the judicial bargaining, comity and shared allegiances manages the legal and factual interaction of the EU and national legal orders and gives voice to national concerns. It makes sure that the constitutional courts see themselves as actors in, and architects of, the constitutional narrative. As such vigilant constitutionalism

[35] Ch. Sabel, O. Gerstenberg, *Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order*, 16 EUROPEAN LAW JOURNAL 511(2010).

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

[37] The term "mega-politics" is taken from R. Hirschl, *The Judicialization of Politics*, in K. E. Whittington, R.D. Keleman, G.A. Caldeira, (eds.), *The Oxford Handbook of Law and Politics*, London, 2008, at. 123. He points out that the judicialization of "mega-politics" includes the very definition - or *raison d'être* - of the polity as such and notes the growing reliance on courts for contemplating for example the definition of the polity as such *vis-à-vis* European supranational polity, (at. p. 128). I would argue that the reconstruction of national identity falls squarely into this category.

[38] G. van der Schyff, *The Constitutional, supra* note 29.

[39] For tone-setting analysis N. MacCormick, *Beyond the Sovereign State*, 56 MODERN LAW REVIEW 1(1993) and his *The Maastricht-Urteil: Sovereignty Now*, 1 EUROPEAN LAW JOURNAL 259(1995).

both reinforces and frames the legal pluralism. It shifts the emphasis from the thus dominant narrative of "*who has the last word*" to the "*who should have the first word*". While the former is *reactive* and deals with the conflict as *fait accompli*, the latter is preemptive and aims at diffusing the tension and framing the disagreement before it escalates into all-out conflict. This new approach to framing the constitutional disagreement caters to the pride and ambition of both actors to the constitutional disagreement – the Court and constitutional courts by making them partners in a common enterprise. It is *pragmatic*, because it recognizes the insoluble conflict of "*either … or*" and pitfalls of the claim that the question of ultimate authority might be resolved once and for all. In place of the ultimate authority vigilant constitutionalism puts premium on the communication and not always rosy judicial bargaining. The bargaining is anything but nice conversation and this is understandable given the stakes at hand: "*the ECJ and national constitutional courts must cooperate with a view to striking the right balance between European unity and national diversity*"[40].

It recognizes that the result must be always a function of two sides talking to each other. It is less diplomatic than pluralism ("*good - mannered dialogue will sort it out somehow*") because it faces up to the reality that sometimes a conflict will indeed require one party to the disagreement to step back. Its pragmatism recognizes the validity and relevance of the original position of all participants in the bargaining. It hopes that this discursive opening will allow the participants to co-exist and make the system work. Importantly, the latter's survival will depend more on the factual, rather than the normative. The *factual* is front and center, because both legal orders have an equal right to win from their own unique perspective. Each order claim to the authority though does not entail the automatic rejection of the claim made by the other. What matters is how these legal orders each autonomous in its own right enforce their application and respect. As rightly observed by Barents this is a question of facts and power[41], rather than *a priori* constitutional theory.

Vigilant constitutionalism expands on the distinction made by N. Walker between plurality and pluralism. He has argued that plurality is about the existence of overlapping jurisdictions and as such is objective in nature. On the other hand pluralism is subjective. As he puts it "*the way in which they (overlapping jurisdictions) co-existed within a single pluralist unity was not or at least not explicitly, with some exceptions such as the Solange decisions,*

[40] K. Lenaerts, *Demoicracy, Constitutional Pluralism and the Court of Justice of the European Union* in L. van Midelaar, P. van Paris, (eds.), *After the Storm. How to Save Democracy in Europe*, (Lannoo, Tielt, 2015), at p. 130.

[41] R. Barents, *The Precedence of EU Law from the Perspective of Constitutional Pluralism*, 5 EUROPEAN JOURNAL OF CONSTITUTIONAL LAW 421(2009).

considered by the ECJ or the national courts. Because pluralism has to be defined subjectively, as an attitude which in some way embraces and recognizes objective plurality and works with it, that actually wants to maintain it and not to destroy it"[42]. This is an important point as pluralism adds a new dimension to plurality and moves beyond the mere acknowledgement of the legal coexistence by delving into the complex interplay of legal systems. As Walker argues "*we live not just within a plurality of adjacent orders, but within some sort of idea of constitutional pluralism*"[43].

Last but not least, "vigilant constitutionalism" needs to be read in more systemic terms. Vigilant approach to constitutional disagreement is part of, what Joseph Weiler termed constitutional tolerance that "*it is a remarkable instance of constitutional tolerance to accept to be bound by a decision not by ‚my people' but by a majority among peoples which are precisely not mine - a people, if you wish, of ‚others'. I compromise my self determination in this fashion as an expression of this kind of internal - towards myself and external - towards others – tolerance*"[44]. Mutual trust towards the other states and the community they had created acting in unison, has been the cornerstone of an ethos of Europe[45]. The trust has been always built on the convergence between fundamental values of Member States and their legal orders on the one hand, and foundations of the Union legal order on the other. Commonality of liberal and democratic values and interests[46], agreement that the Union (previously "Community") is more than just the sum of its parts and loyalty to the community legal order as binding on all components to the same extent that the politics of resentment" do now. European overlapping consensus coalesces around certain essentials that brought together states in a constitutional regime. It requires agreement on fundamental commitments of principle[47] or what former judge of the Court Sir Professor David Edward precipitously called *First Principles*[48]. It is these essentials that I require others to respect as the condition of my own deference to the decisions by others. Persistent differences of citizens living together in a constitutional regime create disagreement over the final shape of these constitutional essentials. At the same time, they agree that these disagreements will be ironed out and spelt out within the

[42] N. Walker in M. Avbelj, J. Komárek, (eds.), *Four Visions of Constitutional Pluralism*, EUI Working Paper LAW 2008/21, at p. 10.
[43] *Id.*
[44] J. H.H. Weiler, *On the power of the word: Europe's Constitutional Iconography*, 3 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 173-188(2005).
[45] On the ethos of Europe see A. Williams, *The ethos of Europe: Values, Law and Justice in the EU*, (2010).
[46] K. Lenaerts, *La Vie ApresL'Avis: Exploring the Principle of Mutual Trust (Yet Not Blind) Trustt,* 54 COMMON MARKET LAW REVIEW 805(2017).
[47] J. Rawls, *Theory of Justice*, (1971); 7 *The idea of an overlapping consensus*, OXFORD JOURNAL OF LEGAL STUDIES 1(1987); *Political liberalism* (1993).
[48] *An Appeal to First Principles*, (On File with the Author).

discursive framework. European overlapping consensus[49] has at its heart constitutional tolerance and an agreement on fundamental commitment of principle or adherence to certain core (essence) of principles, concepts that binds us together (rule of law and separation of powers being one of these, even though their final contours were defined by individual member states) that is those essentials which we require others to respect. "We" peoples of Europe agreed to respect others way of life, provided their lives and decisions respect mutually agreed essentials and fundamental values. Constitutional tolerance subjected European peoples to the discipline of democracy even though the European polity is composed of distinct peoples. Constitutional courts have important role to play in this process. While their constitutional allegiances should continue to be kept and honoured, they must be placed within the broader context of comity of courts. The vigilant constitutionalism at the service of overlapping consensus is based on the most basic commitment of all the constitutional actors to ensure the functionality and the coherence of the system while at the same time searching for a compromise to accommodate all plural voices within it. There is an overarching duty to strive for such maximization of the conformity given what's possible in the *factual* and *legal* registers. Pluralism is double - edged sword and spells duties for both sides. On the one hand, it means that *"each national society remains free to evolve differently to its own scale of values. Value diversity must where possible, be respected and preserved by the EU"*[50]. On the other hand, given the fact that pluralism is not an absolute value, national legal order must be other -regarding in that it must comply with any constitutional consensus that exists at EU level[51]. I have argued that bargaining, power of voice and call to join the comity of vigilant constitutional (at both EU and domestic level) courts responds to the exigency of plural legal order where neither unity, nor diversity is absolute.

To those disappointed by the blurry picture that all the above entails, my parting words must be grounded in real life and often - neglected legal pragmatism: such is the world we live in, driven by contextualism, balancing and imperfect choices. Proceed incrementally, aware of both the opportunities and limitations that the new constitutional politics in Europe entail[52]. Bargaining is incremental because it allows each actor's interests are catered to the extent necessary to keep these actors in the game and rekindle their self-

[49] I draw here on Ch. F. Sabel, O. Gerstenberg, *Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order*, 16 EUROPEAN LAW JOURNAL 511(2010).
[50] K. Lenaerts, *supra* note 41 at 130 but compare G. Davies, *supra* note 28.
[51] *Id.* at p. 131.
[52] M. Shapiro, A. Stone, *The New Constitutional Politics of Europe*, 26 COMPARATIVE POLITICAL STUDIES 397(1994).

interest to play the game as actors rather than mere spectators[53]. The law becomes more and more enmeshed in politics[54], more situational and nuanced with the dominant colour being grey, no longer comfortable black or white. We must accept it, be able to change, accommodate and, in the end, move forward. All this calls for a novel kind of reformative interpretation of a legal system in response to changing social conceptions of justice. Vigilant constitutionalism and comity as understood above bring the challenge of constitutional imagination that is a "*bundle of impression and images, which can be found, not merely in statutes and cases, but in a myriad texts and treatises*"[55]. Such constitutional imagination 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 legal systems, 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 both domestic and European level and transforming these courts into true „*frontier institutions*".

[53] M. Shapiro argues that "incrementalism is highly reiterative, that is new judicially constructed policies tend to be the product of a great many decisions by a large number of decision makers over a period of time and in frequent communication during that period of time, ought not to be analogised to deliberation"; *Can Judges Deliberate*, *supra*, note 14 at p. 9.

[54] On this see insightfully M. Shapiro, *Law and Politics: The Problem of Boundaries*, in K. E. Whittington, R. D. Keleman, (eds.), *The Oxford Handbook of Law and Politics*, (Oxford University Press, 2008).

[55] Term borrowed from I. Ward, *A Charmed Spectacle: England and its Constitutional Imagination*, 2 LIVERPOOL LAW REVIEW, 235(2000).